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Res Ipsa Loquitur - Burden of Proof

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of a frequently used path.[19] In such cases the important questions are the frequency of use of the tracks by pedestrians, and the railway's knowledge of such use. In determining a reasonable rate of speed for driving in a city the density of population may be a very important factor. For example, the court held in *Nolan v. Illinois Central Railroad Company*[20] that the railroad company is not held to the same strict accountability when the train is being operated within the city limits in a section that is not populated as it is when it operates through a thickly populated city or town.[21]

In deciding the instant case, the court logically followed the established jurisprudence in this state that the railroad is under no duty to keep a lookout for occasional trespassers, whether adults or children; and that the train may travel in open country, at the highest possible speed that is consistent with the safety of its passengers.

M. E. C.

RES IPSA LOQUITUR—BURDEN OF PROOF—While an employee of the defendant was engaged in filling the gas tank of a bus in the defendant's station, a fire occurred which destroyed the bus station and the plaintiff's adjoining automobile repair shop. In a suit for damages the plaintiff invoked the doctrine of res ipsa loquitur[1] and contended that where res ipsa loquitur is applied, it is not only incumbent upon the defendant to refute negligence on the part of its employees, but that he must also affirmatively show the exact cause of the fire. Conceding the applicability of this doctrine, the court declared that the defendant is not required to account for the occurrence and show the actual cause of the injury, but merely to rebut the inference that he failed to use due care. *Davis v. Teche Lines, Incorporated,* 200 La. 1, 7 So. (2d) 365 (1942).

In most jurisdictions when harm occurs under circumstances which, from common experience strongly suggest negligence, and when the instrumentality which occasioned the harm is under exclusive control and management of the defendant so that he is in

19. Jones v. Chicago, R.I. & P. Ry., 162 La. 690, 111 So. 62 (1926); Miller v. Baldwin, 178 So. 717 (La. App. 1938).

20. 145 La. 483, 82 So. 590 (1919).

21. 145 La. at 488, 82 So. at 592.

1. For a thorough discussion of the doctrine see Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases (1941) 4 LOUISIANA LAW REVIEW 70.

better position to prove his innocence than the plaintiff is to prove his negligence, the courts apply the doctrine of res ipsa loquitur—"the thing speaks for itself."[2] In *Byrne v. Boadle*,[3] leading case on res ipsa loquitur, the plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop and seriously injured him. The court said, "the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence, it is for the defendant to prove them." In such cases knowledge of the true cause of the injury is easily accessible to the defendant and is usually inaccessible to the plaintiff. The res ipsa loquitur doctrine operates to relieve the plaintiff from the burden of producing direct evidence of negligence by creating a rebuttable presumption of negligence. The decisions are not all in harmony, however, as to the extent of this advantage afforded the plaintiff, and the effect to be given it. Authority divides in three directions: (1) an inference of negligence so that the jury *may* find the defendant negligent in the absence of rebutting evidence; (2) a presumption where the jury will not merely be permitted to infer the defendant's negligence, but in the absence of evidence to the contrary, will be required to do so; and (3) an inference of negligence shifting the burden of proof on the defendant to prove by a preponderance of the evidence that the injury was not caused by his negligence.[4]

Louisiana courts have applied the doctrine of res ipsa loquitur to automobile accidents,[5] fires,[6] explosions,[7] injuries sustained

2. See Harper, A Treatise on the Law of Torts (1933) 183, § 77.

3. 2 H. & C. 722 Ex. (1863).

4. Harper, op. cit. supra note 2, at 184-185, § 77; Heckel and Harper, Effects of the Doctrine of Res Ipsa Loquitur (1928) 22 Ill. L. Rev. 724, 729 et seq.; Prosser, The Procedural Effect of Res Ipsa Loquitur (1936) 20 Minn. L. Rev. 241, 245-247.

5. Lawson v. Nossek, 15 La. App. 207, 130 So. 669 (1930) (guests of the defendant were injured in auto accident); Monkhouse v. Johns, 142 So. 347 (La. App. 1932) (car ran off the road and into a tree); Loprestie v. Roy Motors, Inc., 181 So. 60 (La. App. 1938) (auto accident); Harrelson v. McCook, 198 So. 532 (La. App. 1940) (auto left highway and went into ditch); Nuss v. MacKenzie, 4 So. (2d) 845 (La. App. 1942) (auto collision).

