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# Torts -- Res Ipsa Loquitur -- Doctrine of Exclusive Control of the Instrumentality

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against the railroad when the sole basis of his action is failure of the railroad to provide safety devices which have not been prescribed by the Highway Commission. Such a result appears to be entirely inconsistent with the rule laid down in other states which have similar statutes.[19]

If the legislature did not intend to abolish the railroads' common-law duties to erect safety devices at dangerous crossings, the best possible remedy to the problem would be an amendment to G.S. § 136-20 by the legislature. It should specify that nothing in G.S. § 136-20 should be construed to absolve a railroad from any common-law duty to the public, whether or not any action has been taken by the Highway Commission under the powers granted by G.S. § 136-20.

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**Torts—Res Ipsa Loquitur—Doctrine of Exclusive Control of the Instrumentality**

The doctrine of res ipsa loquitur is a rule of evidence applied where, under the circumstances of the case, the mere fact that the accident occurred is of itself circumstantial evidence of negligence on the part of someone.[1] In application of the doctrine to actual fact situations the courts have developed certain "elements" which might be termed conditions precedent to its invocation. These elements

[19] 57 CAL. PUB. UTIL. CODE § 1202, Pennington v. Southern Pac. Co., 146 Cal. App. 2d 605, 304 P.2d 22 (1956); Jenson v. Southern Pac. Co., 129 Cal. App. 2d 67, 276 P.2d 703 (1954); Lloyd v. Southern Pac. Co., 111 Cal. App. 2d 626, 245 P.2d 583 (1952); ILL. ANN. STAT. 111⅔ § 62 (1954), Baltimore & O.R.R. v. Felgenhauer, 168 F.2d 12 (8th Cir. 1948); Bales v. Pennsylvania R.R., 347 Ill. App. 466, 107 N.E.2d 179 (1952); Lauer v. Elgin, J. & E. Ry., 305 Ill. App. 200, 27 N.E.2d 315 (1940); Willett v. Baltimore & O.S.W.R.R., 284 Ill. App. 307, 1 N.E.2d 748 (1936); Wagner v. Toledo, P. & W.R.R., 352 Ill. 85, 185 N.E. 236 (1933); 5 MASS. GEN. LAWS ANN. ch. 160, § 147 (1959), Peterson v. Boston & M.R.R., 310 Mass. 45, 36 N.E.2d 701 (1941); Mannino v. Boston & M.R.R., 300 Mass. 71, 14 N.E.2d 122 (1938); Hubbard v. Boston & A.R.R., 162 Mass. 132, 38 N.E.2d 366 (1894); 49 OHIO REV. CODE ANN. § 4907.47 (Supp. 1961), Evans v. Erie R.R., 213 Fed. 129 (6th Cir. 1914); 17 OKLA. STAT. ANN. § 84 (1951), Slowik v. Chicago, M., St. P. & Pac. R.R., 89 F. Supp. 590 (D. Minn. 1950); Kansas City So. Ry. v. State, 195 Okl. 424, 158 P.2d 699 (1945); St. Louis-S.F. Ry. v. Prince, 145 Okl. 194, 291 Pac. 973 (1930).

[1] The Latin phrase "res ipsa loquitur" means "the thing speaks for itself." It was first used in Byrne v. Boadle, 2 Hurl. & C. 722, 159 Eng. Rep. 299 (Exch. 1863), although the idea that negligence could be proven by circumstantial evidence had existed prior to that time. PROSSER, TORTS § 42, at 201 (2d ed. 1955).

are: (1) the instrumentality causing the injury must be inherently harmless;[2] (2) the party charged must have had exclusive control of the instrumentality at the time of the injury; and (3) there must be no contributory negligence on the part of the plaintiff or third parties.[3]

The Fourth Circuit Court of Appeals in *Wright v. Huntley Furniture Co.*[4] was called upon to apply the North Carolina doctrine of exclusive control. In this case the plaintiff was injured when he opened the door of a sealed boxcar and was struck by a crate which fell from the top of the cargo being shipped.[5] Since the boxcar had

