

Negligence--Motor Vehicles--Res Ipsa Loquitur--Burden of Proof (Galbraith v. Busch, 267 N.Y. 230 (1935))

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appellant with the "exclusive right" to collect interest on the bond and mortgage amounts to no more than an agreement to continue the agency for the life of the policy.¹ Furthermore, the parties to the policy never contemplated that by provision of law² the mortgage when due could not be collected nor that the guarantee company would go into the hands of a rehabilitator because of a decree declaring its affairs to be in such a condition that a continuancy would be hazardous to its policyholders. The basis on which the policy was entered into has been removed and the value of the guarantee impaired by the forces of these uncontrollable supervening events.³ The bank should be absolved when the guarantee company is released.⁴ In the instant case the statute was held to be retroactive which is not the general rule⁵ but the court justifies its position on the ground that to rule the reverse would be detrimental to many.⁶ Although courts do not modify, change or alter contracts⁷ it is with interest that we note this decision in our present economic conditions and how our courts are tempering justice with humanity and sound economics.⁸

C. B. K.

NEGLIGENCE—MOTOR VEHICLES—RES IPSA LOQUITUR—BURDEN OF PROOF.—Plaintiff was injured while a guest in an automobile owned by her daughter, the defendant Sarah M. Galbraith, and operated under her direction by the defendant Busch. The automobile suddenly swerved from the highway and crashed into a tree. The evidence failed to show any cause for the sudden swerve. Plaintiff contended that under these circumstances a presumption of negligence was raised and that it was the duty of the defendant to go forward with their evidence and show why the car left the highway, and that it did so without any fault or negligence on the part of the driver, Busch. The defendant did not testify as to the cause of the

¹ Farmers Loan & Trust Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784 (1893); RESTATEMENT, AGENCY (1934) §138.

² N. Y. CIVIL PRACTICE ACT §§1077-a, 1077-f.

³ *Supra* note 2; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595 (1891); Buffalo & Lancaster Land Co. v. Bellevue Land & Improvement Co., 165 N. Y. 247, 59 N. E. 5 (1901); Day v. United States, 245 U. S. 159, 38 Sup. Ct. 57 (1917).

⁴ People by Van Schaick v. N. Y. Title & Mortgage Co., 241 App. Div. 351, 272 N. Y. Supp. 553 (1st Dept. 1934).

⁵ Minsker v. John Hancock Mut. Life Ins. Co., 245 N. Y. 330, 38 N. E. 88 (1894).

⁶ People by Van Schaick v. N. Y. Title & Mortgage Co., 241 App. Div. 351, 272 N. Y. Supp. 553 (1st Dept. 1934).

⁷ See WILLISTON, CONTRACTS (3d ed. 1924) §1931.

⁸ *Contra*: Hunt v. Rousmanier, 8 Wheat. 174 (U. S. 1823); Taylor v. Burns, 203 U. S. 120, 27 Sup. Ct. 40 (1906).

accident. The plaintiff recovered in the lower court. On appeal, *held*, reversed. In the absence of circumstances which would justify an inference of negligence, the doctrine of *Res Ipsa Loquitur* does not apply, and the plaintiff has the burden of showing failure by the defendant of some duty owing by him to the plaintiff. *Galbraith v. Busch*, 267 N. Y. 230, 196 N. E. 36 (1935).

The doctrine of *Res Ipsa Loquitur* has been applied in actions seeking to recover for injuries due to the operation of automobiles where the facts surrounding and forming part of an automobile accident were such as to raise the inference that the accident was due to negligence on the part of the person operating or in control of the automobile.¹ The mere happening of the accident does not raise the presumption of negligence.² It is only where the evidence shows that the particular accident would not ordinarily have occurred without the negligent performance of some duty owed to the plaintiff, that the doctrine of *Res Ipsa* applies.³ Also, where an injury results from an instrument exclusively within the control and supervision of the defendant, which injury would not in the ordinary course of events have resulted if proper care had been exercised by the defendant, the doctrine of *Res Ipsa* has been applied,⁴ and the burden rests upon the defendant to explain the cause of the accident and, if possible, to overcome the presumption of negligence.⁵ The problem in each case is whether the circumstances unexplained do justify an inference of negligence.⁶ The same rule has been followed in other jurisdictions where like facts have been involved.⁷ In New

¹ BERRY, AUTOMOBILES (4th ed. 1924) §216; *Mackenzie v. Oakley*, 94 N. J. L. 66, 108 Atl. 771 (1920); *King v. Davis, Agent*, 296 Fed. 986 (App. D. C. 1924); *Hamburger v. Katz*, 167 La. 852, 120 So. 391 (1928); *Wickton, et al. v. Louisville & N. R. Co.*, 45 F. (2d) 615 (D. C. S. D. Miss. 1903).

² *Langley Bus Co. v. Messer*, 222 Ala. 533, 133 So. 287 (1931); *Warshawsky et al. v. Nevins Bus Co.*, — N. J. —, 153 Atl. 114 (1931); *Morton et ux. v. Hinds et al.*, 113 Cal. App. 437, 298 Pac. 160 (1931); *Cecomancino et al. v. D'Onofrio et al.*, 111 N. J. L. 494, 168 Atl. 578 (1933); *Harrison v. Southern Ry. Co. et al.*, 204 N. C. 718, 169 S. E. 637 (1933).

