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Case Comments

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Negligence — Res Ipsa Loquitur — Procedural Effect

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Plaintiff brought an action for damages for personal injury caused by the loss of her hair after she received a permanent wave administered by an employee of the defendant beauty salon operator. The complaint included a general allegation of negligence, and in addition the plaintiff averred that the defendant, upon examination of her scalp, had stated that the condition was caused by the negligence of the beauty operator. After a judgment for the plaintiff, the defendant appealed, asserting among other things, that there should not have been an instruction to the jury on the law governing the doctrine of res ipsa loquitur, nor should the plaintiff have been allowed to rely upon the doctrine after pleading specific acts of negligence. The supreme court's decision in this case reviews and attempts to clarify Colorado's somewhat confusing law on the procedural effect of the doctrine of res ipsa loquitur. The court, in affirming the judgment for the plaintiff, concluded that the doctrine of res ipsa loquitor creates a presumption of law, and thereby shifts the burden of proof to the defendant, who must overcome the presumption with a preponderance of evidence. It was also held that specific allegations of negligence, in addition to the general allegation, do not render the doctrine inapplicable. Weiss v. Axler, 328 P.2d 88 (Colo. 1958).

A review of some Colorado cases involving the application of the res ipsa loquiur doctrine indicates that the results have been grossly inconsistent. The majority of these cases have taken the position that the application of this doctrine shifts the burden of proof to the defendant.[1] Under this theory, a presumption of negligence arises, and the defendant must overcome the presumption with a preponderance of evidence. A second group of Colorado cases rejected the burden-shifting theory and found that application of the res ipsa loquitur doctrine merely shifts the burden of going forward with the evidence.[2] Under this theory the burden of proof continues to be on the plaintiff. In order for the plaintiff to satisfy his burden of proof, and make out a prima facie case, it must be shown that the defendant had control over the instrumentality causing the injury.[3] Plaintiffs did not show that this necessary element existed, therefore it would seem that the presumption of negligence, as defined in the earlier cases, did not arise in this group of cases.

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[1] See, e.g., Gylling v. Hinds, 122 Colo. 345, 222 P.2d 413 (1950); Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632 (1884); Wall v. Livezay, 6 Colo. 465 (1882); Denver S.P. & P. Ry. Co. v. Woodward, 4 Colo. 1 (1877); Kansas Pacific Ry. Co. v. Nutter, 2 Colo. 442 (1874).

[2] Brighton v. De Gregorio, 136 Colo. 1, 314 P.2d 276 (1957); Denver Dry Goods Co. v Pender, 128 Colo. 281, 262 P.2d 257 (1953); Boulder Valley Coal Co. v. Jernberg, 118 Colo. 486, 197 P.2d 155 (1948).

[3] See, e.g., 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).

A third result which has been reached in Colorado's courts, is that the presumption is evidence to be weighed as such against that of the defendant to determine whether or not the defendant was negligent.[4] The court stated "The doctrine does not dispense with the necessity that the plaintiff prove the fact of negligence, but is itself a mode of proving negligence, and *is therefore evidence.*"[5] In direct conflict with this statement, is a more recent case which states, ". . . (T) he doctrine of res ipsa loquitur merely takes the place of evidence as affecting the burden of proceeding with the case, and *is not itself evidence.*"[6]

Another area of conflict in the Colorado courts has been the question of the effect of the plaintiff's introducing evidence of specific negligence or his allegation of specific negligence in the pleadings. Also difficult to reconcile are the decisions stating the effect of the defendant's rebutting evidence. It has been held that the disclosure of the cause of the accident by the defendant puts the two parties on equal footing as to knowledge and means of information, and the doctrine can no longer be applied.[7] Exactly opposite results were indicated, however, in a contemporaneous opinion which held that disclosure of the cause of the accident would not necessarily prevent application of the doctrine.[8] Other decisions have shifted the burden of proof back to the plaintiff, without requiring the defendant to prove affirmatively that his negligent acts were not the cause of the injury.[9] The better reasoned rule seems to be that where the plaintiff has made out a prima facie case, it must be for the jury to decide whether the defendant's evidence overcomes the presumption.[10] The doctrine has been made available to the plaintiff where the defendant's specific acts of negligence were shown by the evidence.[11] But, in another holding, res ipsa loquitur was ruled inapplicable when specific proof of the cause of injury was shown.[12]

