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Max Kaminoff

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COMMENT

THE DOCTRINE OF RES IPSA LOQUITUR IN WASHINGTON

Under the doctrine of *res ipsa loquitur*, where proof is made that an injury occurred under certain circumstances, negligence will be presumed[1] from those circumstances. It is the purpose

[1]As will be pointed out later, Washington is one of those jurisdictions which hold that the doctrine of *res ipsa loquitur* merely permits the jury to draw an inference of negligence from the circumstances proved. It is therefore technically incorrect to speak of a "presumption" arising by virtue of the doctrine, in Washington, but as that language is uniformly used by the authorities, and by the Washington court itself, for the sake of uniformity of language, "presumption" will be used where "permissible inference" would be more accurate.

of this comment to discuss the doctrine as it exists in Washington from the standpoint of: (1) Under what circumstances will the doctrine be applied; (2) What effect will be given to the doctrine when it is applied; and (3) Will the applicability of the doctrine be affected by the plaintiff's pleading and attempting to prove specific acts of negligence.

Before any presumption can arise the circumstances from which it is to arise must first be established. In other words, even though the plaintiff relies on the doctrine of *res ipsa loquitur* for recovery, he still has the duty of proving those facts and circumstances from which the inference of negligence is to be drawn.[2] As Harper puts it, "the plaintiff must still show what happened. The presumption of *res ipsa loquitur* relieves him from showing how it happened."[3] For example, the plaintiff who claims that the defendant negligently allowed a barrel of flour to fall on him, must first prove that a barrel of flour did fall on him, and, that the barrel of flour fell from a window in the defendant's shop. After these facts have been established, the presumption will arise, but not until then.

Thus, in a Washington case, where the plaintiff, while in a Turkish bath, became unconscious, and in some unexplained manner suffered burns, *res ipsa loquitur* was held to be inapplicable, there being no proof of what had rendered him unconscious.[4] He may have fallen asleep and then been burned by leaning against the pipes. "The cause of the accident—the offending instrumentality—must be identified before one charged is put to answer."[5]

Having established the circumstances surrounding the injury, the basic element in determining the applicability of *res ipsa loquitur* in any specific case, is whether or not the circumstances are such that normal experience indicates that the injury would not have happened in the absence of negligence on the part of

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[2]In many of these cases, the plaintiff will have a hard time proving even these preliminary facts. In Norton v. Pacific Power & Light Co., 79 Wash. 625, 140 Pac. 905 (1914), therefore, it was held that while the burden of proving that the gas pipe over which plaintiff had stumbled belonged to the defendant, was on the plaintiff, since the question of the company's ownership was "peculiarly within its own knowledge, and if it were not the owner thereof, such fact could easily be proven by it, . . . we are constrained to view the circumstances as making the burden rest somewhat more lightly . . . than as if proof of the ownership of the pipe . . . was equally available to both parties."

[3]HARPER, TORTS. (1933) § 77.

[4]Brothers v. Grays Harbor Bldg. Co., 152 Wash. 19, 276 Pac. 896 (1929).

[5]McClellan v. Schwartz, 97 Wash. 417, 166 Pac. 783 (1917).

In Parmalee v. Chicago, Milwaukee and St. Paul Ry., 92 Wash. 185, 158 Pac. 977 (1916), the plaintiff proved that the deceased, a brakeman, died as the result of a fall from a train. The presence of a defect on the train was also proved. There being no proof, however, that the fall was caused by the defect, *res ipsa loquitur* was held inapplicable, the court saying: ". . . the proof fails to bring the deceased in contact with the alleged defect. It shows at best only a possibility."