³ *Slater v. Barnes*, 241 N. Y. 284, 149 N. E. 859 (1925).

⁴ *Faubion v. Kansas City Public Service Co.*, — Mo. —, 22 S. W. (2d) 897 (1929); *Wright v. Southern Counties Gas Co. et al.*, 102 Cal. App. 656, 283 Pac. 823 (1929); *Strother v. Adohr Creamery Co. et al.*, 133 Cal. App. 405, 24 P. (2d) 365 (1933); *Gritsch v. Pickwick Stages System*, 131 Cal. App. 774, 22 P. (2d) 554 (1933).

⁵ *Bennet v. Edward*, 239 App. Div. 157, 267 N. Y. Supp. 417 (3d Dept. 1933); *Slater v. Barnes*, 241 N. Y. 284, 149 N. E. 859 (1925).

⁶ Instant case, *Lehman, J.*, writing the opinion of the court, says, "Ordinarily, circumstantial evidence is insufficient where the circumstances are consistent with freedom from wrong. In the administration of the law arbitrary rules cannot be substituted for logically probative evidence. The doctrine of *Res Ipsa Loquitur* is not an arbitrary rule. It is rather a common sense appraisal of the probative value of circumstantial evidence. It requires evidence which shows at least probability that a particular accident could not have occurred without legal wrong by the defendant."

⁷ *Baker v. Baker*, 220 Ala. 201, 124 So. 740 (1929); *Chaisson v. Williams*, 130 Me. 341, 156 Atl. 154 (1931); *Barger v. Chelpon*, 60 S. D. 66, 243 N. W. 97 (1932); *Nicol v. Geitler*, 188 Minn. 69, 247 N. W. 8 (1933).

York, the duty which the driver of an automobile owes to an invited guest is to exercise ordinary and reasonable care⁸ and the guest assumes the risk of any defect in the automobile which was not known to the defendants, and the defendants were under no duty to exercise care to discover and repair defects not known to them.⁹ Thus, where there is no proof as to the cause of the accident, the doctrine of *Res Ipsa* properly does not apply,¹⁰ and the burden of proof is upon the plaintiff to prove his contention by a preponderance of evidence.¹¹ From a review of the principles which the courts have developed in the above cases, it therefore follows that when certain types of harms occur under circumstances which from common experience strongly suggest negligence, and when the agency or instrumentality which occasioned the harm is under the exclusive control and management of the defendant so that he is in a better position to prove his innocence than the plaintiff is to prove his negligence, the doctrine of *Res Ipsa Loquitur* may be applied.¹² Otherwise, the burden is always upon the plaintiff to prove negligence.

H. T. P.

PARTNERSHIP—NEGLIGENCE—WIFE OF PARTNER NEGLIGENTLY INJURED BY HUSBAND—LIABILITY OF PARTNERSHIP AND ITS MEMBERS.—Plaintiff, wife of defendant H. Caplan, sustained personal injuries, while riding as a passenger in an automobile of the defendant partnership, which was operated at the time by her husband, a member of the said partnership, and was concededly engaged

⁸ *Bolton v. Madsen*, 205 App. Div. 180, 199 N. Y. Supp. 353 (3d Dept. 1923); *Clark v. Traver*, 237 N. Y. 544, 143 N. E. 736 (1923).

⁹ *Higgins v. Mason*, 255 N. Y. 104, 174 N. E. 77 (1930).

¹⁰ *Grant v. Pennsylvania and N. Y. C. and R. Co.*, 133 N. Y. 657, 31 N. E. 220 (1892); *Ruppert v. Bklyn. Heights R. R. Co.*, 154 N. Y. 90, 47 N. E. 971 (1897); *Hoffman v. Third Ave. R. R. Co.*, 45 App. Div. 586, 61 N. Y. Supp. 590 (1st Dept. 1899); *Groarke v. Laemmle*, 56 App. Div. 61, 67 N. Y. Supp. 409 (1st Dept. 1900); *Strembel v. Bklyn. Heights R. R. Co.*, 110 App. Div. 23, 96 N. Y. Supp. 1147 (2d Dept. 1904); *Duhme v. Hamburg-American Packet Co.*, 184 N. Y. 404, 77 N. E. 386 (1906); *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805 (1909); *Hardie v. Boland Co.*, 205 N. Y. 336, 98 N. E. 661 (1912); *White v. Lehigh Valley R. R. Co.*, 220 N. Y. 131, 115 N. E. 439 (1917); *Ruback v. McCleary, Wallin and Crouse*, 220 N. Y. 188, 115 N. E. 449 (1917); *Francey v. Rutland R. R. Co.*, 222 N. Y. 482, 119 N. E. 86 (1918); *Hammond v. Hammond*, 227 App. Div. 336, 237 N. Y. Supp. 557 (3d Dept. 1929).

¹¹ *Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321 (2d Dept. 1896); *Kay v. Metropolitan Street Ry. Co.*, 163 N. Y. 447, 57 N. E. 751 (1900); *Loudoun v. Eighth Ave. R. R. Co.*, 162 N. Y. 380, 56 N. E. 988 (1900); *Plumb v. Richmond Light & R. Co.*, 233 N. Y. 285, 135 N. E. 504 (1922); *Salomone v. Yellow Taxicab Corp.*, 242 N. Y. 251, 151 N. E. 442 (1926).

¹² HARPER, LAW OF TORTS (1933) §77, p. 183.