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Notes and Comments

Dicta Editorial Board

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THE DOCTRINE OF RES IPSA LOQUITUR IS APPLICABLE IF THE CIRCUMSTANCES AS TO AN AUTOMOBILE ACCIDENT SPEAK FOR THEMSELVES: Thus the doctrine of res ipsa loquitur appears to have been visibly widened in Colorado in the case of *La Rocco v. Fernandez.*[1] The plaintiffs filed an action for damages for personal injuries, property loss, and for the death of their son as a result of an automobile accident. The accident occurred when the defendants, each driving a separate vehicle, sideswiped each other with the result that one car then crashed head-on into the plaintiff's motor vehicle.

The court held that the peculiar circumstances of the case plus the defensive pleadings and opening statements of each defendant, made out a prima facie case for the plaintiff. Each defendant in his answer and opening statement had admitted that the accident was the proximate cause of the plaintiff's injuries, and each had accused the other of negligence. The court said:

> It having been alleged by the plaintiff and admitted by the defendants that the collision was proximately caused by the negligence of one or both of the defendant drivers, upon showing of loss a *prima facie* case was automatically presented resulting in an issue of fact requiring a solution by the jury; *moreover the circumstances of the accident speak for themselves and that therefore the doctrine of res ipsa loquitur is applicable.*

It is possible that the court in holding the res ipsa doctrine applicable in this case, used language that was broader than necessary to decide the case. Certainly there can be but little dispute that a prima facie case of negligence was made out upon the plaintiff's showing of injury coupled with the other three elements of the tort (duty, proximate cause, and lack of due care) which were supplied by the defendants by their admissions in the answers and opening statements. However if the court does mean that this is a proper res ipsa case, it would appear to have overruled an earlier Colorado Supreme Court case holding to the contrary. Although not mentioned in the *La Rocco* case, in the case of *Yellow Cab Co. v. Hodgson*[2] the Supreme Court held the doctrine of res ipsa loquitur inapplicable. The question raised was whether the plaintiff, a passenger in the taxicab of the defendant, could invoke the doctrine of res ipsa loquitur when injuries were sustained by

[1] 1954-1955 C. B. A. Adv. Sh. No. 4, p. 130.
[2] 91 Colo. 365, 14 P. 2d 1081.

reason of a collision resulting from the separate and ununited but concurrent acts of negligence of two automobile drivers when the owners or drivers were made joint defendants. Upon these facts, similar in general to the facts in the *La Rocco* case, the court stated that this was a case of first impression in Colorado upon this point and admitted that there was not much unanimity on the subject in other jurisdictions. The court was convinced that the res ipsa loquitur doctrine was not applicable in the *Yellow Cab* case and said:

> The evidence clearly established that the injury *may* have resulted by reason of the concurrent negligence of two or more persons or causes not *both* under the managment and control of defendant (i.e. defendant who is appealing, the other defendant did not appeal the case) and therefore the doctrine of res ipsa loquitur is inapplicable.

The view taken by the court in *Yellow Cab v. Hodgson* is supported by 45 Corpus Juris 1214, which states, "When either of two defendants wholly independent of each other may be responsible for the injury complained of, the rule of res ipsa loquitur cannot be applied." This position is again stated at 9B Blashfield Cyclopedia of Automobile Law 6046.

If the court, by the *La Rocco* decision, has widened the scope of res ipsa loquitur in Colorado, and in effect, if not in fact, overruled the *Yellow Cab* decision, it would appear that the Colorado res ipsa doctrine stands very close to the famous 1944 California case of *Ybarra v. Spangard et al*[3] in which the plaintiff was injured while undergoing a surgical operation, and brought an action against all doctors and nurses participating in the operation. The court said:

> It may appear at the trial that one or more defendants will be found liable and the other absolved, but this *should not* preclude the application of res ipsa loquitur. The control, at one time or another, of every one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant . . . this, we think places upon them the burden of initial explanation.

It will be interesting to learn if the broad language used by the court in the *La Rocco* decision does really indicate an expansion and liberalization of the res ipsa loquitur doctrine in Colorado.

RAYMOND J. TURNER

[3] 154 P. 2d 687, 162 A. L. R. 1258.

DISSOLUTION OF CORPORATIONS WHEN THE STOCK IS EVENLY DIVIDED.—Two recent Colorado decisions have made the question of the appointment of a receiver for a solvent corporation where the stockholders are equally divided, one of interest. In *Burleson v. Hayutin*,[1] decided July 26, 1954, the Supreme Court reversed the District Court and ordered the appointment of a receiver. In this case the Supreme Court said:

> The pages of reported cases and text writers are full of situations showing that the courts have been reasonably liberal in the appointment of a receiver for a corporation, even though it is a solvent concern, where there is such dissention among the stockholders, directors or officers that the corporation cannot successfully carry on its corporate functions; that iminent danger of loss of assets is threatened; and that no other remedy appears to be adequate. 43 A.L.R. 260.

In *Hepner v. Miller*,[2] decided Oct. 4, 1954, the Supreme Court reversed the same District Court which in this case had appointed a receiver and ordered dissolution. The Supreme Court said:

> Our holdings having been consistent with the great weight of authority, we must resolve the instant case against the plaintiffs and hold that a court has no power, in the absence of a permissive statute, to dissolve a going solvent corporation, to appoint a receiver to sell its assets, and divide the proceeds of such sale among the stockholders.

