

The New Interpretation of Res Ipsa Loquitur

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effect that "such an objection goes to the application of the full faith and credit clause to many situations"⁴⁸ assumes doubtful conviction in the face of attack on the ground that marriage and divorce have been the subject of special scrutiny and care by states due to the particular relationships therein involved.

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THE NEW INTERPRETATION OF RES IPSA LOQUITUR

The phrase *res ipsa loquitur*—the thing speaks for itself—was used for the first time in the English Court of Exchequer in 1863.¹ In the case of *Byrne v. Boadle*² the plaintiff, while walking along a public street, was struck by a barrel of flour falling from a window above. Said Pollock, C. B.: ". . . there are many accidents from which no presumption of negligence can arise." But on the facts the court held the occurrence would afford "*prima facie* evidence of negligence". Thereafter a number of cases under the rule came up in England and Canada.³ The doctrine was adopted and spread in the United States in the beginning of the 19th century, where it expanded in most jurisdictions. The first *res ipsa* case in New York was *Hogan v. Manhattan Ry.*⁴ This rule now plays an important role in the law of torts and evidence.⁵ However, it has been the source of much confusion in the courts as well as in the writings on the subject.⁶

The situation is, as follows: An instrumentality, in the exclusive possession and management of the defendant or his servants, produces harm to the plaintiff. Furthermore, such an accident would not

and credit, a substantial dilution of the sovereignty of other states will be effected, for it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state." *Williams v. North Carolina*, 317 U. S. 287, 87 L. ed. 189, 63 Sup. Ct. 207, 215 (1942).

⁴⁸ *Ibid.*

¹ HARPER, *TORTS* (1937) 182; PROSSER, *TORTS* (1941) 293.

² H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863). See also *Scott v. London and St. Katherine Docks Co.*, 3 H. & C. 596 (Exch. Chamb. 1865), 159 Eng. Rep. 665 (a classic) (Plaintiff, an officer of the Customs, whilst in the discharge of his duty, was passing in front of defendant's warehouse; six bags of sugar fell upon him).

³ 9 WIGMORE, *EVIDENCE* (3d ed. 1940) § 2509.

⁴ 149 N. Y. 23, 43 N. E. 403 (1896) (An iron bar from defendant's structure hurt the plaintiff while driving along defendant's elevated railway). See also *Griffin v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901) (Passenger rode on elevator and was killed by falling weights).

⁵ WIGMORE, *op. cit. supra* note 3, at 378.

⁶ Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724; Carpenter, *The Doctrine of Res Ipsa Loquitur* (1934) 1 U. OF CHI. L. REV. 519; Prosser, *The Procedural Effect of Res Ipsa Loquitur* (1936) 20 MINN. L. REV. 241.

usually happen, if the defendant had used due care. Finally, there is no contributory negligence of the plaintiff.⁷ Frequent examples are damages to property from breaks of water mains and gas mains.⁸ In these cases, where the defendant has better opportunity to obtain evidence than does the plaintiff, or, in other words, is "in a better position to prove his innocence than the plaintiff is to prove his negligence, there exists a *res ipsa loquitur* case".⁹ This rule seemingly is an offspring of an old English pleading rule that less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.

As to the procedural effect of the doctrine, the courts have, to the knowledge of the writer, nowhere up to this date given an adequate definition. In these cases the real cause of the injury usually cannot be shown. Does the plaintiff in such a case have to make out a *prima facie* case by independent evidence of negligence or is there an inference or rebuttable presumption of negligence against the defendant? A *prima facie* case from the viewpoint of the negligence means that the balance of probability is for the plaintiff. It involves a factual evaluation.¹⁰ Under the particular circumstances of the injurious event, or accident, the plaintiff is unable usually to prove the negligent act or the careless failure to act on the part of the defendant. Instead, the injurious event, in and of itself, *bespeaks* negligence to the mind of reasonable men, *viz.*, the jurors, telling them that in the absence of satisfactory explanation the defendant must have been negligent.

On the other hand, a presumption is a rule of law. A presumption is not based on probability at all.¹¹ It is a convenience which exists, because it has not been rebutted. The law presumes negligence arbitrarily in particular cases. One branch of the *res ipsa* cases, the carrier-collision cases,¹² are based on a presumption of law.

