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Torts -- Res Ipsa Loquitur -- Unexplained Automobile Accidents

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mitted evidence obtained during an illegal search until 1953[27] when the exclusionary rule was adopted by statute.[28]

Although the Court's consideration of the question of constitutionality of state searches and seizures could have best been avoided by adhering to the policy of deciding a case on other than constitutional grounds if at all possible,[29] its pronouncement of a rule of evidence seems sound. The uniformity achieved in federal criminal prosecutions by applying the same rule regardless of whether the search is by state or federal officers is wholly desirable.

G. MARLIN EVANS

Torts—Res Ipsa Loquitur—Unexplained Automobile Accidents.

In *Lane v. Dorney*[1] the North Carolina Supreme Court held that the doctrine of *res ipsa loquitur* was not applicable to unexplained single-car automobile accidents. The plaintiff relied on *Etheridge v. Etheridge*[2] as holding that *res ipsa* was applicable to such accidents. The court stated, however, that the doctrine was not applied in *Etheridge.*

In *Etheridge* the defendant was driving along a dirt road at a moderate rate of speed. As the defendant crossed an intersection his car swerved to the right, ran into a ditch, and turned over. The defendant offered testimony that he was not able to turn the car back toward the center of the road for some unknown reason and that his brakes did not seem to take hold. The court held that the evidence was sufficient to withstand a nonsuit. Though the words *"res ipsa loquitur"* were not used, the court stated the applicable rule to be as follows:

> When a thing which caused an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care.... The rule has found limited application in automobile cases. It applies when the accident is one which

[27] State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949); State v. Simmons, 183 N.C. 684, 110 S.E. 591 (1922); State v. Wallace, 162 N.C. 623, 78 S.E. 1 (1913).

[28] N.C. GEN. STAT. § 15-27 (1953); N.C. GEN. STAT. § 15-27.1 (Supp. 1959). For a discussion of the use of illegally obtained evidence in state courts, see Note, 33 N.C.L. REV. 100 (1954).

[29] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Ashwander v. TVA, 297 U.S. 288, 347 (1936) (concurring opinion).

[1] 250 N.C. 15, 108 S.E.2d 55 (1959).
[2] 222 N.C. 616, 24 S.E.2d 477 (1943).

> does not happen in the ordinary course of events where reasonable care is used, and *the cause of the accident or the loss of control resulting in the accident,* such as an obstruction in the road, a flat tire, or skidding, *does not affirmatively appear.*[3]

This portion of the *Etheridge* opinion has been cited and relied upon by the North Carolina court in other unexplained automobile accident cases in which the jury was allowed to decide the question of negligence.[4] In addition *Etheridge* has apparently been interpreted by the bar of North Carolina as applying *res ipsa.*[5] And furthermore, the language used in *Etheridge* is quite similar to the classic definition of *res ipsa loquitur,* enunciated in *Scott v. London & St. Katherine Docks Co.*[6] In view of the similarity of the rules enunciated in *Etheridge* and *London Docks,* it is not difficult to understand how it was "mistakenly" thought that *res ipsa* was applied by the court in *Etheridge.*[7]

The facts before the court in *Lane v. Dorney* are as follows: Mr. Dorney was driving the automobile on a clear night, accompanied by Mr. Lane in the front seat and Mrs. Lane and Mrs. Dorney in the back seat. Mr. Dorney was in good health, and his vehicle was in good mechanical condition. The highway was hard surfaced, eighteen feet wide, and had dirt shoulders three feet wide. The surface was dry and free from defects. No other travelers were using the highway at the time and place of the accident. As the vehicle was proceeding downhill on a long, sweeping curve to the left, it ran off the road to the right over an embankment, apparently jumped a stream, and was completely demolished. Mr. Dorney and Mr. Lane were killed. A tire track was discovered on the right shoulder leading over to the embankment; there was no evidence to suggest that the vehicle had left the road at any place other than as indicated by the tire mark. Mrs. Dorney, the only witness, testified as follows:

[3] *Id.* at 619, 24 S.E.2d at 479-80. (Emphasis added.)

