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THE EFFECT OF SPECIFIC ALLEGATIONS ON THE APPLICATION OF RES IPSA LOQUITUR

Ordinarily, negligence may not be inferred from the mere happening of an accident. Evidence must be introduced to establish the causal connection between the accident and some negligent act or omission on the part of the defendant. Sometimes, however, the circumstances of an accident are such that this causal connection may be reasonably inferred from the mere happening of the accident, i.e., bricks fall from a building, bottles explode, glass is found in a loaf of bread. Such an inference is based upon the common experience of men that accidents of this type do not usually happen unless someone has been negligent.[1] This inference is commonly termed res ipsa loquitur. It is generally considered a type of circumstantial evidence.[2] Courts will allow a plaintiff the use of res ipsa loquitur where the nature of the accident warrants the application of the inference if it is also shown that the agency or instrumentality causing the accident was in the exclusive control of the defendant at the time of the accident and that the plaintiff did not contribute to or play any voluntary part in the accident.[3] Naturally, it falls upon the plaintiff to allege and prove these facts since he is seeking the benefit of the inference. If he fails he has not brought res ipsa loquitur into the case. This comment will deal with the problem which arises when a plaintiff is not content to merely allege and prove facts sufficient to bring res ipsa loquitur into application, but goes further and alleges specific facts pointing to the exact cause of the accident or the precise negligence of the defendant.

Courts have distinguished between allegations aimed primarily at establishing the applicability of the inference, terming these, general allegations of negligence, and those attempting to establish the precise negligence of the defendant, terming these, specific allegations of negligence.[4] For example, an allegation that a railroad crossing accident was caused by the failure of automatic warning devices to operate is pointed at establishing only that such devices do not ordinarily fail to operate in the absence of negligence. Hence, this is a general allegation.[5] If, however, it is alleged that the accident was caused by the failure of an intoxicated gate tender in the employ of the defendant to lower the gates, the allegation is one pointing to the precise negligence which caused the accident. In the latter example, there is a specific allegation.[6] Here, the plaintiff is not asking the jury to infer the defendant's negligence from a given set of facts, rather he is telling the jury how the accident happened and the precise connection that the defendant had with it.

General allegations have no bearing on the theory of res ipsa loquitur other

1. Prosser, Torts § 42 (2d ed. 1955).
2. Id § 201.
3. Id § 199.
4. 38 Am. Jur. Negligence § 261 (1941).
5. Henderson v. New York, Chicago, St. Louis R. Co., — Ind. —, —, 146 N.E.2d 531, 536 (1957).
6. The distinction between a general allegation of negligence and a specific allegation of negligence is not always clear because of poor draftsmanship in the pleadings. See, e.g., Short v. D. R. B. Logging Co., 192 Ore. 383, 235 P.2d 340 (1951).

than to bring it into application. There is considerable disagreement, however, as to the effect which the pleading of specific allegations will have upon a plaintiff's use of res ipsa loquitur.

The Effect of Specific Allegations of Negligence

Generally, courts have relied on one of three theories in considering the effect of pleading specific allegations of negligence. These theories are: (1) that the plaintiff by merely alleging or, in some instances, by attempting to prove specific allegations of negligence thereby waives his right to use res ipsa loquitur; (2) that the plaintiff may rely on res ipsa loquitur despite his specific allegations of negligence and without regard to his proving or attempting to prove these "surplus" allegations; (3) that the plaintiff is "limited" in his use of res ipsa loquitur to establishing the negligence specified in his complaint.

