CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Howe v Seven Forty Two Company, Inc. (11/5/2010)

Res ipsa loquitur; Burden of Evidence Production

Plaintiff was injured when he sat on a stool at defendant's IHOP, leaned against the back, and the chair fell off the base, causing him to fall to the ground. Of the seven counter stools, each was attached to a metal base fitted onto a riser bolted to the floor. Each wood chair was attached to the base by three wood screws. All three screws on the subject chair were broken near the head of the screw. There was nothing about the stool that indicated the screws had already failed or were just about to fail, as plaintiff sat down.

Defendant provided evidence that it regularly inspected the restaurant, including the bottom of the stools. Only the heads of the screws would be visible to such an inspection. There had been no previous incidents reported involving the stools. Defendant moved for summary judgment, presenting undisputed evidence that it had inspected regularly with no evidence of any prior failures. At the hearing plaintiff argued defendant's inspection procedure was unreasonable, and averred the facts supported an inference of negligence under the doctrine of res ipsa loquitur. This in turn raised a triable issue of fact sufficient to defeat a motion for summary judgment. The defendant's motion was granted by the trial court, with a finding of no triable issues of material fact. Plaintiff appealed.

The Second Division of the Fourth District Court of Appeal noted that plaintiff's complaint alleged negligence. This required plaintiff to prove duty, breach, causation and damages. (*Nola M. v University of Southern California* (1993) 16 Cal.App.4th 421) A store owner has a duty to exercise reasonable care in keeping the premises reasonably safe, and must exercise reasonable care when it regularly inspects. (*Ortega v K-Mart* (2001) 26 Cal.4th 1200) Here, defendant demonstrated in its summary judgment motion that it conducted regular

inspections and had no indication of problems with the seat of the stool separating from the base.

Plaintiff contended the doctrine of res ipsa loquitur applied to demonstrate the presence of negligence and raised a triable issue of material fact. The 4th DCA explained that the doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in light of past experience, that it probably was the result of negligence by someone and the defendant is probably the one responsible. (*Di Mare v Cresci* (1962) 58 Cal.2d 292) Res ipsa loquitur is an evidentiary rule for "determining whether circumstantial evidence of negligence is sufficient." (*Brown v Poway Unified School District* (1993) 4 Cal.4th 820) In California, it is a "presumption affecting the burden of producing evidence." (Evidence Code section 646(b))

In order to invoke res ipsa loquitur, the plaintiff has the burden to establish three conditions: (1) the event must be of a kind which ordinarlily 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. (*Ybarra v Spangard* (1944) 25 Cal.2d 486)

Here, it is safe to say that in light of common experience, a counter stool does not ordinarily fall off its base when used normally unless someone is negligent. Second, the counter stool in this case was in defendant's exclusive control. Finally, plaintiff used the stool in an ordinary manner. Thus, the Justices concluded there was sufficient evidence to establish that the doctrine of res ipsa loquitur applied. Evidence Code section 646 classifies the doctrine as a presumption affecting the burden of producing evidence. When facts are established to give rise to the presumption, the burden of producing evidence to disprove these facts shifts to the defendant to prove lack of negligence or lack of proximate cause that the injury claimed was the result of that negligence.
As a presumption affecting the burden of producing evidence, as distinguished from a presumption affecting the burden of proof, if evidence is presented by defendant to rebut the presumed fact, the presumption is out of the case—it disappears. But if no such evidence is submitted, the trier of fact must find the presumed fact to be established. Thus, if evidence is produced that would support a finding that the defendant was not negligent, or that any negligence on his part was not a proximate cause of the accident, the presumption effect of the doctrine vanishes. Where the defendant introduces evidence to show the

nonexistence of a fact that supports a presumption of negligence, the presumption, as a matter of law, disappears. (*Slater v Kehoe* (1974) 38 Cal.App.3d 819) When the res ipsa presumption disappears, it is then plaintiff's burden to introduce actual evidence that would show that the defendant is negligent and that such negligence was the proximate cause of the accident. (Ev. Code section 646(c).

In the summary judgment motion, defendant IHOP presented evidence of regular visual inspections which included looking at the base of the stools, and that there was no previous incident of a stool separating from its base. This is evidence tending to prove that the accident was not due to negligence on the part of IHOP. But that does not end the case. The jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. The jury may be instructed that even though it does not find facts giving rise to the presumption of negligence have been proven by plaintiff, it may nevertheless find the defendant negligent if it concludes from a consideration of the evidence that it is more probable than not that the defendant was negligent.

Where plaintiff proves the predicate facts for application of the doctrine, but defendant provides evidence to rebut the presumed fact, plaintiff's case may still go forward where there are other theories as to what might have caused the accident. The jury is free to reject the argument advanced by the defendant. In a factually similar case involving a bar stool at a cocktail lounge, Justice Traynor explained, "The doctrine of res ipsa loquitur concerns a type of circumstantial evidence upon which plaintiff may rely to discharge his burden of proving defendant's negligence. Such evidence was given to the jury in this case. The nature of the accident and the fact that defendant and its agents were the only persons whose negligence could have been involved gives rise to the inference that defendant was negligent. There is no reason why the jury may not draw that inference without, as well as with, a specific instruction authorizing them to do so." (*Rose v Melody Lane* (1952) 39 Cal.2d 481) In other words, the plaintiff is permitted to proceed in those cases, but must do so without the aid of the presumption of negligence provided by the doctrine of res ipsa loquitur. Where the three factors giving rise to the presumption are established, but there is evidence from defendant to rebut the presumed facts, the presumption will vanish, but the court may still instruct the jury that it may infer from the established facts that the accident resulted from the defendant's negligence. An

appropriate instruction on the inference may be given. (See, CACI No. 417) In this case, the unrebutted predicate facts, that (1) a counter stool does not ordinarily fall absent negligence, (2) the stool was in defendant's exclusive control, and (3) plaintiff used the stool in the ordinary manner, are enough to raise a triable issue of material fact requiring denial of the defendant's motion for summary judgment. The judgment is reversed. Plaintiff is to recover his costs on appeal.

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