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Torts - Injury While Sport Fishing - Res Ipsa Loquitur

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only the burden of proving a better title than the defendant in order to win.[13] However, the trend of later cases has been to impose on the plaintiff as great a burden of proof as he would bear in a petitory action, that is, the burden of proving a valid title in himself.[14] The confusion of the action to establish title with the petitory action has beclouded the evident purpose of Act 38 of 1908 — to relieve the claimant of having to bear as great a burden of proof when his adversary is not in possession as when the adversary is in possession of the property in question. Otherwise, if the burden of proof were to remain the same as that required of the plaintiff in a petitory action, it is difficult to see what practical purpose the act has served. Should the court have occasion to re-examine its position regarding this matter, it is suggested that the act be considered in the light of its original purpose.

Patsy Jo McDowell

TORTS — INJURY WHILE SPORT FISHING — RES IPSA LOQUITUR

Plaintiff was injured by a lure cast by defendant while both parties were fishing from a boat. In a suit against defendant and his liability insurer the plaintiff alleged negligence in specified respects. Defendant denied negligence and pleaded in the alternative that plaintiff had assumed the risks incident to the sport. The testimony of both parties was equally unilluminating. Plaintiff testified that he did not know what had happened, had seen nothing, and defendant testified that he knew only that he had made an overhand cast and, feeling an obstruction, turned to see the hooks lodged in plaintiff's cheek. In denying recovery for negligence, the trial court held that plaintiff had failed to prove his case with the required certainty.[1] On appeal, plaintiff conceded this failure but urged that recovery was nevertheless in order under the doctrine of res ipsa loquitur. The court of

13. See the expressions of the court in support of this view: Metcalfe v. Green, 140 La. 950, 74 So. 261 (1916); Baltimore v. Lutcher, 135 La. 873, 66 So. 253 (1914); Quaker Realty Co. Praying for Confirmation of Title, 10 Orl. App. 79 (La. App. 1914). See also Doiron v. Vacuum Oil Co., 164 La. 15, 113 So. 748 (1927); Ellis v. Louisiana Planting Co., 146 La. 652, 83 So. 885 (1920).

14. See Albritton v. Childers, 225 La. 900, 74 So.2d 156 (1954); Stockstill v. Choctaw Towing Corp., 224 La. 473, 70 So.2d 93 (1953); Dugas v. Powell, 197 La. 409, 1 So.2d 677 (1941).

1. Plaintiff recovered $154.65, covering medical and hospital expenses due under policy provisions establishing compensation for injury to another resulting from insured's activities.

appeal, *held*, amended and affirmed.[2] The doctrine of res ipsa loquitur is applicable; and, inasmuch as the defendant failed to discharge the duty of showing his freedom from negligence, the plaintiff must recover. The doctrine of assumption of risk does not require that one taking part in a fishing venture assume the risk of injury resulting solely from another's negligence. *Hawayek v. Simmons*, 91 So.2d 49 (La. App. 1956).

In most cases in which recovery is predicated on another's negligence, proof of such negligence is based largely on circumstantial evidence. The trier will usually determine the issue of negligence by weighing the probabilities which arise from the facts presented.[3] However, in many cases the plaintiff does not have adequate information about how the incident occurred, and the defendant cannot or will not disclose the circumstances. In this situation the trier is not presented with the particular acts of defendant upon which to base a determination of the probabilities of negligence. In that area in which a rational mind can determine from common experience and a consideration of the fact of the occurrence alone that the injury sustained is more likely than not a result of defendant's negligence, the doctrine of res ipsa loquitur is often applied.[4] The doctrine, however, is not a solvent to be automatically applied.[5] It does not establish or

2. Affirmed as to medical and hospital expenses and amended to include an award of $1500 under the negligence liability provisions of the policy.

3. 2 HARPER & JAMES, THE LAW OF TORTS § 19.3 (1956); PROSSER, HANDBOOK OF THE LAW OF TORTS § 42 (2d ed. 1955); Malone, *Res Ipsa Loquitur and Proof by Inference — A Discussion of the Louisiana Cases*, 4 LOUISIANA LAW REVIEW 70 (1941). As to proof of a fact by circumstantial evidence, see I WIGMORE, EVIDENCE § 25 (3d ed. 1940).

4. 2 HARPER & JAMES, THE LAW OF TORTS § 19.5 (1956); PROSSER, HANDBOOK OF THE LAW OF TORTS § 42 (2d ed. 1955): "In the situation to which res ipsa loquitur as a distinctive rule applies, there is no evidence, circumstantial or otherwise, at least none of sufficient probative value, to show negligence, apart from the postulate — which rests on common experience and not on the specific circumstances of the instant case — that physical cause of the kind which produced the accident in question do not ordinarily exist in the absence of negligence." Annot., 59 A.L.R. 468, 470 (1942). There are three conditions which are often stated as essential for the application of this doctrine: (1) the accident must have been of such a nature as would not normally occur without someone's negligence; (2) the defendant must have had control of the injuring instrumentality at the time of the injury; and (3) the accident must not have been due to any action or contribution of the plaintiff. It is highly doubtful that these conditions must be met at all times before the doctrine will be applied. See 2 HARPER & JAMES, THE LAW OF TORTS §§ 19.5, 19.8 (1956); Malone, *Res Ipsa Loquitur and Proof by Inference — A Discussion of the Louisiana Cases*, 4 LOUISIANA LAW REVIEW 70 (1941); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

