

1953

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Recent Cases

CRIMINAL PROCEDURE—DUE PROCESS—ERROR OF COURT-APPOINTED COUNSEL FOR DEFENDANT—INSANITY OF COURT'S EXPERT WITNESS

United States ex rel. Smith v. Baldi

The Supreme Court of the United States has recently upheld the conviction of a man who was found to be guilty of murder and sane (though having a long record of mental disease) by a triumvirate of judges who based their opinion on the testimony of a professional witness who two years later was himself committed because of an incurable mental disease.

The childhood and early years of James Smith, Negro, show early age blindness (later cured), separated parents, juvenile delinquency and reform school, sixth grade education, and marijuana smoking. During his three years in the army he was three times subject to a "Nervous Condition." His disorder was diagnosed as schizophrenia, hebephrenic type, in June 1945, after he had stolen an auto in March of that year. He was discharged from another hospital in October of 1945 by the senior director although the staff had concluded he had not recovered. There followed another period spent in a hospital and later two separate prison terms. In December 1947, he stole a gun and, in January 1948, shot a Philadelphia cab driver in the back of the head.²

In February 1948, Smith was arraigned. The judge asked an attorney to stand up with Smith as Smith had no counsel present. The attorney conferred only a brief moment with Smith and then pleaded not guilty to an indictment charging him with murder. The defendant's privately engaged counsel filed a petition for the appointment of a commission to inquire into Smith's mental condition. The petition was dismissed as Dr. Baldi, superintendent of the prison holding the defendant and the proper person to file such a petition, refused to do so.³

"Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder."⁴ Therefore, it had to be decided whether or not the defendant was insane—at the time of the murder. Under a Pennsylvania statute, if the defendant had pleaded not guilty by reason of insanity, he would have had the right to have a jury determine at the outset whether he was insane.⁵

Granting that he lost this opportunity by his plea of not guilty, was the defendant's right of due process of law violated if he was allowed to plead in such

1. 73 Sup. Ct. 391 (1953).

2. Detailed account of Mr. Smith's life history found in *United States ex rel. Smith v. Baldi*, 192 F. 2d 540 at 561 (3rd Cir. 1951).

3. *Id.* at 554.

4. Mr. Justice Frankfurter, dissenting, 73 Sup. Ct. 391, 396 (1953).

5. Act of March 31, 1860, P.L. 427, § 67; 19 PA. STAT. § 1352 (Purdon, 1930).

a fashion while insane? It would seem that the right to counsel in a capital punishment case requires adequate counsel at every stage of the proceedings and a reasonable time to prepare the case.⁶ That is, if he was insane at the time of the arraignment and his counsel had insufficient opportunity to inform himself, has the defendant had adequate opportunity to plead his case? If not, it would seem that due process of law was denied him especially if the right to have a jury determine one's sanity at the outset is material.

Then, presuming that the proceedings were proper up to this point, the next thing to examine is whether the court fairly and properly determined defendant's sanity. The humanitarian reasons for the precautions of the law in dealing with those insane, whether insane at the time of the crime, the pleadings, the trial or execution, must be kept in mind.

Mr. Smith's counsel arranged with the prosecutor and the court to change the plea to guilty so that the defendant could have additional time to obtain out of state evidence to support the defendant's contention of insanity.⁷ The state presented its evidence on September 21, 1948. On this date the Court of Oyer and Terminer of Philadelphia County decided the defendant was guilty of murder in the first degree.⁸ Five weeks later the defendant presented his evidence. There is confusion whether this was presented in mitigation of penalty or to show the defendant insane and therefore not guilty of murder.⁹ Dr. Adams of the Kings County Hospital testified that he and another psychiatrist and a psychologist examined the defendant and diagnosed him as "psychosis. Schizophrenia. Hebephrenic type." He told the court that the defendant was insane during May or June 1945, the time of his examination. (Shortly afterwards, Mr. Smith was adjudged insane by the County Court of Kings County.) This examination was substantially confirmed by the staff of the Brooklyn State Hospital but the senior director found him sane and defendant was released on October 11, 1945. A letter was shown to the court at this time which brought forth the fact that the defendant had been admitted upon his request to the Philadelphia General Hospital's Psychopathic Department in December 1945.

