Applying res ipsa loquitur to premises liability fire cases

"The judge had been around for ages and never once tried a fire case involving res ipsa loquitur."

Donna Bader

Most of us can remember the medical malpractice case from our law school textbook involving a surgical team that left a sponge in the patient and then closed him up. This scenario presented the classic elements for an application of the doctrine of res ipsa loquitur. Attorneys, however, often overlook this doctrine in premises liability cases, especially those involving fires. This article will examine how this doctrine may be applied successfully in such cases.

Several years ago on a warm summer day, a college professor was at home, finishing his morning coffee. He planned to spend a leisurely day reading student papers. His wife was washing the breakfast dishes and looked out the kitchen window, which had a view of the neighbors' yard. It was a beautiful yard with a kidney-shaped swimming pool and a border fringed with tall eucalyptus trees. The gardening and pool supplies were hidden from view in a small shed at the back of the yard.

The professor's wife saw billows of smoke coming from the neighbor's yard. As she peered closer, she observed flames licking at the trees, which if not stopped would certainly come onto their property.

The wife called out to her husband and he immediately dialed 911. They knew the property had been sold and the new neighbors were moving in slow-ly, mostly appearing at times over the weekends. Knowing it might take precious minutes before the fire trucks could arrive, the professor ran outside, hooked up the outdoor hose, and sprayed the fire, now spreading to the eucalyptus trees. His efforts were mostly unsuccessful because the water reacted with the trees, creating a fireball that extensively burned and scarred the professor's arms.

After the fire was put out, several investigators were called in to determine the cause of the fire. The fire chief concluded the *most probable cause* of the fire was the improper storage of chemicals, resulting in an exothermic reaction due to the combining of an oxidizer with hydrocarbons. He could not say conclusively when the combination took place or which specific products were involved. When the case came to trial, the defense disputed this finding and argued it could have been started due to a roving band of juvenile delinquents who, upon learning the house was empty, decided to play with matches in the shed. There was no evidence of this scenario except that the fire department found the gate door unlocked when the homeowner claimed he had locked it upon his departure days before.

The plaintiff's attorney sued for premises liability, arguing the homeowners had been negligent in storing pool chemicals, fertilizer, and gasoline in close proximity. He also argued the improper storage created a dangerous condition. Faced with the possibility that he could not establish, either through evidence or the testimony of expert witnesses, the precise cause of the fire, he argued a presumption of negligence based on res ipsa loquitur.

The court, sitting without a jury, was initially surprised. The judge had been around for ages and never once tried a fire case involving res ipsa loquitur. He, too, had attended law school and read the same books, thus triggering his memory that res ipsa loquitur only applied in medical malpractice cases where the plaintiff was out cold on a surgical table, and thus, there was no possibility that he or she had done anything to cause the accident.

Educating the judge

The attorney had to educate the judge as to the elements of res ipsa loquitur with a strong trial brief and pro-

vided law on its application in fire cases. Surprisingly, there were an abundance of cases dealing with this subject.

• *General principles applicable to the accident.*

The plaintiff alleged the homeowners had a legal duty to inspect their premises, and if in the exercise of reasonable care, they discovered a dangerous condition, they were liable for failing to correct it. (*Ortega v. Kmart* (2001) 26 Cal.4th 1200, 1207 [114 Cal.Rptr.2d 470].) This liability is based on *Civil Code* section 1714(a), which states:

> (a) Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

(See also *Sprecher v. Adamson Cos.* (1981) 30 Cal.3d 358, 363 [178 Cal.Rptr. 783] and *Moeller v. Fleming* (1982) 136 Cal.App.3d 241, 245[186 Cal.Rptr. 24].)

The homeowners could not pass off their duty to the gardener, the pool man, or any other workers who were contractually required to maintain the property. As stated in *Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325 [203 Cal.Rptr. 701],

> Although liability might easily be found where the landowner has actual knowledge of the dangerous condition, '[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an *affirmative duty* to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must *inspect* them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.' (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 592, p. 2860; italics in original.) Accordingly, it would appear that actual knowledge is not an absolute requirement for finding liability here.

(*Id.* at p. 330.)

The trial court concluded the defendants would have discovered the dangerous condition had they conducted a reasonable inspection. It was not persuaded that the defect was a latent defect, which is a hidden defect that is not discoverable by a reasonable inspection.

• *The trial court then applied the doctrine of* res ipsa loquitur *to support its judgment in favor of the plaintiff.*

After initially being surprised by an argument based on res ipsa loquitur, the court agreed the doctrine applied to establish an inference of negligence. The maxim as translated means "the thing, or affair, speaks for itself." The doctrine, formerly considered an inference, that is now codified as a presumption that affects the burden of producing evidence. (Evid.Code, §§ 604 and 646(b).) (See also *Cline v. Lund* (1973) 31 Cal.App.3d 755, 761 [107 Cal.Rptr. 629] and *Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 832 [113 Cal.Rptr. 790].)

