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The Procedural Effect of Res Ipsa Loquitur in Nebraska

Since Chief Justice Pollock first used the phrase "res ipsa loquitur" in the opinion of *Byrne v. Boadle*,¹ there has been disagreement regarding the exact meaning of the phrase and more particularly its procedural effect. Although various authorities have their own refinements, they generally adhere to one of three different views as to just what the phrase means. Dean Prosser states that the doctrine is nothing more than a form of circumstantial evidence and that the pro-

¹ 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

cedural effect of the doctrine may be great or small depending upon the facts of the particular case.² A second theory proposes that *res ipsa loquitur* is a rule of substantive law which compels the court to take judicial notice of the fact that the defendant was negligent.³ There is a third view that the doctrine is merely a part of the best evidence rule,⁴ i.e., where the adverse party has access to the facts the burden of proof shifts to him.

It appears that, though not clearly committed, the Nebraska Supreme Court favors the view advanced by Dean Prosser. The court has stated flatly that *res ipsa loquitur* is not a rule of substantive law but that it merely takes the place of evidence affecting the burden of proceeding with the case.⁵ In a previous case the court expressed the view that "it (*res ipsa loquitur*) affords reasonable evidence . . . that the accident arose from want of care."⁶

The various jurisdictions are in irreconcilable conflict as to the procedural effect of *res ipsa loquitur*.⁷ In the majority of jurisdictions this doctrine creates a permissible inference of negligence, and nothing is added to the probative value of the evidence itself.⁸ Although such an inference does not entitle the plaintiff to a directed verdict, it assures him that his case will at least be submitted to the jury. In other jurisdictions the doctrine creates a presumption of negligence, and the burden of going forward with the evidence is placed upon the defendant.⁹ By this view the defendant may rebut the plaintiff's *prima facie* case, but, if he offers no evidence, a verdict must be directed for the plaintiff. Finally, in some jurisdictions application of the doctrine shifts the burden of proof from the plaintiff to the defendant,¹⁰ who must show by a preponderance of the evidence that he has not been guilty of negligent conduct.

² Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 Minn. L. Rev. 241 (1936).

³ Shain, *Res Ipsa Loquitur* (1945).

⁴ This view seems to be merely an embodiment of one of the basic policy reasons for the doctrine, the idea that the defendant normally has better access to evidence of the cause of the accident.

⁵ *Security Ins. Co. v. Omaha Coca Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954).

⁶ *Miratsky v. Beseda*, 139 Neb. 299, 297 N.W. 94 (1941).

⁷ This confusion exists with regard to other presumptions as well. See Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 Mich. L. Rev. 195 (1953); Morgan, *Further Observations on Presumptions*, 16 So. Cal. L. Rev. 245 (1943); Morgan, *Presumptions*, 12 Wash. L. Rev. 255 (1937).

⁸ For a collection of cases, see Prosser, *Torts* § 44 (1941).

⁹ See cases collected in Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. of Chi. L. Rev. 519 (1934).

¹⁰ Both Professor Carpenter and Shain present arguments in support of this view. See Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 So. Cal. L. Rev. 166 (1937); Shain, *Res Ipsa Loquitur* (1945).

Not only is there a great deal of confusion when different jurisdictions are compared, but even in the same jurisdiction the cases frequently do not conform to a recognizable pattern. The recent case of *Security Ins. Co. v. Omaha Coca Cola Bottling Co.*¹¹ highlights the confusion and uncertainty which prevail in Nebraska. First, the court states that, "The doctrine or *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel it. . . . It merely takes the place of evidence as affecting *the burden of proceeding* with the case."¹² But later in the decision the court states, "the circumstances under which a fire occurs may sometimes be such as to justify the application of the doctrine of *res ipsa loquitur* and impose upon the defendant *the burden of proving his freedom from fault.*"¹³ Both of these divergent and apparently conflicting statements of the law may be justified through ample authority in previous Nebraska cases. The first statement is based upon the line of cases holding that *res ipsa loquitur* is a doctrine permitting an inference of negligence or that it affords reasonable evidence of negligence.¹⁴ The second indicates that, quite to the contrary, *res ipsa loquitur* imposes a rebuttable presumption of negligence. An analysis of these decisions demonstrates the disagreement as to whether the defendant must rebut this presumption by a preponderance or merely by an equality of evidence.¹⁵

Recognizing the confusion of certain jurisdictions (including Nebraska), Professor Seavey has devised a method to bring a measure of order and predictability to these areas of the law.¹⁶ He suggests that the circumstances in any given case present only these three possible variations: they may be such (1) that a reasonable man could not draw an inference of negligence or of causation (the "thing" is mute); or (2) that reasonable men could properly either draw or not draw such an inference (the "thing" whispers); or (3) that such an inference is required even if no further evidence is introduced (the "thing" shouts).

