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Res Ipsa Loquitur: Application of the Doctrine Where a Plaintiff is Contributorily Negligent

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censorship of a work not totally devoid of style, but whose artistry is completely subservient to an obvious pornographic aim. Whatever position is adopted in any jurisdiction, it may be hoped that it at least be a consistent one. Clearly the hard-core and balancing theories are incompatible. Unfortunately, the Wisconsin court speaks in terms of a balancing process, while the decision in effect limits censorship to hard-core pornography. MICHAEL S. NOLAN

Res Ipsa Loquitur: Application of the Doctrine Where a Plaintiff Is Contributorily Negligent—The plaintiff, Mrs. Wilma Turk, and her five year old son were riding an escalator in defendant, H. C. Prange's department store. In prior trips to defendant's store they had often used this escalator. Mrs. Turk's son's galosh became caught in the tread of the escalator. The boy began screaming and the plaintiff took hold of his waist trying to free him without success. The escalator continued moving, and the plaintiff lost her balance and fell, fracturing her wrist on the steel stair of the escalator. The trial court held that *res ipsa loquitur* did not apply, and in a special verdict, only the plaintiff was found to have acted negligently.

The supreme court, in *Turk v. H. C. Prange Co.*,[1] reversed the lower court's holding that the doctrine of *res ipsa loquitur* was applicable and that contributory negligence on the part of the plaintiff was not an absolute bar to its invocation. The court pointed out that, if the defendant were found negligent, the plaintiff's injury would be a "natural consequence" of the defendant's negligence.[2] It reasoned that in light of Wisconsin's comparative negligence statute:[3]

> . . . this third element of freedom from contributory negligence is not a requirement for the application of *res ipsa loquitur* and that if the defendant is found negligent, plaintiff's contributory negligence, if any, goes to the question of comparison of negligence as between the plaintiff and the defendant.[4]

The significance of this decision can be best understood in light of the function of the doctrine *res ipsa loquitur* as a rule of evidence in Wisconsin. The doctrine creates a permissible inference of negligence on the part of the person against whom it is invoked. It allows a jury to find causal negligence solely upon circumstantial evidence. The jury may accept or reject the inference, which is sufficient to support a verdict.[5] The defendant, to prevent the inference from arising, must meet or overcome it by explaining the occurrence, or by showing that

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[1] 18 Wis. 2d 547, 119 N.W. 2d 365 (1963).
[2] *Id.* at 550, 119 N.W. 2d at 371.
[3] WIS .STAT. §331.045 (1961).
[4] Turk v. H. C. Prange Co., *supra* note 1, at 551, 119 N.W. 2d at 372.
[5] Drechsler, *The Doctrine of Res Ipsa Loquitur*, WIS. BAR BULL. 13 (April, 1957).

there is another equally probable cause of the occurrence. If the defendant does this, then to apply the doctrine would require the jury to guess which of the probable causes was the responsible one. So the doctrine of *res ipsa loquitur* may be invoked against a defendant only when all other equally probable inferences have been eliminated.[6]

Prior decisions in Wisconsin involving the doctrine have already pointed to the fact that contributory negligence on the part of the plaintiff probably would not bar its application. After reciting the three requirements for the application of *res ipsa loquitur,* it was added that in view of our comparative negligence statute, contributory negligence on the part of a plaintiff would bar recovery only where it exceeded 50%. In *Zarling v. LaSalle,* the court pointed out per dicta that when contributory negligence becomes an issue, such negligence will be a matter for the defendant to allege as an affirmative defense.[8] This language was a natural preface to the present case, and implied that when the court met this issue head on, Wisconsin would not require a plaintiff to show that he had not been contributorily negligent in order to invoke the doctrine against a defendant. Such a conclusion, however, requires further analysis, or it may be misconstrued.

Although there is basically little or no difference, all jurisdictions do not uniformly state the elements to be satisfied for the application of the doctrine of *res ipsa loquitur.* Many require proof on behalf of the plaintiff that there was no contribution on his part.[9] Other jurisdictions make no reference at all to this element as a separate requirement.[10] Even the states requiring the satisfaction of the third element, relating to contribution by the plaintiff, show little uniformity in its definition. There is then a great deal of confusion over this third element; more specifically, confusion of the third element with contributory negligence. The real purpose of the requirement of the third element is to eliminate

[6] Wisconsin Telephone Co. v. Matson, 256 Wis. 304, 41 N.W. 2d 268 (1950).

[7] See, Ryan v. Zweck-Wollenburg Co., 266 Wis. 630, 631, 64 N.W. 2d 226 (1954) and Arledge v. Scherrer Freight Lines Inc., 269 Wis. 142, 149, 68 N.W. 2d 821, 826 (1954). The statement that contributory negligence bars recovery only when it exceeds 50% under Wisconsin comparative negligence statute was added by the reporter after stating the elements of *res ipsa loquitur* in these decisions.

[8] Zarling v. LaSalle Coca-Cola Bottling Co., 2 Wis. 2d 596, 604, 87 N.W. 2d 263, 269 (1958).

[9] Proctor Electric Co. v. Zink, 217 Md. 22, 141 A. 2d 721 (1958); Richards v. Grace-New Haven Community Hospital, 137 Conn. 508, 79 A. 2d 353 (1951); Johnson v. Coca-Cola Bottling Co. of Wilmar, 235 Minn. 471, 51 N.W. 2d 573 (1952); Rafferty v. Northern Utilities Co. 278 P. 2d 605 (Wyo. 1955); Simmons v. F. W. Woolworth Co., 163 Cal. App. 2d 709, 329, P. 2d 999 (1958); Kahalili v. Rosecliff Realty, Inc., 26 N.J. 595, 141 A. 2d 301 (1958), 66 A.L.R. 2d 680 (1959).

