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Res Ipsa Loquitur - Burden of Proof - Applicability in Electricity Cases

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only the latter, since the former are specifically excepted under the terms of the statute. This distinction is not justified by any meritorious policy consideration. Moreover, the absence of the initial object requirement would mean that a good faith union attempting to comply with 8(b) (7) (C) would be required to guess when picketing acquired a recognitional object in order to file a representation petition within the thirty-day limitation. On the other hand, under the present rule, employer and employees are amply protected from unwanted recognitional picketing. Whenever the addition of a sufficient number of permanent non-union replacements for economic strikers raises a representation question involving the union's majority, they need only file a petition for a decertification election to resolve the issue. If the union is decertified, then under the decision in *Lawrence*, 8(b) (7) (B) would be applicable, and further post-election picketing would be prohibited. A literal application of 8(b) (7) (C) would work substantial hardship on a union engaged in a lawful economic strike, in the teeth of Congressman Griffin's assurance that there was no intent to impair that right with the enactment of 8(b) (7).

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RES IPSA LOQUITUR—BURDEN OF PROOF—APPLICABILITY IN ELECTRICITY CASES

Plaintiff, manager of a cotton gin, noticed the lights in the gin flickering. While attempting to turn off all electric power at the fuse box, he received an electrical shock. When he staggered out of the building, defendant's power cable serving the gin broke and fell to the ground, causing flash burns to his eyes. *Held*, the doctrine of res ipsa loquitur is applicable, and "the burden shifts to the defendant to show that the accident was caused by something for which it is not responsible."[1] Since defendant failed to meet this burden, judgment for plaintiff was upheld. *Tassin v. Louisiana Power & Light Co.*, 191 So. 2d 338 (La. App. 3d Cir. 1966).

In the majority of American jurisdictions, the doctrine of res ipsa loquitur is nothing more than a rule of circumstantial evidence. In a situation where the doctrine is properly applied,

1. Tassin v. Louisiana Power & Light Co., 191 So. 2d 338, 341 (La. App. 3d Cir. 1966).

the mere occurrence of an accident is so indicative of defendant's negligence that one may reasonably infer negligence from the accident. The main justification for the doctrine is the availability to defendant of the motion for a directed verdict in cases involving a jury trial. That is, in common law jurisdictions, if res ipsa applies, the question of negligence automatically goes to the jury for consideration, and a refusal of defendent's motion for a directed verdict at the completion of plaintiff's evidence will be refused.[2] Defendant still has an opportunity to present his evidence. After he does so, the jury determines whether the inference of negligence preponderates over the evidence which the defendant presented. Even if the defendant chooses to rest his case without presenting any evidence, a verdict for the plaintiff is not mandatory. The jury still must determine whether the inference of negligence is sufficient to prove negligence. Thus, there is no "shift in the burden of proof" to defendant.[3]

Professor Prosser states that the usual requirements necessary for the application of res ipsa loquitur are: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Some courts have at least suggested a fourth consideration, that evidence as to the true explanation of the event must be more readily accessible to the defendant than to the plaintiff."[4]

Although the desirability of applying res ipsa loquitur in

2. See PROSSER, TORTS § 40 (3d ed. 1954); Malone, *Res Ipsa Loquitur and Proof by Inference*, 4 LA. L. REV. 70, 84 (1941).

3. RESTATEMENT 2d, TORTS § 328D (1965) states: "(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

"(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

"(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence, and

"(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

"(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

"(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached."

See generally PROSSER, TORTS § 40 (3d ed. 1964); Malone, *Res Ipsa Loquitur and Proof by Inference*, 4 LA. L. REV. 70, 85 (1941). Burden of proof as here used denotes "the burden of ultimately persuading the trier" of fact. See Malone, *id.* at 88.

4. PROSSER, TORTS § 39, at 218 (3d ed. 1964). Compare RESTATEMENT (SECOND) TORTS § 328D (1965), quoted *supra* note 3.

Louisiana has been questioned,[5] the doctrine is firmly imbedded in our jurisprudence. Of much more importance are the conditions Louisiana courts have found necessary for the application of the doctrine. Frequently quoted on this point is *Northwestern Mut. Fire Ass'n v. Allain*,[6] which listed them as: (1) "if the accident which damaged the plaintiff was caused by an agency or instrumentality within the actual or constructive control of the defendant," (2) "if the accident is of a kind which ordinarily does not occur in the absence of negligence," and (3) "if the evidence as to the true nature of the accident is more readily accessible to the defendant than to the plaintiff."[7] Although the decisions are not uniform,[8] it is believed that this is an accurate statement of Louisiana's conditions.

