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Res Ipsa Loquitur as Applied to Multiple Defendants

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complain that too many people carry guns, and they clamor for more strict laws; the average citizen, who knows of no reason why a person other than a policeman should carry a weapon, joins in and is swayed by the vast amount of publicity given the latest local shooting affray. On the other hand, sportsmen, hunters, and others, backed by such organizations as the National Rifle Association and the arms and ammunitions companies, ask for more lenient legislation. The lawmakers, who are in the middle, ofttimes please no one. But this does not mean that there is not a happy medium between the advocates of both arguments. Some believe that the solution can be found in the Uniform Pistol Act.[50] This act, which has been withdrawn for further study by the National Conference of Commissioners, provides briefly: (1) requirement of a license to carry a pistol either openly or concealed; (2) regulation of the sale of pistols; (3) denial to criminals and certain others the use of and the right to possess pistols; (4) exceptions to persons at home or at their fixed places of business; and (5) exceptions to certain classes of persons including peace officers, gun dealers, target shooters, etc. Whether this act is the answer to the problem of pistol control is not a matter for this discourse to decide, since it involves a number of problems which would require considerable discussion. But even if it is not the solution, certainly a state committee comprised of representatives from all interested groups could come forth with a suggested act that would substantially meet the needs of the people and still control the frequent criminal and careless uses of such weapons.

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RES IPSA LOQUITUR AS APPLIED TO MULTIPLE DEFENDANTS

The existence of multiple defendants or instrumentalities which may have caused or contributed to an injury raises an interesting question of whether or not *res ipsa loquitur* should apply in this type of case.

As usually employed, the doctrine of *res ipsa loquitur* requires that: (1) the injury be one which ordinarily would not occur in the absence of someone's negligence; (2) the instrumentality causing the

[50] For an example of the Act, see ALA. CODE ANN. tit. 14, secs. 172-186 (1940). Also see D. C. CODE, secs. 22-3201-3216 (1940); IND. STAT. ANN. secs. 10-4736-4751 (Burns 1942); PA. STAT., tit. 18, sec. 4628 (Purdon 1936); S. D. CODE, secs. 21.01-21.0117 (1939); WASH. REV. CODE, secs. 9.41-41.160 (1951).

injury be within the exclusive control of the defendant or his servants; (3) the possibility of contributory negligence on the part of the plaintiff be eliminated.[1] Some courts have added a fourth *condition,* viz.: that evidence as to the true explanation of the accident must be more readily accessible to the defendant.[2] All these factors being present, a prima facie case is presented, and the jury may infer from the circumstances, in the absence of explanation by the defendant, that the accident arose from want of care.[3] The doctrine is largely founded on necessity—it enables a plaintiff to make a submissible case when otherwise he could not do so because of his inability to know or ascertain the facts.

In order for the doctrine of *res ipsa loquitur* to apply, the plaintiff must first present sufficient proof of the existence of all the elements necessary to bring the doctrine into operation. One of the elements, as we have seen, is that the instrumentality causing the injury be within the *exclusive* control of the defendant. This requirement presents complications where there is more than on defendant or instrumentality which contributes to the injury.[4] In such cases it cannot be said that the instrumentality causing the injury is within the *exclusive* control of any single defendant. This discussion will be confined to the problem of whether or not *res ipsa loquitur* can be applied in such a case.

The purpose of the requirement that the instrumentality causing the injury be within the exclusive control of the defendant should be evident. It is to focus the inference (or presumption,[5] as the case may be) of negligence on the defendant. When another person or defendant is involved in the case, the court has the problem of whether the inference should be raised against both, or any of the defendants alone. It has been stated as a broad proposition that if it appears that two or more instrumentalities, only one of which was under the

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[1] PROSSER, TORTS 291 *et seq.* (1941); see also 9 WIGMORE, EVIDENCE sec. 2509 (3rd Ed. 1940).

[2] Wilson v. East St. Louis and Interurban Water Co., 295 Ill. App. 603, 15 N.E. 2d 599 (1938); Levendusky v. Empire Rubber Mfg. Co., 84 N.J.L. 698, 87 Atl. 338 (1913).