[2] If the instrumentality is inherently harmless, it is reasoned that any harm resulting from the instrumentality would be caused more likely than not by negligence in making or using it than by the thing itself. 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

[3] Wigmore states that the final shape of the elements cannot be so easily predicted. They should be limited to: "(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured." The justice of this doctrine seems to rest in the fact that evidence of the actual negligence, if there is any, is often more accessible to the party charged than to the party injured. 9 WIGMORE, EVIDENCE § 2509, at 380-84 (3d ed. 1940). This is shown in Williams v. Field Transp. Co., 28 Cal. 2d 696, 116 P.2d 884 (1946), where a metal pipe rolled from a truck driven by the defendant and injured the plaintiff. Defendant was presumed liable since negligence was evident and the most logical conclusion was that the negligence was defendant's. The court held that because of his superior knowledge defendant must rebut the logical inference.

Note that the doctrine of res ipsa loquitur concerns the presentation of circumstantial evidence, whereby the plaintiff tries to infer negligence on the part of the defendant. At no time need the plaintiff prove the specific negligence of the defendant; indeed it has been held in some jurisdictions that the attempt to do so will bar the use of the doctrine. See, *e.g.*, Whitcher v. Board of Educ., 233 App. Div. 184, —, 251 N.Y. Supp. 611, 612-13 (1931) where the court stated: "That doctrine does not apply in this case.... 'The doctrine of res ipsa loquitur, although it provides a substitute for direct proof of negligence where 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 .... Hence the presumption or inference arising from the doctrine cannot be availed of, or is overcome, where plaintiff has full knowledge and testifies as to the specific act of negligence which is the cause of the injury complained of.' 45 C.J. 1206."

[4] 299 F.2d 904 (4th Cir. 1962).

[5] The shipment of goods was in interstate commerce and the injury occurred in Massachusetts. Ordinarily, under these circumstances the law of the state in which the injury occurred would control. However, in the principal case both parties agreed that the Massachusetts rules of negligence, contributory negligence, and damages were the same as the North Carolina rules. The cases cited in support of the exclusive control theory were North

been under the control of the shipper at the time of loading and sealing, the plaintiff brought action against the shipper on the theory of res ipsa loquitur. Interference by a third party in this case would have been impossible. The evidence clearly indicated that any negligence could only have been that of the defendant. The court, however, held for the defendant under North Carolina law requiring exclusive control by the defendant at the time of injury.[6]

Those jurisdictions which strictly apply the element of control have interpreted the word "control" literally, requiring proof that the defendant was in actual physical possession of the instrumentality at the time of the injury.[7] The reason for the element of exclusive control is that the doctrine of res ipsa loquitur requires the inferred negligence to be more probably that of the defendant than of another.[8] When this basis is viewed in relation to the strict requirement of control, it is readily seen that any attempt to apply the element strictly to every factual situation without exception can do grave injustice. In the most infamous example of its strict application a customer was denied recovery where she entered defendant's store and sat down in a chair which collapsed. It was decided by the court that the plaintiff was in possession of the chair at the time of the injury.[9] Regardless of plaintiff's physical possession the logical inference of defendant's negligence is readily seen.

Many courts have become aware of the injustice which may occur

Carolina cases. Wright v. Huntley Furniture Co., 197 F. Supp. 117 (M.D.N.C. 1961). The court has recently restated its strict exclusive control rule in Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962).

[6] "At the time of the accident complained of, the shipment was under the exclusive control of the plaintiff and his employer. The doctrine of Res Ipsa Loquitur does not apply 'when the instrumentality causing the injury is not under the exclusive control or management of the defendant.' Lane v. Dorney, 250 N.C. 15, 108 S.E.2d 55 (1959)." 299 F.2d at 906.