It is not certain whether any "burden of proof" shifts after the application of res ipsa loquitur in Louisiana. Prosser states that Louisiana follows the minority view of giving res ipsa loquitur the effect of shifting "to the defendant the ultimate burden of proof, requiring him to introduce evidence of greater weight than that of the plaintiff."[9] In 1941, Professor Malone, expressing a contrary view, felt Louisiana courts were using "burden of proof" language "to convey the idea that the plaintiff's claim will not be dismissed solely on the ground of inadequacy of his own proof without reference to the defendant's explanation." He further explains: "This amounts merely to saying that the defendant's explanations, as well as the plaintiff's showing, enters into a composite picture upon which judgment must be pronounced. In other words proof of the accident affords some inferential proof of negligence; how strong the inference ultimately will prove to be depends in some measure upon the plausibility of the explanation made by the defendant."[10] Chief Justice Fournet's discussion of the procedural effects of res ipsa

5. Malone, *Res Ipsa Loquitur and Proof by Inference*, 4 LA. L. REV. 70, 84 (1941). See also Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 10 LA. L. REV. 59, 67 (1949).

6. 226 La. 788, 77 So. 2d 395 (1954).

7. *Id.* at 794, 77 So. 2d at 397.

8. Some cases require an absence of direct evidence as to the cause of the accident. See Day v. National U.S. Radiator Corp., 241 La. 288, 128 So. 2d 660 (1961); Bourg v. Aetna Cas. & Sur. Co., 77 So. 2d 131 (La. App. 1st Cir. 1954); Storey v. Parker, 13 So. 2d 88 (La. App. 1st Cir. 1943).

In certain types of cases, "exclusive or constructive control by the defendant" is excepted as a condition. Saunders v. Walker, 229 La. 426, 86 So. 2d 89 (1956); Plunkett v. United States Electric Serv., 214 La. 145, 36 So. 2d 704 (1948); Hake v. Air Reduction Sales Co., 210 La. 810, 28 So. 2d 441 (1946).

9. PROSSER, TORTS § 40, at 234 (3d ed. 1964).

10. Malone, *Res Ipsa Loquitur and Proof by Inference*, 4 LA. L. REV. 70, 90 (1941).

loquitur in *Larkin v. State Farm Mut. Auto Ins. Co.*,[11] a 1957 case, seems to settle the question by making it clear that plaintiff must still prove his case by a preponderance of evidence. Res ipsa loquitur allows him nothing more than an "inference of negligence" which goes on the scales along with his other evidence. However, a number of subsequent court of appeal cases have continued to state that the burden of proof shifts to defendant.[12]

It is submitted that three aspects of the instant case are questionable. First is the court's finding that the power cable was under the exclusive control of the defendant at the time of the accident. As Judge Hood pointed out in his dissent,[13] although defendant had contracted to supply the gin company with power to a maximum of 30 kilowatts, the latter, shortly before the accident and without notifying defendant, employed its own electricians to rewire the gin and installed additional electric equipment, causing the average demand at the gin to rise to 68 kilowatts. The sudden increase could easily have caused the line to break because of overloading. It is submitted that the gin company's action deprived the defendant of any "exclusive or constructive control" it may have had.

Second is the court's language concerning the procedural ef-

11. 233 La. 544, 551, 97 So. 2d 389, 391 (1957): "It is generally conceded that *res ipsa loquitur in no way modifies the rule that negligence will not be presumed.* The application of the rule does not, therefore, dispense with the necessity that the plaintiff prove negligence, but is simply a step in the process of such proof, permitting the plaintiff, in a proper case, to place in the scales, along with proof of the accident and enough of the attending circumstances to invoke the rule, an inference of negligence, thereby obtaining an advantage and placing on the defendant the burden of going forward with proof to offset the advantage. *When all the evidence is in, the question is still whether the preponderance is with the plaintiff.*" (Emphasis added.)

It should be noted that there is a distinction between the "placing on the defendant the burden of going forward with proof" referred to by the court and the shifting of the burden of proof to the defendant. In the first, the burden of persuading the trier of fact remains with plaintiff. But plaintiff has offered a piece of evidence from which negligence may be inferred, namely, the occurrence of the accident. A defendant not wanting to allow the scales to remain tilted against him must step forward to rebut the inference.

In the second, the burden of persuading the trier of fact shifts to defendant. If the trier of fact is at a point of indecision at the completion of the case, it will decide in favor of plaintiff. See Malone, *Res Ipsa Loquitur and Proof by Inference*, 4 LA. L. REV. 70, 87-91 (1941).

