

DECEMBER 2014



Let your case speak for itself

Make the doctrine of res ipsa loquitur *work for you*

By Elinor Leary
The Veen Firm, PC

The res-ipsa-loquitur doctrine is an evidentiary rule that shifts the burden of proof to the defendant. (See CACI 417; *Howe v. Seven Forty Two Co., Inc*. (2010) 189 Cal.App.4th 1155, 1161-1163.) Under the doctrine, the defendant is presumed liable and must disprove negligence if the plaintiff meets three elements: (1) the harm ordinarily would not have happened unless someone was negligent; (2) the harm was caused by something that only the defendant controlled; and (3) the plaintiff's voluntary actions did not contribute to the harm. (*Id*.; see, *Fiske v. Wilkie* (1945) 67 Cal.App.2d 440, 447.)

It is natural to limit consideration of the doctrine to cases that involve an easily identifiable instrumentality, such as a bottle of Coke (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436; a suitcase (*Williamson v. Pacific Greyhound Lines* (1947) 78 Cal.App.2d 482), or a train (cue the adage – "If two trains are in the same place at the same time, someone was negligent.") However, thoughtful application of the doctrine to less obvious circumstances benefits the aggrieved – its burden-shifting power makes it difficult for defendants to avoid responsibility.[1]

The benefits of res ipsa are many. Articulated in a mediation brief or settlement conference statement, the points below may highlight the strengths and relative merits of your case to your adversary. At trial, your judge may appreciate a succinct trial brief that incorporates the concepts that follow.

Humble beginnings of the doctrine

It is generally agreed that the first use of this Latin phrase in a negligence context came in the mid-nineteenth century case of *Byrne v Boadle* (159 Eng. Rep. 299 (Exch. 1863). Joseph Byrne was out for a stroll when he passed by the flour dealer Abel Boadle. Boadle's premises, following the typical design of the era, comprised a public shop on the ground floor and a storage room on the floor above. As Byrne walked underneath the storage room's loading bay, a barrel of flour fell down, striking Byrne and knocking him down. (Note, *The Law of Falling Objects: Byrne v. Boadle and the Birth of Res Ipsa Loquitur* (2007) 59 Stan. L. Rev. 1065, 1071.)

Byrne sued Boadle under a respondeat superior theory. Although witnesses testified they had seen plaintiff knocked down, no one provided direct evidence whether the person responsible for the barrel had breached his duty of care. After the case was non-suited due to a lack of evidence from the plaintiff, an appellate judge declared "There are certain cases of which it may be said res ipsa loquitur, and this seems one of them."

Basic mechanics of res ipsa

To invoke res ipsa loquitur, the plaintiff has an initial burden to establish three conditions: "'(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'" (*Howe*, *supra*, 189 Cal.App.4th at 1161, quoting Prosser, Torts (4th ed. 1971) § 39, p. 214.)

If the plaintiff meets these conditions, the burden shifts to the defendant to disprove negligence or causation. (See, *Id*., at 1162-1163; *Fiske*, *supra*, 67 Cal.App.2d at 447.) The jury *must* enter a verdict against the defendant in the absence of any contrary evidence.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



(*Id*.; see Cal. Law Revision Com. Comment to Evid. Code, § 646 ["[W]hen the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding."].) These rules are reflected in CACI 417.

Aside from the pure power of burden shifting and the presumption of negligence, res ipsa alleviates the need for the plaintiff to explain how the event or harm occurred. (*Fowler v. Seaton* (1964) 61 Cal.2d 681, 687) In Fowler, the Court of Appeal explained:

> Of course negligence and connecting defendant with it, like other facts, can be proved by circumstantial evidence. There does not have to be an eyewitness, nor need there be direct evidence of defendant's conduct. There is no absolute requirement that the plaintiff explain how the accident happened. Res ipsa may apply where the cause of the injury is a mystery, if there is a reasonable and logical inference that defendant was negligent, and that such negligence caused the injury.

[Citation.] (*Id*. at 687)

Even if the plaintiff fails to establish the presumption, she may still prevail at trial. The "Directions for Use" under CACI 417 state: "[1] The first paragraph of this instruction sets forth the three elements of res ipsa loquitur. The second paragraph explains that if the plaintiff fails to establish res ipsa loquitur as a presumption, the jury may still find for the plaintiff if it finds based on its consideration of all of the evidence that the defendant was negligent. [Citation.]"

Also, even if the defendant manages to produce rebuttal evidence, the plaintiff can still proceed to a jury. Although the "presumptive effect of the doctrine vanishes" if the defendant produces evidence to rebut negligence or causation (*Howe*, *supra*, at 1163), a plaintiff can still rely on circumstantial evidence to prove the defendant's negligence. (*Id*. at 1164) "In other words, the plaintiff is permitted to proceed in those cases, but must do so without aid of the presumption." (*Ibid*.)

When the presumption vanishes, the court should instruct the jury that:

> If after weighing all of the evidence, you believe that it is more probable than not that [name of defendant] was negligent and that [his/her] negligence was a substantial factor in causing [name of plaintiff]'s harm, you must decide in favor of [name of plaintiff]. Otherwise, you must decide in favor of [name of defendant].

(See CACI 417; see also Cal. Law Revision Com. Comment to Evid. Code, § 646.)

