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Negligence -- Res Ipsa Loquitur -- Application to Unexplained Airplane Accidents

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A somewhat similar treatment might be made in the case of insurance installments. Rather than tax the sum total of the premiums paid to the insurer at three per cent, a tax might be levied on the cash value of the policy at the time of the death of the insured, exempting all income above three per cent taxable income until the excluded non-taxable income reaches the face value of the policy. This plan in no way would tax the corpus of the policy, but would be a tax on the income only.

It is evident that Congress is leaving untouched an abundant source of taxable income. In this era when every available source should be tapped, it is suggested that Section 22(b)(1) be amended so as to include sums paid above the value of the policy at the time of the death.

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Negligence—Res Ipsa Loquitur—Application to Unexplained Airplane Accidents

In a recent North Carolina case of first impression the Supreme Court refused to apply the doctrine of *res ipsa loquitur* to an unexplained airplane accident. The facts of the case were that a passenger invited by the pilot for a ride was injured when the plane crashed without any apparent reason. Both the plaintiff and the pilot testified that the plane went into a spin and crashed, and that neither had any knowledge of the reason why. The Court said that "The doctrine of res ipsa loquitur does not apply because any number of causes may have been responsible for the plane falling, including causes over which the pilot had absolutely no control, it being common knowledge that aeroplanes do fall without the fault of the pilot."[1]

Translated literally, *res ipsa loquitur* means "the thing speaks for itself." The doctrine had its origin in 1863 in an English case where a barrel of flour fell from a second story window and injured the plaintiff.[2] It involves the use of circumstantial evidence to establish the plaintiff's case by allowing an inference or presumption of negligence to arise from the circumstances of the accident itself. An accident resulting in injury must be accompanied by surrounding circumstances which, viewed in the light of the entire situation, give rise to an inference of negligence. From the layman's point of view it can be stated as follows: "What is required is evidence from which reasonable men may conclude that, upon the whole, it is more likely that there was negligence than there was not."[3]

The development of the doctrine has led to much confusion in

[1] Smith v. Whitley, 223 N. C. 534, 535, 27 S. E. (2d) 442, 443 (1943).
[2] Bryne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (1863).
[3] PROSSER, TORTS (1941) §43.

various courts as to the types of accidents to which the doctrine applies and as to the procedural effect of its application.[4]* In this note there will be no further discussion of the procedural effects of *res ipsa loquitur,* except to point out that North Carolina follows the "inference" rule, by which the jury is free to find negligence or not.[5]

I. Does Res Ipsa Loquitur Apply to Unexplained Airplane Accidents?

A. Some courts refuse to apply the doctrine of *res ipsa loquitur* to airplane accidents more or less arbitrarily. Such decisions seem to rest on the theory that the inference that there had been negligence on the part of the defendant must be stronger than the inference that there was not. Nothing else appearing, the scales being evenly balanced between negligence and non-negligence, the courts say that the airplane has not reached such a stage of development as to make the inference of negligence the stronger one.

The North Carolina Court seems to have relied solely on the New York case of *Rochester Gas and Electric Corp. v. Dunlop.* In this case the plane crashed at night into the plaintiff's tower carrying transmission lines, doing considerable property damage. The Court said: "It is common knowledge that airplanes fall in a great many instances from causes over which the pilot has absolutely no control. Time and again we read in the newspapers where a complete inspection of the plane is made before starting and that for some unknown reason the engine stops, requiring a forced landing which often results in a crash."[6]* In this case,

[4]* Harper, Torts (1938) §77. "The effect of the doctrine, once it is applicable, is not quite clear from the cases, some courts holding to one, some another and still others to all three of the possible results. The least effect of the presumption that is said to arise from the rule of *res ipsa loquitur* is to furnish 'some' evidence of negligence, sufficient to insure the plaintiff of getting his case to the jury if the defendant offers no rebutting evidence. . . . Again, the presumption is sometimes held to require the defendant to come forward with some explanation or some rebutting evidence. If he does so, there is a jury case, but if he fails to satisfy this burden, the defendant cannot get to the jury on the issue of negligence and is subject to a verdict directed against him. . . . Still other jurisdictions hold that when the plaintiff makes out a *res ipsa loquitur* case, the burden of proof, in the strict sense, is on the defendant and the risk of obtaining an affirmative finding by the jury on the issue of negligence is upon him. The plaintiff is entitled to the verdict unless the defendant satisfies the jury by a preponderance of the evidence that he was not guilty of negligence."