[7] These jurisdictions include Colorado, Iowa, Massachusettts, Mississippi, North Carolina and Rhode Island. See Hansen v. Phagan, 146 Colo. 484, 361 P.2d 977 (1961); Ruud v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961); Banaghan v. Dewey, 340 Mass. 73, 162 N.E.2d 807 (1959); Denman v. Denman, 242 Miss. 59, 134 So. 2d 457 (1961); Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929); Coia v. Eastern Concrete Prods. Co., 85 R.I. 128, 127 A.2d 858 (1956). See generally 38 AM. JUR. *Negligence* § 300 (1941).

[8] 2 HARPER & JAMES, TORTS § 19.7, at 1085 (1956). See also MORRIS, TORTS § 8, at 133 (1953). Other causes need not be altogether eliminated. Rocona v. Guy F. Atkinson Co., 173 F.2d 661 (9th Cir. 1949). Their probability need be only reduced to such a degree as to point the finger at the party charged. Mintzer v. Wilson, 21 Cal. App. 2d 85, 68 P.2d 370 (Dist. Ct. App. 1937).

[9] Kilgore v. Shepard Co., 52 R.I. 151, 158 Atl. 720 (1932).

through the use of the strict element of control. Some have created exceptions to the basic strict rule while others have reshaped the element of control itself. Generally, these departures have been designed to meet fact situations in which it is evident the strict rule will not be reliable.

The most just approach discards the idea of control altogether, and requires only "that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."[10] The plaintiff must indicate negligence on the part of someone and a resulting injury to himself. He then proves the absence of intervening factors and contributory negligence.[11] By following a process of elimination he removes everyone but the defendant.[12] He must also introduce evidence which shows that the apparent cause of the accident is such that the defendant would be responsible for it.[13] In jurisdictions which adopt this application of res ipsa loquitur exclusive control by the party charged ceases to be a prerequisite element and becomes merely one factual method of

[10] PROSSER, TORTS § 42, at 206 (2d ed. 1955). See Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497 (1925); Sasso v. Randforce Amusement Corp., 243 App. Div. 552, 275 N.Y. Supp. 891 (1934); Minotti v. State, 7 Misc. 2d 252, 166 N.Y.S.2d 396 (Ct. Cl. 1957); Leach v. Joyce Prods. Co., 66 Ohio L. Abs. 296, 116 N.E.2d 834 (Ct. App. 1952); Fick v. Pilsener Brewing Co., 39 Ohio Op. 158, 86 N.E.2d 616 (C.P. 1948).

[11] See Evangelio v. Metropolitan Bottling Co., 339 Mass. 177, 158 N.E.2d 342 (1959); Rinkel v. Lee's Plumbing & Heating Co., 257 Minn. 14, 99 N.W.2d 779 (1959), 59 MICH. L. REV. 136 (1960); Ryan v. Zweck-Wollenberg Co., 226 Wis. 630, 64 N.W.2d 226 (1954).

[12] "Since of every effect there is a cause, where negligence exists, some one must have been the responsible author . . . . Inferentially some one was negligent . . . . By a process of elimination we get back to the manufacturer, who set the dangerous agency in motion, and upon whom the blame ought inferentially to be fastened." Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 763, 73 S.E. 1087, 1088 (1912).

[13] PROSSER, TORTS § 42, at 206 (2d ed. 1955). This approach seems to be an expansion of the third element of res ipsa loquitur. See note 3 *supra* and accompanying text. From the proof of this element, plus the introduction of circumstances which point to the defendant, his negligence becomes apparent. This method of proof might have brought about a different answer on the question of defendant's negligence in the principal case, since (a) there was an accident which would indicate negligence on the part of someone; (b) the plaintiff was injured; (c) and since the boxcar was sealed, negligence on the part of the railroad was disproved; (d) thus by elimination, the possibility of negligence was narrowed to the plaintiff and defendant. The court concluded from further evidence that defendant was not guilty of negligence of any sort; however, plaintiff was found guilty of contributory negligence. 299 F.2d at 907 (1962). *Quaere:* Is contributory negligence on the part of the plaintiff possible without original negligence on the part of the defendant? A finding of negligence under res ipsa loquitur would have reconciled the later holding of contributory negligence.