12. Gabriel v. Royal Prod. Div. of Wash. Prod., 159 So. 2d 384 (La. App. 4th Cir. 1964); Bougon v. Traders & Gen. Ins. Co., 146 So. 2d 535 (La. App. 4th Cir. 1962); Johnson v. Johness, 145 So. 2d 588 (La. App. 4th Cir. 1962); State Farm Mut. Auto. Ins. Co. v. Herrin Transp. Co., 136 So. 2d 272 (La. App. 2d Cir. 1961); Steadman v. American Fid. & Cas. Co., 113 So. 2d 489 (La. App. 2d Cir. 1959).

13. Tassin v. Louisiana Power & Light Co., 191 So. 2d 338, 344 (La. App. 3d Cir. 1966).

fect of the application of res ipsa loquitur. The court stated: "Having determined that the doctrine applies, the burden of proof shifts to the defendant to show that the accident was caused by something for which he is not responsible."[14] As previously discussed, this is not consistent with the majority position in other American jurisdictions and relatively recent expressions by the Louisiana Supreme Court in *Larkin v. State Farm Mut. Auto Ins. Co.*[15] Although much is said in Louisiana cases about shifting the "burden of proof," it is submitted that it is of little practical importance today. In the usual res ipsa loquitur case plaintiff offers as evidence of defendant's negligence more than the mere occurrence of the accident, which is countered with evidence to the contrary by defendant. When the judge is finally called upon to make his determination, the question of burden of proof enters his consideration only if he finds it impossible to say which party offered stronger evidence supporting his contentions. Only then would he be forced to decide against the party carrying the burden of proof. Practically speaking, such is seldom the case.

Third is the courts' application of res ipsa loquitur in cases where electricity caused the injury. In the majority of Louisiana cases dealing with the subject, res ipsa loquitur is not mentioned. The doctrine was applied in only two previous cases.[16] In each the court found for the plaintiff, but was careful to point out specific acts of negligence by defendant.[17] The courts' usual approach is to consider that one who handles power-

14. *Id.* at 341.

15. See note 11 *supra.*

16. Hebert v. Lake Charles Ice, Light & Waterworks Co., 111 La. 522, 35 So. 731 (1903); Ledet v. Lockport Light & Power Co., 15 La. App. 426, 132 So. 272 (La. App. 1st Cir. 1931). For electricity cases finding res ipsa inapplicable, see Kemra Lumber Co. v. Louisiana Power & Light Co., 132 So. 2d 688 (La. App. 1st Cir. 1961) (instrumentality not under defendant's control); Boudreaux v. Louisiana Power & Light Co., 135 So. 90 (La. App. Orl. Cir. 1931) (there was presence of direct evidence and a reasonable inference of negligence could not be drawn).

17. As Judge Hood pointed out in the dissent: "In the Hebert Case . . . the court found that the defendant was negligent in maintaining high voltage wire 'without proper insulation.' In the Ledet case, the court found that the defendant was negligent in failing to equip its electric wires with 'an efficient safety device, one that would work, cut off the power and render the wire harmless in case it broke and fell.'" Tassin v. Louisiana Power & Light Co., 191 So. 2d 338, 343 (La. App. 3d Cir. 1966).

ful currents of electricity is under a duty of exercising utmost care and prudence consistent with the practical operation of its facility, and that more evidence than the mere occurrence of an accident is required to prove negligence.[18]

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18. Calton v. Louisiana Power & Light Co., 56 So. 2d 862, *affirmed* 222 La. 1063, 64 So. 2d 432 (1953); Hughes v. Southwestern Gas & Elec. Co., 175 La. 336, 143 So. 281 (1932); Mays v. Southwestern Gas & Elec. Co., 174 La. 368, 140 So. 826 (1932); Potts v. Shreveport Belt Ry., 110 La. 1, 34 So. 103 (1903); Coulon v. City of Alexandria, 44 So. 2d 171 (La. App. 2d Cir. 1950); Short v. Central La. Elec. Co., 36 So. 2d 658 (La. App. 2d Cir. 1948); McMullen v. McClunney, 23 So. 2d 658 (La. App. 2d Cir. 1945); Scott v. Claiborne Elec. Co-op., 13 So. 2d 524 (La. App. 2d Cir. 1943); Webb v. Louisiana Power & Light Co., 199 So. 451 (La. App. 2d Cir. 1940); Bynum v. City of Monroe, 171 So. 116 (La. App. 2d Cir. 1936); Freibert v. Sewerage & Water Board of New Orleans, 159 So. 767 (La. App. Orl. Cir. 1935); Younse v. Southern Advance Bag & Paper Co., 159 So. 611 (La. App. 2d Cir. 1935).