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tionate or mentally cruel when the convict's alternative is a prison sentence.

Concluding that banishment by a state court is not a cruel and unusual punishment does not validate such a punishment and permit a judge to grant a suspended sentence conditioned on the convicted criminal's leaving the state. The objections to such a procedure based on public policy and the judicial usurpation of executive power, are still valid and would be sufficient to strike such a sentence, in which instance, the case would be remanded for proper sentencing.[42]

In summary, a condition of banishment is a permissible requisite to a conditional pardon, but void when rendered as a condition to a suspended sentence. Although recent cases indicate an acceptance of the premise that banishment from the United States amounts to cruel and unusual punishment, it is submitted that this is not applicable when the banishment is merely from a state, county, or city. Both the *Mansell* and *Bird* line of cases remain good authority for their respective propositions and neither should be altered by evolutionary developments of the eighth amendment provision against cruel and unusual punishment.

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RIL VS. THE EXPERT WITNESS IN MALPRACTICE CASES

> "In few other human relationships between adult competent persons is one person apt to be so dependent on another and so unaware of the significance of the acts and performance of the other, as is the patient in many physician-patient, particularly surgeon-patient, relationships."[1]

The above statement offers an accurate appraisal of a unique interrelationship between two individuals which results from a patient's willingness to repose complete trust and confidence in his doctor. Because of the high standards of competence generally required by the medical profession of its members this trust is usually not mis-

[42]Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962); People v. Cortez, 19 Cal. Rptr. 50 (Dist. Ct. App. 1962); Ex parte Scarborough, 76 Cal. App. 2d 648, 173 P.2d 825 (Dist. Ct. App. 1946); People v. Lopez, 81 Cal. App. 199, 253 Pac 169 (Dist. Ct. App. 1927); People v. Baum, 251 Mich 187, 231 N.W. 95 (1930); Hoggett v. State, 101 Miss. 269, 57 So. 811 (1912); Ex parte Sheehan, 100 Mont. 244, 49 P.2d 438 (1935); State v. Doughtie, 237 N.C. 368, 74 S.E.2d 922 (1953); State v. Baker, 58 S.C. 111, 36 S.E. 501. (1900).

[1]Louisell and Williams, Trial of Medical Malpractice Cases ¶ 14.04, at 425-26 (1960).

placed, and the ultimate outcome of treatment will be a result satisfactory to all concerned. Unfortunate instances do occur, however, which terminate in unforeseen injury or even death to a patient during the course of treatment. When these consequences stem from agencies beyond the control or anticipation of the doctor, they must be accepted as part of the risk inherent in any medical procedure. Complex legal problems arise, however, when the patient has good reason to believe that his injury was needlessly brought about by carelessness or negligence on the part of the doctor.

The recent case of *Brown v. Keaveny*[2] from the Court of Appeals for the District of Columbia absolved an oral surgeon of a malpractice charge which grew out of the extraction of an impacted molar. Removal of the tooth required chipping at the jawbone with a hammer and chisel while the patient was under a general anesthetic. In the process of removal the patient's jawbone was fractured. The plaintiff offered no expert testimony to establish the defendant's negligence, but relied instead on the doctrine of *res ipsa loquitur*. The court held RIL to be inapplicable, saying that this was not an injury which laymen can say, based on their common knowledge, usually does not occur unless there is negligence, and so expert testimony would be necessary on this point. The *per curiam* opinion of Judges Washington, Danaher, and Wright states that expert testimony is always essential when the question turns on the "merits and the performance of scientific treatment."[3] In a dissenting opinion, Judge Wright contended that the workings of a hammer and chisel do not need to be explained by medical experts, and that with the advent of medical liability insurance, courts should be more liberal in allowing a plaintiff to go to the jury, since the physician no longer needs an almost absolute immunity from financial liability.

Since a physician is a specialist and deemed to possess special skills and knowledge, ordinarily the expert testimony of his colleagues is necessary in order to establish any negligence on his part.[4] This often proves to be the greatest stumbling block confronting a plaintiff who seeks recovery in a malpractice action, as there is a marked disinclination on the part of members of the medical profession to testify against a fellow practitioner. This is often termed the "conspiracy of silence"[5]

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[2]326 F.2d 660 (D.C. Cir. 1963).