[4] Edwards v. Cross, 233 N.C. 354, 64 S.E.2d 6 (1951); Wyrick v. Ballard Co., 224 N.C. 301, 29 S.E.2d 900 (1944); Boone v. Matheny, 224 N.C. 250, 29 S.E.2d 687 (1944).

[5] Affidavits from disinterested attorneys show their belief that the *Lane* decision was a departure from the rule of *Etheridge* as to the application of *res ipsa* to unexplained single-car collisions. Petition to Rehear, p. 23, Lane v. Dorney, 252 N.C. 90, 113 S.E.2d 33 (1960).

[6] 3 H. & C. 596, 159 Eng. Rep. 665 (1865). "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care." *Id.* at 601, 159 Eng. Rep. at 667.

[7] "The Supreme Court of North Carolina recently applied the doctrine of *res ipsa loquitur* in a civil action for personal injuries arising out of an unexplained automobile accident." Note, 21 N.C.L. Rev. 402 (1943). It is also interesting to note that of the thirty-nine cases cited and relied upon by the court in *Etheridge,* thirty three cases expressly dealt with the applicability of *res ipsa.*

> I was not conscious of anything unusual happening on the road before... this crash. I do not know whether there was any skidding of the car before the crash.... I was not conscious of any swerving of the car while it was on the paved portion of the road. I was not conscious of the car hitting anything in the road or anything of that sort.[8]

On the first appeal of this case the court, after refusing to apply *res ipsa,* affirmed the nonsuit entered below and stated,

> Negligence is not presumed from the mere fact of injury.... There must be legal evidence of every material fact necessary to support a verdict, and the verdict "must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities."... Testing plaintiffs' evidence by these principles in determining its sufficiency to show negligence... in the operation of the automobile, the question is left in the realm of conjecture and surmise. Just what happened to bring about the "great impact" as characterized by Mrs. Dorney is pure guesswork.[9]

Had this been the final decision on the case, the result would seem to have been a reversal of *Etheridge* and a readoption of the rules requiring that negligence be established by affirmative evidence.[10] However, upon rehearing the case, the court reversed the trial court and its own prior decision and held that even though the doctrine of *res ipsa* was not applicable, there was sufficient evidence of negligence to withstand a nonsuit. The court stated:

> There was no evidence of a blowout, of blinding lights, of skidding, or of mechanical defects, or of negligence on the part of another traveler. Thus Mrs. Dorney's evidence, *though somewhat negative,* nevertheless tends to remove everything that might have influenced the movement of the car, causing it to leave the road, save and except the hands of the man at the wheel.... Why Mr. Dorney drove off the road may be "guesswork," but the fact remains *he was at the wheel and in control of the vehicle when it left the road.*[11]

In view of this decision on rehearing it is difficult to understand why the North Carolina Supreme Court was so emphatic in enunciating that *res ipsa* will not be applied in these cases.[12] The apparent

[8] Lane v. Dorney, 250 N.C. 15, 18, 108 S.E.2d 55, 57 (1959).
[9] *Id* at 21, 22, 108 S.E.2d at 59, 60.
[10] Lane v. Dorney, 250 N.C. 15, 108 S.E.2d 55 (1959); Sowers v. Marley, 235 N.C. 607, 70 S.E.2d 670 (1952); Mills v. Moore, 219 N.C. 25, 12 S.E.2d 661 (1941).
[11] 252 N.C. at 94, 113 S.E.2d at 36 (1960). (Emphasis added.)
[12] This doctrine is applied in similar cases in a number of other jurisdictions.

utilization of this doctrine in North Carolina has not met with any dissent in the past. In addition, though the court *stated* that the doctrine would not be applied, it appears that the court did in fact utilize the underlying principle of *res ipsa* in reaching its decision.