5. "If that phrase had not been in Latin, nobody would have called it a principle." Lord Shaw in Ballard v. North British Ry., Sess. Cas., H.L. 43 (1923). According to Dean Prosser the phrase is an offspring of a casual word of Baron Pollack during argument with counsel in Byrne v. Boadle, 2 H. & Co. 722, 159 Eng. Rep. 299 (Ex. 1863). Dean Prosser would prefer that this "tag," which

delimit a distinct area of the law of negligence but is rather an instrument of judicial expression which, to be understood, must be viewed in the light of the circumstances surrounding its use. A survey of the cases which seem to invite a consideration of this doctrine indicates that the fact of admitting or denying its applicability reflects the courts' attitude toward the administration of negligence liability in particular fact situations. One factor which appears to influence a court's decision heavily as to the application of res ipsa loquitur under given circumstances is the value to society of the defendant's activity. Where the injury is caused by an activity which is of little benefit to or presents a serious threat to society,[6] a court is more apt to apply this doctrine. For example in a case involving firearms which present a serious threat to society with little off-setting value, a court will readily apply res ipsa loquitur, thereby requiring little by way of positive proof of defendant's negligence.[7] Conversely, except in the most flagrant cases a court will reject the application of res ipsa loquitur in medical malpractice suits.[8] As the value of the activity to society increases, or the risks entailed decrease, the likelihood of a finding of negligence lessens. The standard of care in a particular situation — the threshold of

leads only to confusion, "be consigned to the legal dustbin." Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 271 (1936): "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule." Bond, C.J., dissenting in Potomac Edison Co. v. Johnson, 160 Md. 33, 40, 152 Atl. 633, 636 (1930).

6. 2 HARPER & JAMES, THE LAW OF TORTS 1084, § 19.6 (1956); Jensen v. Minard, 44 Cal.2d 325, 328, 282 P.2d 7, 8 (1955): "To put the matter another way, the amount of caution required by the law increases, as does the danger that reasonably should be apprehended. . . . What ordinary care is in any particular case depends upon what the circumstances are."

7. Jensen v. Minard, 44 Cal.2d 325, 327, 282 P.2d 7, 8 (1955): "[O]wing to the dangerous character of the instrumentality ordinary care in the use of firearms requires a very high degree of caution." Recovery allowed in all of the following: Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948); Adams v. Dunton, 284 Mass. 63, 187 N.E. 90 (1933); Winans v. Randolph, 169 Pa. 606, 32 Atl. 622 (1895); Harper v. Holcombe, 146 Wis. 183, 130 N.W. 1128 (1911); Underwood v. Hewson, 1 Strange 596, 93 Eng. Rep. 722 (K.B. 1891). See Inbau, *Firearms and Legal Doctrine*, 7 TUL. L. REV. 529, 551 (1933) for an extensive survey of hunting accidents.

8. Farber v. Olkon, 40 Cal.2d 503, 254 P.2d 520 (1953) (no recovery for unfortunate choice of wrong method of treatment); Meador v. Arnold, 264 Ky. 378, 94 S.W.2d 626 (1936) (mistaken diagnosis alone not sufficient for recovery). Recovery was allowed in the following: Nelson v. Painless Parker, 104 Cal. App. 770, 286 Pac. 1078 (1930) (dropped tooth down windpipe); Evans v. Roberts, 172 Iowa 653, 154 N.W. 923 (1915) (cut off piece of patient's tongue during operation on adenoids); Lewis v. Casenburg, 157 Tenn. 187, 7 S.W.2d 808 (1928) (extreme X-ray burns resulting in death).

negligence — may depend in great measure upon an evaluation of this factor.[9]

In many cases, such as the instant case, another factor, seemingly opposed to the one discussed above, comes in for consideration. This further element arises when both parties are engaged in an activity wherein there exists a mutuality or reciprocity of risk. Where each party is exposing the other to the same hazards and it is a mere matter of chance that the plaintiff is injured rather than the defendant, the courts, moved by a sense of fair play, are less disposed to consider as negligent conduct which might otherwise be so viewed.[10] For example, where two golfers are each exposing the other to the same risks the tendency is to deny recovery for injury resulting from risks commensurate with the sport.[11] The courts will require a greater showing of affirmative proof of the defendant's negligence, and are apparently not as prepared to infer such negligence from the fact of the occurrence alone. This is to be contrasted to cases involving a plaintiff-caddy and a defendant-golfer in which recovery is generally allowed without such an affirmative showing.[12] This would appear to indicate the courts' readiness to appreciate the one-sidedness of the risk in resolving the issue of negligence, for the caddy does not in turn expose the golfer to the risks to which the golfer subjects him.