[3]Id. at 661.

[4]Morgan v. Rosenberg, 370 S.W.2d 685 (St. Louis Ct. App. 1963); Nelson v. Murphy, 42 Wash. 2d 737, 258 P.2d 472 (1953).

[5]See Note, 45 Minn. L. Rev. 1019 (1961).

and has been recognized both by legal writers[6] and by the courts.[7] In an effort to somewhat lighten this burden cast on the plaintiff and to save him from an automatic nonsuit, courts in recent years have shown an increasing willingness to apply the doctrine of *res ipsa loquitur* in certain types of malpractice cases.[8] RIL means simply that "the things speaks for itself," and the general view seems to be that it is a form of circumstantial evidence which will create an inference of negligence to allow the plaintiff to escape a nonsuit and get to the jury.[9] The conditions requisite for the application of RIL have been generally acknowledged to be:

(1) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence;

(2) the apparent cause of the accident is such that the defendant would be responsible for any negligence connected with it; and

(3) the possibility of contributing conduct by the plaintiff which would make him responsible is eliminated.[10] The fact that the evidence is more readily accessible to the defendant than to the plaintiff is not an indispensable criterion, but it may influence courts to apply the doctrine in certain cases.[11]

RIL is applied in a malpractice case when the jury can say from common knowledge that plaintiff's injury would not ordinarily have

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[6]Prosser, Torts § 42, at 210 (2d ed. 1955); Belli, An Ancient Therapy Still Applied: The Silent Medical Treatment, 1 Vill. L. Rev. 250 (1956); Note, 45 Minn. L. Rev. 1019 (1961).

[7]Christie v. Callahan, 124 F.2d 825 (D.C. Cir. 1941); Agnew v. Parks, 172 Cal. App. 2d 746, 343 P.2d 118 (1959); Butts v. Watts, 290 S.W.2d 777 (Ky. 1956), in which the court said that the "notorious unwillingness of members of the medical profession to testify against one another may impose an insuperable handicap upon a plaintiff who cannot obtain professional proof." Id. at 779. The "conspiracy of silence" has been carried to the extreme of a local medical association's bringing disciplinary action against a physician who testified adversely to a colleague in a malpractice action. See Bernstein v. Alameda-Contra Costa County Medical Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (1956). See generally the exhaustive coverage of the "conspiracy of silence" problem in Note 45 Minn. L. Rev. 1019 (1961).

[8]"The principal factors motivating the increasing acceptance of the doctrine [RIL] in malpractice cases, in addition to the general feeling of unfairness caused by inability of plaintiffs to get medical testimony, have been the constantly developing lay comprehension of medical techniques and practice, the growing judicial awareness that the progress of medical science is a substance withheld from the victims of malpractice by the profession's self-imposed rule of silence about acts of malpractice, and the inclination to reaffirm the common law's hard-headed distrusts of expertise that runs counter to the observations of common sense." Louisell and Williams, supra note 1, ¶ 14.02, at 421 (1960).

[9]Prosser, Torts § 43, at 211 (2d ed. 1955).

[10]9 Wigmore, Evidence § 2509 (3d ed. 1940).

[11]Prosser, Torts § 42, at 209 (2d ed. 1955).

happened in the absence of negligence (or can draw an inference to that effect from testimony offered at the trial),[12] and its effect is to obviate the necessity for expert testimony. The situations with which courts are confronted fall into three categories:

(1) Those injuries on which a layman is obviously competent to pass judgment, such as when a sponge is left in the patient's interior,[13] the removal or injury of a part of the patient's body not involved in the operation,[14] nerve damage caused by an ordinary injection,[15] serious burns from a hot water bottle,[16] or a fracture so poorly set as to be apparent to a layman;[17]

(2) Those injuries on which a layman is obviously *not* competent to pass judgment, such as those involving a mistake in diagnosis, unsuccessful treatment or mere adverse result of medical procedure, choice of a wrong method of treatment, or an adverse result of medical procedure which is known to produce some bad effects even when all reasonable precautions have been taken (the so-called "calculated risks");[18]

(3) Those injuries which fall into the "gray area" between these two extremes. In these cases, it might be said that the layman can understand the mechanics of the procedures employed by the doctor, but