Waiver Theory

Only a few jurisdictions apply or have applied the rule that a plaintiff by merely pleading specific negligence thereby waives res ipsa loquitur.[7] The remainder of the jurisdictions which might be loosely classified as following a "waiver" theory bar res ipsa loquitur when the plaintiff offers *evidence* of specific negligence.[8] One of the reasons set forth for this position is that res ipsa loquitur was designed for the benefit of a plaintiff ignorant of the factors causing his injury and that it would be inconsistent to allow a plaintiff to rely upon res ipsa while, at the same time, attempting to prove the precise negligence involved.[9] Another view is that res ipsa loquitur is designed to establish a prima facie case and, if the plaintiff establishes such a case by his direct evidence, he loses the benefit of the doctrine.[10] Cases holding that the plaintiff is not deprived of res ipsa loquitur unless and until he proves the precise cause of the accident[11] are more properly classified in other categories. The latter position is merely a negative statement of the truism that a party who can prove his case by direct proof has no need of the inference of res ipsa loquitur.

The strict waiver theory, it is submitted, is based upon an unnecessary assumption that a plaintiff seeking to use res ipsa loquitur should be totally ignorant of the facts giving rise to the accident. The slightest indication by the plaintiff that he knows some facts in the chain of causality lead-

7. Missouri had so held in a long line of cases illustrated by Venditti v. St. Louis Pub. Serv. Co., 360 Mo. 42, 226 S.W.2d 599 (1950) which held the rule of that state to be that if the plaintiff either pleads or proves specific negligence he waives his right to rely upon res ipsa loquitur. This no longer appears to be the Missouri rule. See Williams v. St. Louis Pub. Serv. Co., 363 Mo. 625, 253 S.W.2d 97 (1952). Kansas apparently still adheres to the strict rule, Pierce v. Schroeder, 171 Kan. 259, 232 P.2d 460 (1951).

8. Highland Ave. & B. R.R. v. South, 112 Ala. 642, 20 So. 1003 (1896); Lyon v. Chicago, M. & St. P. Ry., 50 Mont. 532, 148 Pac. 386 (1915); Bressler v. New York Rapid Transit Corp., 270 N.Y. 409, 413, 1 N.E.2d 828 (1936).

9. See, e.g., Garvey v. Coleman Lamp Co., 113 Kan. 70, 213 Pac. 823 (1923).

10. Lyon v. Chicago, M. & St. P. Ry., 50 Mont. 532, 148 Pac. 386 (1915).

11. See, e.g., Williams v. St. Louis Pub. Serv. Co., 363 Mo. 625, 253 S.W.2d 97 (1952).

ing back to the defendant, is enough to bar his use of the doctrine. The fundamental fallacy in this position is that it considers res ipsa loquitur as an *alternative* to direct proof rather than as a type of circumstantial evidence to be considered by the jury in *conjunction* with whatever other evidence a plaintiff may be able to offer. The result is that the plaintiff is encouraged to suppress facts within his knowledge either because he cannot prove them or because he does not know sufficient facts to establish defendant's negligence directly. He is forced to elect, at the peril of his recovery, whether he will proceed upon res ipsa loquitur or direct proof of negligence.[12] When enough facts have been established that a jury might reasonably draw the inference of defendant's negligence, it should not matter that the plaintiff goes further and offers evidence of specific facts as long as those facts are not inconsistent with the inference that defendant was negligent.

Limitation Theory

Some courts,[13] proceeding upon the principle that proof must conform to the pleadings, have held that a plaintiff in a res ipsa loquitur case who pleads specific acts of negligence may use the doctrine only to establish those specific acts and no others. The jury may infer only that the defendant was negligent in the manner specifically set forth and the defendant need rebut only those acts charged. It has been suggested that this is the most desirable of the various theories[14] but it is submitted that it is, in fact, subject to much the same criticism as the "waiver" theory. While the "waiver" theory considers res ipsa loquitur as an *alternative* for direct proof, the "limitation" theory at least recognizes its character as a rule of circumstantial evidence. The "limitation" theory is weak in its failing to recognize the peculiar nature of the circumstances which bring the doctrine into play. The rule that proof should conform to the pleadings is a perfectly sound rule but, it is submitted, one that should not be applied to the res ipsa loquitur case. The purpose of this rule is to prevent a plaintiff from surprising a defendant by pleading one theory of negligence and then attempting at the trial to prove an entirely different theory which the defendant is unprepared to meet. However, in the true res ipsa loquitur case, where the plaintiff has made a general allegation of negligence,[15] the defendant is sufficiently apprised that he will have to meet res ipsa loquitur as well as the specific allegations. Assuming that the specific facts alleged are not inconsistent with an inference of negligence,[16]

12. Cf. Leet v. Union Pac. R.R., 25 Cal. 2d 605, 155 P.2d 42 (1944) where the court commented upon the undesirability of penalizing the plaintiff because he places before the court facts within his knowledge.

