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RES IPSA LOQUITUR — AUTOMOBILES — APPLICATION OF DOCTRINE WHEN PERSON CHARGED WITH TORT IS DECEASED — Defendant's intestate was killed in an accident when the car which he had been driving left the road. Plaintiff, a guest [1] in the car, sued for damages for injuries sustained, alleging negligence. Plaintiff proved the happening of the accident, and his injuries, and then rested, relying upon the doctrine of *res ipsa loquitur*. Defendant argued that, in view of the death of his intestate, the doctrine should not be applied.

[1] Subsequent legislation limits liability in "guest cases" to those involving willful, wanton negligence. Ohio Gen. Code, Page's Perm. Supp. 1926-1935, § 6308-6.

Held, the doctrine of *res ipsa loquitur* applied, permitting an inference of negligence,[2] though knowledge of facts which would prove the cause of accident is no more accessible to defendant than to plaintiff. *Weller v. Worstall*, (Ohio, 1934) 197 N. E. 410.

A much-quoted [3] statement of the doctrine of *res ipsa loquitur* contains this suggestion: "the particular force and justice of the presumption,[4] regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." [5] An ideal test of the force and effect of this justification of the doctrine is presented in the instant case. The death of defendant's intestate not only negatives the usual situation; actually, it would appear, there is here presented the direct reverse. If either party can be said to be in probable possession of the evidence of the "true cause," it is the plaintiff rather than the defendant. The Ohio court takes the view usually adopted as to the applicability of the doctrine of *res ipsa loquitur* in the automobile cases,[6] and stresses, not the "justification" above suggested, but the requirement that the rule shall apply "whenever . . . the occurrence is such as in the ordinary course of events does not happen if due care has been exercised." [7] Even on the latter basis there would seem to be serious doubt as to the applicability of the doctrine where the injury results from the automobile merely leaving the road.[8]

R. C. C.

[2] As to whether the doctrine raises a presumption or merely warrants an inference of negligence by the jury, see 23 MICH. L. REV. 785 (1925); Heckel and Harper, "Effect of the Doctrine of Res Ipsa Loquitur," 22 ILL. L. REV. 724 (1928).

[3] Riggsby v. Tritton, 143 Va. 903, 129 S. E. 493 (1925), 45 A. L. R. 280; McCloskey v. Koplar, 329 Mo. 527, 46 S. W. (2d) 557, 92 A. L. R. 641 (1932); HARPER, THE LAW OF TORTS 183 (1933).

[4] See note 2, supra.

[5] 5 WIGMORE, EVIDENCE, 2d ed., § 2509 at p. 498 (1923).

[6] Morris v. Morris, 84 Cal. App. 599, 258 P. 616 (1927); Scovanner v. Toelke, 119 Ohio St. 256, 163 N. E. 493 (1928); West v. Jaloff, 113 Ore. 184, 232 P. 642 (1925), 36 A. L. R. 1391; Mackler v. Barnert, (Mo. 1932) 49 S. W. (2d) 244; Knox v. Simmerman, 301 Pa. 1, 151 A. 678 (1930); Cookson v. Fitch, 116 Cal. App. 544, 3 P. (2d) 27 (1931); Doggett v. Lacey, 121 Cal. App. 395, 9 P. (2d) 257 (1932); Spreen v. McCann, 147 Misc. 41, 263 N. Y. S. 46 (1932), affd. 264 N. Y. S. 1008 (1933); Nicol v. Geitler, 188 Minn. 69, 247 N. W. 8 (1933) (where driver unobtainable). *Contra*: Boggs v. Plybon, 157 Va. 30, 160 S. E. 77 (1931); Springs v. Doll, 197 N. C. 240, 148 S. E. 251 (1929); Rothfeld v. Clerkin, 98 Misc. 192, 162 N. Y. S. 1056 (1917); Johnson v. Ostrum, 128 Cal. App. 38, 16 P. (2d) 794 (1932); Giddings v. Honan, 114 Conn. 473, 159 A. 271, 79 A. L. R. 1215 at 1218 (1932). See generally 5 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW 483 (1934).

[7] 20 R. C. L., § 156, p. 187; 29 MICH. L. REV. 940 (1931); 64 A. L. R. 255 (1929); 72 A. L. R. 90 (1931); L. R. A. 1917E 4 and cases cited. See generally ANDERSON, AN AUTOMOBILE ACCIDENT SUIT 779 (1934); 3 COOLEY, TORTS, § 479 (1932).

[8] For instances where the accident might suggest negligence, see: Piehl v. Albany Ry., 30 App. Div. 166 (1898), affd. 162 N. Y. 617 (1900); 54 N. J. L. JOUR. 349 (1931); 5 A. L. R. 1100 (1920). In cases of "traffic accidents" the additional

requirement to the rule relating to the "control of the instrumentality" involved raises similar doubts as to its applicability. See Wing v. London General Omnibus Co., [1909] 2 K. B. 652; Johnson v. American Reduction Co., 305 Pa. 537, 158 A. 153 (1931); Yellow Cab Co. v. Hodgson, (Col. 1932) 14 P. (2d) 1081, noted in 5 ROCKY MOUNTAIN L. REV. 292 (1933).