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res ipsa loquitur--Malpractice--Other Injury

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While it is difficult to determine what the courts will consider a "reasonable regulation" of disbarment proceedings, it must be taken as generally true that only such statutory regulations will be given effect as the courts consider to not interfere with their "inherent power" over the subject.

HENRY O. WHITLOW.

RES IPSA LOQUITUR—MALPRACTICE—OTHER INJURY

In a Kentucky case decided in 1936 a child was taken to a hospital for a tonsillectomy. One of the child's teeth was knocked out during the operation and became lodged in its lung. As a result of the tooth being in the child's lung it died and its parents sued the hospital in which the operation was performed. The plaintiff sought to invoke the doctrine of res ipsa loquitur. The court rejected the application of the doctrine saying:

"Where it is left entirely to speculation whether a fact occurred as a result of want of care or was something not reasonable to be foreseen, the facts are not sufficient to call for an application of the rule of res ipsa loquitur."

An early Kansas case seems to clearly enunciate the holding of the recent Kentucky case above set out. The court held: "The question of negligence or lack of skill in a surgical operation is one of science, to be determined by the testimony of skillful surgeons instead of presumptions."

In another case following the Kentucky line of reasoning where a dentist was removing a decayed tooth and part of it went down the patient's throat, the court said:

"To say that the doctor had complete control of either the tooth or the mouthpack would be carrying the doctrine of res ipsa loquitur too far for a mishap such as the flying of a fragment of tooth or filling into a patient's throat while the tooth is being extracted, is not of itself evidence of negligence or want of skill on the part of the doctor."

In a case where the facts were similar to the principal case a California court treated such circumstances contra, saying: "The presumption of a surgeon's negligence arose from child's loss of tooth following surgeon's insertion of gas preliminary to the operation to remove tonsils." The court further stated that res ipsa loquitur applies where during the performance of surgical or other skilled operations, an ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject.

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1 Hazard Hospital Co. v. Comb's Admr., 263 Ky. 252, 92 S. W. (2d) 35 (1936).
2 Tefft v. Wilcox, 6 Kan. 33 (1870).
while it would not apply in cases involving the merits of diagnosis and scientific treatment.\(^6\)

In *Armstrong v. Wallace*\(^5\) it was alleged that a physician, during a caesarean operation, negligently left a sponge in the patient's abdomen and closed the incision without removing the sponge. *Res ipsa loquitur* was held applicable.

The doctrine is held applicable in Illinois in malpractice actions against a physician arising out of his use and control of an electrical treatment machine.\(^6\)

In *Vonault v. O'Rourke*\(^7\) the doctrine was held to have no application to ordinary malpractice cases which involve diagnosis and scientific treatment, but probably to other acts which may be appraised as regards negligence without recourse to scientific opinion, as where a surgeon was employed to remove tumor and appendix and patient sustained burn on chest while under anesthetic.

The courts, although reluctant to apply this doctrine to doctors, have allowed it in some cases when the act causing the injury is such evidence of negligence that it can be shown to be such without recourse to scientific opinion.\(^8\)

Kentucky has long refused to apply the doctrine to doctors.\(^9\)

A reason given for such holding is that negligence should be shown by expert testimony instead of by mere presumptions. Such reasoning has in itself a prohibitive effect in that one doctor will not testify against a fellow practitioner in good standing. Therefore, without the benefit of *res ipsa loquitur* an injured patient is largely without recourse as to damages against the doctor because the knowledge of the circumstances causing the injury is rarely obtainable by him.

Another reason for the majority rule was given by former Chief Justice Taft while sitting on a Federal Circuit bench:

"A physician is not a warrauter of cures. If the Maxim 'res ipsa loquitur' were applicable to these cases, and a failure to cure were held to be evidence, however slight, of negligence on

\(^7\)97 Mont. 92, 33 P. (2d) 535 (1935).
\(^8\)Snow v. Allen, 227 Ala. 615, 151 So. 468 (1933); Hallinan v. Prindle et al., 220 Cal. 46, 29 P. (2d) 202 (1934); Brown v. Hughes, 94 Colo. 295, 30 P. (2d) 259 (1934); Fink v. Steele, 166 Md. 354, 171 Atl. 49 (1934); Crist v. White, 66 F. (2d) 795 (App. D. C. 1933); Semerjian v. Stetson, 284 Mass. 510, 187 N. E. 329 (1933); Winters v. Rance, 125 Neb. 577, 251 N. W. 167 (1933); Doumitt v. Diemer, 144 Ore. 36, 23 P. (2d) 918 (1933); Rosson v. Hylton, 45 Wyo. 540, 22 P. (2d) 195 (1933).
the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume liability for nearly all the ills that flesh is heir to."

