[J-60-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

ELIZABETH H. LAGEMAN, BY AND THROUGH HER POWER OF ATTORNEY AND DAUGHTER, ADRIENNE LAGEMAN, Appellees v. JOHN ZEPP, IV, D.O.; ANESTHESIA ASSOCIATES OF YORK, PA, INC.; YORK HOSPITAL; AND WELLSPAN HEALTH, T/D/B/A YORK HOSPITAL, Appellants	:	No. 21 MAP 2021 Appeal from the Order of the Superior Court dated July 20, 2020 at No. 756 MDA 2018, Reconsideration Denied on September 22, 2020, Vacating the Judgment of the York County Court of Common Pleas, Civil Division, dated May 10, 2018 at No. 2014-SU-000846-82 and Remanding for a new trial. ARGUED: September 23, 2021

OPINION

JUSTICE WECHT **DECIDED: December 22, 2021**

"The plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him."[1] So begins a case familiar to virtually any lawyer who didn't sleep through first-year torts. Neither any of the several witnesses nor the plaintiff could attest to the events immediately preceding the barrel's fall. The defendant argued that there was no evidence of

[1] *Byrne v. Boadle*, 159 Eng. Rep. 299, 299 (Exchequer 1863), *available at* http://www.commonlii.org/uk/cases/EngR/1863/1012.pdf (last visited Dec. 1, 2021).

negligence to support a jury verdict, indeed no evidence that the defendant or his agents were present at the time of the event, and an Assessor agreed, dismissing the case.

But a panel of judges of the Court of Exchequer felt otherwise. Acknowledging the dearth of "affirmative evidence" that the defendant or his agents were directly responsible for losing control of the barrel, the court observed that courts previously had held "that the mere fact of the accident having occurred is evidence of negligence, as, for instance," when two trains managed by the same company collide.[2] In such a case, the accident alone establishes negligence; responsibility presumably lies only with the company that controlled both trains.

The court concluded that the plaintiff should have prevailed by virtue of "presumptive negligence," what we call a rebuttable presumption, shifting the burden to the defendant to produce exculpatory evidence.[3] While the court emphasized that there are accidents from which no presumption of negligence should arise, it concluded that, for want of contrary defense evidence, the barrel could not have rolled out of the barn but for negligence, and it would be unjust to deny relief due to a lack of specific proof.

The case is famous because it contains the earliest reference to the phrase "*res ipsa loquitur*" in this connection,[4] which we now use in our law to describe a similar

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2 *Id*. at 300.

3 *Id*.

4 *Id*. ("There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them."). For convenience, we sometimes refer to *res ipsa loquitur* as "the Doctrine" and the attendant *res ipsa loquitur* jury instruction as "the Instruction."

doctrine. The literal translation is "*the thing itself speaks*," but it is more commonly rendered in American law as "*the thing speaks for itself*."[5]

In Pennsylvania, we have described *res ipsa loquitur* as a discrete category of "circumstantial evidence,"[6] which may suffice to establish negligence where more specific evidence of the events surrounding the injury eludes even diligent investigation. And while the historical underpinnings of the Doctrine just entailed events that a lay person without assistance might conclude by an exercise of common sense could not occur absent negligence—the barrel rolling out of a barn, two trains colliding on a track managed by the same company—Pennsylvania now recognizes its application in contexts that exceed the unassisted grasp of lay jurors, cases involving complex facts and theories of liability. Among these we find medical malpractice cases, to which we extended the doctrine forty years ago.[7]

The application of the Doctrine to medical malpractice cases by now is settled. We granted review in this case to clarify whether resort to the Doctrine is precluded when the

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[5] *See, e.g., Pepin v. Wal-Mart Stores, Inc.*, 542 F. Supp.2d 107, 112 (D. Me. 2008). Maine also offers "the accident spells negligence." *Pratt v. Freese's, Inc.*, 438 A.2d 901, 903 (Me. 1981). In *Toogood v. Owen J. Rogal, D.D.S., P.C.*, we called this a novel "coinage" by the *Byrne* Court. 824 A.2d 1140, 1145 (Pa. 2003) (plurality). But in fact, the phrase was used decades earlier by this Court (and surely others), albeit in a case having nothing to do with negligence. *See*, *e.g.*, *Porter v. Turner*, 3 Serg. & Rawle 108, 115 (Pa. 1817).

[6] *See Gilbert v. Korvette, Inc.*, 327 A.2d 94, 99 (Pa. 1974) ("*Res ipsa loquitur* is neither a rule of procedure nor one of substantive tort law. It is only a shorthand expression for circumstantial proof of negligence—a rule of evidence.").

[7] *See Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1072 (Pa. 2006) (noting our first approval of *res ipsa loquitur* in a medical malpractice case in *Jones v. Harrisburg Polyclinic Hospital*, 437 A.2d 1134, 1137 (Pa. 1981)).

plaintiff has introduced enough "direct" evidence that the Doctrine is not the only avenue to a finding of liability—whether, in short, the two approaches to satisfying the plaintiff's evidentiary burden are mutually exclusive. As it has in several earlier cases, the Superior Court held that they are not exclusive. We affirm.

I. The Surgery, the Trial Evidence, and the Jury Charge.

On May 17, 2012, Plaintiff-Appellee H. Elizabeth Lageman presented at Defendant-Appellant York Hospital with abdominal pain, nausea, and vomiting. Lageman had a small bowel obstruction secondary to a large ventral hernia. Two days later, a general surgeon performed an emergency exploratory laparotomy. Defendant-Appellant John Zepp, IV, D.O., was the attending anesthesiologist.[8]

As a corollary of their responsibility for administering anesthesia and ensuring that the patient remains in the intended physical state, anesthesiologists carefully monitor the patient's vital signs. Anesthesiologists have at their disposal various methods of monitoring the relevant parameters, and a limited ability to manipulate certain indicators.[9]

To monitor Lageman's condition, Zepp employed a central venous pressure line ("CVP"), which he attempted to insert into the internal jugular vein, located near the internal (or "common") carotid artery. From his insertion point, the carotid lay directly behind Lageman's jugular.[10]

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[8] Unless indicated otherwise, what follows draws exclusively from Zepp's testimony.

[9] Such indicators include heart rate, blood pressure, respiration rate, and hydration.

[10] The arrangement of jugular vein and carotid artery varies from patient to patient, with Lageman's anatomy reflecting that of a minority of patients.

Zepp's general practice in placing such a line involves the following steps. First, he inserts a small needle, monitoring its movement with dynamic, cross-axis ultrasound, which provides a two-dimensional, longitudinal view of the vein and the artery and can visualize the inserted needle.[11] Once he confirms by ultrasound (to the extent possible) the needle's placement in the vein, Zepp uses the needle to thread a small catheter to "pull up" blood from the insertion site. This is another confirmatory step: if the needle has been placed in the vein, the level of the blood visible in the tube will stabilize. But if it has been mistakenly placed in the artery, the pressurization in that vessel will cause the blood in the tube to fluctuate and rise significantly. The blood from each vessel also differs in color, arterial blood a brighter red than venous blood, which appears darker. This method is referred to as manometry.[12] Once placement is confirmed, Zepp threads a dilator into the vein, which makes the hole at the insertion site wider to accommodate the CVP, which he then inserts into the vein.

In this case, the placement failed. Zepp testified that he completed the above steps and confirmed to his satisfaction that he had placed the catheter into the vein, as intended. But when he inserted the CVP, he passed it through the far wall of the vein and into the right common carotid artery behind. The catheter ultimately penetrated approximately eighteen centimeters into the artery, against the pressurized arterial blood

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[11] Zepp acknowledged that "[t]here are inherent problems with the use of the ultrasound sometimes making it challenging to view the tip of the needle." Notes of Testimony, 1/3-8/2018, at 174. The notes of testimony, spanning five days of trial, are continuously paginated. Moving forward, we cite the transcript as "N.T."

[12] Zepp's expert Mark E. Hudson, M.D., testified that "[m]anometry is probably the most important step in terms of confirming that that catheter is in the vein." *Id*. at 508.

flow en route to Lageman's brain, perhaps as deep as the aortic arch,[13] a structure attached to the top of the heart. Zepp did not realize his error at first and secured the placement by sewing the CVP into place.

