Negligence — Res Ipsa Loquitur — Application to Carriers —

Plaintiff was injured while riding on defendant’s bus when it was struck by defendant’s street car, the collision being caused by the derailment of the street car. It was not made clear on trial what was responsible for the derailment. Held, the defendant controlled both vehicles, the event was of a type which would not ordinarily occur if reasonable care were used, the injury to plaintiff was not due to any voluntary act on her part, so the jury could properly infer that the defendant was negligent under the doctrine of res ipsa loquitur. Birdsall v. Duluth-Superior Transit Co., (Minn. 1936), 267 N. W. 363.

Plaintiff stepped to the outside platform of defendant’s street car as it moved around a curve. A violent lurch threw him part way out of a window, injuring him. Held, the passenger assumes the risk of normal jerks, but ones so unusual as this cast the burden on the carrier to show the injury was not occasioned by its negligence. McIntosh v. Los Angeles Ry., (Cal. 1936) 59 P. (2d) 959.

Generally, the cases are in confusion as to what the doctrine of res ipsa loquitur really amounts to, and how it should be applied. It has always been felt, however, to apply peculiarly to injuries arising out of accidents involving public carriers, perhaps due to the high degree of care required of carriers.


3 The “highest degree of care consistent with the carrier’s form of operation and business” is a standard often used. See Jenkins v. Beyer, 118 Pa. Super. 527, 180 A. 135 (1935); Smith v. St. Paul City Ry., 32 Minn. 1, 18 N. W. 827 (1884); Hamilton v. Great Falls St. Ry., 17 Mont. 334, 42 P. 860, 43 P. 713 (1895); Palmer v. Warren St. Ry., 206 Pa. 574, 56 A. 49 (1903). But cf. Union Traction Co. v. Berry, 188 Ind. 514, 121 N. E. 655, 124 N. E. 737 (1919), holding that the doctrine is available especially in carrier-liability cases, even under the rule of that state that there are no degrees of care. And see De Roire v. Lehigh Valley R. R., 205 App. Div. 549, 199 N. Y. S. 652 (1923); Hopkins v. New Orleans Ry. & Light Co., 150 La. 61, 90 So. 512 (1921), on the effect of the contractual relation between carrier and passenger.
Certainly, where injury is caused by a derailment or by a collision with another car on the same track, a strong feeling arises that the carrier, in some way, must have been careless, or the accident would not have occurred as it did. While the fact of the accident, with its surrounding circumstances, may give rise to a presumption or make out a prima facie case of negligence or at least permit an inference of negligence on the part of the carrier, even


6 The use of the term “accident” is subject to criticism, but since the courts use it, the writer employs it designedly.


10 Birdsell v. Duluth-Superior Transit Co., (Minn. 1936) 267 N. W. 363; Eaton v. Wilmington City Ry., 1 Boyce (24 Del.) 435, 75 A. 369 (1910); Sewell v. Detroit United Ry., 158 Mich. 407, 123 N. W. 2 (1909), although this case professed not to apply the doctrine of res ipsa loquitur, apparently under a mistaken impression as to what it is used to mean elsewhere; and cf. Durfee v. Milligan, 265 Mich. 97, 251 N. W. 356 (1933), where the facts were thought strong enough to warrant a presumption of negligence without the use of the doctrine of res ipsa loquitur. See also, HARPER, TORTS, § 77 (1933).
in such cases, the why of the occurrence is open to explanation, at least.\textsuperscript{11} When, under modern conditions of traffic, a public carrier collides with a vehicle operated by a third party, it would seem to assume too much to fasten the cause upon either of the two parties without some evidence beyond the bare facts and circumstances of the event, a position which both courts and writers have properly pointed out.\textsuperscript{12} However, when both of the colliding vehicles are controlled and operated by the same person (whether corporate or individual), there would seem to be no reason why the doctrine should not apply, as to either or both instrumentalities, since this will make no difference as to ultimate liability, which will rest on the same party regardless of the instrumentality to which the doctrine is said to apply.\textsuperscript{18} Even where there are independent operators of the colliding vehicles, if both are joined in the action, a finding by the jury against either one may be sustained by the use of the doctrine of \textit{res ipsa loquitur}.\textsuperscript{14} The conclusion suggested here is that the \textit{Birdsall}


\textsuperscript{12} Setting up such facts may require rebuttal: Cleveland Ry. v. Merk, 124 Ohio St. 596, 180 N. E. 51 (1932). See also, 5 Wigmore, \textit{Evidence}, 2d ed., § 2509 (1923).


