Expert needed when res ipsa claim beyond common knowledge

Federal Courts

By Jay S. Judge

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Today's case involves a set of tandem wheels falling off a semitrailer and striking an auto on I-80; and the question of whether the auto operator could prove negligence against the semitrailer owner under a res ipsa loquitur ("the thing speaks for itself") theory. *Maroules v. Jumbo Inc.*, 452 F.3d 639 (2006).

The 7th U.S. Circuit Court of Appeals, applying Indiana substantive law, discussed the two-pronged test for proof of negligence under a res ipsa loquitur theory, tracing it back to the often-cited "flour barrel falling out of the warehouse window" common-law case of *Byrne v. Boadle*, 2 H & C 722, 159 Eng. Rep. 299 (1863).

The decision helps clarify the test for using res ipsa as a short-cut to prove negligence: (1) the instrumentality causing the injury was in the exclusive control of the defendant; and (2) this type of accident does not ordinarily happen (in the experiences of mankind) absent negligence of the defendant in control of the instrumentality.

Christine Maroules sued Jumbo Inc. and driver James Wheeler for damages as the result of an accident on Jan. 4, 2000, where a set of tandem wheels (2 tires and rims) fell off a semitrailer and crashed into the front passenger side of her car as she drove along I-80 near the Indiana-Illinois border.

Wheeler did not know the tandem wheels fell off the semitrailer he was driving until a state trooper stopped him. An inspection of the truck showed five or six of 10 studs holding the tandem wheels in place were broken and sheared off. The nuts holding the wheels in place were missing. The threads of the portions of the studs remaining did not appear worn.

Jumbo and Windsor moved for summary judgment contending there was no proof of negligence because Windsor inspected the tandem wheels and nuts only a few hours before the accident when he did his routine walk-around inspection before beginning his trip. That included inspecting the tires, rims, lugs, studs, nuts and tire pressure, and all were fine. The president of Jumbo, Philip Simonsen, testified that the semitrailer passed the full annual inspection required by the U.S. Department of Transportation five weeks before the accident. Simonsen also testified that Jumbo hires a third-party contractor to inspect, repair and maintain its trailers, including the wheel studs, and no problems were found in numerous inspections prior to the accident.

Opposing Jumbo and Windsor's motion for summary judgment, Maroules contended that under the doctrine of res ipsa tandem wheels don't fall off of trailers absent negligent maintenance by the owner; and knowing parts wear out, Jumbo should have replaced the wheel studs periodically.

The U.S. District Court, Judge Andrew P. Rodovich, Northern District of Indiana presiding, granted the defendants' motion for summary judgment, finding Maroules did not prove a res ipsa loquitur theory. The 7th Circuit, in an opinion written by Judge Ilana Diamond Rovner, affirmed, holding the second prong of the res ipsa test was not shown — it could not be said that the tandem wheels ordinarily cannot fall off absent the owner's negligence.

Rovner began the 7th Circuit's discussion explaining the use of the res ipsa doctrine as a short-cut to proving negligence:

"Ordinarily we count on gravity to keep heavy items in place; and so when flour barrels, armchairs, and truck wheels become airborne we assume first that something has gone wrong. Such events, lawyers say, speak for themselves, or in Latin, 'res ipsa loquitur,' and the blame for any resulting injury can be imputed to the person who had control of the item before it became a dangerous projectile.

"Res ipsa loquitur is a shortcut to a negligence claim. Although negligence may not be inferred from the mere fact that an injury occurred, it may be inferred from the circumstances surrounding the injury. *K-Mart v. Gipson*, 563 N.E.2d 667, 669 (Ind.Ct.App. 1990). The doctrine recognizes that in some situations an occurrence is so unusual that, absent a reasonable justification, the person in control of the situation should be held responsible. *Cergnul v. Heritage Inn Inc.*, 785 N.E.2d 328, 332 (Ind.Ct.App. 2003). In other words, as the Latin describes, 'the thing speaks for itself.' See *Byrne v. Boadle*, 2 H & C 722, 159 Eng. Rep. 299 (1863) (the original res ipsa loquitur case involving a flour barrel falling out of a warehouse window). The central question in any res ipsa loquitur case is whether the incident more probably resulted from the defendant's negligence than from some other cause."

Next the 7th Circuit set out the test necessary to invoke the res ipsa rule:

"To establish this inference of negligence, the plaintiff must demonstrate: (1) that the injuring instrumentality was within the exclusive management and control of the defendant, and (2) that the accident is of the type that does not ordinarily happen if those who have the management and control exercise proper care. *Balfour v. Kimberly Home Health Care Inc.*, 830 N.E.2d 145, 148 (Ind.Ct.App. 2005)."

Rovner noted that res ipsa creates an inference thereby shortcutting the proofs needed to show negligence:

"Under Indiana law, res ipsa loquitur is an evidentiary doctrine that allows an inference of negligence to be drawn under certain factual circumstances. See *Gold v. Ishak*, 720 N.E.2d 1175, 1880 (Ind.Ct.App. 1999). Once the plaintiff has met the burden of demonstrating the control and due care prongs of res ipsa loquitur, the doctrine operates to permit an inference of negligence based upon the circumstantial evidence. The inference, however, is just that — a plaintiff does not win her case merely because she has met the res ipsa loquitur requirements. A successful res ipsa loquitur showing simply creates an inference, which the trier of fact may choose to accept or not."