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[12]Quick v. Thurston, 290 F.2d 360 (D.C. Cir. 1961); Farber v. Olkon, 40 Cal. 2d 503, 254 P.2d 520 (1953); Sherman v. Hartman, 137 Cal. App. 2d 589, 290 P.2d 894 (1955); Hidgon v. Carlebach 348 Mich. 363, 83 N.W.2d 296 (1957); Klein v. Arnold, 203 N.Y.S.2d 797 (Sup. Ct. 1960). So if RIL is applied in a malpractice suit, the fact of the injury alone may be evidence of negligence when the jury can say that such an injury ordinarily would not occur in the absence of negligence. See Traynor's dissent in Cavero v. Franklin General Benevolent Soc'y, 36 Cal. 2d 301, 223 P.2d 471 (1950).

[13]Ales v. Ryan, 8 Cal. 2d 82, 64 P.2d 409 (1936); Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P.2d 740 (1935); Funk v. Bonham, 204 Ind. 170, 183 N.E. 312 (1932); Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941).

[14]Oldis v. La Societe Francaise de Bienfaisance Mutulle, 130 Cal. App. 2d 461, 279 P.2d 184 (1955); Ybarra v. Spangard, 13 Cal. App. 2d 43, 208 P.2d 445 (1949); Morrison v. Lane, 10 Cal. App. 2d 634, 52 P.2d 530 (1935); Brown v. Shortlidge, 98 Cal. App. 352, 277 Pac. 134 (1929); Frost v. Des Moines Still College of Osteopathy and Surgery, 79 N.W.2d 306 (Iowa, 1956).

[15]Bauer v. Otis, 133 Cal. App. 2d 439, 284 P. 2d 133 (1955).

[16]Timbrell v. Suburban Hospital, 4 Cal. 2d 68, 47 P.2d 737 (1935); Meyer v. McNutt Hospital, 173 Cal. 156, 159 Pac. 436 (1916); Vonault v. O'Rouke, 97 Mont. 92, 33 P.2d 535 (1934).

[17]Olsen v. Weitz, 37 Wash. 2d 20, 221 P.2d 535 (1950).

[18]Louisell and Williams, supra note 1, at ¶14.06, at 337-38 (1960). These four areas should be distinguished from the case in which during the performance of a surgical or other skilled operation an ultimate act or omission takes place which does not require scientific opinion to prove lack of due care. See Rodgers v. Lawson, 170 F.2d 157 (D.C. Cir. 1948).

possibly would not be aware of their effects and consequences in a medical context.

The *Keaveny* case falls into this last area, for while the jury could understand how a hammer and chisel "works" and the purpose for employing this procedure, it is possible that the operation involved other risks and complications beyond the grasp of the lay mind.

Most of the difficulties in applying RIL in malpractice cases arise in the gray area. The decision as to whether the jury is competent to pass on a particular injury is for the trial judge who is a layman himself with no objective standard upon which to base his ruling. The result has been a sharp conflict among jurisdictions, anomalous holdings, and a complete lack of uniformity in the law.[19] It is submitted that a more equitable result would be reached with greater consistency if RIL were applied to all gray area cases where the patient is unconscious.

The question which immediately arises, of course, is whether this would be too great a burden to impose upon doctors, and in this context it may be helpful to examine the procedural effect such a change would bring about. *Res ipsa loquitur* means simply that the facts of the occurrence warrant an inference of negligence, and not that they compel such an inference.[20] For this reason, the majority of the courts have held that the burden of proof does not shift to the defendant when the doctrine is applied,[21] although strong arguments have been made to the effect that this would not be an unfair result in malprac-

