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Torts - Res Ipsa Loquitur - Liability of Rope Manufacturer

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The best method to eliminate this seemingly unconquerable barrier of the presumption of legitimacy, where the mother is married, would seem to be by the use of blood tests, whenever possible, showing that her husband was not the father of her child.[19] If the mother could eliminate the presumption of legitimacy by excluding her husband from any possibility of being assumed to be the father, then she could obtain a favorable adjudication in her paternity action by proving the defendant to be the father of her child by a mere preponderance of the evidence. Of course, the court may always order the mother, child, and alleged father to submit to blood tests; but the results of such tests are admissible in court only to exclude the defendant as being the father of the child and never as affirmative proof of guilt.[20]

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TORTS—RES IPSA LOQUITUR—LIABILITY OF ROPE MANUFACTURER—A recent decision of the Appellate Court of Illinois in *May v. Columbian Rope*[1] serves to underscore the longevity and progression of the doctrine of res ipsa loquitur.

The case arose out of an accident that occurred at a construction site when a one-half inch, three-strand Manila line, manufactured by Columbian, broke and caused the plaintiff to fall and sustain injuries. The evidence presented by the plaintiff was entirely circumstantial, consisting of the offending rope and the plaintiff's own testimony that on the morning of the accident the rope was "brand new," having been delivered to the job and placed in use only some 45 minutes before it broke. This testimony was seemingly corroborated by the deposition of a fellow workman, and by the direct testimony of the man who delivered the rope to the job site. A further point made by the delivery man was that the rope appeared to be dirty when he delivered it, as if it had been used.[2]

To rebut the inference of negligence arising from the circumstantial evidence put forward by the plaintiff, the defendant, Columbian, introduced extensive evidence pertaining to its manufacturing processes, arguing that its testing and safety procedures "showed it to be in the exercise of all due care in the manufacture of its rope.[3] This evidence was buttressed by the testimony of an expert witness that the "dirty" rope in question was not new, as the plaintiff had testified. In concluding its

19 Ill. Rev. Stat. ch. 106 3/4, § 5.
20 Ill. Rev. Stat. ch. 106 3/4, § 1.

1 40 Ill. App. 2d 264, 189 N.E.2d 394 (1st Dist. 1963).
2 *Id.* at 279, 189 N.E.2d at 400. The court took notice of the fact that the workman giving the deposition freely admitted that an illness had left him with an impaired memory and capacity for narration and that he was "hazy" about such events which had happened long ago.
3 *Id.* at 269, 189 N.E.2d at 396.

presentation, the defendant called attention to the physical appearance of the rope at the point of the break, emphasizing that it appeared to have been rather sharply cut, all the strands being severed at the same point. A demonstration conducted with test equipment, upon which similar rope was broken, indicated that when a three-strand Manila line breaks, each strand parts at a different point along the length of the rope.

At the close of the plaintiff's case, the court allowed the motion of Columbian's co-defendant, Dietz Industrial Company,[4] for a directed verdict in its favor. The jury returned a verdict in favor of the plaintiff against Columbian, whereupon Columbian filed motions for judgment notwithstanding the verdict and for a new trial on the condition that such judgment be reversed on appeal. The defendant's motions were allowed, and the plaintiff appealed.

From the time the doctrine was first annunciated in 1863 by Chief Baron Pollock, in *Byrne v. Boadle*,[5] and the first attempt to state the rule of that case by Chief Justice Earle in 1865,[6] the doctrine of res ipsa loquitur has been held to apply to those situations in which the plaintiff's burden of proof has been particularly forbidding; that is, to situations wherein:

> . . . there is no evidence, circumstantial or otherwise, at least none of sufficient probative value, to show negligence, apart from the postulate—which rests upon common experience and not upon the specific circumstances of the instant case—that the physical causes of the kind which produced the accident in question do not ordinarily exist in the absence of negligence.[7]

However, before the plaintiff may rely upon the "doctrine" to make out a prima facie case, certain conditions must be present. Essentially these are but a refinement of those first set out by Chief Justice Earle.[8] One of the more widely quoted, current expositions is that given by Professor Prosser:

> The conditions usually stated as necessary for the application of the principle of res ipsa loquitur are three: 1) the accident must be of a kind which *ordinarily does not occur in the absence of someone's negligence*; 2) it must be caused by an *agency or instrumentality within the exclusive control of the defendant*; 3) it must *not* have been *due to any voluntary action or contribution on the*

4 Leonard and Maude E. Dietz, doing business as Dietz Industrial Company, the jobber through whom the rope was purchased.

