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NEGLIGENCE – RES IPSA LOQUITUR

The plaintiff, Flora Hook, accompanied a group of young men and women to the Lakeside Park. After riding on some of the amusement devices, Miss Hook purchased a ticket for a ride on the Loop-O-Plane. Seated inside the car, she took hold of a metal cross bar as the car rocked back and forth and then swung through a complete revolution. On this first circle, she lost her grip on the cross bar and the upper part of her body jackknifed forward in a sudden violent movement causing her to strike her head on the floor of the car. As a result of this accident the plaintiff sustained a broken back.

The trial was predicated on defendant's alleged negligent maintenance and operation of the amusement device. The trial court dismissed the complaint at the close of plaintiff's case. Two points were specified for reversal on appeal: That an adequate case was made out before the trial court either on the theory of 1) simple or common law negligence or 2) *res ipsa loquitur*. The Supreme Court affirmed the trial court's ruling in a five to two decision,¹ holding that the evidence was insufficient to support any inference of negligence and the doctrine of *res ipsa loquitur* did not serve to supply the deficiencies.² *Hook v. Lakeside Park Co.*, 351 P.2d 261 (Colo. 1960).

The latin phrase "*res ipsa loquitur*," meaning simply that "the thing speaks for itself," is the offspring of a casual word of Baron Pollock in a case in 1863³ in which a barrel of flour rolled out of a warehouse and fell upon a passing pedestrian. The development of the rule in this country has been characterized by uncertainty and confusion and has become the source of so much trouble to the courts that the use of the phrase itself is an obstacle to clear thought.

This enigmatic theme of inconsistency and confusion which has come to characterize the doctrine of *res ipsa* is readily revealed by a review of the decisions on the subject in this state.⁴ The scope of this comment will therefore be primarily confined to the determination of whether the principles of the doctrine enunciated in the instant case serve as increments of reason to stabilize and clarify an otherwise anomalous doctrine or as catalysts in precipitating further confusion.

The court established a formula in the instant case to be utilized in determining whether a particular case calls for the application of *res ipsa loquitur*. This formula embodies the three conditions which are usually stated as necessary to set the doctrine into operation, namely: 1) that the instrumentality is under the exclusive control of the defendant, 2) that the accident is of a kind which

¹ The dissenters believed that the plaintiff made out a *prima facie* case and that the circumstances presented a clear case for the application of *res ipsa loquitur*, citing *Weiss v. Axler*, 137 Colo. 544, 328 P.2d 88 (1958), as being appropriately analogous.

² A petition for rehearing of the Hook case was denied. Mr. Justice Moore, who formerly concurred, joined with the two dissenters at this time. 351 P.2d 261 (Colo. 1960).

³ *Byrne v. Boodle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

⁴ See discussion of this confusion and collected cases in *Weiss v. Axler*, 137 Colo. 544, 328 P.2d 88 (1958).

ordinarily does not occur in the absence of defendant's negligence, and 3) that it must not have been due to any voluntary act or contribution on the part of the plaintiff.⁵ Fragments of the formula set forth in the *Hook* decision have appeared in most of the *res ipsa* cases in this state, but nowhere in this context and in as clear and succinct a form.⁶ Perhaps the best coverage of these conditions in general terms is found in *Denver Consolidated Electric Co. v. Lawrence*.⁷ This formula is consistent with the general principle adhered to in the majority of the cases in this state to the effect that the mere fact that an accident or an injury has occurred, with nothing more, is not sufficient to invoke the rule.⁸ An apparent exception to this rule was early expressed in the common carrier cases.⁹ The earliest of these decisions in this state is *Kansas Pacific Ry. Co. v. Miller*,¹⁰ where the court stated that in case of alleged injuries by stage coach or railroad accidents, the presumption of negligence arises from the mere fact that the accident occurred. This view is in accord with the common law rule as stated in the leading case of *Christie v. Griggs*,¹¹ where Sir James Mansfield remarked that the plaintiff had made out his case *prima facie* by proving his going on the coach, the accident, and that he had suffered damage. The reason sometimes given for this principle is that the carrier's duty of the highest care toward its passengers in effect makes it the insurer of the passenger's safety. However, the court in the instant case held the following view: "It does not follow, however, that an operator of an amusement device, such as defendant, is an insurer of

⁵ Prosser, *Torts* 201 (2d ed. 1955); Harper & James, *Torts*, § 19.5 (1956). Also, see Wigmore, *Evidence*, § 2509 (3d ed. 1940).