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[19]Compare with Keaveny the case of Eichholtz v. Poe, 217 S.W. 282 (Mo. 1920), which held that a broken jaw usually does not result from the extraction of a tooth in the absence of negligence, stressing the complete control of the defendant over this particular operation. The defendant broke a patient's jaw while removing an impacted tooth in Francis v. Brooks, 24 Ohio App. 705, 156 N.E. 609 (1926), but there RIL was not requested by the plaintiff. Nevertheless, the court held that no expert witnesses were required. Some cases, notably Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963), and Eckleberry v. Kaiser Foundation, 226 Ore. 616, 359 P.2d 1090 (1961), have held that RIL is never applicable in a malpractice suit, while others have imputed rather extraordinary knowledge to a layman; for instance, Hurt v. Susnow, 192 P.2d 771 (Cal. App. 1948) held that it was common knowledge among laymen that burns from silver nitrate ordinarily do not occur in the absence of negligence; Cho v. Kempler, 177 Cal. App. 2d 342, 2 Cal. Rptr. 162 (1960), said it was common knowledge that facial nerves usually are not injured during the course of a mastiodectomy; Klein v. Arnold, 203 N.Y.S.2d 797 (Sup. Ct. 1960), held that a rupture which occurs while a patient is undergoing an esophogoscopy to determine whether or not a stricture was malignant is evidence of negligence without any necessity for expert testimony.

[20]Sweeney v. Erving, 228 U.S. 233 (1913).

[21]Prosser, Torts § 43, at 211 (2d ed. 1955).

tice cases.[22] To allow the plaintiff to go to the jury, the inference raised need not be compelling in favor of defendant's negligence,[23] nor is it necessary to exclude every possibility of external negligence and non-negligence causation.[24] All the defendant has to do to rebut the inference raised by RIL is to give a reasonable explanation of the injury.[25]

The increasing judicial acceptance of RIL in malpractice has been particularly manifest when the patient was unconscious.[26] In *Ybarra v. Spangard*[27] the court pointed out that the doctrine, which had its inception in common sense and logic, has been judicially developed into a rigid and inflexible rule which precludes application where it is most important that it be applied, since a patient otherwise is unable to recover unless the doctor volunteers damning information, a most unlikely possibility.[28] In this situation the duty of a physician toward his patient, created by the special and unique relationship existing between them, becomes quite apparent.[29] In other fields, notably that of the common carrier, the law has recognized that such a duty carries

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[22]Louisell and Williams, supra note 1, at ¶ 15.05, at 474 (1960).

[23]Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443 (1903).

[24]Ales v. Ryan, supra note 13.

[25]Hinds v. Wheadon, 67 Cal. App. 2d 456, 154 P.2d 720 (1945); Prosser, Torts §43, at 215 (2d ed. 1955).

[26]In Pendergraft v. Royster, 203 N.C. 384, 166 S.E. 285, 289 (1932), the court, quoting from Herzog's Medical Jurisprudence, said: "In many other cases, it has been held that mere proof of a mistake or poor results does not itself prove malpractice, but where the injury is received while the patient is unconscious, the doctrine [RIL] commonly is held to apply because under such circumstances the patient would not be able to testify as to what had happened, whereas the physician would."

Dierman v. Providence Hospital, 31 Cal. 2d 290, 188 P.2d 12 (1947), has carried this idea one step further. It was established at the trial that there were four possible causes for an explosion which caused plaintiff's injury, two of which involved no negligence on the part of defendant. The court held RIL applicable saying that since the doctor was in a position to produce substantial evidence on the question of negligence and failed to do so, there is a presumption that the evidence would be adverse to him. See also: Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Cho v. Kempler, 177 Cal. App. 2d 342, 2 Cal. Rptr. 167 (1960); Frost v. Des Moines Still College of Osteopathy and Surgery, supra note 14; Whetsteine v. Moravec, 228 Iowa 352, 291 N.W. 425 (1943); and Cavero v. Franklin General Benevolent Soc'y, supra note 12; in which the court noted that an unusual event, while the patient is under an anesthetic, puts the burden on the doctor and the hospital.

[27]25 Cal. 2d 486, 154 P.2d 687 (1944).

[28]See also Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955).

[29]See Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Cho v. Kempler, 177 Cal. App. 342, 2 Cal. Rptr. 167 (1960).

with it a greater burden of explanation when an accident occurs.[30] It would seem only logical that the unconscious patient on an operating table should be entitled to a reasonable explanation of his injury as is the fully conscious commuter on a city bus. It is often said that a physician is no better able to explain the "mysteries of life" than the man on the street, but the application of RIL would not require him to do so, any more than it requires the carrier to explain *why* a mechanical failure occurred when he can show that he was free from fault.