With the CVP secured, Zepp conducted another test to determine the waveform of the pressure in the vessel, "a final confirmation" of placement.[14] The reading indicated arterial rather than venous placement. Alerted to his error, Zepp called for a vascular surgeon to address the misplacement and repair any damage. He also asked the general surgeon to place a catheter in a vein in Lageman's groin to enable proper monitoring, and the surgery continued.

After the procedure, Lageman had little or no movement in her left-side extremities. She was diagnosed with one or more strokes in the distribution of the right internal carotid artery to the right middle cerebral artery.

Zepp acknowledged that arterial cannulation has been associated with stroke, because of the potential penetration of air, fluids, or medications entering the artery, or due to the creation of a blood clot or the dislodgment of arterial plaque which then travels to the brain.[15] But he also testified that, "if it's managed appropriately, we should be able

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[13] *Id*. at 235 ("If you put a catheter from here 7 inches down into somebody's neck, it goes into the aortic arch or actually into the heart . . . .").

[14] *Id*. at 182.

[15] A cannula is "[a] hollow tube with a sharp, retractable inner core that can be inserted into a vein, an artery, or another body cavity." *Cannula*, WEBMD, *available at* http://medicinenet.com/cannula/definition.htm (last visited Oct. 29, 2021). Cannulation is the insertion of a cannula. It is not to be mistaken for a mere "needle stick" to the vessel, which typically does not bring the same elevated risk of complications that cannulation does. N.T. at 526-28.

to hopefully avoid those complications."[16] He said that if such were to occur in the right internal carotid artery, any associated strokes would occur in the right distribution to the right middle cerebral artery, as in this case.

The jury weighed Zepp's testimony against that of his expert witness, anesthesiologist Mark E. Hudson, M.D., and of Lageman's expert, anesthesiologist James M. Pepple, M.D.

Pepple opined to a reasonable degree of medical certainty that Zepp's actions fell below the applicable standard of care. Asked "[i]f the standard of care has been properly observed, that all the steps have not only been taken, but they were taken correctly and things were seen and evaluated correctly, is it possible that this artery would have been cannulated to this degree," he answered "No."[17]

Pepple further testified that Zepp's reliance upon a short-axis ultrasound method of monitoring the needle's placement, or at least the manner in which he used it, was inconsistent with the standard of care because it did not enable him to visualize the *tip* of the needle, leaving him blind to the fact that the needle passed through the vein and entered the artery. Pepple also questioned Zepp's assertion that he relied upon manometry to confirm the needle's placement because Zepp made no note to that effect in the chart.[18] In Pepple's view, the difference in what manometry would show between

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16 N.T. at 185.

17 *Id*. at 238.

18 Zepp did not clearly attest to performing manometry in locating Lageman's CVP, testifying rather that it was his standard practice to do so. He also indicated that he "document[s] by exception," implying that manometry is among standard operating procedures from which he would only document a departure. *Id*. at 177; *see also*

venous and arterial placement would be too striking to miss. This reinforced his opinion by suggesting that whether manometry was performed or not, either its non-performance or the poor quality of its performance fell below the standard of care.

Zepp's attorney questioned Pepple about guidelines provided by the American Society of Anesthesiologists ("ASA"). Pepple noted that the ASA guidelines' "use cannot guarantee any specific outcome,"[19] a proposition Zepp argues should be treated as a self-defeating concession that arterial cannulation can happen in the absence of negligence. Lageman's attorney asked Pepple to situate the putative admission in its proper context, a prefatory caveat that appears in the Guidelines: "[P]ractice guidelines developed by [the ASA] are not intended as standards or absolute requirements, and their use cannot guarantee any specific outcome. . . . Practice guidelines are subject to revision as warranted by evolution of medical knowledge, technology, and practice. They provide basic recommendations . . . ."[20]

Pepple testified to the problems associated with arterial placement of a catheter:

> A. [I]f you put a large catheter in the artery, you can get a hematoma, which would be just . . . blood leaking out and being in that area. You could potentially get an infection from that.

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id. at 312 (Zepp testifying that there is not "ever a time that [he doesn't] follow each and every one of the steps that [his testimony has] outlined").

19 *Id*. at 282; *see id*. at 293, 531 (same).

20 *Id*. at 282 (reading the Guidelines). Even taken at face value, such a concession was compatible with such events rising from negligence. *See id*. at 241 (Lageman's attorney at side bar: "The problem is, when you talk about a known complication, it doesn't tell you whether it's negligently caused or not negligently caused, which means that you can't just say, hey, there are known complications and this happens.").

> But you could also get some much more serious complications . . . . [Y]ou can get embolic phenomenon [*sic*] or obstructive phenomenon [*sic*] which can cause a stroke. . . .
>
> Q. Can you explain what an embolic phenomenon is?
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> A. So when—whenever you put a foreign body in somebody, the body's response to it is generally to try to get rid of it, or if you are in a blood vessel, to start clotting off, okay, so . . . if you put a catheter in a vein, you can get what you might have heard of as thrombophlebitis.
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> And what happens is if you do it in the neck, particularly into the common carotid . . . the carotid blood vessel feeds the brain, and the internal carotid vessel goes to what's called your middle cerebral artery, and that covers the mid-part of your brain, . . . and it can cause a stroke . . . .[21]

Pepple testified that cannulating the artery increased the risk of stroke "exponentially,"[22] and, taken collectively, there was no evidence of another cause in this case. To the contrary, he described how a needle inserted deeply into "a great vessel" could create turbulence causing the formation of "small clots," and that the formation of such clots would be consistent with the "little tiny strokes" that Lageman suffered "in different areas."[23] Pepple further testified that the neurologists investigating the cause of Lageman's strokes considered another possible explanation for the stroke to ensure that she did not suffer from a condition that might lead to a recurrence. Specifically, they searched the left atrium of the heart for blood clots and found "no suggestion of embolic phenomena from the heart."[24]

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21 *Id*. at 222-23.

22 *Id*. at 232.

23 *Id*. at 235-36.

24 *Id*. at 236-37.

Hudson told a different story. Right at the top, Hudson testified to a reasonable degree of scientific certainty that Zepp's performance of the CVP placement satisfied the standard of care and was not negligent.[25] Relatedly, he testified that the correct use of dynamic cross-axis ultrasound in needle placement is the state of the art but does not eliminate the risk of arterial cannulation.[26]

Hudson also testified that Pepple overstated the relative value of long-axis ultrasound over short-axis ultrasound to direct needle placement, noting that "there's really no compelling medical evidence that suggests that one is better than the other to . . . prevent[] carotid artery cannulation," adding that the "vast majority" of practitioners favor short-axis ultrasound.[27] Moreover, the ASA Guidelines make reference *only* to short-axis ultrasound.

Hudson also was questioned about the ASA guidelines. From those guidelines, Lageman's attorney excerpted, and inquired as to, the following observation:

> Q. . . . The consultants and ASA members strongly agree that before insertion of a dilator or large bore catheter—and that would be the triple lumen catheter in this case, correct?"
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> A. Yes.
>
> Q. Large bore catheter over a wire, venous access should be confirmed for the catheter or thin wall needle that accesses the vein. The Task Force

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[25] *Id*. at 502-03; *see id*. at 512-13 ("In my opinion, based on Dr. Zepp's description of his techniques for placement of central venous catheters, he took the recommended steps to limit the risk of inadvertent arterial cannulation, and his technique is consistent with the standard of care.").

[26] *Id*. at 504.

[27] *Id*. at 511.

believes that blood color or absence of pulsatile flow [*i.e.*, as determined by manometry] should not be relied on to confirm venous access.

Would you agree with that?

A. I agree.[28]

Hudson then acknowledged that Zepp did not confirm the presence of the wire in the vein by ultrasound.[29]

Once the parties had introduced their evidence and their closing arguments, the court charged the jury. Our focus is upon the court's determination that Lageman was not entitled to a jury charge on *res ipsa loquitur*. Because the trial court declined, there is no instruction to review. But the court did charge the jury on the distinction between direct and circumstantial evidence, and on the jury's prerogative to base its verdict in whole or in part on the latter:

> [E]vidence can be what we call direct evidence, and direct evidence is something that a witness generally saw or did that they can testify to themselves.
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> Evidence can also be circumstantial evidence. Circumstantial evidence is evidence of facts from which you can infer the existence of other facts.
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> Circumstantial evidence . . . is just as valid as any other type of evidence that can be presented during the course of the trial. It is something

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28 *Id*. at 535.

