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Torts: Res Ipsa Loquitur--The Requirement of Control

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We see that the court is very cautious in sanctioning regulations for licensing street speakers, fearing them as a prior restraint on free speech. The court requires strict standards for these officials, as well as other safeguards, before it will sanction a licensing regulation. Yet, in the *Feiner* case the court adopts a looser attitude in allowing a policeman to quiet a speaker immediately after he has begun to speak and to restrain him from continuing to speak. The restraint is merely applied at a different time interval, and by an individual policeman using his own judgment, rather than by a licensing official.

David B. Gold.

TORTS: RES IPSA LOQUITUR—THE REQUIREMENT OF CONTROL.—In the recent case of *Raber* v. *Tumin*,[1] the California Supreme Court appears to have extended the application of the doctrine of *res ipsa loquitur* beyond its previous limits. In this case, the plaintiff was injured when struck on the head by a falling ladder. The two defendants named in the action were the lessee of the premises on which the injury occurred, and an employee of his who was doing remodeling work on the premises. Plaintiff was a business invitee. He was hit by the ladder as he prepared to leave the building. The evidence tended to prove that the ladder was standing almost vertically against a wall and that the floor was slippery. Plaintiff testified that he saw no one using the ladder. The defendant employee testified that he had no recollection of using the ladder, and there was no evidence that he had used it. The Supreme Court reversed a judgment of nonsuit in the trial court on the ground that the doctrine of *res ipsa loquitur* could be properly applied against *both* defendants.

It has been repeatedly stated in the texts[2] and in the cases,[3] that there are three[4] requirements essential for a *res ipsa* case:

1. The accident must be of a kind which does not ordinarily occur in the absence of someone's negligence, and
2. It must be caused by an agency or instrumentality within the exclusive control of the defendant, and
3. It must not have been due to any voluntary action or contribution on the part of the plaintiff.

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[1]36 A. C. 617, 226 P. 2d 574 (1950).

[2]Prosser, Torts, p. 295; 5 Wigmore 2509 (2d ed., 1923); 19 Cal. Jur. 123.

[3]Ybarra v. Spangard (1944), 25 Cal. 2d 486, 154 P 2d 687; Gritsch v. Pickwick Stages System (1933), 131 Cal. App. 774, 22 P. 2d 554; Roy v. Smith (1933), 134 Cal. App. 240, 25 P. 2d 251; Cavero v. Franklin General Benevolent (1950), 36 A. C. 240, 223 P. 2d 471.

[4]A fourth requirement—defendant's superior knowledge—has been suggested. (5 Wigmore, 2509 (2d ed., 1923).) This is mentioned in California cases as the basis for the doctrine. (Jianou v. Pickwick Stages System (1931), 111 Cal. App. 754, 296 P. 108; Connor v. Atchison T. & S. F. R. Co. (1922), 189 Cal. 1, 207 P. 378, 22 A. L. R. 1462; Kenney v. Antonetti (1931), 211 Cal. 336, 295 P. 341.) Prosser says this is merely makeweight and is never mentioned in the California cases except as an additional reason for applying the doctrine where it was otherwise applicable, or an additional reason for not applying the doctrine where it was otherwise inapplicable. (37 Cal. L. Rev. 183.) However, for a strong intimation to the contrary, see Weaver v. Shell Co. of Calif. (1936), 13 Cal. App. 2d 643, 57 P. 2d 571. The court sustained defendant's contention that the doctrine was inapplicable because information as to the cause of the accident was not more accessible to the defendant than to the plaintiff. It is true that the court also found that the harmful agency was not within the defendant's exclusive control. But the language indicates that these were two separate and distinct grounds, absence of either being sufficient in itself to make res ipsa inapplicable. And in Williamson v. Pacific Greyhound Lines (1947), 78 Cal. App. 2d 484, 177 P. 2d 977: "It is a rule of necessity to be invoked only when necessary evidence is not readily available to the injured party."

