St. John's Law Review

Volume 42, January 1968, Number 3 Article 6

Res Ipsa Loquitur: The Extent to Which Plaintiff May Establish Negligence

St. John's Law Review

Courts in the past have construed away technicalities in the interest of attaining the practical ends of justice.[97] The courts today that hold that no appeal lies from a revocation would do better to re-examine their reasoning. Without an appeal, the humanitarian goals sought to be achieved could very well go unfulfilled.

RES IPSA LOQUITUR: THE EXTENT TO WHICH PLAINTIFF MAY ESTABLISH NEGLIGENCE

The doctrine of *res ipsa loquitur,* while appearing simple on its face, is one of the more obscure doctrines to be found in the negligence area. Perhaps the most difficult problem inherent in this doctrine is, as has been pointed out in the recent New York appellate division decision of *Zaninovich v. American Airlines, Inc.*,[1] whether or not *res ipsa loquitur* should be applied where a plaintiff has proved specific acts of negligence. It is the purpose of this note to analyze the doctrine of *res ipsa loquitur* in general, with specific emphasis being placed upon the questions that arise as to the availability of *res ipsa loquitur* where a plaintiff has proved or attempted to prove specific acts of negligence committed by the defendant.

Res ipsa loquitur has been defined as "a common-sense appraisal of the probative value of circumstantial evidence,"[2] or as "a formulation of a species of circumstantial evidence."[3] The working definition offered here is that *res ipsa loquitur* is a procedural device whereby the plaintiff need not factually establish a prima facie case of negligence, an inference of negligence being logically deduced from the neutral circumstantial evidence introduced. The doctrine was first introduced into Anglo-American law in 1863 in the English case of *Byrne v. Boadle.*[4] In that case, plaintiff was injured when he was struck by a barrel of flour which fell from the window of defendant's store. Even though he failed to factually prove negligence or an intentional tort, plaintiff nevertheless was successful in his suit.

---

[97] *See, e.g.,* Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Staggers v. Otto Gerdau Co., 359 F.2d 292 (2d Cir. 1966); People v. Rossi, 5 N.Y.2d 396, 157 N.E.2d 859, 185 N.Y.S.2d 5 (1959) and text accompanying notes 47, 58, and 59 *supra.*

[1] 26 App. Div. 2d 155, 271 N.Y.S.2d 866 (1st Dep't 1966).

[2] Galbraith v. Busch, 267 N.Y. 230, 234, 196 N.E. 36, 38 (1935).

[3] Zaninovich v. American Airlines, Inc., 26 App. Div. 2d 155, 157, 271 N.Y.S.2d 866, 869 (1st Dep't 1966).

[4] 159 Eng. Rep. 299 (Ex. 1863). *See* Bulman, *Res Ipsa Loquitur—When Does It Apply?,* 1961 INS. L.J. 20, 21.

Test and Effect of Res Ipsa Loquitur

The underlying reason for the application of *res ipsa loquitur* is that the plaintiff is not in a position to know the facts, *i.e.*, there are unusual circumstances involved.[5] Working logically from this underlying reason, a test has been developed for the application of *res ipsa loquitur*. In order to rely on the doctrine, the plaintiff must prove (1) that there has been an accident; (2) that the defendant had exclusive control of the instrumentality which caused the accident both prior to and at the time of the accident, and (3) that if the defendant were using ordinary care, in the ordinary course of events the accident would not have happened.[6]

The requirement of an accident needs little explanation save to point out that not only must it be shown that the plaintiff suffered injury but the instrumentality which caused the injury must be identified.

The requirement that the defendant must have had exclusive control of the instrumentality does not mean that the doctrine of *res ipsa loquitur* is limited to situations wherein the defendant has actual physical control but includes those situations where the defendant has the right of control of the instrumentality.[7] In considering this element, one must take into account the case of *Ybarra v. Spangard*[8] which is a departure from this concept. There, the plaintiff sued and recovered for an injury to his shoulder sustained while he was unconscious during an operation for appendicitis. The plaintiff recovered from the doctors and hospital employees connected with the operation, although not all of these defendants could have had exclusive control of the instrumentality. This case is truly unique in that neither the instrumentality nor its control was conclusively established. The decision may be explained by the defendants' exclusive control of the evidence. That is, be-

---

[5] Byrne v. Boadle, 159 Eng. Rep. 299 (Ex. 1863).

[6] Gerhart v. Southern Cal. Gas Co., 56 Cal. App. 2d 425, 132 P.2d 874 (1942).

