

[NEW MATERIAL]

1 13-1118. Circumstantial evidence of medical negligence
2 ("Res ipsa loquitur").

3 To prove negligence, the patient need not prove
4 specifically what _____¹ did or failed to do
5 that was negligent.

6 The patient may prove _____'s¹ negligence by
7 proving each of the following propositions:

- 8 1. that the injury or damage to the patient was
9 proximately caused by (*the name of the*
10 *instrumentality or occurrence*) which was
11 _____'s¹ responsibility to manage
12 and control; and
13 2. that the event causing the injury or damage to the
14 patient was of a kind which does not ordinarily
15 occur in the absence of negligence on the part of
16 the _____¹ in control of [the
17 instrumentality] or [that portion of the
18 procedure].

19 [Propositions (1) or (2) must be proved by the
20 testimony of a doctor testifying as an expert.]

21 If you find that each of these propositions has been
22 proved, then you may, but are not required to, find that
23 _____¹ was negligent.

24 If, on the other hand, you find that either one of
25 these propositions has not been proved or, if you find,

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1 notwithstanding the proof of these propositions, that
2 _____¹ used ordinary care for the safety of
3 others in [his] [her] control and management of the
4 (instrumentality or occurrence) then the evidence would not
5 support a finding of negligence.

6 **FOOTNOTE**

7 1. Insert the name of the party against whom the
8 claim is asserted.

9 **DIRECTIONS FOR USE**

10 The names of the various individuals and the name or
11 description of the instrumentality or occurrence should be
12 inserted in the appropriate blanks. Care should be used
13 that the correct names are placed in the various blanks.

14 What was previously labeled *res ipsa loquitur* is
15 applicable in a medical negligence action. The fact that
16 there is other evidence of the specific cause of the injury
17 does not preclude the use of this instruction. *Mireles v.*
18 *Broderick*, 117 N.M. 445 (1994). Exclusive control by the
19 defendant, of the instrumentality or circumstance at issue
20 is not a prerequisite for its use. *Mireles v. Broderick*,
21 117 N.M. 445 (1994), *Trujeque v. Service Merchandise*
22 *Company*, 117 N.M. 388, 872 P.2d 361 (1994). As a factual
23 matter, two or more persons may conceivably share
24 responsibility of the management of the object, activity, or

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1 circumstances at issue. Expert testimony is not necessary
2 where propositions 1 or 2 are within the common knowledge of
3 a lay person.

4 [Approved, effective August 1, 1999.]

5 **COMMITTEE COMMENT**

6 Res ipsa loquitur is an appropriate instruction in a
7 medical negligence case. *Mireles v. Broderick*, 117 N.M.
8 445, 874 P.2d 962 (1994). The circumstantial evidence of
9 medical negligence instruction has been drafted in response
10 and is phrased in lay terms. All arcane, magic and "sacred"
11 language, including even "res ipsa", have been eliminated.
12 Res ipsa is a rule of circumstantial negligence and
13 therefore has been characterized as such.

14 *Mireles*, and *Trujeque v. Service Merchandise Company*,
15 117 N.M. 388, 872 P.2d 361 (1994), indicates that exclusive
16 control of the instrumentality or circumstances giving rise
17 to the injury is not a prerequisite for utilizing this
18 instruction. Consequently the exclusivity requirement has
19 been eliminated and the requirement of management and
20 control is substituted in its place.

21 Under this instruction, a number of different persons
22 might have different responsibilities as to the same
23 patient, but if two or more physicians have the
24 responsibility for managing one facet of an operative

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1 procedure, *i.e.*, the padding of an eye or an elbow or even
2 share in that control, then there is no reason under the
3 existing case law and the principles of *Bartlett* and
4 Section 41-3A-1 NMSA 1978 why the doctrine of *res ipsa* does
5 not apply in those instances to both physicians.
6 DBD::DB2::st execute failed: [IBM][CLI Driver][DB2/6000]
7 SQL0530N The insert or update value of the FOREIGN KEY
8 "DBUSER.BILLDETAIL.SQL980508102800170" is not equal to any
9 value of the parent key of the parent table. SQLSTATE=23503
10