The finding in the Raber case that ordinarily a ladder, standing by itself, does not fall unless it has been improperly placed through negligence, is in general accord with the falling objects cases in California.[5] This fulfills the first requirement.

As plaintiff did not touch the ladder and only casually noticed it, the accident was obviously not due to any voluntary action or contribution on his part and the third requirement is successfully met.

There remains only the element of control. This presents difficulty and it is at this point that the court in the Raber case appears to have extended the application of *res ipsa*. It is settled that actual physical control is not necessary, but right of control is sufficient.[6] The defendant lessee, being in possession of the premises, had the right of control over the instrumentality. It remains to be seen whether the defendant employee comes within the requirement.

Regarding the element of control, it has been established in California that management over the thing does not have to exist at the very moment of the accident.[7] Management existing at the time of the negligence is sufficient, provided plaintiff first proves that the condition of the instrumentality has not been changed after it left defendant's control.[8]

Where there are two defendants against whom plaintiff wishes to invoke *res ipsa*, the doctrine will apply against both defendants if both had control of the instrumentality.[9] The case of *Ybarra* v. *Spangard*[10] went a little beyond this. In that case plaintiff suffered an injury to his shoulder while undergoing an appendectomy. In an action against the operating physician, the anesthetist, the attending nurses, and the hospital, a judgment of nonsuit in the trial court was reversed by the Supreme Court of California on the ground that *res ipsa loquitur* applied as against all defendants. In considering the control factor the court said.[11]

> "The control, at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or his employees or temporary servants."

The majority opinion in the Raber case cites *Ybarra* v. *Spangard* as authority for the proposition that the fact that the plaintiff is unable to identify, as between two persons, the actively negligent party, does not deprive him of the aid of *res ipsa loquitur* against both.

This may be a true statement of the rule, but says nothing about defendants' control. The rule of the Ybarra case applies where all the instrumentalities which might have caused the injury were in control of all defendants. Thus, where there

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[5]Welch v. Sears, Roebuck & Co. (1950), 96 Cal. App. 2d 553, 215 P. 2d 796 (roll of linoleum toppling in store); Wills v. Price (1938), 26 Cal. App. 2d 338, 79 P. 2d 406 (another roll of linoleum); Robbins v. Cowell Lime & Cement Co. (1935), 7 Cal. App. 2d 646, 46 P. 2d 781 (falling sack of cement); Cooper v. Quandt (1930), 105 Cal. App. 506, 288 P. 79 (falling painter's plank).

[6]Ybarra v. Spangard (1944), 25 Cal. 2d 486, 154 P. 2d 687; Metz v. Southern Pacific Co. (1942), 51 Cal. App. 2d 260, 124 P. 2d 670; Gerhardt v. Southern Calif. Gas Co. (1942), 56 Cal. App. 2d 425, 132 P. 2d 874; Rafter v. Dubrock's Riding Academy (1946), 75 Cal. App. 2d 621, 171 P. 2d 549.

[7]Michener v. Hutton (1928), 203 Cal. 604, 265 P. 238, 59 A. L. R. 480.

[8]Honea v. City Dairy (1943), 22 Cal. 2d 614, 140 P. 2d 369; Escola v. Coca Cola Bottling Co. (1944), 24 Cal. 2d 453, 150 P. 2d 436.

[9]Price v. McDonald (1935), 7 Cal. App. 2d 77, 45 P. 2d 425. One defendant owned the automobile, and the other defendant was admittedly the last one to use it before it rolled down an incline and struck plaintiff.

[10](1944) 25 Cal. 2d 486, 154 P. 2d 687.

[11]*Id.*, at page 492. This was reiterated in the recent case of Cavero v. Franklin General Benevolent Society (1950), 36 A. C. 240, 223 P. 2d 471. This case involved a suit against an operating physician and the hospital for the death of a child undergoing a tonsillectomy.