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Medical Malpractice—Unconscious Patient—Liability for Defective Instruments—Hospitals and Enterprise Liability—Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1973)

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MEDICAL MALPRACTICE—UNCONSCIOUS PATIENT—LIABILITY FOR DEFECTIVE INSTRUMENTS—HOSPITALS AND ENTERPRISE LIABILITY—*Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1 (1975).

In November 1967, defendant Dr. Somberg performed spinal surgery, using general anesthetic, on the plaintiff. During the procedure a jaw of the pituitary rongeur[1] he was using broke off and lodged in the plaintiff's spine. The doctor terminated the operation after numerous unsuccessful attempts to recover the fragment.[2] Four months later he retrieved the jaw in a second operation. The plaintiff suffered permanent injuries[3] for which he sought recovery from the following: (1) Dr. Somberg for negligently causing the rongeur to break;[4] (2) the hospital in which the surgery was performed for negligently furnishing a defective instrument; (3) the medical supply distributor which sold the defective rongeur for breach of implied warranty; and (4) the rongeur manufacturer in strict liability for manufacturing a defective product.[5] The jury, on special interrogatories, found that plaintiff's injury was not caused by the negligence of the doctor or of the hospital and that the rongeur was not defective, *i.e.*, it was fit for the ordinary purpose for which it was sold and used.[6] The court dismissed the claim as to

1. The pituitary rongeur is a forceps-like instrument used to remove soft tissue. Brief for Defendant-Respondent Lawton Instrument Co. at 2, Anderson v. Somberg, 134 N.J. Super. 1, 338 A.2d 35 (App. Div. 1973). Dr. Somberg was using the instrument to remove disc material when it broke. 338 A.2d at 36.

2. Dr. Somberg spent 30 minutes attempting to retrieve the metal fragment before terminating the operation. 338 A.2d at 36.

3. Dr. Somberg testified that the additional trauma of the second procedure caused the plaintiff to develop drop foot syndrome, a nerve disorder which prevented him from flexing his left foot in an upward direction. Brief for Plaintiff-Appellant Anderson at 6, Anderson v. Somberg, 134 N.J. Super. 1, 338 A.2d 35 (App. Div. 1973).

4. The wisdom of defendant's decision to terminate the first operation was not argued in the parties' briefs.

5. The New Jersey Supreme Court characterized plaintiff's action against Lawton Instrument Company, the rongeur manufacturer, as a strict liability in tort claim. 67 N.J. 291, 338 A.2d 1, 3 (1975). The Appellate Division had previously described the claim as "essentially predicated upon a breach of implied warranty of merchantability." 134 N.J. Super. 1, 338 A.2d 35, 37 (App. Div. 1973). *See* notes 40 & 66 and accompanying text *infra* for commentary on the relationship between these two theories.

6. The evidence identified two possible explanations for the break: (1) the instrument was *not* defective when handed to Dr. Somberg and his subsequent improper twisting caused it to break; or (2) the instrument was defective when handed to Dr. Somberg and broke during proper use. 338 A.2d at 4.

Defendant hospital introduced evidence that the rongeur had been used for approximately four years, in as many as twenty different operations, and by as many as twenty different surgeons. Pre-operative inspection of the instrument had been limited

all defendants.[7] The New Jersey Supreme Court affirmed the appellate court's reversal[8] and remanded for a new trial.[9] By so doing, the

to a visual examination. *Id.* at 3. Dr. Somberg testified that he tested mobility of the handles and checked to see that the edges of the jaws met before inserting the rongeur into the incision. *Id.* A metallurgist, called as a witness by the manufacturer, had conducted a microscopic and spectrographic examination of the rongeur and fragment in 1972. He testified that he discovered minute secondary cracks near the main fracture point. He could not say when the cracks had developed or how they had formed but he acknowledged that if the cracks were present prior to the operation they could have substantially weakened the instrument in the critical area. Brief for Plaintiff-Appellant Anderson at 5, Anderson v. Somberg, 134 N.J. Super. 1, 338 A.2d 35 (App. Div. 1973). He also offered the opinion that the failure was caused by a twisting motion. 338 A.2d at 4. A surgeon, called by the plaintiff, testified that improperly twisting the rongeur during the operation might cause it to break but conceded that there was no evidence that Dr. Somberg had done so. Brief for Defendant-Respondent Somberg at 3, Anderson v. Somberg, 134 N.J. Super. 1, 338 A.2d 35 (App. Div. 1973).

7. 338 A.2d at 37.

8. The Appellate Division had held:

> [T]here has been a miscarriage of justice under the law requiring a new trial. The inescapable facts are that plaintiff suffered injuries while unconscious during surgery from an occurrence which by itself bespeaks liability on the part of one or more of the defendants. . . .
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> Reason and common sense dictate that the jury additionally should be charged that under the peculiar circumstances of this case the occurrence itself indicates liability on the part of one or more of the defendants, and that the burden should be shifted to defendants as they are most likely to possess knowledge of the cause of the accident. Each defendant has the duty to come forward with explanatory evidence.

338 A.2d at 37 (citations omitted).

9. 67 N.J. 291, 338 A.2d 1 (1975), *cert. denied,* 423 U.S. 929 (1975). In the petition for writ of certiorari petitioners contended that the supreme court's decision denied them due process and equal protection of the law. Defendants asserted that the order to return a verdict against at least one defendant constituted an arbitrary taking of property in the amount of the verdict, in violation of the 14th amendment. According to petitioners, the due process violation lay in the deprivation of the petitioners' right to a fair trial. " 'A fair trial in a fair tribunal is a basic requirement of due process. . . . [O]ur system of law has always endeavored to prevent even the probability of unfairness.' Re [sic] Murchison, 349 U.S. 133, 136 (1955). 'Arbitrary action is not due process.' Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955).' " Petitioners' Brief for Certiorari at 5–7, Anderson v. Somberg, 423 U.S. 929 (1975). Neither source is persuasive authority for the point. *Murchison* struck down the practice of allowing a state judge to serve the investigative function of a "one-man grand jury" and to try the persons accused as a result of his investigations. The majority said that "fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." 349 U.S. at 137. It is clear that the majority's primary concern was for the predispositions which the judge brought to the trial, not the arbitrariness of his decision. There was no showing that the appellate tribunals in *Anderson* possessed the biases which the judge in *Murchison* developed when serving his grand juror's function. *Rudder,* on the other hand, dealt with the arbitrary eviction of a tenant from governmental housing. In that case the court said that "the government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law." 226 F.2d at 53. The government's duties as landlord have little relevance to a judge's duty to conduct a fair and impartial trial.

Petitioners' due process argument was a tenuous one. They were not deprived of notice or opportunity to be heard; they had had sufficient opportunity to present their

supreme court made two significant changes in the state's prevailing tort law. First, the court[10] held that the jury should have been instructed that the burden of proving *non*culpability was on the defendants.[11] Second, and more importantly, the plurality, over a strenuous dissent,[12] held that under such circumstances at least one defendant

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most favorable evidence. It would be stretching to say that they were deprived of "fundamental rights," Palko v. Connecticut, 302 U.S. 310 (1937), or that the judges' instruction "shocks the conscience." Rochin v. California, 392 U.S. 165 (1952). Petitioners' argument had to rest simply on the arbitrariness with which a judge may make a decision to apply the *Anderson* rule. To rule for the petitioners would suggest that judgments on the pleadings, judgments n.o.v., and orders for a new trial suffer from the same due process defect. It was unlikely that the court would compromise the utility of these judicial prerogatives by sustaining the allegation that a judge's decision was an arbitrary denial of due process.

