

Res Ipsa Loquitur

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Judiciary Committee and a sub-Committee appointed to consider it. The latter group suggested a substitute bill to the Committee and procured its publication with a view to attracting general attention. While the bill did not reach the floor of the Senate, it is not to be inferred from this that no progress was made.

The introduction of such a measure suggests the question of the attitude of the Court. Less than eight years ago, the Arizona statute considered in the *Truax* case was deemed to sanction a definite wrong in depriving an employer of "all real remedy" against a "wrongful and highly injurious invasion of property rights."¹⁹ In the Court's preliminary statement of the results of the ex-employees' picketing, could be read the decision. The whole tenor of the majority opinion was one of righteous indignation; in fact, as Justice Holmes pointed out, it was not even inquired whether the business affected had not been established subsequent to the enactment of the statute. From such decisions, "it is an easy step," as Laski phrases it, to the conclusion that the Court "is, in entire good faith, the unconscious servant of a single class in the community." Yet, as he reminds us, "more harm has been done in legal history by the prejudices of sincerity than was ever achieved by the receptivity of scepticism."²⁰

V. J. K.

RES IPSA LOQUITUR.*—The rapid growth of industry, with its consequent increase in the use of powerful machinery has given rise to a perplexing and vexatious problem. The question has come to be increasingly common whether the fact of an injury occasioned by the use of such machinery is to be regarded as raising a presumption of negligence upon the part of the owner of the apparatus. "Res ipsa loquitur is the phrase appealed to as symbolizing the argument for such a presumption."¹

of any such dispute, from assembling peaceably to act in the interests of any such dispute, from agreeing with others to do or not to do any of the above specified acts, and from inducing without fraud or violence any of those acts. Further, no injunction might be granted in a labor case except after the taking of testimony in open court and the Court's finding specifically a number of enumerated facts. An exception would permit the issuance of a temporary injunction good for five days only, without notice, where a complainant pleads an irreparable injury and files a bond sufficient to compensate for the improvident issuance of such injunction.

¹⁹ 257 U. S. 312, 328.

²⁰ *Supra* Note 1 at 848.

* "The transaction speaks for itself," 3 Bouvier's Law Dictionary 2908.

¹ 5 Wigmore, Evidence (1923), Sec. 2509.

This doctrine is predicated upon the theory that "when a thing which causes injury, without fault of the person injured, is shown to be under the exclusive control of defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords *reasonable evidence*, in the absence of an explanation, that the injury arose from defendant's want of care."²

It first found expression in the opinion of a famous English jurist³ and soon came to be known and accepted as a rule, adopted generally,⁴ and existing today throughout the United States and Canada.⁵

But whether the rule establishes a full presumption or merely satisfies plaintiff's duty of producing evidence sufficient to go to the jury is not always made clear.⁶ Decisions of the various states present a situation beset with so many variations that a different rule would seem to prevail in each jurisdiction.⁷ Nor is the confusion due solely to a difference between jurisdictions for uncertainty exists even within states. This is so in New York.⁸

Here it is difficult to determine just what degree of benefit, if any, a plaintiff derives from reliance upon the doctrine of *res ipsa loquitur*. Nearly all the cases start out with a statement that the accident creates a presumption but this is subsequently qualified by language which generally diminishes and sometimes completely nullifies the force of the first recital. Some well-considered opinions hold that from a showing of the circumstances attendant upon the injury the jury might presume negligence;⁹ others that a presumption actually exists and that defendant is called upon to explain.¹⁰ Still a third class indicates that he must show due care.¹¹

² *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, 98, 32 Sup. Ct. 399 (1912). (Italics ours.)

³ Pollock, C. B., in *Byrne v. Boadle*, 2 H. & C. 722, 159 Engl. Repr. 299 (1863).

⁴ Only two cases on the subject in North Dakota: *Wyldes v. Patterson*, 31 N. D. 283, 153 N. W. 630 (1815); *Leiferman v. White*, 40 N. D. 150, 168 N. W. 569 (1918).

⁵ Wigmore, *op. cit. supra* Note 1, Sec. 2509 N. 1; Heckel & Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 Ill. Law Rev. 724.

⁶ *Ibid.*

⁷ Heckel & Harper, *op. cit. supra* Note 5 at 726.

⁸ *Ibid.* 734.

⁹ *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901); *Goll v. Manhattan Ry. Co.*, 5 N. Y. Supp. 185 (Sup. Ct. N. Y. C., General Term 1889), *aff'd* 125 N. Y. 714, 26 N. E. 756 (1891).

¹⁰ *Brooks v. Kings County Elevated R. R. Co.*, 23 N. Y. Supp. 1031 (City Ct. Brooklyn, General Term 1893), *aff'd* 144 N. Y. 647, 39 N. E. 494 (1894); *Volkmar v. Manhattan Ry. Co.*, 34 N. Y. 418, 31 N. E. 870 (1892).