6. Dotson v. Louisiana Central Lumber Co., 144 La. 78, 80 So. 205 (1918) (employee in defendant's sawmill lost his life in a fire which destroyed the mill); Gershner v. Gulf Refining Co., 171 So. 399 (La. App. 1936) (while defendant was putting gas in car, gas splashed on plaintiff and he caught fire); Jones v. Shell Petroleum Corp., 185 La. 1067, 171 So. 447 (1936) (damage to plaintiff's building caused by fire where defendant filling station was in control); Gulf Ins. Co. v. Temple, 187 So. 814 (La. App. 1939) (defendant was using a blow torch in repairing auto when the auto caught on fire).

7. Harrell v. Gulf and Valley Cotton Oil Co., 15 La. App. 603, 131 So. 709 (1930) (defendant's deodorizing tank exploded killing a nearby employee);

from falling objects,[8] persons drowning,[9] accidental electrocutions,[10] and consumption of foreign matter contained in foodstuffs,[11] and have had no trouble with these common law distinctions. They have generally held that the doctrine of res ipsa loquitur creates a prima facie case of negligence which may be overcome by the defendant's explanation that he had used due care.[12] It is further held that the defendant, in order to exonerate himself, is not required to allege and prove the specific cause of the injury.[13] The decisions have explained the defendant's burden by a number of confusing phrases: "to show absence of negli-

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Drago v. Dorsey, 13 La. App. 115, 126 So. 724 (1930) (child crushed by falling of fence due to explosion of defendant's boiler); Motor Sales and Service Co. v. Grasselli Chemical Co., 15 La. App. 353, 131 So. 623 (1931) (defendant was transporting acid when drum opened and acid spilled on plaintiff); Auzenne v. Gulf Public Service, 181 So. 54 (La. App. 1938) (Coca-Cola bottle burst and glass cut plaintiff).

8. Noble v. Southland Lbr. Co., 4 La. App. 281 (1926) (injury sustained where plank fell on plaintiff's head at lumber yard); Pizzitola v. Letellier Transfer Co., 167 So. 158 (La. App. 1936) (injury resulted from a fall of a bale of paper off a truck).

9. Rome v. London and Lancashire Indemnity Co. of America, 169 So. 132, 141 (La. App. 1936) (boy drowned in swimming pool).

10. Hebert v. Lake Charles Ice, Light & Waterworks Co., 111 La. 522, 35 So. 731 (1903) (person electrocuted by wire lying in a street).

11. Costello v. Morrison Cafeteria Co. of La., 135 So. 245 (La. App. 1931) (defendant restaurant served petitioner cream cheese unfit to eat); Hill v. Louisiana Coca-Cola Bottling Co., 170 So. 45 (La. App. 1936) (plaintiff swallowed glass while drinking Coca-Cola).

12. Willis v. Vicksburg, 115 La. 53, 38 So. 892 (1905) (explain absence of negligence); Lykiardopoulo v. New Orleans & C. R., Light and Power Co., 127 La. 309, 53 So. 575 (1910) (absence of negligence); Dotson v. Louisiana Central Lumber Co., 144 La. 78, 80 So. 205 (1918) (burden upon defendant to show absence of negligence); Noble v. Southland Lbr. Co., 4 La. App. 281 (1926) (burden on defendant to show absence of negligence); Vargas v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (1930) (defendant must show he did nothing he should not have done and neglected no duty to plaintiff); Lawson v. Nossek, 15 La. App. 207, 130 So. 669 (1930) (presumption of want of due care not conclusive); Motor Sales and Service Co. v. Grasselli Chemical Co., 15 La. App. 353, 131 So. 623 (1931) (effect of res ipsa loquitur is merely to give defendant the burden of overcoming presumption of negligence by showing due care); Monkhouse v. Johns, 142 So. 347 (La. App. 1932) (burden on defendant to adduce proof explanatory of negligence imputed to him); Jones v. Shell Petroleum Corp., 185 La. 1067, 171 So. 447 (1936) (inference of negligence in absence of defendant showing exercise of due care); Gershner v. Gulf Refining Co., 171 So. 399 (La. App. 1936) (defendant must explain due care); Gulf Ins. Co. v. Temple, 187 So. 814 (La. App. 1939) (defendant must show absence of negligence on his part); Harrelson v. McCook, 198 So. 532 (La. App. 1940) (defendant must show absence of negligence); Nuss v. MacKenzie, 4 So. (2d) 845 (La. App. 1942) (defendant must show due care); Davis v. Teche Lines, Inc., 200 La. 1, 7 So. (2d) 365 (1942) (defendant must show due care).