Petitioners' second argument was that the New Jersey Supreme Court's decision denied them equal protection of the laws. They contended that the instruction that at least one defendant must be found liable constituted an unreasonable classification, bearing an irrational relationship to an illegitimate purpose. Petitioners' Brief for Certiorari at 9, Anderson v. Somberg, 423 U.S. 929 (1975). The unreasonable classification lay in the statement that the defendants were the only ones who could be liable to the plaintiff when in fact numerous other unjoined parties had also used the instrument. *Id.* The illegitimate objective lay in the imposition of liability without fault, in contravention of "the heart of New Jersey tort law." *Id.*

Petitioners' equal protection argument was even more tenuous than their due process argument. Strict liability continues to grow as a legitimate and proper means for imposing liability. Also, it appears that the New Jersey Supreme Court's action would be subject to the deferential means-end review of "old equal protection" cases rather than the stricter scrutiny given to matters dealing with fundamental rights and suspect classifications. *See* G. GUNTHER, CASES AND MATERIAL ON CONSTITUTIONAL LAW 657–897 (9th ed. 1975). The deferential review typically given to "old equal protection" cases readily (even inferentially) discovers legitimate ends and routinely finds a rational relationship between the means and ends. It is highly unlikely that the Supreme Court would strike down the classification in *Anderson*-type cases if subjected to this form of review. To do so would jeopardize the workability of such rules as Federal Rule of Civil Procedure 19, which gives the trial judge the discretion to decide when a party is necessary and indispensable to the progress of the suit.

10. Two justices joined in Justice Pashman's majority opinion. One justice concurred in the result on the basis of the Appellate Division's majority opinion, which shifted the burden of proof to the defendants but did not take the additional step of requiring that at least one defendant be found liable. Two justices joined in Justice Mountain's dissent. 338 A.2d at 8, 12.

11. The court noted the following conditions in determining the appropriateness of such an instruction: (1) all defendants who owed the plaintiff a duty of care or to provide a safe product were before the court; (2) the plaintiff was unconscious and could not have been contributorily negligent; and (3) the plaintiff suffered an admitted mishap, not reasonably foreseeable, and unrelated to the scope of surgery. 338 A.2d at 7.

12. Justice Mountain articulated four reasons for dissenting. First, and most important, he was unwilling to accept the majority's premise that "each and every person who may have brought about the imperfection in the surgical instrument or who may have caused the injury by its misuse is before the court . . . ." 338 A.2d at 9. He conceded that the majority's assumption might be acceptable if the hospital had an absolute duty to provide defect-free surgical instruments. He noted, however, that "the state of the law in New Jersey . . . remains open as to whether strict liability in tort might be available against the hospital . . . ." *Id.* at 10 n. 3. Second, he argued

could not sustain his burden of proof and must be found liable.[13] Together these changes represent the most substantial recent extension of medical malpractice liability in the country.

This note will examine the *Anderson* decision and identify the practical and theoretical implications of the court's two holdings. It will also recommend that the holdings of the *Anderson* court not be followed in other states, but that courts instead impose a duty on defendants to exculpate themselves, and extend strict liability theory to hospitals which provide defective medical instruments which injure innocent plaintiffs.

I. THE *ANDERSON* RATIONALE

A. Application of Res Ipsa Loquitur *Theory in New Jersey*[14]

Traditionally, the res ipsa loquitur doctrine has been given one of three procedural effects. The first permits the jury to infer negligence

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that the majority's adaptations of res ipsa loquitur leave the defendants with considerably more than an obligation to explain their conduct and lack of fault. He described them as members "of a group who must collectively, among themselves, play a game of *sauve qui peut* [roughly translated: each man for himself]—and play it for rather high stakes." *Id.* at 11. Third, he questioned shifting the burden of proof to the defendants in strict liability actions, as he believed the majority had done, because precedent did not support such a change. *Id.* at 10 n.4. Finally, he identified a potential conflict for jurors which arises from instructions to arrive at a verdict by a preponderance of the evidence *and* to find one or more of the defendants liable. He contended that this "removes from the case any semblance of rationality." *Id.* at 12.

13. *Id.* at 7. The court continued as follows:

> The judge may grant any motion bearing in mind that the plaintiff must recover a verdict against at least one defendant. . . . If only one defendant remains by reason of the court's action, then, in fact, the judge is directing a verdict against that defendant.

Id. The last sentence suggests that the court would be willing to apply both *Anderson* holdings to an action against a single defendant. In such a case the defendant would be found strictly liable upon a showing that (1) the plaintiff was injured in an unforseeable fashion while unconscious, and (2) no other defendants owed the plaintiff a duty of care or a duty to provide a safe product. Imposition of strict liability under these circumstances would be a major departure from prevailing strict liability theory. *See* Part III–C *infra*.

14. The *Anderson* court did not attach a res ipsa loquitur label to its holding, but its analysis suggests it relied on res ipsa theory in reaching its conclusion. The court mentioned that recent modifications of the doctrine have been labeled "akin to res ipsa loquitur" by the New Jersey Supreme Court and "conditional res ipsa loquitur" by the California Supreme Court. *Id.* at 5. *See* NOPCO Chem. Div. v. Blaw-Knox Co., 59 N.J. 274, 281 A.2d 793, 798 (1971); Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 397 P.2d 161, 171, 41 Cal. Rptr. 577, 581 (1965) (Traynor, C.J., concurring and dissenting). One commentator has referred to a California modification of the doctrine as "California res ipsa." According to that writer:

> The function of California res ipsa is to obviate the basic requirement that the

from purely circumstantial evidence.[15] Under this approach, res ipsa is merely a rule of circumstantial evidence which insures that the plaintiff's case will go to the jury, *i.e.*, the plaintiff will not be nonsuited.[16] The remaining two procedural effects result in the imposition of a greater procedural disadvantage upon certain defendants.[17] This is done by having the court instruct the jury either that a presumption of negligence has arisen or, less frequently, that the burden of proof has shifted to the defendant.[18]

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plaintiff prove by direct or opinion evidence that a negligent act or omission occurred and that the injury resulted therefrom. California res ipsa is predicated on the theory that, under the facts of the case, the patient's injuries might be the result of some unknown malpractice. . . . California res ipsa reasons backwards from an unintended and undesired result to the existence of malpractice. The injury itself is evidence of negligence. The result may be, and often is, liability without fault.

Adamson, *Medical Malpractice: Misuse of Res Ipsa Loquitur*, 46 MINN. L. REV. 1043, 1053 (1962) [hereinafter cited as Adamson]. Perhaps it would be appropriate to call the two-part *Anderson* holding "New Jersey res ipsa."

15. W. PROSSER, THE LAW OF TORTS 228–29 (4th ed. 1971) [hereinafter cited as PROSSER]. *See, e.g.*, Gould v. Winokur, 98 N.J. Super. 554, 237 A.2d 916 (L. Div. 1968), *aff'd*, 104 N.J. Super. 329, 250 A.2d 38 (App. Div. 1969); Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625 (1961); *cf.* note 27 and accompanying text *infra*.

16. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 19.11, at 1099 (1956).

17. PROSSER, *supra* note 15, at 228. The doctrine is most frequently used for the purpose when the defendant has assumed a special responsibility for the plaintiff (*id.* at 230. *See generally* NOPCO Chem. Div. v. Blaw-Knox Co., 59 N.J. 274, 281 A.2d 793 (1971)); or when the defendant has exclusive control of the cause of the injury (PROSSER, *supra* note 15, at 230. *See generally* Magner v. Beth Israel Hosp., 120 N.J. Super. 529, 295 A.2d 363, 365 (App. Div. 1972)); or when the defendant has superior information or opportunity to obtain evidence of the cause of the accident (PROSSER, *supra* note 15, at 230. *See generally* Kahalili v. Rosecliff Realty, 26 N.J. 595, 141 A.2d 301 (1958) and Jackson v. Magnavox Corp., 116 N.J. Super. 1, 280 A.2d 692, 696 (1971)).

