

Torts - Res Ipsa Loquitur - Intervention of a Third Party

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The minority view on the degree of care required in elevator cases is that the instrumentality must be in a reasonably safe condition for the customer's use. A New York court reasoned that since buildings have other things just as dangerous, such as boilers and open hatchways, and only reasonable care is required for them, no exception should be made with regard to elevators, since all of the dangerous instrumentalities are within the same building. *Griffin v. Manice*, 166 N.Y. 188, 198, 59 N.E. 925, 52 L.R.A. 922, 82 Am. St. Rep. 630 (1901). Other courts have reasoned that an elevator is not, like a common carrier, a servant of the public, but that the relations and duties of an elevator operator are with a limited number of persons who have contracted with him for the use of his premises and others who have business with his tenants. *Seaver v. Bradley*, 179 Mass. 329, 60 N.E. 795, 88 Am. St. Rep. 384 (1901); *Burgess v. Stowe*, 134 Mich. 204, 210, 96 N.W. 29 (1903).

The jurisdictions which require the highest degree of care in the operation of elevators seem to follow the same rule in regard to escalators, reasoning that there is no difference in principle between the operation of an elevator and an escalator. Both are installed for the same purpose and the only difference is in the method of operation. The elevator runs in a perpendicular fashion and the escalator at an angle of approximately 45 degrees. Both are intended for the benefit of customers and to induce the customers to visit the establishment of the owners, the owners profiting from the installation and operation of each. *McBride v. May Department Stores*, 124 Ohio St. 264, 178 N.E. 12 (1931); *Petrie v. Kaufman & Baer Co.*, 291 Pa. 211, 139 Atl. 878 (1927).

Jurisdictions following the minority rule as to elevators apply a like rule as to escalators, *i.e.*, the operator must use reasonable care to keep in a reasonably safe condition for customer's use. *Richter v. L. Bamberger & Co.*, 11 N.J. Misc. 229, 165 Atl. 289 (1933). One court reasoned that if the highest degree of care were required for escalators, there would be in the same building one degree of care for one mode of elevation and another degree of care for another, that is, if the plaintiff elected to use the stairs, a degree of care would be required different from that required if she used the escalator or elevator. The court could see no reason for these different degrees of care. *Stratton v. Newberry Co.*, 117 Conn. 522, 169 Atl. 56 (1933).

JOSEPH ZILBER.

Torts—Res Ipsa Loquitur—Intervention of a Third Party.—Action for damages, arising out of the alleged negligent operation of the defendant's power plant, was brought by a meat packing company. The plaintiff operated two electric compressors for the manufacture of ice. The electric power, supplied by the defendant power company, failed. When the current was restored, the motors of the two compressors began to burn. The preponderance of evidence indicated that the fire was caused by the delivery, to the electric motors, of a "single phase current" rather than a "three phase current." The "single phasing" was caused by the collision of an automobile with one of the defendant company's poles. The defendant obtained a judgment on a directed verdict.

The plaintiff appealed, claiming that under the doctrine of *res ipsa loquitur* it was entitled to a full and complete explanation of the cause of the fire, but that no such explanation had been offered. Judgment *held*, reversed and the cause remanded for a new trial, but only on the ground that there had been a sufficient conflict of evidence to prevent a directed verdict. The federal court refused to apply the doctrine of *res ipsa loquitur* because the intervention of a third party

had been shown. *Hagan & Cushing Co. v. Washington Water Power Co.*, 99 F. (2d) 614 (C.C.A. 9th, 1938).

The doctrine of *res ipsa loquitur* is based upon the assumption that the defendant, having control of the instrument causing the injury, has a superior knowledge or at least more adequate means of determining what caused the accident. The doctrine is applied where (1) the instrumentality causing the injury is in the exclusive control of the defendant, (2) the circumstances attending the accident carry a strong probability of negligence on the part of the defendant, (3) the cause is otherwise unknown, and (4) the accident probably would not have happened if the defendant had exercised ordinary care. *Gritsch v. Pickwick*, 131 Cal. App. 794, 22 P. (2d) 554 (1933). The hypothesis upon which the inference of negligence is founded is that the plaintiff has no knowledge of what caused the accident since the instrumentality was solely within the control of the defendant. *Klenzendorf v. Shasta Union High School*, 4 Cal. App. (2d) 164, 40 P. (2d) 878 (1935).

