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Murray B. Guterson

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COMMENTS

RES IPSA LOQUITUR: APPLICATION AND EFFECT

MURRAY B. GUTERSON

THE DOCTRINE of res ipsa loquitur has played a significant role in eighteen cases[1] appealed to the Washington Supreme Court since 1938.[2] Examination of these decisions will reveal that the doctrine of

[1] Keller v. Seattle, 200 Wash. 573, 94 P. 2d 184 (1939); Clark v. Bremerton, 1 Wn. 2d 689, 97 P. 2d 112 (1939); Anderson v. Harrison, 4 Wn. 2d 265 103 P. 2d 320 (1940); Bremer v. Shoultes, 7 Wn. 2d 604, 110 P. 2d 641 (1941); Hardman v. Younkers, 15 Wn. 2d 483, 131 P. 2d 177 (1942); Case v. Peterson, 17 Wn. 2d 523, 136 P. 2d 192 (1943); Mahlun v. Seattle School District, 21 Wn. 2d 89, 149 P. 2d 918 (1944); Wellons v. Wiley, 24 Wn. 2d 543, 166 P. 2d 852 (1946); D'Amico v. Conguista, 24 Wn. 2d 674, 167 P. 2d 157 (1946); Pacific Coast R.R. Co. v. Amer. Mail Line, 25 Wn. 2d 809, 172 P. 2d 226 (1946); Gardner v. Seymour, 27 Wn. 2d 802, 180 P. 2d 564 (1947); Morner v. Union Pac. R. Co., 31 Wn. 2d 282, 196 P. 2d 744 (1948); Carbery v. Fidelity Savings and Loan Assoc., 32 Wn. 2d 391, 201 P. 2d 726 (1949); Nopson v. Seattle, 33 Wn. 2d 772, 207 P. 2d 674 (1949); Covey v. Western Tank Lines, 36 Wn. 2d 381, 218 P. 2d 322 (1950); Shay v. Parkhurst, 38 Wn. 2d 341, 229 P. 2d 510 (1951); Emerick v. Mayr, 139 Wash. Dec. 20, 234 P. 2d 1079 (1951); Wyderas v. Dykstra, 139 Wash. Dec. 699, 238 P. 2d 1198 (1951).

[2] In 1938, a comment on this doctrine appeared in 13 WASH. L. REV. 215, by Mr. Max Kaminoff.

res ipsa is applied as circumstantial evidence at two stages of a negligence action, that its application is made in accordance with three court-made requisites as to the nature of the proof, and that it will be applied only in the event that the plaintiff in the trial court achieves the level of proof that is required for its application. It is the author's purpose to develop the subject within these limits, suggesting, perhaps, a guide to insure consistency in future applications.

When Does a Trial Court Apply Res Ipsa Loquitur?

According to a majority of American courts—in which this jurisdiction definitely falls, res ipsa loquitur is but a form of circumstantial evidence.[3] Hence its initial effect can be only a limited one—it permits the plaintiff to escape a nonsuit.[4] Even where the defendant does nothing, a jury question is presented; a plaintiff cannot on the strength of res ipsa alone have a directed verdict. The defendant, on the other hand, may so overcome by his evidence inferences arising out of res ipsa, that a verdict may be directed in his favor. If the issue of negligence is still in doubt when the defendant rests, res ipsa steps in again with the undefinable appeal to the jury of an instruction such as the following:

"You are instructed that when a thing which caused an injury to another is shown to be under the management and control of a person charged with negligence in the operation of such thing or the failure to keep it in reasonably safe condition, and if it is shown that an accident happened which in the ordinary course of things does not happen, if those in charge of its management and control exercise reasonable care, then the happening of said accident affords reasonable evidence in absence of explanation by the person charged with negligence, that the accident arose from want of reasonable care on the part of such person."[5]

The court, in quoting the instruction, went on to point out that although the burden of explanation devolves upon the defendant, in the final analysis, the plaintiff's evidence must preponderate in order for him to succeed.[6] "In other words, the procedural effect of a res ipsa

[3] Prosser, Torts § 44 ". . . some twenty-three jurisdictions clearly adopt this view, while half a dozen others tend toward it."

[4] This nonsuit would appear to be an inevitable consequence of plaintiff's failure to prove negligence in the ordinary manner.

[5] From D'Amico v. Conguista, *supra* note 1, at 684, 167 P. 2d at 162.

