

1 **13-1118. Circumstantial evidence of medical negligence ([“Res ipsa loquitur”]).**

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

4 The patient may prove _____¹’s negligence by proving each of
5 the following propositions:

6 1. that the injury or damage to the patient was proximately caused by
7 _____ (*name of the instrumentality or occurrence*) which was
8 _____¹’s responsibility to manage and control; and

9 2. that the event causing the injury or damage to the patient was of a kind
10 which does not ordinarily occur in the absence of negligence on the part of the
11 _____¹ in control of [the instrumentality] or [that portion of the procedure].

12 [Propositions (1) and (2) must be proved by the testimony of a doctor testifying as an
13 expert.]

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

16 If, on the other hand, you find that either one of these propositions has not been proved or,
17 if you find, notwithstanding the proof of these propositions, that _____¹
18 used ordinary care for the safety of others in [~~his~~ ~~her~~]their control and management of the
19 _____ (*name of instrumentality or occurrence*) then the evidence would
20 not support a finding of negligence.

21 FOOTNOTE

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

23 USE NOTES

1 The names of the various individuals and the name or description of the instrumentality or
2 occurrence should be inserted in the appropriate blanks. Care should be used that the correct names
3 are placed in the various blanks.

4 What was previously labeled *res ipsa loquitur* is applicable in a medical negligence action.
5 The fact that there is other evidence of the specific cause of the injury does not preclude the use of
6 this instruction. *Mireles v. Broderick*, 1994-NMSC-041, 117 N.M. 445, 872 P.2d 863[~~(1994)~~].
7 Exclusive control by the defendant, of the instrumentality or circumstance at issue is not a
8 prerequisite for its use. [*Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994);] *Id.* ¶¶ 18-19;
9 *Trujeque v. [~~Service Merchandise Company~~]* *Serv. Merch. Co.*, 1994-NMSC-036, 117 N.M. 388,
10 872 P.2d 361 [~~(1994)~~]. As a factual matter, two or more persons may conceivably share
11 responsibility of the management of the object, activity, or circumstances at issue. Expert
12 testimony is not necessary where propositions 1 or 2 are within the common knowledge of a lay
13 person.

14 [Approved, effective August 1, 1999; as amended by Supreme Court Order No. S-1-RCR-2025-
15 00126, effective for all cases pending or filed on or after December 31, 2025.]

16 **Committee commentary.** — *Res ipsa loquitur* is an appropriate instruction in a medical
17 negligence case. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). The circumstantial
18 evidence of medical negligence instruction has been drafted in response and is phrased in lay terms.

19 All arcane, magic and "sacred" language, including even "res ipsa", have been eliminated. *Res ipsa*
20 is a rule of circumstantial negligence and therefore has been characterized as such.

21 *Mireles*, and *Trujeque v. Service Merchandise Company*, 117 N.M. 388, 872 P.2d 361 (1994),
22 indicates that exclusive control of the instrumentality or circumstances giving rise to the injury is

1 not a prerequisite for utilizing this instruction. Consequently the exclusivity requirement has been
2 eliminated and the requirement of management and control is substituted in its place.
3 Under this instruction, a number of different persons might have different responsibilities as to the
4 same patient, but if two or more physicians have the responsibility for managing one facet of an
5 operative procedure, *i.e.*, the padding of an eye or an elbow or even share in that control, then there
6 is no reason under the existing case law and the principles of *Bartlett* [*Bartlett v. New Mexico*
7 *Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d
8 794 (1982)] and Section 41-3A-1 NMSA 1978 why the doctrine of *res ipsa* does not apply in those
9 instances to both physicians.