But compare Lang v. Puget Sound Navigation Co., 189 Wash. 353, 65 P. (2d) 1069 (1937), where an intoxicated passenger died from a fall. The removable railing of his upper berth was found on the floor. *Res ipsa loquitur was applied.* ". . . the jury was warranted in inferring that the railing gave way because the lugs at the end had not been properly placed in the sockets on the wall."

the defendant. As the Washington court put it, "The rule is based upon the apparent fact that the accident could not have happened without negligence . . .; or upon the literal meaning of the expression, that the thing itself speaks, and shows *prima facie* that the . . . [defendant] was negligent."[6]

The mere fact of injury is insufficient in itself to raise any presumption of negligence.[7] The presumption arises from the circumstances surrounding the injury, and then only when they "are so unusual and of such a nature that it could not well have happened" without negligence.[8] The circumstances must "speak" negligence. Where they do, *res ipsa loquitur* is applicable.[9] Where

[6]DeYoe v. Seattle Electric Co., 53 Wash. 588, 102 Pac. 446 (1909).

[7]Hawkins v. Fremont St. Cable Ry. Co., 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72 (1892); Allen v. Northern Pacific Ry. Co., 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804 (1904); Valentine v. Northern Pacific Ry. Co., 70 Wash. 95, 126 Pac. 99 (1912); Hogg v. Standard Lumber Co., 52 Wash. 8, 100 Pac. 151 (1909); Long v. McCabe and Hamilton, 52 Wash. 422, 100 Pac. 1016 (1909); Samardege v. Hurley-Mason Co., 72 Wash. 459, 130 Pac. 755 (1913); Dougan v. City of Seattle, 76 Wash. 621, 136 Pac. 1165 (1913); Parmalee v. Chicago, Milwaukee & St. Paul Ry., *supra*, n. 5; Girocamo v. Tribble, 70 Wash. 25, 126 Pac. 67 (1912); Toler v. N. P. Ry. Co., 97 Wash. 700, 166 Pac. 778 (1917); Brothers v. Grays Harbor Bldg. Co., *supra*, n. 4; Haydon v. Bay City Fuel Co., 167 Wash. 212, 9 P. (2d) 98 (1932).

See also the cases cited *infra*, n. 11.

[8]Firebaugh v. Seattle Electric Co., 40 Wash. 658, 82 Pac. 995, 2 L. R. A. (N. S.) 836, 111 Am. St. Rep. 990 (1905).

[9]*Res ipsa loquitur* was applied in the following situations: where the controller on a street car exploded, Firebaugh v. Seattle Electric Co., *supra*, n. 8; where two street cars, or railroad trains collided, Peterson v. Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 53 L. R. A. 586 (1900), Howe v. Northern Pacific Ry., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949 (1902), Williams v. Spokane Falls & N. Ry., 39 Wash. 77, 80 Pac. 1100 (1905), Russell v. Seattle, Renton & Southern Ry., 47 Wash. 500, 92 Pac. 288 (1907), Jordan v. Seattle, R. & S. Ry, 47 Wash. 503, 92 Pac. 284 (1907), Harris v. Puget Sound Electric Ry., 52 Wash. 289, 100 Pac. 838 (1909); where railroad train was derailed, Pate v. Columbia and P. S. Ry. Co., 52 Wash. 166, 100 Pac. 324 (1909); where street car skidded because of caterpillars on the track and the motorman knew of the danger, Bradley v. City of Seattle, 160 Wash. 100, 294 Pac. 554 (1930); where auto bus got out of control, Poropat v. Olympic Peninsula Motor Coach Co., 163 Wash. 78, 299 Pac. 979 (1931); where plaintiff was hurt as a result of blasting by defendant, Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621 (1894), Britz v. Houlehan, 77 Wash. 506, 137 Pac. 1035 (1914), Briglio v. Holt & Jeffrey, 85 Wash. 155, 147 Pac. 877 (1915); where child was hurt by dynamite caps left by defendant, Crabb v. Wilkins, 59 Wash. 302, 109 Pac. 807 (1910); where consumer got shock while trying to turn on electric light, Abrams v. City of Seattle, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916 (1910); where plaintiff fell down elevator shaft, Moohr v. Victoria Investment Co., 146 Wash. 251, 262 Pac. 643 (1928); where scaffolding collapsed, Cleary v. General Contracting Co., 53 Wash. 254, 101 Pac. 888 (1909), Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 Pac. 39, L. R. A. 1915F, 15 (1913); where wheel fell off small truck used for wheeling iron, Graf v. Vulcan Iron Works, 59 Wash. 325, 109 Pac. 1016 (1910); where handcar used in transporting employees was derailed, Rosellini v. Salsich Lumber Co., 71 Wash. 208, 128 Pac. 213 (1912). Falling objects: Anderson v. McCarthy Dry Goods Co., 49 Wash. 398, 95 Pac. 325, 16 L. R. A. (N. S.) 931, 126 Am. St. Rep. 870 (1908) (overhead carrier basket); Gibson v. Chicago, Milwaukee & Puget Sound Ry., 61 Wash. 639 (1911) (rock fell on employee who reasonably relied on statement that the particular spot was safe); Poth v. Dexter-Horton Estate, 140 Wash. 272, 248 Pac. 374 (1926) (window shade roller). Also, where

