

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

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

The patient may prove _____¹'s negligence by proving each of the following propositions:

1. that the injury or damage to the patient was proximately caused by _____ (*name of the instrumentality or occurrence*) which was _____¹'s responsibility to manage and control; and
2. that the event causing the injury or damage to the patient was of a kind which does not ordinarily occur in the absence of negligence on the part of the _____¹ in control of [the instrumentality] or [that portion of the procedure].

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

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

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

FOOTNOTE

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

USE NOTES

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

What was previously labeled res ipsa loquitur is applicable in a medical negligence action. The fact that there is other evidence of the specific cause of the injury does not preclude the use of this instruction. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994). Exclusive control by the defendant, of the instrumentality or circumstance at issue is not a prerequisite for its use. *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994), *Trujeque v. Service Merchandise Company*, 117 N.M. 388, 872 P.2d 361 (1994). As a factual matter, two or more persons may conceivably share responsibility of the management of the object, activity, or circumstances at issue. Expert testimony is not necessary where propositions 1 or 2 are within the common knowledge of a lay person.

[Approved, effective August 1, 1999.]