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Application of Res Ipsa Loquitur Doctrine in Montana

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I. INTRODUCTION

The doctrine of res ipsa loquitur has played an important role in the evolution of negligence law. Chief Baron Pollock presided at the theory's accouchement in *Bryne v. Boadle*.[1] In that now classic case, plaintiff was struck by an object falling from a building. In holding for plaintiff who was unable to show any direct evidence of negligence, the court observed:

> There are certain cases of which it must be said, res ipsa loquitur, and this seems to be one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence. . . .[2]

The Montana Supreme Court has recently said that the evidence must establish three "elements" before the benefits of res ipsa loquitur can accrue to the plaintiff's cause:

> . . . (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.[3]

Realistically, this mode of proof is a common sense appraisal of fault for an injury inflicted by the operation of an instrumentality in the "exclusive control"[4] of the defendant at the time of the alleged negligence. Tactically, it has been described as a "crutch" to be employed in an otherwise "crippled case" which badly needs its support.[5]

As to the evidentiary effect of res ipsa loquitur, the law is now clear that the doctrine is not an exception to the rule that the burden is on the plaintiff to prove actionable negligence.[6] However, it has been said

[1] 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

[2] *Id.* at 725, 159 Eng. Rep. at 300; fifty-four years earlier, under a different rule, this same burden was placed on a common carried in Christie v. Griggs, 170 Eng. Rep. 1088 (1809); the expression "res ipsa loquitur" may be found at an earlier date in cases other than those involving negligence. See Roberts v. Trenayne, 1 Cro. Jac. 507 (1614).

[3] Gormley v. Montana Deaconess Hosp., 423 P.2d 301, 305 (Mont. 1967), *citing* Horner v. Northern Pacific Beneficial Ass'n. Hospitals, Inc., 62 Wash. 2d 351, 359, 382 P.2d 518, 523 (1963).

[4] A recent Montana Supreme Court decision defined the concept of exclusive control as follows:

> The exclusive control spoken of does not mean actual physical control right up to the time of the accident. It simply means that the [defendants] must have had such control that it would be unlikely that other negligence could have occurred which would have operated as an intervening proximate cause of the injury complained of. Knowlton v. Sandaker, 436 P.2d 98, 103 (Mont. 1968).

[5] 1 BELLI, MODERN TRIALS § 38 at 200 (1954).

[6] Early Montana decisions held that the doctrine placed the burden on the defendant to prove that there had been no negligence. *See e.g.*, Ryan v. Gilmer, 2 Mont. 517, 25 Am. Rep. 744 (1877); Dempster v. Oregon S.L.R.R. Co., 37 Mont. 335, 96 P. 717 (1908). However, the later cases have followed the Rule that the doctrine does not cast upon the defendant the burden of disproving negligence in the sense of making

that the doctrine "relieves a plaintiff from the burden of producing direct evidence of negligence,"[7] and also that the defendant has the obligation to go forward with his proof, which is sometimes called the "risk of non-persuasion".[8] The doctrine does not permit recovery on proof of the injury alone.[9] Instead, the doctrine raises a disputable presumption of law and supplies the proof necessarily wanting when the injured party cannot disclose the cause of his injury. It requires that it be apparent prima facie that the accident would not ordinarily have happened had the defendant exercised ordinary care.[10]

The res ipsa loquitur theory has found application in a variety of commonplace cases. It has been applied most often in cases involving falling objects,[11] explosions,[12] sudden collapses of structures,[13] and vehicle wrecks.[14] Montana courts, and federal courts applying Montana law, have realistically decided that stagecoaches do not ordinarily overturn,[15] gasoline does not ordinarily spill and burn,[16] trains do not ordinarily derail,[17] high voltage wires do not ordinarily fall,[18] and patients do not ordinarily enter operating rooms for hysterectomy operations and emerge with broken arms[19] without giving rise to a justifiable inference of negligence on the part of the person in control.

