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## TORTS — APPLICATION OF RES IPSA LOQUITUR TO AUTOMOBILES

The purpose of this article is an examination into the utilization of *res ipsa loquitur* in connection with automobile accidents, with particular attention to its efficacy in Wisconsin. The difficulties inherent in the application of this rule are exceeded only by the conflict of opinion that surrounds its proper procedural effect. For this reason, a topical method of exposition treating some of the more frequent type situations involved in automobile litigation, seems best employed.

Briefly expressed, the rule states that the fact of occurrence of an injury and the circumstances that surround it may permit an inference or presumption of negligence on the part of a defendant. The essential elements of the doctrine call for an injury from an instrumentality which, barring careless construction, inspection or user, does not ordinarily result in injury; exclusive control on the part of the party charged,<sup>1</sup> and lack of negligence on the part of the plaintiff. Sometimes a fourth element, greater knowledge of the true cause of the injury on the part of the party charged, is added.<sup>2</sup>

Wisconsin courts have been sparing in applying the rule to automobile collisions, the court in *Linden v. Miller*,<sup>3</sup> said:

“. . . As a rule in auto collisions 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. . . .”

They have not said that *res ipsa loquitur* will not be applied in automobile cases, but they have inferred that it is available only in unusual and extraordinary situations. This view is in harmony with most authorities and entirely in keeping with the principle that the character of the accident, rather than the fact of the accident, determines whether the doctrine of *res ipsa loquitur* applies. It doesn't apply where the ac-

<sup>1</sup> What is meant here is not mere control over the mechanism causing injury or damage, but exclusive control over the probable causative factors of the injury or damage. “All that is necessary is that the defendant have exclusive control of the factors which apparently have caused the accident. . . .” Prosser on Torts, sec. 43, p. 298 (1941). So, if several alternative possible causes are present, some of which were not under the exclusive control of the defendant, and these non-exclusively controlled factors can be shown to have a possible causal connection with the accident, the doctrine will not be applied. In reference to the plaintiff's problem of showing the exclusive control element, note the following statement of the court in *Rocono v. Guy F. Atkinson Co.*, 173 F.(2d) 661 (9th cir., 1949):

“The plain implication of the case is that it is not necessary, as a prerequisite to the application of the rule, that the party having the burden of proof of negligence establish by direct or conclusive evidence that his adversary had exclusive control of the causative instrumentalities.”

<sup>2</sup> Wigmore on Evidence, Vol. 9, sec. 2509 (1940).

<sup>3</sup> 172 Wis. 20, 177 N.W. 909 (1920).

cident may have arisen from one or more causes, . . . where there is evidence as to the cause, or where specific negligence is alleged.<sup>4</sup>

The rule is not a substitute for proof of negligence, it is a method of proving it in cases where common experience teaches that the physical forces producing an accident do not ordinarily exist in the absence of negligence. The maxim is thus applicable only where an injury cannot be otherwise explained.

#### COLLISIONS BETWEEN AUTOMOBILES

The possible causative factors involved in a collision between two moving vehicles are so numerous that it is virtually impossible to show the defendant's exclusive control over the factors producing the accident necessary to the application of *res ipsa loquitur*. Hence the doctrine is held inappropriate in situations of this type, and the courts of Wisconsin have denied its application where no direct evidence of how such an accident occurred is shown, and the facts indicate that it may as readily be ascribed to a non-actionable as well as an actionable cause, holding that it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict.<sup>5</sup>

In *Seligman v. Hammond*,<sup>6</sup> a car driven by deceased defendant swerved over the center line of a highway into the lane of oncoming traffic, and struck the plaintiff's car. After the accident it was discovered that the front left tire on the defendant's car was flat, and since this fact presented a possible non-actionable cause of the collision, the jury decided the case in favor of the defendant. The trial court ignored the verdict and found for the plaintiff, but was reversed by the Supreme Court which held that mere presence of defendant's car in the left hand lane did not, without more, establish liability. The problem of blowouts in relation to *res ipsa loquitur* was discussed in a more detailed manner in the case of *Pawlowski v. Eskofski*,<sup>7</sup> where the court said:

"The only other possible basis for upholding the finding of the jury as to defendant's negligence would be to apply the *res ipsa loquitur* rule, which would be to say that blowouts do not ordinarily happen in the absence of negligence in driving the car at the time of the accident, or in failing to inspect or inflate the tires properly previous to it. It is manifest that the negligence in driving cannot be so assumed."

Courts of most jurisdictions have with uniformity held that the fact of the happening of a collision between two automobiles, even if a rear end collision, without evidence of the circumstances under which it

<sup>4</sup> Huddy, *Automobile Law*, 9th Ed. sec. 157, p. 283 (1931).