[6] "If then, after considering such explanations of the whole case, and of all the issues as to negligence, injury, and damages, the evidence still preponderates in favor of the plaintiff, then plaintiff is entitled to recover; otherwise not." D'Amico v. Con-

case is a matter of the strength of the inference to be drawn, which will vary with the circumstances of the case."[7] The burden of proof does not shift and even the burden of going forward does not change, for, of necessity, plaintiff must go first and prove what happened.

THE CONDITIONS PRECEDENT TO ITS APPLICATION

If this is the effect of the application of res ipsa on the trial level, what ought the conditions precedent to application of the doctrine be? In order for an injured party to derive the benefits of res ipsa loquitur, his case must comply with the following requirements, carried over somewhat indiscriminately from the earlier decisions:[8] (1) it must be an accident of a type that would not ordinarily occur without fault; (2) exclusive control of the instrumentality inflicting the injury must be in the defendant or his servants;[9] and (3) the defendant must have "superior means of information"[10] concerning the circumstances surrounding the accident. The third requirement—that the defendant be equipped with superior means of information—invites inquiry.

There is a minority group of states where the doctrine's effect is to permit more than a mere permissible inference of negligence to be

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guista, 24 Wn. 2d 674, 684, 167 P. 2d 157, 162 (1946). Sole contra authority claiming a shift in the burden of proof was found in dicta in Keller v. Seattle, 200 Wash. 573, 94 P. 2d 184 (1939). Actually the trial court had so instructed and on the appeal, the Supreme Court remained silent on this point.

[7] PROSSER § 44 (1941).

[8] As evidenced in Washington by a definition like the following: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Poth v. Dexter Horton Estate, 140 Wash. 272, 275, 248 Pac. 374, 375 (1926); Brothers v. Grays Harbor Bldg. Co., 152 Wash. 19, 276 Pac. 896 (1929); Highland v. Wilsonian Inv. Co., 171 Wash. 34, 17 P. 2d 631 (1932); Anderson v. Harrison, 4 Wn. 2d 265, 103 P. 2d 320 (1940); Mahlum v. Seattle School District No. 1, 21 Wn. 2d 89, 149 P. 2d 918 (1944); Pacific Coast R.R. Co. v. American Mail Line, 25 Wn. 2d 809, 172 P. 2d 226 (1946).

[9] "The reason for the prerequisite of exclusive control of the offending instrumentality is that the purpose of the rule is to require the defendant to produce evidence explanatory of the physical cause of an injury which cannot be explained by the plaintiff. If the defendant does not have exclusive control of the instrumentality producing the injury, he cannot offer a complete explanation and it would work an injustice upon him to presume negligence on his part and thus in practice demand of him an explanation when the facts indicate such is beyond his ability." Morner v. Union Pacific R. Co., 31 Wn. 2d 282, 296, 196 P. 2d 744, 751 (1948).

[10] "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 cannot be invoked." Morner v. Union Pacific R. Co., 31 Wn. 2d 282, 286, 196 P. 2d 744, 749 (1948). See also Gardner v. Seymour, 27 Wn. 2d 802, 180 P. 2d 564 (1947); Mahlum v. Seattle School District No. 1, 21 Wn. 2d 89, 149 P. 2d 918 (1944); Bremer v. Shoultes, 7 Wn. 2d 604, 110 P. 2d 641 (1941).

drawn from the evidence. In those states where the minority rule obtains, application of res ipsa creates a presumption which will give the plaintiff a directed verdict in the event the defendant offers no evidence to rebut it. In such a jurisdiction, it is within the bounds of reason to call for superior means of information on the part of defendant before subjecting him to the adverse directed verdict should he fail to rebut the presumption. But as has been stated, the doctrine does not produce such severe consequences in Washington. An examination of the cases has revealed the expected: the third element—superior means of information—has been lifted by the Washington court from the minority jurisdiction.[11] Actually, the factor of plaintiff's comparative ignorance should be of no consequence if those courts which res ipsa is given only the procedural effect of an inference from circumstantial evidence.[12] The practice of adopting the requirements of the minority and the operative effect of the majority restricts the effect of the doctrine to a level necessarily inferior to that of either.[13]

THE STATE OF THE PROOF AT WHICH THE DOCTRINE IS APPLIED

The remaining portion of the discussion will deal with what may be termed the "state of the proof" at which the doctrine will be applied. Generally stated, res ipsa loquitur will be applied in the manner already considered when, in the opinion of the trial court, the proof of the case of the injured party has reached a certain level—when he has shown *what* happened. Failure to achieve this level, or success in continuing beyond it, are both fatal to the application of res ipsa.