13. Gershner v. Gulf Refining Co., 171 So. 399 (La. App. 1936) (defendant not required to allege and prove the particular act of the injury); Gulf Ins. Co. v. Temple, 187 So. 814 (La. App. 1939) (he need not show actual cause).

gence,"[14] "to show due care,"[15] "to explain the cause of the accident to escape inference of negligence."[16] Apparently these phrases are accepted as synonymous, as a combination of two of them may be found in the same case to express the same meaning.[17] The present case has subscribed to the majority Louisiana view by accepting and approving the general statement of the rule of res ipsa loquitur as stated in Corpus Juris: "where the thing which caused the injury complained of 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 its management or control use proper care, it affords reasonable evidence, in absence of explanation by the defendant, but the presumption or inference is overcome and rebutted if the defendant's explanation is sufficient to rebut the inference that he had failed to use due care."[18]

However, a number of Louisiana cases appear to be in conflict with this rule. In *Dye v. American Beverage Company*,[19] a suit to recover damages for illness resulting from consumption of bottled beverages alleged to contain unwholesome foreign substance, the prima facie case was not overcome by the defendant corporation's evidence that it operated a modern sanitary bottling plant and that it was improbable that foreign matter could have entered the product during the process of manufacture. In *Hill v. Louisiana Coca-Cola Bottling Company*[20] the court held that

14. Willis v. Vicksburg, 115 La. 53, 38 So. 892 (1905); Dotson v. Louisiana Central Lumber Co., 144 La. 78, 80 So. 205 (1918); Noble v. Southland Lbr. Co., 4 La. App. 281 (1926); Motor Sales and Service Co. v. Grasselli Chemical Co., 15 La. App. 353, 131 So. 623 (1931); Monkhouse v. Johns, 142 So. 347 (La. App. 1932); Gershner v. Gulf Refining Co., 171 So. 399 (La. App. 1936); Gulf Ins. Co. v. Temple, 187 So. 814 (La. App. 1939); Harrelson v. McCook, 198 So. 532 (La. App. 1940); Nuss v. MacKenzie, 4 So. (2d) 845 (La. App. 1942).

15. Willis v. Vicksburg, 115 La. 53, 38 So. 892 (1905); Noble v. Southland Lbr. Co., 4 La. App. 281 (1926); Motor Sales and Service Co. v. Grasselli Chemical Co., 15 La. App. 353, 131 So. 623 (1931); Jones v. Shell Petroleum Corp., 185 La. 1067, 171 So. 447 (1936); Gulf Ins. Co. v. Temple, 187 So. 814 (La. App. 1939); Nuss v. MacKenzie, 4 So. (2d) 845 (La. App. 1942); Davis v. Teche Lines, Inc., 200 La. 1, 7 So. (2d) 365 (1942).

16. Monkhouse v. Johns, 142 So. 347 (La. App. 1932); Jones v. Shell Petroleum Corp., 185 La. 1067, 171 So. 447 (1936); Gershner v. Gulf Refining Co., 171 So. 399 (La. App. 1936).

17. See cases cited in notes 14, 15, and 16, supra.

18. 45 C. J. 1193, § 768 (1928); Gershner v. Gulf Refining Co., 171 So. 399, 401 (La. App. 1936); Jones v. Shell Petroleum Corp., 185 La. 1067, 1071, 171 So. 447 (1936); Davis v. Teche Lines, Inc., 200 La. 1, 7, 7 So. (2d) 365, 367 (1942).

19. 194 So. 438 (La. App. 1940).

20. 170 So. 45 (La. App. 1936) (plaintiff swallowed glass while drinking Coca-Cola). See also Freeman v. Louisiana Coca-Cola Bottling Co., 179 So. 621 (La. App. 1938) (plaintiff swallowed particles of glass while drinking Coca-Cola); Auzenne v. Gulf Public Service, 181 So. 54 (La. App. 1938) (Coca-

the defendant, to excuse itself from liability, must prove that the foreign substance did not enter the product during bottling or manufacturing process. The same view was recently adopted by the Louisiana Supreme Court in *Ortego v. Nehi Bottling Works,*[21] where the plaintiff was injured when a bottle of root beer exploded. In that case the defendant was found negligent notwithstanding the showing that they purchased bottles from a reputable manufacturer, and that gas gauges used in the bottling process prevented any excessive gas pressure in bottles. In these "bottling cases" it appears that proving due care or even a high degree of care in the bottling process will avail the defendant nothing. He must virtually prove that the deleterious substance could not have entered his product during the bottling process. When a bottled beverage explodes or contains a deleterious substance, the bottling company is confronted with an almost irrebuttable presumption of negligence. This unique application of the res ipsa loquitur doctrine does not really achieve any exceptional result when one compares it with the decisions in other jurisdictions which also hold the bottling company to a strict liability upon a contractual theory of implied warranty of fitness.[22]