18. 2 F. HARPER & F. JAMES, *supra* note 16, at 1100–03. The theoretical difference between the *permissible inference* and *presumption* (also described as shifting the burden of going forward with the evidence to the defendant) theories is that the former does not entitle the plaintiff to a directed verdict if the defendant offers no explanation for his behavior. When the plaintiff is aided by a presumption of negligence, however, he is entitled to a directed verdict if the defendant presents no defense or if his explanation is so inadequate as not to rebut the presumption of negligence. The theory which *shifts the burden* of proving nonculpability to the defendant differs from the presumption theory only when the jury finds the probabilities of negligence and nonnegligence to be equal. When this occurs, in cases in which the burden of proof has shifted, the plaintiff must prevail because the defendant has not proved his nonculpability by a preponderance of the evidence. *Id.*

There is little practical difference among these three theories. Harper and James write as follows:

In most of these cases the only serious obstacle to plaintiff's recovery is the possibility that he may not make out a res ipsa case in the first place. If he does, it will make little practical difference to him which of the competing theories the court has adopted. The only serious obstacles then would arise from a convincing meritorious defense, or the danger of reversal on appeal. Of course the latter danger may be considerable where the decisions in a jurisdiction are in confusion—a state of things which is far more of an obstacle to plaintiffs than the

Prior to the New Jersey Supreme Court's 1971 decision in *NOPCO Chemical Division v. Blaw–Knox Co.*[19] New Jersey was a "permissible inference" jurisdiction. This meant that in New Jersey the application of res ipsa permitted the jury to draw an inference of a defendant's negligence but did not require it to do so.[20] In *NOPCO,* however, the court significantly modified res ipsa theory by extending it to multiple defendants and by shifting the burden of going forward with the evidence to the multiple defendants.[21]

The extension of res ipsa theory to multiple defendants appears to violate the traditional res ipsa requirement that the defendant be in exclusive control of the instrumentality which caused the plaintiff's injury.[22] In many cases involving multiple defendants, however, the plaintiff can prove damages and suggest that one of the defendants has breached his duty, but cannot identify the responsible party. In these situations the plaintiff cannot make out a preponderant case against any individual defendant.[23] As a result, under the traditional res ipsa permissible inference theory, as long as the negligent party and cause of the accident are matters of speculation, or the probabilities are at best equally balanced, the court must direct a verdict for

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adoption of any one of the competing rules would be.
Id. See also Seavey, *Res Ipsa Loquitur: Tabula in Naufragio,* 63 HARV. L. REV. 643, 644–45 (1950) (criticizing academic discussions of the procedural effect of res ipsa loquitur); Carpenter, *The Doctrine of Res Ipsa Loquitur,* 1 U. CHI. L. REV. 519 (1934).

Because res ipsa is contrary to the basic notion that a plaintiff must prove liability by a preponderance of the evidence, courts have restricted its application to limited fact patterns. According to traditional res ipsa theory, three conditions must exist before the doctrine can be applied: (1) normally the event would not have occurred in the absence of someone's negligence; (2) the cause of the accident was within the exclusive control of the defendant; and (3) the event was not caused by the contributory negligence or voluntary action of the plaintiff. PROSSER, *supra* note 15, at 214. Some courts have added a fourth condition, that the defendant be in a better position than the plaintiff to provide a true explanation of the accident. Prosser asserts, however, that the inference of negligence should not be denied simply because the defendant knew nothing of what had happened. Conversely, the inference should not arise from a simple showing that the defendant knew more about the accident than the plaintiff. *Id.* at 215.

19. 59 N.J. 274, 281 A.2d 793 (1971) (buyer of heavy machinery sued manufacturer, carriers, and bailees for damages inflicted on the machinery before reaching the buyer).

20. *See, e.g.,* Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625 (1961); Gould v. Winokur, 98 N.J. Super. 554, 237 A.2d 916 (L. Div. 1968), *aff'd,* 104 N.J. Super. 329, 250 A.2d 38 (App. Div. 1969).

21. 281 A.2d at 798. The *Anderson* court supported these adaptations because the defendants individually owed the plaintiff a duty, had superior knowledge of the accident, and each could have been liable for the loss. 338 A.2d at 5–6.

22. PROSSER, *supra* note 15, at 223. *See* note 18 *supra.*

23. PROSSER, *supra* note 15, at 221.

the defendants.[24] In such circumstances multiple defendants have little incentive to explain their behavior. The court can discourage this "conspiracy of silence"[25] by shifting the burden of going forward with the evidence to the defendants, as the New Jersey court did in *NOPCO,* or by creating a presumption of negligence. In this way the defendants are compelled to offer explanations of their conduct or to lose to plaintiff's motion for a directed verdict.

A year after the *NOPCO* decision, the appellate division failed to apply the *NOPCO* rules to a medical malpractice action in *Magner v. Beth Israel Hospital.*[26] For the first time, however, it applied res ipsa

24. PROSSER, *supra* note 15, at 218, 241. The plaintiff who is aided by a permissible inference of negligence can avoid dismissal at the close of the presentation of his case. He cannot, however, prevail in a motion for a directed verdict when confronted with multiple, unresponsive defendants. *See* note 18 and accompanying text *supra. See also* Gould v. Winokur, 98 N.J. Super. 554, 237 A.2d 916, 921 (L. Div. 1968), *aff'd,* 104 N.J. Super. 329, 250 A.2d 38 (App. Div. 1969).

According to traditional tort law, in a negligence action the plaintiff must prove that the defendant had a duty to the plaintiff, that the defendant breached his duty, that the defendant's conduct was the cause-in-fact and proximate cause of the plaintiff's injury, and that the plaintiff suffered actual loss or damage as a result. PROSSER, *supra* note 15, at 143. Although res ipsa theory may assist the plaintiff in proving the defendant's breach by permitting an inference that he has not used reasonable care, theoretically, the doctrine cannot be used to establish cause-in-fact. Thode, *The Unconscious Patient: Who Should Bear the Risk of Unexplained Injuries to a Healthy Part of His Body?,* 1969 UTAH L. REV. 1, 2 [hereinafter cited as Thode]. *See also* PROSSER, *supra* note 15, at 226. With one exception, the burden of proving causation remains with the plaintiff. The one exception arises when "double fault and alternative liability" are clearly present. PROSSER, *supra* note 15, at 243. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), is the famous illustration. In that case the two defendants shot simultaneously in the direction of the plaintiff, injuring his eye. Only one of the defendants' shots could have caused the injury but the plaintiff was unable to identify the responsible party. The court wrote:

> When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrong-doers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can.

199 P.2d at 4. The distinction between shifting the burden of proving cause-in-fact and shifting the burden of proving negligence (that the defendant breached his duty to the plaintiff) becomes important in analyzing *Anderson*'s departure from precedent and the practical implications of the decision. *See* note 31 and accompanying text *infra.*

25. This phrase refers to the near impossibility of getting medical experts to testify against their colleagues, no matter how incompetent or negligent the medical defendant may have been. This "conspiracy" not only permits the negligent party to escape liability, but it does little to insure that behavior will be modified to avoid similar accidents in the future. *See* Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (Dist. Ct. App. 1957). *See also* Gould v. Winokur, 98 N.J. Super. 554, 237 A.2d 916, 923 (L. Div. 1968). *See generally* Adamson, *supra* note 14; Note, *Overcoming the "Conspiracy of Silence": Statutory and Common Law Innovations,* 45 MINN. L. REV. 1019 (1961).

26. 120 N.J. Super. 529, 295 A.2d 363 (App. Div. 1972), *cert. denied,* 62 N.J. 199,

principles to a complex medical malpractice action requiring expert medical testimony.[27]

B. Anderson's *Departure from Precedent*

The *Anderson* court departed from New Jersey precedent in three significant ways. First, the court extended *NOPCO* by shifting the burden of proving nonculpability to the defendants.[28] The court perceived *NOPCO* not as shifting the burden of proof to the defendants but merely as requiring an explanatory account from the defendants.[29] Presumably to elicit a more complete explanation and to further assist the plaintiff, the *Anderson* court increased the defendants' burden to one of presenting an exculpatory account.[30] As a result of this

299 A.2d 733 (1973) (plaintiff undergoing a surgical procedure for removal of a mole or lesion injured by flash fire triggered by electric cauterizer used by defendant).