6. *Powell v. Alabama*, 287 U.S. 47, 84 A.L.R., note at 544-547 (1932).

7. The bargain is described and criticized in dissenting opinion, 192 F. 2d 540 at 554 (3rd Cir. 1951). See n. 9, *infra*.

8. This fact seems to have been conceded at the outset in *Commonwealth v. Smith*, 362 Pa. 222, 66 A. 2d 764 (1949). It was the subject of discussion but declared unimportant in *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 71 A. 2d 107 (1950). It was thought to be of great significance in the dissenting opinion of Chief Judge Biggs, 192 F. 2d 540 at 556, but was dismissed as immaterial by the United States Supreme Court in the instant case.

9. If one regards the plea of guilt (Sept. 21) as belief by counsel that defendant was sane, then the purpose of the evidence offered at a later date would seem to determine the appropriate penalty. See 364 Pa. 93, 112, 71 A. 2d 107, 117. If the purpose of the plea was to gain additional time to gather out of state records, then it would seem that the plea, if the records raised substantial doubt of defendant's sanity, was agreed to be subject to withdrawal. If this be so, then when there was substantial doubt, it seem that defendant was entitled to withdrawal of the plea and, consequently, a jury trial. In general, the dissenting opinion of 192 F. 2d 540 at 554 believes the court should have withdrawn the plea while the majority opinion of 192 F. 2d 540 at 548 and the majority opinion of the instant case believes it was up to defendant's counsel to do so.

He was discharged shortly—his case diagnosed as "Acute Alcoholic Hallucinosiis." The court also received evidence that the defendant while in the army had been hospitalized because of a nervous condition and had received a medical discharge. After this hearing the court appointed a psychiatrist, Dr. D, as the court's witness to examine the defendant. Dr. D's examination was rather short—about an hour plus no doubt an informative conversation with the defendant's guard and general observation in the court room. On November 5, 1948, Dr. D, after being questioned by defendant's counsel and the court, told the court that the defendant was sane then and on January 15. Incidentally, this examination was eight and one-half months after the crime, and it is pointed out that on adequate examination is a very difficult job after such a length of time.¹⁰ The court sentenced the defendant to death on February 4, 1949.

Mr. Smith's fortunes grew dim as appeal after appeal failed in state and federal courts.¹¹ Just before the defendant's counsel got to the Supreme Court after having been once refused, a surprising fact was learned. Dr. D, in the words of Mr. Justice Frankfurter, "had himself been committed, as of January 12, 1952, because of an incurable mental disease which had deprived him of 'any judgment or insight.'"¹² This was the professional witness who had found the defendant to be sane. Thus, the defendant, having lost the chance to have a jury trial *in limine* on the question of his sanity due to his hasty consultation with an attorney who happened to be standing in the court room, having been found guilty of murder in the first degree after only the state's evidence was in, having had a long record of mental disease described as "classic symptoms" of schizophrenia in which recovery rate is very

10. 192 F. 2d 540 at 565 (3rd Cir. 1951).

11. The Pennsylvania Supreme Court denied the defendant's contention that the trial court abused its discretion in imposing the death penalty. *Commonwealth v. Smith*, 362 Pa. 222, 66 A. 2d 764 (1949). A writ of habeas corpus was issued by the United States District Court for the Eastern District of Pennsylvania but later denied on the ground that the court had no jurisdiction over Smith because, when the writ was issued, Smith had been removed to the western part of Pennsylvania an hour or so earlier. *United States ex rel. Smith v. Warden of Philadelphia County Prison*, 87 F. Supp. 339 (E.D. Pa. 1949). An appeal from this denial was taken to the United States Court of Appeals, Third Circuit, which also held the writ was properly discharged. *United States ex rel. Smith v. Warden of Philadelphia County Prison*, 181 F. 2d 847 (3rd Cir. 1950). A petition for writ of habeas corpus was refused by the Pennsylvania Supreme Court which found that the defendant was not insane and had not been denied due process of law. *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 71 A. 2d 107 (1950). Certiorari was denied by the United States Supreme Court. *Commonwealth ex rel. Smith v. Ashe*, 340 U.S. 812 (1950). The District Court issued a rule to show cause based on the petition and thereafter, sitting *en banc*, discharged the rule and denied the writ of habeas corpus. *United States ex rel. Smith v. Baldi*, 96 F. Supp. 100 (E.D. Pa. 1951). This was affirmed by the United States Court of Appeals, Third Circuit. *United States ex rel. Smith v. Baldi*, 192 F. 2d 540 (3rd Cir. 1951), a four to three decision. The United States Supreme Court granted certiorari, 343 U.S. 903 (1952) and then found the defendant had not been denied due process of law in a six to three decision. Majority opinion of instant case written by Mr. Justice Reed, dissenting opinion by Mr. Justice Frankfurter joined by Black and Douglas. Separate opinion concerning writs of certiorari by Mr. Justice Frankfurter, 73 Sup. Ct. 437 (1953).