⁶ *Gylling v. Hinds*, 122 Colo. 345, 222 P.2d 413 (1950); *Home Public Market v. Newrock*, 111 Colo. 428, 142 P.2d 272 (1943); *Denver Tramway Corp. v. Kuttner*, 95 Colo. 312, 35 P.2d 852 (1934); *Yellow Cab Co. v. Hodgson*, 91 Colo. 365, 14 P.2d 1081 (1932); *Velotta v. Yampa Valley Coal Co.*, 63 Colo. 489, 167 Pac. 971 (1917); *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632 (1884).

⁷ 31 Colo. 301, 73 Pac. 39 (1903).

⁸ *Weber v. Gamble Building Co.*, 345 P.2d 727 (Colo. 1959); *National Co. v. Holt*, 137 Colo. 208, 322 P.2d 1046 (1958); *Perry Co. v. Ruybal*, 133 Colo. 502, 297 P.2d 531 (1956); *Grand Junction v. Lashmet*, 126 Colo. 256, 247 P.2d 909 (1952); *Maloney v. Jussel*, 125 Colo. 125, 241 P.2d 862 (1952); *Salliman v. Silk*, 118 Colo. 220, 194 P.2d 304 (1948); *Home Public Market v. Newrock*, 111 Colo. 428, 142 P.2d 272 (1943); *Berkens v. Denver Coca-Cola Bottling Co.*, 109 Colo. 140, 122 P.2d 884 (1942); *Denver Tramway Corp. v. Kuttner*, 95 Colo. 312, 35 P.2d 852 (1934); *Clune v. Mercereau*, 89 Colo. 227, 1 P.2d 101 (1931); *McMillan v. Keck*, 82 Colo. 434, 260 Pac. 1079 (1927); *Denver Co. v. Thompson*, 65 Colo. 4, 169 Pac. 539 (1917); *Velotta v. Yampa Valley Coal Co.*, 63 Colo. 489, 167 Pac. 971 (1917).

⁹ *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632 (1884); *Wall v. Livesay*, 6 Colo. 465 (1882); *Denver, S.P. & P. Ry. Co. v. Woodward, Administrator*, 4 Colo. 1 (1877); *Kansas Pacific Railway Co. v. Miller*, 2 Colo. 442 (1874).

¹⁰ 2 Colo. 442 (1874).

¹¹ 2 Camp. 79, 170 Eng. Rep. 1088 (1809).

COMPLIMENTS

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the passenger's safety. The presumptions and inferences available to a passenger in an action against a carrier are not available in such circumstances."¹²

The dissent recognized a fourth element which is found in several decisions in this state, i.e., that evidence as to the true explanation of the accident must be more readily accessible to the defendant than to the plaintiff.¹³ The reasoning usually employed in support of this proposition is aptly stated in *Denver Tramway Corp. v. Kuttner*¹⁴ to the effect that the doctrine of res ipsa is necessary to prevent a miscarriage of justice in negligence cases where the injured party is either comparatively or totally ignorant of the cause of the accident. The court then proceeded to a conclusion which effectively summarizes the general philosophy accorded the doctrine of res ipsa in this state: "It is a doctrine that must be kept within comparatively narrow limits, lest a desire to promote justice bring about the defeat of justice instead." A corollary of this fourth element is that where the plaintiff has equal or superior means of information as to the cause of the accident, the doctrine will not be invoked.¹⁵ Dean Prosser states that this fourth element is of dubious validity in a res ipsa case, but adds that the plaintiff's comparative ignorance of the facts undoubtedly has some persuasive effect in making some courts more willing to apply the doctrine.¹⁶