29 *See id.* at 538-39 (reviewing Hudson's quotation of another article that "[u]ltrasound guidance and pressure measurement is best seen as complementary"; the article also noted that "[b]ecause of the possible difficulty with reliably imaging the tip of the needle in the vein, imaging the guidewire in the vein with ultrasound before placing a large bored catheter has been recommended").

> for you to consider when you consider the evidence and when you go back to deliberate on a verdict.[30]

So charged, the jury retired. The jury then returned a defense verdict, answering "no" to whether Zepp's conduct "fell below the applicable standards of medical care."[31] Lageman appealed.

II. Pennsylvania's *Res Ipsa Loquitur* Doctrine.

A. This Court's Cases.

As best we can tell, the phrase "*res ipsa loquitur*" first appeared in this Court's jurisprudence in our 1817 decision in *Porter*, *supra*, but there it was invoked in an estate case. Then, we described "*res ipsa loquitur*" as "the most unerring species of evidence," characterizing it as "internal evidence," and counterposing it against "external evidence," which we described as "positive proof"[32] and now call "direct evidence."

It appears that "*res ipsa loquitur*" first appeared in a Pennsylvania tort case in *Shafer v. Lacock*.[33] There, echoing *Byrne*, we noted that "[t]here are cases in which a fair presumption or inference of negligence arises from the circumstances under which the injury occurred."[34] The facts also resembled *Byrne*'s in a sense: roofers were sued after sparks from a firepot they were using ignited a roof fire.

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30 *Id*. at 621-23.

31 *Id*. at 649.

32 *Porter*, 3 Serg. & Rawle at 115.

33 32 A. 44 (Pa. 1895).

34 *Id*. at 46.

Pennsylvania courts' application of the doctrine initially was limited, but early reservations and strictures gave way over time to broader application. By now, the scope of the Doctrine's application has evolved with modern life and tort law, itself, advancing in step with (if, in the law's way, a step behind) legal, technological, and social developments.

We extended the Doctrine to medical malpractice claims in 1981, in *Jones*, *supra*.[35] There, the plaintiff underwent several gynecological surgeries performed consecutively by two surgeons. Each surgery required the plaintiff to lie in a different position. Throughout, one of the plaintiff's arms remained on a board to facilitate an IV line. When the plaintiff awoke, she felt severe pain in her neck, shoulder, and arm, symptoms of what later was diagnosed as suprascapular nerve palsy caused by her positioning during the surgery.

The plaintiff filed a malpractice claim against the first surgeon based upon a *res ipsa loquitur* theory. The jury returned a plaintiff's verdict. The Superior Court found *res ipsa loquitur* inapt, reversed, and granted a new trial. The plaintiff then asked this Court to review whether the Doctrine could apply in a medical malpractice action.

We held that it could. We noted that, in adopting Section 328D of the Restatement (Second) of Torts in *Gilbert*,[36] we cast aside the earlier tripartite account of the doctrine,

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35 437 A.2d 1134.

36 Section 328D of the Restatement provides as follows:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when:

"which combined substantive and procedural concerns with the evidentiary question of the propriety of inferring negligence from the particular circumstances."[37]

In keeping with the Restatement, the *Jones* Court held that the Doctrine implicates only evidentiary concerns.

> Section 328D is fashioned to reach all instances where negligence may properly be inferred and its applicability is not necessarily precluded because the negligence relates to a medical procedure. The section establishes criteria for determining circumstances wherein the evidentiary rule of *res ipsa loquitur* may become operative in providing the inference of negligence. It is premised on a recognition that certain factual situations demand such an inference.
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> [S]ection 328D provides two avenues to avoid the production of direct medical evidence of the facts establishing liability: one being the reliance upon common lay knowledge that the event would not have occurred
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> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
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> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
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> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
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> (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.
>
> (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

RESTATEMENT (SECOND) OF TORTS § 328D.

[37] *Jones*, 437 A.2d at 1137 (citing *Gilbert*, 327 A.2d at 99). The *Gilbert* Court explained that, before the Restatement's unitary, circumstantial-evidence account of *res ipsa loquitur*, what stood in its place was a mélange of three companion doctrines—"*res ipsa loquitur*, exclusive control, and an untitled evidentiary rule of simple circumstantial evidence"—which collectively "obscured 'a simple matter of circumstantial evidence.'" *Gilbert*, 327 A.2d at 98 & n. 19 (quoting W. Prosser, HANDBOOK OF THE LAW OF TORTS § 40, at 231 (1971)).

> without negligence, and the second, the reliance upon medical knowledge that the event would not have occurred without negligence.[38]

Eschewing courts' past reluctance to allow "circumstantial proof in medical malpractice cases where the nature of the evidence provides the requisite reliability of the inference sought to be drawn," the Court concluded that, "[w]hen common[-]law knowledge or medical evidence can be established that the event would not ordinarily occur without negligence, there is no basis for refusing to permit a jury to draw such an inference."[39]

Next came *Hightower-Warren v. Silk.*[40] There, a routine medical examination of the plaintiff revealed an enlarged thyroid lobe. During a thyroidectomy, the laryngeal nerve, which is critical to the vocal cords, must be protected. During (or after) her procedure, plaintiff suffered a paralyzed vocal cord and sued the physician. The trial court rejected the videotaped testimony of the plaintiff's expert on the basis that it was too speculative as to both the standard of care and causation, entered a non-suit, and denied the plaintiff's post-trial motion seeking to proceed to a jury on *res ipsa loquitur*. The Superior Court affirmed, concluded that the Doctrine was not available to the plaintiff because the expert's testimony "failed to indicate that [her] injury would not have occurred absent negligence or that other responsible causes had been eliminated."[41]

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38 *Jones*, 437 A.2d at 1138.

39 *Id*.

40 698 A.2d 52 (Pa. 1997).

41 *Id*. at 54; *see* RESTATEMENT (SECOND) OF TORTS §§ 328D(1)(a), (b).

This Court reversed. We discussed favorably and at length the Superior Court's contrary decision in *Sedlitsky v. Pareso*,[42] another case involving thyroid surgery gone awry in much the same way. There, the Superior Court found the expert testimony sufficient to support instructing the jury on *res ipsa loquitur*, identifying aspects of the plaintiff's expert's testimony that enabled a jury to infer the presence of the two relevant factors.

The plaintiff's expert in *Hightower-Warren* conceded that the injury can occur without negligence, but only under dissimilar circumstances. The expert also opined that all other possible causes could be excluded. This Court concluded that the expert testimony was sufficient to support the Instruction.

Subsequent cases both reinforced and muddled *Jones* and *Hightower-Warren*. In *Toogood*, for example, this Court failed to achieve a substantive consensus, although a majority supported the result.[43] There, the trial court refused to allow the plaintiff's expert to participate in the trial due to timeliness issues. And of the individuals present during the procedure only the plaintiff remained; the nurse anesthetist and treating physician died before trial. *Res ipsa loquitur* was plaintiff's only recourse. The trial court allowed the plaintiff to proceed under the Doctrine. The jury returned a plaintiff's verdict, and the Superior Court affirmed.

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[42] 582 A.2d 1314 (Pa. Super. 1990).

[43] *See* 824 A.2d 1140. The lead opinion had the full support of only three of six participating Justices. Justices Castille and Saylor concurred in the result. Justice Nigro dissented. Chief Justice Zappala did not participate.

This Court reversed. First, a plurality of the Court reaffirmed that *res ipsa loquitur* is nothing more than a rule of circumstantial evidence.

> The gist of *res ipsa loquitur* is the inference, or process of reasoning by which the conclusion is reached. This must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion. . . . This theory relieves the plaintiff of having to prove causation directly.[44]

The plurality also noted a limiting consideration: "medicine is not an exact science, . . . the human body is not susceptible to precise understanding, . . . the care required of a medical professional is the degree of learning and skill common in his profession, and . . . even with the greatest of care, untoward results do occur in medical and surgical procedures."[45] Courts long have taken caution lest they grant so much latitude to plaintiffs that doctors became guarantors of their treatments.[46]

Critically to this dispute, the plurality also observed that, "[o]riginally, a plaintiff could not employ a *res ipsa loquitur* instruction *if the plaintiff had evidence regarding the cause of the accident*."[47] Instead, the doctrine "was reserved for obvious cases in which lay jurors could apply their own knowledge and common sense to establish the cause of the injury and deduce an inference of negligence."[48]

Moreover, in *Jones* we embraced Comment (d) to Section 328D:

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44 *Id*. at 1146 (cleaned up).