low,¹³ was found to be guilty by the testimony of an expert witness whose qualifications might well be doubted.¹⁴ Did the defendant have a fair and proper adjudication of his case? An earnest contention was made by counsel that they should have been supplied with services of a psychiatrist in order properly to prepare his defense. Such a contention is rejected in *McCarty v. O'Brien*.¹⁵ Mr. Smith's counsel may have been at fault in failing to change the plea of guilty to that of not guilty by reason of insanity. Yet, a "claim of denial of due process can hardly be predicated upon the failure of a defense move."¹⁶ Upon reflection and regarding the matter as a whole the defendant seems to have been denied a fair and proper adjudication. There is a fine balance between orderly, expedient justice on the one hand and on the other the sobering considerations of wrongly holding a man's life forfeit through procedure of error. We protect this man's life if insane because we have the doctrine in our law that an insane person cannot commit murder. This protection involves difficult decisions, and, though the presumption will be that he is sane, it doesn't seem to be illogical that the greatest care will be taken in determining the question of sanity.

It is interesting to notice that, after the decision of the Supreme Court on February 9, 1953, the following events have occurred as described in a letter from F. S. Baldi, M.D., Superintendent of the Philadelphia County Prison, to the writer:¹⁷

February 13th 1953 a Commission was appointed by the Quarter Sessions Court to examine James Smith and report to the Court.¹⁸

The following is an order of the Court, in the matter of James Smith a lunatic.

And now to wit, on the 23rd day of March 1953 it is ordered by the Court that the said James Smith be removed from the Philadelphia County Prison present place of confinement to the FAIRVIEW STATE HOSPITAL there to be detained and treated as an insane patient at the expense of the County of Philadelphia until further orders of the Court.

Hon. Peter Hagan
Judge

Dated 3/23/1953.

ROSS W. LILLARD

TORTS—CONTRIBUTORY NEGLIGENCE—EXTENT OF
"DUTY TO LOOK" DOCTRINE

*Empire District Electric Co. v. Rupert*¹

Plaintiff was an army captain vacationing at Lake Taneycomo, an artificial lake formed on the White River by a hydro-electric dam. He approached the dam

13. 192 F. 2d 540, 563, 565 (3rd Cir. 1951).

14. Apparently the illness was the culmination of a long process and developed in a gradual manner. 73 Sup. Ct. at 397.

15. 188 F. 2d 151 (1st Cir. 1951).

16. 73 U.S. at 395.

17. Letter dated April 14, 1953.

18. The commission was appointed pursuant to the provisions of the Mental Health Act of 1951, P.L. 533, Art. III, § 344, as amended. The commission, of course, found Mr. Smith to be *presently* insane. Letter of April 20, 1953 from Mr. Frank P. Lawley, Jr., Assistant Deputy Attorney General to writer.

1. 199 F. 2d 941 (8th Cir. 1952).

too closely in his fishing boat, and, while preoccupied with his camera, was swept over the top of the dam by the overflow and seriously injured. No warning signs or devices were maintained by the defendant electric company, operator of the dam. Plaintiff recovered a judgment in the trial court, but the United States Court of Appeals, applying Missouri law, reversed the judgment and held that the plaintiff was contributorily negligent as a matter of law, and that such negligence was the proximate cause of his injury.

