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Notes and Comment

Res Ipsa Loquitur in California: Inference or Presumption?

The plaintiff in a negligence case must prove that the injuries he suffered resulted from the breach of some duty owed to him by the defendant. Many cases occur in which, because of the nature of the occasion, the plaintiff is unable to supply any direct evidence to prove his case. If a negligence action depended on direct proof in this type of situation the plaintiff would be unable to maintain the action. The defendant would escape liability even though he might be confronted with a multitude of facts from which his fault could be conclusively inferred, although not directly established. But, if lack of direct proof is the only obstacle to the plaintiff, he need not leave the bar uncompensated. He can instead summon to his aid a legal formula, clothed in a magic Latin phrase, which of its own force may achieve the relief he seeks: The Doctrine of Res Ipsa Loquitur.

PREFACE

Perhaps it is better to preface a consideration of the effect of such an important legal mechanism by a notation of its nature and conditions for its operation, despite the risk of being at worst suspected of plagiarism, and at least accused of monotony. The first appearance of *res ipsa loquitur* in a court of law came in 1863, when a man was injured by a flour barrel rolling out of a second story warehouse window. When he brought suit for his injuries, the judge made the remark to counsel that "there are certain cases in which it may be said *res ipsa loquitur*, and this seems to be one of them."¹ This comment, though perhaps intended as an innocent observation in the context of the case, became the label for a type of circumstantial evidence in the field of negligence. This thought was first reduced to a written statement in *Scott v. London & St. Katherine Docks Co.*²

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendants, that the accident arose from want of care.³

At the present time, there is more or less general agreement on the conditions that must be shown to bring *res ipsa loquitur* into operation:⁴ (1) the accident must be of the type which does not ordinarily occur in the absence of someone's negligence; (2) the accident must be caused by an agency or instrumentality

¹ *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863).

² 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1863).

³ *Id.* at 601, 159 Eng. Rep. at 667.

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

within the exclusive control of the defendant; (3) the accident must not have been due to any voluntary action or contribution on the part of the plaintiff.⁵

To set forth a generally agreeable definition of *res ipsa loquitur* is one thing; to set forth such a statement of its effect when applied, is quite another. The self-explanatory meaning of the phrase is lost when placed in the light of the various procedural possibilities of all causes of action. That is, does it amount to a prima facie case? Does it shift the burden of proof to the defendant, or does it merely require the defendant to meet the plaintiff's case with equal weight? In the absence of rebutting testimony by the defendant, is it merely an inference, allowing the jury to weigh the circumstances, and still be free to decide for the defendant? Or, is it a presumption, requiring the jury to determine for the plaintiff unless the defendant introduces rebutting evidence?

Various jurisdictions have applied diverse solutions to the procedural effect of *res ipsa loquitur*.⁶ The cases which follow demonstrate that California's answer became the synthesis of a conflict between the doctrine as a presumption and as an inference.

CALIFORNIA CASES

Perhaps the first California case on record⁷ dealing with *res ipsa loquitur*, referred to the doctrine as raising a presumption of negligence. The case dealt with an explosion of nitro-glycerine while being manufactured into dynamite in defendant's powder factory, causing damage to plaintiff's property. The plaintiff established the fact of the explosion and also offered expert testimony to the effect that if the factory was properly conducted, and the employees careful during the process of manufacturing, an explosion would not occur. From the decision for plaintiff, the defendant appealed, contending that the former offered no evidence tending to show that the explosion was occasioned by the negligence of the defendant. The argument gave rise to the court's consideration of a "most important principle of law." Relying on the English cases,⁸ and *Rose v. Stephens & Condit Transp. Co.*⁹ and *Grimsley v. Hankins*,¹⁰ the court laid down the general proposition that negligence is prima facie presumed from the fact of the explosion of a nitro-glycerine factory, in the absence of a showing of due care on the part of the employees.