The existence of the "conspiracy of silence" presents probably the most compelling reason for allowing a plaintiff the latitude of RIL in these gray area cases. It has been said that if the plaintiff is not given this procedural advantage, not only will many guilty parties escape punishment, but their fellow practitioners will take no steps to insure that this same result will not be repeated.[31]

Malpractice cases are among those in which the application of the equitable notion of "balancing the hardships" would certainly seem to be warranted, in fact, almost necessary. However, these are the very cases in which many courts, seemingly loath to extend any concept unless a "perfect" solution can be found, refuse to do this, construing the law most strictly against the plaintiff. Of course, strict liability for physicians is out of the question and it is not contended that a doctor should ever be an insurer of health. At the other extreme, though, there is a kind of reverse "strict liability" applied against the plaintiff who is unable to obtain expert testimony. Even if his claim is meritorious the plaintiff is helpless because his only chance of recovery, ironically enough, lies with the person from whom he is seeking to recover and his colleagues. It is submitted that RIL is a good balance between strict liability for physicians on one hand and strict nonsuit for plaintiffs on the other.

The proposition that a plaintiff should not be allowed to rest his case on the jury's "untutored sympathies" is certainly a valid one,[32] but it cannot be assumed that a jury will neglect its duty and ignore all other considerations merely because a plaintiff in a tort action will undoubtedly appeal to its sympathies. The whole theory behind having the doctor explain his conduct is to tutor these sympathies and give both parties the fairest treatment possible under the circumstances. Cases have shown that while getting an expert witness for a

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[30]Prosser, Torts § 42, at 207 (2d ed. 1955).

[31]Salgo v. Trustees of Stanford University, 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

[32]Brown v. Keaveny, 326 F.2d 660 (D.C. Cir. 1963).

plaintiff may be a virtually impossible task, the defendant doctor fares considerably better.[33] Thus, the burden placed on him to overcome an RIL case does not seem to be too great. He must merely give a reasonable explanation of what happened, and with his own standing as an expert and the help of his fellow physicians, this should not prove an unfair or insurmountable task if he is in fact free from fault.[34] If it is clear that a jury verdict for the plaintiff was based merely on sympathy, the judge can then set it aside as contrary to the weight of the evidence.[35]

It is contended, then, that in gray area malpractice cases where the patient is unconscious the court should apply the doctrine of *res ipsa loquitur* in an effort to persuade the doctor to explain his conduct. Not only would the doctrine give the plaintiff his day in court without predicating his right of recovery on the whim of his opponent, but it would be instrumental in persuading the medical profession (and possibly the insurance companies)[36] to take a more responsible position with regard to malpractice litigation and make an effort to aid in the solution of the problem. Finally, it would diminish the chances of incompetence being perpetuated behind the wall of almost absolute protection which now surrounds the physician. A California court has succinctly stated the problem and the policy behind its solution:

> "In an integrated society where individuals become inevitably dependent upon others for the exercise of due care, where these relationships are all closely interwoven with our daily living, the requirement for explanation is not too great a burden to impose upon those who wield the instruments of injury and whose due care is vital to life itself."[37]

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[33]See Dierman v. Providence Hospital, 31 Cal. 2d 290, 188 P.2d (1947), where the defendant had at least one expert witness and the plaintiff none; Cho v. Kempler, 177 Cal. App. 2d 342, 2 Cal. Rptr. 167 (1960), where there were three expert witnesses who testified for the defendant and none for the plaintiff; Toy v. Mackintosh, 222 Mass. 430, 110 N.E. 1034 (1916), where defendant had four experts and plaintiff none.

[34]See Klein v. Arnold, 203 N.Y.S.2d 797 (Sup. Ct. 1960), as an example of a case where defendant's testimony itself overcame plaintiff's RIL case.

[35]On the other hand, it is fairly well settled that the criteria for *directing* a verdict and the criteria for setting one aside as contrary to the weight of the evidence are entirely different, and the judge should not direct a verdict merely because he thinks he would have to set aside a contrary one. See: McDonald v. Metropolitan St. Ry., 167 N.Y. 66, 60 N.E. 282 (1901).

[36]In Belli, supra note 6, the author expresses the opinion that insurance companies are responsible for much of the "conspiracy of silence" as they exert pressure to dissuade physicians from testifying on behalf of a plaintiff in a malpractice action.

[37]Cho v. Kempler, 177 Cal. App. 2d 342, 2 Cal. Rptr. 167, 171 (1960).