In this setting therefore the present study breaks down into three distinct problems: (1) The effect of allegations of specific negligence in the complaint upon the plaintiff's ability to rely on res ipsa loquitur at the trial. (2) The effect of plaintiff's introducing evidence of spe-

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it incumbent upon him to establish freedom from negligence by a preponderance of the evidence. *See* Vonault v. O'Rourke, 97 Mont. 92, P.2d 535 (1934); Stocking v. Johnson Flying Service, 143 Mont. 61, 387 P.2d 312 (1963), Gormley v. Montana Deaconess Hosp., *supra* note 3.

[7]Foltis v. City of New York, 287 N.Y. 108, 115, 38 N.E.2d 455, 459 (1941).

[8]Hickory Transfer Co. v. Nezbed, 202 Md. 253, 96 A.2d 241, 245 (1953).

[9]Maki v. Murray Hosp., 91 Mont. 251, 263, 7 P.2d 228, 231 (1932).

[10]Stocking v. Johnson Flying Service, *supra* note 6.

[11]Gillilan v. Portland Cremation Ass'n., 120 Ore. 286, 249 P. 627 (1926) (Fall of slab in crematorium onto child causing mother to strain herself in lifting); Glowacki v. N.W. Ohio Ry. & Power Co., 116 Ohio St. 451, 157 N.E. 21, 53 A.L.R. 1486 (1927) (High voltage wires fell on highway); Griffen v. Manice, 166 N.Y. 188, 59 N.E. 925, 52 L.R.A. 922 (1901) (Fall of elevator in office building).

[12]Baker v. B.F. Goodrich Co., 115 Cal. App. 2d 221, 252 P.2d 24 (1953) (Explosion of automobile tire being mounted on a wheel); Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal.2d 453, 150 P.2d 436 (1944) (Explosion of soft drink bottle); Alston v. J. L. Prescott Co., 10 N. J. Super. 116, 76 A.2d 686 (1950) (Explosion of bottle containing laundry fluid).

[13]McHarge v. M. M. Newcomer & Co., 117 Tenn. App. 595, 100 S.W. 700, 9 L.R.A. (N.S.) 298 (1907) (Collapse of awning attached to a building).

[14]Spinner v. Los Angeles Ry. Corp., 52 Cal. App.2d 679, 126 P.2d 940 (1942) (Bus-automobile collision); Nielsen v. Pyles, 322 Ill. App. 574, 54 N.E.2d 753 (1944) (Rear-end automobile collision); Fink v. New York Cent. Ry. Co., 144 Ohio St. 1, 56 N.E.2d 456 (1944) (Train derailment).

[15]Stiles v. Gove, 345 F.2d 991 (9th Cir. 1965).

[16]Harding v. Johnson, Inc., 126 Mont. 70, 244 P.2d 111 (1952).

[17]John v. Northern Pac. Ry. Co., 42 Mont. 18, 111 P. 632 (1910).

[18]Houle v. Helena Gas & Elec. Co., 31 F.2d 671 (9th Cir. 1929).

[19]Gormley v. Mont. Deaconess Hosp., *supra* note 3.

cific negligence at trial upon his ability to rely on res ipsa loquitur at the conclusion of the trial. (3) The effect of the doctrine in the presence of multiple defendants.

II. The Effect of Allegations of Specific Negligence in Plaintiff's Complaint

A. *The General Position*

Courts throughout the United States have adopted several positions regarding the effect of the nature of the allegations in the pleadings.[20] In some jurisdictions, the plaintiff loses his right to rely upon, or have the jury instructed on, res ipsa loquitur if he alleges specific acts of negligence in his complaint.[21] Other jurisdictions have held that the plaintiff may use an inference of negligence drawn from the circumstances of the injury only if the inference supports the specific allegation of negligence.[22] A third position is that res ipsa loquitur may be applied when specific acts of negligence have been alleged only if the pleadings also include general allegations of negligence.[23] One difficulty with the last approach is the problem of distinguishing specific from general allegations of negligence.[24] Under a fourth rule, res ipsa loquitur is available without respect to the form of the pleading.[25] This position allows plaintiff to allege specific negligence alone and still avail himself of the doctrine.

