Volume 51 | Issue 1 Article 12

February 1948

Pleadings--Actions--Injury to Person and Property One Cause of Action

B. H. W. II.
West Virginia University College of Law

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

grounds. On plaintiff's appeal, defendant cited this ruling as cross-error. *Held, inter alia,* plaintiff had not changed her cause of action by the amendment for the reason that there was but a single cause of action, the negligent act of defendant. Judgment affirmed. *Larzo v. Swift & Co.,* 40 S. E. (2d) 811 (W. Va. 1946).

The cases are in direct conflict as to how many causes of action exist when a single tort injures both the person and the property of another with majority of jurisdictions following the so-called American rule that only one cause of action results, *Dearden v. Hey,* 304 Mass. 659, 24 N. E. (2d) 644, 127 A. L. R. 1077 (1939); *King v. Chicago, Milwaukee & St. Paul Ry.,* 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161 (1900), while the English view, followed by the minority, is that there are two separate causes of action for which separate actions lie. *Brunsden v. Humphrey,* 14 Q. B. D. 141 (1884); *Reilly v. Sicilian Asphalt Paving Co.,* 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176 (1902). The instant case adopts the majority view, stating that the cause of action is the negligent act alone, and "the elements of damages, consisting of injury to the person and property of the plaintiff must be joined in the same action" (p. 814). It relies on *Thalman v. Schultze,* 111 W. Va. 64, 160 S. E. 303 (1931), the only earlier relevant West Virginia case in which the court said, "It is a general rule of common law pleading that a party having a plurality of claims or causes of action. of the same general character, against the same defendant, not only can but should unite them in the same action" (p. 68), and held that plaintiff was not precluded from recovery because of the union in one count of the declaration of claims for personal and property injury as the two claims "may be treated" as different elements of the same cause of action even though the court indicated the more ordinary and regular practice is to set them forth in different counts. A fair inference from the case is that there were two causes of action but they might be treated under the pleading as a single cause of action with separable parts so as not to preclude recovery. Duplicity would have been the only ground of objection and it, being a formal defect, would not constitute a ground of objection in West Virginia since objections to formal defects, except in pleas in abatement, have been abolished. W. VA. CODE (Michie, 1943), c. 56, art 4, § 37. *Thalman v. Schultze* cited *Chicago W. D. Ry. v. Ingraham,* 131 Ill. 659, 23 N. E. 350 (1890) for the proposition that claims were joinable in one count, which case clearly recognizes that two causes of action exist

but that joinder is possible when no demurrer is filed and no objection made to the introduction of evidence as to such injuries, if plaintiff sustains his declaration by proof. However, the late Illinois case of *Clancey v. McBride,* 338 Ill. 35, 169 N. E. 729 (1920), held that injury to person and damage to property are separate and distinct wrongs giving rise to distinct causes of action though resulting from a single tortious act. The other decision relied on to sustain the holding in *Thalman v. Schultze* is not entirely clear but seems to accept the same position as the Illinois case. See *Baltimore & Ohio R. R. v. Ritchie,* 31 Md. 191. 197 (1869). Not until the instant case has West Virginia treated the cause of action as the negligent act alone or said that both claims must be joined in one action. Both West Virginia cases recognize that there are differences between the claims, for example as to limitations, assignability, but call these incidental matters to which appropriate procedural requirements may attend. For contrasting views as to sufficiency of such circumstances to show legislative intent compare *Ochs v. Public Service Ry.,* 81 N. J. L. 661, 663, 80 Atl. 495, 496 (1911), with *Dearden v. Hey, id.* at 663, 24 N. E. (2d) at 646. The conflict between the authorities seems basically to arise from contrary views as to the nature of a cause of action. At common law, the right to recover in tort was based upon three elements: (1) primary right or interest in the one party, (2) corresponding duty on the part of the other, and (3) breach of this duty by the other to the injury or damage of the party whose primary right was invaded. SHIPMAN, COMMON LAW PLEADING (3d ed. Ballantine 1923) 77; STEPHEN, PLEADING (Andrew's ed. 1901) § 59; RESTATEMENT, TORTS (1934) 281. It is fundamental tort law that negligence which does not invade another's primary right is not actionable. HARPER, TORTS (1933) 67. There are primary rights not to have either person or property damaged by negligence of another. HARPER, TORTS 67; GREEN, RATIONALE OF PROXIMATE CAUSE (1927) 5. If more than one primary right is invaded by another, no matter how many or few his acts, it might be supposed that, at common law, more than one cause of action exists. In support of the American rule is the policy of the law to do away with unnecessary litigation and, where one suit will suffice, to make it suffice. However, from common law reasoning and logic, the conclusion must be drawn that two causes of action, not one, exist when both person and property are injured as a result of a single tort. 2 BLACK, JUDGMENTS (2d ed.

1902) § 740. Nevertheless, adoption of the majority view may be justified on the policy considerations noted. To do so suggests many perplexing problems, however, for instance, if the claim for injury to property be assigned and recovery had by the assignee prior to suit for personal injury, will the judgment be *res judicata?*

B. H. W., II.

WITNESSES—POWER TO COMPEL EXPERT TESTIMONY.—A real estate expert who had appraised property for a prior owner not a party to the present action, upon being questioned regarding his opinion as to the value of the property by the taxpayer in a tax certiorari proceeding, stated he did not wish to participate in the case and refused to accept a fee, when called as an expert for plaintiff. The trial court sustained the witness in his refusal to testify as to any matter asked him in his professional and not in his lay capacity, and certiorari was granted on this point. *Held,* that a witness may not, against his will, be compelled to give his opinion as an expert. Judgment affirmed. *People ex rel. Kraushaar v. Thorpe,* 296 N. Y. 224, 72 N. E. (2d) 165 (1947).

This holding aligns New York with Indiana, *Buchanan v. State,* 59 Ind. 1 (1877), New Jersey, *Hull v. Plume,* 131 N. J. L. 511, 37 A. (2d) 53 (1944), and Pennsylvania, *Pennsylvania Transit Co. v. Philadelphia,* 262 Pa. 439, 105 Atl. 630 (1918); *Moran v. Pittsburgh-Des Moines Steel Co.,* 15 U. S. L. Week 2563 (W. D. Pa. 1947) in following the doctrine of *Webb v. Page,* 1 Car. & K. 23 (N. P. 1843), distinguishing between one who sees a fact and is called on in a court of justice to testify as to it and one selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment. The reasoning on which this so-called "liberal" view is based is clearly enunciated in *Stanton v. Rushmore,* 112 N. J. L. 115, 117, 169 Atl. 721 (1934), stating that "neither justice nor public policy forbids that the expert shall retain such knowledge and skill free from disclosure other than by his voluntary act. This is true whether disclosure be sought for compensation for the exercise of his skill, or in the expression of his professional judgment privately, or as a witness in a court of justice." The decisions involve and the proposition is asserted only as to one called as an expert witness in behalf of a private litigant. A state or the United States may compel a citizen to testify as an expert in criminal trials or other causes involving the public interest. See