13. Pickwick Stages Corp. v. Messinger, 44 Ariz. 174, 36 P.2d 168 (1934); Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S.E. 329 (1904); Terre Haute & I. R.R. v. Sheeks, 155 Ind. 74, 56 N.E. 434 (1900); Wallace v. Norris, 310 Ky. 424, 220 S.W.2d 967 (1949); Short v. D. R. B. Logging Co., 192 Ore. 383, 235 P.2d 340 (1951); Johnson v. Galveston, H. & N. Ry., 27 Tex. Civ. App. 616, 66 S.W. 906 (1902).

14. 24 L.R.A. (n.s.) 788 (1910).

15. See note 18 infra.

16. See, e.g., Connor v. Atchison, T. & S.F. Ry., 189 Cal. 1, 207 Pac. 378 (1922) where

the defendant would have had to rebut them even if they had not been specifically alleged, for, in meeting res ipsa loquitur, the defendant is forced to rebut *all* probable theories upon which his negligence might be based.[17]

The "limitation" theory would be valid in limiting the inference of negligence to the precise cause of the accident *if and when* the plaintiff *establishes* that cause by his proof. Once the jury knows the exact cause of the accident they should not be permitted to infer negligence upon any other grounds. If a defendant is negligent, but his negligence is not the proximate cause of the plaintiff's injuries, no court would hold him liable for those injuries. This should be just as true in the res ipsa loquitur case as in any other case of negligence. The "limitation" theory suffers, however, from the defect that it also limits plaintiff's *evidence* to the cause alleged. It is one thing to say that a plaintiff, having established the exact cause, should be forced to stand upon it. It is quite another thing to say that a plaintiff having *alleged* a particular cause will not be allowed to offer evidence as to other possible causes. It is this latter aspect of the "limitation" theory that renders it less desirable than the "surplus" theory followed in the majority of the jurisdictions.

Surplus Theory

The vast majority of jurisdictions,[18] while varying in their reasoning, take the position in a res ipsa loquitur case, that where the plaintiff makes both a general allegation of negligence and specific allegations, he is entitled to the full benefit of the doctrine. Some of these jurisdictions reason that res ipsa loquitur is used simply to establish the general allegation.[19] This is, in effect, treating the specific allegations as surplus.

plaintiff's specific facts tended to show that the proximate cause of the accident was an unusually violent cloudburst.

17. Johnson v. United States, 333 U.S. 46 (1948).

18. Reece v. Webster, 221 Ark. 826, 256 S.W.2d 345 (1953); Leet v. Union Pac. R.R., 25 Cal. 2d 605, 155 P.2d 42 (1944); Colorado Springs & Interurban Ry. v. Reese, 69 Colo. 1, 169 Pac. 572 (1917); Briganti v. Connecticut Co., 119 Conn. 316, 175 Atl.. 679 (1934); Krueger v. Richardson, 326 Ill. App. 205, 61 N.E.2d 399 (1945); New York, C. & St. L. R.R. v. Henderson, — Ind. —, 146 N.E.2d 531 (1957); John Rooff & Sons, Inc. v. Winterbottom, — Iowa —, 86 N.W.2d 131 (1957); Cassady v. Old Colony St. Ry., 184 Mass. 156, 68 N.E. 10 (1903); Waidleich v. Andros, 182 Mich. 374, 148 N.W. 824 (1914); Heffter v. No. States Power Co., 173 Minn. 215, 217 N.W. 102 (1927); Mares v. New Mexico Pub. Serv. Co., 42 N.M. 473, 82 P.2d 257 (1938); McNeill v. Durham & C. R.R., 130 N.C. 256, 41 S.E. 383 (1902); Weller v. Worstall, 50 Ohio App. 11, 197 N.E. 410 (1934); Independent E. Torpedo Co. v. Gage, 206 Okla. 108, 240 P.2d 1119 (1951); Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 193 S.W. 1053 (1917); Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 P.2d 254 (1940); Humphrey v. Twin State Gas & Elec. Co., 100 Vt. 414, 139 Atl. 440 (1927); Washington-Virginia Ry. v. Bouknight, 113 Va. 696, 75 S.E. 1032 (1912); D'Amico v. Conguista, 24 Wash. 2d 674, 167 P.2d 157 (1946).

