RES IPSA LOQUITUR.

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THE falling of half a dozen bags of flour from a warehouse on to the head of a Customs officer has made *Scott* v. *The London and St. Katherine Docks Co.*[4] one of the best known of reported cases. Having regard to the facts, the decision of the Court of Exchequer Chamber in favour of the plaintiff seems so obvious that one might easily fail to realize the number of questions involved in cases like this, to which the maxim *res ipsa loquitur* has been applied, and, as the affair is taken to speak for itself, the plaintiff alleging negligence, is required to do nothing further to prove his case.

When we say the affair speaks for itself, we do not mean that negligence may ever be inferred from the mere fact of damage being sustained; but in such cases the surrounding circumstances, which are necessarily brought into view on seeing how the accident occurred, lead to a presumption that it was due to negligence.

By the use of the term presumption is it meant that once there is a case of *res ipsa loquitur* the law presumes the defendant to be negligent, placing the onus on him to disprove negligence; or is it meant that the burden of proof remains the same, but the circumstances of the accident itself may be relied upon to provide the means of discharging that onus? The former view prevails in the line of cases dealing with those collisions at sea where a moving ship runs down a vessel at anchor;[2] but it is submitted that the latter, which is the view generally obtaining judicial approval,[3] is the one more consistent with principle. According to this theory, the happening itself has merely an evidentiary value, and therefore, as Dixon J. has said, "The principle expressed in the phrase *res ipsa loquitur* does no more than furnish a presumption of fact."[4]

The Case for the Plaintiff.

When may such a presumption arise? Firstly it must be a case "where damage is caused by some unusual event which might reasonably be expected to happen only as a result of an omission to take ordinary precautions or of a positive act of negligence."[5] Unless that is so there is nothing from which any negligence can reasonably be inferred. But it cannot be presumed that a particular defendant is responsible for such negligence unless the damage arises out of operations or the behaviour of inanimate things which are within his exclusive control. So this becomes the second requisite without which the presumption cannot arise.[5]

1. 3 H. & C. 596.
2. *The Annot Lyle*, 11 P.D. 114; *The Indus*, 12 P.D. 46; The Merchant Prince [1892], P. 179.
3. *Scott* v. *The London and St. Katherine Docks Co.* 3 H. & C. 596; *Byrne* v. *Boadle* 2 H. & C. 722; *Bridges* v. *North London Railway Co.* L.R. 6 Q.B., at 391; *Burke* v. *Manchester, Sheffield and Liverpool Railway Co.* 22 L.T. 442; *Carpue* v. *London and Brighton Railway Co.* 5 Q.B. 747; *Ballard* v. *North British Railway Co.* 1923 S.C. 43; *Henderson* v. *Mair* 1928 S.C. 1.
4. *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* 54 C.L.R. at 218.
5. *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* 54 C.L.R., at 218 *per* Dixon J., and *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co. Ltd.*, 135 L.T. at 89, *per* Scrutton L.J.

Assuming it has been proved that the defendant was in control of the factors causing damage, when, as a matter of law, may an unusual event reasonably be considered the result of the defendant's negligence, so as to constitute evidence of negligence to go to the jury? To begin with, if the facts suggest the existence of negligence, it does not matter that they are not inconsistent with other alternatives such as inevitable accident, so long as the inferences in favour of the other alternatives are not so strong as to be equally consistent with the inference of negligence.[6] In determining whether the circumstances are more than equally consistent with negligence, "the Court must assume that every inference of fact which a jury might legitimately draw in favour of the plaintiff has been drawn, and must assume the existence of the fact so inferred in addition to the facts proved."[7] If the inference of negligence then substantially predominates, the existence of other alternatives does not prevent the circumstances of the case itself constituting evidence of negligence.

The circumstances in which the damage occurred must also suggest that the negligence causing the accident was not that of the plaintiff. For instance, where a train stopped in a tunnel, and the plaintiff, thinking it was a station, stepped out and was injured, Channell B. said, "If the nature of an accident to a passenger in getting out of a train in a tunnel is of itself evidence of negligence on anyone's part, it is on the part of the passenger, not of the company."[8] Again, in *Wakelin* v. *The London and South-western Railway Co.*,[9] where a man had been run over at a level crossing, it was held that in the circumstances there was nothing "to show that the train ran over the man rather than the man ran against the train."

Further, the facts themselves must clearly point to the defendant as being responsible, and not to any third party for whose torts the defendant is not vicariously liable. Therefore, since it is usual to employ an independent contractor to do repairs on one's roof, the falling of a plank and a roll of zinc from a roof on which men were working was held not to constitute evidence upon which the jury might find negligence.[10]

The Function of the Jury.