<sup>5</sup> *Hyer v. City of Janesville*, 101 Wis. 371, 77 N.W. 729 (1898).

<sup>6</sup> 205 Wis. 199, 236 N.W. 115 (1931).

<sup>7</sup> 209 Wis. 189, 244 N.W. 611 (1932).

happened, is not proof of negligence of the operator of either of them.<sup>8</sup> What seems to be an exception to the majority view on this point is to be found in the Louisiana case of *Overstreet v. Ober*,<sup>9</sup> where the court, in an action brought by a plaintiff injured in an automobile accident against her host-driver and the driver of the other car involved, said:

"The two vehicles collided on a straight paved highway, in open daylight, where there were no obstructions and no other vehicles in sight. Some one was negligent. *Res ipsa loquitur*."

Perhaps the case may be distinguished from the others by virtue of the fact that both drivers of the cars involved were defending against a non-negligent plaintiff. While it is conceivable that unusual cases of the above nature may arise to warrant applicability of the doctrine in collisions between automobiles, there are no such cases on record in Wisconsin.

#### SKIDDING AUTOMOBILES

The applicability of the *res ipsa loquitur* rule to cases involving automobile skidding and causing injury or damage has met with the same objections as found in collisions between automobiles, namely, the possibility of existence of several causative factors. In *Linden v. Miller*,<sup>10</sup> a case in which the defendant's car skidded on an icy road and struck the plaintiff's car, the court stated:

"Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means partial or complete loss of control of the car under circumstances not necessarily implying negligence. Hence, plaintiff's claim that the doctrine of *res ipsa loquitur* applies to the present situation is not well founded. In order to make the doctrine of *res ipsa loquitur* apply it must be held that skidding itself implies negligence. This it does not do."

In another case,<sup>11</sup> the fact that defendant's car skidded nine hundred feet down an icy hill was not of itself evidence of negligence on his part. In other jurisdictions skidding has been held to constitute evidence of negligence. *Davis v. Brown*<sup>12</sup> and *Kruzie v. Sanders*<sup>13</sup> are two California cases where skidding was held to be such evidence. In the former case, the court held that circumstances warranted an inference of

<sup>8</sup> *Schneider v. Steindler*, 188 Wis. 129, 205 N.W. 797 (1925); *Holborn v. Coombs*, 209 Wis. 556, 245 N.W. 673 (1932); *Handler v. Coffey*, 278 Mass. 339, 179 N.E. 901 (1932).

<sup>9</sup> 14 La. App. 633, 130 So. 648 (1930).

<sup>10</sup> *Supra*, Note 2; accord, *Cleary v. Eckart*, 191 Wis. 114, 210 N.W. 267 (1926); *Mitchell v. Melts*, 220 N.C. 793, 18 S.E. (2d) 406 (1942).

<sup>11</sup> *Wobosel v. Lee*, 209 Wis. 51, 243 N.W. 425 (1931).

<sup>12</sup> 921 Cal. App. 20, 267 P. 754 (1928).

<sup>13</sup> 23 Cal. (2d) 237, 135 P.(2d) 710 (1943). (See also subsequent opinion in 143 P. (2d) 704.

negligence where an automobile was driven on wet, asphalt pavement through a tunnel at excessive speed, and skidded, when defendant applied his brakes, causing a collision with another car. In the second case, *res ipsa loquitur* was applied where defendant's car skidded on a road which was slippery from rain and the sap from eucalyptus trees.

The Wisconsin viewpoint, in harmony with the majority, that skidding may occur without fault would seem to present in most such cases, the possibility of both actionable and non-actionable causes and hence bar the application of the rule. If it could be shown that the skidding would not have occurred without fault, it is possible that the rule might be used to create an inference of want of care as to speed, lookout, control or management, or some other component of negligence.

#### AUTOS LEAVING THE ROAD

It is in the case of automobiles leaving the traveled portion of the highway and causing injury or damage, that the rule is most frequently applied. Even in this type situation, if the circumstances are as consistent with a non-actionable as with an actionable cause, negligence will not be presumed or inferred. In *Klein v. Beeten*,<sup>14</sup> the defendant's car suddenly left the road, went into a ditch and injured the plaintiff passenger. After the accident it was found that the front left tire was flat. The court in refusing to apply *res ipsa loquitur* said:

"Verdicts cannot rest on guess or conjecture. It is the duty of the plaintiff to prove negligence affirmatively, and while the inferences allowed by the rule or doctrine of *res ipsa loquitur* constitute such proof, it is only where the circumstances leave no room for a different presumption that the maxim applies. Where it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked."