B. *The Montana Position*

The cumulative result of the Montana cases on the effect of alleging specific negligence was unclear until *Whitney v. Northwest Greyhound*

[20]38 Am Jur., *Negligence*, §§ 261, 263.

[21]Midland Valley R.R. Co. v. Conner, 217 F. 956 (8th Cir. 1914); O'Rourke v. Marshall Field & Co., 307 Ill. 197, 138 N.E. 625 (1923).

[22]Pickwick Stages Corp. v. Messinger, 44 Ariz. 174, 36 P.2d 168 (1934); Atkinson v. United Railroads of S.F., 71 Cal. App. 82, 234 P. 863 (1925); Terre Haute & I.R.R. Co. v. Sheeks, 155 Ind. 74, 56 N.E. 434 (1900); Alabama & V.Ry. Co. v. Groome, 97 Miss. 201, 52 So. 703 (1910).

[23]Wass v. Suter, 119 Ind. App. 114, 84 N.E.2d 734 (1949); Rauch v. Des Moines Elec. Co., 206 Iowa 309, 218 N.W. 340 (1928); McDonough v. Boston Elev. Ry. Co., 208 Mass. 436, 94 N.E. 809 (1911); Williams v. St. Louis Public Service Co., 363 Mo. 625, 253 S.W.2d 97 (1952).

[24]One offered distinction between specific and general allegations of negligence was:

> For example, an allegation that a railroad crossing accident was caused by the failure of automatic warning devices to operate is pointed at establishing only that such devices do not ordinarily fail to operate in the absence of negligence. Hence, this is a general allegation. If, however, it is alleged that the accident was caused by the failure of an intoxicated gate tender in the employ of the defendant to lower the gates, the allegation is one pointing to the precise negligence which caused the accident. In the latter example there is a specific allegation. 27 Ford. L. Rev. 411 (1958), noting New York Chicago, St. Louis R.R. Co. v. Henderson, 146 N.E.2d 531 (Ind. 1957).

See also Radisch v. Franco-Italian Packing Co., 68 Cal. App. 2d 825, 158 P.2d 435 (1945).

[25]Briganti v. Connecticut Co., 119 Conn. 316, 175 A. 679 (1934); Dearden v. San Pedro L.A. & S.L.R. Co., 33 Utah 147, 93 P. 271 (1907).

Lines, Inc. [26] was decided by the Montana Supreme Court in 1952. The *Whitney* decision made it clear that res ipsa loquitur is available in Montana regardless of the form of the pleading.

Most of the cases tried prior to 1952 in which the plaintiff sought application of res ipsa loquitur were cases in which the complaint sounded in terms of general negligence.[27] In those cases the court's decisions as to the doctrine's applicability were based on factors other than the form of the complaint. This is not surprising as res ipsa loquitur is normally alleged in general terms. Thus, judicial examination of the effect of the allegations upon the applicability of the doctrine is usually found only in cases in which the defendant complains that the plaintiff has pleaded specific negligence. The first such case reported in Montana was *Lyon v. Chicago M. & St. P. Ry. Co.*[28] There, the plaintiff alleged that the defendant was negligent in excavating a borrow pit to a point so close to the river that the remaining embankment was insufficient in thickness and strength to retain the river within its natural channel, and that because of such negligence the embankment gave way, resulting in damage to plaintiff's property. At trial, plaintiff introduced evidence of the specific facts alleged in her complaint. However, the jury found for the defendant who introduced evidence that the damage was caused by water overflowing a slough maintained by the plaintiff. On appeal, the plaintiff attempted to rely on res ipsa loquitur. In rejecting the doctrine's applicability the court based its decision on two grounds, *i.e.*, not only had plaintiff alleged specific negligence, but she also had produced specific evidence of negligence sufficient to make out a prima facie case. By basing its holding on both the pleadings and the proof the court left unanswered the question of whether allegations of specific negligence were a sufficient basis alone upon which to reject the applicability of res ipsa loquitur.

