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EVIDENCE-RES IPSA LOQUITUR-EVIDENCE OF SPECIFIC NEGLIGENCE AS AFFECTING RELIANCE UPON GENERAL NEGLIGENCE

Frank Bowen, Jr. S.Ed.
University of Michigan Law School

EVIDENCE—RES IPSA LOQUITUR—EVIDENCE OF SPECIFIC NEGLIGENCE AS AFFECTING RELIANCE UPON GENERAL NEGLIGENCE—Plaintiff sued in New York to recover for injuries sustained in a crash of an airplane owned and operated by the defendant. Plaintiff's pleading and proof relied upon general negligence and res ipsa loquitur, but after evidence of specific negligence was elicited upon cross examination of defendant's witness, plaintiff also used such specific negligence in argument to the jury. The defendant excepted to the jury instruction which gave the plaintiff the benefit of the res ipsa loquitur doctrine. Verdict was for the plaintiff. On appeal, *held*, the plaintiff was entitled to the benefit of the res ipsa loquitur doctrine, but reversed on other grounds. *Lobel v. American Airlines, Inc.*, (2d Cir. 1951) 192 F. (2d) 217.

The plaintiff in a negligence action has both the burden of persuading the trier of fact that the defendant was more likely negligent than not and the burden of going forward with the evidence of such negligence until he has established a prima facie case.[1] However, when the plaintiff's only available evidence is circumstantial and so remote that a prima facie case ordinarily would not be established, there are certain cases in which the plaintiff may

[1] McCloskey v. Koplar, 329 Mo. 527, 46 S.W. (2d) 557 (1932); 9 WIGMORE, EVIDENCE, 3d ed., §2485 (1940).

rely upon the doctrine of res ipsa loquitur.[2] Depending upon the jurisdiction, either an inference[3] or a presumption[4] of negligence is raised by that doctrine if the plaintiff can prove that (1) the injury was received in circumstances which would not normally occur in the absence of negligent conduct, (2) the apparatus causing the injury was in the sole control and use of the defendant, and (3) the accident occurred irrespective of any voluntary act on the part of the plaintiff.[5] The defendant may then offer evidence of the use of due care[6] or of other facts[7] negating the implication of negligence as a cause of the injury. The accessibility of evidence to the defendant as contrasted with the practical inaccessibility of evidence to the plaintiff is said to be the basis of the rule.[8] Courts are divided, however, as to whether a plaintiff who alleges specific negligent conduct may also allege general negligence in order to prove res ipsa loquitur, and rely upon both for a verdict.[9] It is assumed in the principal case that the New York courts would have denied the instruction as to res ipsa loquitur had the specific negligence been alleged,[10] the reason apparently being that the plaintiff should not be allowed the benefit of less stringent proof if he is also in a position to rely upon specific negligent conduct.[11] This reason for the method of pleading seems insufficient to deny a plaintiff the benefit of res ipsa loquitur when, as in the principal case, neither his pleading nor his direct proof shows reliance upon specific

[2] Byrne v. Boadle, 2 H. & C. 772, 159 Eng. Rep. 299 (1863). Neither Michigan nor South Carolina recognizes the doctrine, Mitchell v. Stroh Brewing Co., 309 Mich. 231, 299 N.W. 706 (1944); Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E. (2d) 857 (1941).

[3] George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E. (2d) 455 (1941).

[4] Terre Haute & I.R. Co. v. Sheeks, 155 Ind. 74, 56 N.E. 434 (1900). There is some authority that a res ipsa loquitur case will shift the burden of persuasion, Southeastern Greyhound Lines v. Callahan, 244 Ala. 449, 13 S. (2d) 660 (1943); cases collected, 167 A.L.R. 658 (1947).

[5] Ybarra v. Spangard, 25 Cal. (2d) 486 at 489, 154 P. (2d) 687 (1944); 9 WIGMORE, EVIDENCE, 3d ed., §2509 (1940).