¹¹ *Schmidt v. Stein*, 119 Misc. 529, 196 N. Y. Supp. 727 (1922); *Lynch v. Ley*, 119 Misc. 681, 197 N. Y. Supp. 360 (1922); *Levine v. Brooklyn C. & S. R. Co.*, 119 N. Y. Supp. 315, 134 App. Div. 606 (2nd Dept. 1909).

Griffen v. Manice,¹² a case frequently cited with approval is illustrative of the first type. Plaintiff's intestate was in defendant's building upon the latter's implied invitation. After a visit to one of the upper stories and while returning to the ground floor in an elevator, the elevator descended with such speed as to cause it to strike the bumpers below the street level. Immediately thereafter the counterbalance weights crashed through the roof of the elevator striking him and causing his death. Upon the trial, the judge charged:¹³

" * * * if you find in this case that this accident was one which, in the ordinary course of business would not have happened if the required degree of care was observed, you have a right to presume that such care was wanting."

The facts as outlined were cogent evidence of negligence yet the court advised the jury that they were permitted to, not that they *must* presume a lack of care. Defendant's appeal upon the ground of alleged error in this charge was denied, though allowed for another reason.

In Loudoun v. Eighth Ave. R. R. Co.¹⁴ defendants operated cars over different routes which crossed at right angles at which point two trolleys, one operated by each company, collided, injuring plaintiff, a passenger on the Eighth Ave. line. Besides herself only one other witness, her husband, testified in plaintiff's behalf, and such testimony was limited to a mere statement of the accident. Compared with the previous case this one was palpably weak yet the Court of Appeals expressed its satisfaction with respect to the opinion of the trial court that a presumption was created.¹⁵

"We agree with the learned trial court below that the details of the collision, meagre as they were, required submission to the jury of the issue of negligence as to each defendant, and that a nonsuit would have been improper. * * * While the occurrence of the accident called for an explanation by the defendant, the trial court erred in charging, as a matter of law, that no explanation had been furnished. *Even though the accident created a presumption of negligence* if there was any evidence to rebut the presumption, the burden of proof rested on the plaintiff and if on the whole case the conclusion of negligence or absence of negligence could be drawn with equal fairness that burden was not discharged."

¹² *Supra* Note 9.

¹³ *Ibid.* 192.

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

¹⁵ *Ibid.* 384 (Italics ours).

The jury would be justified in finding that even with the aid of the presumption the evidence did not preponderate in plaintiff's favor¹⁶ but they could not ignore its existence.¹⁷

The import of the rule is still further obscured by the holding in *Hogan v. Manhattan Railway Co.*¹⁸ Plaintiff driving a coal cart under an elevated railway received a severe wound from an iron bar which fell from the structure overhead where a gang of men were at work. At the close of plaintiff's evidence cross motions were made for a directed verdict with the result that plaintiff's was granted, the amount of damages being left to the jury for determination. Here was a finding that not only was there a presumption but one of force sufficient to merit the Court of Appeals affirmance of a directed verdict. Judge Bartlett said:¹⁹

"We think the case was properly disposed of at the trial for the reason that the undisputed evidence raised a presumption of negligence against the defendant. The plaintiff sustained the burden of proof and it was incumbent upon the defendant to offer evidence if any existed to rebut the presumption of negligence."

Finally we have the case of *Sandler v. Garrison*²⁰ decided in November, 1928. Plaintiff, while standing upon a sidewalk was struck by an iron door lock which fell from defendant's elevated road while a train was passing. The object was seen while falling through the air but whether it came from the structure or the train itself, plaintiff's witnesses were unable to testify. This coupled with the statement of the injury and circumstances surrounding it, comprised plaintiff's evidence. An employee of defendant testified respecting the similarity of the exhibit to locks used upon its cars and that an examination of the cars contained in the train which was had soon after the accident disclosed the fact that a lock had been torn from its fastenings on one of the cab doors. Further evidence was adduced describing the construction of the cab, its position within the body of the car and the height of the window therein. The purpose of this was to show that a higher position was occupied by the window than by the door lock when in place and that by reason thereof it was impossible for it if it became dislodged to fall through the window. The jury returned a verdict for plaintiff and although the judgment was unanimously affirmed by the Appellate Division,²¹ the Court of Appeals reversed the judgment and dismissed the complaint.

¹⁶ *Kay v. Metropolitan Street Ry. Co.*, 163 N. Y. 447, 57 N. E. 751 (1900).

¹⁷ *Heckel & Harper*, op. cit. *supra* Note 5 at 730 N. 47.

¹⁸ 149 N. Y. 23, 43 N. E. 403 (1896).

¹⁹ *Ibid.* 25.

²⁰ 249 N. Y. 236 (1928).

²¹ 223 App. Div. 738 (2nd Dept. 1928).