[7] For example, where a plaintiff is injured while a passenger in the defendant's airplane as a result of the plane crashing, the element of exclusive control is satisfied, the defendant having the exclusive right of control through his pilot's actual physical control. Citrola v. Eastern Air Lines, Inc., 264 F.2d 815 (2d Cir. 1959). Similarly, where a plaintiff is injured while shopping in the defendant's supermarket as a result of an exploding soda bottle, the element of exclusive control is satisfied by the defendant's exclusive right to supervise or manage the supermarket in general. Cole v. Great Atl. & Pac. Tea Co., 44 Misc. 2d 694, 254 N.Y.S.2d 929 (Sup. Ct. 1964). But, where a plaintiff is injured by a chair which is apparently thrown from a window of defendant's hotel, then the defendant-proprietor, not normally having even a right of entry to a guest's room, does not have the right of control of the instrumentality. Larson v. St. Francis Hotel, 83 Cal. App. 2d 210, 188 P.2d 513 (1948).

[8] 25 Cal. 2d 486, 154 P.2d 687 (1944).

cause of the peculiar position of a doctor, especially within the hospital confines, the presumption is so strong that the doctor is aware of the true facts that exclusive control of the instrumentality will not be required in this type of situation.[9] In any event, it is to be noted that no subsequent case has gone as far as the *Ybarra* decision and its precedent value may be limited to its unique facts.

The third element of the test for the applicability of the doctrine of *res ipsa loquitur, i.e.*, that the plaintiff must establish that, if the defendant had used ordinary care, in the ordinary course of events the accident would not have happened, is a negative concept. The plaintiff, by his proof, must establish that there was no cause for the accident other than the negligence of the defendant.[10] By this, it is not meant that the conclusion of negligence to be reached by the jury must be made upon "absolute logical certainty," but the evidence must lead to a conclusion with probable certainty.[11] "There must be a *rational, i.e.*, evidentiary basis on which the jury can choose the competing possibilities,"[12] not one of speculation and conjecture. For example, in *Galbraith v. Busch*,[13] the plaintiff, while a guest in a car operated by one of the defendants, suffered injuries when the automobile suddenly swerved from the highway and crashed into a tree. The weather was clear, the highway in good condition and little traffic was on the road. *Res ipsa loquitur* was held inapplicable even though the instrumentality was identified and was established to be under the exclusive control of the defendant. The evidence failed to establish that there was a greater probability that the accident was caused by the negligence of the defendant than that it was caused by a mechanical defect unknown to the defendant.[14]

---

[9] Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1, 8-9 (1951).

[10] Thus, as in an ordinary negligence action, in New York, the plaintiff must prove the absence of any contributory negligence on his part. Minotti v. State, 6 App. Div. 2d 990, 176 N.Y.S.2d 449 (4th Dep't 1958) (memorandum decision).

[11] Galbraith v. Busch, 267 N.Y. 230, 234, 196 N.E. 36, 38 (1935).

[12] Jaffe, *Res Ipsa Loquitur Vindicated*, *supra* note 9, at 4.

[13] 267 N.Y. 230, 196 N.E. 36 (1935).

[14] The rule of *Galbraith* has been modified by Pfaffenbach v. White Plains Exp. Corp., 17 N.Y.2d 132, 216 N.E.2d 324, 269 N.Y.S.2d 115 (1966). Here, the plaintiff, a passenger, was injured when the car in which he was riding was struck by the defendant's truck which had crossed into the opposite lane. It was raining or snowing and the road was slippery. The defendant offered no explanation of the accident. There was a verdict for the plaintiff in the lower court, but the appellate division reversed. The Court of Appeals, in reversing the appellate division, held that the plaintiff had made out a prima facie case of negligence. In reaching this conclusion, the Court, in dictum, stated:

> The nice balance of knowledge and responsibility for some unknown 'defect in the automobile' as a possible cause of an unexplained accident which the passenger guest, when he got in the car, was

Once the three elements of the test have been established by the plaintiff, three effects of the application of the doctrine follow: (1) there is an inference of culpability on the part of the defendant; (2) the plaintiff's prima facie case is established; and (3) a question of fact is presented for the defendant to meet with an explanation.[15]

Jurisdictions are divided as to the question of whether the effect of the doctrine is the creation of a presumption or an inference of defendant's culpability.[16] A presumption may be defined as

> the assumption of the existence of one fact which the law requires the trier of fact to make on account of the existence of another fact or group of facts, standing alone.[17]

In the context of the doctrine of *res ipsa loquitur*, the purpose of the presumption is to make the defendant come forth with evidence, thus shifting the burden of explanation. It is to be noted that the presumption is rebutted as soon as the defendant comes forth with *any* evidence which is contrary to the presumption.[18] If the jurisdiction interprets the presumption of negligence in a strict sense, then "in absence of evidence to the contrary [submitted by the defendant], the court must decide the issue and direct the jury."[19]

An inference, on the other hand, is merely a permissible deduction which the jury may make.[20] Thus, in this context, *res ipsa loquitur* is but an evidentiary rule and, therefore, some courts have taken the position that it neither creates a full presumption nor entitles the plaintiff to a directed verdict.[21] This is true even if

---

> deemed to share equally with the owner and driver, and which it was held to be his burden to eliminate as part of his affirmative case has, in the 30 years since *Galbraith v. Busch* was handed down, been sapped of all practical application to the real world of motor vehicle operation. . . . *Id.* at 135-36, 216 N.E.2d at 325, 269 N.Y.S.2d at 116-17.