Recent cases do not reveal this distinction with any clarity, however. In *D'Amico v. Conguista,*[14] the court said, "Nor does the allegation

[11] Noting *Morner v. Union Pac. R. Co., supra,* note 10, the Washington Court called for "superior means of information." In so doing the court quoted from 45 C. J. 1205. On examining the jurisdictions cited for their textual material both C. J. and 65 C. J. S. 1001 list Illinois, New York, Rhode Island, and Virginia as their sources. The most recent cases in these jurisdictions are: Curley v. Ruppert, 272 App. Div. 441, 71 N.Y.S. 2d 578 (1947); Edmonds v. Heil, 333 Ill. App. 497, 77 N.E. 2d 863 (1948); Dufresne v. Theroux, 69 R.I. 280, 32 A. 2d 609 (1943); Seven Up Bottling Co. v. Gretes, 183 Va. 738, 27 S.E. 2d 925 (1943). Prosser lists these jurisdictions as subscribing to the minority procedural approach for many years. PROSSER, TORTS, 304 n. 45, citing Kay v. Metropolitan St. R. Co., 163 N.Y. 447, 57 N.E. 752 (1900); N.Y.C. & St. L. R. v. Blumenthal, 160 Ill. 40, 43 N.E. 809 (1895); Kearner v. Charles S. Tanner Co., 31 R.I. 203, 76 Atl. 833 (1910); Riggsby v. Tutton, 143 Va. 903, 129 S.E. 493 (1925).

[12] PROSSER § 43.

[13] Even more dissatisfying is the fact that no decision in our jurisdiction has turned on the absence of this element of superior means of information although our court has repeatedly included it within the prerequisites to application of *res ipsa.*

[14] Where plaintiff's husband was killed by a wheel which became disengaged from defendant's truck, rolled upon the curb, and struck him.

and proof of specific negligence deprive a plaintiff of the benefit of the rule."[15] Of a similar nature is this language: "This court has adopted the rule that, even though a plaintiff should base his action upon the doctrine of res ipsa loquitur, he may plead and prove specific acts of negligence on the part of the defendant and rely upon the presumptions of negligence, and also, upon his proof of specific acts of negligence in support of his right to recover."[16]

Then, in July of 1951, the following and seemingly contradictory approach was taken in *Emerick v. Mayr*: "Here the appellant alleged specific acts of negligence on the part of respondents and introduced evidence in support thereof. The question of respondent's negligence and the direct cause of the accident were squarely presented to the trier of fact, and there was no occasion to resort to the doctrine of res ipsa loquitur."[17] Does the foregoing truly point up an area of contradiction in the court's determination of whether or not to apply res ipsa loquitur, or, once again, would a use of more precise and definite language reconcile two apparently irreconcilable approaches?

Logically, no distinction should be drawn between the plaintiff who only shows *what* happened and the plaintiff who shows what happened and also *attempts* to make evident *how* or *why* the negligent act occurred—by pleading or introducing proof of specific acts of negligence. If the court will aid the plaintiff who can show only the former, the plaintiff who goes further in the presentation of his case certainly should not be penalized, and such has been the normal Washington result.[18] In light of this can there be any valid explanation for the

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[15] Also found in earlier Washington cases: Walters v. Seattle, Renton, and Southern R. Co., 48 Wash. 233, 93 Pac. 419 (1908); Kluska v. Yeomans, 54 Wash. 465, 103 Pac. 819 (1909).

[16] Case v. Peterson, 17 Wn. 2d 523, 529, 136 P. 2d 192, 195 (1943); D'Amico v. Conguista, 24 Wn. 2d 674, 167 P. 2d 157 (1946); Highland v. Wilsonian Inv. Co., 171 Wash. 34, 17 P. 2d 631 (1932). In the *Peterson* case, for example, plaintiff introduced testimony that a fence was overly charged with electricity and also that no notice was given—certain specific allegations of sub-standard conduct; still, the court permitted the instruction (a wire is not severely charged with electricity close to a road and without notice of such unless someone was negligent).

[17] Emerick v. Mayr, 139 Wash. Dec. 20, 22, 234 P. 2d 1079, 1080 (1951). Defendants were attempting to load an enormous log into plaintiff's truck to be hauled away. Log slipped causing injury. Plaintiff alleged (1) failure to use proper loading methods and (2) general negligence in permitting log to break away. The court declined to give the desired *res ipsa* instruction.

