Diaz v Los Angeles County MTA

7/20/09

The 79 year old plaintiff was a passenger on the defendant's bus. The bus was in an accident with a car driven by Artero. Plaintiff sued the MTA and its driver for her injuries. The MTA claimed Artero made a dangerous lane change, and caused the accident, while its driver acted reasonably.

Plaintiff sought a jury instruction at trial that the accident created an inference of negligence on the part of the MTA, as a common carrier, shifting the burden to MTA to demonstrate it was not negligent. The trial court denied the request. The jury found the MTA and its driver not negligent, and plaintiff appealed from the judgment.

A *res ipsa loquitur* instruction, which allows the jury to presume negligence and shifts the burden to the defendant to show he or she was not negligent, is warranted only when, among other things, there is substantial evidence from which a jury could reasonably conclude the accident could not have happened at all but for the defendant's negligence. (*Zentz v Coca Cola Bottling Co.* (1952) 39 Cal.2d 436) Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of *res ipsa loquitur* 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 that the defendant is probably the person who is responsible." (*Rimmele v Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123)

In *Hardin v San Jose City Lines, Inc*. (1953) 41 Cal.2d 432, the Supreme Court held the doctrine of *res ipsa loquitur* applies when a passenger on a common carrier, through no fault of his or her own, is injured in connection with the operation of the carrier's vehicle. The Court observed the doctrine of *res ipsa loquitur* has been most frequently applied in common carrier cases when injury has occurred to a passenger.

In view of the very high degree of care essential under the law on the part of a carrier of persons toward those who are its passengers, such a collision would not happen in the ordinary course of events if the carrier

exercised such care, and that ordinarily when such an accident occurs, it is due to failure on the part of the person operating the car to use the proper degree of care in so operating it. (see generally *Rest.2d Torts*, section 328D, comment b)

MTA and its driver contended that although they are held to the highest degree of care in operating their vehicles, **it is equally well established they are not insurers of their passengers' safety.** (*Lopez v Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780)

The Second Appellate District stated that, to the contrary, an instruction on *res ipsa* is not tantamount to making the common carrier an insurer. The presumption created by *res ipsa loquitur* is an evidentiary one; it may be rebutted by the defendant with evidence the accident was the fault of a third party, not the defendant. (See, *Brown v Poway Unified School Dist.* (1993) 4 Cal.4th820)

MTA also contends the instruction was not warranted in this case because, unlike *Hardin*, which involved the sudden stop of a city bus for no apparent reason, a collision with a third party is not the type of accident, that, more probably than not, does not occur absent the common carrier's negligence. The Justices noted though, that the doctrine has long been held applicable to actions in which the carrier claims the accident is the result of a third party's negligence, provided there is **substantial evidence** to support the passenger's position the accident resulted from the carrier's operation of its vehicle. (See, *Rogers v Los Angeles Transit Lines* (1955) 45 Cal.2d 414)

The Second DCA determined the instruction should have been given, and error occurred when the trial court refused plaintiff's request. An error is not cause for reversal of a judgment unless it can be shown the error resulted in a miscarriage of justice. Here the question of negligence was a close one. Both drivers offered different versions of the facts and who was at fault. The party benefitting from the presumption of negligence thus enjoyed a critical advantage at trial. Under such circumstances, it cannot be said the failure to give a *res ipsa loquitur* instruction was harmless. (see, *Bedford v Re* (1973) 9 Cal.3d 593)

The judgment is reversed and the matter is remanded for further proceedings. Plaintiff is to recover her costs on appeal.

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