The Montana Supreme Court's next reference to the effect of pleadings in res ipsa loquitur cases was in *Vonault v. O'Rourke.*[29] There, the defendant appealed on the ground that the complaint did not state a cause of action because it was couched in terms of general negligence. The court held that this did not preclude plaintiff's recovery on the res ipsa loquitur theory and further recognized, in dicta, that there was authority for holding that if the complaint had been any more

[26]125 Mont. 528, 242 P.2d 257 (1952).

[27]*See e.g.*, Houle v. Helena Gas & Elec., *supra* note 18; Harding v. Johnson, *supra* note 16; Vonault v. O'Rourke, *supra* note 6; Maki v. Murray Hosp., *supra* note 9; Childers v. Deschamps, 87 Mont. 505, 290 P. 261 (1930); John v. Northern Pac. Ry. Co., *supra* note 17.

[28]50 Mont. 532, 148 P. 386 (1915).

[29]97 Mont. 92, 33 P.2d 535 (1934); The court passed up an opportunity to examine the effect of the pleadings on the applicability of the doctrine in Childers v. Deschamps, *supra* note 27. In that case the plaintiff alleged the cause of her injury in detail. The court denied her recovery under res ipsa loquitur, but based its holding on the fact that the plaintiff had been contributorily negligent.

specific in its allegations, it would have been fatal to plaintiff's reliance on the doctrine.[30]

In light of the *Lyon* and the *Vonault* decisions it is not surprising that nearly two decades passed without the subject receiving attention in reported cases. It was not until 1952 when the *Whitney* case was decided that the court spoke again on the effect of pleadings in res ipsa loquitur cases. In *Whitney* the plaintiff alleged that when the driver of a bus in which she was a passenger, attempted to pass another vehicle, he drove so far over on the left side of the highway that the bus went off the road and overturned, resulting in injuries to the plaintiff. At trial, the verdict was for the defendant. The trial court had given an instruction which was inconsistent with plaintiff's proffered theory of res ipsa loquitur and plaintiff appealed. The defendant, using the same reasoning espoused by the *Lyon* court, contended that the plaintiff was not entitled to rely on res ipsa loquitur because she had attempted to both plead and prove specific acts of negligence. For the first time the court focused directly on the question of whether specific allegations of negligence were a bar to the doctrine's applicability. The court denied the defendant's contention that the complaint alleged specific negligence and held it was a general allegation. Nonetheless, said the court:

> . . . Where res ipsa loquitur is otherwise applicable, a plaintiff does not lose the benefit of that presumption by alleging specific acts of negligence of the [defendant] which he fails to prove . . .[31]

The defendant in *Whitney* relied on the *Lyon* rationale. In rejecting that rationale, the court in the *Whitney* case appears to have reversed, *sub silencio*, its prior holding in *Lyon*. The *Whitney* case has been cited with approval in subsequent Montana cases.[32] In those cases the court has seemingly regarded as immaterial the effect of the allegations. Thus, in Montana, the nature of the allegations in the complaint will not be the determining factor of the doctrine's applicability. Therefore, plaintiff's attorneys should be able to allege specific acts of negligence in

[30]The authority recognized in *Vonault* was 45 C.J. 1225. The court also relied on Pierce v. Great Falls & C. Ry. Co., 22 Mont. 445, 56 P. 867 (1899), for the proposition that general allegations were "sufficient" upon which to base a cause of action under res ipsa loquitur. The report of the Pierce case, however, does not specifically indicate that the plaintiff therein sought to rely on res ipsa loquitur. However, it does say that because the plaintiff had alleged specific negligence, "[s]he could not recover for negligence *in any other respect*, for a plaintiff must stand on the cause of action alleged in the complaint." 22 Mont. at 448, 56 P. at 868 (emphasis added).

[31]125 Mont. at 535, 242 P.2d at 261, *citing* Greyhound Lines, Inc. v. Patterson, 14 Tenn. App. 652, 657.