In the *Hepner* case the plaintiffs and defendants each held 50% of the stock of the corporation. There was complete dissention among the stockholders and the same Board of Directors had been in control for over three years because of the inability to elect a new board. However it is admitted by the plaintiffs that the sole point involved is:

> . . . whether a corporation which is solvent, free from debt and operating can be dissolved and a receiver appointed at the instance of a stockholder when no fraud is alleged." Counsel also admit there is not statutory authority in Colorado for the appointment of a receiver for a corporation on behalf of a stockholder.

Thus the Court pointed out that there is no charge of fraud or mismanagement by the plaintiff but only the fact that there is an inability to hold a valid stockholders' meeting at which anything could be accomplished. Thus there cannot be a new board of directors elected or the charter amended as desired by the plaintiff.

[1] 273 P. 2d 124, 1953-54 C.B.A. Adv. Sh. No. 17, p. 427.
[2] 274 P. 2d 818, 1954-55 C.B.A. Colo. Adv. Sh. No. 1, p. 29.

By its decision the Supreme Court held that these facts alone are not sufficient to dissolve a solvent corporation.

The Court ordered the cause remanded with directions to discharge the receiver and to dismiss the action.

The Court distinguishes the *Burleson* case on its facts and also by the statement, "We did not order the dissolution of the corporation in the *Burleson* case."

In the *Burleson* case it was determined that there was an equal division of stockholders and the affairs of the corporation were thus bogged down. Also the Court said:

> . . . it just as fully appeared that one-half of the stockholders or the interest of the corporation was assuming full control and acted accordingly to their own use and benefit all to the exclusion of Burleson; that ample arrangements were made to absorb much of the income of the corporation by salaries created and bonuses provided for, without any recognition of Burleson, by which he should share in the benefits due him as owner of one-half of the corporate stock of the corporation.

Thus the differences between the two cases are clearly distinguishable on their facts as stated by the Supreme Court.

But the second difference made by the Supreme Court is not quite so clear.

In the *Burleson* case the plaintiff prayed "for an accounting, for dissolution of the corporation and for receivership and damages." With the exception of the claim for damages the *Hepner* case prayed for substantially the same relief. However in the *Burleson* case the court reversed and remanded:

> with directions to appoint a receiver; and then proceed toward an accounting of the affairs of the corporation during the period in which, through the operations of the holders of the other fifty per cent of the stock, Burleson found himself to be in the position of an outsider, through no fault of his own.

As pointed out above the *Hepner* case was reversed with directions to dismiss. Even though the Court had no power to order a dissolution of the corporation in the absence of a permissive statute, the remedy of having a receiver appointed, was available as shown in the *Burleson* case. This remedy was denied the plaintiff in the *Hepner* case, if he had desired it, by the order to dismiss.

One other Colorado case which touches directly on this point is *The People ex rel Daniels v. The District Court of the City and County of Denver, and Mullins, as Judge thereof.*[3] This was an action by a minority stockholder to dissolve a solvent corporation. It was before the Supreme Court on Petition for Writ of Prohibition questioning the jurisdiction of the District Court to appoint

[3] 33 Colo. 293 (1905).

a receiver. The complaint averred that the managers had diverted the corporation from its true object and carried on their business to their own enrichment and to the injury of other stockholders, and were guilty of acts *ultra vires.*

The Court said in this case:

> It is also the rule in this state, as generally in this country, that in the absence of a permissive statute, courts of equity have no power to dissolve a going business corporation and to that end appoint a receiver for the sequestration of the corporate property.

The Court also indicated, in the opinion, that even if a receiver had been asked to manage the business, and fraud and *ultra vires* acts had been alleged, it would not be disposed to grant the relief.

In summary, it would appear from the three Colorado cases that the Colorado Court would follow the theory that they have no power to dissolve a solvent corporation, but if sufficient facts are shown as to fraud, mismanagement, etc., then the Court will appoint a receiver to run the corporation and under such facts this may be the relief granted even though this is not the relief specifically prayed for.

A. ROBERT MCMULLEN

Editor's Note: For a recent decision involving this issue see Savageau v. Savageau, Inc., 1954-55 C.B.A. Adv. Sh. No 12.

Notes From The Secretary

On the following pages you will find once again a reprinting of some of the Canons of Ethics and a few headnotes from pertinent opinions of the American Bar Association Committee, interpreting these Canons. Also included is an editorial reprinted from the Journal of the American Judicature Society, and that I am sure you will find interesting reading, and a list of the new committees of the Denver Bar Association, as recently appointed by President Richard Tull.

President Tull was extremely elated when he received over 150 requests from members of the Denver Bar Association to serve on committees. He was very sorry that he could not satisfy every request, but to do so would have made some committees too large and ineffective. He hopes that those appointed to the committees will take their appointments seriously and endeavor to meet and work when the occasion demands it. He also hopes that the local members will continue to exemplify their interest in Bar Association activities by attending the monthly luncheon meetings, that will begin again this Fall; attending Institute meetings and any other special meetings the Bar Association may sponsor. In addition, he welcomes any suggestions or criticisms of Bar functions