[5] Mitchell v. Saunders, 219 N. C. 178, 13 S. E. (2d) 242 (1941), 19 N. C. L. Rev. 671; White v. Hines, 182 N. C. 275, 109 S. E. 31 (1921); Womble v. Merchants Grocery Co., 135 N. C. 474, 47 S. E. 493 (1904).

[6]* 266 N. Y. Supp. 469, 472 (1933). In Conklin v. Canadian Colonial Airways, 242 App. Div. 625, 271 N. Y. Supp. 1107, 1934 U. S. Av. R. 21 (1934), *aff'd,* 266 N. Y. 244, 194 N. E. 692 (1935) there were similar facts in that a passenger plane crashed into high tension wires and burned. Controversy arose over whether the plane should have attempted the trip under the weather conditions and the defendant claimed that an unavoidable accident had occurred. The Court said that the mere fact that an accident occurred did not make the defendant liable, but the plaintiff was awarded a verdict on negligence.

it is to be noted that although the Court refused to apply *res ipsa loquitur,* the plaintiff recovered on the theory of trespass. Tennessee has a case of a plane crashing on a sightseeing trip which said: "This is not a case for the application of *res ipsa loquitur,* for it is a common and not unusual occurrence for airplanes to stall and fall while in operation, and without the intervention of any act upon the part of the operator. Under such circumstances it was the duty of the plaintiff to point out the negligence upon which they attributed the proximate cause of the injury."[7] In the Arkansas case of *Herndon v. Gregory,* the Court cited cases in which the doctrine of *res ipsa loquitur* had been applied to airplane accidents, but refused to follow them, saying: "While it has been judicially recognized that aviation is no longer an experiment, it still is in its formative stage, and liability of the carrier should hardly be measured by the same rule of law governing transportation by land or water. . . . It would appear that one taking flight in an airplane assumes certain apparent risks in this mode of travel which are of greater hazard than travel on land or water. . . . This accident may have been caused by one or more of a number of reasons over which the owner and operator of the airplane had no control."[8]

A Wyoming[9]* and a Georgia case[10] seem in accord with the previous cases in saying that the time had not yet arrived for the application of the doctrine of *res ipsa loquitur* to airplane accidents. In an Ontario case, where the pilot was killed in a crash caused by a welding defect, the Court found no evidence of the defendant manufacturer's negligence and refused to apply *res ipsa loquitur.*[11]

B. In contrast to those courts which have held the doctrine of *res ipsa loquitur* inapplicable to unexplained airplane accidents, other courts have held that the doctrine is applicable.

New York, in a case previous to the *Dunlop* Case, where a passenger plane crashed on a clear day after making a turn, *held:* "The charge was likewise prejudicial in its failure to charge the doctrine of *res*

[7] Boulineaux v. City of Knoxville, 20 Tenn. App. 404, 410, 99 S. W. (2d) 557, 560, 1937 U. S. Av. R. 145, 151 (1935).

[8] 190 Ark. 702, 709, 81 S. W. (2d) 849, 852, 1935 U. S. Av. R. 44, 45 (1935).

[9]* Cohn v. United Air Lines Transport Corp., 17 F. Supp. 865, 869 (D. C. Wyo. 1937). A plane crashed on its test flight. The Court, in holding for the defendant, said: "It may be that in the not too distant future in the evolution and development of the wonderful and enchanting science of aviation, a sufficient fund of information and knowledge may be afforded to make a safe basis in compensating for the injuries sustained, the doctrine here invoked; but it seems to me quite clear that the time has not yet arrived. . . . It will not do to discourage the pioneer by making him assume undue hazards in a monetary way. In the meantime it is quite evident that those who choose air-ways for transportation must in many instances be held to have themselves assumed the risk."

[10] Morrison v. Le Tourneau, 138 F. (2d) 339 (C. C. A. 5th, 1943).