[32]Davis v. Trobough, 139 Mont. 322, 326, 363 P.2d 727 (1961); Stocking v. Johnson Flying Service, *supra* note 6 at 316; Jackson v. Dingwall, 145 Mont. 127, 136, 399 P.2d 236, 241 (1965); Krohmer v. Dahl, 145 Mont. 491, 498, 402 P.2d 979, 983 (1965); Bostwick v. Butte Motor Co., 145 Mont. 570, 590, 403 P.2d 614, 625 (1965); Baumgartner v. National Cash Register Co., 146 Mont. 346, 353, 406 P.2d 686, 690 (1965); Pollard v. Todd, 418 P.2d 869, 872 (1966); Gormley v. Montana Deaconess Hosp., *supra* note 3 at 304; Baker v. Rental Service co., 24 St. Rep. 701, 432 P.2d 624, 628 (1967); Knowlton v. Sandaker, *supra* note 4.

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their complaint without fear of denying their client the right to rely on the doctrine.

III. The Effect of Plaintiff's Introduction of Evidence at Trial Which Tends to Show the Actual Cause of the Injury

A. *Generally*

Plaintiff's attorney is frequently confronted with the question of how much negligence he can establish without jeopardizing his right to have the jury instructed on res ipsa loquitur. If he elects not to offer that evidence of negligence that is available to him, he affords the defendant the first opportunity to reveal the details of the occurrence which caused the injury. Plaintiff's subsequent rebuttal, or lack thereof, may then raise an insurmountable inference that his cause is really one of desperation.

There are only two situations where the plaintiff's attorney is not confronted with this problem. One is in cases where he has sufficient evidence to prove that the defendant's negligence was the cause of his client's injury. In such cases it is axiomatic that res ipsa loquitur is not applicable and plaintiff will proceed on a specific negligence theory alone. The other situation is where the causation evidence is exclusively within the defendant's own knowledge.[33] In such cases it is evident that res ipsa loquitur is the only theory available to plaintiff.

Between these two extremes are those cases in which the quantum of proof of defendant's negligence which is available to plaintiff is insufficient to make out a case based on specific negligence, but it is more than the usual absence of proof generally characteristic of a res ipsa case. Under these circumstances, the plaintiff's attorney encounters the problem of how much to prove without proving too much, and thus losing his right to rely on the doctrine.

An excellent illustration of this predicament is found in *Hickory Transfer Co. v. Nezbed*.[34] From the facts it appeared that plaintiff's case was suited to an application of the res ipsa loquitur theory. The plaintiffs had been awakened in the middle of the night when a tractor-trailer unit crashed into their home, resulting in extensive damages to the house and in injuries to plaintiff and his wife. The facts showed that the defendant was driving a tractor-trailer unit on a boulevard highway, and seeing no traffic light at the intersection, entered it without decreasing his speed. In the intersection the truck collided with a car

[33]This situation frequently arises in product liability cases. For a discussion of the doctrine's applicability in such cases see Hursh, American Law of Products Liability, §§ 2:104, 2:105, 2:108, 2:117-120. For a discussion of res ipsa loquitur's applicability in products liability cases dealing with automobiles, see Gilliam, Products Liability in the Automobile Industry 150-160 (1960).

[34]*Supra* note 8.

driven by Baugher, who had entered the intersection from the truck's left. Unknown to either driver, the traffic light at the intersection was defective. At the time of the collision it showed no light to the truck driver, but showed a green light to Baugher. As a result of the impact the truck was propelled into plaintiff's house. Plaintiff sued the trucking company, the truck driver, and Baugher. The jury found in favor of Baugher, but against the trucking company and its driver, both of whom appealed. The appellate court reversed, holding that because of the extent of plaintiff's proof, he had lost the right to rely on res ipsa loquitur. At trial, plaintiff could and did offer evidence that there were no skid marks, but also that there was evidence of brake failure.