[3] 38 AM. JUR. 989-991 (1941).

[4] Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38 (1918) (Collision of automobile and milk wagon); Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P. 2d 740 (1935) (Shared control of surgical operation); Yellow Cab Co. v. Hodgson, 91 Colo. 365, 14 P. 2d 1081 (1932) (Collision of carrier with another vehicle).

[5] Palmer Buick Co. v. Chenall, 119 Ga. 837, 47 S.E. 329 (1904) (to the effect that it raises an inference that can be rebutted by the defendant). Prosser, *The Procedural Effect of Res Ipsa Loquitur,* 20 MINN. L. REV. 241 (1936), states that some twenty-three jurisdictions clearly adopt this view, while about six more tend toward it.

defendant's control, contributed to or may have contributed to the injury, the doctrine *cannot* be invoked.[6]

Exclusive control on the part of a single defendant, however, is not *always* required for the application of *res ipsa loquitur.* This is particularly so in cases where the plaintiff has been injured while a passenger of a common carrier which has collided with another carrier or vehicle. In such cases a dozen or more courts have interpreted the doctrine so as to exclude the technical requirement of exclusive control.[7] Representative of this class of cases is *Jackson* v. *Capital Transit Co.*,[8] where the plaintiff who was a passenger on a street car operated by one of the defendants, a transit company, was injured as a result of collision between the street car and a truck of the co-defendant, a local laundry. The instrumentality was not solely in control of the defendant carrier, since the laundry truck might also have been responsible for the injury. The plaintiff alleged general negligence on the part of both defendants. Upon proving that she was a passenger, that a collision took place, and that she was injured as a result, the plaintiff rested her case. In their answers, the defendants charged each other with being negligent and urged that the doctrine of *res ipsa loquitur* is inapplicable where it appears that two or more instrumentalities, only one of which was under the control of the defendant, may have contributed to the injury. The trial court gave a directed verdict for both defendants, and the plaintiff appealed. The Municipal Court of Appeals for the District of Columbia, although holding *res ipsa loquitur* inapplicable to the other vehicle, said that a passenger of a common carrier who is injured as a

[6] 38 AM. JUR. 997 (1941).

[7] Among these jurisdictions are: *Arizona,* Pickwick Stages Corp. v. Messinger, 44 Ariz. 174, 36 P. 2d 168 (1934); *Arkansas,* Biddle v. Riley, 108 Ark. 206, 176 S.W. 134 (1915); *California,* Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169 (1902); Holt v. Yellow Cabs Co. of San Diego, 124 Cal. App. 385, 12 P. 2d 472 (1932); *Iowa,* Crozier v. Hawkeye Stages, 209 Iowa 313, 228 N.W. 320 (1929); Preston v. Des Moines Ry., 214 Iowa 156, 241 N.W. 648 (1932); *Kentucky,* Central Passenger Ry. v. Kuhn, 86 Ky. 578, 61 S.W. 441 (1888); see Vogt v. Cin., Newport & Cov. St. Ry. Co. 312 Ky. 668, 229 S.W. 2d 461 (1950); *Louisiana,* Dawson v. Tage Bros., 15 La. App. 326, 131 So. 716 (1931); *Maryland,* Cumberland and W. Transit Co. v. Metz, 158 Md. 424, 149 Atl. 4 (1930); *Missouri,* Hurley v. Missouri Pac. Trans. Co., 56 S.W. 2d 620 (Mo. App. 1933); Zichler v. St. Louis Public Service Co., 332 Mo. 912, 59 S.W. 2d 654 (1933); *New Jersey,* Cox v. Scott, 104 N. J. Law 371, 140 Atl. 390 (1928); Lunaski v. S. Kosson and Sons, 149 Atl. 760 (N. J. 1930); *New York,* Maher v. Metropolition St. Ry., 102 App. Div. 517, 92 N.Y.S. 825 (1905); *Rhode Island,* De Nicola v. United Elec. Ry. Co.; 55 R.I. 402, 182 Atl. 1 (1935); *West Virginia,* Hodge v. Sycamore Coal Co., 82 W. Va. 106, 95 S.E. 808 (1918); *United States,* Interstate Stage Lines v. Ayers, 42 F. 2d 611 (8th Cir. 1930).