establishing the necessary circumstantial evidence.[14] This more flexible rule has been applied to such varied subject matter as exploding bottles,[15] sealed containers holding foreign matter,[16] faucets,[17] dynamite,[18] appliances,[19] and exploding heaters and oil burners.[20]

A few courts have used the above approach to go one step farther. Until recently it was thought that there could not be multiple defendants in cases where res ipsa loquitur was used.[21] The reasoning was based on the fact that where there is more than one defendant, the instrumentality could not have been in the "exclusive control" of any one of them.[22] However, where the courts have abandoned the requirement of actual physical possession they have found that res ipsa loquitur can be more fully implemented. Once this was accomplished the courts felt it necessary to permit multiple defendants.

[14] Thus, where the plaintiff was shocked by a refrigerator which she had owned for almost three years she was allowed to recover from the manufacturer when she showed that there was no intervening negligence on the part of third parties which could have caused the short circuit, and proved the faulty wiring was in a component part which was sealed at the factory. Ryan v. Zweck-Wollenburg, Co., 226 Wis. 630, 64 N.W.2d 226 (1954).

[15] Florence Coca-Cola Bottling Co. v. Sullivan, 259 Ala. 56, 65 So. 2d 169 (1953); Coca-Cola Bottling Co. v. Hicks, 215 Ark. 803, 223 S.W.2d 762 (1949); Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 247 P.2d 344 (1952); Hughs v. Miami Coca-Cola Bottling Co., 155 Fla. 299, 19 So. 2d 862 (1944); Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 (1941); Johnson v. Coca-Cola Bottling Co., 235 Minn. 471, 51 N.W.2d 573 (1952); Honea v. Coca-Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944); Ferrell v. Royal Crown Bottling Co., 144 W. Va. 465, 109 S.E.2d 489 (1959).

[16] Rutherford v. Huntington Coco-Cola Bottling Co., 142 W. Va. 681, 97 S.E.2d 803 (1957), 60 W. VA. L. REV. 110 (glass in bottle under control of the plaintiff).

[17] Minotti v. State, 7 Misc. 2d 252, 166 N.Y.S.2d 396 (Ct. Cl. 1957), 7 BUFFALO L. REV. 330 (1958) (no mixing valve on hot and cold water faucets being used in a school for the blind).

[18] Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (Texas law applied) (stick of dynamite exploded while in plaintiff's possession).

[19] Peterson v. Minnesota P. & L. Co., 207 Minn. 387, 291 N.W. 705 (1940) (electrical shock from stove).

[20] Chandler v. Automatic Heating, Inc., 40 Ga. App. 280, 149 S.E. 287 (1929); Plunkett v. United Elec. Serv., 214 La. 145, 36 So. 2d 704 (1948); Peterson v. Minnesota P. & L. Co., 207 Minn. 387, 291 N.W. 705 (1940); Schafer v. Wells, 171 Ohio St. 506, 172 N.E.2d 708 (1961), 30 U. CINN. L. REV. 543; Rafferty v. Northern Util. Co., 73 Wyo. 287, 278 P.2d 605 (1955).

[21] Sanders v. Nehi Bottling Co., 30 F. Supp. 332 (N.D. Tex. 1939); Harrison v. Sutter St. Ry., 134 Cal. 549, 66 Pac. 787 (1901); Wolf v. American Tract Soc'y, 164 N.Y. 30, 58 N.E. 31 (1900). See generally Annot., 38 A.L.R.2d 905 (1954).

[22] See Actiesselskabet Ingrid v. Central R.R., 216 Fed. 72, 79 (2d Cir. 1914).