Indeed, the Court is supported by studies which show that only three and one-half percent of the cars in accidents have mechanical defects and only in one-quarter of one percent do these defects play a part. James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 770-71 (1950).

[15] Plumb v. Richmond Light & R.R., 233 N.Y. 285, 135 N.E. 504 (1922). Note that although the defendant must come forward with an explanation, the burden of proof remains with the plaintiff.

[16] The majority rule is that *res ipsa loquitur* creates an inference, not a presumption. Bulman, *Res Ipsa Loquitur—When Does It Apply?*, *supra* note 4. This is the New York position. *Infra* note 21.

[17] Note, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

[18] Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930).

[19] W. PROSSER, TORTS § 39 (3d ed. 1964).

[20] George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941).

[21] *Id.* *See also* Dickinson v. Delaware, L. & W. R.R., 3 App. Div. 2d 629, 158 N.Y.S.2d 127 (3d Dep't 1956) (memorandum decision); Judd v. Sams, 270 App. Div. 981, 62 N.Y.S.2d 678 (4th Dep't 1946) (memorandum decision), *aff'd*, 296 N.Y. 801, 71 N.E.2d 772 (1947) (memorandum decision).

the defendant offers no evidence to counter the inference of negligence.[22]

In an ordinary negligence action, a plaintiff must establish that (1) he is an individual or a member of a class of individuals to which the defendant owes a duty of care, (2) that defendant has breached that duty, and, (3) that such breach proximately caused the plaintiff's injuries. In a negligence action in which the plaintiff has successfully invoked the doctrine of *res ipsa loquitur*, the plaintiff must prove all the above facts except that the defendant was negligent and that negligence was the proximate cause of the accident.[23] Instead of actual proof, the inference of negligence is employed in establishing the prima facie case.[24]

When it is stated that as a result of *res ipsa loquitur* a question of fact is presented for the defendant to meet with an explanation, it is meant that the "burden of explanation" has been shifted from the plaintiff to the defendant, but not the "burden of proof."[25] "If a satisfactory explanation is offered by the defendant, the plaintiff must rebut it by evidence of negligence or lose his case."[26] The underlying reason for this shift is the defendant's exclusive control over the instrumentality, placing him in a better position to know the facts.[27]

The more difficult question to be dealt with, if the test for the application of *res ipsa loquitur* is met, is whether the doctrine should still be applied if the plaintiff pleads specific acts of negligence.

Pleading Specific Acts of Negligence

Where a plaintiff has alleged specific acts of negligence the courts have taken four basic positions: (1) The plaintiff, by his specific allegations, has waived or lost his right to rely on the doctrine.[28] (2) The plaintiff may take advantage of the doctrine

[22] Lo Piccolo v. Knight of Rest Prods., Corp., 7 App. Div. 2d 369, 183 N.Y.S.2d 301 (1st Dep't 1959), *aff'd*, 9 N.Y.2d 662, 173 N.E.2d 51, 212 N.Y.S.2d 75 (1961) (memorandum decision).

[23] *See* Citrola v. Eastern Air Lines, Inc., 264 F.2d 815 (2d Cir. 1959).

[24] The courts have often confused the terms inference and presumption with each other. With the exception of the previous section, the term inference as used in this note is not distinguished from the term presumption.

[25] It is to be noted, however, that a few states do shift the burden of proof to the defendant. *E.g.*, Jacks v. Reeves, 78 Ark. 426, 95 S.W. 781 (1906); Shaughnessy v. Director Gen. of R.Rs., 274 Pa. 413, 118 A. 390 (1922).

[26] Plumb v. Richmond Light & R.R., 233 N.Y. 285, 288, 135 N.E. 504 (1922).

[27] Jaffe, *Res Ipsa Loquitur Vindicated*, *supra* note 9, at 6-9 (1951). *See* Whitcher v. Board of Educ., 236 App. Div. 293, 258 N.Y.S. 556 (3d Dep't 1932).