5 2 H. & C. 772, 159 Eng. Rep. 299 (1863).

6 "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Scott v. London & Katherine Docks Co., 3 H. & C. 596, 159 Eng. Rep. 665 (1865).

7 141 A.L.R. 1016 (1942).

8 *Supra* note 6.

> *part of the plaintiff.* Some courts have added a fourth condition, of dubious validity, that the evidence as to the true explanation of the accident must be more readily accessible to the defendant than to the plaintiff.[9] (Emphasis supplied.)

In the instant case, the court in its opinion observed that the doctrine of res ipsa loquitur presents one aspect of circumstantial evidence and that the two terms are not mutually exclusive. The court referred to *Cobb v. Marshal Field & Co.*,[10] wherein it was said:

> In a res ipsa loquitur case there is an inference of negligence arising from circumstantial evidence. Although this is often called a "presumption" it is really a presumption of fact and not of law. Such an inference, or presumption, does not disappear when contrary evidence appears; it remains to be considered with all the other evidence in the case and must be weighed by the jury.

In the principal case, as in other typical res ipsa loquitur cases, the specific negligent act or defect that was the proximate cause of the injury was unknown to the plaintiff. Thus, he was forced to rely upon those meager facts of which he had knowledge, and the surrounding circumstances, to sustain the burden of proof necessary to make out a prima facie case, leaving it to the trier of fact to draw the presumption[11] of negligence from such showings. This is perhaps the most significant aspect of the doctrine; it enables a plaintiff so situated to get his case to the jury. On this point Harper and James observe: "And since juries incline heavily toward plaintiffs (especially in cases likes these) the net practical effect of the doctrine is to shift the substantive burden of loss from unexplained accidents of these types from plaintiffs to defendants."[12] Because the plaintiff is not required to disprove every hypothesis suggesting a cause other than the defendant's negligence,[13] the burden of going forward with the evidence shifts from the plaintiff to the defendant to explain or rebut the inference of negligence. Contrary to an earlier position adopted by the Illinois Supreme Court,[14] after the defendant has come

9 Prosser, Torts 201 (2d ed. 1955).

10 22 Ill. App. 2d 143, 159 N.E.2d 520 (1st Dist. 1959). The case involved an elevator, located in the defendant's building, that fell while it was being operated by the plaintiffs, employees of a painting contractor hired by the defendant. At the time of the accident, the elevator was being used by the plaintiffs to move their equipment from an upper floor storage area to a lower floor where they were to work. The court found that the elevator had been recently inspected by City of Chicago elevator inspectors who reported that it was in a safe and serviceable condition, with all the safety devices functioning properly; that the maximum allowable weight was prominently posted in the car; that the plaintiffs overloaded the car; and finally, that, after the accident, the elevator was tested again and found to be operating properly. The jury returned a verdict for the defendant which was affirmed on appeal.

11 The word "presumption," as used herein, is deemed to mean a mandatory, though rebuttable, inference arising from the particular facts.

12 2 Harper and James, Torts 1081 (1956).

13 May v. Columbian Rope, 40 Ill. App. 2d 264, 189 N.E.2d 394 (1st Dist. 1963).

14 Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930). Defendant dentist was extracting the plaintiff's tooth when the tooth broke and part of it passed down the

forward and presented evidence as to the cause of the occurrence, the presumption of negligence still remains and should be considered by the trier of fact.[15]

The general rule followed in most jurisdictions today is that the mere happening of an accident does not, of itself, raise any presumption of negligence on the defendant's part, and liability cannot be predicated upon the mere happening of an accident.[16] Therefore, it seems but proper that the inferences drawn from the plaintiff's circumstantial evidence should be tested to determine whether they warrant the jury's finding the defendant negligent in his conduct toward the plaintiff. In the ordinary case based upon circumstantial evidence, such inferences are tested. This test has been variously expressed:

> Where the conclusion is a matter of mere speculation or conjecture, or where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that the burden of proof has not been sustained.[17]

Another version is given in *Nash v. Raun*:[18] "If the plaintiff cannot show the possibility of a conclusion of the defendant's negligence supported by a clear preponderance of its likelihood . . . the plaintiff should not be permitted to go to the jury."

