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Meaning of the Concept of Exclusive Control in Res Ipsa Loquitur Cases

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privacy theory would require the theoretical complications discussed above and would involve extension of the right of privacy to areas not within its usual scope, PROSSER, LAW OF TORTS §97 (2d ed. 1955); RESTATEMENT, TORTS §867 (1939). Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), the New York defamation theory would seem a more desirable basis for relief. But either approach is to be preferred to the Georgia court's flat rejection of recovery without regard to the validity of the asserted claim, or even the reasonableness of the creditor's belief in its validity.

James Magavern

Meaning of the Concept of Exclusive Control In Res Ipsa Loquitur Cases

The decedent, while attending the New York State School for the Blind, died of burns received while attempting to take a bath. There were no witnesses present when the accident occurred and the cause of the accident was not established at the trial. The Court held that this was a proper case of the application of *res ipsa loquitur*. *Minotti v. The State of New York*, 166 N.Y.S.2d 396 (Ct. Cl. 1957).

When *res ipsa loquitur* is applicable, the specific acts of negligence do not have to be proven for the doctrine establishes an inference which permits the jury to find negligence. *Foltis v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1951). New York accepts the view that *res ipsa loquitur* is nothing more than a rule of circumstantial evidence. *Gabraith v. Busch*, 267 N.Y. 230, 196 N.E. 36 (1935). But for the theory that *res ipsa loquitur* is something more, that is, to allow the jury to find negligence where there is some probability, even though the probability is 50-50, or less; see: Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1 (1951).

Even when used as a rule of circumstantial evidence what requirements must be met before the doctrine may be invoked? The general view is that damage must be of a kind which does not ordinarily occur in the absence of negligence and that it must be caused by an agency or instrumentality within the exclusive control of the defendant. WIGMORE, EVIDENCE §2509 (3d ed. 1940) New York claims to follow this view and verbally, at least, requires exclusive control by the defendant in order to apply the *res ipsa* doctrine. *Silverberg v. Schweig*, 288 N.Y. 217, 42 N.E.2d (1942).

However this writer questions whether the court has not relaxed in application the stringent requirement of *exclusive control*. It is suggested that an example of this relaxation may be seen by comparing the following cases: In *Sasso v. Randforce Amusement Corporation*, 243 App. Div. 552, 275 N.Y. Supp. 891 (2d Dep't 1934) the plaintiff was injured when the theater seat on

which she was sitting collapsed. The court held that *res ipsa loquitur* applied. Subsequently in *Nabson v. Mordall Realty Corporation*, 257 App. Div. 659, 15 N.Y.S. 2d 38 (1st Dep't 1939) the court held that the doctrine was not applicable in a case where the plaintiff received an injury by a splinter from a theater seat. Is it not true that in both cases the defendant had the same amount of control? The court distinguished the cases by saying:

The instrumentality which produced the accident must be within the exclusive possession and control of the person charged with negligence. Where a defendant has such control and has exclusive knowledge of the care exercised in the control and management of the instrumentality, evidence of circumstances which show that the accident would not ordinarily have occurred without neglect of some duty owed to the plaintiff is sufficient to justify the inference of negligence. . . . In the present case the elements which must be present before the rule of *Res Ipsa Loquitur* is invoked were not shown to exist. Assuming that control of the seat might be held sufficiently exclusive if the accident occurred from some structural defect, it should not be so held as to a minor lack of repair that might have been developed a few minutes before the plaintiff's injury from casual use of the seat by a patron.

The least these cases do is to clearly point to the conclusion that control is an ambiguous concept. However, this writer believes that the two cases can be rationalized on the basis of their respective probabilities. In the *Nabson* case it was just as probable that the injury was caused by another's negligence while in the *Sasso* case, although the instrumentality was subject to dual control, the defendant's negligence is more probable because of the nature of the defect. However, in the *Nabson* case the nature of the defect was such that the injury may be reasonably attributable to the negligent or non-negligent acts of a number of persons. Cf. Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1, 6, n. 13 (1951).

In the instant case the defendant did not have exclusive control of the instrumentality causing the injury. The decedent was trained to take a bath without aid and can be held to the same standard of care as an ordinary prudent man under the circumstances of being blind. *Hill v. City of Glenwood*, 124 Iowa 479, 100 N.W. 522 (1904). He, not the state via its agents, had exclusive control of the faucets. Furthermore the probability that the defendant was negligent is no greater than the probability that the decedent was negligent.

Thus the writer is of the opinion that *res ipsa loquitur* cannot be used to aid the plaintiff whether the strict requirement of exclusive control is followed or a more liberal test of probability. Whichever test is applied the necessary elements are not present.

Morton H. Levy