



When Facts Speak for Themselves in Medical Litigation

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Establishing negligence or wrongdoing on the part of a medical practitioner or medical institution is a difficult challenge to overcome for patients. As a result, the assertion that “*res ipsa loquitur*” applies can often be found pleaded in a patient’s statement of claim.

What is ‘*res ipsa loquitur*’?

Latin for “the thing speaks for itself”, this is a convenient phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and establish a *prima facie* case against him.

The maxim can be traced as far back as the 1800s and an example of its early application is the famous case of *Byrne v Boadle*,¹ where the plaintiff was injured by a falling barrel from a warehouse (used and occupied by the defendant) as he passed along a public road. The court in this case held:

“This would be *prima facie* evidence of negligence against the builder; here the evidence before the court was, that the plaintiff and his wife were passing along the Scotland Road, in Liverpool, and when they were close against the defendant’s warehouse, the whole of which was in his occupation, used by him as a flour dealer, there came down suddenly upon the man a barrel of flour, and thus the accident occurred to the plaintiff of which he complained. This is one of those cases in which, I think, a presumption of negligence by defendant is raised, and it was for him, who had all the means of evidence and knowledge within his reach, to meet it. It having been shown that the defendant had the entire possession and exclusive use of this warehouse, it would be presumed that the accident arose from his want of care, unless he gave some explanation of the cause by which it was produced, which explanation the plaintiff could not be expected to give, not having the same means of knowledge.”

As in the case above, this maxim is often used in cases involving, among others, personal injury, falling objects and where mechanisms malfunction. It may be of considerable assistance in certain circumstances.

Application in medical negligence cases

In the realm of medical negligence claims concerning diagnosis and treatment, both the English and Malaysian courts apply the Bolam test (the standard or practice accepted as proper by a responsible body of medical



men skilled in that particular art). It is interesting to note that pre-*Bolam*, the courts applied *res ipsa loquitur* more liberally whereas its traction dwindled post-*Bolam*.

Cases prior to Bolam

In *Mahon v Osborne*,² a surgeon performed an abdominal surgery and it was later discovered that a swab was left behind under the liver. In allowing the claim, the court clarified that “the presumption of fact arises only because it is an inference which the reasonable man, knowing the facts, would naturally draw and that is in most cases for two reasons (i) because the control over the happening of such an event rested solely with the defendant and (ii) that in the ordinary experience of mankind such an event does not happen unless the person in control has failed to exercise due care”. This is an example of a case where the findings of the court are likely to be the same even if it were to be decided post-*Bolam*.

In contrast is the case of *Cassidy v Ministry of Health*.³ Here, even though the plaintiff could not prove negligence, Lord Denning remarked, “*I went into hospital to be cured of two stiff fingers. I have come out with four stiff fingers and my hand is useless. That should not happen if due care had been used. Explain it if you can.*” This approach by Lord Denning, however, has been criticised by many.

Cases post-Bolam

In *Delaney v Southmead Health Authority*,⁴ the plaintiff sued the health authority alleging negligence in the performance of surgery for the removal of her gall bladder under general anaesthesia. In dismissing the plaintiff's appeal, Stuart-Smith LJ remarked that he was doubtful whether *res ipsa loquitur* would be of any assistance in medical negligence cases as unexpected results often occur in the absence of negligence. He also added that it is always open to a defendant to rebut a case of *res ipsa loquitur*, either by explaining what happened which is inconsistent with negligence or by showing that the defendant had exercised all reasonable care.

Further, Hobhouse LJ in *Ratcliffe v Plymouth and Torbay Health Authority*⁵ expressed that “... *res ipsa loquitur* should be dropped from the litigator's vocabulary and replaced by the phrase ‘a *prima facie* case’. *Res ipsa loquitur* is not a principle of law: it does not relate to or raise any

² *Mahon v Osborne* [1939] 1 All ER 535 (CA)

³ *Cassidy v Ministry of Health* [1954] 2 KB 343 (CA)

⁴ *Delaney v Southmead Health Authority* [1995] 6 Med LR 355 (CA)

⁵ *Ratcliffe v Plymouth and Torbay Health Authority* [1998] 4 Med LR 162 at 190 (CA)



presumption. It is merely a guide to help identify when a *prima facie* case is being made out. Where expert and factual evidence has been called on both sides at a trial its usefulness will normally have long since been exhausted”. However, the court did agree that although in very simple situations the *res* (the thing itself) may speak for itself at the end of the evidence adduced on behalf of the plaintiff, in practice the inference is then buttressed by expert evidence adduced on his behalf, and if the defendant were to call no evidence, the judge would be deciding the case on inferences he was entitled to draw from the whole of the evidence (including the expert evidence), and not on the application of the maxim in its purest form.

Lastly, the Malaysian Court of Appeal also put the application of *res ipsa loquitur* in medical negligence cases in perspective when it held that:

“... the plaintiff must establish the appropriate standard of care and demonstrate that the standard of care has been breached, with expert evidence. The doctrine of ‘*res ipsa loquitur*’ will not ordinarily apply as the plaintiff will have to discharge the legal burden and only after the legal burden has been discharged, the defendant has to satisfy that legal duty was not breached”.⁶

Summary

It is important for patients to keep in mind that medical practitioners are not insurers of a cure or of favourable results. Unless the *res* is as simple as amputation of a wrong body part or surgical tools being left in the patient’s body, the maxim of *res ipsa loquitur* will not be automatically applicable. The claim will instead be assessed based on the *Bolam* test (with a *Bolitho* addendum) where diagnosis and treatment are concerned.

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⁶ *Shalini a/p Kanagaratnam v Pusat Perubatan Universiti Malaya (formerly known as University Hospital) & Anor* [2016] 3 MLJ 742 (CA)