A comparison of the instant decision and the recent *Ortego* case indicates that there are two clearly recognizable classifications concerning the effect of the prima facie case of negligence

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Cola bottle burst and glass cut plaintiff); Hollis v. Ouachita Coca-Cola Bottling Co., Ltd., 196 So. 376 (La. App. 1940) (dead spider in Coca-Cola); Jenkins v. Bogalusa Coca-Cola Bottling Co., 1 So. (2d) 426 (La. App. 1941) (dead spider in bottle).

The same rule was applied in one case where defendant restaurant served petitioner cream cheese unfit to eat. Costello v. Morrison Cafeteria Co., 135 So. 245. (La. App. 1931).

21. 199 La. 599, 6 So. (2d) 677 (1942). See also Auzenne v. Gulf Public Service, 181 So. 54 (La. App. 1938).

22. See note (1942) 4 LOUISIANA LAW REVIEW 606 for a comparison of the contract and tort theories of liability. The courts that hold the bottling company on the "warranty" theory reason that since the consumer is without opportunity to inspect for himself when he buys a bottled beverage, he has a right to rely upon the "implied warranty" of the manufacturer that the contents are fit for human consumption. Coca-Cola Bottling Co. v. Ezzell, 22 Ala. App. 210, 114 So. 278 (1927); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Hertzler v. Manshum, 237 Mich. 289, 211 N.W. 754 (1927); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Chenault v. Houston Coca-Cola Bottling Co., 151 Miss. 366, 118 So. 177 (1928); Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 479, 72 A.L.R. 143 (1930); Madouras v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. (2d) 445 (1936); Nemela v. Coca-Cola Bottling Co., 104 S.W. (2d) 773 (Mo. App. 1937); Ritchie v. Sheffield Farms Co., 129 Misc. 765, 222 N.Y. Supp. 724 (1927); Nock v. Coca-Cola Bottling Co., 102 Pa. Super. Ct. 515, 156 Atl. 537 (1931); Coca-Cola Bottling Co. v. Smith, 97 S.W. (2d) 761 (Tex. Civ. App. 1936).

confronting the defendant in res ipsa loquitur situations. In the "bottling cases" as illustrated by the *Ortego* decision, the presumption of negligence is almost irrebuttable. In other situations the prima facie case may be rebutted by merely showing that the defendant used due care. This approach to the problem is nicely illustrated by the *Davis* decision. In that case the Louisiana Supreme Court confirms prior Louisiana jurisprudence as to the general effect of the burden of proof in res ipsa loquitur cases, and recognizes the distinction between merely requiring the defendant to show due care and requiring him to specifically account for the occurrence.

J.J.C.

TORTS—AUTOMOBILES—RIGHT OF WAY—CONFLICTING AND CONCURRING REGULATIONS—Plaintiff was driving east while defendant approached from the south, plaintiff's right. Defendant slowed perceptibly, and plaintiff, assuming he would stop, did not further notice him. They collided in the middle of the intersection. Plaintiff claimed right of way under the city ordinance[1] which generally gave east-west streets the right of way. Defendant contended that he had right of way under the state act[2] which provided that the vehicle approaching from the right has the right of way. *Held,* irrespective of which driver was entitled to the right of way, both were guilty of negligence—suit dismissed. *Burden v. Capitol Stores, Incorporated,* 200 La. 329, 8 So. (2d) 45 (1942).[3]

The Louisiana decisions rendered on intersection accidents involving right of way are uniformly based upon general negligence principles. The courts, by this means, effectively dodge the right of way question and are not put in the position of having to uphold either the statute or the municipal ordinance.

Prior to the enactment of statutory provisions the rule of the road was that the first to reach the intersection had the right of way.[4] Rules giving the right of way to certain streets set a standard of care, but do not eliminate the general requirement of reasonable care under the circumstances. Louisiana recognizes that

1. Baton Rouge City Ordinance.
2. La. Act 286 of 1938, tit. II, § 3, Rule 11 [Dart's Stats. (1939) § 5216].
3. A more complete statement of the facts is given in the appellate case. Burden v. Capitol Stores, Inc., 4 So.(2d) 62 (La. App. 1941).
4. Johnston v. Worley, 3 La. App. 675 (1926).