[8] 72 W.L.R. 718 (D.C. Mum. App.) 38 A. 2d 108 (1944); see; 25 A.L.R. 690 (1923); 83 A.L.R. 1163 (1933); and 161 A.L.R. 1113 (1946); 10 AM. JUR. 379 (1937).

result of a collision with an independent vehicle need prove only the occurence of the accident and the resulting injuries. Then, under the doctrine of *res ipsa loquitur*, the carrier must rebut the inference of negligence.

From a study of the cases, this inference or presumption against the carrier appears to rest on several distinct theories:

1. The notion that the passenger's action against the carrier is based upon breach of a contract of safe transportation, that he makes out his case by proving the contract and the injury, and that due care is an affirmative defense on the part of the carrier.[9]
2. Defendant's exclusive control of the situation, as between the carrier and the passenger, and the improbability that any accident would occur unless defendant has been negligent.[10]
3. The fact that evidence as to the cause of the accident can be more readily obtained by defendant than by the plaintiff.[11]
4. The fact that a carrier is under a duty to exercise an unusually high degree of care toward its passengers, it following from this that when an accident occurs, it must be presumed that the carried is at fault.[42]

Although applying it in the carrier cases,[13] most of the courts have refused to apply *res ipsa loquitur* against the driver of a privately owned automobile in favor of a guest in his car who is injured by a collision.[14] The California court, in the case of *Godfry* v. *Brown*,[15] refused to make any distinction between the situations and held the private driver subject to the same "presumption" as the carrier. In this case the plaintiff was a gratuitous guest in Brown's automobile when an automobile driven by Cole collided with it at an intersection. The plaintiff was injured and sued both drivers on the theory of *res ipsa loquitur*. The court held that the doctrine is as applicable to cases where both vehicles are privately owned as it is to cases where one is a common carrier for hire. It pointed out that the inference and the workability of the rules are the same as in the carrier cases. As a matter of *physics* the court was probably correct. The same ele-

[9] Burgoyne v. Chicago City Ry. Co., 167 Ill. App. 59 (1912); Steele v. Southern Ry. Co., 55 S.C. 389, 33 S.E. 509 (1899).

[10] Union Traction Co. v. Mann, 72 Ind. App. 50, 124 N.E. 510 (1919); Curtis v. Rochester and Syracuse R.R. Co., 18 N.Y. 534 (1859).

[11] *Supra* note 10. *See also* Steele v. Southern Ry. Co., *supra* note 9.

[12] Housel v. Pacific Elec. Ry., 167 Cal. 245, 139 Pac. 73 (1914).

[13] Price v. Ry. Co., 220 Mo. 453, 119 S.W. 932 (1909); Stauffer v. Metropolitan St. Ry. Co., 243 Mo. 305, 147 S.W. 1032 (1912); Laundon & Eighth Ave. Ry. Co., 162 N.Y. 380, 56 N.W. 988 (1900).

[14] See State ex rel. Brancoto v. Trimble 332 Mo. 318, 18 S.W. 2d 4 (1929).

[15] 222 Cal. 57, 29 P. 2d 165 (1934).

ments are present in both cases—the only difference being the relationship of the parties. It may be argued with some plausibility that the nature of the act, not the relationship of the parties, should be the governing factor as to whether or not the doctrine applies. Most courts have not seen fit to look at the question from this angle, however, and have confined the doctrine almost exclusively to carrier cases. The cases more frequently stress the fact that the law requires of carriers a very high degree of care toward their passengers, and it is more reasonable to require them to come forward with the proof.[16] In the light of all the circumstances it is believed that the correct result is reached in the carrier cases. It seems only just that the passenger of a common carrier should be entitled to a satisfactory explanation of the collision by the carrier who was entrusted with the passenger's safety. That the burden of overcoming the inference of negligence should be placed upon the carrier is further supported by the fact that the carrier is in a much better position to show that the proper degree of care could not have avoided the collision than the passenger is to show that the proper degree was not exercised. One writer has gone so far as to suggest that it is common experience that in traffic accidents it is highly probable that both drivers are negligent. It therefore would not be unreasonable to presume negligence on the part of both.[17] The California case[18] could be justified on this basis.