Dean Prosser has made an exhaustive study of the various applications of the doctrine in the United States.[13] He found that the majority of American courts treat the doctrine as raising nothing more than a permissible inference.[14] Such an application permits the jury to infer the defendant's negligence from the plaintiff's case without other evidence. The plaintiff's burden of proof is sufficiently satisfied to avoid a nonsuit or dismissal of the case, but, a directed verdict for the plaintiff is not thereby justified. This is the position followed by the federal courts. The leading case, *Sweeney v. Irving*,[15] provided a clear statement of the theory. It was there specifically stated that the doctrine does not have

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[4] Colorado Springs and Interurban Ry. Co. v. Reese, 69 Colo. 1, 169 Pac. 572 (1917).
[5] Id. at 7, 169 Pac. at 575 (emphasis supplied).
[6] Denver Dry Goods Co. v. Pender, 128 Colo. 281, 262 P.2d 257 (1953) (emphasis supplied).
[7] St. Luke's Hospital Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952).
[8] Scott v. Greeley Joslin Store Co. Inc., 125 Colo. 367, 243 P.2d 394 (1952).
[9] Nutt v. Davison, 54 Colo. 586, 131 Pac. 390 (1913).
[10] See note 4 supra and Rudolph v. Elder, 105 Colo. 105, 95 P.2d 827 (1929); Denver Tramway Corp. v. Kuttner, 95 Colo. 312, 35 P.2d 852 (1934).
[11] See note 8 supra.
[12] See note 7 supra.
[13] Prosser, The Procedural Effect of Res Ipsa Loquitur, 20 Minn. L. Rev. 241 (1936).
[14] See also, Carpenter, The Doctrine of Res Ipsa Loquitur in California, 10 So. Cal. L. Rev. 166, 171 (1937).
[15] 228 U.S. 233 (1912) which states, "In our opinion 'res ipsa loquitur' means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference, that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict."

the effect of shifting the burden of proof.[16] Many jurisdictions go a step farther, according to Dean Prosser, and treat a res ipsa loquitur case as creating a presumption of negligence on the part of the defendant. In this situation, the jury is required to find the defendant negligent in absence of evidence to the contrary. The burden of going forward with the evidence is on the defendant, and if all the evidence is evenly balanced, the verdict must be for the defendant. Only a few jurisdictions give the doctrine the greater effect of shifting the burden of proof to the defendant in which case the defendant must prove by preponderance of evidence that the injury was not caused by his negligence.

The other questions raised by the instant case—the effects of the introduction of specific evidence, of the allegation of specific negligence, and of the rebutting evidence—seem to be as confusing in other jurisdictions as they are in Colorado. Dean Prosser, in his article dealing with these questions found that the courts have taken at least four positions in cases where the plaintiff has alleged specific negligence.[17] In his opinion, the preferable rule would be that the allegation of specific negligence, accompanied by a general allegation of negligence, should not defeat the plaintiff's reliance on the res ipsa loquitur doctrine, if the specific allegations should fail.[18] Dean Prosser also found that it is generally agreed that it is for the jury to determine whether or not the evidence offered by the defendant defeats the inference or presumption raised by the plaintiff's prima facie case. However, it should be noted that Dean Prosser was discussing cases where the burden of proof had not been shifted to the defendant. It is his opinion that shifting the burden of proof by the inference raised in a res ipsa loquitur case gives circumstantial evidence more weight than would be given to direct evidence.[19]

In all the Colorado cases reviewed by this writer which follow the shift-of-burden theory, it was stated that the doctrine of res ipsa loquitur raises a presumption of negligence.[20] Prior to the instant case there has been no effort to define or clarify whether or not the presumption was one of fact or one of law. In 1937 *American Insurance Co. v. Naylor*[21] clarified the effect of a presumption of fact in Colorado. There, it was stated that such a presumption makes a prima facie case upon which, in the absence of contrary evidence, judgment must be rendered for the plaintiff. The burden of proof is not thereby shifted to defendant, but only the burden of going forward with the evidence. This holding seems to indicate that except where there is a conclusive presumption, or a presumption of law, the burden of proof can never be shifted.