[11] McCoy v. Stinson Aircraft Corp., 1942 U. S. Av. R. 154 (Sup. Ct., Ontario, 1939).

ipsa loquitur, which had, under the facts appearing in this record, application to this case as a rule of evidence to aid the jury in passing upon the issue of liability."[12] In another New York case, which was decided subsequent to the *Dunlop* Case, an experienced pilot rented a plane and kept it aloft longer than he had been told the gas supply would permit and as a consequence of this, and the failure to use the reserve tank, the plane ran out of gas and crashed. Here the Court stated: "Although the burden of proof of negligence in such cases unquestionably rests upon the plaintiff, yet he is not always required to point out the precise act or omission in which the negligence consists. . . . Negligence may be inferred from the circumstances of the case. Where the accident, as in the case at bar, is one which in the ordinary course of events would not have happened but for the want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precaution as prudence would dictate, and his failure to furnish the proof, where if it existed, it would be within his power, may subject him to the inference that such precautions were omitted."[13] Two California cases, *Smith v. O'Donnell*[14] and *Thomas v. American Airways*[15] have held the doctrine applicable to airplane accidents. In line with these decisions are an Alaskan case[16] and a Washington case.[17] The Washington case is unusual in that the defendant's plane, while on the ground, ran across a field with no one at the controls and damaged the plaintiff's hangar and plane.

In another Ontario case, where a passenger plane crashed while the pilot attempted to gain control after pulling out from a dive, the Court said: "Travel by aeroplane must now be regarded as a common means of transport, extensively used, not only throughout North America, but in many other parts of the world. With experienced and careful pilots and proper equipment, a passenger has the right to expect that he will be carried safely to his destination."[18] The Manitoba Court followed Ontario in holding the doctrine applicable in *McInnerny v. McDougall,*[19] and in *Nysted v. Wings Ltd.*[20] These Canadian cases seem to be

[12] Seaman v. Curtiss Flying Service, Inc., 247 N. Y. Supp. 251, 253 (1930).
[13] Braman-Johnson Service, Inc. v. Thompson, 3 N. Y. Supp. (2d) 602, 607, 1939 U. S. Av. R. 142, 147 (1938); *accord,* Stoll v. Curtiss Flying Service, Inc., 236 App. Div. 664, 1930 U. S. Av. R. 148 (1930), *aff'd,* 257 N. Y. Supp. 1010, 1932 U. S. Av. R. 163 (1932).
[14] 215 Cal. 714, 5 P. (2d) 690 (1931), *aff'd and opinion adopted,* 12 P. (2d) 933 (1932).
[15] 1935 U. S. Av. R. 102.
[16] Smith v. Pacific Alaska Airways, 89 F. (2d) 253 (C. C. A. 9th, 1937).
[17] Genero v. Ewing, 176 Wash. 78, 28 P. (2d) 116, 1934 U. S. Av. R. 11 (1934).
[18] Malone v. Trans-Canada Airlines & Moss v. Same, 3 D. L. R. 369, 371 (Ct. of App., Ontario, 1942).
[19] 3 Western Weekly Rep. 625, 1938 U. S. Av. R. 166 (K. B., Manitoba, 1938).
[20] 3 D. L. R. 336 (K. B., Manitoba, 1942).

in line with the British case of *Fosbroke-Hobbes v. Airwork Ltd.*, in which a plane crashed just after the take-off. Here the Court said: "That this disastrous accident was due to the fault of the pilot, is in my opinion, abundantly clear. In the first place I hold that the doctrine of *res ipsa loquitur* applies. . . . It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails and passengers all over the world, and as is well known, they arrive and depart with the regularity of express trains. They have indeed become a common-place method of travel, supplementing, though not superceding, rail and sea transport."[21]

C. Some courts have held that the doctrine of *res ipsa loquitur* is applicable but only in a proper case, that is to say when all prerequisites are present. Only two of these prerequisites have caused difficulties in the airplane cases and call for any further comment.

(1) *Control of the instrumentality.* ". . . when certain types of harms occur under circumstances, which from common experience, strongly suggest negligence and when the agency or instrumentality which occasioned the harm is under the exclusive control and management of the defendant, so that he is in a better position to prove his innocence than the plaintiff is to prove his negligence, there exists a *res ipsa loquitur* case."[22]

In the California case of *Parker v. Granger*,[23*] the South Dakota case of *Budgett v. Soo Sky Ways*,[24*] and the Tennessee case of *Towle v. Phillips*,[25] the doctrine of *res ipsa loquitur* was held inapplicable because the planes were equipped with dual controls, and it was not shown that at the time of the accident the defendants were in complete control. In *Michigan Aero Club v. Shelley*,[26] although Michigan purports not to apply the doctrine of *res ipsa loquitur* in any situation,[27] the Court talks as if the doctrine, although not calling it by name, would have