[28] *E.g.*, Highland Ave. & B. R. Co. v. South, 112 Ala. 642, 20 So. 1003 (1896); Kerby v. Chicago Motor Coach Co., 28 Ill. App. 2d 259, 171 N.E.2d 412 (1960). It should be noted that the court in the *Kerby* case indicated that the rule entailed not only allegations of specific acts but also an attempt to prove such acts.

if the inference of negligence to be drawn supports the specific allegations.[29] (3) *Res ipsa loquitur* may be applied only if the specific pleading is accompanied by a general allegation of negligence.[30] (4) It is available regardless of the form of the pleading.[31]

The basic underlying theory of the first three rules is that a defendant who comes into court with notice only of a specific claim should not be required to litigate other issues, or to meet inferences based on a theory first advanced at the trial,[32] *i.e.*, the removal of the element of surprise. It should be observed that today these rules go more to the form than the substance of the law. In view of the liberal rules applicable to amending complaints now in use,[33] it would seem unnecessarily restrictive to limit the plaintiff's proof to his pleadings. Furthermore, should it appear that allowing the plaintiff to rely on *res ipsa loquitur* where he alleges specific acts of negligence would cause the element of surprise to be introduced, thus creating an inequity in the proceeding, the defendant would most likely be able to get a continuance or an adjournment in order to formulate his defense.[34] Such an eventuality is, however, unlikely in view of modern pre-trial discovery techniques, such as the examination before trial. Therefore, the fourth rule would seem to be the best, *i.e.*, allegations by the plaintiff of specific acts of negligence are of no import as to the application of *res ipsa loquitur*.[35]

Specific Proof: The New York Rules

The issue of specific proof has come to be such an enigma that one New York appellate court, in the case of *Zaninovich v. American Airlines, Inc.*,[36] stated:

---

[29] *E.g.*, Atkinson v. United R.Rs. of San Francisco, 71 Cal. App. 82, 234 P. 863 (1925); 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).

[30] *E.g.*, Rauch v. Des Moines Elec. Co., 206 Iowa 309, 218 N.W. 340 (1928); McDonough v. Boston Elevated Ry., 208 Mass. 436, 94 N.E. 809 (1911); Williams v. St. Louis Pub. Serv. Co., 363 Mo. 625, 253 S.W.2d 97 (1952).

[31] *E.g.*, Johnson v. Greenfield, 210 Ark. 985, 198 S.W.2d 403 (1946); Briganti v. Connecticut Co., 119 Conn. 316, 175 A. 679 (1934); DeRoire v. Lehigh Valley R.R., 205 App. Div. 549, 199 N.Y.S. 652 (4th Dep't 1923); Caivana v. Spohn, 29 Misc. 2d 183, 217 N.Y.S.2d 624 (Sup. Ct. 1961).

[32] W. PROSSER, *supra* note 19, at § 40.

[33] *E.g.*, FED. R. CIV. P. § 15; N.Y. CIV. PRAC. § 3025.

[34] *E.g.*, N.Y. CIV. PRAC. §§ 4402, 3211(d), (e).

[35] For a detailed discussion of the pleading area *see* Niles, *Pleading Res Ipsa Loquitur*, 7 N.Y.U.L.Q. REV. 415 (1929); Comment, *Practice and Procedure—The Effect of Plaintiff's Pleading on the Doctrine of Res Ipsa Loquitur*, 31 MICH. L. REV. 817 (1933); Comment, *The Effect of Specific Allegations on the Application of Res Ipsa Loquitur*, 27 FORDHAM L. REV. 411 (1958).

[36] 26 App. Div. 2d 155, 271 N.Y.S.2d 866 (1st Dep't 1966).

[I]t has involved grave logical difficulties in trying to separate the type of case where plaintiff offers less circumstances to establish defendant's liability from that where he offers more but, still being uncertain of his ground, declines to elect reliance between the doctrine and his specific proof.[37]

In that case, the plaintiff-executors were suing on behalf of the decedents who died when defendant's airplane crashed. The plaintiffs offered evidence showing that the pilot of the airplane was negligent in his duties and this negligence resulted in the crash. The lower court, nevertheless, allowed plaintiffs to rely on *res ipsa loquitur*.[38] The appellate court, in analyzing earlier court decisions, found there were two rules to be applied. First, "a plaintiff must elect whether he relies on *res ipsa loquitur* or proof of specific cause of accident,"[39] and, secondly, a plaintiff may "rely on the doctrine despite evidence of specific cause of accident so long as the evidence does not fully account for the accident."[40] The appellate court concluded that, although the plaintiffs had gone far enough in their proof so as to bar them from relying on *res ipsa loquitur*, the fact that the lower court allowed the plaintiffs to rely on the doctrine was not prejudicial error since, based on the evidence alone, the jury would have found for the plaintiffs.[41]

If the plaintiff satisfies the test for *res ipsa loquitur* and offers no proof of specific acts of negligence, he may rely on the doctrine. In addition, as was pointed out in *Zaninovich*, if the plaintiff meets the test for *res ipsa loquitur* and, at the same time, the evidence submitted by the plaintiff as to the defendant's negligence proves to be a preponderance of the credible evidence, it apparently makes no practical difference whether or not plaintiff is allowed to rely on *res ipsa loquitur*. However, serious problems remain in the area where the plaintiff introduces some evidence of specific acts of negligence which do not equal a preponderance of evidence. The New York position in this area will be analyzed in an attempt to clarify and to solve the problems therein.