Judge Kellogg based the opinion of the Court upon the ground that plaintiff failed to prove ownership or control and that possession by a passenger, who accidentally or purposely dropped the lock, was a hypothesis at least equal in probability to the theory that it was under defendant's supervision.²²

"The lock, which had been torn from the door, had occupied a position nearly two feet lower than the window opening of the cab. If through the negligence of the defendant, the fastenings of the lock had become insecure and the lock had fallen, nevertheless it could not have fallen on the plaintiff to cause the injuries of which she complains. The very evidence, therefore, which furnished proof that the defendants at one time possessed and controlled the lock, negatived *every possible inference that negligence on the part of the defendant was the proximate cause of the accident.*"

Conceding that plaintiff's case is weak, we find it hard to agree with its final disposition. The argument that voids every possible inference of defendant's negligence is unconvincing. While it is true that mere injury or accident alone does not justify application of the maxim²³ the circumstances in this case were of such character that negligence was deducible therefrom without further proof.²⁴ Plaintiff is not required to present a case of an impregnable nature. The conclusion of defendant's negligence need not be inescapable, but only inferable therefrom.²⁵ The very reason for the rule is founded upon plaintiff's inability to do more than state the occurrence.²⁶ Usually the chief evidence of the accident is practically accessible to the defendant but inaccessible to the person injured.²⁷ That exclusive control of the instrumentality causing the injury is essential cannot be disputed,²⁸ and it is upon this point that plaintiff's case is

²² *Supra* Note 20 at 239 (Pound, Crane and Andrews, *JJ.*, dissented). (Italics ours.)

²³ *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534 (1859); *Feingold v. Ocean S. S. Co. of Savannah, Ga.*, 113 N. Y. Supp. 1018, 61 Misc. 638 (1909).

²⁴ *Shearman & Redfield, Negligence* (4th Ed.), Sec. 59: "Where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that whether it is so or not is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant."

²⁵ *Plumb v. Richmond Light & P. Co.*, 187 N. Y. Supp. 38, 195 App. Div. 254 (2nd Dept.), *aff'd* 233 N. Y. 285; 135 N. E. 504 (1922).

²⁶ *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121 (1905).

²⁷ *Ibid.* 140 N. C. at 122; 52 S. E. at 124.

²⁸ *Slater v. Barnes*, 241 N. Y. 284, 149 N. E. 859 (1925).

noticeably weak.²⁹ But that question was, upon conflicting evidence, submitted to the jury and resolved in plaintiff's favor.

In the closing lines of its opinion the Court speaks of "proximate cause."³⁰ Inquiry into that point would involve a discussion so far beyond the contemplation of this note that we cannot now do more than simply refer to it. Proceeding upon any theory other than that which assumes "possession" by a passenger would not defendant still be liable?³¹ As already stated it is neither necessary nor expedient for us to answer that question at this time for it is merely tangent to the issue.

We find then, upon a summation of our cases, four different holdings, starting with an inference which is gradually extended into a presumption of considerable force and ending with a complete denial of the application of the doctrine. From these, assuming that they are fairly indicative of judicial opinion in this state, we are to draw our conclusions. We feel that the rule relates merely to the probative force of evidence,³² and, like all circumstantial evidence, owes its efficacy to the probability that acts flow from their usual and natural causes. It attains, in some cases, the height of a presumption, and always, where the rule is applicable, entitles the plaintiff to go to the jury on the question of negligence.³³ But is it really necessary to determine the grade of presumption or whether one exists at all? Is it not more important to decide whether "the thing really speaks for itself," affording "reasonable evidence" of defendant's negligence? May we venture to suggest that the latter proposition is representative of the majority opinion and more nearly consonant with the progressive attitude of the New York Court of Appeals, than any other example given herein?

J. A. M.

²⁹ Richardson, Evidence (2nd Ed. 1923) Sec. 86 ("But if the injury can be accounted for on any reasonable theory other than that of the defendant's negligence, or if the responsibility for the injury may lie with one of two or more parties so that it is not clear from the mere happening of the accident whose negligence caused it, the doctrine of *res ipsa loquitur* will not be applied. *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805; *Wolf v. Am. Tract Society*, 164 N. Y. 30, 58 N. E. 31; *Haidie v. Boland Co.*, 205 N. Y. 336, 98 N. E. 661; *Francey v. Rutland R. R. Co.*, 222 N. Y. 482, 119 N. E. 86").

³⁰ *Supra* Note 20 at 240.

³¹ McLaughlin, *Proximate Cause* (1925) 39 Harv. Law Rev. 149; 6 Words & Phrases (3rd Series) 315 ("The test of proximate cause is whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent and the final result is not the natural and probable consequence of the primary cause. It is not 'the sole cause,' but 'a direct and concurring cause and one but for which the result would not have occurred. * * *").

Here, it might well be contended, that the proximate cause of injury was defendant's negligence, in allowing the lock to become unfastened and that it was the probable cause that set in motion other causes, thus producing inquiry.

³² *Atkinson v. United Railroads of San Francisco*, 71 Cal. App. 82, 234 P. 863 (1925).

³³ *Myers v. City of Independence*, 189 S. W. 816 (Sup. Ct. Mo. 1916).