Between the years of 1895 and 1917 the doctrine was applied as a presumption

⁵ California's position is basically similar to this, except that there is no absolute requirement that the instrumentality be under the exclusive control of the defendant. The California requirement, in summary, is that the plaintiff need only show that the accident was, in the light of past experience, probably the result of negligence by someone, and that defendant is probably the one responsible. Probability of defendant's negligence appears to be the basis of *res ipsa loquitur* in California, and the various conditions, such as extent of defendant's control and plaintiff's own conduct, are aids to determine the extent of the probability of defendant's negligence. *Zentz v. Coca-Cola Bottling Co.*, 39 Cal.2d 436, 247 P.2d 344 (1952).

⁶ Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

⁷ *Judson v. Giant Powder Co.*, 107 Cal. 549, 50 Pac. 1020 (1895).

⁸ *Kearney v. London Ry. Co.*, L.R. 5 Q.B. 411 (1870); *Scott v. London & St. Katherine Docks Co.*, 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865); *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863).

⁹ 11 Fed. 438 (1882).

¹⁰ 46 Fed. 400 (1891).

in carrier cases.¹¹ In *Hansel v. Pacific Electric Ry.*,¹² the plaintiff received injuries by reason of a collision between the car of the defendant, in which she was a passenger, and a hay wagon. The court held that the doctrine of *res ipsa loquitur* was applicable and, after laying down the elements of the doctrine, stated that it had been applied to a long line of cases involving injuries to a passenger while being transported by a common carrier. The effect of the doctrine when applied to such cases is that proof of the injury to the passenger, while he was being carried as such, creates a prima facie case or presumption of negligence on the part of the carrier, which the carrier is called upon to meet or rebut.

Years later, in 1936, the case of *Ales v. Ryan*¹³ came before the California Supreme Court. This case involved the failure of a doctor to remove a sponge from his patient's stomach. The court applied the doctrine of *res ipsa loquitur* stating:

The inference of negligence which is created by the rule of *res ipsa loquitur* is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff. It is incumbent on the defendant to rebut the *prima facie* case so created. The burden is cast upon the defendant to meet or overcome the *prima facie* case made against him. The defendant is not required to establish his defense by a preponderance of the evidence. All that is required is that he produce evidence which equals in evidentiary weight the inference which the doctrine creates in favor of the plaintiff.¹⁴

Here, although the word "presumption" does not appear, the language used gives the force of a rebuttable presumption to the "inference" of negligence arising from the application of the doctrine.

The case of *Ybarra v. Spangard*,¹⁵ decided in 1944, was another doctor-patient case which held that, where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body, or the instrumentalities which might have caused the injuries, may properly be called upon to meet the inference of negligence by giving an explanation of their conduct, thereby placing or imposing the burden upon the defendant to rebut the inference of negligence arising from the *res ipsa loquitur* doctrine.

Thus, in situations where there are special relationships between the parties—where the defendant was engaged in a dangerous activity and the plaintiff was injured as a result thereof; where, because of the nature of the accident, an inference of negligence on the part of the defendant may be so strong that no reasonable man could fail to accept it in the absence of explanatory evidence; where the defendant has facts peculiarly within his knowledge; and where it is incumbent upon the defendant to show that he was not negligent¹⁶—the burden has been placed upon the defendant to meet and rebut the inference of negligence

¹¹ *Hausel v. Pacific Elec. Ry.*, 167 Cal. 245, 139 Pac. 73 (1914); *McCurrie v. Southern Pacific Co.*, 122 Cal. 558, 55 Pac. 324 (1898); *Sambuck v. Southern Pacific Co.*, 7 Cal.Unrep. 104, 71 Pac. 174 (1903).

¹² 167 Cal. 245, 139 Pac. 73 (1914).

¹³ 8 Cal.2d 82, 64 P.2d 409 (1936).

¹⁴ *Id.* at 99, 64 P.2d at 417.

¹⁵ 25 Cal.2d 486, 154 P.2d 687 (1944).

¹⁶ See cases cited in *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 689-90, 268 P.2d 1041, 1044-45 (1954).

that arises from an application of the *res ipsa loquitur* doctrine by evidence sufficient to offset or balance it. Whether the effect of the doctrine was to raise a presumption or a permissible inference of negligence was a confusing question.