The plaintiff proved that the brakes on the truck had failed. The appellate court said that this proof rebutted any possible inference, from the absence of skid marks, that the truck driver had failed to apply his brakes. Further, if the brakes failed *after* the first collision as a result of the brake lines being severed by Baugher's car, then Baugher and not the truck driver would be at fault. On the other hand, if they falied *before* the collision with Baugher, then the truck driver would still be free of negligence, as mere brake failure is not in itself evidence of negligence.[35] Consequently, the court held that plaintiff's own proof of the details precluded his reliance on res ipsa loquitur, and stated that plaintiff had explained away the possible inference of negligence. "Paradoxically," the court said, "the plaintiffs proved too much and too little".[36]

The various jurisdictions are in conflict with respect to the effect of plaintiff's introduction of evidence of specific negligence upon his ultimate ability to rely on res ipsa loquitur. Most courts hold that an unsuccessful attempt by plaintiff to demonstrate the precise cause of the injury will not deprive him of the benefits of the doctrine.[37] There are jurisdictions however which deny plaintiff the right to use res ipsa loquitur if he introduces any evidence of specific negligence.[38] In some cases it is held that if plaintiff's evidence of specific negligence raises an issue of causation for the jury, the jury may not be charged under res ipsa loquitur as the plaintiff, by his proof, has waived his right to have the jury give him the benefit of the inference which flows from the doctrine.[39] These last cases proceed upon the theory that res ipsa

[35]*Supra* note 8, *citing* Schaeffer v. Caldwell, 273 App. Div. 263, 78 N.Y.S.2d 652 (1948).

[36]*Supra* note 8 at 245.

[37]Pennsylvania Co. v. Clark, 266 F. 182 (6th Cir. 1920); Scott v. Kreeley Joslen Store Co., 125 Colo. 367, 243 P.2d 394 (1952); Conner v. Atchison T. & S.F.R.R. Co., 189 Cal. 1, 207 P. 378 (1933); Eaves v. City of Ottumwa, 240 Iowa 956, 38 N.W.2d 761 (1949); the cases are collected at 33 A.L.R.2d 792, 796.

[38]Jackson v. 919 Corporation, 344 Ill. App. 519, 101 N.E.2d 594 (1951); Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 (1930); Kaltenbach v. Cleveland, C. & C. Highway Inc., 82 Ohio App. 10, 80 N.E.2d 640 (1948).

[39]Heffter v. Northern States Power Co., 173 Minn. 215, 217 N.W. 102 (1927); Berry v. Kansas City Public Service Co., 343 Mo. 474, 121 S.W.2d 825 (1938).

loquitur is available only of necessity and therefore when plaintiff does not need the benefit of the inference it will not be available to him. A more liberal rule which permits the jury to consider both res ipsa loquitur and any amount of specific negligence introduced by plaintiff is applied in several jurisdictions.[40]

B. Montana Decisions

The Montana position has gradually evolved into a liberal approach to this problem. In 1915, the court in the *Lyon* case held that if it was possible for the plaintiff to make out a prima facie case based on specific negligence, res ipsa loquitur could not be invoked. Thus, since the plaintiff offered direct proof of specific negligence, the doctrine was held inapplicable. This rule was followed[41] until 1952 when the *Whitney* decision held that the plaintiff was not deprived of his ability to rely on res ipsa loquitur simply by introducing evidence of specific acts of negligence which did not prove to be the precise cause of the injury.

In 1965 the Ninth Circuit, in *Stiles v. Gove*[42] further liberalized the rule announced in *Whitney*. In *Stiles*, the plaintiff presented a prima facie case based on specific negligence. However, the defendant offered evidence disputing plaintiff's proof and the court allowed application of the doctrine on the ground that the "precise cause of the [accident] was not shown *beyond dispute*".[43]

Consequently, in an otherwise applicable case, a plaintiff in Montana is well advised to request an instruction on res ipsa loquitur even if he has produced evidence of specific negligence, provided that the evidence he has adduced either does not clearly establish the precise cause of the injury or the defendant has offered evidence disputing its cause. Thus, it appears that in Montana, after specific evidence of negligence has been offered and disputed, the biggest problem will be to frame a clear charge to the jury to the effect that they may consider res ipsa loquitur along with specific evidence of negligence.