Traditionally in cases in which the defendant relied upon the doctrine of res ipsa loquitur, the courts followed the guidelines laid down by the conditions necessary for the doctrine to apply;[19] when the conditions were present, the inferences were subjected to the test set out above.[20] But of late, the courts, particularly in Illinois, appear to be adopting a more liberal approach. Not only has the test of the balance of probabilities seemingly been abandoned,[21] but also a more liberal trend is apparent in the

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throat and lodged in the lung. The court states at page 542: "The doctrine of res ipsa loquitur is that whenever a thing which produces an injury is shown to have been under the control and management of the defendant and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of the injury itself will be deemed to afford prima facie evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. The presumption or inference of negligence raised by the application of this doctrine is not absolute or conclusive but is rebuttable, and vanishes entirely when even slight evidence appears to the contrary."

15 May v. Columbian Rope, *supra* note 13; Cobb v. Marshall Field & Co., *supra* note 10.

16 Muss v. Wagner, 27 Ill. 2d 551, 190 N.E.2d 305 (1963); Adams v. J. C. Penny Co., 411 Pa. 653, 192 A.2d 218 (1963); Brown v. Alabama Foods, 190 A.2d 257 (1963); Duchaine v. Fortin, 192 A.2d 473 (1963); Bart de Latt & Assoc. v. Knight, 369 S.W.2d 65 (1963); Weddle v. Draper, 204 Va. 319, 130 S.E.2d 462 (1963).

17 Prosser, *Torts* 200 (2d ed. 1955).

18 149 F.2d 885 (3d Cir. 1945).

19 *Supra* note 17, at 201.

20 Ford v. District of Columbia, 190 A.2d 904 (1963); Skipper v. Royal Crown Bottling Co. of Wilmington, 192 A.2d 910 (1963).

21 *Supra* note 13. United States v. Ridolfi, 318 F.2d 467 (2d Cir. 1963). The test at

courts' adherence to the guidelines established by the conditions. The trend is particularly apparent as related to the condition requiring that the accident be caused by an *agency or instrumentality within the exclusive control of the defendant.* Today, the doctrine is held to apply not only to soft drink bottles that explode,[22] but also to Coca-Cola bottles found to contain dead mice;[23] to tea pots which break apart in the plaintiff's hands,[24] and to elevators that fall while being operated by the plaintiffs.[25] And now a new situation presents itself; a rope that has passed from the *exclusive control* of the defendant manufacturer, through the hands of a jobber and the plaintiff's employer, into the hands of the plaintiff, breaks, causing the plaintiff to fall. Herein, the court upheld the application of the doctrine of res ipsa loquitur, declaring that:

> The demonstrable trend of these authorities is to determine from the nature of the defective instrumentality and the surrounding circumstances whether the inference of the defendant's negligence is strong enough to survive the fact that, between the defendant's control and the plaintiff's injury, another possession intervened. If a reasonable inference does survive, liability has been imposed.[26]

It is submitted that the modern view more closely approaches what the doctrine was originally intended to be, i.e., a common-sense appraisal of the probative value of circumstantial evidence.

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best only provides a highly delusive standard, since there is no known scientific or mathematical method to determine where the balance of probabilties lies.

22 Roper v. Dad's Root Beer Co., 336 Ill. App. 91, 82 N.E.2d 815 (1st Dist. 1948). Sometime after the bottle of root beer had left the *exclusive* control of the defendant, it exploded, injuring the plaintiff. In affirming the judgment for the plaintiff the court indicated, that upon a sufficient showing, liability for the resulting injury might be traced to the defendant bottler, since it was in control of the bottle at the time of the alleged negligence.