Application of res ipsa to a broad variety of cases

One of the great advantages of res ipsa is that as a doctrine its terms are broad enough to apply in a wide variety of cases.

For example, the res ipsa loquitur doctrine applies where the instrumentality of harm is not known. Said another way, there is no formal rule that limits res ipsa loquitur to cases in which the instrumentality of harm is known. (See, e.g., *Fowler*, *supra*, 61 Cal.2d 681.) In the *Fowler* case, a mother took her healthy child to preschool. When the mother picked up the child later that day, the child had a serious head injury. The school offered two inferably false explanations for the injury. The Court held that a jury could find the res-ipsa-loquitur doctrine applied. (*Fowler*, *supra*, 61 Cal.2d at 686.)

The *Fowler* court reasoned that the school operated for profit; and the school's "main function" was to supervise the children. (*Id*. at 688.) The court explained, "[I]t appears that the defendant, who had the exclusive control of the plaintiff at the time of injury, was under a duty to exercise care in the supervision of the infants in her school, and to keep them under supervision at all times that they were at the nursery." (*Ibid*.)

The *Fowler* court emphasized the defendant's inferably false explanations or lack of explanation for the injury. The court said:

> Where, under the evidence, an explanation is called for, if the defendant refuses to explain or gives a false explanation, it is reasonably inferable that the defendant is hiding something which, more probable than not, is his negligence.

(*Id*. at 689.)

A human being can be the subject of a res ipsa theory. For example, the res-ipsa-loquitur doctrine has been applied in a switched-baby case. (See, e.g., *Lopez v. Corporacion Insular de Seguros* (1st Cir., 1991) 931 F.2d 116.) In *Lopez*, the day after two sets of twins were born in the same hospital, the twins were switched and the hospital was sued. (*Id*. at 119.) In deciding whether the res-ipsa-loquitur doctrine applied, the *Lopez* court held the plaintiff met the doctrine's elements.

Under the first element, the court found that "Common sense dictates that babies will not be switched unless due care is by the boards," and "a swap could not have eventuated in the absence of negligence." (*Id*. at 124.) Exclusivity of control was present as "the Hospital was solely in charge of safekeeping and tending the infants in its care. It dominated the environment, exercising pervasive control over what transpired in the wards, in the nursery, and elsewhere on the premises." (*Ibid*.) Neither mother had access to the other's newborns. (*Ibid*.) Finally, plaintiff was free of responsibility for the negligent act. (*Ibid*.)

This analysis allows the doctrine to be applied to hospitals, schools, preschools, funeral homes and other businesses where the business is solely responsible for the care and safekeeping of a person, living or dead.

Res ipsa may also apply under a bailment analysis. A hired bailee who has sole, actual and exclusive physical possession of property is presumed to be negligent if he or she cannot explain the loss or disappearance of the property, or fails

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



to redeliver or return it upon proper demand. (See, *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 715.) The law imposes on the bailee the burden of showing that he or she exercised due care in the care and custody of the property. (*Ibid*.) "This is true even where a third person stole the subject of the bailment and thus made redelivery impossible." (*Id*.; *Beetson v. Hollywood Athletic Club* (1930) 109 Cal.App. 715, 721 [valet left "without taking the slightest precaution to protect plaintiff's car against theft."].)

Thinking expansively, a bailment analysis can be applied to anything – a car, a human body, and even human remains. Most courts recognize that next of kin have at least a quasi-property interest in a decedent's body. (See *Newman v. Sathyavaglswaran* (9th Cir. 2002) 287 F.3d 786, 793) In *Newman*, deceased children's parents brought an action against a coroner alleging deprivation of property without due process, based on the coroner's removal of their children's corneas without notice or consent. (*Id*. at p. 788.) The Ninth Circuit held that the parents – as next of kin – had protectable property interests in their children's corneas. (*Id*. at 789-794, 798.)

The *Newman* court reasoned that the parents maintained a property interest in the corneas, even if the corneas did not possess positive economic or market value. The court said, "Nor does the fact that California forbids the trade of body parts for profit mean that next of kin lack a property interest in them. The Supreme Court has 'never held that a physical item is not "property" simply because it lacks a positive economic or market value.'" (*Id*. at 798, quoting, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169 (1998) (physical item still deemed "property" even absent value).

Conclusion

Res ipsa loquitur is a powerful legal doctrine that need not be limited to cases that involve "things" such as bottles, suitcases, or barrels of flour. Creative application of the doctrine will benefit your client and make it difficult for those responsible to escape liability.


Leary

Elinor Leary is a trial attorney at The Veen Firm *who specializes in catastrophic personal injury cases. Ms. Leary has tried cases to verdict as well as reached large settlements in numerous other cases. She was selected to the Northern California Rising Stars list in 2011, 2012 and 2013, and the Super Lawyers List in 2014. Ms. Leary was also selected to the Top Northern California Female Lawyers in 2012 and 2013. Two of her settlements have been honored by inclusion in* The Recorder's California's Top Settlements. *Ms. Leary devotes significant time to public interest work and to mentoring others in the profession.*

[i] The author acknowledges Oliver E. Vallejo, Esq. for his tireless research and inspired insight into the diverse application of the res-ipsa doctrine.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**