45 *Id*. at 1146-47.

46 *See generally Donaldson v. Maffucci*, 156 A.2d 835, 838 (Pa. 1959) ("[A] physician or surgeon is neither a warrantor of a cure nor a guarantor of the result of his treatment.").

47 *Toogood*, 824 A.2d at 1147 (emphasis added).

48 *Id*.

> In the usual case the basis of past experience from which this conclusion may be drawn is common to the community, and is a matter of general knowledge . . . . It may, however, be supplied by the evidence of the parties; and expert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the inference. Such testimony may be essential to the plaintiff's case where, as for example in some actions for medical malpractice, there is no fund of common knowledge which may permit laymen reasonably to draw the conclusion. On the other hand there are other kinds of medical malpractice, as where a sponge is left in the plaintiff's abdomen after an operation, where no expert is needed to tell the jury that such events do not usually occur in the absence of negligence.[49]

The plurality deemed *res ipsa loquitur* "especially obvious in the situation where a patient submits himself or herself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used or procedures employed in his or her treatment."[50] But the plurality added case-specific caveats—that the plaintiff had presented standard-of-care evidence, and *res ipsa loquitur* was required only as to causation.[51]

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[49] RESTATEMENT (SECOND) OF TORTS § 328D, cmt. d.

[50] *Toogood*, 824 A.2d at 1148 (quoting *Jones*, 437 A.2d at 1139).

[51] This highlights a question as to *what res ipsa loquitur* encompasses, one complicated by the fact that we, like the Restatement, persistently refer to the doctrine as entitling the jury to infer *negligence*. We acknowledged this difficulty later in *Quinby*:

> [I]t is apparent that *res ipsa loquitur* provides no assistance to a plaintiff's obligation to demonstrate a defendant's duty, that a breach of that duty was a substantial factor in causing plaintiff harm, or that such harm resulted in actual damages. However, *res ipsa loquitur* does aid a plaintiff in proving a breach of duty. While *res ipsa loquitur* is useful in this limited regard, case law universally refers to *res ipsa loquitur* as raising an inference of "negligence" rather than an inference of "breach of duty."

Quinby, 907 A.2d at 1071 n.15. With due respect to our comment in *Quinby*, it is plain from the case law—now including this case—that proof of causation, too, may benefit

Our subsequent decision in *Quinby* completed the loose quartet that began with *Jones*. In *Quinby*, a quadriplegic fell from an examination table while unattended after surgery and later died, allegedly of injuries sustained in the fall. The decedent, who died before trial, testified that he did not know why he fell, merely that he felt his body roll toward and over the edge of the table.[52] Neither the defendants nor anyone else witnessed the fall, and the parties disputed the position in which the defendant had been left on the table.

The plaintiff presented an expert witness who testified "that he was unaware of how, absent extrinsic forces not present in this situation, a quadriplegic could fall from an examination table without there being a breach of the requisite standard of care."[53] He testified that the decedent should not have been left unattended and/or should have been secured with straps or side rails. He further opined that how the decedent had been left positioned did not affect his opinion. Conversely, the defendants' expert testified that leaving a quadriplegic patient on his back in the center of the table—as the defendants maintained they did—was consistent with the standard of care.

The plaintiff asked the court to instruct the jury on *res ipsa loquitur*, and the court refused, finding that the plaintiff's evidence did not establish that the decedent's fall was something that typically does not occur without negligence *and* failed wholly to exclude

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from the Doctrine, just as suggested in *Toogood* and exemplified in numerous other cases.

[52] Decedent testified in a discovery deposition and in a *de bene esse* deposition, which is taken when a witness is not expected to be available at trial. *See Quinby*, 907 A.2d at 1067 & n.7.

[53] *Id*. at 1067.

other possible causes, including the decedent's own actions. The jury rendered a defense verdict. The Superior Court reversed, rejecting the trial court's assessment of the evidence. It also granted the plaintiff judgment of negligence notwithstanding the verdict and remanded for a trial on damages. Defendants appealed.

With regard to the suitability of the Instruction, we agreed with the Superior Court that the plaintiff had introduced a *prima facie* case as to each of the Restatement's three factors. As to the first, we observed that the defendants were obligated to secure the plaintiff on the table in a way that would ensure he did not fall. Regardless of whether he was positioned on his side or his back, we opined, "there is no factual issue or possible dispute that Decedent's fall resulted from something other than Defendants' negligence. . . . [I]n the absence of negligence, a quadriplegic patient . . . could not fall off an examination table."[54] As to other responsible causes, we deemed it "undisputed that there is no explanation for Decedent's fall beyond Defendants' negligence. No one else entered the examination room; the table did not break; nothing fell on or near it; there was no seismic disturbance in the area, etc."[55] Accordingly, the plaintiff had been entitled to the Instruction.

B. The Superior Court's "Grey Zone."

Superior Court case law also has accreted over time. In paying respect to this Court's earlier limitations while granting the Instruction in tort cases similar to the case before us, the Superior Court has alluded to a "grey zone"—circumstances in which the plaintiff has adduced less than overwhelming direct evidence, but enough to submit to a

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54 *Id*. at 1072.

55 *Id*. at 1073.

jury nonetheless—while creating a body of circumstantial evidence warranting the Instruction. Notably, this Court's cases have yet to address the circumstance squarely, save for suggestions and broadly-stated principles.

The term "grey zone" first appeared in this connection in *Smith v. City of Chester*.[56] In *Smith*, the plaintiff was injured when a drainage grate collapsed beneath him. Critical to the case was whether the plaintiff's employer's agents had damaged the grate by rolling over it with a pavement roller. While there was testimony that the roller may have come into contact with the side of the grate opposite where it failed, a plaintiff's expert testified that, because the grate sat in a depression, it could not have been contacted by the roller at all, and two operators of the roller testified that it had not done so. The defendant's expert testified that the grate had been weakened by hairline fractures caused by vehicle impacts with the grate.

The Superior Court concluded that this evidence situated this case in "the grey zone" such that "the jury could reasonably conclude that the accident was more probably than not caused by the negligence of" the defendant.[57] The court explained:

> While it is true that a *res ipsa loquitur* instruction is not warranted in the face of clear and indubitable proof of negligence, it is also true that a *res ipsa loquitur* charge is appropriate where the facts of a case lie somewhere in a grey zone "between the case in which the plaintiff brings *no* evidence of specific acts of negligence, and therefore must rely on the *res ipsa loquitur* inference alone, and the case in which the defendant's negligence 'can be clearly and indubitably ascertained' from the plaintiff's evidence, *Farley v. Phila. Traction Co.*, 18 A. 1090 (Pa. 1890) [(*per curiam*)], and therefore the

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56 515 A.2d 303 (Pa. Super. 1986).

57 *Id*. at 306 (internal quotation marks omitted).

> plaintiff need not rely on the *res ipsa loquitur* inference at all." *Hollywood Shop, Inc. v. Pa. Gas & Water Co.*, 411 A.2d 509, 513 (Pa. Super. 1979).[58]

Thus, the plaintiff was entitled to the Instruction.

In *D'Ardenne v. Strawbridge & Clothier, Inc.*,[59] another grey-zone case, the Superior Court approved the Instruction. There, a child's shoe was caught in a department store escalator and he suffered serious injuries. The parents sued the department store and an elevator company for negligent maintenance and strict liability. The trial court refused to give the Instruction because "the [p]laintiffs had clearly sought to prove that the accident was caused by a particular defect in the escalator," as attested to by the plaintiffs' expert witness.[60] The expert identified specific defects in the escalator and explained how they *could* cause the accident in question. But he also conceded that,

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[58] *Id*. (citations modified). It is incorrect to ascribe the *Farley* quotation to our ruling in that case, which said no such thing. Rather, the quoted language appears in the Court of Common Pleas decision this Court *affirmed* in *Farley*. *See Farley v. Phila. Traction Co.*, 6 Pa.C.C. 347, 1889 WL 2977 (Phila. Cty. Feb. 5, 1889). Although we have cited *Farley* in a handful of cases, most recently (before this case) in 1923, we have never quoted or embraced the "clearly and indubitably ascertained" language that has been attributed to this Court by the Superior Court for decades.