The first important New York case to be examined is *Whitcher v. Board of Education*.[42] The plaintiff was a pupil in a school owned and operated by the defendant. He was injured while leaving the school building when he was struck on the head by a piece of glass

---

[37] *Id.* at 157, 271 N.Y.S.2d at 869-70.

[38] Zaninovich v. American Airlines, Inc., 47 Misc. 2d 584, 262 N.Y.S.2d 854 (Sup. Ct. 1965). For indication of this fact see the appellate division report, 26 App. Div. 2d 155, 271 N.Y.S.2d 866 (1st Dep't 1966).

[39] 26 App. Div. 2d at 157, 271 N.Y.S.2d at 869.

[40] *Id.* at 158, 271 N.Y.S.2d at 870.

[41] *Id.*

[42] 233 App. Div. 184, 251 N.Y.S. 611 (3d Dep't 1931).

which fell from a broken transom. At the trial, the plaintiff offered evidence that the transom had broken as a result of reverberations caused by the slamming of a door which was being blown around by the wind at the time of the accident. The court indicated that the duties of the defendant were the care, custody, control and safekeeping of the school property which involved reasonable inspection and repair, and that there was no proof of neglect in the performance of these duties. The lower court had given judgment for the plaintiff allowing him to rely on *res ipsa loquitur*. The appellate court reversed, finding that the doctrine was inapplicable to the case. The court stated:

'The doctrine of *res ipsa loquitur*, although it provides a substitute for direct proof of negligence where plaintiff is unable to point out the specific act of negligence which caused his injury, is . . . to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available. . . . Hence the presumption or inference arising from the doctrine cannot be availed of, or is overcome, where the plaintiff has *full knowledge* and testifies as to the specific act of negligence which is the cause of the injury complained of.'[43]

Although the court espoused the above doctrine, it would appear that the decision was a misapplication of its own rule. The plaintiff's evidence established only what was the *direct* cause of the accident, *i.e.*, the slamming of the door, but did not establish whether the defendant's negligence, if it were negligent, was the *proximate* cause. To the extent that blueprints, records of inspection and care, and expert opinion might have been available to the plaintiff, and since the plaintiff had knowledge of the direct cause of the accident, actual evidence of negligence would have been available to the plaintiff; a plaintiff in such a case should not be allowed to rely on the doctrine of *res ipsa loquitur*. Apparently, however, judging from the dissenting opinion, such records were not available to the plaintiff.[44] Thus, the plaintiff in fact did not have *full knowledge* of the specific act of negligence and should have been allowed to rely on *res ipsa loquitur*.

The anomaly of the *Whitcher* decision is to be seen in the court's decision of the case when it was reviewed for the second time.[45] There, the facts established were identical to those shown in the first instance except that no evidence was introduced by the

---

[43] *Id.* at 184-85, 251 N.Y.S. at 612-13 (emphasis added). It is to be noted that although the court here attributes the statement to Plumb v. Richmond Light & R.R., 233 N.Y. 285 (1922), no such statement is to be found in that case, and all subsequent cases cite *Whitcher* for the statement.

[44] *Id.* at 186, 251 N.Y.S. at 614 (dissenting opinion).

[45] Whitcher v. Board of Educ., 236 App. Div. 293, 258 N.Y.S. 556 (3d Dep't 1932).

plaintiff tending to establish that the glass fell because of the slamming of the door. The lower court refused to allow the plaintiff to rely on *res ipsa loquitur*, but the appellate court reversed, holding that the plaintiff should have been allowed to rely upon the doctrine because the defendant was "in the best position to show that the happening was without its fault."[46]

The result of the *Whitcher* case was the formation of three conflicting rules of election in New York. They are: (1) if the plaintiff has offered evidence in some degree to explain the direct cause of the accident he is barred from relying on *res ipsa loquitur*; (2) where the plaintiff introduces evidence which tends to establish specific acts of the defendant's negligence, the plaintiff is barred from relying on the doctrine of *res ipsa loquitur*; and, (3) the plaintiff is barred from relying on the doctrine of *res ipsa loquitur* only where he factually establishes a prima facie case.

