North Dakota Law Review

Volume 43 | Number 3 Article 10

1967

Negligence - Evidence - Rebuttal of Res Ipsa Loquitur

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the law does not prescribe a definite rule for the determination of the exact amount recoverable for false imprisonment.[16] The only solution is the considered judgment and opinion of the reasonable man.[17] Where the issue of reputation is paramount and the jury is denied access to relevant evidence of reputation, the appellate courts must remand for a new trial,[18] as in the instant case. There is no requirement that the testimony of witnesses be uniformly favorable or unfavorable regarding the litigant's reputation, only that it be allowed for consideration.[19]

North Dakota apparently has not considered the issue of alleged damage to general reputation in false imprisonment or any other civil action. The cases in other jurisdictions are generally quite old and relatively infrequent. Their value as precedent is not diminished, however, as their results are consistent and represent the correct application of the rules of evidence.

The admissibility of reputation evidence in those civil actions where reputation is placed directly in issue may well be settled. The instant case is representative of the authorities cited herein, and North Dakota could well use that court's reasoning as a guideline when the issue arises. Compensatory damages should, insofar as possible, compensate the plaintiff in the amount of the damages suffered. To arrive at a just amount, however, the defendant must be allowed to show any mitigating facts or circumstances which would properly influence the determination of those damages. Perhaps no precise formula will ever be developed to determine the amount of compensation for non-pecuniary loss of reputation, nor is one needed if the jury is allowed to consider all of the relevant evidence. It is only just that a man of good repute should recover more than the man with a doubtful reputation.

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NEGLIGENCE—EVIDENCE—REBUTTAL OF RES IPSA LOQUITUR—The defendant, while using a rented truck to haul hay, had backed the vehicle up to a barn to discharge the third load for the day when a fire started in the barn, resulting in a complete loss of both the hay and the barn. The Supreme Court of California, in a 4-3 decision

16. Herbrick v. Samardick & Co., 169 Neb. 833, 101 N.W.2d 488 (1960).
17. Burns v. Burns, *supra* note 12.
18. Price v. Phillips, 90 N.J. Super. 480, 218 A.2d 167 (1966).
19. *In re* Greenfields Estate, 245 S.C. 595, 141 S.E.2d 916 (1965).

affirming the trial court, *held* that the fire was caused by "hot gasses and sparks from the exhaust system of the truck" and that under the doctrine of res ipsa loquitur the defendant was liable for negligence. The dissent emphasized that the defendant had introduced evidence that tended to rebut the inference of negligence and that the doctrine of res ipsa loquitur should not have been applied. *Seely v Combs,* 52 Cal. Rptr 578, 416 P.2d 810 (1966)

The doctrine of res ipsa loquitur deals with a type of circumstantial evidence which allows the plaintiff to shift the burden of going forward with the evidence to the defendant.[1] It makes a prima facie case against the defendant by raising an inference of negligence[2] which the defendant may rebut with the proper evidence.[3]

The California Supreme Court in *Ybarra v Spanard*[4] set forth prerequisites to the application of res ipsa loquitur:

(1) The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) the accident must have been caused within the exclusive control of the defendant;

(3) the accident must not have been due to any voluntary act on the part of the plaintiff.

The plaintiff, when availing himself of the doctrine must prove the existence of the elements required for its application.[5] To dispel the inference of negligence as a matter of law, the defendant must produce affirmative evidence that tends to meet or balance the inferences created by the doctrine.[6] If such proof will rebut the plaintiff's evidence, thereby revoking the use of res ipsa loquitur, the burden of going forward with the evidence reverts to the plaintiff.[7] The California Supreme Court has said that where evidence which would tend to rebut the inference of negligence is introduced by the defendant, it is a question of fact rather than a question of law whether this inference has been overcome.[8]

To offset the application of the doctrine of res ipsa loquitur, the defendant, in the instant case produced the following evidence:

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1. See generally Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335 (1952).
2. Ales v. Ryan. 8 Cal.2d 82, 64 P.2d 409 (1936).
3. See Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954).
4. 25 Cal.2d 468, 154 P.2d 687 (1944).
5. See Larson v. St. Francis Hotel, 83 Cal. App. 210, 188 P.2d 513 (1948).
6. See generally Dimari v. Cresci, 58 Cal.2d 292, 23 Cal. Rptr. 772, 373 P.2d 860 (1962). Leonard v. Watsonville Community Hosp., 47 Cal.2d 509, 305 P.2d 36 (1956). A few jurisdictions may treat the inference as a presumption requiring a directed verdict for the plaintiff if the defendant offers no evidence in explanation. See Burr v. Sherwin Williams Co., *supra* note 3.
7. See Burr v. Sherwin Williams Co., *supra* note 3 at 1046.
8. Druzanick v. Crily, 19 Cal.2d 439, 122 P.2d 53 (1942).

The truck's exhaust system had been examined immediately after the occurrence of the fire and nothing improper was found; the muffler was of the type prescribed by statute in California;[9] the muffler was of a type that had low gas pressure allowing the gasses to cool; there were no leaks found; the fire was said to have started on the right side of the truck while the exhaust system was located on the left; the defendant also provided evidence that the truck, in substantially unchanged condition, had been tested at a date subsequent to the fire. These tests established that the truck would neither backfire nor would the exhaust gasses ignite a gasoline soaked rag.