The court held that it was well established Missouri law that when "one is charged with a duty to look, and to look is to see, he must have been held to have seen what looking would have revealed," and that where such duty exists, failure to look is contributory negligence as a matter of law. This doctrine developed in railroad crossing cases before the turn of the century, and has been applied or referred to as controlling in grade crossing tragedies involving wagons,² horse-drawn buggies,³ automobiles,⁴ and pedestrians.⁵ With the coming of the automobile this doctrine fitted naturally into cases involving intersection collisions.⁶ It has been extended to cover a woman stepping backward from a bus without looking,⁷ and a motorist driving at high speed on a street where he knew unfinished construction work was in progress.⁸

This doctrine appears to be limited generally to places such as intersections and crossings where the danger is so great and so universally recognized that the duty to look is no longer a question of fact.⁹ The holding of the court in this case, however, pre-supposes that such a locality was involved and that there did exist on the part of plaintiff a duty to look. Certainly a man crossing a railroad track or approaching a highway intersection will not be heard to maintain that he had no duty to look; but it extends the doctrine considerably further to hold that an invitee upon an artificial lake will be held to appreciate the possible danger of proximity to the dam as fully as the motorist is held to appreciate the possible danger of an onrushing locomotive.

2. *Hayden v. M.K. & T. Ry.*, 124 Mo. 566, 28 S.W. 74 (1894).

3. *Kelsay v. Missouri Pacific Ry.*, 129 Mo. 362, 30 S.W. 339 (1895).

4. *State ex rel. Hines v. Bland*, 237 S.W. 1018 (1922); *Fitzpatrick v. K.C. Southern Ry.*, 347 Mo. 57, 146 S.W. 2d 560 (1941).

5. *Reeves v. Thompson*, 357, Mo. 847, 211 S.W. 2d 23 (1948). This case was submitted to the jury, however, because of additional considerations. These considerations, incidentally, show some of the limitations of this doctrine.

6. *Weis v. Melvin*, 219 S.W. 2d 310 (Mo. 1949) (auto collision at intersection); *Branscum v. Glacer*, 234 S.W. 2d 626 (Mo. 1950) (auto turning in front of truck at intersection).

7. *Curtis v. Capitol Stage Lines Co.*, 27 S.W. 2d 747 (Mo. App. 1930).

8. *Rohmann v. City of Richmond Heights*, 135 S.W. 2d 378 (Mo. App. 1940).

9. It should be noted that any harshness of this doctrine is tempered or sometimes nullified by Missouri's humanitarian doctrine—a doctrine likewise particularly significant in crossing and intersection cases. Also, the "duty to look" doctrine is given added impetus in the case of automobiles by Mo. REV. STAT. § 304.010 (1949), which requires the "highest degree of care" in the operation of

motor vehicles.

Missouri has another doctrine to the effect that one is not required to look for danger when he has no cause to anticipate the danger.¹⁰ In *Gerber v. Schuttle Investment Co.*¹¹ where plaintiff was attempting to recover for damages sustained by falling down an elevator shaft, it was held that he was not contributorily negligent as a matter of law merely because he failed to see that the elevator car was not at floor level. The question of contributory negligence was left to the jury, yet it is arguable that such a situation more clearly presents a duty to look than the principal case.

The effect of the principal case is to proclaim as a matter of law that one who approaches within fifty feet of a portion of this particular dam is taking a risk and will be held to know it despite the great variance from time to time of such factors as flow of water, swiftness of current, or external manifestations of the danger.

Another possible approach under Missouri law would be to hold that an invitee can assume that the defendant's premises to which he is invited are reasonably safe or that a warning of dangerous conditions would be given.¹² The defendant should certainly foresee many possible circumstances in which the need for such precautions would be required—children boating on the lake, fisherman approaching the dam at night, boats washed near the dam or overturned by storms, swimmers, or boats drifting toward the overflow with stalled motors. The defendant should also reasonably foresee that at least some of the many vacationers would not know the physical construction of the dam, the operation of the overflow, or the peril of approaching that particular section of the dam. Moreover, the cost of such warning or safety devices, or at least signs, would be negligible in proportion to the ability of the defendant to provide them and to the potential harm their absence might cause to persons like the plaintiff. Had the court found such a duty on the part of the defendant, the plaintiff could still have been found contributorily negligent, but such a high degree of diligence would not have been exacted of him, since he would have been entitled to expect safeguards or warnings against dangerous conditions which he might reasonably encounter on the premises. Moreover, one is not required to look for danger when it may not be anticipated except for the negligence of another.¹³