A second point covered by the majority opinion relates to the question as to whether the fact that the plaintiff elects to stand upon specific allegations of negligence in pleadings at trial operates as a waiver of the benefits of res ipsa loquitur. The court held that it was quite generally agreed that the introduction of evidence which does not purport to furnish a complete explanation of the occurrence does not deprive the plaintiff of res ipsa. The court cited four Colorado cases in support of this principle.¹⁷ However, with deference to the learned court, a careful reading of these cases and others dealing with this rule reveals that no such general agreement exists in this state on this point. The principal authority for the proposition cited by the court is *Scott v. Greeley Joslin Store Co.*,¹⁸ which was later adhered to in the landmark case of *Weiss v. Axler*.¹⁹ However, contrary to this holding are two recent decisions, *St. Luke's Hospital Ass'n v. Long*²⁰ and *Brighton v. DeGregario*.²¹ In the *St. Luke's* case the court stated that the plaintiffs were unable to present evidence as to the actual cause of the death, and that the defendant's by their broad denial would have made applicable the rule of res ipsa loquitur had no specific proof as to the cause of the death been produced. In an extensive survey of the

¹² *Hook v. Lakeside Park Company*, 351 P.2d at 265, (Colo. 1960).

¹³ *Denver Consolidated Electric Co. v. Lawrence*, supra note 11. *Accord*, *Boulder Valley Co. v. Jernberg*, 118 Colo. 486, 197 P.2d 155 (1948); *Denver Tramway Corp. v. Kuttner*, 95 Colo. 312, 35 P.2d 852 (1934); *Yellow Cab Co. v. Hodgson*, 91 Colo. 365, 14 P.2d 1081 (1932); *Velotta v. Yampa Valley Coal Co.*, 63 Colo. 489, 167 Pac. 971 (1917).

¹⁴ 95 Colo. at 315, 35 P.2d at 853 (1934).

¹⁵ *Boulder Valley Co. v. Jernberg*, 118 Colo. 486, 197 P.2d 155 (1948); *Yellow Cab Co. v. Hodgson*, 91 Colo. 365, 14 P.2d 1081 (1932). Reaffirmed in *National Co. v. Holt*, 137 Colo. 208, 322 P.2d 1046 (1958).

¹⁶ Prosser, *Torts*, § 42 (2d ed 1955).

¹⁷ *Brighton v. DeGregario*, 136 Colo. 1, 314 P.2d 276 (1957); *Scott v. Greeley Joslin Store Co.*, 125 Colo. 367, 243 P.2d 394 (1952); *Zimmerman v. Franzen*, 121 Colo. 574, 200 P.2d 344 (1950); *Rudolph v. Elder*, 105 Colo. 105, 95 P.2d 827 (1939).

¹⁸ 125 Colo. 367, 243 P.2d 394 (1952).

¹⁹ 137 Colo. 544, 328 P.2d 88 (1958).

²⁰ 125 Colo. 25, 240 P.2d 917 (1952).

²¹ 136 Colo. 1, 314 P.2d 276 (1957).

various applications of the doctrine of *res ipsa* in the United States,²² Dean Prosser stated that the plaintiff should be limited by his allegations, as the function of specific pleading is to limit proof. A secondary purpose in this respect is to avert undue hardship on the part of the defendant in requiring him to meet inferences based on a theory which is advanced for the first time at the trial. In this respect, it is interesting to note that *res ipsa loquitur* was interposed in the instant case for the first time in the appellate court. The court held that this did not deprive the plaintiff of the use of the doctrine.