[21] 53 T. L. R. 254, 255, 81 Sol. J. 80, 81, 1938 U. S. Av. R. 194, 197 (1936).
[22] HARPER, TORTS (1938) §77.
[23*] 4 Cal. (2d) 668, 52 P. (2d) 226 (1935). Planes were rented to a movie company through the defendant. Two planes collided and all were killed. Each plane had dual controls, and a pilot and director were in each plane. Neither director could fly, but one director was to signal by wiggling the wings by rocking the wheel back and forth. The Court said that this might show that the plane was not under the exclusive control of the pilot.
[24*] 64 S. D. 243, 266 N. W. 253 (1936). The passengers were prospective buyers of the plane which had dual controls. Both were flyers and were seated in a single cockpit with a control stick between them.
[25] 172 S. W. (2d) 806 (Ct. of App., Tenn., 1943).
[26] 283 Mich. 401, 278 N. W. 121 (1938).
[27] Peplinski v. Kleinke, 299 Mich. 86, 299 N. W. 818 (1941); Wabeke v. Bull, 289 Mich. 551, 286 N. W. 825 (1939); Loveland v. Nelson, 235 Mich. 623, 209 N. W. 835 (1926); Fuller v. Magatti, 231 Mich. 213, 203 N. W. 868 (1925).

applied had the instrumentality been shown to have been under the control of the defendant. Massachusetts held that the doctrine was inapplicable to a case where a plane crashing into water, ruined the passenger's clothing. The case turned on the fact that the inspection of the plane had been done by others than the defendant, and the Court said, "The principle of *res ipsa loquitur* only applies where the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control of the defendant or their servants."[28]

It is to be noted that Canada, in its determination to hold the doctrine applicable to unexplained airplane accidents, ignored in the *McInnerny* Case the fact that the dual controls of the plane still being connected might have enabled one other than the pilot to be in control. Instead of using this point as prohibiting application of the doctrine, the Court said that the failure of the pilot to disconnect the dual controls was evidence of his lack of skill and experience.

(2) *Direct evidence.* The second requirement of *res ipsa loquitur* causing difficulty in the airplane cases has been summed up as follows: "Different jurisdictions are hopelessly in conflict upon the effect of pleading specific acts of negligence in a case which is properly the subject of the application of *res ipsa loquitur*. The better reasoning, however, seems to favor the view that such allegation of particular negligent acts does not preclude the plaintiff from relying upon the presumption created by the doctrine although there are strong decisions by courts to the contrary."[29]

Canadian[30] and British[31] cases have applied *res ipsa loquitur* although specific allegations of negligence were made. The Canadian Court stated its position firmly in saying, "Thus if under the law of evidence, negligence will be inferred in certain circumstances, and if the plaintiff can prove those circumstances, he need not plead acts of negligence, but may rely on the operation of law to infer negligence. . . . And even when he does so plead (as the plaintiffs do in this case) he does not thereby confine himself to the pleaded particulars, nor lose his right to rely upon the wider negligence, if the maxim is applicable."[32]

Other courts refuse to apply the doctrine when there is evidence of negligence. New York courts have held both ways. A New York City

[28] Wilson v. Colonial Air Transport, 278 Mass. 420, 425, 180 N. E. 212, 214, 1932 U. S. Av. R. 139, 143 (1932).

[29] HARPER, TORTS (1938) §77; see PROSSER, TORTS (1941) §44.

[30] Nysted v. Wings Ltd. & Anson v. Same, 3 D. L. R. 336 (K. B., Manitoba, 1942).

[31] Fosbroke-Hobbes v. Airwork, Ltd., 53 L. T. R. 254, 81 Sol. J. 80, 1938 U. S. Av. R. 194 (1936).

[32] Nysted v. Wings Ltd. & Anson v. Same, 3 D. L. R. 336, 346 (K. B., Manitoba, 1942).

Municipal Court in the case of *Braman-Johnson Service, Inc. v. Thomson,*[33] although the plaintiff alleged specific counts of negligence, applied the doctrine of *res ipsa loquitur.* But in *Goodheart v. American Airlines,* in the Appellate Division, the Court said: "The doctrine of *res ipsa loquitur,* although it provides for a substitute for direct proof of negligence where the plaintiff is unable to point out the specific act of negligence which caused his injury, is a rule of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available."[34]* Illinois[35] and Texas[36]* refused to apply the doctrine of *res ipsa loquitur* in cases where specific acts of negligence were pleaded, and California did likewise in the case involving an injury suit for the death of the famous explorer Martin Johnson.[37]