⁷ *George Foltis, Inc. v. City of New York*, 287 N. Y. 108, 38 N. E. (2d) 455 (1941), 117: "... wherever there is a combination of those two conditions, *viz.*, control by the person charged with negligence and improbability of the occurrence having happened if he had been reasonably careful, the doctrine applies."

⁸ *Cf. PROSSER, TORTS* 294 n.81, and *WIGMORE, ibid.*, for a collection of cases.

⁹ *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U. S. 104 (1941), 111: "... where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the fact in issue . . . Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him."

¹⁰ *HARPER, TORTS* (1937) 183; *Sweeney v. Erving*, 228 U. S. 233 (1913), 240: "When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."; *Foltis v. City of New York*, 287 N. Y. 108, 119, 38 N. E. (2d) 455, 461.

¹¹ *Foltis v. City of New York, id.* at 121: "Very little evidence might suffice to rebut a presumption."

¹² *Cf. (1942) 42 Col. L. Rev.* 877, 880, and the collection of cases cited there in footnotes 15, 16 and 17.

In view of the writer, they are cases in contracts, not in torts. The contractual relationship between the passenger plaintiff and the common-carrier defendant forms the basis of the claim. Under the law "common carriers are responsible for all loss or damage during transportation, from whatever cause, except the act of God or the public enemy".¹³ The common-carrier reserves his fare from the passenger for the transportation and, in return, is i.a. presumed by law to be negligent, whatever damages the passenger may suffer during the transportation. In *Loudoun v. Eighth Ave. R. R. Co.*¹⁴ there was a collision between two street cars belonging to different companies. The plaintiff, a passenger on a car of the Eighth Avenue R. R. Co., sued both companies. The court did not go into the question which company had been negligent, but said: ". . . the Third Avenue Railroad Company . . . defendant, not being the carrier, was bound only to the exercise of ordinary care in the management of its cars."¹⁵ ". . . when such a collision occurs there arises a presumption of negligence on the part of the carrier . . ."¹⁶ Judgment was only against the Eighth Avenue R. R. Co. In *Plumb v. Richmond Light & R. R. Co.*¹⁷ the court states: "If a passenger in a street car is injured by reason of a collision with another vehicle moving in the street, a presumption of negligence arises against the carrier . . ." "This presumption arises out of the duty of the carrier to its passengers 'to exercise the very highest degree of care in the management and operation of its car . . .'"¹⁸ Therefore these cases should not be called *res ipsa* cases, but be distinguished from the latter.

Nevertheless, judicial opinions in *res ipsa* cases have used both terms—*prima facie* and presumption—indiscriminately. Thus in *Hogan v. Manhattan Ry. Co.*¹⁹ the New York Court of Appeals, in the same breath, said: ". . . the accident is *prima facie* evidence of negligence, or, in other words, the presumption of negligence arises." The United States Supreme Court in *Sweeney v. Erving*²⁰ spoke of "a presumption of negligence on defendant's part, upon the doctrine of *res ipsa loquitur*". A choice must be made between the two views.²¹

A careful study of the New York law up to 1936 in an article on

¹³ 1 BOUVIER, LAW DICTIONARY (8th ed. 1914) "Common Carrier".

¹⁴ 162 N. Y. 380, 56 N. E. 988 (1900).

¹⁵ *Id.* at 385, 56 N. E. at 989.

¹⁶ *Id.* at 387, 56 N. E. at 989.

¹⁷ 233 N. Y. 285, 135 N. E. 504 (1922).

¹⁸ *Id.* at 289, 135 N. E. at 505.

¹⁹ *Supra* note 4.

²⁰ 228 U. S. 238 (1913).

²¹ *Foltis v. City of New York*, 287 N. Y. 108, 121, 38 N. E. (2d) 455, 462: "A study of the opinions of the appellate courts of this state reveals that judges have used the terms 'inference' and 'presumption' indiscriminately and without recognition that an 'inference' and a 'presumption' are not identical in scope or effect. Judicial failure to note the distinction has led to confusion of thought and often to inconsistencies in judicial opinions and decisions."

this question led Mr. Rosenthal to the following result:²² "On the basis of the authorities considered thus far . . . it may well be concluded that New York adheres to the view that a *res ipsa loquitur* case has the procedural effect of a true presumption." And:²³ The "procedural effect is in the nature of a rebuttable presumption, requiring a directed verdict for the plaintiff in case the defendant fails to introduce evidence in rebuttal . . ."