> In our affirming opinion, our analysis in its entirety read:
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> > There is nothing in the plaintiff's evidence that would have warranted the jury in rendering a verdict in his favor, and hence there was no error in entering judgment of nonsuit, and refusing to take it off. Without some evidence, tending to prove that the injury complained of resulted from the defendant company's negligence, the plaintiff had no right to ask that his case should be submitted to the jury.

Farley, 18 A. at 1090. That said, we cannot deny that its frequent quotation by the Superior Court has at least given it the imprimatur of that court's authority. In the discussion that follows, we have made adjustments to rectify the misattributions.

[59] 712 A.2d 318 (Pa. Super. 1998).

[60] *Id*. at 321 (quoting the trial court opinion).

because his investigation followed the accident, he could not say with certainty that any of those defects was present at the time of injury.

The Superior Court then examined the difficult question of what quantum of direct evidence will preclude the Instruction:

> Courts have experienced many difficulties in determining when a plaintiff has introduced so much specific evidence of negligence that "the precise cause of injury" is "clearly established." Annotation, 33 A.L.R.2d 791, 793. The following illustration . . . is helpful in unraveling the difficulty:
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> > Plaintiff is of course bound by his own evidence, but proof of some specific facts does not necessarily exclude inferences of others. When the plaintiff shows that the railway car in which he was a passenger was derailed, there is an inference that the defendant railroad has somehow been negligent. When the plaintiff goes further and shows that the derailment was caused by an open switch, the plaintiff destroys any inference of other causes; but the inference that the defendant has not used proper care in looking after its switches is not destroyed, but considerably strengthened. If the plaintiff goes further still and shows that the switch was left open by a drunken switchman on duty, there is nothing left to infer; and if the plaintiff shows that the switch was thrown by an escaped convict with a grudge against the railroad, the plaintiff has proven himself out of court.
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> W. Page Keeton, PROSSER & KEETON ON THE LAW OF TORTS § 40, at 260 (5th ed. 1984) (footnotes omitted). Scenario one is the pure *res ipsa* case; scenario three is the case in which the plaintiff "clearly and indubitably" establishes the specific acts of defendant's negligence; and scenario four establishes the intentional tort of a third party, thereby removing defendant's alleged negligence from the case. It is scenario two in which the courts most often find themselves.[61]

The court rejected the view that the plaintiff who has evidence sufficient to proceed both directly and by circumstantial inference must choose which he prefers. As the Superior Court recognized in *Hollywood Shop*,[62] where the evidence can sustain a

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61 *Id*. at 322 (citations modified)

62 411 A.2d 509.

plaintiff's verdict based either upon the Doctrine or upon direct proof, the answer is not to make the plaintiff choose between the two, but to allow him to present a jury with both options. Thus, in *Hollywood Shop*, the court embraced this comment of the Third Circuit Court of Appeals: "We have before us not only a *res ipsa* claim but one capable of some specific proof regarding the railroad's alleged negligence. In these peculiar circumstances to force the plaintiff to abandon one of his theories is not only illogical but unfair."[63]

To similar effect, the *Hollywood Shop* court quoted a California Supreme Court case:

> If, because of the circumstances of the case and the probabilities, an inference of negligence is raised, the [D]octrine should be applied, it is difficult to see why its application should be denied merely because plaintiff proves specific acts of negligence. There is no reason why such proof should wholly dispel the inference any more than it would in any other case. The plaintiff is penalized for going forward and making as specific a case of negligence as possible. If he endeavors to make such a case he runs the risk of losing the benefits of the [D]octrine to which the circumstances entitle him. Rather than place him in such a position he should be encouraged to prove as much as possible. The end result is not injurious to the defendant.[64]

The *D'Ardenne* court noted that an apparent majority of commentators and courts has "accepted the rule that an unsuccessful attempt to prove specific negligence on the defendant's part, or the introduction of evidence of specific negligence not clearly establishing the precise cause of injury, will not deprive the plaintiff of the benefits otherwise available under the [Doctrine]."[65] This is the grey zone; the evidence in

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63 *Id*. at 512 (quoting *Weigand v. Pa. R.R. Co.*, 267 F.2d 281, 284 (3d Cir. 1959)).

64 *Id*. at 512-13 (quoting *Leet v. Union Pac. R.R. Co.*, 155 P.2d 42, 51 (Cal. 1944)).

65 *D'Ardenne*, 712 A.2d at 324 (quoting Annotation, 33 A.L.R.2d § 2, at 793).

D'Ardenne occupied it, and the court determined that the Instruction was warranted despite expert testimony suggesting precise causes, but less than conclusively.

III. The Trial Court Declines to Give a *Res Ipsa Loquitur* Instruction.

Based upon the duty Zepp undisputedly owed Lageman; Pepple's testimony that, "accepting Zepp's version of how he performed the procedure, . . . arterial cannulation[] would not ordinarily occur in the absence of negligence";[66] and Pepple's further testimony that no other plausible causes were present, Lageman contended that she made out a *prima facie* case under Section 328D and was entitled to the Instruction. The trial court disagreed.

In its opinion pursuant to Pa.R.A.P. 1925(a), the court distinguished *Quinby* and *Hightower-Warren*. With respect to the former case, the court reviewed the evidence we cited to support our determination that the plaintiff had made a threshold *res ipsa loquitur* showing with respect to his fall from the examination table.[67] Then the court did much the same with *Hightower-Warren*, noting expert testimony that such injuries do not typically occur without negligence, and no cause but the thyroid procedure could be identified for the vocal cord injury.

The court then reviewed the evidence, highlighting Pepple's alleged equivocations and Hudson's contradictory testimony. In these, the court discerned disputes concerning whether short- or long-axis ultrasound was the state of the art for needle placement, the

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66 *Lageman*, 237 A.3d at 1103.

67 The court noted in passing that *Quinby* was a no-expert-testimony-required case, and distinguishable on that basis. However, as noted above, the parties in *Quinby* elected to produce and rely upon expert testimony.

degree to which Lageman's less common blood vessel arrangement complicated the catheterization, and whether, *e.g.*, "the use of ultrasound does or does not totally eliminate the risk that a doctor could still puncture or cannulate the artery rather than the vein."[68]

The court concluded:

> [T]he evidence in this case did not establish that more likely than not that Plaintiff's injuries were caused by Defendant Zepp's negligence. We find that the experts shared different views on the use of ultrasound to find the vein and artery. Based on these conclusions, we found that the possibilities were evenly divided between negligence and its absence. As a result, we found that Plaintiff did not meet her burden of proof of drawing a permissible conclusion that an arterial cannulation does not ordinarily happen unless someone is negligent.[69]

Notably, these comments conformed to Section 328D's commentary as to when the Instruction is available to a plaintiff.[70]

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[68] Tr. Ct. Op., 8/1/2018, at 18.

[69] *Id*. at 19. Taken at face value, this suggests that diametrically opposed testimony alone would always require a non-suit. This, plainly, is not the law. *See Mader v. Duquesne Light Co.*, 241 A.3d 600, 612 (Pa. 2020) ("Jurors are free to believe all, part, or none of the evidence and to determine the credibility of the witnesses.") (cleaned up).

[70] The Restatement explains:

> The plaintiff's burden of proof . . . requires him to produce evidence which will permit the conclusion that it is more likely than not that his injuries were caused by the defendant's negligence. *Where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof*.

RESTATEMENT (SECOND) OF TORTS § 328D, cmt. e (emphasis added). Notably, the Restatement also qualifies this limitation:

> The plaintiff need not, however, conclusively exclude all other possible explanations, and so prove his case beyond a reasonable doubt. . . . It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation. This conclusion is not for the

IV. The Superior Court Reverses.

Lageman sought a new trial on the basis that the trial court erroneously refused to charge the jury on *res ipsa loquitur* when she adduced *prima facie* evidence of all three factors of the Section 328D test. She argued that the quartet of our cases discussed above collectively establishes that the Instruction should be given when the plaintiff provides *prima facie* evidence of each element of the Restatement's formulation without regard to the presence or absence of "direct" evidence of negligence. As the *Quinby* Court explained, "In the ordinary case, where different conclusions may be reasonably reached, it is the function of the jury to determine whether the [*res ipsa loquitur*] inference is to be drawn.[71]

Two of three judges agreed.