Two jurisdictions apparently take the position that a general allegation must be controlled by the specific allegations and the general allegation is treated as merely surplusage. Pierce v. Schroeder, 171 Kan. 259, 232 P.2d 460 (1951); Pierce v. Great Falls & C. Ry., 22 Mont. 445, 56 Pac. 867 (1899). It should be noted, however, that both of these states hold the waiver theory in regard to res ipsa loquitur see note 7 supra.

19. See, e.g., Feldman v. Chicago Rys. Co., 289 Ill. App. 25, 124 N.E. 334 (1919).

Other courts take the position that once res ipsa loquitur is brought into the case by a general allegation, it remains until the precise cause of the accident is established by other evidence. Thus the court in *Cassady v. Old Colony St. Ry.*[20] said, "But if at the close of the evidence the cause does not clearly appear . . . then it is open to the plaintiff to argue upon the whole evidence. . . . An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon [res ipsa loquitur]."[21]

CONCLUSION

The limitation theory would seem, generally speaking, to be the soundest of the three main positions.[22] It is the most consistent position in respect to the proposition that res ipsa loquitur is a rule of circumstantial evidence. It permits the plaintiff to plead res ipsa loquitur and, in addition, whatever specific facts of cause and negligence he may know. It permits the jury to weigh res ipsa loquitur along with whatever other evidence the plaintiff may provide. Naturally, if the plaintiff's direct proof is sufficient to establish the negligence of the defendant, the jury should predicate its verdict upon the basis of that proof and not upon an inference. That is a question for the court in determining whether or not it should charge res ipsa loquitur. The "surplus" theory is, it is submitted, the most logical in that it recognizes the true nature of an inference. If it can be said that an inference of negligence may reasonably be drawn from facts A, B and C, there is no reason to say that merely because fact D, which is also consistent with a finding of negligence, is added, the inference is thereby barred or limited. If anything the inference is strengthened by the addition of other facts consistent with it. To encourage a strengthening of the factual basis of the inference is desirable. The "waiver" and "limitation" theories, far from encouraging such a strengthening, discourage it and result in tempting the plaintiff to suppress facts within his knowledge and to seek recovery upon the sole basis of an unenlightened inference.

One authority has summarized the problem of specific allegations and proof as follows:

> Plaintiff is of course bound by his own evidence; but proof of specific facts does not necessarily exclude inferences. When the plaintiff shows that the railway car in which he was a passenger was derailed, there is an inference that the defendant has been negligent. When he goes further and shows that the derailment was caused by an open switch, he destroys any inference of other causes, but the inference that the defendant has not used proper care in looking after its switches is not destroyed, but strengthened. If he goes further still and shows that the switch was left open by a drunken switchman on duty, there is nothing left to infer; and if he shows that the switch was thrown by an escaped convict with a grudge against the railroad, he has proved himself out of court. It is only in this sense that when the facts are known there is no inference, and res ipsa loquitur vanishes from the case.[23]

20. 184 Mass. 156, 68 N.E. 10 (1903).

21. Id. at 163, 68 N.E. at 12-13.

22. It is submitted that the "surplus" theory courts might adopt the view that, once the plaintiff has proved the precise cause of the accident, the inference of negligence to be drawn should be limited to that cause.

23. Prosser, op. cit. supra note 1, § 43, at 214-15.