Michigan Law Review

Volume 51 | Issue 1

1952

NEGLIGENCE-RES IPSA LOQUITUR-JUSTIFICATION FOR A DIRECTED VERDICT IN FAVOR OF THE PLAINTIFF

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NEGLIGENCE—RES IPSA LOQUITUR—JUSTIFICATION FOR A DIRECTED VERDICT IN FAVOR OF THE PLAINTIFF—Defendant was driving his car along a straight and unobstructed stretch of gravel road when it ran off the road, overturned, and injured the plaintiff, who was a passenger. There was some conflict in the evidence as to the speed of the car and the only evidence that the defendant could offer as to the cause of the accident was a statement that it could have been the gravel or a tie rod. The trial court directed a verdict for the plaintiff. On appeal, *held,* affirmed. The car left a straight and unobstructed highway and there is no showing of an intervening cause. An explanation of the accident is essential if the defendant will avoid liability. *Fannin v. Lewis,* (Ky. 1951) 243 S. W. (2d) 60.

Generally, negligence will not be inferred from the mere happening of an accident;[1] but where the plaintiff's evidence indicates the defendant's exclusive control of the responsible instrumentality, plus a high probability that the accident would not have occurred but for negligence on the part of the defendant, and a resulting injury,[2] an overwhelming majority of jurisdictions will allow a plaintiff to invoke the doctrine of res ipsa loquitur.[3] In applying the doctrine, the general rule is that the facts which give rise to res ipsa loquitur are mere evidence from which the jury may infer negligence.[4] Since the doctrine owes its existence to the unavailability of direct evidence due to the defendant's exclusive control of the instrumentality which caused the accident, this rule would appear to be quite sound. In general, a directed verdict for the plaintiff under this theory would be error even if the defendant should introduce no evidence whatsoever.[5] This is logical in view of the fact that directed verdicts are seldom allowed where direct evidence of negligence is available, and there would seem to be no reason why the circumstantial evidence of res ipsa loquitur should stand on a higher plane.[6] In directing a verdict for the plaintiff, the court in the principal case is completely at odds with the general rule, although earlier Kentucky cases were regarded as establishing the rule in that jurisdiction.[7] It is submitted that the Kentucky court in recent decisions has abandoned the inference rule and has adopted the position that the doctrine will give rise to a presumption of law with the burden on the defendant to prove that the cause

[1] Knox v. Simmerman, 301 Pa. 1, 151 A. 678 (1930). Etheridge v. Etheridge, 222 N. C. 616, 24 S. E. (2d) 477 (1943), indicates that a lack of negligence is to be presumed. Statements may be found that the mere happening of the accident is sufficient, but on closer examination it would seem that the courts are considering the circumstances such as the condition of the road, lack of obstructions and lack of defects in the car. Loprestie v. Roy Motors, Inc., 191 La. 239, 185 S. 11 (1938); Bower Auto Rent Co. v. Young, (Tex. Civ. App. 1925) 274 S. W. 295.

[2] Lewis v. Wolk, 312 Ky. 536, 228 S. W. (2d) 432 (1950).

[3] An excellent discussion of the doctrine, including a state by state breakdown, appears in Prosser, "Procedural Effect of Res Ipsa Loquitur," 20 MINN. L. REV. 241 (1936). South Carolina, Daniels v. Timmons, 216 S. C. 539, 59 S. E. (2d) 149 (1950), and Michigan, Facer v. Lewis, 326 Mich. 702, 40 N. W. (2d) 457 (1950), have expressly rejected the doctrine was expressly applied in Conover v. Hecker, 317 Mich. 285, 26 N. W. (2d) 774 Inc., 199 S. C. 500, 20 S. E. (2d) 153 (1942); and in a recent Michigan decision the doctrine was expressly applied. Conover v. Hecker, 317 Mich. 285, 26 N. W. (2d) 774 (1947).