In a similar case,<sup>15</sup> where after the accident the steering gear on the defendant's car was found to be broken, the doctrine was held not to apply. It will be noted that in each of the above cases there is actually an alternative possible cause of the accident, not involving negligent operation. It is only where the accident is not otherwise explainable that an inference of negligence is said to arise. In *Storlie v. Hartford Accident and Indemnity Company*,<sup>16</sup> no alternative possible cause was found, and causal negligence of the driver was established. The Wisconsin Court in a recent decision<sup>17</sup> permitted recovery on the basis of *res ipsa loqui-*

<sup>14</sup> 169 Wis. 385, 172 N.W. 736 (1919).

<sup>15</sup> *Baars v. Benda*, 249 Wis. 65, 23 N.W. (2d) 477 (1945).

<sup>16</sup> 251 Wis. 340, 28 N.W. (2d) 920 (1947); (The plaintiff was denied recovery because of assumption of risk).

<sup>17</sup> *Wisconsin Telephone Company v. Matson*, 256 Wis. 304, 41 N.W. (2d) 268 (1950).

*tur* in a case where defendant's truck was alleged to have struck a telephone pole belonging to plaintiff company. There were no eye-witnesses to the accident, but the side of the truck's box was later found to be damaged and some of its contents were found at the pole. No other alternative possible cause was shown, and the court said:

"Nothing is left which can rationally explain the collision except negligence on the part of the driver. There are no circumstances which leave room for a different presumption. . . . the record has eliminated the inferences until only those of negligent operation remain. . . . a thing in good mechanical order, under the management of the defendant or his servants, strikes a roadside installation belonging to the plaintiff. This is an accident which in the ordinary course of things does not happen if those who have the management use proper care. Thus it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. Explanation by the defendant is withheld so the reasonable evidence of negligence afforded by the accident itself sustains a finding of causal negligence. In such circumstances it is immaterial whether the negligence was in respect to lookout, management or control, position on the highway or whatever component of negligent driving counsel or the trial judge might suggest. Selection is unimportant when the res has spoken and the defendant has not explained."

The above is a clear cut example of the fact that given the proper case Wisconsin courts will not hesitate to apply *res ipsa loquitur* to automobile accidents. Their reasoning is completely in harmony with decisions of courts of other jurisdictions.<sup>18</sup>

#### AUTOMOBILES STRIKING STATIONARY OBJECTS IN THE ROAD

While there are no Wisconsin cases on this type situation, decisions in other jurisdictions indicate that it is often a proper type to which to apply *res ipsa loquitur*. The situation differs from that of collisions between automobiles in that here only the defendant's vehicle is in motion. In the absence of negligence as to the placement by the stationary object, and other possible causes of the accident, it is fair to assume that the Wisconsin court will follow its reasoning in the case of automobiles leaving the road. The leading case in the present situation is that of *Bryne v. Great Atlantic & Pacific Tea Co.*<sup>19</sup> In that case a truck hit a large stationary excavator standing near the curb in the daytime. The court held:

<sup>18</sup> *Brown v. Des Moines Steam Bottling Works*, 174 Iowa 715, 156 N.W. 829 (1916); *Nicol v. Geitler*, 188 Minn. 69, 247 N.W. 8 (1933); *Zwick v. Zwick*, 29 Ohio App. 522, 163 N.E. 917 (1928); *Smith v. Hollander*, 85 Cal. App. 535, 259 P. 958 (1927).

<sup>19</sup> 269 Mass. 130, 168 N.E. 540 (1929); cf. *Morris v. Morris*, 84 Cal. App. 599, 258 P. 616 (1927), hitting a pole; *Bauhofer v. Crawford*, 16 Cal. App. 676, 117 P. 931, (1911), hitting a parked car; *Gomer v. Anding*, Ct. App. La. 1st Cir., 146 So. 704 (1933), hitting a bridge.

"In the ordinary experience of mankind a moving vehicle does not without negligence of those responsible for it come into collision with a stationary object the size of an excavator."

The court applied the doctrine of *res ipsa loquitur* to the accident.

#### AUTOMOBILES STARTING AND ROLLING

The doctrine has been successfully applied in this type of situation, although there are no Wisconsin decisions on the point. In *Cleveland Ice Cream Company v. Call*,<sup>20</sup> the court in applying the rule, said:

"The principle of *res ipsa loquitur* imports that a prima facie case can be made out without any direct proof of actionable negligence. . . . The runaway truck in coming down the hill without anyone in control, speaks for itself, and under the doctrine under discussion a jury has a basis for inferring that the negligence of the defendant was the cause of the accident."