On this analysis, the position of the dissenting justice¹⁴ seems quite sound. In his conclusion is found the essence of the dissent: "If appellee's conduct was imprudent, it seems to me that the brand can in the circumstances only be placed upon it by the branding iron of fact, and not by the branding iron of law."

RAYMOND C. LEWIS, JR.

10. *Becker v. Aschen*, 344 Mo. 1107, 131 S.W. 2d 533 (1939); *Sears, Roebuck & Co. v. Scroggins*, 140 F. 2d 718 (8th Cir. 1944).

11. 354 Mo. 1246, 194 S.W. 2d 25 (1946).

12. *Glazer v. Rothchild*, 221 Mo. 180, 120 S.W. 1 (1909); *Kennedy v. Phillips*, 319 Mo. 573, 5 S.W. 2d 33 (1928); *Kellogg v. H. D. Lee Mercantile Co.*, 236 Mo. App. 699, 160 S.W. 2d 838 (1942).

13. *Crawford v. K.C. Stockyards Co.*, 215 Mo. 394, 114 S.W. 1057 (1908).

14. Judge Johnson dissenting.

TORTS—RES IPSA LOQUITUR—ITS APPLICABILITY TO PASSENGER
WHO RECEIVED INJURY WHILE AIRPLANE IN FLIGHT

*Cudney v. Midcontinent Airlines, Inc.*¹

Plaintiff-appellant, while a passenger in the defendant's DC-3, twenty-one passenger plane, was thrown from her seat and across the aisle into the seats and on to another passenger when the plane suddenly "dropped, jerked, and jolted while in the air." The air was "choppy" and there was "light turbulence." The "Fasten Seat Belt" signal was put on as soon as the plane was aloft. The trial court entered a judgment on the verdict for the defendant airline company. On appeal, respondent-airline company contended that the *res ipsa loquitur* doctrine was not applicable, and that the trial court should have directed a verdict for the airline company. The Missouri Supreme Court held that *res ipsa loquitur* was not applicable, but reversed the lower court and remanded the cause to allow the plaintiff to plead specific negligence.

The *res ipsa loquitur* doctrine is a rule of evidence which operates as a substitute for showing specific proof of negligence.² It presupposes that the plaintiff is unable to determine how the particular act occurred, and that the defendant is, or should be, in a better position to explain how the accident happened.³ Before the doctrine may be invoked, it is necessary that: (1) the instrumentality involved was under the sole management and control of the defendant, and (2) the occurrence resulting in an injury was such as does not ordinarily happen in the normal course of events if the one in charge uses due care. A bolstering reason is often given in that the defendant possesses superior knowledge or means of information as to the cause of the occurrence.⁴

As a common carrier, the airplane company must exercise the highest degree of care towards its passengers.⁵ However, this does not mean that for every injury

1. *Cudney v. Midcontinent Airlines, Inc.*, 254 S.W. 2d 662 (Mo. 1953) (*en banc*).

2. *Belding v. St. Louis Public Service Co.*, 358 Mo. 491, 215 S.W. 2d 506 (1948); *Hendricks v. Weaver*, 183 S.W. 2d 74 (Mo. 1944). Early Missouri decisions held that the *res ipsa loquitur* doctrine had the effect of shifting the burden of proof from the plaintiff to the defendant. *McCloskey v. Koplar*, 329 Mo. 527, 46 S.W. 2d 557 (1932) held, however, that to give an instruction that the defendant had to overcome the presumption by a preponderance of the evidence was reversible error. In *Duncker v. St. Louis Public Service Co.*, 241 S.W. 2d 64 (Mo. App. 1951), the court said at page 67: "Therefore, following the later decisions of the Supreme Court, and our own original view . . . we reassert that the inference raised upon a *res ipsa loquitur* showing in a carrier-passenger relationship is a permissive inference only; that the burden of proof remains at all times with the plaintiff to establish defendant's negligence and that the burden of proof to show non-negligence never shifts to the defendant."