In the instant case, it is argued that "since the court decides as a matter of law the existence of probable negligence making a prima facie case, the presumption is truly one of law."[22] It is further argued that negligence cannot be inferred in a res ipsa loquitur case, because it is not within the discretion of the trier of facts whether to accept or reject

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[16] 288 U.S. at 236.
[17] See note 13 supra at 255.
[18] Id. at 265.
[19] Id. at 266.
[20] See, e.g., Rudolph v. Elder, 105 Colo. 105, 95 P.2d 827 (1939); Velotta v. Yampa Valley Coal Co., 63 Colo. 489, 167 Pac. 971 (1917); Wall v. Livezay, 6 Colo. 465 (1882); Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442 (1874).
[21] 101 Colo. 34, 70 P.2d 349 (1937).
[22] 328 P.2d at 96.

the inference. Of course, in jurisdictions where the majority rule is followed, it is within the discretion of the trier of facts to accept or reject the inference.[23] The courts of Colorado in attempting to follow this landmark decision may find its rule a harsh and rigid one.

[23] See, e.g., Sweeney v. Irving, 228 U.S. 233 (1912).

Workmen's Compensation—Heart Injury as Compensable Accident

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On April 7, 1955, Frank Ciuba suffered a heart attack while in the course of his employment. In an action under New Jersey's Workmen's Compensation Act[1] he was denied compensation on the ground that the work causing the injury was no more strenuous than that usually incident to his employment. On appeal, *held:* Reversed. The work being performed need not be unusually strenuous if it was the proximate cause of the heart injury. *Ciuba v. Irvington Varnish and Insulator Co.,* 141 A.2d 761 (N.J. 1958).

By this decision the New Jersey court has expressly overruled a long series of cases[2] which held that a heart injury must arise out of unusual exertion to be compensable. As a result New Jersey is now aligned with a majority of states which hold that any exertion in the course of employment which produces heart injury creates a compensable accident.[3] This holding is even more significant in view of the fact that New Jersey has been considered one of the leading proponents of the minority rule requiring unusual exertion.[4]

The rationale of the minority rule is that the heart injury must be the result of an accident and not the accident itself. Thus, before an "accident" can be found something unusual in the work must have occurred. Applying this rule, Michigan has denied compensation for a heart injury which occurred in performing unusually hard work, since the alleged accident, *i.e.,* overexertion, was in reality intentional and not accidental.[5] This holding seems to be unique since most states that follow the minority rule will consider a heart injury incurred under such circumstances to be accidental.[6]

The minority rule has been severely criticized on three grounds. First, the requirement that the accident must be the cause of the injury instead of the injury itself is said to be a misinterpretation of the word "accident" as usually intended by workmen's compensation acts.[7] Second, it is said to be erroneous to hold that lifting a 200 pound weight with a consequent heart injury is an accident while lifting fifty pounds with the same result is not.[8] Third, it is said to be obviously impractical to

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[1] N.J. Stat. Ann., c. 34, § 15-7 (1937).

[2] Seiken v. Todd Dry Dock, Inc., 2 N.J. 469, 67 A.2d 131 (1949); Temple v. Storch Trucking Co., 3 N.J. 42, 68 A.2d 828 (1949); Mannery v. Waters, 8 N.J. Super. 57, 73 A.2d 266 (App. Div. 1950); Franks v. Mack Manufacturing Co., 5 N.J. Super. 1, 68 A.2d 267 (App. Div. 1949); Schroeder v. Arthur Sales Co., 5 N.J. Super. 287, 68 A.2d 878 (App. Div. 1949); Irons v. New Jersey Dep't of Institutions and Agencies, 3 N.J. Super. 216, 66 A.2d 44 (App. Div. 1949).

[3] See collection of cases in 1 Larson, Workmen's Compensation Law § 38.30, n. 19 (1952). Professor Larson lists as following the majority rule: Ark., Conn., Ga., Ida., Ill., Ind., Kans., Ky., La., Me., N.M., Okla., S.C., Tex., Utah, Wash., W. Va., and Wis.

[4] Id. § 38.64.

[5] Crossweller v. Briggs Manufacturing Co., 294 Mich. 443, 293 N.W. 711 (1940).

[6] Larson, op. cit. supra note 3, § 38.20-30, n. 18 and 19. The Crossweller case seems to be ignored even in Michigan. Cf. Schlange v. Briggs Manufacturing Co., 326 Mich. 552, 40 N.W.2d 454 (1950).

[7] Bohlen, A Problem in Drafting Workmen's Compensation Acts, 25 Harv. L. Rev. 328, 337 (1912).