The first rule is apparently based on the actual result of the *Whitcher* cases. The second rule is apparently based in part on the reasoning given in those cases. The third is apparently based in total on the reasoning found in *Whitcher*.

An example of the first rule is found in *Bressler v. New York Rapid Transit Corp.*,[47] wherein the plaintiff was injured when struck by a piece of glass which fell from the window of the defendant's train on which she was a passenger. The plaintiff claimed that the window was cracked prior to falling, but stated that the defendant could not be charged with notice or negligence based on that fact alone. Similarly, the defendant was not charged with negligence in the operation of the train with respect to any sudden jolting or jerking. The defendant offered evidence tending to show that a boy had thrown a stone through the window, thus causing the accident. The lower court submitted the case to the jury on the basis of *res ipsa loquitur* and gave judgment for the plaintiff. The Court of Appeals reversed, holding *res ipsa loquitur* inapplicable to the case.

The Court found that the plaintiff's evidence tended to prove the cause of the accident but did not establish evidence of the defendant's negligence. While approving the *Whitcher* decisions, the Court stated "[i]n the absence of evidence by plaintiff tending *in some degree* to explain the cause of . . . [the] accident,"[48] the defendant would have the "burden of explanation." Thus, since the plaintiff had offered evidence *in some degree* to explain the direct cause of the accident, he was barred from relying on *res ipsa loquitur*. It would seem that the Court's reasoning here cannot be logically supported. *Res ipsa loquitur* allows an inference or pre-

---

[46] *Id.* at 294, 258 N.Y.S. at 557.
[47] 270 N.Y. 409, 1 N.E.2d 828 (1936).
[48] *Id.* at 413, 1 N.E.2d at 829 (emphasis added).

sumption of negligence where negligence cannot be proved, not where the direct cause of the injury cannot be established. The Court failed to distinguish between the direct and the proximate cause of the injury, *i.e.*, although the falling glass can be considered the direct cause of injury, no evidence was introduced on behalf of the plaintiff tending to establish the negligence of the defendant as the proximate cause of the glass falling.[49]

The second rule of election in New York may be illustrated by two cases: *Goodheart v. American Airlines, Inc.*[50] and *Cunningham v. Lence Lanes, Inc.*[51] *Goodheart* was a wrongful death action which evolved when plaintiff's intestate died as a passenger on the defendant's airplane when it crashed. The plaintiff alleged that the pilot was negligent in that, among other things, he carelessly and unnecessarily deviated from the safe course he was ordered to take and took a course over an unfamiliar mountainous area thereby proceeding at an unsafe altitude. The plaintiff's proof tended to establish the specific indications of negligence: that the plane crashed into the mountain twelve hundred feet below its summit; that the mountain was located fifty miles off the route which the pilot had been ordered to take; that the pilot had maps showing the contour of the land over which he flew; and, that although the weather was inclement, the airplane was equipped with all the necessary instruments for "flying blind." The defendant proved that it had complied with all government rules and regulations, that the pilot was experienced and licensed and that the plane and instruments were sound and had been inspected prior to the flight.

Although the plaintiff did not request the court to do so, the lower court submitted the case to the jury on the theory of *res ipsa loquitur* and the jury gave a verdict for the defendant. The appellate division, on the plaintiff's appeal, reversed, finding that the doctrine of *res ipsa loquitur* was inapplicable in that the plaintiff introduced evidence to establish the specific acts of negligence and the verdict was against the clear weight of the evidence.[52]

It appears that the court, by linking the allegations of negligence with the proof, erred in its analysis. Based on the facts presented in this case, it would seem to be a proper one for the application of the doctrine of *res ipsa loquitur*. All the facts proved by the plaintiff appear to be neutral and circumstantial in nature. Therefore, since the plaintiff had merely alleged and not formally proved any actual facts which showed negligence, a combination of the two should not be sufficient to withhold the benefit of the *res ipsa loquitur* doctrine.

---

[49] From a reading of subsequent cases, it would appear that the rule of this case has not been followed.

[50] 252 App. Div. 660, 1 N.Y.S.2d 288 (2d Dep't 1937).

[51] 25 App. Div. 2d 238, 268 N.Y.S.2d 609 (3d Dep't 1966).

[52] 252 App. Div. at 663, 1 N.Y.S.2d at 291.