Explaining that res ipsa presents a mixed question of law and fact, the court continued:

"Whether the doctrine of res ipsa loquitur applies in any given negligence case is a mixed question of law and fact. *Syfu v. Quinn*, 826 N.E.2d 699, 703 (Ind.Ct.App. 2005). The question of law is whether the plaintiff's evidence includes all of the underlying elements of res ipsa loquitur. The determination for the trier of fact is whether the permissible inference is to be drawn. *Shull v. B.F. Goodrich Co.*, 477 N.E.2d 924, 928 (Ind.Ct.App. 1985)."

Addressing the first question as to whether Maroules had proven Jumbo's exclusive control of the trailer, the court set out Jumbo's contention of no control:

"The defendants begin by denying that they had exclusive control. To support this proposition, they contend that they had no role in manufacturing the trailer or its wheel studs; they had no control over the inspection and maintenance of the trailer or its wheel studs prior to the time that Jumbo purchased the trailer in 1999; and that Jumbo does not maintain, service, or repair its trailers and their parts, but instead relinquishes control every time it sends its trailers to an outside third party maintenance company to do this work."

Finding that Maroules need not refute all possible causes, but, instead, prove at least one potential cause in Jumbo's control, the court held the District Court correctly found exclusive control in Jumbo:

"Jumbo's argument is appealing on the surface when one contemplates any number of alternative theories for the accident; the stud manufacturer could have negligently or knowingly manufactured defective studs, the maintenance business could have used a faulty power tool to tighten the bolts, or a vandal could have sabotaged the truck wheels. Recall, however, that the doctrine of res ipsa loquitur does not hand victory to the plaintiff; it merely creates an inference of negligence that the trier of fact, upon hearing all of the evidence may or may not choose to accept. Consequently, the concept of control under Indiana's res ipsa loquitur case law is expansive. To prove the 'exclusive control' requirement of res ipsa loquitur, the plaintiff simply is required to show either that a specific instrument caused the injury and that the defendant had control over that instrument or that any reasonably probable causes for the injury were under the control of the defendant. *Sealse v. Hughbanks*, 684 N.E.2d 496, 499 (Ind.Ct.App. 1997). Indiana case law instructs that a defendant need not be in control of the causative instrumentality at the exact moment of injury, provided the defendant was the last person in control. Furthermore, the possibility of multiple causes or multiple defendants does not automatically defeat the application of res ipsa loquitur. It is not necessary for the plaintiff to exclude every other possibility other than the defendant's negligence as a cause of the injury. In other words, the possibility that a third party may have negligently manufactured, installed, or maintained the studs does not preclude a finding that Jumbo had control over the injuring instrumentality. In fact, a plaintiff may point to several alternative causes of injury and allow the jury to determine which, if any, instrumentality caused the injury. As the Indiana Appellate court explained: '[a]ll inferences from the evidence, including those arising from the res ipsa doctrine, are to be placed in the scales to be weighed by the trier of fact.' If the plaintiff cannot, however, identify any potential causes and show that they were in the exclusive control of the defendant, the res ipsa loquitur claim must fail. Maroules had identified at least one potential cause of her injury in the control of the defendants — the failure to take notice that the studs might decay and to replace them before they do. We agree with the district court, therefore, that Maroules has demonstrated the element of exclusive control as defined expansively under Indiana law."

Rovner then considered the second prong: whether the accident would ordinarily occur in the absence of negligence:

"Although res ipsa loquitur is a doctrine of common sense, expert testimony is required when the issue of care is beyond the realm of the layperson, that is, where a fact-finder cannot determine whether a defendant's conduct fell below the applicable standard of care without technical input from an expert witness. The *Shull* court cited Prosser for the proposition that:

'In the usual [res ipsa] case the basis of past experience from which the conclusion may be drawn that such events usually do not occur without negligence, is one common to the whole community, upon which the jury are simply permitted to rely. Even where such a basis of common knowledge is lacking, however, expert testimony may provide a sufficient foundation.

Shull, 477 N.E.2d at 927 (citing Prosser, Handbook of the Law of Torts, § 39, P. 215 (4th Ed. 1971))."

The 7th Circuit concluded that expert testimony was necessary to determine whether the tandem wheels could fall off with an absence of negligence:

"This case presents questions that simply cannot be determined by a fact-finder without some understanding of the standard of proper or reasonable care in the industry. After all, Jumbo claims that the proper care of wheel assembly studs involves regular visual inspection and replacement only when any stud on the wheel shows signs of wear or breakage. Maroules claims, instead, that the standard of care requires that truck owners and operators 'take notice of the tendency of parts of machinery to decay from age, or wear out by use ... make reasonable inspection [and] ... change the wheel studs periodically instead of waiting for one of them to break.' Only expert testimony, and not our own common sense, can tell us which is correct. Furthermore, only an expert could tell us whether this is the type of accident that might happen even if those who have management and control of trucks and their wheel assemblies exercise the kind of care Maroules proposes. In other words, it is possible that this type of accident happens randomly even when truck drivers and owners periodically inspect their wheel assemblies and change the wheel studs prophylactically as Maroules argues they should. Our past experience and common knowledge is not sufficient to answer these questions."

Finding Maroules had not proven the second prong of the res ipsa loquitur, the 7th Circuit affirmed summary judgment for Jumbo:

"Consequently, we conclude that Maroules has failed to show by common sense or expert testimony that the injury was one that would not ordinarily occur in the absence of proper care on the part of those controlling the instrumentality.

"As explained above, however, Maroules, has not presented sufficient evidence to bring herself within the operation of the res ipsa loquitur doctrine. Consequently, summary judgment must be granted for Jumbo, and the judgment of the district court is affirmed."

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