This seems to have resulted for two different reasons: (1) the courts realize that it may be possible for a plaintiff to suffer injury from the concurring negligence of two or more parties, thus creating the difficulty of apportioning damages;[23] (2) the plaintiff cannot in every case pick the negligent party from several persons who may have had control.[24] It is foreseeable the plaintiff might know that several persons had some control over the instrumentality. Because of evidentiary problems[25] he may decide to join them all as defendants, relying on the court to require them to prove their own innocence. The problem then becomes how many potential defendants plaintiff should be allowed to join.[26] Looking at the problem solely from the plaintiff's point of view it is sufficient for present purposes to say the more defendants which are joined the weaker the inference of actionable negligence by any one defendant becomes. There is a point where that inference ceases to exist and res ipsa loquitur will not be available to the plaintiff. Thus, he must weigh the availability of evidence against the desire to use the doctrine.[27]

[23] See Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (Texas law applied). A driller injured by an exploding blasting cap was allowed to use the doctrine against three separate manufacturers who made the component parts.

[24] Thus, where a patient was injured while under sedation, and evidence showed that he was under the care of several parties at different times, each of the defendants was called upon to prove his innocence. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). This case provoked extensive comment. See, *e.g.*, 40 ILL. L. REV. 421 (1946); 18 So. CAL. L. REV. 310 (1945). For the application of res ipsa loquitur to malpractice cases, see generally Klein v. Arnold, 203 N.Y.S.2d 797 (Sup. Ct. 1960); Pendergraft v. Royster, 203 N.C. 384, 166 S.E. 285 (1932); Davis v. Kerr, 239 Pa. 351, 86 Atl. 1007 (1913); Dux v. Shaver, 105 Pa. Super. 344, 161 Atl. 481 (1932).

[25] These problems may disturb either party in an action at law. Certain defendants may find it impossible to show their innocence. If indiscriminate joinder is allowed parties actually innocent may find themselves held liable due to the inability to prove it. On the other hand plaintiffs often labor under an impossible burden of proving negligence from facts inaccessible to them. The difficulty of weighing these two possibilities may be a factor retarding the acceptance of this approach by more jurisdictions.

[26] In allowing joinder of these defendants the courts have to consider the existence of a duty on the part of the defendant to the plaintiff, as well as other requirements of the jurisdiction concerning joinder, such as concert of action, concurrence of the negligent acts, separability of injuries, etc. Extensive exploration of the problem of separating defendants from the point of view of the court is beyond the scope of this note.

[27] Note that the inference created from the evidence will not carry against everyone who had control, *e.g.*, in the principal case the boxcar being sealed would negative any inference of negligence on the part of the railroad company. This arises from the fact that the type of control which the railroad had was not that type of control which would allow it to either apply its own negligence to the instrumentality or to alter any negligence of the shipper.

Other innovations in the use of the element of control are nothing more than exceptions. The first of these has been styled the "right to control" maxim.[28] It does not require that the instrumentality be under the actual physical control of the defendant, but refers to his right to control from the time of the alleged negligence to the time of the injury.[29] This creates another problem since it applies only where the defendant's legal relation to the instrumentality is such that he alone has the right of possession and control.[30] It would be of little value in deciding cases in which a third party or plaintiff had not only possession but ownership as well.[31] A second exception has been made which answers the problem created by complexities of title. In this exception the control required does not refer to control at the time of the injury, but to control at the time of the alleged negligent act.[32] This approach is illustrated by the case of *Escola v. Coca-Cola Bottling Co.*[33] where a waitress was injured when a bottle of carbonated drink broke in her hand. In *Escola* the defendant company argued that the bottle was not in its possession or ownership at the time of the injury, therefore recovery on the ground of res ipsa loquitur was not available to the plaintiff. The court answered that the doctrine may be applied on the theory that the defendant had control at the time of the negligent act, although not

[28] "[T]he requirement that the instrumentality be under the management and control of the defendant does not mean . . . actual physical control, but refers rather to the right of control at the time the negligence was committed." McCloskey v. Koplar, 329 Mo. 527, 535, 46 S.W.2d 557, 560 (1932).

[29] See Van Horne v. Pacific Ref. & Roofing Co., 27 Cal. App. 105, 148 Pac. 951 (Dist. Ct. App. 1915), where an owner had installed piping prior to certain work being done by the plaintiff who was later injured because of faulty installation. The owner was held liable since he had the right to control the piping at the time of the negligence.