Res ipsa loquitur, as applied by a majority of the states, is a *rule of probabilities* arising from circumstantial evidence.[13] The rule is used only when the cause of the accident is not affirmatively shown and it is necessary to rely upon the circumstances to determine cause.[14] If, when all the facts and circumstances surrounding an accident are considered, it is more probable that the accident resulted from negligence of the defendant than from some other cause, the issue of negligence will be submitted to the jury.[15]

In the principal case the court held that the physical facts and surrounding circumstances presented a case for the jury.[16] Concededly, circumstantial evidence may be used to establish affirmatively some particular negligent act or forbearance on the part of the defendant. For example, evidence that the automobile continued a long distance after the collision and did serious damage in the process would tend to

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For example, in a Minnesota decision a car ran off the road on a curve and overturned. The court stated that "the car left the paved road, went over the shoulder, and turned over. This made a prima facie case of negligence for plaintiff.... Such is the rule of res ipsa loquitur which is applicable." Nicol v. Geitler, 188 Minn. 69, 73, 247 N.W. 8, 10 (1933). The California court considered these facts: There was no obstruction or defect in the pavement, which was level, dry, and twenty-two feet wide. The evening was clear and there was no indication that any other vehicle had been near defendant's automobile at the time of the accident. The defendant testified that she did not know what caused the car to go off the road and collide with the tree. The court stated: "Since it cannot be successfully claimed that an automobile would ordinarily leave a . . . highway under the circumstances shown in the instant case . . . without at least some negligence on the part of the person who was in exclusive control thereof, the doctrine of res ipsa loquitur must be applied." Fiske v. Wilkie, 67 Cal. App. 2d 440, 447, 154 P.2d 725, 729 (Dist. Ct. App. 1945). See also Ralston v. Dossey, 289 Ky. 40, 157 S.W.2d 739 (1941) (auto left road in attempting to pass and turned over trying to return to the highway); Lindsey v. Williams, 260 S.W.2d 472 (Mo. 1953) (auto left highway and collided with a tree); Smith v. Kirby, 115 N.J.L. 225, 178 A. 739 (1935) (auto left highway and struck a tree); Morrow v. Hume, 131 Ohio St. 319, 3 N.E.2d 39 (1936) (auto left road and hit a telephone pole). See generally Ghiardi, *Res Ipsa Loquitur in Wisconsin,* 39 MARQ. L. REV. 361 (1956); Prosser, *Res Ipsa Loquitur in California,* 37 CALIF. L. REV. 183 (1949); Note, 37 B.U.L. REV. 213 (1957); Note, 40 VA. L. REV. 951 (1954).

[13] See PROSSER, TORTS § 43 (2d ed. 1955). See also Note, 3 UTAH L. REV. 113 (1952).

[14] Lea v. Carolina Power & Light Co., 246 N.C. 287, 98 S.E.2d 9 (1957); Payne v. Carolina Power & Light Co., 205 N.C. 32, 169 S.E. 831 (1933); Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929).

[15] Wyrick v. Ballard Co., 224 N.C. 301, 29 S.E.2d 900 (1944); McRainey v. Virginia & C. So. Ry., 168 N.C. 570, 84 S.E. 851 (1915).

[16] Note the following statement regarding the meaning of *res ipsa:* "The doctrine of *res ipsa loquitur* . . . does not mean that negligence can be assumed from the mere fact of an accident and injury, but . . . is a short way of saying that the circumstances attending upon the accident are in themselves of such a character as to justify a jury in inferring negligence as the cause of the injury." Barger v. Chelpon, 60 S.D. 66, 70, 243 N.W. 97, 98 (1932).

establish that the automobile was traveling at excessive speed.[17] Similarly, evidence that two vehicles approached each other on a street in the daytime, and one driver did not see the other vehicle, though his view was unobstructed, would tend to establish that this driver failed to maintain a proper lookout.[18] However, this is not the sole manner in which circumstantial evidence may be used. The evidence may not only be used to establish a definite negligent act on the part of the driver, but it also may be used to establish that *it was more probable* that the accident was caused by negligent conduct on the part of the defendant than by something for which he would not be responsible. The latter usage is embodied in the doctrine of *res ipsa loquitur* and, it is submitted, is the usage of circumstantial evidence adopted by the court in the principal case.

The refusal of the courts to apply *res ipsa* in a two-car accident indicates that the application of the doctrine depends upon circumstantial evidence which tends to establish negligence as the more probable cause of the accident, as distinguished from circumstantial evidence establishing a definite act of negligence. This refusal is based upon the theory that in such cases it is not more probable that one driver, rather than the other, was negligent.[19] However, if the application of *res ipsa* depended upon circumstantial evidence tending to establish a particular negligent act as the cause of the accident, the doctrine could easily be applied to multi-car accidents.