they do not—that is, where they are not "unusual", or where they leave room for different presumptions,[10] *res ipsa loquitur* is not applicable.[11]

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defendant cranked airplane without blocking the wheels, Genero v. Ewing, 176 Wash. 78, 28 P. (2d) 116 (1934); where defendant maintained an improperly lighted area adjoining the sidewalk, into which plaintiff fell, Hanna v. Bodler, 173 Wash. 460, 23 P. (2d) 396 (1933); where head of mallet came off while being used by patron of amusement park, Wodnik v. Luna Amusement Co., 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N. S.) 1070 (1912); where railing of upper berth gave way, Lang v. Puget Sound Navigation Co., 189 Wash. 353, 65 P. (2d) 1069 (1937); where defendant's automobile was on wrong side of street at time of collision, Lauber v. Lyon, 188 Wash. 644, 63 P. (2d) 389 (1936), Crowe v. O'Rourke, 146 Wash. 74, 262 Pac. 136 (1927), Thomas v. Adams, 174 Wash. 118, 24 P. (2d) 432 (1933); where parked car ran down an incline, Oberg v. Berg, 90 Wash. 435, 165 Pac. 391 (1916), Kolbe v. Public Market Delivery & Transfer, 130 Wash. 302, 226 Pac. 1021 (1924); where ammonia fumes escaped from a refrigeration plant, Highland v. Wilsonian Investment Co., 171 Wash. 34, 17 P. (2d) 631 (1932).

[10]Girocamo v. Tribble, *supra*, n. 7.

[11]No presumption of negligence was held to arise in the following situations:

Where the injury was caused by failure to supply sufficient employees, Rosin v. Donahar Lumber Co., 63 Wash. 430, 115 Pac. 833, 40 L. R. A. (N. S.) 913 (1911); fire of unknown origin, Hughes v. Oregon Improvement Co., 20 Wash. 294, 55 Pac. 119 (1898); where customer tripped over scale, Engdal v. Owl Drug Co., 183 Wash. 100, 48 P. (2d) 236 (1935); injury caused by defect in floor or stairway, Riley v. Pacific Outfitting Co., 185 Wash. 497, 55 P. (2d) 1058 (1936); where automobile skidded, Osborne v. Charbneau, 148 Wash. 359, 268 Pac. 884, 64 A. L. R. 251 (1928), Martin v. Bear, 167 Wash. 327, 9 P. (2d) 365 (1932); where injury was caused by jerk of cable car, railroad train, etc., Allen v. N. P. Ry. Co., 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804 (1904), DeYoe v. Seattle Electric Co., *supra*, n. 6, Wile v. Northern Pacific Ry., 72 Wash. 82, 129 Pac. 889, L. R. A. 1916C, 355 (1913), Wade v. North Coast Transportation Co., 165 Wash. 418, 5 P. (2) 985 (1931); in suits against physicians and dentists for malpractice, Hoffman v. Watkins, 78 Wash. 118, 138 Pac. 664 (1914), Inglis v. Norton, 99 Wash. 570, 169 Pac. 962 (1913), Thomson v. Virginia Mason Hospital, 152 Wash. 297, 277 Pac. 69 (1929), Brear v. Sweet, 155 Wash. 474, 284 Pac. 803 (1930), Prather v. Downs, 164 Wash. 427, 2 P. (2d) 709 (1931), Brant v. Sweet Clinic, 167 Wash. 166, 8 P. (2d) 972 (1932), Bruginski v. Lane, 177 Wash. 121, 30 P. (2d) 970 (1934), Gross v. Partlow, 190 Wash. 489, 68 P. (2d) 1034 (1937).