27. *Id.* Originally res ipsa theory was not used in medical malpractice actions. Adamson, *supra* note 15, at 1043. It was felt that expert medical testimony, complemented by res ipsa instructions, would prove too confusing for jurors. *See, e.g.*, Magner v. Beth Israel Hosp., 120 N.J. Super. 529, 295 A.2d 363, 365 (App. Div. 1972), *cert. denied*, 622 N.J. 199, 299 A.2d 733 (1973). Beginning in the 1950's, New Jersey courts recognized that this complexity need not exist in all malpractice cases, and consequently adopted the "common knowledge" doctrine which provided the procedural benefits of res ipsa without requiring expert medical testimony to establish the proper standard of care. This doctrine was applied in cases where negligence was so clear that laymen could, in light of their common knowledge, conclude that the medical defendant was not "acting with the care and skill normal to the average member of the profession." Steinke v. Bell, 32 N.J. Super. 67, 107 A.2d 825, 826 (App. Div. 1954). *See also* Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625 (1961). *See generally* 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE 439–42 (1969, Supp. 1975); McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 610 (1959), in T. ROADY & W. ANDERSEN, PROFESSIONAL NEGLIGENCE 13, 74 (1960). One writer has said that the doctrine has been "primarily limited to 'sponge cases,' cases in which a physician failed to take an x-ray, and cases of gross medical misconduct." Note, 51 WASH. L. REV. 167, 184 (1975).

In the earlier case of Gould v. Winokur, 98 N.J. Super. 554, 237 A.2d 916 (L. Div. 1968), *aff'd*, 104 N.J. Super. 329, 250 A.2d 38 (App. Div. 1969), the court reviewed the difference between the res ipsa loquitur and "common knowledge" doctrines but stopped short of allowing expert testimony to lay a foundation for res ipsa in cases where the jury does not possess the requisite knowledge. New Jersey's prerequisites for applying the res ipsa doctrine to malpractice actions generally conform to the usual rules. *See* note 18 *supra*.

28. The court wrote:

> We now hold that a mere shift in the burden of going forward, as adopted in *NOPCO*, is insufficient. For this particular type of case, an equitable alignment of duties owed plaintiff requires that not only the burden of going forward shift to defendants, but the actual burden of proof as well.

338 A.2d at 6.

29. *Id.*

30. *See* Part II–A *infra* for a discussion of the practical implications of requiring an exculpatory account.

change defendants must now prove their nonculpability by a preponderance of the evidence or be found liable.[31]

Anderson's second, and most significant, departure from precedent was its requirement that the jury be instructed to find at least one defendant liable. The court noted:[32]

31. Although the burden-of-proof holding in *Anderson* was new law in New Jersey there was supporting precedent in California. In *Dierman v. Providence Hospital,* 31 Cal. 2d 290, 188 P.2d 12 (1947), the California Supreme Court, despite a seemingly direct disclaimer, effectively shifted the burden of proving nonculpability to the defendant hospital and physician. 188 P.2d at 14. Quoting from *Bourguignon v. Peninsular Ry. Co.,* 40 Cal. App. 689, 181 P. 669 (1919), the *Dierman* court said:

> [W]here the accident is of such a character that it speaks for itself, as it did in this case, . . . the defendant will not be held blameless, except upon a showing either (1) of satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown.

188 P.2d at 15. Justice Traynor's dissent correctly suggested that the majority demanded considerably more than Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944), which permitted the plaintiff to rely on the res ipsa doctrine to avoid a nonsuit and required the defendants to give an "initial explanation" of the accident and their conduct. 154 P.2d at 690. Traynor believed that the *Dierman* majority required that the defendant prove (1) he was not negligent, and (2) the actual cause of the accident. Only by proving both elements could he be adjudged free from fault. 188 P.2d at 17. In so doing, the court created more than a permissible inference or a presumption of negligence. California has since retreated from the *Dierman* rule in multiple defendant actions. *See* Clark v. Gibbons, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967); Leonard v. Watsonville Community Hosp., 47 Cal. 2d 509, 305 P.2d 36 (1956); Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1965). In *Clark,* for example, the supreme court ignored *Dierman* and reverted to *Ybarra* reasoning. In so doing the court resurrected the language of "permissible inferences" and "initial explanations." The majority, however, continued as follows:

> To avoid the inference *as a matter of law* an individual doctor must go beyond showing that it was unlikely or not probable he was negligent and must establish that he is free from negligence by evidence which cannot be rationally disbelieved.

426 P.2d at 533 (emphasis in original). This statement suggests that a medical defendant can avoid liability by proving that he has conformed to the proper standard of care. Under the discarded *Dierman* rule, and now under *Anderson,* on the other hand, the defendant must also establish both the cause for the accident and his freedom from contribution to it in order to avoid liability.

The *Anderson* majority also cites Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), as authority for shifting the burden of proof to the defendants. *Summers* is easily distinguishable and clearly inapposite. As the court correctly identified, *Summers* involved two clearly negligent parties upon whom the California court placed the burden of proving the cause-in-fact of the plaintiff's injury. Although the defendants were acting independently the court said they were joint tortfeasors and would remain so until one of them proved that his negligence did not cause the injury. 199 P.2d at 4; *see* note 24 *supra.* None of the four *Anderson* defendants was clearly negligent and their conduct, when compared to that in *Summers v. Tice,* does not justify shifting the burden of proving causation to the defendants.

32. 338 A.2d at 7 (footnote omitted).

> [A]t the close of all the evidence, no reasonable suggestion had been offered that the occurrence could have arisen because of plaintiff's contributory negligence, or some act of nature; that is, there was no explanation for the occurrence in the case save for negligence, or defect on the part of someone connected with the manufacture, handling, or use of the instrument. . . . Since all parties had been joined who could reasonably have been connected with that negligence or defect, it was clear that one of those parties was liable, and at least one could not succeed in his proofs.

This rationale is both surprising and confusing. On its face, the statement resembles a simple conclusion that liability existed as a matter of law, *i.e.*, reasonable men could not differ in the conclusion that liability existed. Such a conclusion, however, is normally reserved for situations where the responsible party can be identified. Absent a clearly negligent act by the physician or a demonstrable defect in the instrument, negligence can be found as a matter of law only if the hospital or doctor had a duty to conduct microscopic examinations of surgical instruments to discover minute defects. The ease with which one can reconstruct a reasonable, indeed probable, explanation for the injury[33] further undermines the negligence as a matter of law conclusion and, on the other hand, supports the contention that the court actually attempted to extend strict liability theory, albeit in an awkward fashion, to hospitals and physicians.[34]

Anderson's third departure from precedent was its application of res ipsa principles to alternative theories of liability. The court stated that the res ipsa loquitur doctrine has "been expanded to embrace cases where the negligence cause was not the only or most probable theory in the case, but where the alternate theories of liability accounted for the only possible causes of injury."[35] The cases to which the court refers, however, provide little if any support for this statement.[36] Thus, *Anderson* is the first New Jersey case in which "social

33. The most logical explanation of the plaintiff's injury is that: (1) the rongeur was delivered defect-free to the hospital; (2) during one or more of the intermediate operations the instrument was mishandled; (3) as a result of this mishandling (or proper handling and general fatigue) the invisible secondary crack developed; (4) the weakened instrument was handed to Dr. Somberg and broke during the operation.

34. *See* Part II–B *infra*.

35. 338 A.2d at 5.