[18] Mahlum v. Seattle District, *supra,* note 10, Highland v. Inv. Co., *supra,* note 15, Case v. Peterson, *supra,* note 15. As stated "the allegation and proof of specific acts of negligence do not deprive the plaintiff of the benefit of the doctrine." A rationale for this very sound approach was stated in the *Peterson* case: "The reason for the rule we have adopted by these cases is that a plaintiff may not desire to rely wholly upon the presumption of negligence, but may wish to strengthen his case by proof of specific acts of negligence so that, if the trier of fact should believe the presumption had been

language in *Emerick v. Mayr*?[19] This writer so believes and also feels that such explanation may assist in explaining future holdings on the subject. The point is this: In the *Emerick* case, the plaintiff did more than introduce proof of the defendant's negligence; the plaintiff actually proved negligence. As the Supreme Court said in its opinion,[20] "We are of the opinion that it was established by a clear preponderance of the evidence that [defendants] were negligent. . . ."[21]

The language depicting a seemingly irreconcilable conflict can be attributed to broad statements such as, "The allegation and proof of specific acts of negligence do not deprive the plaintiff of the benefit of the doctrine."[22] Precisely, the preceding statement would declare that the pleading and introduction of proof does not deprive the plaintiff of the benefit of the doctrine, a declaration that is certainly true and yet quite obviously distinct from granting the application of res ipsa loquitur to the plaintiff who has successfully proven the specific act or acts of negligence—as was done in the *Emerick* case.[23] On but slight reflection it can be seen that this distinction is valid. Where the evidence clearly stamps the precise act or acts negligent, there is no longer room for inference, presumption, or conjecture;[24] to use res ipsa in instructing the jury would clearly work an injustice on the defendant whose testimony has been directed to softening the blow of the specific negligent acts leveled against him. When the plaintiff knows just how an injury occurred, the recovery must be predicated upon a

overcome by evidence submitted by the defendant, the plaintiff, if he has a cause of action, would, nevertheless, be entitled to recover upon his proof of the specific acts of negligence." 17 Wn. 2d 523, 529, 136 P. 2d 192, 195 (1943).

[19] Emerick v. Mayr (log-slipping case), *supra,* note 17.

[20] The *Emerick v. Mayr* opinion, *supra,* note 17, at 24, 234 P. 2d at 1082, reversed a trial court decision for the defendant and thus awarded the plaintiff the decision without resort to *res ipsa loquitur.*

[21] *Id.* at 24, 136 P. 2d at 1084. A portrayal of a specific type of negligence, the same as is normally necessary to be proven in any negligence case.

[22] Mahlum v. Seattle School District, *supra,* note 1, at 98, 149 P. 2d at 923.

[23] This point is quite vividly spotlighted by Mr. Kaminoff's language: "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." 13 WASH. L. REV. 215, at 223. See also Barnes v. J. C. Penney Co., 190 Wash. 633, 70 P. 2d 311 (1937).

[24] Carbery v. Fidelity Savings and Loan Assoc., 32 Wn. 2d 391, 201 P. 2d 726 (1949); also see Wellons v. Wiley, 24 Wn. 2d 543, 166 P. 2d 852 (1946) and Anderson v. Harrison, 4 Wn. 2d 265, 103 P. 2d 320 (1940). The language of the *Anderson* case was this: "This case is not an instance of an unsuccessful attempt to prove the precise cause, but, on the contrary, is an instance of a reliance upon definite causative facts, excluding all inferences of a cause or thing which, unexplained, does not happen, according to common experience, without fault on the part of the carrier. In such cases, the doctrine does not apply." 4 Wn. 2d at 273, 103 P. 2d at 324.

finding of facts constituting the negligence; it cannot then rest upon the doctrine. But the mere introduction in proof of evidence or an allegation that was not borne out in the trial is certainly no sound basis for denying the benefit of res ipsa loquitur to a plaintiff.

IDENTIFICATION OF THE OFFENDING INSTRUMENTALITY

As has been stated, the determination to invoke res ipsa loquitur depends upon: (1) establishing an unusual accident, (2) exclusive control of the instrumentality in the defendant, (3) the dubious requirement of superior knowledge, and (4) plaintiff's failure to prove the specific negligent act.

However, disturbing language in other Washington decisions must be reconciled to the rule. For example, in 1946, the court said: "It has been held that one charged under the doctrine of res ipsa loquitur is not to be put to his proof unless there is some showing of cause. . . . The cause of the accident—the offending instrumentality—*must be identified* before one charged is put to an answer."[25] (Italics supplied.) In *Gardner v. Seymour,*[26] the Washington court declared, "The [plaintiff] cannot substitute the doctrine of res ipsa loquitur for proof of proximate cause in the case . . . the proof of proximate cause cannot be left to conjecture or speculation." And, as recently as 1948, in *Morner v. Pacific Coast R.R. Co.,* the court stated the following: "Since . . . the injurious occurrence here involved resulted or could have resulted from the operation of one or more agencies or instrumentalities or from several independent agencies or instrumentalities operating concurrently, the doctrine of res ipsa loquitur was not applicable."[27]

In the preceding topic, proof of the definite cause of injury removed all need for inference and became the death blow, on a logical basis, to any aid from res ipsa. And now the *Pacific Coast, Gardner,* and *Morner* cases seem to confuse this reasoning by adding that without proving direct cause, a plaintiff cannot possibly benefit by the doctrine.