While normally a presumption of negligence arises from the fact of a parked car rolling down an incline, *supra*, n. 9, in Joseph v. Schwartz, 128 Wash. 634, 224 Pac. 5 (1924), where the evidence showed that the car had stood for five or six hours before moving down the incline, *res ipsa loquitur* was held inapplicable. While a collision between two street cars will raise a presumption of negligence, n. 9, *supra*, a collision between a street car and an automobile will not. Hoopman v. City of Seattle, 122 Wash. 379, 210 Pac. 783 (1922). In Lewinn v. Murphy, 63 Wash. 356, 115 Pac. 740, L.R.A. 1917E, 198, Ann. Cas. 1912D, 433 (1911) where the plaintiff who had been struck by a falling object, was an employee of the defendant's, *res ipsa liquitur* was held inapplicable, the court holding that while a case in which a pedestrian is hurt by a falling board "readily falls within the true application of the rule," the rule would not apply in the case of a worker, the difference being that in the case of a pedestrian there is "no possible defense of acts of fellow servants, assumption of risk, contributory negligence, or any other that might be applied in the case of an injured employee." But again, where the facts eliminate blame on the part of the employee, *res ipsa loquitur* will be applied. LaBee v. Sultan Logging Co., 51 Wash. 81, 97 Pac. 1104, 20 L. R. A. (N. S.) 405 (1908); Gibson v. Chicago, Milwaukee & P. S. Ry., 61 Wash. 639, 112 Pac. 919 (1911).

In addition to the requirement that the circumstances "speak" negligence, "a circumstance *necessary* to its application is that the injured party . . . is not in a position to explain the cause, while the party charged is in a position where he is, or if he has exercised reasonable care should be, able to explain and show himself free from negligence, if in fact he was so." (Italics supplied)[12] "If the circumstances do not suggest or indicate superior knowledge or opportunity for explanation on the part of the party charged, or if the plaintiff has equal or superior means of information, the doctrine will not apply."[13]

Obviously, exclusive control of the offending instrumentality in the defendant is essential before it can logically be said that the circumstances suggest negligence on his part, and in order that he have superior opportunity for explanation.[14] That does not mean, however, that the mere fact that the plaintiff was a physical actor in bringing about his injuries will bar application of the doctrine. For when the injury is caused by a defect in the instrumentality, if there was no duty on the plaintiff to inspect the instrument, control will have been in the defendant even though the plaintiff was the one using the instrumentality at the time of the injury.[15] On the other hand, where the injury was the result of the way in which the instrumentality was used, then, if the

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[12]Penson v. Inland Empire Paper Co., *supra*, n. 9.

[13]Lynch v. Ninemire Packing Co., 63 Wash. 423, 115 Pac. 838, L. R. A. 1917E, 178 (1911). See also Johnson v. Columbia & P. S. Ry. Co., 74 Wash. 417, 133 Pac. 604 (1913).

The logical result of this requirement is that where an employee is injured by "an implement of simple structure presenting no complicated question of power, motion, or construction, and intelligible in all of its parts to the dullest intellect," *res ipsa loquitur* will not be applicable, "for there is no reason known to the law why a person handling such instrument and brought in daily contact with it, should not be chargeable equally with the master with a knowledge of its defects." Cole v. Spokane Gas & Fuel Co., 66 Wash. 393, 119 Pac. 831 (1911).

[14]". . . and when the . . . instrumentality . . . is under the exclusive control and management of the defendant so that he is in a better position to prove his innocence than the plaintiff is to prove his negligence, there exists *a res ipsa loquitur* case." HARPER, TORTS, (1933) § 77.

"This may be said to be the 'reason' for the rule, and usually takes the form of the instrument or appliance causing the injury being under the defendant's control and management. Indeed it has sometimes been declared that the instrumentality must have been under the defendant's exclusive control, otherwise the question of proximate cause complicates the issue and destroys the presumption because the injury may have been as easily due to the negligence of a third person." Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur*, (1928) 22 Ill. L. R. 724.