[10] Eaves v. Ottumwa, 240 Iowa 956, 38 N.W. 2d 761 (1949); Northwestern Mut. Fire Assoc. v. Allain, 226 La. 788, 77 So. 2d 395 (1954); Danville Community Hospital v. Thompson, 186 Va. 746, 43 S.E. 2d 882 (1947); Littlefield v. Laughlin, 327 S.W. 2d 863 (Mo. 1959); C. C. Anderson Stores Co. v. Boise Water Corp., 372 P. 2d 752 (Idaho, 1962); Lewis v. Polk, 312 Ky. 536, 228 S.W. 2d 432 (1950), 16 A.L.R. 2d 974 (1951).

responsibility on the part of the plaintiff. Therefore, it is not necessary that every plaintiff seeking to invoke the doctrine of *res lipsa loquitur* be free of negligence, but merely that there be evidence to show that the plaintiff's contributory negligence was not the responsible cause of the accident.[11] To allow contributory negligence to bar the application of *res ipsa loquitur* in every case would be to expand the third element further than the courts have intended.

The decision in the *Turk* case does not go so far as to say that the requirement of the third element need not be satisfied by a plaintiff. To invoke the aid of the doctrine, a plaintiff must still show that any negligence on his part was no more than a cause contributing to his injury, and not another equally probable, responsible cause of the accident.[12] This conclusion is best shown by a comparison of the principal case and the *Zurich* case. In the *Zurich* case, the deceased was guiding a heavy coil resting on an I-beam, while the defendant's servant was attempting to move the coil along the beam with a pinchbar. The court refused to apply *res ipsa loquitur* as a basis for proof of negligence on the part of the defendant's servant. It reasoned that the fall may have been due to the failure on the part of the deceased to properly guide it along the beam. The deceased's conduct was such that the inference of causal negligence on his part was as great as any such inference that might be drawn against the defendant's servant.[13] In the *Turk* case, the galosh of plaintiff's son became engaged in the defendant's escalator through no fault of the plaintiff. Her contributory negligence formed no part of the responsible cause of the accident. With no other responsible cause being shown, it does no injustice to the defendant to apply *res ipsa loquitur* and infer negligence on its part.

When a plaintiff is successful in satisfying this third requirement, then any contributory negligence of the plaintiff becomes strictly a matter of defense.[14] Thus the principal case has gone a step further in clarifying the requirements which a plaintiff must satisfy in order to invoke *res ipsa loquitur*. Since it is necessary that there be no

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[11] PROSSER, TORTS §42, at 208 (2d ed. 1955), "The plaintiff is seldom entirely static, and it is not necessary that he be completely inactive, but merely that there be evidence removing the inference of his own responsibility." See also, Simmons v. F. W. Woolworth Co., *supra* note 9, at 710, 329 P. 2d at 1001, ". . . its purpose like that of control by the defendant is merely to assist the court in determining whether it is more probable than not that defendant was responsible for the accident."

[12] Klein v. Beeten, 169 Wis. 385, 172 N.W. 736 (1919). Here, the court refused to apply *res ipsa loquitur* because the accident may have been due to another cause.

[13] Zurich Gen. Acc. & L. Ins. Co. v. Bowers, 171 Wis. 116, 176 N.W. 772 (1920).

[14] Ghiardi, *Res Ipsa Loquitur in Wisconsin*, 39 MARQ. L. REV. 361, 374 (1955-6), "The recent cases indicate that contributory negligence will not bar application of the doctrine unless the percentage is as great as the defendants. This is a correct result if treated solely as a question of defense and not as an element of the doctrine."

other probable explanation for the occurrence before a court will apply the doctrine, it seems that the third element is merely a reiteration of this basic requirement, but specifically directed at the plaintiff's acts. Once the plaintiff satisfies the court that there is no other explanation for the occurrence, the third element has been satisfied and contributory negligence is not a bar to the application of *res ipsa loquitur.*

JOHN L. REITER

Criminal Law: Involuntary Confessions—The petitioner was found guilty of robbery in the Superior Court of Spokane County, Washington, after a trial during which the court admitted, over objection, the petitioner's written and signed confession. The petitioner's uncontradicted testimony was that the confession was made 16 hours after his arrest, during which time his requests to call his wife and attorney were denied. He stated that he was repeatedly told that he would not be allowed to call until he "co-operated" with the police and gave them a signed confession. Throughout this period the petitioner was not advised of his right to remain silent, warned that his statements might be used against him, or told of his rights respecting consultation with an attorney. The Washington Supreme Court affirmed his conviction holding that the issue of the voluntariness of petitioner's confession had been properly submitted to the jury.[1]

The United States Supreme Court reversed the conviction by a vote of five to four.[2] In the opinion written by Mr. Justice Goldberg, the Court held that the confession was coerced and thus violated the due process clause of the fourteenth amendment of the United States Constitution. The Court found that the confession was obtained in an atmosphere of substantial coercion and did not meet the requisite test for admissibility into evidence of being made "freely, voluntarily, and without compulsion or inducement of any sort."[3] The Court said:

> Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a *free and unconstrained will* as required by the Fourteenth Amendment.[4] (Emphasis added.)

Starting with *McNabb v. U.S.*,[5] the Court made clear its intention to review cases of coerced confessions using two distinct and separate standards of admissibility, depending on their jurisdictional origin.

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[1] Hayes v. State of Washington, 58 Wash. 2d 716, 364 P. 2d 935 (1961).
[2] Haynes v. State of Washington,—U.S.—, 83 Sup. Ct. 1336 (1963).
[3] Wilson v. U.S., 162 U.S. 613, 623 (1896).
[4] Haynes v. State of Washington, *supra* note 2, at 1343.
[5] 318 U.S. 332 (1943).