The doctrine of *res ipsa loquitur* was sought to be applied in another Kentucky case, *Frank Fehr Brewing Co. v. Corley*, decided in 1936. The plaintiff operated a soft drink stand and was severely injured by the explosion of a beer keg supplied by the defendant. A tank containing carbon dioxide gas was used to force the beer from the keg. On the morning of the accident the plaintiff opened the stand as usual and after a while noticed beer, spewing and foaming from the top of the beer keg, which exploded, causing the injury. After the accident the valves on the gas tank were found to be defective and dangerous. Plaintiff claimed that *res ipsa loquitur* had such application here as would authorize the court to submit the case to the jury on the question as to whether fermentation of the beer was the proximate cause of the explosion, but the court rejected the doctrine saying:

"The doctrine should only be applied where the nature of the accident itself not only clearly supports the inference of negligence, but excludes all others, or such as might have been due to one of several causes, of or which the defendant is not responsible."

Courts do not ordinarily apply the doctrine under circumstances where all the instrumentalities are not completely under the defendant's control, and where it is a matter of conjecture as to what caused the injury.23

The same reasoning shown above has been followed consistently in Kentucky decisions as to invoking *res ipsa loquitur*.22 The holding in the Fehr24 case is in all probabilities sound according to the rules of application of the doctrine of *res ipsa loquitur*. The reason for the doctrine, as throwing upon the party charged the duty of producing evidence, is attributable to the fact that the chief evidence is accessible to him but practically inaccessible to the injured person.25

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23 265 Ky. 308, 96 S. W.(2d) 860 (1936).
26 *Supra*, n. 11.
27 5 Wigmore, Evidence (2d ed. 1923), Sec. 2509.
In the *Fehr* case the gas tank valves were shown to be defective and the gas tank was not furnished by the defendant. The keg was shown to be sound and the beer had tasted all right the night before the explosion, negativing any suspicion of its being abnormally fermenting. Therefore the plaintiff, in fact, had as much chance to know the cause of the injury as did the defendant and the burden of proof was justly left with the plaintiff.

VINCENT F. KELLEY.

**TAXATION—CONSTITUTIONAL LAW—DISCRIMINATION AS TO RATE**

The question of the constitutionality of a Kentucky statute, taxing deposits in Kentucky banks at a rate of one-tenth of one percent annually, as compared to five-tenths of one percent on bank deposits which are located outside the State, arose in the case of *Commonwealth v. Madden’s Exr.*¹ The appellee’s contention is that the above statute is in violation of the Fourteenth Amendment to the United States Constitution since it attempts to apply different rates of taxation to property of the same class, and that the distinction upon which the legislature bases its power to impose a different rate of taxation is arbitrary and discriminatory. He contends also, that the State cannot, upon mere difference of location, justify a difference in rates regarding property in the same class. The entire issue resolves itself to this: Is the classification made by the Kentucky statute,² between deposits in Kentucky banks and deposits in other banks located outside the State, a reasonable classification? If it is a reasonable classification, is the difference in rate between local and foreign banks arbitrary and discriminatory?

Application of the Fourteenth Amendment to the United States Constitution and Section 171 of the Kentucky Constitution definitely indicates that a State cannot apply different rates of taxation to property having the same classification. The state may classify different kinds of property into different classes and impose different rates of taxation upon the different classes, but the difference must rest upon some genuine distinction and not upon one of time or place.

In *Louisville Gas Co. v. Coleman,*³ the Kentucky Mortgage Tax Act was held to violate the Fourteenth Amendment to the United States Constitution because the statute could not impose a tax on the recording of mortgages having a maturity of more than five years and no tax on the recording of mortgages having an earlier maturity, and still be considered fair and non-discriminatory.

¹ 265 Ky. 684, 97 S. W. (2d) 561 (1936).
² Ky. Stat., Sec. 4019a-1.
³ 277 U. S. 32, 72 L. Ed. 770, 48 Sup. Ct. 423 (1928).