[30] In all the cases defendant has been the holder of legal title to the instrumentality. See Wright v. Southern County Gas Co., 102 Cal. App. 656, 283 Pac. 823 (Dist. Ct. App. 1929); McCloskey v. Koplar, 329 Mo. 527, 46 S.W.2d 557 (1932); Hart v. Emery, Bird, Thayer Dry Goods Co., 233 Mo. App. 312, 118 S.W.2d 509 (1938). But the exception should apply equally to cases where the defendant is a lessee, cestui que use, bailee, etc.

[31] The right to control theory has appeared in North Carolina only once in a dissenting opinion by Clarkson, J., in Armstrong v. Acme Spinning Co., 205 N.C. 553, 556, 172 S.E. 313, 314 (1934).

[32] As stated in a recent case, "'[I]t is not necessary that the instrumentality causing the injury be within the physical control of the person sought to be held liable under the doctrine' . . . . [I]t is only necessary that the instrument be under the control of the defendant at the time of the negligent act causing the injury." Haas v. Carrier Corp., 339 S.W.2d 727, 730 (Tex. Civ. App. 1960), 15 Sw. L.J. 464 (1961).

[33] 24 Cal. 2d 453, 150 P.2d 436 (1944).

at the time of the accident.[34] However, the plaintiff must show that the condition of the instrumentality was not altered by intervening forces.[35] These two exceptions are the primary steps to the final recognition of the fact that the requirement of control cannot be strictly applied.

North Carolina has invented a unique exception to the doctrine of res ipsa loquitur. The requirement of strict control by the defendant at the time of the injury will be waived where the plaintiff can show other "similar instances," *i.e.,* that substantially similar occurrences involving defendant's products have taken place within a reasonable proximity in time.[36] In the cases where this "similar instances rule" has been applied res ipsa loquitur by name[37] has been denied because defendant was not in control of the instrumentality at the time of injury. The court allows the case to go to the jury on the grounds that the similar instances are evidence of negligence on the part of the defendant. However, the evidence remains circumstantial and the plaintiff need not prove defendant's specific negligence.[38]

The rule recognized by the Fourth Circuit in the principal case was first stated in North Carolina in 1841.[39] Since that time North

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[34] *Id.* at 455, 150 P.2d at 438.

[35] *Ibid. Accord* Honea v. City Dairy, Inc., 22 Cal. 2d 614, 140 P.2d 369 (1943); Dunn v. Hoffman Beverage Co., 126 N.J.L. 556, 20 A.2d 352 (Ct. Err. & App. 1941).

[36] North Carolina's sister state to the south also seems to have been inclined to adopt this rule. Boyd v. Marion Coca-Cola Bottling Co., 126 S.E.2d 178 (S.C. 1962).

[37] The distinction, if any, between the "similar instances" rule and res ipsa loquitur is so tenuous and shadowy as to be insubstantial. "O! be some other name: What's in a name? That which we call a rose by any other name would smell as sweet . . . ." SHAKESPEARE, *Romeo & Juliet,* Act II, Sc. ii, l. 42-4.

[38] The rule as stated by Devin, J., in Davis v. Coca-Cola Bottling Co., 228 N.C. 32, 34, 44 S.E.2d 337, 339 (1947), was: "As tending to show actionable negligence on the part of the defendant, it is competent for plaintiff to show that products produced by the defendant under substantially similar conditions and sold by it at about the same time contained the same defects, such similar instances being allowed to be offered as some evidence of defendant's negligence at the time of plaintiff's injury 'when accompanied by proof of substantially similar circumstances and reasonable proximity in time.'" See, *e.g.,* Perry v. Kelford Coca-Cola Bottling Co., 196 N.C. 175, 145 S.E. 14 (1928).