Since the application of the *res ipsa loquitur* doctrine rests upon presumptions of fact that will vary with each particular set of circumstances, once there is a case to go to the jury, it is for the jury to say in each instance whether the evidence adduced from the fact of the happening itself is sufficient to satisfy them that the defendant was negligent. In many cases the evidence of negligence provided by the accident itself would be such that a finding by the jury either way would be possible. On the other hand, to use the words of Dixon J.,

6. *Crisp* v. *Thomas* 63 L.T. 756.
7. *Flannery* v. *Waterford and Limerick Railway Co.* I.R. 11 C.L. 30, *per* Palles C.B. at 36.
8. *Bridges* v. *North London Railway Company* L.R. 6 Q.B., at 391.
9. 12 A.C. 41, at 45.
10. *Welfare* v. *London and Brighton Railway Company* L.R. 4 Q.B. 693.

"The circumstances may be so strong that a failure to be satisfied would be unreasonable."[11]

Do the words "relevant to infer negligence" and "necessarily inferring negligence" used by Lord Dunedin in *Ballard* v. *North British Railway Company*[12] refer respectively to those cases where the *res* constitutes evidence of negligence upon which a jury may find for either party, and to those where the presumption would be so strong that a finding of no negligence would be set aside as unreasonable? The Scottish Court of Session evidently considers that the words do not bear that meaning. In *Henderson* v. *Mair*,[13] Lord Hunter, and in *Mullen* v. *Barr*,[14] the Lord Justice-Clerk (Alness) and Lord Anderson treated the phrase "relevant to infer negligence" as referring to those cases where the inference of negligence is no more than equally consistent with other inferences. If that were so the circumstances really would not be "relevant to infer negligence," as there would be no evidence to go to the jury upon which the jury could bring in a finding for the plaintiff. Further, Lord Dunedin uses the words "relevant to infer negligence" at other parts of his speech in referring to cases where the principle of *res ipsa loquitur* is to be applied.[15] It is submitted therefore that the Court of Session is incorrect in its interpretation of Lord Dunedin's meaning; but it is also submitted that the two phrases do not refer to the relative strength of the evidence, as is suggested above. If we note carefully Lord Dunedin's speech it will be seen that he reasons thus: if the phrases had the same meaning then a presumption of law would arise in favour of the plaintiff; but they are not synonymous, and in the case before him the distinction is of moment. The facts are relevant to infer negligence, and therefore a defence peculiar to cases where the principle of *res ipsa loquitur* is applied may avail.[16] It is suggested therefore that Lord Dunedin uses the two phrases to illustrate the difference between presumptions of fact and presumptions of law respectively, and without having regard to cases where a jury would or would not be unreasonable in finding for the defendant.

The Defence.

It is submitted that there are four ways of defending an action where the plaintiff's case rests on *res ipsa loquitur*.

1. The defendant may prove the actual source of the accident, and prove that it was not caused as a result of any negligence for which he is responsible.[17]

2. The defendant may prove all the possible sources of the accident, and, though unable to say which was the actual source, may prove that in each case the accident would not be the result of any negligence for which he is responsible.[18]

11. *Fitzpatrick v. Walter E. Cooper Pty. Ltd.* 54 C.L.R., at 218.
12. 1923 S.C. 43, at 54.
13. 1928 S.C., 1 at 7.
14. 1929 S.C., 461 at 467 and 481.
15. 1923 S.C., at 53.
16. 1923 S.C., at 54.
17. *Christie* v. *Greggs* 2 Camp. 79, *The Merchant Prince* [1892], P. at 189.
18. *The Merchant Prince* [1892] P. at 189.

3. Again on principle we have an answer to a *prima facie* case of negligence based on *res ipsa loquitur* if the defendant says he does not know how the accident happened, but, nevertheless, proves that he and his servants used all reasonable care throughout.[19] A conflict of evidence then arises, and the jury is at liberty to reject the original inference of negligence. Of course the difficulty is to persuade the jury to believe anyone raising this defence.

4. Numerous Judges have treated the above three defences as the only possible means of defending such an action. As examples of this attitude we have the decision of Latham C.J. in *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd,*[20] *The Merchant Prince,*[21] and the recent Irish case, *Corcoran* v. *West.*[22] It is submitted with respect that this view is incorrect.