In view of the fact that the courts consistently have disagreed as to the applicability of *res ipsa loquitur* to collisions between vehicles on land, there is no reason to expect any more unanimity in the field of aviation.[19] Many courts unreasonably refuse to apply the doctrine of *res ipsa loquitur* to airplane accidents involving *one* airplane. These courts, in the absence of evidence, conclude that the airplane has not yet reached such a stage of development as to justify the birth of an inference or presumption of negligence from the mere occurrence of the accident. One would normally expect the courts, in view of the general rule, absolutely to refuse to apply *res ipsa loquitur* to mid-air collisions between two planes, but surprisingly enough, in *Smith* v. *O'Donnell*,[20] the trial court instructed the jury in effect that *res ipsa loquitur* was applicable to mid-air collisions, since a collision of two

[16] M'Currie v. Southern Pac. Co., 167 Cal. 245, 139 Pac. 73, 51 L.R.A. (U.S.) 1005; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169 (1902).
[17] Prosser, *Collision of Carriers With Other Vehicles*, 30 ILL. L. REV. 980, 992 (1936).
[18] Godfry v. Brown, 222 Cal. 57, 29 P. 2d 165 (1934).
[19] Goldin, *Res Ipsa Loquitur in Aviation Law*, 18 So. CAL. L. REV. 15, 124 (1944).
[20] 215 Cal. 714, 12 P. 2d 933 (1932).

planes in mid-air does not ordinarily occur if a proper degree of care is observed, and therefore the burden should be on the carrier to show that he was not at fault. The California Supreme Court upheld the instruction.

The willingness of the California courts to invoke the doctrine of *res ipsa loquitur* to a case arising out of a collision in the air is again demonstrated in *Rainger* v. *American Airlines, Inc.*,[21] where a transport plane and all its occupants were lost as a result of a collision with a United States Army plane. In a suit against the common carrier for wrongful death of a passenger, the pilot of the Army aircraft testified that he had informed one of the pilots of the transport that he intended to fly close to the larger ship in order to look at it, and that the collision occurred when the Army plane approached the defendant's airplane. The court, on its own motion, gave the following instruction to the jury:

> From the mere happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant, American Airlines. . . . Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant, American Airlines, to rebut the inference. . . .[22]

The same reason was held to apply to airlines as applies to other common carriers, *viz.*, the idea that the carrier owes its passengers a very high degree of care. Mid-air collision between aircraft is a relatively rare species of aerial mishap, and the plaintiff would have even less chance of producing affirmative evidence of defendant's negligence, if there be such, than he would if he were riding on a train, bus or street car.

An examination of the cases in other negligence situations discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions or qualifications have been recognized where the purpose of the doctrine of *res ipsa loquitur* would otherwise be defeated. Thus in the California case of *Armstrong* v. *Wallace*,[23] a patient sued both the hospital and her physician for failure to remove a sponge from her abdomen after a Caesarian operation. The court held that the fact that there was a possibility that the hospital servants might have been negligent did not preclude application of the *res ipsa loquitur* doctrine against the physician. The

[21] (1943) U.S. Av. Rep. 122 (Cal. Supr. Ct. 1943) as cited in Goldin, *op. cit. supra*, note 19 at 145.
[22] *Id.* at 146.
[23] 8 Cal. App. 2d 429, 47 P. 2d 740 (1935).