Once established, the burden shifts to the defendant to prove that he or she was not negligent or that any negligence was not a proximate cause of the occurrence. If the defendant makes such a showing, the trier of fact then determines whether the defendant is negligent without regard to the doctrine and must simply weigh the evidence. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820 [843 P.2d 624].)

The doctrine of res ipsa loquitur was applied in *Ybarra v. Spangard* (1944) 25 Cal.2d 486 [154 P.2d 687], which presented the classic situation of the plaintiff who suffered injuries during a surgical operation and because he was unconscious, he could not identify the cause of his injuries.

The Supreme Court in *Ybarra* set forth the elements necessary to establish the doctrine:

> The doctrine of res ipsa loquitur has three conditions: (1) the accident 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. (Prosser, Torts, p. 295.)

(*Id.* at p. 489.)

The Supreme Court in *Ybarra* cited a number of cases dating back to 1905. The earliest case, *Ross v. Double Shoals Cotton Mills* (1905) 140 N.C. 115 [52 S.E. 121], however, was not a medical malpractice case, but arose from an injury the plaintiff suffered while operating a machine in a cotton mill. Another case, *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453 [150 P.2d 436], dealt with an exploding bottle of soda, while *Smith v. O'Donnell* (1932) 215 Cal. 714 [12 P.2d 436] involved a collision between two vehicles.

In yet another case of an exploding bottle of Coca Cola, the California Supreme Court decided *Zentz v. Coca Cola Bottling Co.* (1952) 39 Cal.2d 436 [247 P.2d 344], which held that as a general rule the doctrine of res ipsa loquitur will be applied when the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone, and the defendant is probably the person who is responsible.

Newing v. Cheatham

The California Supreme Court again addressed this doctrine in *Newing v. Cheatham* (1975) 15 Cal.3d 351 [124 Cal.Rptr. 193], a case involving an airplane crash where the plaintiff's decedent was an occupant in the plane.

The court in *Newing* confirmed that the existence of these conditions is usually a question of fact; however, *they all may exist as a matter of law,* such as where no issue of fact has been raised to the conditions. (*Id.* at pp. 360-361.) It also held that "[i]t need not be concluded

that negligence is the only explanation, but merely the most probable one." (*Id.* at p. 360.)

Of course, this was good news for the plaintiff in the fire case described above because at trial he was faced with testimony by the defense expert, who testified that the cause of the fire had to exist within minutes or hours before the fire, and since the homeowners were not present, he blamed that roving band of delinquents. This testimony focused on the second element of res ipsa loquitur that required the agency or instrumentality is under the exclusive control of the defendants.

The phrase "exclusive control" of the injury-causing instrumentality is a term of art and does not necessarily mean the defendants had actual possession of the instrumentality at the time of the injury. In *Levy-Zentner v. Southern Pacific Transportation Co.* (1977) 74 Cal.App.3d 762 [142 Cal.Rptr. 1], plaintiffs sued to recover losses suffered in a fire in the railroad's warehouse. The railroad argued a third party was responsible for the fire; however, it was established that even though there was itinerant activity, the dangers presented by such activity were patent, foreseen and ignored by the railroad.

The court in *Levy-Zentner* held:

> Where the only reasonably probable causes of the accident are due to the conduct of defendant and a third party, and where defendant is legally responsible for the conduct of the third party, the second condition is satisfied since the defendant is then responsible for all probable instrumentalities that caused the injury.

(*Id.* at p. 779)

In *Pappas v. Carson* (1975) 50 Cal.App.3d 261 [123 Cal.Rptr. 343], a fire started due to overloading of an electrical system in the owner's wall or a defect in the installation of the wiring. The owner argued there was an equally probable cause due to an independent contractor's negligence in rewiring the electrical system. The court held that the owner was deemed in control of the actions of the independent contractors, noting:

> The critical factor thrusting the duty upon a land possessor is his legal and actual control over the premises in which the instrumentality causing the harm is located.

(*Id.* at p. 269.)

Seeley v. Combs

In another Supreme Court case, *Seeley v. Combs* (1966) 65 Cal.2d 127 [52 Cal.Rptr. 578], the plaintiff filed an action to recover damages for injuries caused by a fire in a hay-filled barn. The defendant backed his truck into the barn to deliver additional hay. The court concluded the elements of res ipsa loquitur had been established, noting "[t]he barn, the hay, and the truck were within the exclusive control of defendant at the time the fire was discovered." (*Id.* at p. 133.)

The court in *Seeley* confirmed that the doctrine applied to nonjury, as well as jury, cases. "Nor does the fact that this case involves a fire make the doctrine of res ipsa loquitur inapplicable. "'Fire damage cases have no peculiar characteristics isolating them from res ipsa loquitur.'" (*Id.* at p. 133.)