The Arkansas case of *Herndon v. Gregory* is peculiar. Although there is a strong declaration that the doctrine of *res ipsa loquitur* was not applicable to airplane accidents, the Court said: "If the complaint had alleged some particular act of negligence or some unusual or out of the ordinary occurrence, from which negligence might be presumed . . . then it would have alleged a fact over which human conduct had control which might have given rise to the application of the doctrine of *res ipsa loquitur.*"[38] The dissenting judge took the view that this would be precisely the case when *res ipsa loquitur* would not be applied.[39]*

II. Should the Doctrine of Res Ipsa Loquitur Apply to All Unexplained Airplane Accidents?

The North Carolina Court in refusing to apply the doctrine of *res ipsa loquitur* in the *Whitley* Case based its decision on *Rochester Gas and Electric Corp. v. Dunlop, supra.* However, that case did not involve injury to a passenger, but property damage for which the plaintiff

[33] 3 N. Y. Supp. (2d) 602, 1939 U. S. Av. R. 142 (1938).

[34]* 1 N. Y. Supp. (2d) 288, 291 (1937).

[35] McCusker v. Curtiss-Wright Flying Service, Inc., 269 Ill. App. 502, 1933 U. S. Av. R. 105 (1932).

[36]* English v. Miller, 43 S. W. (2d) 643, 644 (Tex. Civ. App., 1931). The plaintiff's son was killed when the plane crashed while stunt-flying. The Court said, "The doctrine of *res ipsa loquitur,* under the facts revealed by this record, would be applicable . . . but for the fact, as contended by the appellant, that the appellee pleaded specific acts of negligence . . . for which reason the doctrine cannot be invoked or applied in this case."

[37] Johnson v. Western Air Express Corp., 45 Cal. App. (2d) 614, 114 P. (2d) (1941).

[38] 190 Ark. 702, 710, 81 S. W. (2d) 849, 852, 1935 U. S. Av. R. 38, 45 (1935).

[39]* See Herndon v. Gregory, 190 Ark. 702, 714, 82 S. W. (2d) 244, 246, 1935 U. S. Av. R. 38, 48 (1935) (dissenting opinion): "The rule of *res ipsa loquitur* is applied where no act of negligence is known, in cases where it is simply known that it would not have happened in the ordinary course of things but for negligence. The majority opinion then calls attention to a number of airplane cases, but said in each of those cases that the complaint alleged some act of negligence. I think the majority are mistaken in this."

was allowed recovery on the theory of trespass. Furthermore, the *Dunlop* Case is not the only New York decision on *res ipsa loquitur*. New York courts have applied the doctrine in three cases and refused to apply it in two other cases, not because the doctrine is inapplicable to unexplained airplane accidents, but because the requirements for a proper case were not present. The pattern formed by the New York cases can be traced exactly by looking at all the decisions of the other courts on this matter.

Recently North Carolina, in the face of many decisions *contra,* applied the doctrine of *res ipsa loquitur* in the case of an unexplained automobile accident.[40] The same statements that have been made refuting the applicability of *res ipsa loquitur* to unexplained airplane accidents have been made time and again in the past about unexplained automobile accidents; yet the doctrine, as applied to automobile accidents, has gained widespread use. Both automobiles and airplanes have gone through the stage of being called dangerous instrumentalities; yet the automobile in a rapid stage of development has become the most prevalent mode of transportation, and the airplane is following a similar development.

The aviation industry has opposed the application of the doctrine of *res ipsa loquitur* to unexplained airplane accidents because it widens the scope of liability. However, assuredly it cannot be said that aviation is not now capable of taking care of its own liabilities. As a recent author has said, "No one has yet contended that this lusty, new infant of commerce cannot be self-supporting."[41]

To courts which argue that "the time has not yet arrived" for the application of *res ipsa loquitur* to unexplained airplane accidents, it can be replied that the incredible developments in aviation of the past years, partly brought about by the war, have more clearly established the desirability for the treatment of the unexplained airplane accident cases under the rules of negligence and the accompanying doctrine of *res ipsa loquitur.*

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Joint-Tortfeasors—Effect of Payment by Party Not Liable—Subrogation

A pedestrian was injured by falling over a stake protruding about three-eights of an inch from a concrete sidewalk. In a suit against the City of Charlotte the pedestrain obtained a judgment which the City paid. In the present action the City seeks to recover from the abut-

[40] Etheridge v. Etheridge, 222 N. C. 616, 24 S. E. (2d) 477 (1943), 21 N. C. L. REV. 402.

[41] GEORGE B. LOGAN, AIRCRAFT LAW—MADE PLAIN (1928), p. 52.