A tertiary incident of import to the applicability of the doctrine of *res ipsa* in a given case set forth in the *Hook* decision relates to the availability of evidence, necessary in attaching negligence, to the defendant. Following the principle laid down by the United States Supreme Court in *Johnson v. United States*,²³ the court stated that *res ipsa loquitur* was a "rule of necessity to be invoked only where the necessary evidence is absent and not readily available,"²⁴ and that where it appears that such evidence is readily available and the plaintiff fails to present it, the doctrine cannot be invoked to supply the deficiencies. However, it should be noted that Justice Frankfurter, in the *Johnson* case, recommended a new trial and an adequate adjudication based upon a determination of this issue.²⁵

The final aspect presented by the instant case concerns the applicability *vel non* of *res ipsa loquitur* where the uncontroverted evidence presented by the plaintiff is such that there exists a balance of possibilities as to the cause of the accident. The recurrence of the term "possibility" in negligence cases has long been a source of irritation in the law.²⁶ However, the courts of this state have held with practical unanimity that where the evidence tends to show that the accident is just as reasonably attributable to causes other than that of the negligence of the defendant, the doctrine of *res ipsa* cannot be invoked.²⁷ This result was well expressed in *Elkton v. Sullivan*,²⁸ in which the court said: "A resort to mere conjecture or possibilities will not take the place of direct or circumstantial evidence. No number of mere possibilities will establish a probability." The court in the instant case held that where the happening is not such as to point to negligence as the predominant or even the equal explanation, the vagueness and ambiguousness of plaintiff's evidence operates to defeat her claim.

A review of the recent decisions concerning *res ipso* impresses one with the supreme effort being made by our appellate courts to transform into a precise and symmetrical form the "monster child"

²² Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 Minn. L. Rev. 241 (1936).

²³ 333 U.S. 46 (1947). Dissenting opinion of Justice Frankfurter.

²⁴ *Id.* at 395; Cooley, *Torts*, § 480 (4th ed. 1932).

²⁵ *Johnson v. United States*, *supra*, note 23.

²⁶ *Kramer Service, Inc. v. Wilkins*, 184 Miss. 483, 186 So. 625 (1939) where the court stated: "There is one heresy in the judicial forum which appears to be Hydraheaded, and although cut off again and again, has the characteristic of an endless renewal. That heresy is that proof that a past event possibly happened, or that a certain result was possibly caused by a past event, is sufficient, in probative force to take the question to the jury. Such was never the law in this state, and we are in accord with almost all of the other common law states."

²⁷ *Coakley v. Hayes*, 121 Colo. 303, 215 F.2d 901 (1950); *Salliman v. Silk*, 118 Colo. 220, 194 P.2d 304, (1948); *Clune v. Mercereau*, 89 Colo. 227, 1 P.2d 101 (1931); *Denver Co. v. Thompson*, 65 Colo. 4, 169 Pac. 539 (1917).

²⁸ 41 Colo. 241, 92 Pac. 679 (1903).

propagated by the maze of contradictory and inaccurate statements enunciated by our courts regarding the nature and meaning of the doctrine.²⁹ The *Hook* decision represents another phase of this effort to rehabilitate the rule and develop it into an efficient "aide" to the courts in a proper case calling for the application of the rule. In the instant case, a patron of an amusement park paid her fare and placed herself in a contrivance under the exclusive care and control of the agents of the defendant. The plaintiff entered the device whole and emerged with a broken back. The court held that the circumstances were inadequate to raise the doctrine of *res ipsa loquitur* and to carry the plaintiff's cause to the jury. Yet the *Hook* decision stands on its merits as one of the clearest statements of the facts necessary to raise the doctrine of *res ipsa* set forth to date by an appellate court of this state. Whether or not such clear statements of law are to be utilized as instruments of justice or exist merely as legal abstractions is a question to be resolved in future adjudication. One is tempted to conclude that the *Hook* case must be classified with those cases in which the courts have desired to utilize the doctrine of *res ipsa* to promote justice, and in so doing have only succeeded in bringing about the defeat of justice instead.

Ken Harper

²⁹ J. Frantz made the following observation in this respect in *Weiss v. Axler*, 137 Colo. at 556, 328 P.2d at 95 (1958): "Out of this welter of confusing and chaotic commentaries selected from our decisions there is much that is compatible with the historic concept of the principle of *res ipsa loquitur*. It is the departure from this concept which has misshapened the doctrine and made its application uncertain."

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