Under circumstances similar to those in *Escola,* plaintiff, injured by an exploding bottle, was refused the right to plead res ipsa loquitur but allowed to recover against the manufacturer on a pure negligence theory because he could show other "similar instances." Styers v. Winston Coca-Cola Bottling Co., 239 N.C. 504, 80 S.E.2d 253 (1954).

[39] Ellis v. Portsmouth & R.R.R., 24 N.C. 138 (1841).

Carolina has continued to limit the use of res ipsa loquitur to those cases where the defendant is in control of the instrumentality at both the times of negligence and injury.[40] With the exception of the "similar instances rule" there has been no deviation.[41] In many of the North Carolina cases control was no problem since the evidence was quite conclusive as to whose negligence, if any, was the cause of the injury.[42] In other cases where the negligence was not so readily laid to the defendant the court balked at expanding the use of the control element as other jurisdictions have seen fit to do.[43] Absent the availability[44] of the "similar instances rule," North Carolina has refused to allow the use of the doctrine in the "exploding bottle" cases where the plaintiff had possession of the bottle.[45] The doctrine has also been denied where foreign substances in packaged goods have caused injury. The subject matter of these foreign substances has run the gamut from fishhooks to mice,[46] yet unless the defendant has recently made the same mistake there has been no recovery. In

[40] *E.g.*, where the defendant's boiler exploded killing the plaintiff's intestate who was standing nearby, recovery was allowed on the theory of res ipsa loquitur. Harris v. Mangum, 183 N.C. 235, 111 S.E. 177 (1922).

[41] *But see* Lane v. Dorney, 252 N.C. 90, 113 S.E.2d 33 (1960). The court held res ipsa loquitur not applicable in a case concerning a skidding automobile. It appeared from further language in the decision that the plaintiff was allowed recovery by offering *negative* circumstantial evidence of defendant's negligence. It would appear that use of res ipsa loquitur in these cases may become possible in the near future. For an excellent discussion of this decision and its implications see Note, 39 N.C.L. REV. 198 (1960).

[42] *E.g.*, Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921).

[43] *Compare* the North Carolina view as stated in Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962), *with* the views stated in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) *and* Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 (1941).

[44] A circumstance more likely than not. It would be difficult to conceive of a rule more conducive to wild imagination. Imagine the prospective plaintiff who has been told by his attorney that he will not have a case unless they can uncover a witness who has also found a mouse in his bottled drink. Plaintiff informs his friends of the state of the law. Suddenly everyone's drink begins to taste strange. Fortunately, two days later plaintiff's nephew finds what he believes to be a mouse in his drink. What a coincidence!

[45] See Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962); Styers v. Winston Coca-Cola Bottling Co., 239 N.C. 504, 80 S.E.2d 253 (1954); Dail v. Taylor, 151 N.C. 284, 66 S.E. 135 (1909).

[46] Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E.2d 680 (1941) (fishhook in plug of chewing tobacco); Tickle v. Hobgood, 216 N.C. 221, 4 S.E.2d 444 (1939) (foreign substance in bottled drink); Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935) (dead mouse in a bottled drink); Gill v. Ceases' Lunch System, Inc., 194 N.C. 803, 139 S.E. 925 (1927) (per curiam) (plaintiff's intestate died after eating at defendant's lunch room); Lamb v. Boyles, 192 N.C. 542, 135 S.E. 464 (1926) (injurious substance in ale).

other cases the opportunity to adopt a less stringent control rule was foregone by questionable statements that our rigid requirement was met.[47]

In *Schueler v. Good Friend N.C. Corp.*[48] North Carolina easily disposed of a classic "collapsing chair" case using the doctrine of res ipsa loquitur simply by stating that our control requirement was met.[49] Yet who could actually contend that the defendant had anything more than ownership without possession? In *Eaker v. International Shoe Co.*[50] an employee of the defendant was working a revolving drum to process hides. The employee stopped the drum, reached inside, whereupon the clutch became engaged injuring him. The court applied res ipsa loquitur against the defendant with no discussion of control. The rule of strict control is strongly voiced in North Carolina, but uniformity of its application is wanting.