In *Cunningham,* the plaintiff, a business invitee of defendant, was injured while leaving the defendant's bowling establishment by means of a glass door. When he opened the door in an apparently proper manner, the plate glass in the door shattered and fell from its frame, striking plaintiff on the leg and causing his injury. At the trial, plaintiff introduced direct evidence tending to prove that the glass shattered because of the defendant's specific acts of negligence in the construction, maintenance and supervision of the door. The lower court submitted the case to the jury with an instruction as to the applicability of *res ipsa loquitur* and judgment was given for the plaintiff. The appellate court, in reversing, held that not only was the proof submitted insufficient to establish negligence but it "effectively deprived the plaintiff of the benefit of the presumption under the rule of *res ipsa loquitur.*" [53]

Thus, the second rule of election as to *res ipsa loquitur* of the New York courts is that where the plaintiff introduces evidence which tends to establish specific acts of defendant's negligence, he is barred from relying on the doctrine of *res ipsa loquitur.* The purpose of the doctrine of *res ipsa loquitur* being to allow a plaintiff to establish a prima facie case via an inference that the defendant was negligent and that such negligence had caused the plaintiff's injury, it is hard to see why proof of specific acts of negligence should deny the plaintiff this inference where, because of the surrounding circumstances, he is unable to gain full knowledge of the accident. Indeed, there is every reason to allow the plaintiff the inference of the defendant's negligence in such circumstances. For example, assume the plaintiff was a passenger on the defendant's train and that the train crashed, injuring the plaintiff. The plaintiff proves that the defendant's engineer was drunk and acting in a careless manner, but he cannot show that this was the proximate cause of the accident. In fact, unknown to the plaintiff, but known to the defendant, the accident was caused by the defendant's switchman negligently leaving a switch open. This fact is not offered at trial, nor could the plaintiff ever discover such fact. It is submitted that under these circumstances, the plaintiff should not be denied the inference of *res ipsa loquitur* even though it is proved that such alleged negligence was not the cause of the accident.

The third rule barring a plaintiff from relying on *res ipsa loquitur* has developed in recent years in the federal courts which have interpreted New York law. In the case of *Citrola v. Eastern Air Lines, Inc.,*[54] the plaintiff was the administratrix of an individual killed in an airplane crash. The plaintiff showed that im-

[53] 25 App. Div. 2d at 239, 268 N.Y.S.2d at 610.
[54] 264 F.2d 815 (2d Cir. 1959).

mediately prior to the accident the defendant's plane was flying below the minimum altitude allowed by regulations. This evidence alone, if believed by the jury, would have been sufficient to prove negligence. In the district court, the case went to the jury on the doctrine of *res ipsa loquitur* and judgment was given for the plaintiff. The circuit court of appeals, in affirming the judgment, noted that flying below the minimum altitude was only one possible cause for the accident, that several other probable negligent causes also existed, and, therefore, the inference of *res ipsa loquitur* was allowed. The court stated:

> The strength or weakness of the inference will, of course, vary with the circumstances. If the plaintiff introduces evidence tending to prove a specific cause of the occurrence, naturally the strength of the possible inference that the occurrence was attributable to an *unknown* act of the defendant diminishes.[55]

This view was further confirmed in *Becker v. American Airlines, Inc.*,[56] which involved a hearing to determine the rule on a pre-trial question as to the application of *res ipsa loquitur*. The court ruled that the plaintiff's right to rely on the doctrine was "not lost by plaintiff's attempt to show the *possible* causes of an airplane accident."[57]

Thus, the federal interpretation of New York law seems to be that where there is some evidence introduced tending to show specific acts of the defendant's negligence, but not purporting to furnish a complete explanation of the accident, such introduction does not destroy the inferences consistent with the evidence or deprive the plaintiff of the benefit of *res ipsa loquitur*.[58] Where the evidence furnishes a complete explanation of the accident, there obviously can be no inference of negligence since the plaintiff would then have proved a prima facie case under the ordinary rules of negligence.

A fourth theory has been suggested that only evidence of specific negligence which "clearly establishes the precise cause of the injury" and not "[e]vidence of specific negligence which amounts to a prima facie case" should rule out the possibility of a plaintiff's utilization of the doctrine of *res ipsa loquitur*.[59] How-

---

[55] *Id.* at 813.

[56] 200 F. Supp. 839 (S.D.N.Y. 1961).

[57] *Id.* at 840 (emphasis added).

[58] This is the rule suggested in W. PROSSER, TORTS § 40 (3d ed. 1964). Although not truly adopting the federal interpretation in its decision, a New York appellate court has incorporated the language of the federal interpretation into its opinion. McKenna v. Allied Chem. & Dye Corp., 8 App. Div. 2d 463, 188 N.Y.S.2d 919 (4th Dep't 1959).

[59] Note, *Negligence—Res Ipsa Loquitur—Applicability*, 1959 WIS. L. REV. 325, 328.

ever, it is suggested that the proponent of such a rule has fallen into a semantic trap since both phrases appear mutually inclusive. Under normal principles of negligence a plaintiff must prove that the defendant's act of negligence was the proximate cause of the injury. Therefore, evidence of specific negligence which clearly establishes the precise cause of the injury is a necessary and integral part of a negligence action wherein *res ipsa loquitur* is not applicable.