In thus setting forth "the present state of the New York law on the procedural effect of *res ipsa loquitur*" Rosenthal still felt that the doctrine needed to "be more fully explained"²⁴ by the courts in this jurisdiction. Five years later the *Foltis*²⁵ case gave an elaborate response to such request. An action was brought for damages to a restaurant resulting from a broken water main in the city of New York. Lehman, C. J., writing for the majority, one judge dissenting, has in this opinion said the latest word on the rule of *res ipsa loquitur* in New York. His formulation reads, as follows:²⁶ "Where a plaintiff establishes *prima facie* by direct evidence that injury was caused by negligence of the defendant . . . the question of whether the defendant was in fault in what he did or failed to do is ordinarily one of fact to be determined by the jury . . . The practice should be the same where under the rule of *res ipsa loquitur* the plaintiff establishes *prima facie* by circumstantial evidence a right to recover."

Accordingly, upon the authority of the highest tribunal within this jurisdiction, the law has now been established contrary to the trend which Rosenthal had discerned hitherto. Thus, after some obscurity of treatment, the New York Court of Appeals has reached the conclusion that the phrase *res ipsa loquitur* refers to *prima facie* cases, as distinguished from a presumption.²⁷

In a decision of a sister state²⁸ we are presented with a situation analogous to the *Foltis* case. A gas heater exploded in a restaurant. The explosion blew the front of the building into the street, carrying a restaurant employee with it. The court held it to be "apparent that the rule of *res ipsa loquitur* applies to the facts in the case at bar".²⁹ "*Res ipsa loquitur* . . . is evidence to be weighed, not necessarily to be accepted as sufficient . . ." said the Supreme Court of Iowa.

Equally in 1941 the Federal Supreme Court dealt with a *res ipsa*

²² Rosenthal, *The Procedural Effects of Res Ipsa Loquitur in New York* (1936) 22 CORN. L. Q. 39, 57.

²³ *Id.* at 61.

²⁴ *Id.* at 63.

²⁵ *Supra* note 7. Cf. Notes (1942) 27 CORN. L. Q. 285, (1942) 42 COL. L. REV. 877, (1942) 19 N. Y. U. L. Q. REV. 444, (1942) 11 FORDHAM L. REV. 226.

²⁶ *Foltis v. City of New York*, 287 N. Y. 108, 122, 38 N. E. (2d) 455, 463.

²⁷ *Accord*, (1942) 42 COL. L. REV. 879, 880.

²⁸ *Sutcliffe v. Fort Dodge Gas and Electric Co.*, 218 Iowa 1386, 257 N. W. 406 (1934).

²⁹ *Id.* at —, 257 N. W. at 411.

case in *Commercial Molasses Corp. v. New York Tank Barge Corp.*³⁰ There Mr. Chief Justice Stone delivered the opinion of the Court on a proceeding in admiralty. Defendant, a private carrier, had the duty to furnish a seaworthy barge. It sank without contact with any external object to account for the sinking. Mr. Chief Justice Stone stated: "This is but a particular application of the doctrine of *res ipsa loquitur*, which similarly is an aid to the plaintiff in sustaining the burden of proving breach of the duty of due care but does not avoid the requirement that upon the whole case he must prove the breach by the preponderance of evidence."³¹ However, as Lehman, C. J., did in the *Foltis* case, Mr. Chief Justice Stone failed to lay down a principle of large and general application and to finally shape the rule. He confined himself to saying: "Whether we label this permissible inference with the equivocal term 'presumption' or consider merely that it is a rational inference from the facts proven . . ." ³²

Since the fellow-servant rule is abolished, the doctrine of *res ipsa loquitur* may, in view of the constantly increasing specialization of labor, gain importance in favor of employees in common law suits against their employer. A factory workman frequently operates a machine which is moved by another laborer. His task amounts only to a fraction of the whole manipulation necessary for the production of a particular article, of which, as a totality, he may know nothing. Should the employee suffer damages from injuries sustained while at work, he is entitled to rest upon the doctrine of *res ipsa loquitur* and recover in the absence of an explanation by the defendant employer.³³

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³⁰ 314 U. S. 104 (1941).

³¹ *Id.* at 113.

³² *Id.* at 111.

³³ *Marceau v. Rutland R. R. Co.*, 211 N. Y. 203, 105 N. E. 206 (1914); (1925) 25 Col. L. Rev. 109; (1926) 26 Col. L. Rev. 111.