[15]Thus, the doctrine was applied: Where plaintiff was using the mallet which injured him, Wodnik v. Luna Park Amusement Co., *supra*, n. 9; where plaintiff was injured by an awning crank which *she* was using, Thornton v. Van De Kamp's Dutch Bakers, 181 Wash. 213, 42 Pac. 799 (1935).

The justification for this result is that "insofar as the (plaintiff) was an actor, he was such actor along the lines of the express directions of the (defendant), and along lines which appellant's express directions told him that it was safe". Moohr v. Victoria Investment Co., *supra*, n. 9 (plaintiff fell down elevator shaft).

"There was no duty of inspection cast upon (the plaintiff) . . .; nor

plaintiff was the actor, control was in him, and *res ipsa loquitur* will obviously be inapplicable.

The prerequisites to the application of the doctrine, then, are: (1) that the circumstances be such as to logically allow a presumption of negligence; and (2) that the circumstances suggest superior knowledge or opportunity for explanation on the part of the party charged. And before these requirements can be said to exist, exclusive control in the defendant will be essential as a matter of logic.

Whether the circumstances of a particular case justify the application of the doctrine will be decided by the court, as a matter of law, when the sufficiency of the plaintiff's case is challenged at the close of his evidence; by a motion for non-suit or for a directed verdict; or when the plaintiff requests that the jury be instructed that *res ipsa loquitur* is applicable.

Having determined that the doctrine of *res ipsa loquitur* is properly applicable in a specific case, three possible effects might be given to it. First, it might be held to merely furnish some evidence of negligence, thereby getting the plaintiff past a non-suit and making a case for the jury. Secondly, it might be held to establish a *prima facie* case for the plaintiff which will entitle him to a directed verdict in the absence of any explanation by the defendant.[16] In this situation, the burden of proof remains on the plaintiff, but the burden of going ahead with the evidence shifts to the defendant. Finally, some jurisdictions hold that the doctrine has the effect of shifting the burden of proof to the defendant.[17]

The Washington decisions abound with statements to the effect that the presumption which arises when the doctrine of *res ipsa loquitur* is applied, shifts the "burden" to the defendant.[18] Yet,

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was the truck in his exclusive use or control. Its use was a mere incident to his main employment. It is apparent that the (defendant) did not intend such a waste of time or energy (inspection by employees of equipment which they used only occasionally as a mere incident to their main employment)". Graff v. Vulcan Iron Works, *supra*, n. 9 (where wheel came off a truck which the plaintiff was using to wheel iron around).

But when the circumstances indicate that the employee has, or is chargeable with equal or superior knowledge to that of the employer, *res ipsa loquitur* will not be applicable. *Supra*, notes 12 and 13.

[16]Regardless of the effect given to the doctrine, in order to rebut the presumption which has arisen, the defendant's explanation, of course, must be such that it negatives the inference of negligence, if uncontested. Thus, in Hayes v. Staples, 129 Wash. 436, 225 Pac. 417 (1924), though the defendant proved the accident was caused by the breaking of a channel lock on one of the wheels of the conveyance, he was not entitled to a directed verdict because that fact alone would not relieve him from liability. There still remained open the question of whether or not he had exercised proper care in looking after the lock, etc.

[17]HARPER, TORTS, (1933) § 77; Heckel and Harper, *supra*, n. 14.

[18]The language of the court has varied:

"It then became the duty of the defendant to meet this *prima facie* case." Rosellini v. Salsich Lumber Co., *supra*, n. 9; "the burden of explanation," Wodnik v. Luna Park Amusement Co., *supra*, n. 9; ". . . there has been an absolute failure to sustain the burden of proof thus imposed upon it," Russell v. Seattle, R. & S. Ry., *supra*, n. 9; "the

when that question was directly before the court in *Briglio v. Holt and Jeffery*[19] the court said:

> "The proper instruction as to the application of the presumption would be this: The jury should be instructed that the burden of proof is upon the plaintiff to establish all the controverted allegations of his complaint by a fair preponderance of the evidence; that when a situation is shown which necessarily infers negligence on the part of the defendant, or *res ipsa loquitur*, the burden then devolves upon the defendant to furnish an explanation or rebuttal of that presumption of negligence by producing evidence of his due care and proper caution, under the circumstances and conditions necessarily within the defendant's exclusive control. If then, after considering such explanation, on the whole case and on all the issues as to negligence, injury and damages, the evidence still *preponderates in favor of the plaintiff*, the plaintiff is entitled to recover, *otherwise not.*" (Italics supplied.)