As Dean Prosser states in his article, "Res Ipsa in California,"¹⁷

The least effect which may be given to *res ipsa loquitur* is to permit the jury to infer from the plaintiff's case that the defendant has been negligent. . . . [This is] enough to avoid a nonsuit or a dismissal. It is not enough to entitle the plaintiff to a directed verdict, even though the defendant offers no evidence. . . . The jury may accept the inference,¹⁸ but it is not compulsory and if they see fit to find for the defendant they are free to do so.

. . . A greater advantage is given to plaintiff if his *res ipsa* case is treated as raising a presumption.¹⁹ This means that the jury will not merely be permitted to infer the defendant's negligence, but in the absence of sufficient evidence to the contrary will be required to do so. If the defendant rests without evidence, the plaintiff will be entitled to a directed verdict. The "burden of going forward" is placed upon the defendant, in the sense that if he does not offer evidence he will necessarily lose. But when all of the evidence is in, if it is evenly balanced, the verdict must be for the defendant.²⁰

BURR V. SHERWIN WILLIAMS

Hence, until 1954 and the *Burr v. Sherwin Williams Co.* decision,²¹ confusion ran rampant as to whether the doctrine of *res ipsa loquitur* gave rise to a presumption, couched in the language of an inference, or merely a permissible inference. In *Burr* the supreme court in a unanimous decision, concluded "that in all *res ipsa loquitur* situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and the jurors should be instructed that, if the defendant fails to do so, to find for the plaintiff."²² This seems to rule out the permissible inference theory of *res ipsa loquitur*. The court went on to declare that *res ipsa loquitur* raises an inference, not a presumption. "This, however, does not preclude the conclusion that *res ipsa loquitur* may give rise to a special kind of inference which the defendant must rebut, although the effect of the inference is somewhat akin to that of a presumption."²³ This language seems to indicate that although the court uses the word "inference," in reality and practical effect the doctrine of *res ipsa loquitur* creates a presumption of negligence. An earlier case had noted the following distinction.

The difference between an evidentiary presumption and an evidentiary inference is simply this, that when the law requires the jury to draw a certain, designated conclusion from particular evidence, that conclusion so forced upon the jury is a presumption. Where mandatory presumptions are not exacted, it is the right and the duty of the jury to draw such reasonable inferences from the evidence as may appeal to and satisfy their minds.²⁴

¹⁷ Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949).

¹⁸ "An inference is a deduction which the reason of the jury makes from the facts proved, without express direction of law to that effect." CAL. CODE CIV. PROC. § 1958. [Footnote by Dean Prosser, renumbered and relocated.—Ed.]

¹⁹ "A presumption is a deduction which the law expressly directs to be made from particular facts." CAL. CODE CIV. PROC. § 1959. [Footnote by Dean Prosser.]

²⁰ Prosser, *supra* note 17, at 217-18.

²¹ 42 Cal.2d 682, 268 P.2d 1041 (1954).

²² *Id.* at 691, 268 P.2d at 1046.

²³ *Id.* at 688, 268 P.2d at 1044.

²⁴ *Anderson v. I. M. Jameson Corp.*, 7 Cal.2d 60, 66, 59 P.2d 962, 965 (1936).

In the *Burr* case the jurors were instructed that from the occurrence of the damage involved in this case, as established by the evidence, "there arises an inference" of negligence on the part of the defendant and it is "incumbent upon the defendants to rebut the inference." The appellants contended that the court erred by instructing the jury that the inference of negligence based on the doctrine is mandatory rather than permissive. The court in its discussion replied to this by stating that a few decisions²⁵ have criticized instructions "to the effect that *res ipsa loquitur* imposes a mandatory burden upon the defendant to rebut the inference of negligence and have apparently proceeded on the theory that the doctrine creates an inference which is enough to avoid a nonsuit but which the trier of fact may accept or reject as it sees fit, even though the defendant offers no evidence."²⁶ In other words the doctrine of *res ipsa loquitur* raises a mere permissive inference. "This view which is inconsistent with most of the California decisions, is very difficult to apply, and there are substantial reasons why we should hold that in every type of *res ipsa loquitur* case the defendant should have the burden of meeting the inference of negligence."²⁷ The court concluded that the trial court did not err in respect to the instructions given and that it was incumbent upon the defendant to rebut the inference of negligence.