¹¹ 157 Neb. 923, 62 N.W.2d 127 (1954). Since the court refused to apply the doctrine of *res ipsa loquitur*, its statements relating thereto are of course *obiter dictum*.

¹² Emphasis supplied.

¹³ *Ibid.*

¹⁴ *Watson Bros. Transportation Co. v. Chicago, St Paul, M. & O. Ry.*, 147 Neb. 880, 25 N.W.2d 396 (1947); *Miratsky v. Beseda*, 139 Neb. 299, 297 N. W. 94 (1941); *Rocha v. Payne*, 108 Neb. 246, 187 N.W. 804 (1922); *Riley v. Cudahy Packing Co.*, 82 Neb. 319, 117 N. W. 765 (1908).

¹⁵ *Mercer v. Omaha and Council Bluffs Street Ry.*, 108 Neb. 532, 188 N.W. 296 (1922); *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369, 104 N.W. 882 (1905); *Omaha Street Ry. v. Boesen*, 74 Neb. 764, 105 N.W. 303 (1905); *Lincoln Traction Co. v. Webb*, 73 Neb. 136, 102 N.W. 258 (1905); *Lincoln Street Ry. v. McClellan*, 54 Neb. 672, 74 N.W. 1074 (1897); *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N.W. 270 (1893).

¹⁶ Comment, 63 Har. L. Rev. 643 (1950).

With this in mind three Nebraska cases should be examined. In *Bush v. James*,¹⁷ there was an automobile accident at an intersection which the plaintiff approached from the west and the defendant from the south. The accident occurred in a residential area on a clear day when driving conditions were ideal. There was evidence that the plaintiff was proceeding at an excessive rate of speed, 55 to 60 miles per hour, but no evidence as to the defendant's speed. There were no traffic signals at the intersection and both parties had unobstructed vision of the approach to the intersection. The court stated that the mere happening of an accident will not create an inference of negligence, whereupon the plaintiff's petition was dismissed.

In *Miratsky v. Beseda*,¹⁸ the defendant erected some temporary bleachers upon his premises for the convenience of spectators at a gymnastic meet. Plaintiff attended the exhibition as a spectator, sitting in the third row of the bleachers. During the performance, the bleachers collapsed, and the plaintiff was injured. Granting recovery, the court stated that the circumstances surrounding the accident, in the absence of an explanation by the defendant, afforded reasonable evidence that the accident arose from want of care.

In *Lincoln Traction Co. v. Webb*,¹⁹ the plaintiff was a passenger on a streetcar operated by the defendant company. As the plaintiff alighted from the car, the motorman drove away giving no warning. Plaintiff was thrown to the pavement and injured. Granting recovery, the court ruled that the defendant must rebut the inference of negligence and introduce evidence sufficient to demonstrate that it was equally probable that there was no negligence.

Comparing these cases with the three types of evidentiary situations envisioned by Professor Seavey, a striking resemblance may be noted. *Bush v. James* represents the class of cases wherein the circumstances give no hint or indication of negligence so the doctrine of *res ipsa loquitur* did not apply.²⁰ *Miratsky v. Beseda* represents the class of cases wherein the circumstances may or may not indicate a lack of care²¹ so the doctrine affords a permissible inference of negligence. *Lincoln Traction Co. v. Webb* represents the class of cases wherein the circumstances give convincing proof of a lack of care unless contrary evidence is introduced²² so the doctrine compels a rebuttable presumption of negligence. When considered in this light, Nebraska's seem-

¹⁷ 152 Neb. 189, 40 N.W.2d 667 (1950).

¹⁸ 139 Neb. 299, 297 N.W. 94 (1941).

¹⁹ 73 Neb. 136, 102 N.W. 258 (1905).

²⁰ *Scarborough v. Aeroservice, Inc.*, 155 Neb. 749, 53 N.W.2d 902 (1952); *Bush v. James*, 152 Neb. 189, 40 N.W.2d 667 (1950); *Claim of Shroeder*, 153 Neb. 73, 43 N.W.2d 562 (1950); *Bixby v. Ayers*, 139 Neb. 652, 298 N.W. 533 (1941); *Meyers v. Neeld*, 137 Neb. 428, 289 N.W. 797 (1940).