In Idaho, where the instant case arose, the court follows the majority interpretation of the doctrine of *res ipsa loquitur*, namely that a sufficient inference of negligence is created to take the case to the jury. The jury, however, is not compelled to find the defendant negligent. *Ryan v. George L. Lilley Co.*, 121 Conn. 26, 183 Atl. 2 (1936); *Garrett v. M. McDonough Co.* (Mass. 1937) 7 N.E. (2d) 417; *Rost v. Roberts*, 180 Wis. 207, 192 N.W. 38 (1923). Under this interpretation the doctrine of *res ipsa loquitur* is strictly evidentiary and supplies, not a presumption of negligence, but rather evidence of negligence upon which a recovery may be had. *Atlas Powder Co. v. Benson*, 287 Fed. 797 (U.S.C.C.A., N.J., 1923). There is, therefore, no shift in the burden of proof. *Mercer v. Omaha & C. B. St. R. Co.*, 180 Neb. 532, 188 N.W. 296 (1922). There is only a justification of a finding by the jury that the defendant was negligent. *Stephens v. Kitchen Lumber Co.*, 222 Ky. 736, 2 S.W. (2d) 374 (1928). The inference of negligence, even in the face of rebutting evidence, may be considered independently by the jury. *Covington v. James*, 214 N.C. 71, 197 S.E. 701 (1938).

A very small minority holds that upon a showing of a *res ipsa loquitur* case, there is a shift of the burden of proof to the defendant. *Maltz v. Carter*, 311 Pa. 550, 166 Atl. 852 (1933). Under the latter view the defendant must offer an explanation which shows by a preponderance of the evidence that the accident was not chargeable to his negligence. *Highland v. Wilsonian Inv. Co.*, 171 Wash. 34, 17 P. (2d) 631 (1933).

An intermediate view holds that the burden of proof does not shift in a *res ipsa loquitur* case, but the burden of going forward with the evidence does. That is, the plaintiff gets the benefit not merely of a permissible inference of negligence, but of true legal presumption, or required inference, compelling the defendant to introduce rebuttal evidence. *Cavaretta v. Universal Film Exchange Inc.*, 182 So. 135 (1938).

Within the three foregoing interpretations of the doctrine of *res ipsa loquitur*, there is a second and distinct conflict of opinion. Under the majority rule, the doctrine is not at all applicable if it can be shown that (1) the defendant does not have control of the premises or the operation of the instrumentality, or (2) there is a division of responsibility. *Laurent v. United Fuel Gas Co.*, 101 W.Va. 499, 133 S.E. 116 (1926). Though most often included in the two foregoing elements, a third element, possession of the instrumentality, is sometimes expressly required. *Winfree v. Coca Cola Bottling Works of Lebanon*, 19 Tenn.

App. 144, 83 S.W. (2d) 903 (1935). Similar decisions have been rendered in *Brunell v. Mountain State Power Co.*, 81 F. (2d) 205 (1936); *Sutcliffe v. Fort Dodge Gas and Electric Co.*, 218 Iowa 1386, 257 N.W. 406 (1935); *Dittert v. Fisher*, 148 Ore. 366, 36 P. (2d) 592 (1934); *Jones v. Shell Petroleum Corp.*, 185 La. 1067, 167 So. 833 (1936).

While the great weight of authority requires that the instrumentality be under the control of the defendant, a minority permits the intervention of a third party. Those jurisdictions permitting the intervention of a third party do so only under limited circumstances. The doctrine has been held to be applicable even though the injury was received in a collision between a trolley car and a motor truck. Thus, though the defendant was not in full control of the instrumentality causing the injury, the doctrine was held applicable. *Plumb v. Richmond Light and R. R. Co.*, 233 N.Y. 285, 135 N.E. 504, 25 A.L.R. 685 (1922). Other New York cases, not involving carriers, refused to permit the use of the doctrine where a third party intervened. In *Slater v. Barnes*, 241 N.Y. 284, 149 N.E. 859 (1926), the plaintiff sought damages for injuries received from falling plaster. It was held that the doctrine of *res ipsa loquitur* required the instrumentality producing the injury to be within the exclusive possession of the defendant. The doctrine was held to be inapplicable where some of the agencies contributing to the injury were outside the control of the defendant. *Murray v. Great Atlantic & Pacific Tea Co.*, 236 App. Div. 477, 260 N.Y.S. 132 (1932). It would appear, therefore, that any deviation from the weight of authority is to be found only in cases involving common carriers or similar agencies upon which is placed a greater responsibility to protect the safety of the public. However, this deviation from the rule is a concession rather than well defined policy since in *Alexander v. Rochester City & B. R. Co.*, 128 N.Y. 13, 27 N.E. 950 (1891), the court refused to apply the doctrine in a collision between a street car and a wagon.

Wisconsin follows the majority rule that proof of the intervention of a third party prevents the application of the doctrine. *Klein v. Beeten*, 169 Wis. 385, 172 N.W. 736 (1919); *Carroll v. Chicago B. & N. R. Co.*, 99 Wis. 399, 75 N.W. 176 (1898).

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