> [Pepple] opined . . . that it was impossible to perform the [catheterization] procedure as [Zepp] maintained that he did, execute the procedure properly, and still place the catheter seven inches into the artery. [Pepple] was asked, "if the standard of care has been properly observed, that all the steps have not only been taken, but they were taken correctly and things were seen and evaluated correctly, is it possible that this artery would have been cannulated to that degree?" He responded in the negative.
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> * * * *
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> Thus, [Lageman] produced testimony that cannulation of the artery did not usually occur in the absence of negligence. Such testimony was sufficient

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> court to draw, or to refuse to draw, in any case where either conclusion is reasonable; and even though the court would not itself find negligence, it must still leave the question to the jury if reasonable men might do so.

Id. Both the caveat and its limitation jibe with the usual account of the burden of proof, and apply equally to any case reliant upon circumstantial evidence in whatever guise.

71 *Quinby*, 907 A.2d at 1076.

> to meet the first element of *res ipsa loquitur*: that arterial cannulation as occurred herein does not ordinarily happen in the absence of negligence.[72]

With regard to the second element, Zepp himself ruled out other factors as contributing to or causing the harm. Lageman did not move during the procedure, no one bumped the table, there was no equipment malfunction, and the catheter kit was not defective.[73] As to the causal connection between the cannulation and Lageman's stroke, Pepple testified that Lageman had no pre-existing conditions that predisposed her to stroke, and the post-operative MRI disclosed no other evidence of candidate alternative causes. Finally, Lageman's stroke occurred "directly upstream from the site of the arterial cannulation."[74]

Zepp sought to distinguish *Quinby* and *Jones* and analogize this case to our plurality opinion in *Toogood,* maintaining that neither *Quinby* nor *Jones*, both of which approved the Instruction, involved complex factual disputes as to causation, as in this case. Conversely, in *Toogood*, the parties disputed causation, and the Court found the Instruction unwarranted.

The majority disagreed, opining that *Toogood* was driven in substantial part by the lack of expert testimony to establish that the injury would not occur but for negligence, not because causation was complex or disputed. Moreover, Zepp's and Hudson's testimony

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72 *Lageman*, 237 A.3d at 1107 (citations modified; footnote omitted).

73 *Id*. at 1107.

74 *Id*. at 1108.

in this case as to alternative causes was far less substantial or persuasive than in *Toogood*.[75]

Finally, the majority rejected Zepp's contention that Lageman precluded the Doctrine by making out a *prima facie* case of negligence by direct evidence. The majority opined that the *Quinby* Court "implicitly sanctioned the plaintiff's introduction of evidence of specific negligence and concomitant reliance on the inference of negligence under *res ipsa*."[76] But the court primarily relied upon its own grey-zone cases. Even if Lageman made out a *prima facie* case of negligence without recourse to the Doctrine, that did not preclude her entitlement to the Instruction if she established a *prima facie* case under the Section 328D rubric. Rather, she earned her right to both theories and shouldn't be forced for contrived reasons to choose one evidentiary approach to proving her claim to the exclusion of another.[77] Accordingly, the Superior Court reversed, vacated the judgment in favor of Zepp, and remanded for a new trial.

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[75] As a plurality opinion, *Toogood* does not bind this or any Pennsylvania court. *Commonwealth v. McClelland*, 233 A.3d 717, 729 (Pa. 2020).

[76] *Lageman*, 237 A.3d at 1112.

[77] Judge Stabile dissented. *See id*. at 1116. He primarily focused on historic language about a plaintiff's entitlement to the Instruction when, *inter alia*, he lacks "direct evidence of the elements of negligence." *Id*. at 1117 (quoting *Toogood*, 824 A.2d at 1146); *see id*. at 1117-18. While Judge Stabile's opinion is broad and thorough, it largely aligns with the trial court's reasoning and Zepp's arguments, which we take up and reject below.

V. The Trial Court Erred and Abused Its Discretion in Declining to Charge the Jury on *Res Ipsa Loquitur*.[78]

Stripped of its ornaments and caveats, *res ipsa loquitur* boils down to this: Under certain circumstances a plaintiff may turn to the jury and ask, "What else could this be *but* malpractice?" In the interests of justice, and given the philosophical underpinnings of tort law and the jury system generally, this grants the jury latitude to fulfill its function. Over time, this Court has expanded the Doctrine incrementally until it now reaches most areas of tort law, provided its threshold conditions are satisfied. Where it applies, the jury may conclude that "this," the cause of injury, could be nothing else but a breach of a duty of care resulting in harm.

Zepp challenges the grey-zone cases without challenging the grey-zone cases, laboring to distinguish them without quite committing to their rejection. As the above discussion makes clear, over time the Superior Court has embraced the view that *prima facie* evidence of one approach to proving negligence does not bar recourse to another. Notably, we have never called those cases into question directly or by implication, and

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[78] We described the applicable scope and standard of our review in *Quinby*:

> In examining jury instructions, our [standard] of review is limited to determining whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. . . . [T]his Court's review is plenary.

Quinby, 907 A.2d at 1069-70 (cleaned up). As well, "[i]t is hornbook law that instructions given to a jury must be confined to the issues raised in the pleadings and the facts developed by the evidence in support of such issues." *Heymann v. Elec. Serv. Mfg. Co.*, 194 A.2d 429, 432 (Pa. 1963).

Zepp does not expressly contend that any of them was wrongly decided. Rather, Zepp would have us bypass forty years of Superior Court case law—and to a lesser extent the substantive overtones of our own—and reaffirm the strictest account of language from the Common Pleas Court's decision in *Farley*, *supra*, that neither the Superior Court nor this one has applied so rigidly, at least not since we adopted Restatement Section 328D in *Gilbert*.

In *Farley*, the Common Pleas Court observed:

> The presumption of negligence arises from the entire absence of proof, or the want of clear and indubitable proof, of the cause of the accident. Where . . . there is evidence from which the cause can be clearly and indubitably ascertained, the presumption [of negligence] ceases, and the question of negligence is to be determined from the evidence.[79]

In that case, the plaintiff tripped over a fixed design feature-*cum*-hazard on the floor of the streetcar from which he fell, with the only point at issue being whether it reflected negligence that the hazard existed. The trial court ruled that it did not. But in any event, there was no mystery whatsoever regarding how the hazard came to be there or whether or how it contributed to the plaintiff's injury, only whether its design or placement was blameworthy.[80]

But unlike in *Farley*, disputed but more than merely substantial evidence pointed toward arterial cannulation as the cause of Lageman's stroke. Whether Zepp breached his undisputed duty to Lageman also was contested, with competing testimony from qualified experts as to whether the injury ordinarily would occur absent negligence.

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[79] *Farley*, 1889 WL 2977, at *1.

[80] As noted above, this Court affirmed the trial court's ruling in *Farley v. Phila. Traction Co.*, 18 A. 1090 (Pa. 1890).

Perhaps more importantly, though, when we affirmed the Common Pleas Court's ruling in *Farley*, even our first invocation of the phrase *res ipsa loquitur* in the tort context was years in the future and our adoption of the Restatement, along with its elaborately qualifying commentary plainly at odds with a rigid reading of *Farley*, was still more than a half-century away.

Courts may continue to pay *Farley* lip service, mistaking the oft-quoted language for this Court's commentary. But no modern case like this one, if any at all, has hinged upon its rationale, not least because none of the notable cases have had very similar facts. Indeed, of the modern cases, Farley most resembles *Quinby*, not as a "pure" *res ipsa loquitur* case, but as a case in which the full circumstances and outcomes were known, and the only question was whether a given act was negligent—in *Quinby*, allowing a quadriplegic to fall from a table, and in *Farley* the alleged design defect.

