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Torts - Application of Res Ipsa Loquitur to Carrier-Passenger Cases

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done in class "B", "C", or "D" zones. When attempts have been made to banish churches to the business districts, it has been held that:

> "to require that churches be banished to the business district, crowded alongside filling stations and grocery stores, it is clearly not to be justified on the score of promoting the general welfare."[32]

This writer believes that the majority opinion, because it was decided contrary to the well considered and unanimous authority of other jurisdictions, is supported by insufficient persuasive argument, and could do great harm to private education, should be overruled by the Wisconsin Court at the earliest opportunity. If allowed to stand, it can mean a limitation of the right of parents to educate their children as their conscience directs, a right long ago established by the United States Supreme Court.[33] If the schools are forced into the business and industrial areas, or outside the city limits, these schools become less accessible and desireable. The state is then an active party to unwarranted limitation upon the right of all parents to educate their young as they see fit. The Wisconsin Supreme Court should have seriously pondered the clear language of the United States Supreme Court in *Pierce v. Society of Sisters:*[34]

> "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state. Those who nurtured him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."

CLAUDE KORDUS

Torts—Application of Res Ipsa Loquitur to Carrier-Passenger Cases—Action by plaintiff for injuries allegedly received while a passenger in defendant's taxicab, plaintiff claiming she was thrown or bounced against the inside roof of the cab. The cab driver, the only other witness, testified that there was no bump, swerving, marked change of speed or other occurrence which could account for the alleged injuries. The jury found that plaintiff was injured while a passenger, but that the cab driver was not negligent. Trial court granted a motion for new trial "in the interests of justice," holding that the doctrine of *res ipsa loquitur* applied and that answers to negligence questions were contrary to the great weight of the evidence.

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[32] State *ex rel* Synod of Ohio of United Lutheran Church in America v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515 (1942).

[33] Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

[34] Pierce v. Society of Sisters, *ibid.*

Held: Reversed. Assuming, but not determining, that *res ipsa* applies, the trial judge erred concerning its effect. The court abused its discretion when it gave the rule greater probative force than the jury did. Justice Currie, dissenting, agreed in principle with the majority's statement regarding the effect of the doctrine, and affirmatively held the case a proper one for application of *res ipsa loquitur.* He felt, however, that the discretion vested in the trial judge was sufficiently broad to authorize the order under review. *Mayer v. Boynton Cab Co.,* 66 N.W. 2d 137 (Wis. 1954).

The positive statement by Justice Currie that the doctrine of *res ipsa loquitur* applies in this case, and the assumption by the majority that it might apply, are of some significance in view of previous cases finding the doctrine inapplicable to auto accident cases. A recent law review article[1] on the question summarizes the author's findings by quoting *Linden v. Miller:*[2]

> "As a rule, in auto collision the direct cause of the accident and the controlling circumstances attendant thereon are usually not so within the control of a driver as to raise a presumption of negligence on his part. In other words, the doctrine of res ipsa loquitur does not usually apply to such accidents."

The principal case is distinguished from the ordinary auto negligence case because of the existence of the carrier-passenger relationship. Such a relationship imposes on defendant carrier

> "the highest degree of care reasonably to be expected from human vigilance and foresight in view of the character of the conveyance adopted and consistent with the practical operation of the business."[3]

It is not inconsistent, therefore, to hold *res ipsa* inapplicable in the ordinary auto negligence case while applying the doctrine in passenger-carrier cases, since an inference of slight negligence might be legitimate where an inference of ordinary negligence is not.