In other words, the "burden" referred to in the Washington cases is merely the burden of going forward with the evidence. "This burden should not be confused with the burden of making the better case as between the plaintiff and the defendant. The plaintiff must have made the better case in the end by the preponderance of the evidence."[20] The burden of proof is not affected.[21]

And even though the burden of going forward with the evidence has shifted to the defendant, his failure to rebut, or to even attempt to rebut, the plaintiff's *prima facie* case, will not result in a directed verdict for the plaintiff, in Washington. The actual effect given to the doctrine in this jurisdiction was stated by the court in the following unequivocal language:

> " 'In our opinion, *res ipsa loquitur* means that the facts of occurrence warrant the inference of negligence, not

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burden of exculpatory explanation," Penson v. Inland Empire Paper Co., *supra*, n. 9.

These statements have misled as eminent an authority as Prof. Harper to state that Washington is one of those jurisdictions which hold that the application of the doctrine results in a shifting of the burden of proof.

[19]*Supra*, n. 9.

[20]Abrams v. City of Seattle, *supra*, n. 9.

"The doctrine does not dispense with the rule that the party who alleges negligence must prove it. It merely determines the mode of proving it, or what shall be *prima facie* evidence of negligence." Penson v. Inland Empire Paper Co., *supra*, n. 9.

"The doctrine is, in its application, no more than proof by circumstantial evidence." McClellan v. Schwartz, *supra*, n. 5.

Cf. Long v. McCabe & Hamilton, *supra*, n. 7.

[21]Harper approves of such a result. Once the defendant has explained how the accident happened "the parties are in precisely the same position that they would occupy in any negligence case". Any other result, instead of merely relieving the plaintiff of a disadvantage, would actually give him an unfair advantage over the defendant, and would be "distinctly erroneous". HARPER, TORTS, (1933) § 77.

> that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.' *Sweeney v. Erving*, 228 U. S. 233, 33 S. Ct. 416, Ann. Cas. 1914D, 905."
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> "If this case had been tried to a jury, rather than the court, the rule of *res ipsa loquitur* would have carried the case beyond a non-suit to the jury, but the weight of the inference would thereafter be for the jury, as it was in this case for the trial court."[22]

Thus, in Washington, the plaintiff who establishes a *res ipsa* case may not be non-suited. He has made a case for the jury. But the weight of the inference is for the jury to determine. It may find against the plaintiff even though the defendant has offered no explanation.[23] This represents the weakest of the three possible effects which might have been given to the doctrine.

Since, as we have seen, the doctrine of *res ipsa loquitur* is applicable only where the plaintiff is not in a position to explain how the accident occurred, does he lose the benefit of the doctrine if he also pleads and attempts to prove, specific acts of negligence? The Washington court has held that he does not. "The plaintiff is not to be deprived of the case her pleadings and proofs made

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[22]Genero v. Ewing, *supra*, n. 9.

Accord: "The doctrine . . . means that the jury . . . are warranted in finding . . .", Wodnik v. Luna Park Amusement Co., *supra*, n. 9; "it may be inferred from the facts," Abrams v. City of Seattle, *supra*, n. 9; "it was a reasonable and natural inference which the jury would be warranted in deriving from the facts," Crabb v. Wilkins, *supra*, n. 9; "the case should have been submitted for the jury to say whether negligence of the defendant was established," Anderson v. McCarthy Dry Goods, *supra*, n. 9; "The evidence, if believed to be true, would have warranted the jury in returning a verdict in favor of respondents (plaintiffs)," Hanna v. Bodler, *supra*, n. 9.