3. *Gibbs v. General Motor Corp.*, 350 Mo. 431, 166 S.W. 2d 575 (1942).

4. *Belding v. St. Louis Public Service Co.*, *supra* note 2; *Zichler v. St. Louis Public Service Co.*, 59 S.W. 654 (Mo. 1933); *McCloskey v. Koplar*, *supra* note 2; *Price v. Metropolitan St. Ry.*, 220 Mo. 435, 119 S.W. 932, 132 Am. St. Rep. 588 (1909); 5 WIGMORE ON EVIDENCE p. 498, § 2509 (2d ed. 1923).

5. *O'Gara v. St. Louis Transit Co.*, 204 Mo. 724, 103 S.W. 54, 12 L.R.A. (N.S.) 840, 11 Ann. Cas. 850 (1907); *Lucas v. St. Louis and Suburban Ry.*, 174 Mo. 270, 73 S.W. 589, 61 L.R.A. 452 (1903); *Sullivan v. Jefferson Ave. Ry.*, 133 Mo. 1, 14 S.W. 566 (1899); *Missouri Judicial Committee*, 155 S.W. 1216 (1916).

to a passenger the carrier will be liable. The proving of negligence by the plaintiff is still the requisite for recovery. The doctrine of *res ipsa loquitur* is just a method of facilitating that proof.⁶

The difficulty in the instant case is in determining whether the elements for the application of the doctrine are present. The court concedes that the respondent had control, and that "It may be assumed that if knowledge of the cause of the occurrence was possible that the evidence or means of knowledge of the cause lay with the respondent rather than the plaintiff." However, the court was concerned with whether the occasion of the injury—the sudden violent jerking—was one which does not ordinarily occur if the carrier uses the highest degree of care.

Similar occurrences on street cars and buses have been held not to happen in the normal course of events in the absence of negligence, and *res ipsa loquitur*, therefore, has been applied.⁷ In other words, the courts conclude in the land carrier cases that, through human experience over the course of years, a *prima facie* inference of negligence may be drawn when there is jostle or jerk resulting in an injury.

The *res ipsa loquitur* doctrine has been applied to airplane accidents also, although without uniformity in the jurisdictions.⁸ In those cases, generally, where it has been applied, death has resulted by reason of the crash of the plane to the ground. No case has been found similar to the instant case on the facts where *res ipsa loquitur* has been involved.

The argument for the application of the doctrine is generally made on the grounds that the plaintiff cannot discover the circumstances attending the accident. The argument against the application is on the basis of the newness of the industry and the lack of sufficient aeronautical knowledge.⁹

One writer points out that the plaintiff's difficulties are greater in air carriers than in surface carriers because: (1) lack of witnesses in those cases where all the occupants are killed; (2) the operation is so technical that even where lay witnesses

6. See 167 A.L.R. 658 (1947); 53 A.L.R. 1494 (1928).

7. *Powell v. St. Joseph Ry., Light, Heat and Power Co.*, 336 Mo. 1016, 81 S.W. 2d 957 (1935); *Zichler v. St. Louis Public Service Co.*, *supra*, n. 4; *Redmon v. Metropolitan St. Ry.*, 185 Mo. 1, 84 S.W. 26 (1904).

8. *Res ipsa loquitur* applied in: *Johnson v. Eastern Air Lines, Inc.*, 177 F. 2d 713 (2d Cir. 1949); *Bratt v. Western Air Lines, Inc.*, 169 F. 2d 214 (10th Cir. 1948), *cert. denied*, 335 U.S. 886 (1948); *Smith v. Pacific Alaska Airways, Inc.*, 89 F. 2d 253 (9th Cir. 1937) *cert denied*, 302 U.S. 700 (1937); *Smith v. O'Donnell*, 5 P. 2d 690 (Cal App. 1931), *aff'd per curiam*, 215 Cal. 714, 12 P. 2d 933 (1932); *Genero v. Ewing*, 176 Wash. 78, 28 P. 2d 116 (1934).