The carrier, initially saddled with so high a standard of care, has understandably complained against imposition of further impediments upon its attempted defense. Perhaps the chief defensive weapon left in the carrier's hands is the passenger's usual ignorance of the facts which produced the accident. He knows that he was a passenger, and he knows that he was injured; but he is often totally unaware of what series of events produced his injury. Unless afforded a further measure of judicial assistance, therefore, he may be unsuccessful in proving that slight degree of carrier-negligence upon which his recovery depends. Such was the result in the principal case;

[1] 35 MARQ. L. REV. 36 (1951-52).
[2] 172 Wis. 20, 177 N.W. 909 (1920).
[3] 158 Wis. 69, 147 N.W. 3 (1914).

and such was the result even more unfortunately, in a recent Michigan decision,[4] where plaintiff passenger failed to recover because of the jury's inability to decide which of two colliding vehicles was negligent, although it was certain that one of the two was guilty.

The courts are unanimous in holding that a common carrier, while an insurer of goods[5] is not an insurer of its passengers[6] in the absence of statute or express agreement to that effect. The distinction is based on the fact that a passenger, unlike an owner of goods who delivers them to the carrier, can exercise care and vigilance in the interests of his own safety.[7] A carrier obviously should not be held liable for injuries suffered by a passenger due to the passenger's own negligence. It is perhaps upon this basis that Justice Currie's willingness to apply *res ipsa* in the present case is most obviously open to criticism.

Once applied, the rule is well settled in Wisconsin[8] and in the majority of jurisdictions[9] that the procedural effect of *res ipsa* is to permit the jury to draw an inference (as distinguished from a presumption) of negligence, there being no compulsion to find for the plaintiff even in the absence of rebutting testimony; nor does the rule have the effect of shifting the burden of proof, which remains with the plaintiff.[10]

Assuming that, as a policy matter, it is advisable to lend a measure of legal assistance to a passenger seeking to recover for injuries sustained while in that protected status, there is some question as to whether application of the doctrine of *res ipsa loquitur* is the most desirable method of doing so.

The Louisiana courts have chosen another method. The defendant carrier, in cases where he has superior means of knowledge as to the cause of the accident, has the burden of proving "that it was free of any negligence which had a causal connection with the accident."[11] A study of Louisiana cases reveals that prior to the case of *Ensminger v. New Orleans*[12] no requirement of "superior knowledge" on the carrier's part was imposed, the carrier having the burden of proving itself free from negligence by a preponderance of the

[4] Rogers v. City of Detroit, 340 Mich. 291, 65 N.W.2d 848 (1954).
[5] 9 AM. JUR., *Carriers*, §660, pp. 813-814.
[6] 10 C. J., *Carriers*, §1312 p. 863; Ormond v. Wis. Power and Light Co., 194 Wis. 305, 216 N.W. 489 (1927).
[7] 10 AM. JUR., *Carriers*, §1236 p. 155.
[8] Ryan v. Zweck Wollenberg Co., 267 Wis. 630, 64 N.W.2d 226 (1954). Koehler v. Thiensville State Bank, 245 Wis. 281, 14 N.W.2d 15 (1944).
[9] 167 A.L.R. 665.
[10] 10 AM. JUR., *Carriers*, §1629, p. 373; 10 C. J., *Carriers*, §1426(b), p. 1023-1028.
[11] Schmitt v. Algiers Public Service Co., 69 So.2d 754 (1954). Plaintiff's decedent was fatally injured in a fire destroying defendant operator's waiting room. Plaintiff was nonsuited in the lower court. *Held:* Affirmed. The burden of exculpating itself was placed on the carrier but on a showing of due care, on its part, defendant carrier successfully met that burden and plaintiff's cause of action falls for lack of proof of specific acts of negligence.

evidence in any case.[13] The primary reason relied on was that of contractual relationship:

> "***carrier*** due to its contractual obligation for safe carriage, coupled with the fact of injury caused by an instrumentality under its control, [has] cast upon it the duty of exonerating itself from negligence."[14]

The early cases have been distinguished[15] and explained[16] but not overruled.