This aspect of similarity also suggests why *Farley* is of little moment to this case even if *stare decisis* bound us to it on its own terms. If anything, read literally, it suggests that the Superior Court ruled correctly in this case, at least in its determination that Lageman was entitled to the Instruction. The evidence of causation being somewhat disputed and necessarily inferential in nature—certainly more so than in *Farley*—makes it a stretch to suggest that the cause can be "clearly and indubitably ascertained" from whatever passes for "direct" evidence in this case. And arguably, *Farley* requires too much for medical malpractice cases as they are tried in the real world anyway. The vast

majority of such cases hinge upon expert testimony, which, by its very nature, typically is based upon educated inference rather than comprising truly "direct" evidence.[81]

The one Superior Court case that Zepp would have us embrace—again on a questionable reading—is *MacNutt v. Temple University Hospital*,[82] which quoted our decision in *Fredericks v. Atlantic Refining Co.*, as observing that "if there is any other cause to which with equal fairness the injury may be attributed . . . an inference of negligence will not be permitted to be drawn against the defendant."[83] In that case, a patient undergoing surgery for thoracic outlet syndrome suffered a chemical burn. The trial court declined to give a *res ipsa loquitur* instruction and denied the plaintiff's post-trial motion for a new trial. A three-judge Superior Court panel affirmed, and the Superior Court granted *en banc* review.

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[81] What direct evidence can there be, for example, of how an internal biophysical process unfolded? As Pepple acknowledged, and as was surely true of Hudson as well, the experts in this case, as in most cases, were not present for any of the relevant events. *See*, *e.g.*, N.T. at 243 (Pepple agreeing with the assertion that, "from a factual perspective, [he was] not present for any of the events that transpired regarding this case," and that he never treated or even met Lageman); *id*. at 523 (Hudson agreeing that he has "made certain assumptions in giving" his "opinion because [he wasn't] there at the time"). To count this as "direct" evidence both stretches the definition of "direct" to the breaking point and underscores the difficulty of fashioning a bold, straight line between the two categories of evidence. *Cf*. *D'Ardenne*, 712 A.2d 321 (expert witness testifying that he could not be certain as to the state of the escalator at the time of the accident because he investigated after the fact).

[82] 932 A.2d 980 (Pa. Super. 2007) (*en banc*).

[83] *Id*. at 987 (quoting *Fredericks v. Atl. Refining Co.*, 127 A. 615, 617 (Pa. 1925)); *cf.* RESTATEMENT (SECOND) OF TORTS § 328D, cmt. e ("Where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof.").

In affirming its three-judge panel's affirmance, the unanimous *en banc* panel quoted comment o to Restatement Section 328D, which we have not yet mentioned:

> The inference arising from a *res ipsa loquitur* case may . . . be destroyed by sufficiently conclusive evidence that it is not in reality a *res ipsa loquitur* case. If the defendant produces evidence which is so conclusive as to leave no doubt that the event was caused by some outside agency for which he was not responsible, or that it was of a kind which commonly occurs without negligence on the part of anyone and could not be avoided by the exercise of all reasonable care, he may be entitled to a directed verdict.[84]

The parties experts' had disputed the very nature of the plaintiff's injury, the court noted, disagreeing as to whether the burn had resulted from lying in a pool of Betadine solution or the injury was an outbreak of herpes zoster or shingles. "Because the nature of the injury was itself in dispute," the court concluded, "the [trial] court correctly determined the injury could have occurred without negligence."[85] The case involved robust, competing views of what *caused* the injury, undermining the conclusion that plaintiff had furnished sufficient evidence to reach a jury as to the exclusion-of-other-causes factor of the Section 328D test.[86] But perhaps more significantly as a practical matter, the court eventually concluded that the defense's evidence that the injury was in fact a symptom of herpes rather than a betadine burn, itself, eliminated all other responsible causes, rendering the case a directed-verdict case of the sort described in comment o.[87] The defense hadn't merely provided evidence contradicting plaintiff's

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84 RESTATEMENT (SECOND) OF TORTS § 328D, cmt. o; *see MacNutt*, 932 A.2d at 987.

85 *MacNutt*, 932 A.2d at 990.

86 S*ee id*. at 989-991.

87 *Id*. at 991.

account. It had *proved* its account to the court's satisfaction, which no one maintains occurred in this case.

We underscore what burden comment o assigns and to whom. In point of fact, the burden reflects what happens *after* the plaintiff establishes a *prima facie* case under the three Section 328D factors. As we have noted since its inception, the Doctrine, once satisfied, creates a *rebuttable* presumption; comment o merely describes a rebuttal strong enough that it bypasses the necessity of a jury determination entirely. Here, even *Zepp* does not assert that his evidence met comment o's high standard. *MacNutt*, while apparently consistent with our case law and that of the grey-zone cases, is entirely distinguishable from the instant case because, as noted above, it hinged upon the conclusiveness of the defense's proofs. Moreover, precisely in setting the standard so high, and in constituting the last comment to Section 328D, comment o only underscores the flexibility intentionally baked into Section 328D by the Restatement reporters, as well as its implicit preference that a jury determine the presence or absence of the Section 328D factors.

Were Section 328D read more parsimoniously it might be penny-wise in its simplicity, but it would be pound-foolish in its consequences for the administration of justice. A plaintiff in Lageman's position would be forced either not to adduce the Instruction-disqualifying "direct" evidence in question in service of going to a jury under the Doctrine, or to abandon the Doctrine entirely in favor of "direct" proof, allowing also for circumstantial evidence—*except* circumstantial evidence with a whiff of *res ipsa loquitur* about it, an especially challenging task with a surfeit of expert testimony, which, as we noted above, is inherently inferential. In either scenario, the court, and more

importantly the jury, will receive a *lesser* quantum of evidence to assess whether, how, and to what extent the defendant is liable for the plaintiff's harm.

Here, a bedrock principle largely unobserved by the parties and courts surfaces. It has long been the law of Pennsylvania that a plaintiff has no obligation to choose one theory of liability to the exclusion of another. We spoke of this concern in broad enough terms to encompass the present case in *Schreiber v. Republic Intermodal Corp.*[88]: "[Pa.R.C.P. 1020] reflect[s] the general principle that *plaintiffs should not be forced to elect a particular theory in pursuing a claim* and avoids the attendant possibility that meritorious claims will fail because the wrong legal theory was chosen."[89] While Rule 1020 speaks to pleadings, and to the prospect of discrete causes of action rather than merely discrete means of proving a single cause of action, *i.e.*, negligence, this only highlights how little it asks to allow a plaintiff to pursue a unitary claim of malpractice, by any means of proof that may apply.[90] In a case like this, where the evidence available to

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88 375 A.2d 1285, 1291 (Pa. 1977).

89 *Schreiber* cited Rules 1020(a) ("The plaintiff may state in the complaint more than one cause of action cognizable in a civil action against the same defendant. . . .") and 1020(c) ("Causes of action and defenses may be pleaded in the alternative."). *See Schreiber*, 375 A.2d at 1291 (emphasis added). Rule 1020(d) provides, *inter alia*, "If a transaction or occurrence gives rise to more than one cause of action heretofore asserted in assumpsit and trespass, against the same person, including causes of action in the alternative, they shall be joined in separate counts in the action against any such person."

90 While a plaintiff may assert claims and theories of the case in the alternative, *see Schreiber*, *supra*; *PennDOT v. Manor Mines, Inc.*, 565 A.2d 428, 431 (Pa. 1989) (noting that, while the pleading must inform the defendant of the cause of action asserted, "this rule cannot be applied to limit a plaintiff from choosing to prove only one of two alternate theories of liability if the defendant has sufficient notice of both"), under the doctrine of election of remedies, the plaintiff may not seek inconsistent *relief*. *Umbelina v. Adams*, 34 A.3d 151 (Pa. Super. 2011); *see Wedgewood Diner, Inc. v. Good*, 534 A.2d 537, 538 (Pa. Super. 1987) (quoting Annotation, 40 A.L.R.4th 627, 630-31 ("[T]he adoption, by an unequivocal act, of one of two or more inconsistent remedial rights has the effect of

the plaintiff is equivocal and less than conclusive on the elements of negligence, asking the plaintiff to choose which evidentiary approach to pursue is manifestly unfair.[91]

This is not analogous to submitting two incompatible claims to a jury. Lageman has stated one straightforward claim and has submitted evidence in an effort to meet her burden of proof. The evidence that does not establish a basis for the Instruction cannot simply cancel out the evidence that does. Nor should plaintiff's presentation of conflicting categories of evidence—not evidence that is inconsistent, but merely qualitatively *different*—force her to abandon any evidentiary approach to proving her claim as to which she has made out a *prima facie* case.