[25] Pacific Coast R. R. Co. v. American Mail Line, 25 Wn. 2d 809, 819, 172 P. 2d 226, 232 (1946); McClellan v. Schwartz, 97 Wash. 417, 166 Pac. 783 (1917).

[26] Gardner v. Seymour, 27 Wn. 2d 802, 812, 180 P. 2d 564, 571 (1947) (man fatally injured in fall down an elevator shaft).

[27] Morner v. Union Pac. R. Co., 31 Wn. 2d 282, 296, 196 P. 2d 744, 752 (1948) (where plaintiff's car and another truck collided while both were driving in the same direction, parallel to a railroad track, on which a train was also moving and emitting an enveloping vapor). It should further be noted that the absence of the second element of exclusive control on part of defendant in this case would also prevent application of the doctrine.

Nevertheless, it is submitted that the cases can be harmonized on the following basis: In every case, even where plaintiff seeks the support of res ipsa, "the plaintiff must still show what happened."[28] He must always go that far. As has been said, if he goes further and shows *how* the accident or injury occurred, the doctrine will not be applied in his favor—simply because he no longer needs it. But in these three cases, the truth of the matter is that the plaintiff in each failed even to prove what happened, and hence there is no basis whatsoever for the inference that the injury was caused by defendant's fault.[29] In each case, the plaintiff failed to perform the primary obligation of every complainant—that of establishing his adversary as the party directly responsible for his injury. This requirement is quite different from what at first blush the court's language seemed to demand, that is, proof of exactly *how* the accident occurred—the very thing which in fact will necessitate denying the application of res ipsa loquitur. The plaintiff must maintain this burden in every case; on certain occasions, where the facts permit, his inability to go further will be compensated for in part, at least, by res ipsa.

CONCLUSION

In general, it can be stated that the Washington cases in res ipsa loquitur during the past fourteen years have arrived at satisfactory

[28] HARPER, TORTS § 77 (1933).

[29] In *Pacific Coast R. R. Co. v. Amer. Mail Line*, 25 Wn. 2d 809, 172 P. 2d 226 (1946), there was no showing that the hitting of the scow by the vessel forced the scow to strike the dock and do the damage. In *Gardner v. Seymour*, 27 Wn. 2d 802, 180 P. 2d 564 (1947), the plaintiff's evidence was so slight that the party responsible for plaintiff's fall could just as well have been plaintiff himself. In *Morner v. Union Pac. R. R. Co.*, 31 Wn. 2d 282, 196 P. 2d 744 (1948), there was considerable doubt as to what agency caused the collision inflicting plaintiff's injuries—the driver of the car in which plaintiff was riding (who was attempting to pass a truck) or the train emitting the steam. *Res ipsa loquitur* will not salvage such incomplete cases for plaintiffs!

Another quite valuable point is made in the *Morner* decision when the court says: "However, assuming for the purposes of this decision that under the theory of [plaintiffs'] complaints and the evidence adduced by them in support thereof, the doctrine was applicable to the extent of taking the case beyond a non-suit [simply that the steam emission was the proven sole proximate cause] and thereby casting upon [the defendant] the burden of producing explanatory evidence as required by the rule, the question then arises whether, at the conclusion of all the evidence, it was necessary or proper to submit the doctrine to the jury under instructions by the court?" 31 Wn. 2d at 297, 196 P. 2d at 752. In other words, this statement presents an analysis of that type of case where by doing what every plaintiff must always do—prove what happened—the proof will, of necessity, have established how the injury was caused. By establishing the steam emission as the proximate cause, the only remaining question is whether in quantity or situs of emission that act was negligent. The *how* is included in the *what;* in those circumstances the doctrine is not to be invoked; not because plaintiff failed to qualify for its aid, but because necessarily he has gone beyond the point of inference.

results. The nonsuit is avoided and the instruction given when, on logical analysis, such a course is sound. But, as has been emphasized in this comment, the loose terminology the Washington court has used to explain its results has tended to reduce the precedent value of the individual case. Future opinions might be designed to provide analysis as sound as result, and language effectively distinguishing the bases of quite dissimilar results.