INSTRUCTIONS

The question of the effect of the application of the doctrine again rose in 1958 in the case of *Ferrate v. Key System Transit Lines*.²⁸ Instructions were given that "From the happening of the accident involved in this case as established by the evidence, an inference arises that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if none other exists tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff."²⁹ In this case, *Burr* was cited as holding that the language "an inference arises" with its mandatory intonation was correct.³⁰ The next year it was held that the inference of negligence arising in a *res ipsa loquitur* case is not merely permissive, but a necessary deduction from the proof of certain facts.³¹ Giving added impetus to the theory that the doctrine of *res ipsa loquitur* actually gives rise to a presumption of negligence is *California Jury Instructions, Civil* (CALJIC). The pertinent instruction reads, "From the happening of the accident involved in this case, an inference arises that a proximate cause of the occurrence was some negligent conduct on the part of the defendant."³² The phrase "an inference arises" with its mandatory effect is embodied in these approved instructions. In the 1962 *DiMare v. Cresci* decision³³ the supreme court held that "The facts

²⁵ *Pruett v. Burr*, 118 Cal.App.2d 188, 195-96, 257 P.2d 690, 695 (1953); *Black v. Partridge*, 115 Cal.App.2d 639, 649-50, 252 P.2d 760, 766 (1953); *Bazzoli v. Nance's Sanitarium, Inc.*, 109 Cal.App.2d 232, 239-41, 240 P.2d 672, 677-78 (1952).

²⁶ *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 690, 268 P.2d 1041, 1045 (1954).

²⁷ *Ibid.*

²⁸ 165 Cal.App.2d 391, 331 P.2d 991 (1958).

²⁹ *Id.* at 397, 331 P.2d at 995.

³⁰ *Id.* at 398, 331 P.2d at 996.

³¹ *McCormick v. City & County of San Francisco*, 193 Cal.App.2d 96, 14 Cal.Rptr. 79 (1961).

³² CAL. JURY INSTRUCTIONS, CIVIL, No. 206, at 30 (4th rev. ed. 1956, Supp. 1962).

³³ 58 Cal.2d 292, 373 P.2d 860, 23 Cal.Rptr. 772.

giving rise to the doctrine being undisputed, the jury was properly instructed that the inference of negligence arose as a matter of law. This, of course, does not mean that there was liability as a matter of law but only that the defendant had the burden of meeting or balancing the inference."³⁴

The cases indicate that "the inference arises as a matter of law," "the inference is mandatory" and "the inference is not merely permissive." As the court in *Ander-son v. I. M. Jameson Corp.*³⁵ declared, "when the law requires the jury to draw a certain designated conclusion from particular evidence, that conclusion so forced upon the jury is a presumption." This being the case, a "presumption" and not an "inference" of negligence arises from the application of the doctrine of *res ipsa loquitur*. Why, then, do the courts of California refuse to "call a spade a spade" in referring to that which arises from the application of the doctrine of *res ipsa loquitur* as an "inference" rather than a "presumption"?

It seems, as one writer has declared, "This hesitancy on the part of the California courts to say that *res ipsa loquitur* gives rise to a presumption is possibly attributable to the provision in section 1963 of the Code of Civil Procedure for specific rebuttable presumptions, which may be taken as limiting the rebuttable presumptions recognized in California."³⁶ Another writer states, "The California courts hold that the term 'presumption' can be applied only to those listed in the statutes and that other presumptions generally recognized by the case law are merely 'inferences.' Thus the important doctrine of *res ipsa loquitur* must be termed an 'inference' in California, though its effect seems substantially equivalent to that of a statutory presumption."³⁷

THE LEONARD CASE

At this point it would appear that *res ipsa loquitur* enjoys in force and effect the position of a rebuttable presumption, although it must proceed under the disguise of a mere inference. And such would be the undisputed law in California today were it not for the case of *Leonard v. Watsonville Community Hospital*.³⁸ This was a medical malpractice case, involving multiple defendants. The injuries resulted from a failure to remove a clamp from the upper right quadrant of the plaintiff's abdomen. The plaintiff called all three defendant doctors to testify under provisions of the Code of Civil Procedure.³⁹ This testimony disclosed that one of the doctors, who was operating elsewhere in the hospital, was consulted, and gratuitously removed cancerous tissue from the lower left quadrant of the abdomen, and never used clamps. On the basis of this testimony, which exonerated the doctor, the plaintiff was nonsuited as to him, and the decision was upheld. The

³⁴ *Id.* at 300, 373 P.2d at 864, 23 Cal.Rptr. at 776.

³⁵ 7 Cal.2d 60, 66, 59 P.2d 962, 965 (1936); see text accompanying note 24, *supra*.

³⁶ McCoid, *Negligence Actions Against Multiple Defendants*, 7 STAN. L. REV. 480, 485 n.27 (1955).

³⁷ WITKIN, CALIFORNIA EVIDENCE § 62 (1958).

³⁸ 47 Cal.2d 509, 305 P.2d 36 (1956).

³⁹ "A party . . . may be examined by the adverse party as if under cross-examination. . . . The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence." CAL. CODE CIV. PROC. § 2055. All subsequent statutory citations refer to the California Code of Civil Procedure.

court said that while a presumption could not be dispelled by facts brought out under section 2055, an inference could be dispelled even though it was unfavorable to the party calling the witness.⁴⁰

Perhaps the significance of this decision is other than that it seems to throw water on the proposition that *res ipsa loquitur* is a presumption. The court was dealing in essence with the problem of whether evidence so strong as to compel a particular result could be disposed of in considering a motion for a nonsuit, if the evidence was elicited from an adverse witness pursuant to section 2055. The court decided that it would not disregard evidence merely because the plaintiff was "not bound" by such testimony. To effectuate this result the court relied on the rule that, while presumptions resting on facts brought out under section 2055 could not be dispelled, inferences could be. Thus *res ipsa loquitur* was again labeled an inference. One writer has criticized the statement that unfavorable testimony should be wholly disregarded as "obviously unsound."⁴¹

The authority which the *Leonard* case relies upon in dispelling an inference⁴² suggests the interpretation of section 2055 "shall not be bound" means that the party calling such an adverse witness is not precluded from rebutting his testimony or impeaching him.⁴³

Thus while the court had the opportunity and precedent to interpret section 2055 liberally, it chose instead to make the distinction between inference and presumption as it applies to *res ipsa loquitur*.

CONCLUSION

The *Burr* decision, and recent decisions which follow it, mentioned in this writing, demonstrate that it is authoritative to assert that *res ipsa loquitur* has the force of a rebuttable presumption in California. This is in keeping with the purpose of the doctrine, that is, to alleviate the rigor applied to proving common law negligence. On the other hand, *Leonard* indicates that perhaps the historical inconsistency surrounding the procedural effect of the doctrine is yet to be resolved.

It seems that the only reason the *Burr* case, and those that follow it, have refused to call *res ipsa loquitur* a presumption lies in the traditional judicial attitude that to earn the title of a presumption, a particular type of evidence must be mentioned in a statute. That this attitude has its effect can be seen in the *Leonard* case.

If *res ipsa loquitur* continues to be called an inference, the least effect will be to provide a subject for academic speculation. At most it could rekindle the fires of confusion and inconsistency which have only so recently been controlled.

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⁴⁰ *Leonard v. Watsonville Community Hospital*, 47 Cal.2d 509, 516, 305 P.2d 36, 40 (1956).

⁴¹ WILKIN, *op. cit. supra*, note 37, § 613.

⁴² *Crouch v. Gillmore Oil Co.*, 5 Cal.2d 330, 54 P.2d 709 (1936).

⁴³ *Figari v. Olcese*, 184 Cal. 775, 195 Pac. 709 (1921). This decision used a like interpretation, saying that "testimony was to be treated as if given on cross-examination." *Id.* at 782, 195 Pac. at 428.