

February 1948

Negligence--Res Ipsa Loquitor--Exclusiveness of Defendant's Control Over Residual Circumstances After all Elements of Shared Control Eliminated

L. H. B.

West Virginia University College of Law

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Recommended Citation

L. H. B., *Negligence--Res Ipsa Loquitor--Exclusiveness of Defendant's Control Over Residual Circumstances After all Elements of Shared Control Eliminated*, 51 W. Va. L. Rev. (1948).

Available at: <https://researchrepository.wvu.edu/wvlr/vol51/iss1/11>

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571 (1894); *Patterson v. New River & P. C. Ry.*, 87 W. Va. 177, 104 S. E. 491 (1920), and *State v. Sauls*, 97 W. Va. 184, 124 S. E. 670 (1924), the subsequent trial was that of the same issue. and no problem of unidentical issues was present. Since the courts, in general, have broadly developed most exceptions to the hearsay rule to allow as much of the evidence as is trustworthy to come before the court and jury in order to get all the facts of the case, it is submitted that the West Virginia court in the principal case has avoided the "narrow and pedantic illiberality" often applied to the problem.

M. S. K.

NEGLIGENCE—*Res Ipsa Loquitur*—EXCLUSIVENESS OF DEFENDANT'S CONTROL OVER RESIDUAL CIRCUMSTANCES AFTER ALL ELEMENTS OF SHARED CONTROL ELIMINATED.—Plaintiff's intestate, a brakeman employed by defendant, was killed when a freight car upon which he was riding was derailed and plaintiff sought damages under the Federal Employers' Liability Act. 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. § 51 (1940). There was evidence that deceased had signalled the engineer to stop, thrown a switch to put the cars on a siding, climbed back upon the car, and signalled the engineer to proceed. Plaintiff was unable to show any evidence of particular acts of negligence. The district court directed a verdict for defendant on the first count alleging negligence of defendant with respect to car, track or roadbed but submitted the second count alleging negligence generally, with no particulars specified to the jury on the theory of *res ipsa loquitur*. Following verdict and judgment for plaintiff, the circuit court of appeals reversed, because defendant did not have exclusive control over all the probable causative factors connected with the injury. *Held*, that the jury could from the circumstances fairly infer negligence of the defendant upon finding that the deceased was free from any negligence that contributed to the derailment. Judgment reversed. *Jesionowski v. Boston & Maine R. R.*, 67 S. Ct. 401 (U. S. 1947).

It is generally accepted formula that three essentials for the application of *res ipsa loquitur* are (1) a type of accident which ordinarily does not occur in the absence of negligence (2) caused by an agency or instrumentality within the exclusive control of the defendant and (3) not attributable to any voluntary action or want of care of the person injured. *Sweeney v. Erving*, 228 U. S. 233 (1912); 4 WIGMORE, EVIDENCE (3d ed. 1940) § 2509. The instant

case, without questioning that these are requisites, raises the question, apparently for the first time, whether the second element precludes resort to the doctrine where certain aspects of the occurrence are shown to have been within the control of others, even of the person injured, but all such aspects are found not to have been causative of the injury.

The requirement that the injury must have arisen from an instrumentality in defendant's exclusive possession and control is uniformly recognized in England, *Scott v. London & St. K. Docks Co.*, 3 H. & C. 596 (Exch. 1865), the federal courts, *San Juan Light Co. v. Requena*, 224 U. S. 89 (1911); *United States v. Porter Brothers & Biffle*, 95 F. (2d) 694 (C. C. A. 5th, 1938), and the various state courts. *Phillippi v. Farmers' Mutual Telephone Co.*, 113 W. Va. 470, 178 S. E. 762 (1933); *Decatur v. Eady*, 186 Ind. 205, 115 N. E. 577 (1917); *Slater v. Barnes*, 241 N. Y. 284, 149 N. E. 959 (1925). *Res ipsa loquitur* is a fortiori unavailable where the injuring agency was partly or entirely under the control and management of the person injured. *Courtney v. New York, N. H. & H. Ry.*, 213 Fed. 388 (D. Conn. 1914); (1928) 45 C. J. 1216.

But the instant case raises the question of what amounts to exclusive control and when the defendant can be said to have such control over the injuring agency. Where all the probable causative factors were in the exclusive control of the defendant there has been no doubt that the doctrine is applicable, but this is not the extent or limit of the doctrine. *Res ipsa loquitur* has been applied where two defendants retained control of the instrumentality causing the injury, *Smith v. Claude Neon Lights*, 110 N. J. L. 326, 164 Atl. 423 (1933), and applied where a passenger was injured in a collision between a carrier and another vehicle not under the carrier's control. *Interstate Stage Lines v. Aylers*, 42 F. (2d) 611 (C. C. A. 8th, 1930); *Crozier v. Hawkeye Stages*, 209 Iowa 313, 228 N. W. 320 (1929).

Where others, even including the injured party, had control exclusively, or along with the defendant, of some factors which might have caused the injury, it is for the jury to decide whether these factors contributed to the injury. If the jury finds that plaintiff's proof does not eliminate these factors then *res ipsa loquitur* does not apply. But where plaintiff's proof does show that these factors did not contribute to the accident that caused the injury and the only factors left that could have caused the accident are those in

the exclusive control of the defendant, then the doctrine is applicable.

The instant case belongs in the last category. The jury, having the evidence before it, knowing that plaintiff might have had control of one or more of the factors causing the accident, found that these factors did not cause it. The defendant then must have had exclusive control of all the factors causing the accident.

The phrase *res ipsa loquitur* is nothing but a picturesque way of describing a balance of probability on a question of fact on which little evidence either way has been presented. The principle is one of inclusion and not exclusion and a plaintiff whose case comes within the principle is entitled to go to the jury and no plaintiff who makes a probable case is disentitled to go to the jury by the fact that his case does not come within it or goes beyond it. *Washington Loan & Trust Co. v. Hickey*, 137 F. (2d) 677 (C. C. A. D. C., 1943). While the instant case might be a new step in the use of the doctrine, it cannot be said to be a change in the rule of *res ipsa loquitur*. The essential requirement that the instrumentality must be in the exclusive control of the defendant has taken on added meaning and possibly it will be well for the courts to give more emphasis to essentials (1) and (3) as a measure to check too great an expansion of the doctrine through this second essential. To go to the other extreme where a too literal application of the condition of exclusive control is required may lead to such a result as was arrived at in *Kilgore v. Shepard & Co.*, 52 R. I. 151, 158 Atl. 720 (1932), where a customer in a store sat down in a chair which collapsed. The court held the *res ipsa loquitur* doctrine inapplicable for the chair in question was under the exclusive control and use of the customer.

Such application unduly narrows the limits of the doctrine while the application of the instant case broadens it with the result that the plaintiff in negligence cases will be able to invoke the aid of *res ipsa loquitur* in many situations where it has heretofore been considered inapplicable.

L. H. B.

PLEADING — ACTIONS — INJURY TO PERSON AND PROPERTY ONE CAUSE OF ACTION.—In a personal injury action, the common pleas court of Kanawha county allowed plaintiff to amend her declaration to include damages to her automobile. The circuit court affirmed the amendment to this extent but held it too broad on other