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Negligence - Res Ipsa Loquitur - Application to Multiple Defendants in the Alternative

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NEGLIGENCE—RES IPSA LOQUITUR—APPLICATION TO MULTIPLE DEFENDANTS IN THE ALTERNATIVE—Appellant, a minor, was injured by the explosion of an "aerial bomb" which he found on a county fair ground. Two of the defendants admitted having brought aerial bombs to the fair but each entered evidence which if believed would show that he had not left the article which injured the appellant. These two defendants were completely independent of each other and it was admitted that both could not be responsible for the injury to the child. The lower court instructed the jury that if they could not determine which of the two defendants was actionably negligent, they were compelled to exonerate both. *Held,* reversed. An instruction based on res ipsa loquitur should have been given and if the jury was unable to determine which of two defendants was guilty of actionable negligence, both should have been held liable. *Litzmann v. Humboldt County,* (Cal. App. 1954) 273 P. (2d) 82.

Although the essential elements of the doctrine of res ipsa loquitur have been modified since their enunciation by Professor Wigmore,[1] it is still generally accepted that some sort of control over the instrumentality causing the injury must be attributable to the defendant.[2] Thus the doctrine is not applicable to two defendants[3] unless they can be found to be jointly responsible.[4] The

[1] 9 WIGMORE, EVIDENCE, 3d ed., §2509 (1940).

[2] Exclusive control is necessary. Seeden v. Great Northern R. Co., (Minn. 1954) 65 N.W. (2d) 178. Inference that someone other than the defendant was negligent must be excluded. Towle v. Phillips, 180 Tenn. 121, 172 S.W. (2d) 806 (1943). The doctrine is never applicable where the circumstances of the accident do not identify the wrongdoer. Cruse v. Sabine Transp. Co., (5th Cir. 1937) 88 F. (2d) 298. Exclusive control does not mean sole control, hence landlord and tenant may share control. Marzotto v. Gay Garment Co., 11 N.J. Super. 368, 78 A. (2d) 394 (1951).

[3] Estes v. Estes, (Kan. City Ct. of App. 1939) 127 S.W. (2d) 78.

[4] 52 COL. L. REV. 537 (1932).

principal case represents an unprecedented extension of the doctrine to two completely independent defendants.[5] The court interpreted the earlier California decision in *Summers v. Tice*[6] as authority for the proposition that res ipsa loquitur can be applied to two defendants in the alternative. The problem in that case, however, was one of proximate cause; there was no need for the application of res ipsa loquitur since it was found that both defendants were actively negligent toward the plaintiff.

Had each of the defendants in the instant case been negligent and left an aerial bomb on the fair grounds, one of which had injured the plaintiff, and if it had been impossible to ascertain which bomb had caused the injury, the situation would have been analogous to that of *Summers v. Tice*. Such is not the case. Here, not only was there a failure to prove negligence on the part of either defendant, but in addition, since the assumption was that one of the defendants must be innocent, the burden of proving freedom from negligence was shifted to an innocent defendant.[7] Such a procedural disadvantage could often lead to liability without fault since an innocent defendant may not always be able to prove his innocence. If this disadvantage is imposed for policy reasons, the opinion gives no hint as to what they might be. In another earlier California decision, *Ybarra v. Spangard*,[8] an exception was made to the general rule when multiple defendants were required to meet the inference of negligence placed upon them by giving an explanation of their conduct. But in that case, emphasis was placed upon the accessibility of the evidence to the defendants as a reason for the use of res ipsa loquitur, reference was made to the presumption of negligence used against the common carrier, and stress was laid on the hospital-patient relationship of the parties. The result has been properly described as being peculiar to the facts of that case.[9] The principal case, if followed, would extend the reasoning of *Ybarra v. Spangard* and make it applicable to any case where there is an injury plus an inference of negligence for which more than one defendant could be responsible in the alternative. Outside of California the only cases even remotely analogous have involved vehicle collisions. It has

[5] It is recognized generally that the doctrine of res ipsa loquitur may not be applied where several defendants are involved, all of whom could not be negligent, and the inference of negligence against each defendant is of equal weight. Coastal Tank Lines v. Carroll, (Md. 1954) 106 A. (2d) 98; 65 C.J.S., Negligence §220(8) (1950).

[6] 33 Cal. (2d) 80, 199 P. (2d) 1 (1948). Plaintiff recovered against two defendants who fired shotguns in his direction at the same time, though only one caused his injury. As it was impossible to determine which defendant injured the plaintiff, and since both were clearly negligent, both were held liable.

[7] Res ipsa loquitur is generally considered to be merely the name given to a certain type of circumstantial evidence. The procedural effect of such evidence may be a mere inference, a presumption, or may shift the burden of proof to the defendant. Prosser, "Procedural Effect of Res Ipsa Loquitur," 20 MINN. L. REV. 241 (1936). Although the procedural effect of the doctrine in California is not clear [Prosser, "Res Ipsa Loquitur in California," 37 CALIF. L. REV. 183 (1949)], a recent case indicates that the burden is placed upon the defendant to rebut the inference of negligence. See Burr v. Sherwin-Williams Co., (Cal. 1954) 268 P. (2d) 1041.

[8] 25 Cal. (2d) 486, 154 P. (2d) 687 (1944); 162 A.L.R. 1258 at 1265 (1946).

[9] See 18 So. CAL. L. REV. 310 (1945).

been held that where two vehicles collide and cause injury to a third person, res ipsa loquitur may be invoked against both drivers.[10] The collision analogy does not support the result in the principal case, however, since the use of res ipsa loquitur in these cases is based upon the assumption that *both* drivers were negligent or the collision would not have occurred, whereas the court in the principal case admits that one party defendant must be innocent.[11] General application of this new "California doctrine"—which can hardly be called res ipsa loquitur as that term has come to be defined—would have an effect that is immediately apparent. If a person is struck by a flower-pot which falls from a multi-storied apartment building, he may recover from all tenants unless the innocent are able to identify the guilty one.[12] It is one thing to allow a jury to infer that an injury was caused by negligence and that a certain defendant was probably guilty of this negligence,[13] but it is quite another to hold several defendants liable when the most that can be inferred is that one of them *might* have been negligent. If the California courts find it desirable to impose a burden of absolute liability,[14] or a presumption of negligence, against those who use fireworks or conduct county fairs, they might easily have done so. By twisting the doctrine of res ipsa loquitur to fit the facts of the instant case, the court announced a broader rule than is necessary to achieve the desired result.

Edward H. Hoenicke

[10] Pearlman v. W. O. King Lumber Co., 302 Ill. App. 190, 23 N.E. (2d) 826 (1939).

[11] This use of res ipsa loquitur in collision cases is by no means universal. See Yellow Cab Co. v. Hodgson, 91 Colo. 365, 14 P. (2d) 1081 (1932); 83 A.L.R. 1163 (1933); Termuhlen v. Schaffer, (Ohio 1952) 107 N.E. (2d) 133.

[12] See the dissenting opinion of Traynor, J., in Raber v. Tumin, 36 Cal. (2d) 654, 226 P. (2d) 574 (1951).

[13] Warner v. Terminal R. Assn. of St. Louis, 363 Mo. 1082, 257 S.W. (2d) 75 (1953).

[14] The court specifically rejected absolute liability.