IV. Operation of the Doctrine in the Presence of Multiple Defendants

A. Generally

Subsidiary problems arise in the cases in which there are multiple defendants. There are holdings to the effect that the plaintiff may apply res ipsa loquitur against one defendant and at the same time introduce

[40]Leet v. Union Pac. R.R. Co., 25 Cal.2d 605, 155 P.2d 42 (1944); Cassady v. Old Colony Street Ry Co., 184 Mass. 156, 68 N.E. 10 (1903); Cullen v. Pearson, 191 Minn. 136, 253 N.W. 117 (1934); Cleary v. Camden, 118 N.J.L. 215, 192 A. 29 (1937).

[41]*See Childers v. Deschamps, supra* note 27.

[42]*Supra* note 15.

[43]345 F.2d at 993 (emphasis added).

acts of specific negligence against another.[44] Most of these cases involve passengers in carriers which are involved in collisions with third parties and are probably explained on the carrier-passenger relationship rather than on res ipsa loquitur.[45] So too, where the defendant's evidence tends to establish specific proof of the cause of the injury or where the plaintiff develops specific evidence of negligence on cross examination of defendant's witnesses, it is generally held that plaintiff still retains the benefit of the inference flowing from res ipsa loquitur.[46]

The real problem here is one of showing exclusive control of the instrumentality, so as to make res ipsa loquitur applicable. It is entirely possible that two defendants may be in joint control of a single instrumentality. However, in *Schroder v. City & County Savings Bank, Albany*[47] the courts wrote: "It is not necessary for the application of the res ipsa loquitur doctrine that there be but a single person in control of that which caused the damage".[48]

B. *In Montana*

There is as yet no Montana case reported involving the applicability of the doctrine when there are multiple defendants. However, it is submitted that when such a case does arise, the plaintiff should be able to show by direct evidence which defendant had control. If this can be done and the other requirements of res ipsa loquitur are met, then the plaintiff has a prima facie case. If this cannot be done by plaintiff, then the defendant's evidence will usually establish the necessary control or lack thereof because they will be anxious to avoid application of the doctrine against themselves.

V. Conclusion

In Montana, a plaintiff's complaint may contain allegations of specific negligence without endangering his right to rely on res ipsa loquitur. A plaintiff will not lose his ability to rely on the doctrine by offering evidence which tends to show the cause of his injury, *provided* his evidence falls short of proving the precise cause, or *provided* that the defendant's evidence substantially rebuts plaintiff's proof. In cases where plaintiff must proceed against more than one defendant, he should be able to utilize res ipsa loquitur against one or both if he

[44]*See eg.*, Kilgore v. Brown, 90 Cal. App. 555, 266 P. 297 (1928); Rothweiler v. St. Louis Public Service Co., 361 Mo. 259, 234 S.W.2d 552 (1950).

[45]*See* Prosser, *Res Ipsa Loquitur, Collisions of Carriers With Other Vehicles*, 30 Ill. L. Rev. 980 (1936). Montana places a high duty of care on carriers. *See* Revised Codes of Montana, 1947, §§ 8-405, 406. *See also* Heck v. N.P. Ry. Co., 59 Mont. 106, 196 P. 521 (1921).

[46]Lobel v. American Airlines, Inc., 192 F.2d 217 (2d Cir. 1951), Phillbert v. Benj. Ansehl Co., 342 Mo. 1239, 119 S.W.2d 797 (1938).

[47]293 N.Y. 370, 57 N.E.2d 57 (1944).

[48]*Id.*, at 59.

can establish who had control of the injury-producing instrumentality. In cases in which plaintiff cannot establish which defendant had control, the defendants' evidence will usually supply this element becaus eof their interest in escaping individual liability.

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