In North Carolina res ipsa loquitur creates at most an inference of negligence on the part of the defendant.[51] The burden of proof remains on the plaintiff and does not shift to the defendant.[52] Under such protection for the defendant a generous application of the doctrine of res ipsa loquitur as a whole and the control element in particular could be allowed in this state.[53] A change would be desirable in view of the problems of control just discussed. That other jurisdictions have squarely faced these problems is evidenced by the trend toward expansion of the control rule to encompass the

[47] See Turner v. Southern Power Co., 154 N.C. 131, 69 S.E. 767 (1910). Plaintiff was shocked when turning on an overhead light. Res ipsa loquitur was held applicable even though a third party had furnished the appliances for distributing the current to the different lamps. In McAllister v. Pryor, 187 N.C. 832, 123 S.E. 92 (1924), plaintiff was injured by high voltage coming through her iron. Res ipsa loquitur was applied even though a third party had attached the iron to the current.

[48] 231 N.C. 416, 57 S.E.2d 324 (1950).

[49] Compare the North Carolina view and the Rhode Island view discussed in text accompanying note 9 *supra*.

[50] 199 N.C. 379, 154 S.E. 667 (1930).

[51] See Coca-Cola Bottling Co. v. Munn, 99 F.2d 190 (4th Cir. 1938); Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941). See generally Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

[52] The party charged is merely required to go forward with the evidence in an attempt to rebut the inference. The credibility of the evidence remains with the jury and it may find for the defendant. Mitchell v. Saunders, 219 N.C. 178, 183, 13 S.E.2d 242, 246 (1941).

[53] For an excellent discussion of the evidentiary problems facing plaintiffs in the area of inference, prima facie case, etc., see Note, 41 N.C.L. REV. 124 (1962).

difficulties of an advanced society. As our community continues to develop, the individuals of which it is composed become more interdependant. This creates the necessity for liberality in the field of law concerning liability for injuries caused by harmful instrumentalities. Early in the twentieth century the law of implied warranties was forced to yield to the realities of modern life.[54] The time may now be ripe for a similar advance in the doctrines of implied negligence. Where circumstantial evidence appears in such an abundance as to show probable negligence of a defendant, it would seem improper to remove a plaintiff from court solely on the ground that he alone was in control of a harmful device. Although plaintiff was in physical possession and perhaps had ownership, he may not have had such control as would alter a hidden defect caused by the defendant's negligence.

ARNOLD T. WOOD

**Wills—Dissent Statute—Constitutionality of Husband's Right to Dissent From Wife's Will**

Prior to July 1, 1960 a husband could not by will deprive his widow of her dower and other intestate rights in his estate if, pursuant to the privilege given surviving wives by legislation originating in 1784, she duly filed a dissent to his will.[1] On the other hand, no right of dissent was extended to the husband, and his wife could make a will disinheriting him from any share in her estate.[2]

The General Assembly at its 1959 session enacted new laws governing intestate succession by which the estates of dower and curtesy were abolished.[3] Correlated sections permitted either husband or wife to dissent from the will of the deceased spouse where the survivor does not receive one-half or more in value of all the property passing upon the death of the testator.[4] The latter enactments were

[54] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[1] N.C. Pub. Laws 1868-69, ch. 93, §§ 37, 38. A history and explanation of this legislation will be found in Hunter v. Husted, 45 N.C. 97 (1852).

[2] Gomer v. Askew, 242 N.C. 547, 89 S.E.2d 117 (1955); Hallyburton v. Slagle, 132 N.C. 947, 44 S.E. 655 (1903). See DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA §§ 18, 48, 158 (1948).

[3] N.C. GEN. STAT. § 29-4 (Supp. 1961).

[4] N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1961). These sections were rewritten and amended by the 1961 amendment, effective July 1, 1961, for the most part in particulars not material here, except that the right of a surviving spouse to dissent was limited by N.C. GEN. STAT. § 30-1(a) (Supp. 1961)