36. The *Anderson* court cites three California cases, one New Jersey case, and one New Jersey dissenting opinion to support this statement. 67 N.J. 291, 338 A.2d at 5. Two of the three California cases involved only negligence or malpractice ac-

policy res ipsa" has been extended to breach of warranty/strict liability actions.[37]

II. PRACTICAL AND THEORETICAL IMPLICATIONS OF *ANDERSON*

A. Shifting the Burden of Proof to the Defendants

Under *Anderson*, in order to avoid liability for negligence a defendant must exculpate himself by a preponderance of the evidence. If traditional negligence principles were applicable his exculpatory account could take one of two forms. The defendant could prove either (1) that he had conformed to the proper standard of care, or (2) that his conduct was neither the cause-in-fact nor the proximate cause of

tions. Dierman v. Providence Hosp., 31 Cal. 2d 290, 188 P.2d 12 (1947) (plaintiff injured when cauterizing spark caused explosion of contaminated nitrous oxide or ether); Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1965) (plaintiff suffered cardiac arrest when anesthetized for elective eye surgery). In *Dierman* four possible reasons were given for the injury-producing explosion, one of which might have supported a strict liability claim against the supplier of the nitrous oxide tanks. No such action was brought, however. In Burr v. Sherwin–Williams Co., 258 P.2d 58 (Cal. Dist. Ct. App. 1953), *rev'd*, 42 Cal. 2d 682, 268 P.2d 1041 (1954), negligence and breach of implied warranty actions were brought against the manufacturer of a crop spray. It is not clear from the opinion whether the court's comments about the res ipsa loquitur doctrine apply to the breach of warranty action as well as the negligence action. NOPCO Chem. Div. v. Blaw–Knox Co., 59 N.J. 274, 281 A.2d 793 (1971) (action against multiple defendants for in-transit damage to chemical drying equipment), provides little or no support for the *Anderson* court's statement. The greatest support for the statement may be found in the majority opinion of Jakubowski v. Minnesota Mining & Manufacturing, 42 N.J. 177, 199 A.2d 826 (1964). There the court seemed amenable to applying the res ipsa loquitur doctrine to the negligence and breach of implied warranty actions against an abrasive disc manufacturer. 199 A.2d at 830.

37. In Corbin v. Camden Coca-Cola Bottling Co., 60 N.J. 425, 290 A.2d 441 (1972), the New Jersey Supreme Court did not find reversible error in the trial court's charge that the res ipsa loquitur doctrine was applicable to a breach of warranty (strict liability) claim against Coca-Cola Bottling Company. The court said:

> To invoke the doctrine of *res ipsa* plaintiff need not altogether eliminate the possibility of other causes but only that their likelihood be so reduced that it is more probable than not that, in the absence of an explanation to the contrary, the cause of the defect was one for which the defendant is responsible.
>
> While it has been said that the doctrine does not apply to breach of warranty cases, *United States Rubber Co. v. Bauer*, 319 F.2d 463, 468 (8th Cir. 1963), under the circumstances here it may be said that in a broad sense the theory underlying the doctrine of *res ipsa* does apply, *i.e.*, the circumstances give rise reasonably to an inference of a defect in the carton.

290 A.2d at 446–47 (citations omitted). It is clear the court was speaking of res ipsa as a form of circumstantial evidence which permitted the jury to infer that a product was defective. This is far different from using the doctrine as an instrument of public policy which requires the defendant to rebut a presumption that a defect exists or prove by a preponderance of the evidence that the product is not defective.

plaintiff's injury.[38] Thus, under traditional principles, Dr. Somberg and the defendant hospital could have avoided liability by proving that the operation was consistent with generally accepted surgical practices and that the instruments were inspected in accordance with the proper standard of care. But in holding that under the circumstances at least one defendant must be found liable[39] the *Anderson* court abolished the alternative of avoiding liability by proving conformance with the proper standard of care. Moreover, at least one defendant will be unable to exculpate himself by proving that his conduct was neither the cause-in-fact nor the proximate cause of the injury.

The New Jersey courts have found little difference between strict liability in tort and breach of warranty actions when brought by injured consumers.[40] Thus, if the *Anderson* court had simply shifted the burden of proof to the rongeur manufacturer and supply distributor they could have avoided liability under either theory in one of three ways. They could have proven that (1) the instrument was *not* defective, *i.e.*, that it was reasonably fit for the purpose of removing disc material; (2) the defect did not arise out of the design or manufacture of the instrument or while the article was in their control; or (3) the defect was not the proximate cause of plaintiff's injury.[41] *Anderson*'s second holding, however, indicates that a manufacturer or distributor could be found liable, even if it had exculpated itself by a preponderance of the evidence.

Shifting the burden of proof to multiple medical defendants has several practical advantages, foremost of which is the assurance of a more complete presentation of the facts. Placing the burden of proof on the defendants discourages "strategic silence." It insures that the plaintiff's motion for a directed verdict will be granted unless the defendants offer satisfactory explanations. It also insures that the plaintiff will prevail when the defendant's liability and innocence appear equally probable. In addition, shifting the burden of proof reduces the

38. PROSSER, *supra* note 15, at 143.
39. *See* Part II-B *infra*.
40. *See* notes 63–69 and accompanying text *infra*. *See also* Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879, 884 (L. Div. 1967), *rev'd on other grounds*, 53 N.J. 138, 249 A.2d 65 (1969), where the court stated that "[s]trict liability in tort for harm caused by defective merchandise sold or supplied for a consideration is the same cause of action as that asserted under the heading of warranty." 232 A.2d at 884.
41. *See* note 66 and accompanying text *infra*.

plaintiff's burden of discovering and proving unusually complex matters peculiarly within the defendants' expertise.[42] It also tends to simplify jury instructions and minimize the danger of reversal on appeal.[43] Finally, the wisdom of simply shifting the burden of proof to the defendants does not depend on the joinder of all defendants who could possibly be liable. A defendant could avoid liability by showing it is more probable than not that an unjoined party was responsible for the injury. The practical advantages of shifting the burden of proof far outweigh the theoretical inconsistencies of doing so.[44]

B. Instructing the Jury That at Least One Defendant Must Be Found Liable

1. The joinder problem

Instructing the jury that at least one defendant must be found liable assures that the unconscious patient will be compensated for his injury. Although this outcome has equitable appeal, it is not achieved without substantial cost. First, this instruction could strain the state's impleader provisions and increase drastically the complexity of litigation. Because the viability of the *Anderson* rule depends upon the joinder of *every* party who is or may be liable for all or part of the defendant's claim, joinder requirements must be liberally construed. This suggests that a medical defendant's motion to serve a third party complaint in an *Anderson*-like case should be readily granted. Because at least one defendant *must* be found liable the defendants will have a strong interest in expanding the number of defendants from which the jury can select the responsible party or parties. As a result, strategic use of the third party practice provisions, and their liberal interpretation, would generate more complex medical malpractice cases.

The problem is complicated because the holding precludes separation of trials. Under *Anderson* each defendant has a two-dimensional burden of proof, one as against the plaintiff and the second as

42. *See* Adamson, *supra* note 14, at 1050.
43. *See* Louisell & Williams, *Res Ipsa Loquitur—Its Future in Medical Malpractice Cases*, 48 CALIF. L. REV. 252, 261–62 (1960) [hereinafter cited as Louisell & Williams].
44. *See* notes 24 & 31 and accompanying text *supra*.

against the other defendants. The jury's assessment of liability depends on its evaluation of both dimensions of each defendant's case. The jury must identify the defendant or defendants who provide the *least* credible explanation for the cause of the accident and find him liable. In order to make this determination, the jury must have an opportunity to hear and compare each defendant's evidence. Separate trials would cut off the jury's ability to evaluate the second dimension of each defendant's proof.

The second difficulty is that the ultimate justice of the instruction depends on the joinder of all defendants who could be liable to the plaintiff. Unless the hospital has an absolute duty to discover all defects in a surgical instrument[45] the plaintiff will have the nearly impossible task of identifying and joining all of the surgeons who had previously used the instrument before he can claim the benefit of the instruction. Moreover, once all the defendants have been joined the trial judge will have the difficult task of deciding whether any defendants should be dismissed. The defendants' memories are likely to be faded and explanations of the cause of the break extremely incomplete and speculative. The problem might be compounded by the availability of more than one rongeur in the hospital, in which case the intermediate defendants will be hard pressed to identify the instrument they actually used.