At first blush, it would seem that the Louisiana rule goes considerably farther in assisting the injured passenger than would a liberalized application of *res ipsa* to the situation. The advantage thus apparently gained, however, disappears upon closer inspection of the most recent case in that state. For the rule there appears to be that, once the carrier has established *prima facie* that it exercised care in the premises, the passenger must either present evidence to the contrary or face a nonsuit. The quantum of proof ordinarily required to establish due care on the part of the carrier does not appear by any means to be large. The passenger's relief from the necessity of proving matters of which he is ignorant is, therefore, only temporary, so shortlived, indeed, as not even to carry plaintiff to the jury room.

Res ipsa loquitur, on the other hand, if it were held to apply in at least some passenger-carrier cases, would in most situations have sufficient vitality to live past a motion for nonsuit, and would normally support a verdict favorable to plaintiff if one were returned, regardless of the quantum of proof adduced by the carrier that it exercised due care.

It is undoubtedly true, as the majority in the principal case appears to suspect, that an application of the doctrine of *res ipsa loquitur* to the ordinary passenger-carrier case involves a decided liberalization of the traditional requirements for utilizing the doctrine.

In his noted work on Torts, Professor Prosser states the requirements:

> "The conditions usually stated as necessary for the application of the principle of res ipsa loquitur are three: (1) The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) It must be caused by an agency or instrumentality within the exclusive control of the

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[12] Ensminger v. New Orleans, 65 So.2d 402 (1953).
[13] Hart v. Gulf, M. & N. R. Co., 167 So. 166 (1936). LeBlanc v. Sweet, 107 La. 335, 31 So. 766 (1902).
[14] Hart v. Gulf, M. & N. R. Co., *supra* note 13.
[15] Ensminger v. New Orleans, *supra* note 7, distinguishing early cases.
[16] Cusimano v. New Orleans, 170 La. 95, 127 So. 376 (1930).

defendant; (3) It must not have been due to any voluntary action of contribution on the part of the plaintiff."[17]

The difficulty of proof arises chiefly with respect to the first element. The passenger in the ordinary case, being ignorant of the chain of circumstances producing the injury, is at an obvious disadvantage in attempting to prove that such circumstances exclude any reasonable explanation of the unusual occurrence other than the carrier's negligence. Yet, if the passenger is prohibited from invoking the doctrine until he has excluded non-negligent explanations, a strict reading of the traditional rule of *res ipsa* would almost invariably forbid the use of the doctrine in the average passenger-carrier situation. In its strict traditional sense, *res ipsa* relieves a plaintiff from showing specifically that defendant's negligence caused the injury, but substitutes an obligation of proving that nothing else caused it. It is indeed the rare case wherein a plaintiff may draw any great solace from the substitution; and by the same token, it is indeed the rare case in which the doctrine, under strict application of its traditional requirements, may be invoked at all.

One thing, however, may be stated as obvious: if a strict adherence to traditional prerequisites of *res ipsa* is continued, then certainly the inference permitted when the doctrine is invoked successfully should be raised to the full dignity of a presumption. The doctrine is practically valueless when it first requires plaintiff to exclude, by proof of circumstances, all reasonable explanations of the injury other than defendant's negligent conduct, yet rules that a mere permissible inference is the most that can result.

The writer's conclusion, therefore, is that some liberalization of the traditional requirements of *res ipsa loquitur* is necessary before the dictum of Justice Currie in the principal case can be freely accepted, and *res ipsa* applied in any but the most isolated passenger-carrier cases. At the same time, it would appear that the passenger's problem of proof would be eased to a greater extent by such liberalization than by the Louisiana rule shifting the burden of proof to the carrier.

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Income Taxation—Deductibility of Advertising Expenditures—Taxpayer corporation, engaged in the business of designing, manufacturing and installing laboratory equipment, printed and distributed catalogs to its representatives to be used as reference books in making sales of equipment. In the years of 1944, 1945, and 1946 the taxpayer incurred costs as a result of printing a new catalog which was pub-

[17] PROSSER, TORTS, §43, p. 295 (1941).