[6] Hinds v. Wheaton, 67 Cal. App. (2d) 456, 154 P. (2d) 720 (1945). If a presumption is raised, the defendant must offer rebuttal evidence or suffer a directed verdict. Prosser, "The Procedural Effects of Res Ipsa Loquitur," 20 MINN. L. REV. 241 at 244 (1936).

[7] Central of Georgia R. Co. v. Robertson, 203 Ala. 358, 83 S. 102 (1919). More often this type of evidence is said to take the case out of the res ipsa loquitur doctrine. Parker v. James Granger, Inc., 4 Cal. (2d) 668 at 676, 52 P. (2d) 226 (1935).

[8] 9 WIGMORE, EVIDENCE, 3d ed., §2509 (1940). But the doctrine is applicable even though plaintiff could have obtained evidence by use of discovery, Menth v. Breeze Corp., 4 N.J. 428 at 437, 73 A. (2d) 183 (1950), or when the defendant is dead, Weller v. Worstall, 50 Ohio App. 11, 197 N.E. 410, affd. 129 Ohio St. 596, 196 N.E. 637 (1935).

[9] Compare Pearson v. Butts, 224 Iowa 376, 276 N.W. 65 (1937) with Leet v. Union Pacific R. Co., 25 Cal. (2d) 605, 155 P. (2d) 42 (1944). Cases collected, 160 A.L.R. 1450 (1946).

[10] Principal case at 220, following Goodheart v. American Airlines, Inc., 1 N.Y.S. (2d) 288 (1938) but citing Leed v. Robert Joshua, Ltd., 72 N.Y.S. (2d) 3 (1947) as throwing doubt on the proper rule.

[11] Goodheart v. American Airlines, Inc., supra note 10 at 291; Prosser, "The Procedural Effects of Res Ipsa Loquitur," 20 MINN. L. REV. 241 at 265 (1936).

negligence.[12] Res ipsa loquitur is a rule of evidence,[13] however, and regardless of either the particular method of pleading or intended reliance, the benefit of the doctrine will be denied if the proof, by disclosing the precise cause of the injury, eliminates other possible inferences of negligence.[14] On the other hand, the mere introduction of evidence of possible specific negligence may not destroy other possible inferences from the circumstances of the particular case.[15] When these circumstances allow only limited possibilities of negligent conduct, any attempt to prove specific negligence is likely to negate other possible inferences of negligence.[16] However, if it is conceded that an aviation accident case is a proper one for the use of the res ipsa loquitur doctrine,[17] then the inferences of possible negligence are numerous, and, as was properly held in the principal case, the precise establishment of specific negligence should be required to eliminate other possible inferences.[18] The principal case shows how common sense analysis of res ipsa loquitur problems in terms of circumstantial evidence and the particular facts involved could eliminate much of the confusion that surrounds use of the Latin tag.[19]

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[12] Principal case at 220.

[13] Southern Pacific Co. v. Hanlon, (9th Cir. 1925) 9 F. (2d) 294; Barger v. Chelpan, 60 S.D. 66, 243 N.W. 97 (1932).

[14] Gill v. Northwest Airlines, Inc., 228 Minn. 164, 36 N.W. (2d) 785 (1949).

[15] Cassady v. Old Colony Street R. Co., 184 Mass. 156, 68 N.E. 10 (1903); Leed v. Robert Joshua, Ltd., supra note 10; cases collected, 93 A.L.R. 609 (1934).

[16] Dufresne v. Theroux, 69 R.I. 280, 32 A. (2d) 609 (1943).

[17] Compare McLarty, "Res Ipsa Loquitur in Airline Passenger Litigation," 37 VA. L. REV. 55 (1951) with O'Conner, "Res Ipsa in the Air," 22 IND. L.J. 221 (1947); cases collected 6 A.L.R. (2d) 528 (1949).

[18] Note 14 supra.

[19] Galbraith v. Busch, 267 N.Y. 230 at 234, 196 N.E. 36 (1935); Prosser, "Res Ipsa Loquitur in California," 37 CALIF. L. REV. 183 at 232 (1949).