2. *Theories of liability*

The instruction that one or more defendants must be found liable provides little or no incentive to modify surgical technique, instrument inspection, or manufacturing practices. The court is short-sighted when it says this instruction is merely a rule of evidence[46] to be employed in limited situations.[47] It is true that the rule does not alter the manufacturer's and distributor's duty to provide a defect-free instrument. Nor does it clearly state that doctors and hospitals should alter the standards of care with which they treat patients. It does suggest, however, that the jury may extend sub silentio the strict liability standard to both physicians and hospitals.

45. *See* note 12 *supra.*
46. 338 A.2d at 5.
47. *See* note 11 *supra* for the court's articulation of the circumstances in which the *Anderson* rule will be applied.

Although the *Anderson* court totally abandoned *caveat emptor* liability, it did not identify the alternative theory upon which liability should be based. The decision contains language descriptive of liability based upon fault but demands that the jury find at least one defendant absolutely liable. This instruction is most dangerous to hospitals and physicians who previously have been immune from strict liability actions.[48] Under *Anderson* the jury can impose strict liability on either of these parties by a process of elimination. More specifically, the jury could believe that neither the doctor nor the hospital breached its duty to the plaintiff but find either or both parties liable because it believed the instrument was defect-free when delivered to the hospital. This retention of negligence standards, with strict liability overtones, creates uncertainty as to the standard of care to which physicians and hospitals must conform to avoid liability.

Furthermore, when the jury is honestly unable to identify a culpable defendant it is likely either to apportion damages equally among all defendants or to return a verdict for nominal damages. Both responses would conform to the jury instructions, but neither would have resulted under either the negligence theory or the strict liability theory alone. Thus both theories have been altered in an effort to allow the plaintiff to recover.

III. AN ALTERNATIVE TO *ANDERSON*: IMPOSE A DUTY ON THE DEFENDANT TO EXCULPATE HIMSELF AND EXTEND STRICT LIABILITY THEORY TO HOSPITALS

A. Equity and the Negligence Action

The foreign-objects-in-unconscious-patient cases have been particularly difficult for courts because of the apparent inequity of denying compensation to an unconscious plaintiff who is injured by an object left in him by a physician. In such cases the plaintiff's innocence is complete; he has surrendered himself totally to those persons providing his care. The *Anderson* court recognized the injustice of denying recovery but failed to deal forthrightly with the real barrier to the plaintiff's recovery—the difficulty of negligence actions against

48. *See* Part III–C *infra*.

the doctor and hospital. This oversight is apparent in the court's overly simplistic and erroneous statement that "[t]his case resembles the ordinary medical malpractice foreign-objects case, where the patient is sewn up with a surgical tool or sponge inside."[49] The negligent failure to recover all surgical sponges is a clear breach of the surgeon's duty of care for which the plaintiff should be compensated. Failure to detect a minute crack in an instrument, however, absent a duty to microscopically inspect, is not analagous. The breach was not in inadvertently leaving the fragment in the patient; rather, if there was a breach, it was in failing to discover the defect or incorrectly manipulating the instrument.

As long as the hospital or physician is held to a reasonable standard of care, the possibility exists that an unconscious patient will go uncompensated. Because negligence theory has not previously required that either defendant inspect surgical instruments for microscopic cracks, they could both exercise reasonable care but overlook a defect, not attributable to the manufacturer or distributor, which seriously injures the plaintiff. In such circumstances, the plaintiff cannot recover. The *Anderson* rationale provides a means for avoiding this conclusion. Future patients and the future of the law, however, would be better protected by imposing a *duty* on the defendants to exculpate themselves and by extending strict liability to hospitals.

B. Medical Defendants Have a Duty To Exculpate Themselves

There are numerous reasons for employing the res ipsa loquitur doctrine in malpractice actions where an unconscious patient is injured.[50] Doing so, however, introduces the confusion of permissible inferences, presumptions, and shifting burdens.[51] It is possible to retain the benefits and avoid the difficulties by abandoning the res ipsa rationale and language. In its place the trial judge would charge the jury in terms of the medical defendant's duty to explain untoward re-

49. 338 A.2d at 5.
50. *See* notes 42–44 and accompanying text *supra*.
51. *See generally* Louisell & Williams, *supra* note 43. *See also* Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519 (1934); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936); Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 S. CAL. L. REV. 166 (1937); Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 S. CAL. L. REV. 459 (1937); Carpenter, *Res Ipsa Loquitur: A Rejoinder to Professor Prosser*, 10 S. CAL. L. REV. 467 (1937).

sults of surgery.[52] This duty can be derived from three sources. The first is in the "special responsibility for the plaintiff's safety undertaken by everyone concerned."[53] Many common carrier cases reflect a deliberate policy of requiring the defendants to explain or pay.[54] Doctors occupy a similar special responsibility toward their patients which requires similar disclosure.[55] The second source of defendant's duty to explain is the code of medical ethics, which requires that a physician render "to each [patient] a full measure of service and devotion."[56] Third, physicians have the duty of providing sufficient information to permit a patient's informed consent to treatment.[57] They also must inform a patient of a condition resulting from treatment which may itself require further treatment.[58] A physician should have a similar duty to explain unanticipated complications resulting from surgery.

There are logical, practical, and theoretical advantages to the application of duty principles. Such an approach would simplify jury instructions. The principle of duty is more readily understandable than the subtle differences between permissible inferences, presumptions,

52. The change is essentially one of nomenclature, prompted primarily by the confusion which res ipsa instructions generate in the minds of jurors. *See* note 9 and accompanying text *supra*. A defendant with a duty to explain untoward results of surgery would have the same task as a defendant to whom the burden of proof had shifted. *See* Louisell & Williams, *supra* note 43, at 261–62, 269, in which the authors support use of the res ipsa principle as a means of converting a moral duty to explain into a legal one. *See also* Thode, *supra* note 24, and Seavey, *Res Ipsa Loquitor: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950), in which the author writes: "It would seem to be just that where plaintiff has submitted himself or his property to another, the other should be under a duty to explain any resulting harm which would not normally occur without negligence on the defendant's part." *Id.* at 646 (footnote omitted).

53. PROSSER, *supra* note 15, at 223.

54. *Id.* at 223. *See, e.g.*, NOPCO Chem. Div. v. Blaw-Knox Co., 59 N.J. 274, 281 A.2d 793 (1971) (buyer of heavy machinery sued manufacturer, carriers, and bailees for damages inflicted on the machinery before reaching the buyer).

55. Thode, *supra* note 24, at 8.

56. AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS § 1 (1957), *quoted in* Louisell & Williams, *supra* note 43, at 253.

57. Thode, *supra* note 24, at 8. *See, e.g.*, Lopez v. Swyer, 115 N.J. Super. 237, 279 A.2d 116 (App. Div. 1971), *modified*, 62 N.J. 267, 300 A.2d 563 (1973); Kaplan v. Haines, 96 N.J. Super. 242, 232 A.2d 840 (App. Div. 1967), *aff'd*, 51 N.J. 404, 241 A.2d 235 (1968). *See also* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959); Comment, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396, 1397–98 n. 5 (1967).

58. *See* Dietze v. King, 184 F. Supp. 944, 948 (E.D. Va. 1960) (physician who had suspicion that he left a sponge in wound, but failed to reveal his suspicions to the patient, was liable for negligence). *But cf.* Cady v. Fraser, 122 Colo. 252, 222 P.2d 422 (1950) (physician's failure to explain to patient upon his discharge from the hospital that there was a nonunion of a fractured ankle was not itself malpractice).

and shifting burdens of proof.[59] Using duty principles also avoids the theoretical error of using res ipsa to establish cause-in-fact.[60] The duty to explain would not depend on the joinder of all possible defendants or the exclusivity of a defendant's control over the instrumentality.[61] Finally, a beneficial by-product could result from application of duty principles:[62]

> It might well be that a rule requiring physicians frankly to face up to an obligation to explain untoward results to the best of their ability would produce a public psychology that would accord them a fairer, even a more sympathetic hearing than that accorded under the cat and mouse psychology of today's secrecy.