[23]In the Genero case, *supra*, n. 9, the court went on to say that "a careful reading of the record does not warrant a reversal of the trial court's findings. . . . we cannot say that the evidence preponderates against its findings". The inference is clear that under the proper circumstances, the plaintiff would be entitled to a directed verdict. There is no logical reason why that should not be so. That is, where the inference is so strong that reasonable minds could not differ, and the defendant offers no explanation, or an obviously inadequate one, a verdict in favor of the defendant would be *contra* to the evidence. "The doctrine is . . . no more than circumstantial evidence." McClellan v. Schwartz, *supra*, n. 5. However, no case has been found in Washington, in which the plaintiff, on this ground, was held to be entitled to a directed verdict. So while such a result may be theoretically possible in this jurisdiction, in the usual situation, the result will be as indicated above.

merely because she alleged a stronger case than she was able to prove.''[24]

There seems to be no logical reason why the result should be otherwise. The doctrine, in effect, says that under certain circumstances, an inference of negligence is valid. Why should that validity be affected by the plaintiff's attempt to prove specific acts of negligence, keeping in mind the fact that this applies only when the plaintiff's attempts to prove the specific acts are unsuccessful? Once the actual cause of the injury is established beyond controversy, of course, whether by the plaintiff or by the defendant, no presumptions will be involved.[25] An unsuccessful attempt to prove specific acts is not inconsistent with the requirement of inferior knowledge or lack of knowledge on the part of the plaintiff. On the contrary, it constitutes proof of his lack of knowledge. And if the injured plaintiff, in his perfectly justifiable effort to make as strong a case as possible, makes an unsuccessful effort to prove specific acts of negligence, why should the defendant, who by hypothesis knows what happened, escape liability by merely disproving the plaintiff's specific allegations? If the inference of negligence is good when the plaintiff doesn't plead and attempt to prove specific acts, there is no logical reason why it isn't just as good when he does. In either case, the defendant who is in possession of the facts, should have the burden of explaining what happened or of taking the risk of an adverse verdict on the basis of the presumption. The Washington doctrine seems sound.[26]

To summarize, then, the doctrine of *res ipsa loquitur* will be applied, in Washington, in any negligence case where (1) the circumstances surrounding the injury are such that normal experience indicates that it would not have happened in the absence of negligence, and (2) the circumstances suggest superior knowledge on the part of the defendant. When applied, a case for the jury has been made. And finally, the doctrine will be applied, under the proper circumstances, even though the plaintiff pleaded and attempted to prove specific acts of negligence in addition.

While one may at times be inclined to disagree with the court's decision as to the applicability of the doctrine in certain factual situations, the legal principles which the court has laid down as governing the application of, and the legal effect to be given to, the doctrine, appear to be sound.

MAX KAMINOFF.

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[24]Walters v. Seattle, R. & S. Ry. Co., 48 Wash. 233, 93 Pac. 419, 24 L. R. A. (N. S.) 788 (1908); Lobb v. Seattle, R. & S. Ry. Co., 48 Wash. 238, 93 Pac. 240 (1908); Kluska v. Yeomans, 54 Wash. 465, 103 Pac. 819, 132 Am. St. Rep. 1121 (1909); Hayes v. Staples, *supra*, n. 17.

"Language in Osborne v. Charbneau, 148 Wash. 359, 268 Pac. 884 . . . which might be construed in conflict was clearly *obiter*." Highland v. Wilsonian Investment Co., *supra*, n. 9.

[25]Kluska v. Yeomans, *supra*, n. 24; Topping v. Great Northern Ry., 87 Wash. 702, 151 Pac. 775 (1915); Grant v. Libby, McNeill & Libby, 160 Wash. 138, 295 Pac. 139 (1930); Engdal v. Owl Drug Co., *supra*, n. 11; Barnes v. J. C. Penney Co., 190 Wash. 633, 70 P. (2d) 311 (1937).

[26]Harper is in accord. "The better reasoning . . . seems to favor the view that such allegation of particular negligent acts does not preclude the plaintiff from relying upon the presumption created by the doctrine, although there are decisions by strong courts to the contrary." HARPER, TORTS, (1933) § 77.