It should be noted that application of the doctrine has been denied where the automobile stood safely on a sloping street for a period of time before rolling down. What period of time of safe standing is required is questionable, since one case<sup>21</sup> held that ten to twenty minutes was sufficient, while another<sup>22</sup> held that five hours was sufficient. In *Glaser v. Schroeder*,<sup>23</sup> the rule was applied even after the car had been left standing for a time. Two passengers got into the back seat and the car then rolled backwards. The court held this was evidence of a defect or want of repair and negligence in failing to discover and remedy the same. It is difficult to hazard how the Wisconsin court would hold on a case of this type, but it would seem reasonable to expect that the doctrine would be applied where the circumstances leave no room for a different presumption.

#### PROCEDURAL EFFECT OF THE DOCTRINE

There is considerable conflict over the effect that *res ipsa loquitur*, once applied, should have on the outcome of the case. The effect given ranges from a presumption to a permissible inference. The greatest effect given to the rule is to place on the defendant the ultimate burden of proof, requiring him to prove by a preponderance of the evidence that the injury was not caused by his negligence. According to Charles E. Carpenter,<sup>24</sup> in a majority of jurisdictions the maxim lays down the basis for a permissible inference by a jury, of negligence on the part of a defendant. Under this theory the plaintiff could not be non-suited, nor could he receive a directed verdict. The issue would have to go to

<sup>20</sup> 28 Ohio App. 521, 162 N.E. 812 (1928).

<sup>21</sup> Buzzello v. Sramek, 110 Nebr. 362, 193 N.W. 743 (1923).

<sup>22</sup> Joseph v. Schwartz, 128 Wash. 634, 224 P. 5 (1924).

<sup>23</sup> 269 Mass. 337, 168 N.E. 809 (1929).

<sup>24</sup> 1 Univ. Chicago L. Rev. 519 (1929).

the jury. Wisconsin would seem to be in this classification,<sup>25</sup> but *Dehmel v. Smith*<sup>26</sup> might indicate that a presumption rather than an inference is raised. Similarly, *Cummings v. National Furnace Company*,<sup>27</sup> where the court said:

"The accident itself was of such a character as to raise a presumption of negligence either in the character of the machinery used or in the care with which it was handled; . . ."

raises the question as to the maxim's procedural effect in Wisconsin.

In several jurisdictions, according to Carpenter,<sup>28</sup> the rule has the force of a presumption, and he lists California, Kentucky and Illinois as states giving it that effect. Whether permitting an inference or raising a presumption, the evidence used to rebut should be credible and have some probative force. In a California case,<sup>29</sup> the presumption was overcome by evidence that the defendant was momentarily blinded by the sun. In Wisconsin it would appear that to rebut the inference raised by the doctrine either the defendant must satisfactorily explain the cause or some non-actionable cause must be present in the evidence of the circumstances.

#### CONCLUSION

There appears to be a controversy between a growing tendency to attach liability where ever possible, and making the motorist an insurer. In *Shea v. Hern*,<sup>30</sup> the court stated that if the doctrine was held inapplicable to accidents resulting from the operation of motor vehicles, and evidence to prove the happening and cause of the latter is not available to the plaintiff, then—

" . . . many plaintiffs might fail to establish their cases where the inference of negligence was clear, since it is common knowledge that many automobile casualties occur without apparent reason, and injury may result from mere inattention on the part of the operator of the car, from his fleeting glance to left or right, which cannot be detected by those seated beside him and of which he himself may be almost unconscious, from his failure to call into use those mental processes which control the action of eyes and hands and feet, and for such lapses, incapable of accurate determination, an injured person is not without a remedy."

The doctrine is applicable to motor accidents in Wisconsin, albeit in limited and restricted situations. Perhaps the most clever and astute

<sup>25</sup> *Kaples v. Orth*, 61 Wis. 531, 21 N.W. 633 (1884); *Klitzske v. Webb*, 120 Wis. 254, 97 N.W. 901 (1904); *Rost v. Roberts*, 180 Wis. 207, 192 N.W. 38 (1923).

<sup>26</sup> 200 Wis. 292, 227 N.W. 274 (1930).

<sup>27</sup> 60 Wis. 603, 18 N.W. 742 (1884).

<sup>28</sup> *Supra*, Note 24.

<sup>29</sup> *Binns v. Standen*, 118 Cal. App. 625, 5 P.(2d) 637 (1931).

<sup>30</sup> 132 Me. 361, 171 A. 248 (1934).

observation made on the rule is that quoted by Professor Prosser<sup>31</sup> in a review of a book on the lighter side of law: "*Loquitur vere; sed quid in inferno vult dicere?*"

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<sup>31</sup> 21 Minn. L. Rev. 475 (1936-37).