Thus, the application of duty principles would be preferable to employing the res ipsa rationale.

C. Extend Strict Liability Theory to Hospitals

The New Jersey Supreme Court spearheaded the rapid extension of strict liability theory to the products liability field in the historic 1960 case of *Henningsen v. Bloomfield Motors, Inc.*[63] In *Henningsen* the court recognized an implied warranty of merchantability running from the manufacturer to the consumer regardless of whether there was privity of contract between them.[64] Five years later, in *Santor v. A & M Karagheusian, Inc.*,[65] the court refined its statement of strict liability in tort theory and clarified its relationship to the contract breach-of-warranty theory.[66] The court has since expanded the princi-

59. *See* notes 15–18 and accompanying text *supra*. *See also* Thode, *supra* note 24, at 7.

60. Thode, *supra* note 24, at 2. *See also* Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950); note 24 *supra*.

61. *See* note 18 and accompanying text *supra*.

62. Louisell & Williams, *supra* note 43, at 268. The authors were arguing for a shift in the burden of proof but the point is as valid when used to argue for replacing res ipsa loquitur principles with duty principles.

63. 32 N.J. 358, 161 A.2d 69 (1960) (plaintiff's wife was injured while driving allegedly defective automobile, manufactured by defendant Chrysler Corporation, shortly after its purchase from defendant Bloomfield Motors).

64. 161 A.2d at 84.

65. 44 N.J. 52, 207 A.2d 305 (1965) (plaintiff purchaser of defective carpet succeeded in a strict liability action against the manufacturer).

66. According to the majority in *Santor:*

> Under the strict liability in tort doctrine, as in the case of express or implied warranty of fitness or merchantability, proof of the manufacturer's negligence in the making or handling of the article is not required. If the article is defective,

ples of these cases to include a used car dealer,[67] a mass developer of homes,[68] and a truck lessor.[69]

The court has not, however, extended strict liability theory to physicians or hospitals who supply defective medical equipment. In *Magrine v. Spector*[70] the New Jersey Supreme Court affirmed a lower court dismissal of a strict liability action against a dentist for injuries resulting from his use of a defective hypodermic needle. The lower court gave four reasons for the dismissal. First, the dentist neither created the defect nor possessed a better capacity or expertise than the plaintiff to control, inspect, or discover the defect.[71] Second, the defendant was not involved in the sale of the product nor did he promote its purchase; he merely provided services to the plaintiff.[72] Third, although the court admitted that spreading the risk of loss may

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i.e., not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists. Existence of the defect means violation of the representation implicit in the presence of the article in the stream of trade that it is suitable for the general purposes for which it is sold and for which such goods are generally appropriate.
207 A.2d at 313.

The RESTATEMENT (SECOND) OF TORTS § 402A (1965) describes the rules of strict liability slightly differently. The section provides as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  (a) the seller is engaged in the business of selling such a product, and
  (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
  (a) the seller has exercised all possible care in the preparation and sale of his product, and
  (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

67. Realmuto v. Straub Motors, Inc., 65 N.J. 336, 322 A.2d 440 (1974).

68. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

69. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965). *See* notes 76–78 and accompanying text *infra*.

70. 53 N.J. 259, 250 A.2d 129 (1969) (per curiam), *aff'g* 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968), *aff'g* Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. L. Div. 1967).

71. 227 A.2d at 543.

72. *Id.* In the court's words:

[T]he *essence* of the transaction between the retail seller and the consumer relates to the *article sold.* The seller is *in the business* of supplying the product to the consumer. It is that, and that alone, for which he is paid. A dentist or a physician offers, and is paid for, his professional services and skill. That is the *essence* of the relationship between him and his patient.

Id. (emphasis in original).

be desirable, it reasoned that the manufacturer, with his many customers, was in a better position to insure against defects in his products than was the dentist with his relatively low volume of patients.[73] Finally, the dentist did not know who manufactured or supplied the needle. Consequently, the defendant was unable to implead either of the two parties who were most likely responsible for the defect.[74]

Although these objections may be appropriate to an action against a physician they are not appropriate to an action against a hospital. Hospital personnel are in a better position than either a physician or a patient to control, inspect, and discover defects in reusable surgical instruments. Operating-room personnel are present during the operation to observe an instrument's use and possible misuse.[75] Likewise, repeated sterilizations of the instruments would provide the opportunity for responsible personnel to conduct close inspections of the instruments.

The role of a hospital includes more aspects of a sale than does professional service by a physician or dentist. The sale-service distinction is important because strict liability in tort and contract is applicable only to the sale of a product and not to the rendering of a personal service. That plaintiff Anderson's injury occurred during the "sale" of a product is apparent from an analysis of *Cintrone v. Hertz Truck Leasing & Rental Service*.[76] There the New Jersey Supreme Court held that a lessor of trucks may be found strictly liable for injuries resulting from the use of its rental vehicles. There were two facts critical to the court's extension of strict liability to the lessor. First, the

73. *Id.* at 545–46. *See generally* Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120 (1960); Havighurst & Tancredi, *"Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance*, 1974 INS. L.J. 69; Brant, *Medical Malpractice Insurance: The Disease and How to Cure It*, 6 VALPARAISO U.L. REV. 152 (1972). *See also* Comment, *Congress Takes a Look at a No-Fault Proposal for Medical Malpractice: Some Observations*, 9 AKRON L. REV. 116 (1975), where the author reports that the maximum annual premium for high risk medical professionals across the continental United States ranges from $14,000 to $47,000. *Id.* at 116 n.2.

74. 227 A.2d at 546.

75. If, for example, the rongeur had been bent and then straightened by one of the intermediate surgeons the attendant operating-room personnel would have been forewarned of a potential defect. They should have the duty to discard that instrument.

76. 45 N.J. 434, 212 A.2d 769 (1969). Plaintiff Cintrone was a passenger in a truck leased by his employer from the defendant when the brakes apparently failed, causing the plaintiff's injury. Previous difficulty with the brakes had allegedly been brought to the defendant's attention. The trial court had dismissed the plaintiff's warranty claim (which was the principal issue on appeal) and the jury had found for the defendant on the plaintiff's negligence claim. 212 A.2d at 771–73.

lessor was a bailor-for-hire. Revenue collection preserved the notion of enterprise liability[77] which justified extension of strict liability to wholesalers and retailers. Second, "the customer was expected to, and in fact must, rely ordinarily on the express or implied representation of fitness for immediate use."[78] Both of these elements are present in *Anderson.*

Like the truck lessor, the hospital seeks to recoup its investment in equipment by charging a fee for the benefits that its instruments provide to the patient. Many times the patient must use the equipment outside the hospital in order to realize its benefits.[79] Other times, as with surgical instruments, the hospital provides "products" in the form of benefits to patients by making medical equipment available for professional use. Second, the surgical patient is at least as vulnerable as the lessee of a truck, for the patient also relies on the representation that the equipment is fit for use. He has neither the authority, the opportunity, nor the expertise to inspect for defects.

The willingness to find a "sale" by a hospital was indicated in the opinion of the *Magrine* trial court in its discussion of *Perlmutter v. Beth David Hospital,*[80] a New York case which held that the defendant hospital was not strictly liable to the plaintiff for giving blood which contained a hepatitis strain. The *Magrine* court said: "It is doubtful that New Jersey would follow *Perlmutter,* at least insofar as

77. *See* Justice Botter's dissent in Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637, 642 (App. Div. 1968), where he states:

> In Santor . . . the court pointed out that the obligation is "an enterprise liability" that does not depend upon "the intricacies of the law of sales" and that this "strict liability in tort is not conditioned upon advertising to promote sales." *Cintrone* . . . makes it clear that there is no reason to restrict the rule to sales transactions. The obligation is implied in law, "as an incident of a transaction because one party to the relationship is in a better position than the other to know and control the condition of the chattel * * * *and to distribute the losses* which may occur because of a dangerous condition the chattel possesses."