Although the California Supreme Court in *Viera v Atchison, T. & S.F Ry.*[10] stated that absolute certainty of the defendant's responsibility for the damaging occurrence is seldom possible, it also stated that a reasonable probability is necessary In the instant case the court failed to consider the fact that improperly cured hay might ignite spontaneously[11] Also, since the defendant had been hired to perform this service, he must have been directed by the plaintiff to put the hay in the barn. A third possibility is that the defendant's employee, who was absent at the time of trial, may have had some part in starting the fire. These three arguments demonstrate that the occurrence might have taken place in the absence of any negligence, that the plaintiff may not have wholly divested himself of control, or that the cause of the fire was wholly unrelated to the condition of the truck. Considering that all the requirements for its application may not have been met, it appears that this was not a proper case for the invocation of the doctrine.

In applying the doctrine, North Dakota courts have generally followed the California decisions.[12] The North Dakota Supreme Court, however, has said that only after the evidence has shown that the "thing" did cause the injury, may the doctrine raise a presumption of negligence.[13] It has also held that negligence must be affirmatively proved; it is not sufficient merely to prove that an occurrence took place for which the defendant may be responsible.[14] Under these cases, North Dakota appears to place upon the plaintiff a greater burden than the California court did in the

9. Statutes of California, 1964-65, ch. 1144, P. 2828, § 9.4.
10. 10 Cal. App. 267, 101 Pac. 690 (1909).
11. Hay that is improperly cured, i.e. not allowed to dry thoroughly before baling, is likely to ignite spontaneously. The plaintiff should be required to show that the hay had been properly cured.
12. See McKenzie v. Hanson, 143 N.W.2d 697 (N.D. 1966), Bergley v. Mann's, 99 N.W.2d 849 (N.D. 1959), Kuntz v. McQuade, 95 N.W.2d 430 (N.D. 1959).
13. Farmers Home Mut. Ins. Co. v. Grand Forks Implement Co., 79 N.D. 177, 55 N.W.2d 315 (1953).
14. Severinson v. Nerby, 105 N.W.2d 252 (N.D. 1960), Mischel v. Vogel, 96 N.W.2d 233 (N.D. 1959).

instant case.

That the Restatement position relative to the application of res ipsa loquitur is somewhat different from that of either the California or North Dakota courts is illustrated by the following section thereof:

> It may be inferred that harm suffered by the plaintiff is caused by the negligence of the defendant when
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence;
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.[15]

It should be noted that the Restatement is unique in that it requires the plaintiff to produce evidence as to what did not cause the accident.

According to the Restatement, res ipsa loquitur should place liability for negligence upon a defendant only when the plaintiff has shown that there is no other reasonable explanation for the accident or occurrence. Once the plaintiff has obviated these other possible causes of the accident, the burden of showing his faultless conduct lies with the defendant. When the defendant does not meet this burden, the doctrine of res ipsa loquitur should apply But when the defendant produces sufficient credible evidence to mitigate his responsibility concerning the accident, it should be the duty of the court to direct a verdict for the defendant because the plaintiff can no longer rely on res ipsa loquitur

Application of this interpretation of the Restatement, places the defendant in a more equitable position. It also insures that a plaintiff who wishes to sue cannot rely solely on the doctrine, but must have some affirmative evidence eliminating other reasonable causes. In the instant case, had the court applied the Restatement approach, the action against the defendant could not have rested on the doctrine of res ipsa loquitur because the plaintiff had not eliminated these other reasonable causes of the fire.

Consequently, it appears that the Restatement position is preferable to the view held by the courts examined here. A rule requiring the plaintiff to produce the type of evidence required by the Restatement seems to be a desirable addition to the doctrine as it is now

15. RESTATEMENT (SECOND), TORTS §328 D (1965).

enforced by the courts. It would bar the plaintiff's access to res ipsa loquitur until he can produce some affirmative evidence. This is in opposition to the present day doctrine which allows the plaintiff to use res ipsa loquitur when he cannot show the negligence of the defendant. By requiring this additional evidence, the courts can insure a better application of the doctrine of res ipsa loquitur

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PRODUCTS LIABILITY—BREACH OF IMPLIED WARRANTY—MANUFACTURERS' LIABILITY TO ULTIMATE CONSUMERS—A seven week old child, living next door, used a vaporizer-humidifier purchased by his aunt for the ordinary purpose of relieving nasal congestion. The humidifier shot boiling water upon the child resulting in his death three days later. The administrator of the child's estate sought damages for breach of an implied warranty of merchantability against the retailer, wholesaler-distributor and manufacturer of the product. The Supreme Court of Pennsylvania, limiting liability to the retailer, *held* that the administrator could bring an action against the seller notwithstanding decedent's lack of privity of contract. *Miller v Preitz*, 221 A.2d 320 (Pa. 1966)

The majority opinion was based upon the Uniform Commercial Code, Section 2-318, which provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such a person may use, consume or be affected by the goods and who is injured in person by breach of the warranty .[1]

Under the court's interpretation of this section, the deceased nephew was in the buyer's "family," and, further, the section could not be construed to maintain an action in assumpsit against remote sellers. Dissenting opinions attacked both the fictional approach to the inclusion of the decedent within the buyer's family and the inequitable placement of liability The dissenters contended that the majority opinion ignored comment three of Section 2-318 which stated:

1. 12A PA. STAT. ANN. § 2-318 (1953).