\textsuperscript{14} Prosser, “\textit{Res Ipsi Loquitur: Collisions of Carriers with Other Vehicles},” 30 ILL. L. REV. 980 (1936); North Chicago St. Ry. v. Cotton, 140 Ill. 486, 29 N. E. 899 (1892); as in Birdsall v. Duluth-Superior Transit Co., (Minn. 1936) 267 N. W. 363, if the injury by derailment permits an inference of negligence (see cases cited supra, note 10), there would seem to be no reason not to carry this over to the plaintiff in this case except for some difficulty in regard to proximate cause, if the applicability of \textit{res ipsa loquitur} is based solely on the fact of derailment (as to foreseeability of this general type of harm), and cf. infra, note 16.

\textsuperscript{15} Zichler v. St. Louis Pub. Service Co., 332 Mo. 902 at 909, 59 S. W. (2d) 654 (1933): “when two vehicles . . . meet each other traveling in opposite directions on a street wide enough for both, and each sees and knows of the other, yet they collide, either something very extraordinary has happened, or the operators of one or both have been guilty of negligence. This at least is the viewpoint of an innocent and injured passenger.” But see, Loudoun v. Eighth Ave. Ry., 162 N. Y. 380, 56 N. E. 988 (1900).
case, following logic of this sort, reached a correct result. The McIntosh case presents what might be termed more of a "type situation" for application of res ipsa loquitur, with nothing involved but the carrier, the accident accompanied by the surrounding circumstances thereof, and the fact that such accident is inexplicable except for negligence on the part of the carrier. The doctrine is nowhere mentioned in the court's opinion, although some of the prerequisites thereof are utilized by the court as justification for the result. However, the fact that there was a voluntary act on the part of the plaintiff might prevent use of the doctrine as such in many courts, but the facts as far as shown would seem to uphold the result in this particular case.

15 (Minn. 1936) 267 N. W. 363.
16 "Defendant controlled both vehicles; the occurrence was of the type that would not ordinarily have happened but for negligence; and the injury received by the plaintiff was in no way due to any voluntary action on her part. This is not a case involving a collision between a carrier and another vehicle not under its control, in which case the problem would be more difficult. . . . The control herein was wholly in the defendant company. It matters not that plaintiff was riding on the bus and the probability of negligence extended only to the street car, appliances connected with the street car, or the street car tracks. The application of the above principle is the same." Birdsall v. Duluth-Superior Transit Co., (Minn. 1936) 267 N. W. 363 at 364-365.
17 (Cal. 1936) 59 P. (2d) 959.
18 Prerequisites usually agreed: (1) The instrumentality must be such that injury of this type would not normally be expected in the absence of fault (generally speaking, "fault of anyone"). (2) Inspection, user, and control of such instrumentality in the hands of the party charged with fault (operating to limit the scope of fault-possibility). (3) Injurious consequences, not due to voluntary action on the part of the plaintiff (placing the finger of guilt directly on the acting, controlling, and inspecting party, absent explanation thereby). Reasons given for the use of res ipsa loquitur are that the person in control will be more likely to be able to explain the reason for the event than would the injured party, although certainly this might tend to charge wholly innocent persons, but the courts rely on the strength of the circumstances, as above. Note, for instance, the Birdsall case, in which apparently, the company knew little more about what caused the derailment than plaintiff did. See 3 Univ. Chi. L. Rev. 126 (1935). Exactly what is meant by the need for the lack of voluntary action on the part of plaintiff in these carrier cases is not wholly clear, for certainly some cases have applied the doctrine of res ipsa loquitur where such action was present, apparently feeling the facts otherwise strong enough to justify it. See: Palmer v. Warren St. Ry., 206 Pa. 574, 56 A. 49 (1903); Lynch v. Market St. Ry., 130 Cal. App. 433, 19 P. (2d) 1009 (1933); Denver City Tramway Co. v. Hills, 50 Colo. 328, 116 P. 125 (1911); Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 82 P. 995, 2 L. R. A. (N. S.) 836 (1905); Denver City Tramway Co. v. Hills, 50 Colo. 328, 116 P. 125 (1911); Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 82 P. 995, 2 L. R. A. (N. S.) 836 (1905); 93 A. L. R. 609 (1934); Rystinki v. Central California Traction Co., 175 Cal. 336, 165 P. 952 (1917), relied on by McIntosh v. Los Angeles Ry., (Cal. 1936) 59 P. (2d) 959.
19 Because it leads to an inference other than the defendant's negligence. See Univ. Mo. Bul. 50 Law Series 63 (1935).