In an ideal world, the jury receives as much probative evidence as there is and no plaintiff is punished for successfully providing *prima facie* evidence sufficient to establish a basis for a finding of liability under the *res ipsa loquitur* doctrine. As with any other showing, if it satisfies the bare minimum requirements to support a given instruction, that instruction should be given.[92] If there is first-hand evidence to support a negligence claim, the jury should be so charged. If there is indirect, circumstantial evidence to cover gaps

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precluding a resort to the others.". . "[A] party cannot, in the assertion or prosecution of his rights, maintain inconsistent positions . . . .")).

[91] The Dissent argues that "[t]he majority . . . adopt[s] an expansive mandate for instructions authorizing jurors to infer negligence without specific proof, while sometimes referring to the inference as an alternate 'theory of liability.'" Diss. Op. at 2. But, as the foregoing sentences make clear, we refer to "theories of liability" only to establish "evidentiary approaches to a unitary theory of liability" as an *a fortiori* case: if courts must entertain disparate theories of liability, surely nothing prevents them from accepting alternate proofs in furtherance of a *unitary* theory of liability. Moreover, even if *res ipsa loquitur* was transformed into a discrete theory of liability, under Rule 1020 the plaintiff would not be precluded from pursuing it on that basis alone.

[92] *See Heymann*, 194 A.2d at 432.

in the (more) direct evidence, and that evidence constitutes a *prima facie* showing under Section 328D, the jury should be so charged. This will only disadvantage a defendant as to whom the claim becomes more facially meritorious as more competent evidence emerges—as, perhaps, it should.[93]

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[93] The Dissent makes much of the lack of "empirical" evidence of how juries respond to *res ipsa loquitur* instructions. *See* Diss. Op. at 3. At the same time, also without any such evidence, the Dissent simply adopts and treats as a verity the supposed phenomenon of juries biased in favor of plaintiffs merely by the giving of the charge itself. This assertion itself lacks any "empirical" support, resting as it does on nothing more than the conjectures of Zepp's *amici curiae*. *See* Diss. Op. at 3 (citing Brief for *Amici Curiae* Am. Med. Ass'n & Pa. Med. Soc. At 16-18), 4 n.3 (quoting Brief for *Amici Curiae* Am. Med. Soc. & Pa. Med. Soc. At 4).

The Dissent champions the role of the General Assembly in "making difficult social policy decisions." *Id*. at 2 n.1. But the Legislature already made such decisions with its 2002 enactment of the all-encompassing Medical Care Availability and Reduction of Error Act, Act of March 20, 2002, P.L. 154, No.13, *codified as amended at* 40 P.S. §§ 1303.101, *et seq*., an Act *designed* to address alleged excesses in the arena of medical malpractice litigation. *See generally* 40 P.S. § 1303.102 ("Declaration of policy"). By the time that MCARE was enacted, our approval in *Jones* of the *res ipsa loquitur* doctrine in malpractice actions was already approximately twenty years old; we had reaffirmed the Doctrine's viability five years earlier in *Hightower-Warren*; and the Superior Court had applied it in a host of decisions, including *Hollywood Shop*, *Smith*, *Sedlitsky*, and *D'Ardenne*, with which this decision is largely consistent, and none of which the Dissent engages. Had the Legislature agreed with the Dissent that "the medical malpractice field is a particularly inapt one in which to judicially mandate jury instructions . . . that alleviate the obligation to prove negligence to support liability," Diss. Op. at 6, it could have restricted or eliminated the Doctrine's application in medical malpractice litigation. It did neither of these things. *Cf. Fonner v. Shandon, Inc.*, 724 A.2d 903, 906 (Pa. 1999) ("The failure of the General Assembly to change the law which has been interpreted by the courts creates a presumption that the interpretation was in accordance with the legislative intent; otherwise the General Assembly would have changed the law in a subsequent amendment.").

We assume only one thing about juries: that they will follow judicial instructions faithfully. *See, e.g., Commonwealth v. McRae*, 832 A.2d 1026, 1034 (Pa. 2003) ("It is an almost invariable assumption of the law that jurors follow their instructions." (cleaned up)); *Dauphin Deposit Trust Co. v. Standard Oil Co. of Pa.*, 167 A. 287, 288 (Pa. 1933) (same). Getting an Instruction to the jury is only half the battle for a litigant. There is no more reason to think a jury will reflexively grant judgment for a plaintiff in, for example, the Dissent's hypothetical 60/40 case, *see* Diss. Op. at 5, than there is to think a jury will

That leaves us only with the question whether Lageman made out a *prima facie* case to support a *res ipsa loquitur* instruction. Like the Superior Court, we conclude that she did. Pepple, a qualified and credible expert, testified in no uncertain terms that this event ordinarily cannot happen without negligence on the part of the provider. Thus, Pepple's testimony by itself comprises *prima facie* evidence as to that proposition.

Causation makes out a closer question, but notwithstanding the credible cardiac-event counternarrative advanced by Hudson, whether that theory was more credible than Lageman's stroke-by-cannulation theory is a jury question. In arguing otherwise, Zepp seems to want the trial court to assess the exclusion of other causes before going to a jury. But it is plain that the trial court must yield to the jury as soon as the plaintiff makes a threshold showing. With both experts acknowledging the association between arterial cannulation and stroke, there can be no serious question that Lageman succeeded, entitling her to a jury determination.

Hightower-Warren is similar. There, too, the defense did not fail to propose alternate explanations for the harm. A defense expert suggested that the "recurrent laryngeal nerve was somehow strangled or entrapped by subsequent scar tissue build-up"—that it occurred as an inevitable patient-specific consequence of the surgical procedure which, itself, was performed without fault.[94] We did not find this testimony alone sufficient to dispense with the Instruction. Instead, we noted deficiencies in the

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award damages for fraud based upon circumstantial evidence that a plaintiff lost money in a transaction with a defendant. Lageman must convince the jury that the Restatement elements have been satisfied—that, in fact, arterial cannulation does not happen absent negligence, and that, in fact, all potential non-cannulation causes of Lageman's harm have been eliminated. Whether she can or will succeed is not our concern.

94 *Hightower-Warren*, 698 A.2d at 55.

defense testimony, in particular the lack of corroborating evidence. Ultimately, we recognized it as a *res ipsa loquitur* jury question, and the correct approach is the same here.

Lageman successfully made out a *prima facie case* in support of the two disputed factors of the Restatement Section 328D test. Thus, she was entitled to the Instruction.

VI. Conclusion.

There is nothing occult about the *res ipsa loquitur* doctrine; it is among the more accessible evidentiary doctrines, since it resembles the practical inferences people make in their own lives. The Restatement's own account describes the Doctrine more commonly:

> Negligence and causation, like other facts, may of course be proved by circumstantial evidence. Without resort to Latin the jury may be permitted to infer, when a runaway horse is found in the street, that its owner has been negligent in looking after it; or when a driver runs down a visible pedestrian, that he has failed to keep a proper lookout. When the Latin phrase is used in such cases, nothing is added. A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it.[95]

As such, creating a jury question as to the Section 328D factors should not require Herculean labors. The factors speak for themselves, as will the evidence in a given case as to whether it supports the Instruction.

We cannot fairly hold that *res ipsa loquitur* may be invoked in complex, medical malpractice cases requiring expert testimony, then subject the Doctrine to an oversimplified view of the interplay of direct and circumstantial evidence. Medical malpractice cases, in particular, are seldom he-said she-said battles of credibility among

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[95] RESTATEMENT (SECOND) OF TORTS § 328D, cmt. b.

first-hand lay witnesses. They typically require the benefit of expert witnesses with specialized knowledge to contextualize events; speak to the complex processes that, for example, may connect an arterial cannulation involving penetration of the aortic chamber to a stroke in the brain; and render opinions that, more often than not, are inferential.

The question that must drive when the Instruction is warranted hinges entirely upon whether the plaintiff has made out a *prima facie* showing as to the Section 328D factors, *not* whether the defense has a credible counternarrative or plaintiff also has made out a plausible basis for recovery without resort to that doctrine. In effect, the two run in parallel toward the same destination, and if either arrives, the plaintiff recovers. There is nothing more in this approach than the assurance that, with the sum of the available information, a jury of the parties' peers has rendered a just verdict.

For the foregoing reasons, the Superior Court correctly vacated the trial court's refusal to charge the jury on *res ipsa loquitur* and remanded for a new trial. We affirm.

Justices Todd, Donohue, Dougherty and Mundy join the opinion.

Chief Justice Baer files a concurring and dissenting opinion.

Justice Saylor files a dissenting opinion.