23 Duval v. Coca-Cola Bottling Co. of Chicago, 329 Ill. App. 290, 68 N.E.2d 479 (1st Dist. 1946). The plaintiff claimed to have observed a dead mouse in the bottle while drinking Coca-Cola bottled by the defendant and became ill. The defendant argued that its motion for judgment notwithstanding the verdict should have been granted because it was not shown to have been in possession and control of the bottle at the time of the plaintiff's injury. The court applied the doctrine of res ipsa loquitur and answered the defendant's argument by saying, at p. 293: "We cannot take seriously any suggestion that the mouse may have entered or been placed in the bottle while in the garage of the salesman." Harris v. Coca-Cola Bottling Co. of Chicago, 35 Ill. App. 2d 406, 193 N.E.2d 56 (1st Dist. 1962). Recovery was allowed upon facts similar to those in the Duval case.

24 Johnson v. Stevens Bldg. Catering Co., 323 Ill. App. 212, 55 N.E.2d 550 (1st Dist. 1944). A waitress, employed by the defendant, passed a teapot to the plaintiff which broke apart in the plaintiff's hands. In affirming the judgment in favor of the plaintiff, the court reasoned that the inference of the defendant's negligence in preparing the pot of tea survived the "intervening momentary" possession of the plaintiff.

25 Cobb v. Marshall Field & Co., 22 Ill. 2d App. 2d 143, 153, 154, 159 N.E.2d 520, 524, 525 (1st Dist. 1959). "The usual requirement that the accident-causing instrumenality must be under the exclusive control of the defendant need not mean actual physical control at the time of the accident, if the instrumentality is one which it is the defendant's responsibility to maintain at all times and which responsibility cannot be delegated by consent, agreement or usage."

26 May v. Columbian Rope, 40 Ill. App. 2d 264, 271, 189 N.E.2d 394 (1st Dist. 1963).

Undoubtedly many factors are playing a part in shaping the progressive attitude of the courts in their approach to res ipsa loquitur cases; but it is submitted that these three are the most significant: (1) the impact of liability insurance; (2) the high cost of expert testimony; and (3) the concept of social insurance in conjunction with a growing belief that fault is an outmoded criterion of liability. Of these three, the impact of liability insurance is the most frequently acknowledged. The remaining two are more subtle but more far-reaching in their effect.

The high cost of expert testimony is not only a matter of common knowledge, but is quite generally conceded to be beyond the means of the average plaintiff.[27] On the other hand, the usual defendant is a business enterprise of some kind, capable of sustaining the expense incurred through the employment of such experts. When expert testimony is introduced, the presiding judge must consider it, as well as those matters commonly known to laymen, in determining the applicability of the doctrine of res ipsa loquitur to the particular case.[28] *It is not suggested* that the courts disregard such testimony and instead rely upon a priori conjectures and partly informed hunches in reaching a decision. *It is suggested* that because of the vast disparity in the relative ability of plaintiffs and defendants to sustain the high costs incurred when experts are employed to testify, the courts in some instances are prone to look with more favor upon the plaintiff's cause than is warranted by the evidence introduced.

Lastly, what appears to be a growing disenchantment with fault as the criterion of liability in the typical res ipsa loquitur case, may be but evidence of the belief that the innocent victim of an unexplained accident should not be sent forth from the courts as a man without a remedy.[29] This belief has served to focus attention upon the need felt by a number of jurists for some form of social insurance to compensate such innocent victims for their injuries, as workmen are compensated under existing workmen's compensation laws. Such a program of social insurance would require legislative action, and there has been, as yet, no such comprehensive enactment.

In the absence of such legislative enactments, the courts that have adopted a more liberal attitude in their approach to res ipsa loquitur cases have been prompted to do so by the specter of grievously injured plaintiffs, innocent of any fault, being dismissed from the courts, uncompensated for their pain and suffering. It is suggested that the court in the principal case was so motivated.

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27 83 *Time* 48 (March 20, 1964).

28 Bradford v. Winter, 30 Cal. Rptr. 243 (1963).

29 Ill. Const. Art. II, § 19: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay."