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# The Res Ipsa Loquitur Doctrine in Kentucky

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## THE RES IPSA LOQUITUR DOCTRINE IN KENTUCKY

The purpose of this note is to examine the res ipsa loquitur doctrine as it has been used and applied in Kentucky This doctrine was summarized by the Court of Appeals in a recent case as follows:

> "Where an instrument which causes an injury is shown to be under the control of the defendant, and the accident is such as would not happen in the ordinary course of events if those having control of the instrument used the degree of care imposed upon them by law, proof of the happening of the accident, in itself, affords reasonable evidence that the accident occurred as the result of negligence on the part of the defendant, unless the latter shows it to be attributable to some other cause."[1]

The doctrine has been applied where a passenger was injured while riding in a carrier, where several soft drink bottles exploded[2] or where such a bottle contained foreign matter,[4] where an automobile ran into a stationary object,[5] where a boy was hit by a baseball coming over the fence of a ballpark,[6] where chewing tobacco contained a worm,[7] and in other similar situations covered by the definition where "the thing speaks for itself."

Res ipsa loquitur is a type of circumstantial evidence used in proving negligence, but it is applied in a type of situation where ordinary circumstantial evidence could not make a case. Pound, J. said:

> "The term 'surrounding circumstances' in this connection (with the rule res ipsa loquitur) refers not to circumstances directly tending to show lack of care in handling but only to mere neutral circumstances of control and management by the defendant, which may, when explained, appear to be entirely consistent with due care."[8]

The res ipsa loquitur doctrine has grown and expanded because frequently in this mechanized age the plaintiff can do no more than point to the injuring instrumentality, the defendant's control of it,

[1] Alford v. Beaird, 301 Ky. 512, 514, 192 S.W 2d 180, 181 (1945).

[2] Watson v. Pullman Co., 238 Ky. 491, 38 S.W 2d 430 (1931).

[3] Coca-Cola Bottling Works v Shelton, 214 Ky. 118, 282 S.W 778 (1926).

[4] Coca-Cola Bottling Co. of Shelbyville v Creech, 245 Ky 414, 53 S.W 2d 745 (1932).

Schechter v. Hann, 305 Ky. 794, 205 S.W 2d 690 (1947)

[6] Louisville Baseball Club v. Hill, 291 Ky 333, 164 S.W 2d 398 (1942).

[7] Liggett & Meyers Tobacco Co. v Rankin, 246 Ky. 65, 54 S.W 2d 612 (1932).

[8] Plumb v. Richmond Light & R. Co., 233 N.Y. 285, —, 135 N.E. 504, 505 (1922).

and the injury itself. Because of the nature of the accident no other evidence may be available to him, while at the same time the evidence is more easily accessible to the defendant. Under these circumstances it seems reasonable for the defendant either to explain the accident or take the risk that the jury may infer negligence on his part. This is the reasoning behind the doctrine.[9]

ELEMENTS

1. *Control by the Defendant.* The instrumentality which causes the injury should be in the exclusive control of the defendant,[10] but the type of control required varies with the instrumentality involved and the surrounding circumstances. The first res ipsa cases involved carriers[11] and consequently there was actual physical control present, but this element was later found where the instrumentality was no longer in the hands of the defendant, such as food or drink containers that are sealed by the defendant and later explode,[12] or are found to contain foreign matter.[13] In this type of case the defendant either was in control or should have been in control when the negligent act was performed, and the plaintiff is able to show that the container has not been opened by anyone else.[14]

2. *Unusual Occurrence.* Negligence will not be presumed from the mere fact of injury[15]—the accident must be such as would not ordinarily happen without negligence. However, one of the circumstances to be considered is the degree of care required of the defendant.[16] In brief, all that is required is that the balance of probabilities tends to indicate negligence. But some cases have used more restrictive language, a typical remark being, " the doctrine is only to be applied when the nature of the accident itself not only clearly supports the inference of negligence, but excludes all others, or such as might have been due to one of several causes, of or for which the defendant is not responsible."[17] However, this language was used in a case involving the explosion of a beer keg and there was no record of any previous injury of this kind. In other cases in which

[9] Norfolk & W Ry Co. v McKenzie, 116 F 2d 632 (C.C.A. 6th 1941)

[10] Stephens v Kitchen Lumber Co., 222 Ky 736, 2 S.W 2d 374 (1928) Kentucky Utilities Co. v Sutton's Adm'r, 237 Ky. 732, 36 S.W 2d 380 (1931)

[11] Morgan v Chesapeake & O. Ry Co., 127 Ky 433, 32 Ky. L. Rep. 330, 105 S.W 961 (1907)

[12] Coca-Cola Bottling Works v Shelton, *supra* note 3.

[13] Coca-Cola Bottling Co. of Shelbyville v. Creech, *supra* note 4.

[14] Seals v Coca-Cola Bottling Works, 297 Ky 450, 179 S.W 2d 598 (1944) Note, 23 Ky. L. J. 534 (1935).

[15] Johnson Adm'x v. Mobile & Ohio R. Co., 178 Ky. 108, 198 S.W 538 (1917)

[16] Black Mountain Corp. v Partin's Adm'r, 243 Ky. 791, 49 S.W 2d 1014 (1932)

[17] Frank Fehr Brewing Co. v Corley, 265 Ky. 308, 317, 96 S.W 2d 860, 865 (1936).

the defendant has pleaded another cause not within his control, the court has said that a jury question is presented.[18] The fact that the accident might have been caused by several factors will not prevent the application of the doctrine if the defendant has had control of all of those factors.[19]

Recovery has been denied where one bottle of Coca-Cola exploded[20] and granted where twenty-seven exploded, the court saying, "From these facts it may be inferred that they were defective or were improperly charged, matters exclusively under the control of the defendant, and presumably within its knowledge, and that when delivered their condition was such as to render them imminently if not intrinsically dangerous."[21] The manufacturer of plug chewing tobacco has been held liable to a consumer who purchased a plug from a retailer and was poisoned through biting into a worm pressed into the plug during its manufacture.[22]

Kentucky has held many times that res ipsa loquitur is not applicable to malpractice cases.[23] It has been said, " the mere failure to effect a cure does not raise the presumption of want of proper care, skill, and diligence upon the part of a physician "[24] The most frequently used reasoning for this position was enunciated by Taft, J. in *Ewing* v. *Goode*:[25]

> "A physician is not a warranter of cures. If the maxim 'Res Ipsa Loquitur' were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to' "[26]

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[18] Reibert v Thompson, 302 Ky 688, 194 S.W 2d 974 (1946) Schechter v. Hann, *supra* note 5.

[19] Ralston v Dossey, 289 Ky. 40, 157 S.W 2d 739 (1941).

[20] Loebig's Guardian v. Coca-Cola Bottling Co., 259 Ky. 124, 81 S.W 2d 910 (1935).

[21] Coca-Cola Bottling Works v. Shelton, 214 Ky 118, 122, 282 S.W 778, 780 (1926).

[22] Liggett & Meyers Tobacco Co. v. Rankin, *supra* note 7.

[23] Steinmetz v. Humphrey, 289 Ky. 709, 160 S.W 2d 6 (1942), Williams v. Tartar, 286 Ky. 717, 151 S.W 2d 783 (1941) Meador v Arnold, 264 Ky. 378, 94 S.W 2d 626 (1936) Hazard Hospital Co. v. Combs, 263 Ky. 252, 92 S.W 2d 35 (1936), Prewitt v. Higgins, 231 Ky. 678, 22 S.W 2d 115 (1929), Donoho v Rawleigh, 230 Ky 11, 18 S.W 2d 311 (1929) Hanners v Salmon, 216 Ky. 584, 288 S.W 307 (1926) Miller v. Blackburn, 170 Ky 263, 185 S.W 864 (1916) Barnett's Adm'r v. Brand, 165 Ky 616, 177 S.W 461 (1915).

[24] Miller v. Blackburn, 170 Ky. 263, 270, 185 S.W 864, 867 (1916).

[25] 78 Fed. 442 (S. D. Ohio 1897) quoted in Miller v. Blackburn, *supra* note 24.

[26] *Id.* at 443. But a physician may be sued in his proprietary capacity as owner of a hospital: Quillon v Skaggs, 233 Ky 171, 25 S.W 2d 33 (1930).

But despite the number of Kentucky decisions saying that res ipsa loquitur is not applicable to malpractice cases this position seems logically indefensible, and upon examination the decisions appear to be based on other grounds.[27]

[27] Examination of the cases show that they rest on at least three other grounds:

(1) *An improper result or a failure to cure, of itself, is no evidence of negligence:* Steinmetz v Humphrey, Williams v. Tartar, Meador v. Arnold, Prewitt v Higgins, Donoho v Rawleigh, Hanners v. Salmon, Miller v Blackburn, *supra* note 23. This is beside the point, for it is saying no more than that the injury itself is no evidence of negligence. This has always been a limitation imposed upon the res ipsa loquitur doctrine.

(2) *The negligence was not the proximate cause of the injury:* Hazard Hospital Co. v Combs, Barnett's Adm'r v Brand, *supra* note 23. Since this is a limitation common to all negligence actions it would not tend to prove that res ipsa loquitur is inapplicable to malpractice cases, but rather that there was no cause of action at all.

(3) *Expert testimony would be needed to prove negligence:* Meador v Arnold, *supra* note 23. Since res ipsa loquitur is not applied unless the balance of probabilities point to negligence according to the common knowledge of ordinary laymen, this limitation does not preclude the application of the doctrine.

In short, the identical grounds upon which these cases denied recovery are implicit in a discriminating enumeration of the requirements for a good res ipsa case.

Do these limitations, which are a part of the doctrine itself, by necessity exclude all malpractice cases? In Samuels v. Willis, 133 Ky. 459, 118 S.W 339 (1909) where a surgical sponge was left in the abdomen of a patient, thus making another operation necessary, the court allowed a recovery although res ipsa loquitur was not specifically mentioned. In a later res ipsa case (Steinmetz v. Humphrey, *supra* note 23) Samuels v Willis was referred to and the court said that the leaving of a sponge in a patient was negligence within the common knowledge of the ordinary layman, unless explained by the defendant.

Hence we come to the position either that the leaving of a surgical sponge in a patient is an exception to the rule that res ipsa loquitur will not apply to a malpractice case, or else we must admit that the application of the doctrine itself would have denied recovery as in the other cases. It is submitted that the latter is the better view.

A recent California case succinctly stated the argument in favor of the application of the doctrine where a patient received an injury that paralyzed his arm while undergoing an appendectomy· "The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railway car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table." (Ybarra v. Spangard, 25 Cal. 2d 486, 154 F 2d 687, 162 A.L.R. 1265 [1944].)

The point of this discussion is not that niceties of language have been overlooked, but that there are situations where res ipsa loquitur could well apply to malpractice cases in this jurisdiction—cases in which the plaintiff could have no other remedy, and where the rights of the medical profession would be adequately protected by a just application of the doctrine. For the method of handling in other jurisdictions, see Note, 162 A.L.R. 1265 (1946).

3. *Plaintiff not at fault.* In order to recover the plaintiff must have been free from fault, but the type of contributory fault that will prevent the plaintiff from recovering is not so essentially different from that involved in the usual negligence case as to merit discussion here except in those cases between employer and employee. In such cases the employee may be in control himself and hence cannot recover,[28] or else may have been injured by the negligence of a fellow servant. These possibilities have led the courts to say that something more is required when the employee seeks to invoke the rule res ipsa loquitur against his employer.[29] However, this does not seem justifiable if the plaintiff can prove that he was not in control and can eliminate the negligence of a fellow servant or intermeddler[30]

4. *Defendant's superior access to the evidence.* Some decisions include the added element that the defendant's knowledge or access to the evidence must be superior to that of the plaintiff.[31] Certainly this is true in the sense that if all the facts are known and testified to at the trial there will be no need for the application of the doctrine as the negligence may be proved directly.[32] But to use this as an added element seems more of a makeweight[33] or rationalization as the defendant's superior knowledge would seem a necessary concomitant of his exclusive control.

EFFECT

Much has been written concerning whether res ipsa loquitur raises a presumption or inference, and the question becomes even more confused because of the varying effects that are given to presumptions, presumption of fact sometimes being used interchangeably with inference. The crux of the problem, divested of confusing terms, is whether the plaintiff is entitled to a directed verdict if the defendant introduces no evidence. At one time there were two lines of decisions within this jurisdiction: one holding that the burden of proof shifted to the defendant,[34] and the other holding that a res ipsa case merely permitted the jury to infer negligence.[35]

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[28] Stephens v. Kitchen Lumber Co., *supra* note 10.

[29] High Splint Coal Co. v Bailey's Adm'r, 238 Ky. 217, 37 S.W 2d 22 (1931).

[30] Note, 51 L.R.A. (N.S.) 1221.

[31] Paducah Traction Co. v. Baker, 130 Ky. 360, 113 S.W 449 (1908)

[32] Droppelman v. Willingham, 293 Ky 614, 169 S.W 2d 811 (1943).

[33] PROSSER, TORTS 303 (1941).

[34] T. B. Jones & Co. v. Pelly, 128 S.W 305 (Ky. 1910) L. & N. R. Co. v. Comley, 173 Ky. 469, 191 S.W 96 (1917), Quillon v Skaggs, *supra* note 26.

[35] Watson v. Pullman Co., 238 Ky. 491, 38 S.W 2d 430 (1931) Wright v Elkhorn Consolidated Coal & Coke Co., 182 Ky. 423, 206 S.W 634 (1908).

In *Black Mountain Corporation* v. *Partin's Adm'r*[36] the court referred to the confusion and said that it favored the latter view, as a res ipsa case presented facts " from which the jury may infer negligence on the part of the one charged therewith, and that from that point he shall 'go forward' with his proof in substantiation of the exercise of the proper degree of care on his part."[37]

In brief, the presentation of a res ipsa case merely discharges the plaintiff's burden of producing enough evidence to get by the judge and the jury, but it does not entitle him to a directed verdict. This seems the better view and has been followed in the later cases.[38] Certainly Kentucky is not using the presumptive effect as it is defined in the Model Code of Evidence:

> " when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until the evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established."[39]

An allied problem which arises less frequently is as to the effect to be given to a res ipsa case when the defendant introduces evidence. Again there has been no little confusion. If the defendant's evidence shows that he used the proper degree of care, and the plaintiff cannot contradict that evidence directly should a verdict be directed for the defendant? Or may the jury still infer negligence? The latter view would seem preferable, since this is the very type of situation which the doctrine was evolved to meet. Consider the position of the plaintiff who was made ill by drinking part of a soft drink that contained a partially decomposed mouse.[40] All that the plaintiff can do is to trace the course of purchase to the defendant, point to the mouse in the bottle, and show his medical expenses, while the defendant can show the most scrupulous care. In such a situation the res ipsa case should be weighed as evidence and the question decided by the jury Kentucky has espoused this view.[41]

However, the inference of defendant's negligence disappears on a conclusive showing of defendant's exercise of the appropriate degree of care. "But the *overcoming* proof must be undisputed and uncontradicted by any testimony or *circumstances* refuting it."[42] (Latter emphasis writer's.) Obviously, so long as the circumstances still have weight even after the defendant has introduced testimony,

[36] *Supra* note 16.

[37] Black Mountain Corp. v Partin's Adm'r, 243 Ky 791, 797, 49 S.W 2d 1014, 1017 (1932)

[38] Droppelman v Willingham, *supra* note 32.

[39] MODEL CODE OF EVIDENCE, Rule 704, sec. 1 (1942).

[40] Coca-Cola Bottling Works v. Creech, *supra* note 4.

[41] *Ibid.*, Coca-Cola Bottling Works v Curtis, 302 Ky. 199, 194 S.W 2d 375 (1946)

[42] New St. L. & Calhoun Pack Corporation v Pennsylvania R. Co., 302 Ky. 693, 703, 194 S.W 2d 977, 982 (1946).

the actual effect of a res ipsa case in this jurisdiction is to allow a permissible inference, regardless of what terminology may be used.

It is submitted that the res ipsa loquitur doctrine as evolved and applied in this state is in the main internally consistent, in accord with the majority holdings, and consonant with the preferred views of the writers.

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