Conclusion

Of the three New York rules pronounced in the courts, the federal interpretation seems to be the most reasonable. The rule that a plaintiff will be barred from relying on *res ipsa loquitur* when he proves the direct cause of the injury is deficient in that it fails to take into account the fact that the negligence of a defendant is not necessarily the direct cause of the accident.

The rule that a plaintiff will be barred from relying on the doctrine where his proof tends to establish specific acts of negligence is also open to criticism. The rule fails to take into account the fact that a *res ipsa loquitur* inference creates a prima facie case, *i.e.*, the inference is that the defendant was negligent and that such negligence was the proximate cause of the accident. The negligence which the plaintiff tends to establish through his proof is not necessarily the proximate cause of the accident, and he should therefore not be denied the inference under certain circumstances.

On the other hand, the federal interpretation that the plaintiff will be barred from relying on the doctrine of *res ipsa loquitur* only where he establishes a prima facie case seems to be the most equitable rule.[60] Indeed, the New York Court of Appeals seems to be favoring the federal interpretation, as may be seen in the recent case of *McDonald v. Shell Oil Co.*[61]

In *McDonald*, the plaintiff's intestate was killed when he was struck by a piece of chain while waiting for his automobile at a service station. The station was owned by the defendant Shell Oil Company and leased to and operated by the defendant Smith. Smith had requested Shell to install an hydraulic lift in one of its bays, the other bay already having a lift. Shell purchased the equipment from the defendant Joyce Cridland Company and hired the defendant Manion to install it. Manion connected the control valve for the new lift. While he was doing this he had turned off the compressor and had asked Smith not to turn it on or to use the old lift while he was working. Accordingly, Smith's employees

---

[60] Under the federal interpretation, the introduction of evidence tending to establish specific acts of negligence goes only to the strength of the inference.

[61] 20 N.Y.2d 160, 288 N.E.2d 899, 281 N.Y.S.2d 1002 (1967).

waited until Manion had finished for the day and then turned on the compressor to use the old lift. The control valve was turned off for the new lift, but, as a result of a leak in the valve, air flowed into the new lift causing it to rise. The chain holding the lift in place broke and the accident resulted.

The leak in the valve was caused by a sliver of low carbon steel. The valve itself was made of stainless steel but the pipes to which the valve had been attached were made of low carbon steel. At the trial, the defendant Manion testified that prior to attaching the pipes he had cut them and this produced metallic shavings.

The lower court found in favor of the defendants Shell Oil Company and Joyce Cridland Company, but found for the plaintiff as against Smith and Manion. The Court of Appeals reversed the judgment as to Smith but affirmed as to Manion. In its opinion the Court noted that "[t]he plaintiff did not rely on *res ipsa loquitur* but attempted to show specific acts of negligence";[62] nevertheless, the Court felt that

> [t]he sliver had to come from somewhere. Since it was not of the same substance (stainless steel) as the valve, there appears a sufficient basis for *inferring* that Manion caused it.[63]

The question to be answered is on what theory did the Court rely in affirming the judgment against Manion. The Court plausibly could have reached its decision on the basis of damaging circumstantial evidence of negligence. However, it would seem that if the Court followed this theory it would have announced its rationale as such. Moreover, if this was the Court's theory, there was no need to mention the *res ipsa loquitur* doctrine at all.

On the other hand, the Court could have relied on the doctrine of *res ipsa loquitur* to affirm the judgment. If it did so, it must be determined whether the Court deemed the evidence submitted entirely neutral and circumstantial or in part tending to establish specific acts of negligence. It would seem, by the Court's reliance on Manion's damaging testimony, that it believed that the evidence tended to establish a specific act of negligence. Since the Court affirmed the judgment, if it was indeed basing its opinion on *res ipsa loquitur*, there is no conclusion to be had other than that the Court of Appeals followed the federal interpretation as to proof of negligence.

To reiterate, the federal interpretation is that, as long as the plaintiff does not establish a prima facie case, the fact that the

---

[62] *Id.* at 165, 288 N.E.2d at 901, 281 N.Y.S.2d at 1004.

[63] *Id.* at 166, 288 N.E.2d at 902, 281 N.Y.S.2d at 1006 (emphasis added).

proof offered tends to establish a specific act of negligence should not bar the plaintiff from relying on *res ipsa loquitur*. It is submitted that the federal interpretation is the proper one with one further limitation. In a situation where the plaintiff has not established a prima facie case, but from all the evidence submitted it is reasonable to assume he could have done so, the plaintiff should not be allowed to hide behind the doctrine of *res ipsa loquitur*; he should not be given the procedural advantage of an inference to which he is not equitably entitled.