[4] Sweeney v. Erving, 228 U.S. 233, 33 S. Ct. 416 (1913); Foltis v. City of New York, 287 N.Y. 108, 38 N.E. (2d) 455 (1941). See also, 53 A.L.R. 1494 (1928); 167 A.L.R. 658 (1947).

[5] Res ipsa loquitur will only justify and not require a verdict for the plaintiff. Marsh v. Henriksen, 213 Minn. 500, 7 N.W. (2d) 387 (1942). Johnson v. Eastern Air Lines, (2d Cir. 1949) 177 F. (2d) 713, indicates that this is so even where there may be a presumption. Etheridge v. Etheridge, supra note 1, states that the jury and not the court may infer negligence.

[6] Foltis v. City of New York, supra note 4. See annotation, 153 A.L.R. 1134 (1944).

[7] Prosser, "Procedural Effect of Res Ipsa Loquitur," 20 MINN L. REV. 241 (1936); Fehr Brewing Co. v. Corley, 265 Ky. 308, 96 S.W. (2d) 860 (1936); Thompson v. Kost, 298 Ky. 32, 181 S.W. (2d) 445 (1944).

of the accident was not his negligence.[8] Under this view, if the defendant fails to sustain the burden, there will be a directed verdict for the plaintiff.[9] The Kentucky court has said, however, that the facts must be such that no reasonable person could conclude that the accident did not result from negligence.[10] There is authority for this view in other jurisdictions, but it does not appear that the departure from the rule has been as extreme as that in the principal case.[11] Where the evidence presented or withheld by the defendant is of a character which would tend to support the plaintiff's claim, the conclusion of the court might be justified.[12] But in the ordinary case where the defendant is unable to produce sufficient evidence to sustain the full burden of proof and to overcome the plaintiff's prima facie case, it seems unfair to establish his negligence as a matter of law and to impose on him the burden of establishing his innocence by a preponderance of the evidence. To do so is to overlook the evidentiary nature of the res ipsa loquitur doctrine and to overthrow the well-recognized concept that the ultimate burden of proof is on the plaintiff.

William A. Bain, Jr., S.Ed.

[8] Defendant must show the real cause of the accident: Ralston v. Dossey, 289 Ky. 40, 157 S.W. (2d) 739 (1941). Res ipsa loquitur gives rise to a presumption of law and in the absence of evidence by the defendant, it is the duty of the court to direct a verdict for the plaintiff: Schechter v. Hann, 305 Ky. 794, 205 S.W. (2d) 690 (1947). Res ipsa loquitur is a rule of substantive law: Lewis v. Wolk, supra note 2. Burden on the defendant to show that the loss resulted without his negligence and he must introduce substantive proof that it resulted from a non-negligent cause: Welch v. Cooke Chevrolet Co., (Ky. 1950) 236 S.W. (2d) 690. But see, Bell v. Ward, (Ky. 1951) 242 S.W. (2d) 869, where the court said that if the defendant's evidence may rebut the presumption, the plaintiff is not entitled to a directed verdict.

[9] See cases in note 8 supra.

[10] Robinson v. Higgins, 295 Ky. 446, 174 S.W. (2d) 687 (1943).

[11] In Dierman v. Providence Hospital, 31 Cal. (2d) 290, 188 P. (2d) 12 (1947), the court said that in a res ipsa loquitur situation where the defendant had it in his power to produce substantial evidence on the issue of negligence, but failed to do so, it must be presumed that such evidence would be adverse to the defendant, and in such a case the plaintiff is entitled to a directed verdict. There are similar decisions in Missouri, Illinois, Iowa, Tennessee, Ohio, Mississippi and New York. See 153 A.L.R. 1134 at 1140 (1944). But compare, Foltis v. City of New York, supra note 4; Chesnut v. Louisville and N.R. Co., 335 Ill. App. 254, 81 N.E. (2d) 660 (1948); Glowacki v. North Western Ohio Ry. and Power Co., 116 Ohio St. 451, 157 N.E. 21 (1927).

[12] Robinson v. Higgins, supra note 10; Dierman v. Providence Hospital, supra note 11.