[illegible] met more squarely in the subsequent case of *Ybara* v. *Spangard*,[24] where the plaintiff sought damages from one or several of defendant nurses and doctors for personal injuries, allegedly inflicted by the defendants during the course of a surgical operation. While under anesthetic, an injury was caused to his shoulder, which was not within the area of operation. Included in the suit were all the defendants who might have had some control at one time or another over the instrumentality or instrumentalities[25] which might have injured him. Plaintiff contended that he was entitled to rely on the doctrine of *res ipsa loquitur*. Defendants maintained that there was a division of responsibility in the use of the instrumentalities which might have caused the injury, and it might have resulted from the separate act of anyone, so that the rule of *res ipsa loquitur* could not be invoked against any one of them; and that there were several instrumentalities, and no showing was made as to which caused the injury or as to the particular defendant in control of it, so that the doctrine could not apply. The court held that all those defendants who had any control over the plaintiff's body, or over the instrumentalities which might have caused the injury could properly be called upon to meet the inference of negligence by giving an explanation of their conduct. It further stated that neither the number nor relationship of the defendants alone determines whether *res ipsa loquitur* applies. The case has been criticized,[26] but on its facts it is believed that the court reached the proper conclusion. It was essentially a policy consideration. Since the plaintiff was rendered unconscious for the purpose of undergoing surgical treatment, it would be manifestly unreasonable for defendants to insist that he identify any one of them as having had control over the injuring instrumentality or instrumentalities. Without the application of the doctrine, the plaintiff could not have recovered here.

Likewise, the doctrine has found application in a few manufacturing cases where there was a division of control.[27] In *Claxton Coca-Cola Bottling Co.* v. *Coleman*,[28] plaintiff brought an action against a dealer and a bottling company for injuries sustained when

[24] 25 Cal. 2d 486, 154 P. 2d 687 (1944).

[25] It did not appear whether only one instrumentality caused the injury; but it is more likely that it did. In the court's mind, the important thing seemed to be control of the situation.

[26] Note, 18 So. CAL. L. REV. 310 (1945). But see notes, 9 U. of DET. L. J. 51 (1945); 40 ILL. L. REV. 421 (1946); 25 B. U. L. REV. 295 (1945).

[27] Motor Sales and Service, Inc. v. Grasselli Chemical Co., 131 So. 623 (La. 1930) (Res ipsa loquitur applicable even though at the time of injury the defendant had neither control nor possession of the instrumentality which was the cause thereof); Hertzler v. Monshum, 228 Mich. 416, 200 N.W. 155 (1924).

[28] 68 Ga. App. 302, 22 S.E. 2d 768 (1944).

a Coca-Cola, purchased from the dealer and manufactured by the bottling company, contained a considerable quantity of kerosene and pine needles. Plaintiff recovered against both defendants on the theory of *res ipsa loquitur* because of the possible negligence of either or both defandants.

In *Hertzler* v. *Monshen*,[29] plaintiff brought on action against a miller and retail dealer for the death of her husband which was caused by arsenate of lead in flour purchased from the dealer. Although not specifically mentioning the doctrine by name, the court in effect held that *res ipsa loquitur* applied though reversing the case on other grounds. The court said that the burden was on the plaintiff to show that the poison was in the flour when purchased from the dealer. If such a fact is established, plaintiff will make out a prima facie case against both defendants requiring them to excuse themselves. If the dealer satisfies a jury that the poison did not get into the flour while in his possession, then he is not liable and excuse, if any, is to be made by the manufacturers.

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The doctrine of *res ipsa loquitur* has been expanded beyond its original meaning in multiple defendant cases. The requirement of "exclusive control" has broken down, especially in cases where justice would not be done with a strict interpretation of the doctrine. This is so in the carrier cases where the passenger was owed a high degree of care and in other cases like malpractice and manufacturing, where it would be grossly unreasonable to require the plaintiff to come forward with affirmative evidence and identify the particular person who had control of the injuring instrumentality. One cannot argue with such results. In applying *res ipsa loquitur*, the fact must be remembered that it fundamentally is a rule of necessity devised to do justice. This purpose must not be defeated by a mechanical interpretation of the doctrine. On the other hand, *res ipsa loquitur*, if it is to have any meaning at all, must not be extended indiscriminately. It is believed that the extension as applied to the cases discussed represents a healthy growth in the law. As long as the applicability of the doctrine to multiple defendants is made to depend upon the peculiar facts and circumstances of each individual case and is applied with care and only when justice requires, it should not be material whether there is one or more persons who had, or may have had control of the injuring instrumentality.

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[29] 228 Mich. 416, 200 N.W. 155 (1924).