[8] Larson, op. cit. supra note 3, § 38.61-63.

determine when exertion is unusual since almost all forms of manual labor involve tasks of varying degrees of exertion.[9]

The effect of the minority rule is a mass of cases with extremely fine distinctions as to when exertion is unusual. New York, still nominally committed to the "unusual" test,[10] has reached the point where almost any type of exertion will be termed unusual.[11]

In the instant case the New Jersey court, in overruling its prior decisions, relied heavily upon English cases[12] decided under an act which is a prototype of the New Jersey act. These cases were decided prior to the adoption of the New Jersey act, and the court considered their interpretation as having been intended by the legislature. In *Clover, Clayton, and Co. v. Hughes,*[13] the court declared that an accident "arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work whatever the degree of exertion or the condition of health."[14]

In Colorado the trend represented by the instant case has been completely reversed. Beginning with *Carroll v. Industrial Commission,*[15] the majority rule was clearly adopted. However, cases subsequent to *Carroll* began to use the phrase "overexertion" without expressly overruling *Carroll* or adopting the unusual circumstances test.[16] In *Coors*

[9] Ibid.
[10] Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E. 334 (1925).
[11] See Masse v. James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950); Serie v. F & M Schaefer Brewing Co., 273 App. Div. 833, 76 N.Y.S.2d 50 (3d Dep't 1948); McCormack v. Wood Harmon Warranty Corp., 263 App. Div. 914, 32 N.Y.S.2d 145 (3d Dep't 1942).
[12] Fenton v. Thorley, (1903) A.C. 443; Clover, Clayton and Co. v. Hughes, (1910) A.C. 242.
[13] (1910) A.C. 242.
[14] Id. at 247.
[15] 69 Colo. 473, 195 Pac. 1097 (1921). "By the term 'injury' is meant, not only an injury the means or cause of which is an accident, but also any injury which is itself an accident."
[16] Industrial Commission v. McKenna, 106 Colo. 323, 104 P.2d 458 (1940); Industrial Commission v. Wetz, 100 Colo. 161, 66 P.2d 812 (1937); Ellerman v. Industrial Commission, 73 Colo. 20, 213 Pac. 120 (1923).

Porcelain Co. v. Grenfell,[17] the court created confusion in the rule by distinguishing two prior cases[18] on grounds that recovery was had because unusual circumstances had produced the injury. This conclusion was dictum and seems unwarranted since an examination of the court's opinion in those cases shows that the *Carroll* test of usual exertion was followed.[19] In 1943, the court stated the Colorado rule to be that "overexertion" is required.[20] Then, in *Industrial Commission v. International Minerals and Chemical Corp.,*[21] the court clearly stated the minority rule, saying, "It has been the consistent holding of this court that in such cases claimant must prove more than mere exertion attendant upon the usual course of the employment, and that overexertion must be established."[22]

The phrase "overexertion" seems to have created much of the confusion in the Colorado cases. However, except for the *International Minerals* case, this confusion is possibly more apparent than real. In an early case[23] the Colorado court accepted the majority view that any exertion causing heart injury is overexertion to that particular person.[24] Using this definition of overexertion all the cases up to *International Minerals* are consistent.[25] However, in that case the word overexertion is equated with unusual circumstances, which indicates that Colorado might follow the minority rule. Since the court in *International Minerals* quite clearly didn't intend to overrule all its prior decisions,[26] it is possible that the case will not be followed as stating the minority rule which New Jersey has now expressly repudiated.[27]

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[17] 109 Colo. 39, 121 P.2d 669 (1942).

[18] Industrial Commission v. McKenna, 106 Colo. 323, 104 P.2d 458 (1940); Industrial Commission v. Wetz, 100 Colo. 161, 66 P.2d 812 (1937).

[19] The Wetz case dealt with whether there was sufficient evidence to sustain a finding of exertion. The court expressly referred to the exertion as customary in the work. The McKenna case dealt with whether the work was the proximate cause of the injury. The unusual exertion was referred to for reasons of proving proximate cause, and not as a prerequisite for recovery.

[20] Black Forest Fox Ranch v. Garret, 110 Colo. 323, 134 P.2d 332 (1943).

[21] 132 Colo. 256, 287 P.2d 275 (1955).

[22] Id. at 260, 287 P.2d at 277.

[23] U.S. Fidelity and Guaranty Co. v. Industrial Commission, 96 Colo. 571, 45 P.2d 895 (1935).

[24] "The defendant bank had Yuenger in its service with his resistance to exertion . . . not an individual with a resistance to exertion denominated as normal resistance. The important question here is, whether what occurred was overexertion for him . . . ." Id. at 579, 45 P.2d at 898.

[25] Omitting the dictum of the Coors Porcelain case.

[26] The court cites the U.S. Fidelity and Guaranty case as supporting its rule. See note 23 supra.

[27] The denial of recovery in International Minerals could easily have been based on lack of proximate cause.