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TORTS - EVIDENCE - RES IPSA LOQUITUR DOCTRINE - APPLICATION IN PENNSYLVANIA

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TORTS — EVIDENCE — RES IPSA LOQUITUR DOCTRINE — APPLICATION IN PENNSYLVANIA — The plaintiff sued defendant power company for damages resulting from the destruction of his building by fire. The electricity furnished by defendant, after being reduced by a transformer, passed from its main line through an auxiliary line to a point a few inches from plaintiff's building where it was connected with the wiring system of the building which had been installed, and at the time of the accident was controlled, by plaintiff. Failing to show by direct proof that the transformer was defective and the proximate cause of the loss, plaintiff's claim for negligent destruction of his building was predicated upon the doctrine of res ipsa loquitur. *Held*, affirming the decision of the lower court, that the doctrine of res ipsa loquitur was inapplicable because the defendant had not shown that a defect in his own wiring system was not the proximate cause of the destruction of the building. *Clark v. Pennsylvania Power & Light Co.*, 336 Pa. 75, 6 A. (2d) 892 (1939).

In Pennsylvania the following elements are necessary before the plaintiff may invoke the res ipsa loquitur doctrine in his favor: (1) the accident must be of such a nature that it would not have ordinarily happened if those in charge of the instrumentality alleged to be the cause of the accident used due care; [1] (2) the circumstances constituting the physical cause of the accident must be under the complete control of the defendant; [2] (3) the accident must be one which the defendant because of his superior knowledge of its cause would be in a better position to explain; [3] (4) the defendant must owe an extensive duty to the plaintiff.[4] The result of this last requirement is practically to restrict the applica-

[1] Fitzpatrick v. Penfeld, 267 Pa. 564, 109 A. 653 (1920).

[2] Zahniser v. Pennsylvania Torpedo Co., 190 Pa. 350, 42 A. 707 (1899).

[3] Norris v. Philadelphia Electric Co., 334 Pa. 161, 5 A. (2d) 114 (1939). Although this element has existed in most of the cases in Pennsylvania, it is doubtful whether the court would reject the application of the doctrine merely because the evidence was equally accessible.

[4] Johns v. Pennsylvania Ry., 226 Pa. 319, 75 A. 408 (1910); Fitzpatrick v. Penfeld, 267 Pa. 564 at 577, 109 A. 653 (1920), where the court said that the doc-

tion of the doctrine to common carriers and public utilities.[5] Although in many states the extensiveness of the duty may be important,[6] in no other jurisdiction is its application restricted to the existence of such an extraordinary duty.[7] In the principal case there is an indication that the plaintiff may plead specific acts of negligence without waiving his right to rely upon the res ipsa loquitur doctrine.[8] Once the doctrine is applied, courts in this jurisdiction have consistently held that the effect is to shift the burden of proof to the defendant, who must then show that his actions were not negligent or run the risk of having a verdict directed against him.[9] In one aspect the concept has been liberalized, so that, despite the existence of an intervening agency under plaintiff's control, the doctrine may still be applied.[10] But the plaintiff must show by direct proof that the intervening act under his control was not the proximate cause of the accident.[11] In the principal case the court justifies this on the ground that, when the doctrine is applied, it has the effect of actually shifting the burden of proof to the defendant.[12] However, the real justification would seem to lie in the fact that the doctrine is being extended to cover a case where the defendant

trine applied only when, "there is an absolute duty or obligation amounting practically to that of an insurer." The term absolute duty is used loosely in this case and other cases purporting to follow the same principle. If the term were used in its strict sense, the question of presumption of negligence would be irrelevant, as the existence of an absolute duty owed by the defendant to the plaintiff justifies recovery irrespective of the question of negligence. It is evident then that the language of the court refers not to cases where an absolute duty exists, but rather to cases where a rather extensive duty is owed, viz., public carrier.

[5] But see, Dougherty v. Philadelphia Rapid Transit Co., 257 Pa. 118, 101 A. 344 (1917), where the court refused to apply the doctrine of res ipsa loquitur, but was willing to take a very broad interpretation of the concept of circumstantial evidence so that the case went to the jury. See also, Lanning v. Pittsburg Rys., 229 Pa. 575, 79 A. 136 (1911), where the same distinction between doctrines of circumstantial evidence and res ipsa loquitur is made. Query, is this distinction sound? See, 59 A. L. R. 468 (1929) for justification. But see Prosser, "The Procedural Effect of Res Ipsa Loquitur," 20 MINN. L. REV. 241 (1936); Heckel and Harper, "Effect of the Doctrine of Res Ipsa Loquitur," 22 ILL. L. REV. 724 (1928).

[6] The greater the duty the more willing the courts are to apply the doctrine. See Heckel and Harper "Effect of Doctrine of Res Ipsa Loquitur," 22 ILL. L. REV. 724 (1928).

[7] See Norris v. Philadelphia Electric Co., 334 Pa. 161, 5 A. (2d) 114 (1939). In a rather extensive discussion of the doctrine, the court does not expressly limit the doctrine to the public utility or public carrier cases, but nowhere is the doctrine expressly repudiated.

[8] 31 MICH. L. REV. 817 (1933).

[9] Johns v. Pennsylvania Ry., 226 Pa. 319, 75 A. 408 (1910); Davis v. Kerr, 239 Pa. 351, 86 A. 1007 (1913); Shaughnessey v. Director General of Railroads, 274 Pa. 413, 118 A. 390 (1922).

[10] Thus, the court in the principal case said that the doctrine might have applied. See Larrabee v. Des Moines Tent & Awning Co., 189 Iowa 319, 178 N. W. 373 (1920), for opposing view.

[11] Lynch v. Meyersdale Electric Light, H. & P. Co., 268 Pa. 337, 112 A. 58 (1920).

[12] Supra, note 9.

is not actually in control of the entire situation. To the extent that plaintiff controls it, he must show that the instrumentality within his control did not cause the loss. It is doubtful whether the courts would require the same high degree of proof of causation in a situation where the plaintiff had no control of the facts and circumstances surrounding the accident.[13] In at least one case the court has indicated that it would not require strict compliance.[14] It is submitted, therefore, that the arbitrary distinctions developed by the decisions of the Pennsylvania court give support to the contention that the res ipsa loquitur doctrine should be swept away and the doctrine of circumstantial evidence substituted.[15]

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[13] Shaughnessy v. Director General of Railroads, 274 Pa. 413, 118 A. 390 (1922).

[14] Lynch v. Meyersdale Electric Light, H. & P. Co., 268 Pa. 337, 112 A. 58 (1920).

[15] 3 UNIV. CHI. L. REV. 126 (1935).