• *Once applied,* res ipsa loquitur *creates an inference of negligence, requiring the defendants to rebut it.*

Once the plaintiff produces proof of these elements, a presumption affecting the burden of producing evidence is created, requiring a finding of negligence unless the defendants rebut this presumption. (*Newing v. Cheatham, supra,* at pp. 364-365.) If the defendants failed to rebut this presumption, it becomes conclusive. (Evid. Code, §§ 604 and 646.)

In the case discussed above, the defense's fire expert testified that fires can occur through spontaneous circumstances that have nothing to do with defendants' negligence. He testified that such accidents may occur without any negligence.

Of course, there was no argument that the plaintiff had caused the fire. He was at home enjoying his coffee when the fire started and spread to the eucalyptus trees. But at least one cause – and the most probable one – placed blame on the defendant.

Res ipsa loquitur in other fire cases

The doctrine of res ipsa loquitur has been applied to many fire cases:

• *Gailbreath v. Homestead Fire Ins. Co.,* 185 F.2d 361 (9th Cir. 1950) [fire occurred when defendant installed oil-burning stove and there was no evidence as to its cause];

• *Gentlemen v. Nadell & Co.* (1961) 197 Cal.App.2d 545 [17 Cal.Rptr. 389] [fire allegedly caused by the presence of certain inflammable substances improperly stored on the property and the cause could only be narrowed to two possibilities];

• *Horner v. Barber* (1964) 229 Cal.App.2d 829 [40 Cal.Rptr. 570] [fire in the garage of an auto repair business due to an unknown cause];

• *Levy-Zentner Co. v. Southern Pac. Transportation* (1977) 74 Cal.App.3d 762 [142 Cal.Rptr. 1] [plaintiff claimed a fire was started by defendant's inadequate fire protection and inspection procedures while defendant claimed the fire was caused by itinerants];

• *Pappas v. Carson* (1975) 50 Cal.App.3d 261 [123 Cal.Rptr. 343] [fire started at shopping center with the cause being traced to an electrical problem];

• *Hinckley v. La Mesa R.V. Center, Inc.* (1984) 158 Cal.App.3d 630 [205 Cal.Rptr. 22] [fire in motor home caused by electrical problem]; and

• *Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806 [100 Cal.Rptr. 501] [electric power company caused fire by allowing its power line to come into contact with a tree].

An application of the doctrine is based on a theory of probability, especially since there may be no direct evi-

dence of the defendant's conduct. *(Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].) Thus, even though all experts above admitted to other possible reasons for the fire, the weight of the testimony as to the *most probable* explanation placed liability squarely on the defendants.

As in *Gicking,* the evidence at trial presented at least two possible causes for the fire, one of which was not under defendants' control. However, to avoid an application of the doctrine, it must be shown that any other possible explanation at least rises to a level that it is "equally probable" with the plaintiff's explanation. (*Id.* at p. 77.) Nor can it be applied to infer negligence where the cause of the fire is speculative "that is, where there are several possible causes and no cause can be excluded or included by the evidence." (*Ibid.*)

Defendants' theory of third-party juveniles or vandals did not rise to the level of being "equally probable." Since there was no evidence to support the theory, the court excluded it as being too speculative.

The plaintiff was not deprived of the application of the doctrine of res ipsa loquitur because he could not establish the precise combination that resulted in the exothermic reaction. As stated in *Horner v. Barber* (1964) 229 Cal.App.2d 829 [40 Cal.Rptr. 570], a case involving an auto repair shop fire, which cited another California Supreme Court decision in *Fowler v. Seaton* (1964) 61 Cal.2d 681 [39 Cal.Rptr. 881]:

> Res ipsa loquitur 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.

(*Id.* at p. 836.)

In deciding whether to apply res ipsa loquitur, the trial court may consider "common knowledge, the testimony of expert witnesses, and the circumstances relating to the particular accident at issue . . . Numerous decisions of the courts of this state have upheld conditional res ipsa loquitur instructions in cases involving fire and smoke damage." (*Levy-ZentnerCompany v. Southern Pacific Transportation Company* (1977) 74 Cal.App.3d 762, 778 [142 Cal.Rptr. 1].)

Conclusion

The doctrine of res ipsa loquitur is often overlooked by the attorneys handling premises liability fire cases. While the doctrine may not be applicable in many premises liability cases, the plaintiff's attorney should consider it as a theory to be pleaded and proved at trial. If it applies, then the plaintiff has satisfied his or her burden of proof, shifting the burden to the defendant to rebut the presumption. In the case analyzed above, the plaintiff established that the facts fell neatly within the elements of the doctrine and prevailed at trial.

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