The circumstances themselves do not create a legal presumption of negligence reversing the ordinary onus of proof, but merely give rise to a presumption of fact. By a presumption of fact we mean simply the inference which the mind naturally and logically draws from given facts, and consequently anything which prevents the mind drawing that inference rebuts the presumption of negligence. Therefore this *prima facie* case may be destroyed by an explanation which suggests that the damage was caused without negligence. There is no need for proof. On the surface the facts may point to negligence; but on hearing a possible explanation of the accident it may suggest itself to the mind that it is more reasonable and probable that the accident was not the result of the defendant's negligence. In view of the explanation, then, the circumstances no longer suggest negligence, and so the plaintiff is left with his burden of proof undischarged. The defendants, as Langton J. says in *The Kite,*[23] "need not even go so far as that, because, if they give a reasonable explanation which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted the burden of proof back to the plaintiffs to show . . . . that it was the negligence of the defendants that caused the accident." For it is well settled that if a plaintiff alleging negligence leaves his case in even scales he cannot succeed.[24] So even if the explanation only makes the accident as consistent with negligence as with no negligence the plaintiff has failed to establish the negligence of the defendant. On this reasoning it is incorrect to say of an explanation of the type Langton J. had in mind, that the defendant "has only shown that the accident *might* possibly have happened without negligence, whereas the plaintiff has shown that *prima facie* it did happen by reason of negligence."[25] For in the light of the explanation, the circumstances no longer suggest negligence, but merely suggest that the accident may be due to negligence or no negligence, and so the

19. *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* 54 C.L.R., at 208, *per* Latham C.J.
20. 54 C.L.R., at 207.
21. [1892], P. 179.
22. [1933] I.R. 210.
23. [1933] P. at 130.
24. *Morgan* v. *Sim* 11 Moo P.C. 307.
25. *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* 54 C.L.R., at 208.

original *prima facie* case is destroyed. Of course the explanation or explanations (there being no reason for limiting the number of explanations that may be put forward) must account for every inference of negligence that arises from the fact of the accident taking place.[26]

The jury must be satisfied that the explanation is not only possible but reasonable and probable. If the jury still feels that negligence is substantially the more reasonable and probable inference, then the *prima facie* case remains despite the fact that the explanation is a possible one. In such a case the jury should reject the explanation, just as if one had been submitted to them that was not a possible explanation of the accident. Once they feel it is reasonable and probable, the jury is not entitled to reject an explanation because it is not proved, since, with the explanation in view, the fact of the accident no longer suggests negligence. To demand proof would be to transfer the onus, by making the defendant prove his case against a plaintiff who no longer has any evidence of negligence.

Accidents on the Highway.

It has been said that accidents on the highway provide an exception to which the doctrine of *res ipsa loquitur* has no application.[27] This appears partly due to misunderstanding portion of the judgment of Blackburn J. in *Fletcher* v. *Rylands*,[28] in which the learned Judge distinguishes the case before him from those where the plaintiff must prove negligence. He mentions accidents on the highway as an example of this type of case, for, as he says, those who go on the highway take upon themselves the risk of inevitable accident, and so if injured they must prove negligence. However, this simply means that an action of trespass to the person, in which the onus of disproving negligence is on the defendant, could not be maintained with regard to a highway accident.[29] The fact that *Scott* v. *London and St. Katherine Docks Co.* is cited as a case where the plaintiff must prove negligence shows that Blackburn J. had no intention of preventing the doctrine of *res ipsa loquitur* being invoked to enable the plaintiff to discharge his burden of proof.

Further, in the case of a large proportion of street accidents, there is nothing to be inferred from the accident itself to provide evidence of negligence.[30] With many such accidents there is not that exclusive control on the part of the defendant which is essential if the *res ipsa loquitur* principle is to be invoked.[31] Again, the fact of the accident taking place often gives no assistance in determining whether the plaintiff or the defendant was at fault.[32] These considerations have

26. *Mercovich v. Mullaney* 1934 V.L.R. 285.
27. Beven on *Negligence*, 4th Edn., at 138; cf. *Wing* v. *London General Omnibus Co.* [1909] 2 K.B., at 663.
28. L.R. 1 Ex., at 286.
29. *Holmes* v. *Mather* L.R. 10 Ex. 261.
30. *Moffatt v. Bateman* L.R. 3 P.C. 115.
31. *Hammack* v. *White* 11 C.B., N.S. 588.
32. *Ballard* v. *North British Railway Co.* 1923 S.C., at 54; *Cotton v. Wood* 8 C.B., N.S. at 571.

led some to consider that the principle does not apply to highway cases. However, the above facts present no bar in principle to the application of the doctrine, but only make its application difficult and relatively rare. In fact, it has been applied to cases where vehicles have caused injuries to persons on the footpath,[33] to accidents on the roadway proper,[34] and, to use the words of Scrutton L.J., as regards "that very important highway, a navigable river."[35]

33. *McGowan* v. *Stott* 99 L.J., K.B. 357.
34. *Halliwell v. Venables* 99 L.J., K.B. 353; *Hannan v. Dalgarno* 2 N.S.W. S.R. 494.
35. *McGowan* v. *Stott* 99 L.J., K.B. at 359.