The evidence of Mrs. Dorney, though of a negative nature, was accepted by the court as affirmatively removing certain causes of the accident which, if proved by the defendant, would relieve him of liability. It is settled that testimony by a witness that he was not aware of certain events, when the witness was in a position to observe these events had they occurred, raises a positive inference that they did not occur.[20] Thus the fact that Mrs. Dorney, a passenger in the defendant's car, was not aware of any unusual happening on the road, any skidding of the car, any blinding lights of other travelers, or the car's hitting anything in the road tended to remove these factors as possible causes of the accident. This evidence, however, did not affirmatively

[17] Volksen v. Kelly, 12 N.J. Super. 202, 79 A.2d 319 (App. Div. 1951); Yokeley v. Kearns, 223 N.C. 196, 25 S.E.2d 602 (1943); 10 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE § 6560 (1955).

[18] Rounds v. Fitzgerald, 207 App. Div. 534, 202 N.Y. Supp. 595 (1924).

[19] PROSSER, TORTS § 42 (2d ed. 1955). However in an action by a third party passenger in one of the vehicles against the drivers of both vehicles, the doctrine could be applied on the theory that both drivers were more probably negligent than not, although this application is not commonly allowed. PROSSER, *op. cit. supra* at 206-07.

[20] Hill v. Norfolk So. Ry., 195 N.C. 605, 143 S.E. 129 (1928); Edwards v. Atlantic Coast Line R.R., 129 N.C. 78, 39 S.E. 730 (1901); Purnell v. Raleigh & G.R.R., 122 N.C. 832, 29 S.E. 953 (1898).

show any negligent act or forbearance on the part of the defendant which caused the accident. The evidence merely seemed to increase the probability that the accident was the result of some negligence of the driver by removing these possible non-negligent causes.

The apparent utilization of the underlying principle of *res ipsa* and a simultaneous rejection of the doctrine itself, as in the *Lane* decision, can only lead to uncertainty as to what evidence will be required to raise a question for the jury in unexplained single-car automobile accident cases. Under this decision it seems that where the plaintiff is unable to present evidence which affirmatively shows the cause of an accident, he may be able to withstand a nonsuit by producing testimony which tends to remove possible causes of the accident for which defendant would not be responsible. However, a question remains as to what possible causes must be removed before the case can be submitted to the jury. It appears that the plantiff must at least negative mechanical failure,[21] skidding,[22] blowouts,[23] negligence on the part of another traveler,[24] and sudden illness of the driver.[25]

The adoption of the doctrine of *res ipsa* and its application within the limits previously established by our court[26] would create a uniform set of rules for inferring negligence from circumstantial evidence. No such uniformity exists within the rule of *Lane v. Dorney*.

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Wills—Construction—Right of Adopted Children To Take Under a Will as "Grandchildren."

Adoption through judicial proceedings, a process nonexistent under the common law, received statutory sanction in the United States more than a century ago.[1] In recent years, as adoption steadily has

[21] Ferry v. Holmes & Barnes, Ltd., 12 La. App. 3, 124 So. 848 (1929).
[22] Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929).
[23] Clodfelter v. Wells, 212 N.C. 823, 195 S.E. 11 (1938).
[24] Pridgen v. Produce Co., 199 N.C. 560, 155 S.E. 247 (1930).
[25] Cohen v. Petty, 65 F.2d 820 (D.C. Cir. 1933).
[26] "The principle does not apply: (1) when all the facts causing the accident are known and testified to by witnesses at the trial; (2) where more than one inference can be drawn from the evidence as to the cause of the injury; (3) where the existence of negligent defaut is not the more reasonable probability, and where the occurrence, without more, leaves the matter resting only in conjecture; (4) where it appears that the accident was due to a cause beyond the control of the defendant, such as the act of God or the wrongful or tortious act of a stranger; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant; (6) where the injury results from accident as defined and contemplated by law." Spring v. Doll, 197 N.C. 240, 242, 148 S.E. 251, 252-53 (1929).

[1] Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956). This article contains an excellent discussion of the statutory evolvement in this country of the institution of adoption. In North Carolina statutory adoption reaches back to 1873. N.C. Pub. Laws 1872-73, ch. 155.