In the instant case the court was of the opinion that the rights of a person injured in an accident in which the cause is

9. For an able discussion of the various factors involved and their effect in the determination of negligence, see Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

10. In its treatment of this area the court may achieve the same result via two different methods: it may refuse to apply the doctrine and require that the plaintiff show the defendant's negligence by facts other than the mere fact of the occurrence of the incident, or may allow application of the doctrine but hold that the plaintiff assumed the risks of injury.

11. Houston v. Escott, 85 F. Supp. 59 (D. Del. 1949); Rogers v. Allis-Chalmers Mfg. Co., 153 Ohio St. 513, 92 N.E.2d 677 (1950); Benjamin v. Nernberg, 102 Pa. Super. 471, 157 Atl. 10 (1931). However, recovery has been allowed for breaches of the generally recognized rules of the game, such as a party's failure to precede his drive with the customary warning of "Fore": Getz v. Freed, 377 Pa. 480, 105 A.2d 102 (1954); Alexander v. Wrenn, 158 Va. 486, 164 S.E. 715 (1932).

12. Biskup v. Hoffman, 220 Mo. App. 542, 287 S.W. 865 (1926); Toohey v. Webster, 97 N.J.L. 545, 117 Atl. 838 (1922); Povanda v. Powers, 272 N.Y. Supp. 619, 152 Misc. 75 (1934); Simpson v. Fiero, 260 N.Y. Supp. 323, 237 App. Div. 62 (1932); Gardner v. Heldman, 82 Ohio App. 1, 80 N.W.2d 681 (1948). *Contra:* Stober v. Embry, 243 Ky. 117, 47 S.W.2d 921 (1932) (caddy watching but careless); Page v. Unterreiner, 106 S.W.2d 528 (Mo. App. 1937) (player careful, caddy careless). For interesting articles on golfing cases see Clothier, *Negligence in Golf*, 9 TEMP. L.Q. 42 (1934); Note, *Negligence — Golf — Liability Players and Course Operators*, 11 N.Y.U.L.Q. REV. 452 (1934).

unknown to him must be protected. The court, assuming that the defendant was aware of his own acts, placed upon him the burden of proving himself free from negligence.[13] The court was of the further opinion that in the absence of such proof the accident could only be presumed to have been a result of fault on the part of the defendant and therefore recovery was in order. The decision appears to be supported by the "benefit to society" factor discussed above, as sport fishing is not impressively beneficial to society. Evidence of a consideration of the second factor discussed, mutuality of risk, is not as apparent in the decision. In rejecting the defendant's plea of assumption of risk, the court stated that whereas one participating in a sport assumes all risks commensurate with that activity one does not assume the risk of an injury resulting *solely from defendant's want of care.* In the instant case this is misleading for the defendant's negligence was not established by affirmative proof but rather was merely a presumption of law resulting from the application of the doctrine of res ipsa loquitur. In its denial of the plea of assumption of risk the court assumed that the defendant was negligent, the very inquiry with which it was confronted. The fact that each party was exposing the other to similar hazards is a matter which must be given serious consideration in determining what conduct will constitute negligence. It is interesting to consider the nature of the two cases upon which the court relied in support of its decision to reject the plea of assumption of risk. In the first the plaintiff was an employee, a caddy, of the defendant-golfer;[14] in the other the plaintiff, a spectator at a polo contest, was injured by a player who failed to maintain reasonable control of his horse.[15] In neither of these cases did any mutuality of risk exist. The instant case may be more closely analogized to the player-player cases in golf in which recovery is usually denied due, in part, to the existence of a mutuality of risk. The importance of this element in determining liability for negligence has been forcefully expressed by Professor Vold: "[T]his mutuality of risk is one of the great foundation stones on which the main structure of the law of negligence has been erected, and . . . without it the negligence doctrine loses its at-

13. In Louisiana there is no procedural shifting of the burden of proof. For an excellent discussion of this problem and a thorough commentary on Louisiana cases, see Malone, *"Res Ipsa Loquitur" and Proof by Inference — A Discussion of the Louisiana Cases,* 4 LOUISIANA LAW REVIEW 70, 84 *et seq.* (1941).

14. Toohey v. Webster, 97 N.J.L. 545, 117 Atl. 838 (1922).

15. Douglas v. Converse, 248 Pa. 232, 93 Atl. 955 (1915).

traction as being inherently fair."[16] It is submitted that in the instant case this element of reciprocity did exist, as both parties were fishing, and it was a mere matter of chance that the plaintiff rather than the defendant was injured. Therefore the court should have required for recovery an affirmative showing of a high degree of deviation from the norm of fishermen's conduct. However, the liability insurer of the defendant was a co-defendant, and it is not unlikely that the theory of social absorption of negligence liability achieved through the widespread use of such insurance is reflected in the court's decision.

It is interesting to speculate on the outcome of future similar litigation. With the increasing amount of leisure time available to the average man, hobbies and other modes of recreation and diversion will assume more social importance; such activities may even become socially imperative. The benefits derived by society from sport activities, therefore, may receive wider appreciation with a resulting noticeable effect upon the application of negligence liability in this area.

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16. Vold, *Aircraft Operators Liability for Ground Damage and Passenger Injury*, 13 NEB. L. BULL. 373, 380 (1934).