²¹ See note 14 supra.

²² See note 15 supra.

ingly confused and conflicting decisions emerge in a logical and orderly pattern. In addition this approach involves a retreat from the mystical idea that the "magic Latin words" in some way impose liability. Instead, the circumstantial evidence itself dictates the procedural effect to be given. This theory could bring a new degree of understanding to a field of the law confused and clouded with doubts.

A collateral problem which further complicates matters concerns the availability of *res ipsa loquitur* when specific acts of negligence are alleged in the plaintiff's petition. A number of possible solutions have been offered.²³ First, allegations of specific acts of negligence may bar the plaintiff from making use of *res ipsa loquitur*. Second, allegations of specific acts of negligence may be limiting in that *res ipsa loquitur* can be used only to establish these specific acts. Third, *res ipsa loquitur* may be applied only in a case wherein there is a general allegation of negligence accompanying the specific allegations. Finally, there is the possibility that *res ipsa loquitur* may be available to the plaintiff without regard to the form of pleading.

Although earlier Nebraska decisions use the terms "direct evidence" and "the evidence shows" rather than considering the specific allegations as the controlling factor, later pronouncements by the court indicate that the first of the above mentioned alternatives has been adopted in this jurisdiction. This solution is probably based upon the idea that by pleading specific acts of negligence the plaintiff negates the probability that the evidence as to the cause of the accident is more available to the defendant. Thus, one major reason for the application of *res ipsa loquitur* disappears.

The first Nebraska case to discuss this problem was *Knies v. Lang*,²⁴ wherein the Court quoted a Massachusetts case, saying, "where the evidence shows the precise cause of the accident... there is of course no room for the application of the doctrine of presumption." This statement is of little utility since, if the plaintiff can show the precise cause of the accident through direct evidence, he will rarely resort to the doctrine of *res ipsa loquitur*.²⁵ In *Mischnick v. Iowa-Nebraska Light & Power Co.*,²⁶ the court states the rule this way, "if the petition alleges particular acts of negligence, then the plaintiff in order to recover must establish the specific negligence alleged, and the doctrine of *res ipsa loquitur* cannot be applied." The *Security Ins. Co.* case

²³ Prosser, Torts § 44 (1941); Carpenter, *supra* note 9.

²⁴ 116 Neb. 387, 217 N.W. 615 (1928).

²⁵ Also see *Mirautsky v. Beseda*, 139 Neb. 299, 297 N.W. 94 (1941). Held: *res ipsa loquitur* is not available "where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant upon the occurrence clearly appear." This statement is of questionable value since it is a strange case indeed wherein all the facts and circumstances attendant upon the occurrence clearly appear.

²⁶ 125 Neb. 598, 251 N.W. 259 (1933).

which cites both the *Lang* and *Mischnick* cases with apparent approval clarifies the present rule in Nebraska. Mere introduction of evidence which does not clearly establish the specific acts of negligence will not deprive the plaintiff of the doctrine of *res ipsa loquitur* if the case is otherwise proper for it.²⁷

The present Nebraska rule is subject to some pointed criticisms. The plaintiff is penalized for going ahead with his evidence and proving all he possibly can, e.g., if the plaintiff merely alleges general negligence, he may utilize the doctrine while, on the other hand, if he pleads one or more specific acts of negligence which would further enlighten both the court and the adverse party, he is deprived of the use of *res ipsa loquitur*. Certainly we should be constrained to reject a rule which places a premium upon the concealment of pertinent facts. Such a rule is valuable to the defendant not because it protects him from surprise, but rather because it gives him an opportunity to catch an unwary opponent in a damaging error.²⁸

For these reasons the better rule is evidenced by the third alternative that specific allegations will not preclude the application of *res ipsa loquitur* so long as the facts present a proper case for it, and there has been a general allegation of negligence. If there has been a general allegation of negligence, the defendant will not be surprised when an attempt is made to use *res ipsa loquitur* in supporting a general case of negligence.²⁹

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²⁷ 157 Neb. 927, 62 N.W.2d 131 (1954).

²⁸ Niles, Pleading *Res Ipsa Loquitur*, 7 N.Y.U.L.Q. 415 (1929).

²⁹ Prosser, The Procedural Effect of *Res Ipsa Loquitur*, 20 Minn. L. Rev. 241 (1936).