Res ipsa loquitur not applied in: *San Diego Gas and Electric Co. v. U.S.*, 173 F. 2d 92 (9th Cir., 1949); *Cohn v. United Airlines Transport Corp.*, 17 F. Supp. 865 (D. Wyo. 1937); *Hendron v. Gregory*, 190 Ark. 702, 81 S.W. 2d 849 (1935); *Deojay v. Lyford*, 139 Me. 234, 29 A. 2d 111 (1942); *Wilson v. Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N.E. 212 (1932); *Rochester Gas and Electric Corp. v. Dunlop*, 148 Misc. 849, 266 N.Y. Supp. 469 (Co. Ct. 1933); *Smith v. Whitley*, 233 N. C. 534, 27 S.E. 2d 442, 443 (1943); *Boulineaux v. Knoxville*, 20 Tenn. App. 404, 99 S.W. 2d 557 (1935).

9. *O'Connor, Res Ipsa In The Air*, 22 IND. L. J. 221 (1947); Note, 4 VAND. L. REV. 857, 869 (1951); advocating the use of the *res ipsa loquitur* doctrine in airplane accidents, see Note, 22 TEMP. L. Q. 440 (1951).

are available, their evidence is not too valuable and (3) the course of flight is "more difficult to reconstruct" than the course of a surface carrier.¹⁰

Not much opposition is encountered in applying *res ipsa loquitur* where an airplane crashes to the earth resulting in injury to property or persons on the ground. However, in cases as the instant one or in cases where death results by reason of crashes in the air, the problem becomes more difficult. In the principal case, the court said:

" . . . it is not possible at this date, as it may be in another day, to say that it is the common experience of mankind that commercial airlines do not lurch and drop for some distances except for negligence in the operation of the plane and, therefore, it is not now possible to confidently apply the doctrine of *res ipsa loquitur* to the mere occurrence in the circumstances relied upon by Mrs. Cudney [the plaintiff] . . ."¹¹

Just as there is no uniformity among the jurisdictions in the application of the *res ipsa loquitur* doctrine to air carriers, so there are divergent views among the writers on the subject as to whether the doctrine should be applied.¹² If the welfare of the individual as such is to be stressed, then it would seem that the doctrine should apply; however, from the viewpoint of the airlines the application of the doctrine approaches an insurers liability. It is not to be denied, however, that some protection should be offered the injured passenger, not only for his benefit, but for the benefit of the industry in the long run. Perhaps the answer lies in compulsory insurance, or in a statute clearly defining the liability of the carrier and the evidence rules which should apply.

In the principal case the court took a cautious approach, emphasizing that at a future time when more factual data are available it may apply the doctrine to air carriers under the same circumstances that it is applied to land carriers.

The concurring opinion emphasized that a case for *res ipsa loquitur* could have been made out on the basis that the plaintiff had fastened her safety belt, as she testified, and that in the normal course of events the belt should have been sufficient to keep the passenger in the seat.¹³

BERNARD SILVERMAN

10. O'Connor, *supra* n. 8.

11. 254 S.W. 2d at 667.

12. For general discussions and various views on *res ipsa loquitur* as applied to airplane accidents see the following: McClarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. (1951); O'Connor, *supra* n. 9; Orr, *Airplane Tort Law*, 19 INS. COUNSEL J. 64 (1952); Osterhout, *The Doctrine of Res Ipsa Loquitur As Applied to Aviation*, 2 AIR L. REV. 9 (1931); Note, 22 TEMP. L. Q. 440 (1951); Note 4 VAND. L. REV. 857 (1951); see Note, 6 A.L.R. 2d 528 (1949).

13. An interesting comment on the development of airplane business in recent years was made by Orr, *supra* n. 12, at page 64: "There are now over 100,000 airplanes registered in the United States. Only a few years ago our airlines were struggling to pass the 1,000,000 passenger mark. Our airlines carried some 18,828,000 revenue passengers last year. True they have established such a wonderful safety record over the past several years that only a fraction over one passenger was fatally injured in each 1,000,000,000 passenger miles of flight—making airline safety far greater than driving from office to house in automobile or taxi."