241 A.2d at 642 (emphasis in original; citations omitted). *See generally* P. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 2 (1951); Campbell, *Enterprise Liability—An Adjustment of Priorities,* 10 FORUM 1231 (1975).

78. 45 N.J. 434, 212 A.2d at 777.

79. A much clearer case for imposing strict liability exists for those products the hospital permits patients to take home. Examples include walking aids, prostheses, braces, portable respirators, diagnostic/monitoring equipment, and other therapeutic equipment. Frequently the hospital charges rental fees for such equipment. Under these circumstances the hospital's liability as lessor should be the same as that of the truck lessor in *Cintrone. See* note 76 *supra.*

80. 308 N.Y. 100, 123 N.E.2d 792 (1954). In this case the New York Court of Appeals said the defendant hospital was not liable under warranty theory because the plaintiff had not been "sold" a transfusion of impure blood. The transaction was characterized as a service rather than as a sale.

it holds a 'sale' was not involved or that such description of the transaction is necessary to establish strict liability. . . . [T]he hospital in *Perlmutter* was a supplier."[81]

Furthermore, subsequent to *Cintrone* and *Magrine*, the New Jersey Supreme Court has indicated a willingness to abandon the "essence" test of *Magrine*.[82] When the *Magrine* court applied the essence test to the transaction between the dentist and the patient, the court found that the dentist offered, in essence, a professional service rather than a product. In a more recent case[83] the court indicated its willingness to abandon the essence test in a hybrid sales-service transaction.[84] Thus, for purposes of strict liability, hospitals no longer provide either a sale *or* a service, but they provide both a sale *and* a service.

In *Magrine* the court said that the manufacturer, because of numerous customers, was in a better position to distribute the risk of injury than was the relatively low-volume dentist. This barrier to strict liability recovery from the hospital does not apply in *Anderson*, however. St. James Hospital had 216 beds and admitted 8,025 patients during 1974. Expenses for that year exceeded $7 million.[85] The volume of its business is sufficient to spread the risk of defective equipment across large numbers of patients.[86] Also, unlike the dentist

81. Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539, 544–45 (Hudson County Ct. L. Div. 1967) (citations omitted). *See also* Brody v. Overlook Hosp., 127 N.J. Super. 331, 317 A.2d 392 (App. Div. 1974), where the court stated:

> If it is otherwise determined that the basic policy considerations which lead to the application of the doctrine of strict liability are here present, that doctrine will be applied regardless of whether such activity by either defendant [doctor or hospital] be characterized as a sale or a service.

317 A.2d at 394. The court found, however, that the defendant hospital was not liable because the blood transfusion (containing nearly undetectable serum hepatitis) was an unavoidably unsafe product. *Id.* at 397.

82. *See* note 72 *supra*. *See also* Farnsworth, *Implied Warranties of Quality in Non–Sales Cases*, 57 COLUM. L. REV. 653, 663–65 (1957); Note, *Products and the Professional: Strict Liability in the Sale–Service Hybrid Transaction*, 24 HAST. L. REV. 111, 120, 124–25 (1972).

83. Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969) (beauty parlor operator applied a permanent wave solution which injured the plaintiff, for which the court permitted recovery from the beauty parlor).

84. 258 A.2d at 701–02. The court said:

> The transaction, in our judgment, is a hybrid partaking of incidents of a sale and a service. It is really partly the rendering of service, and partly the supplying of goods for a consideration. . . . The no–separate–charge argument puts excessive emphasis on form and downgrades the overall substance of the transaction.

Id. at 701. *See* notes 70 & 72 and accompanying text *supra*.

85. AMERICAN HOSPITAL ASSOCIATION, GUIDE TO THE HEALTH CARE FIELD 151 (1975 ed.).

86. Calabresi and Hirschoff offer a slightly different test for distributing the risk. They would have the courts impose liability upon "the cheapest cost avoider," that

in *Magrine*, St. James Hospital knows who manufactured and distributed the rongeur. Both of these parties were joined in the action. Therefore, St. James could shift liability to one of the other two defendants if it could show the instrument was defective when received.[87]

St. James could not avoid strict liability by claiming the rongeur was unavoidably unsafe.[88] A rongeur is capable of "being made safe for its intended and ordinary use."[89] However, if the hospital can

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party who *"is in the best position to make the cost–benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) (emphasis in original).

If one phrases the issue as Calabresi and Hirschoff do—"not *whether* avoidance is worth it, but which of the parties is relatively more likely to find out whether avoidance is worth it"—it is apparent that the hospital would be the cheapest cost avoider. *Id.* at 1060–61. It certainly possesses greater knowledge than the patient of the injuries which could result from the use of defective surgical instruments. Likewise, it will know more about alternative inspection techniques and the expense of discovering such defects.

As long as the defect is not one of design, the hospital should be a cheaper cost avoider than the manufacturer or distributor. Neither of these two parties can inspect for defects which develop after the instrument leaves their hands. Finally, the hospital's opportunities for discovering the defects exceed those of the surgeon. Hospital personnel handle the equipment more frequently and observe its use in more operations. The surgeon is trained to provide medical services; it would be a waste of his skill and resources to require that he inspect for defects in the equipment which the hospital provides.

87. The hospital will have more difficulty shifting liability when the instrument is a reusable product than when it is disposable and designed for a single use. Many disposable medical products are pre-sterilized and packaged by the manufacturer to enhance the convenience of using the product. When the instrument is pre-sterilized the hospital cannot be expected to contaminate it by carefully inspecting it for defects. Yet, arguably, the hospital's position should be no different from that of the retail dealer who sells food in a sealed container but is nevertheless liable for defects. Sofman v. Denham Food Service, Inc., 37 N.J. 304, 181 A.2d 168 (1962). The hospital should, however, have more success at showing that the instrument was defective when received. An instrument which is used once, and breaks during that single use, carries a strong inference that it was defective when received. The inference is supported by the requirement that such products be stored and handled carefully.

88. *See* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897, 903–04 (1970) (hepatitis-infected blood transfusion is not unavoidably unsafe and the transfuser was, therefore, *not* immune from a strict liability action). *But see* Brody v. Overlook Hosp., 127 N.J. Super. 331, 317 A.2d 392 (App. Div. 1974) (criticizing *Cunningham* and finding a similar transfusion to be an unavoidably unsafe product).

89. According to the RESTATEMENT (SECOND) OF TORTS § 402A, Comment k (1965):

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper

show that Dr. Somberg used the rongeur abnormally or otherwise knew the rongeur was weakened and proceeded to use it, Dr. Somberg's negligence should relieve the hospital from liability.[90]

IV. CONCLUSION

Imposing a duty on multiple medical defendants to exculpate themselves retains the benefits of the res ipsa rationale without its attendant procedural and analytical confusion. In addition, extending strict liability theory to hospitals has several advantages over the *Anderson* holding. It would promote predictability of results and permit the parties to modify their behavior in order to improve medical care and avoid liability. The joinder of all possible defendants would not be necessary, nor would the hospital be precluded from seeking contribution or indemnity from an unjoined defendant. Finally, extending strict liability to the hospital would preserve the integrity of the strict liability and negligence theories and avoid the conflict and theoretical uncertainty inherent in the instruction that "at least one defendant must be found liable" when negligence actions are involved.

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directions and warning, is not defective, nor is it *unreasonably* dangerous. *Id.* (emphasis in original).

90. There is some confusion as to whether a party's contributory negligence in using a defective product insulates the manufacturer from liability in a strict liability action. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769, 782 (1965). The New Jersey Supreme Court, however, accepts the distinction espoused in the RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965):

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Id. See also PROSSER, *supra* note 15, at 667–71 for a discussion of the difference between abnormal use, contributory negligence which overlaps the defense of assumption of the risk, and simple contributory negligence.