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Recent Cases

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NUISANCES—PUBLIC—INTOXICATING LIQUOR—INJUNCTION—PADLOCKING

State ex rel. *Davenport v. Henry*[1]

Defendants owned and operated a combination cafe, tavern and grocery store, and were licensed to sell non-intoxicating beer.[2] Adjoining the cafe-grocery store were tourist cabins, a filling station and garage. Defendants were charged, among other things, with maintaining a public nuisance in that they sold and permitted intoxicating liquor[3] to be consumed on the premises and to be mixed with so-called non-intoxicating beer and then consumed. In the petition framed by the prosecuting attorney, defendants also were charged with permitting immoral and dangerous persons to frequent the cafe and indulge in cursing, loud and indecent language, and fighting on the premises, to the disturbance of persons living nearby and to the disturbance of persons passing by the property on two state highways. It was alleged that the defendants had offered no restraint to the acts and, on some occasions, even entered into the activities.

The trial court perpetually enjoined the defendants from using the building for the sale or furnishing of either intoxicating liquor or non-intoxicating beer and forever enjoined the defendants from permitting the drunken, immoral, turbulent, lewd and dangerous persons from congregating in the tavern or on the premises and from permitting cursing, profanity, quarreling, fighting or rioting to the annoyance of persons traveling along the highways or to the public generally residing in the community in which the premises were located. The court further ordered the sheriff to padlock the cafe and tavern building for sixty days, and enjoined defendants from using the cafe building as a public house or place of business of any kind or character for sixty days. Defendants appealed to the Springfield Court of Appeals where the judgment was affirmed, two of the three judges concurring in result only.

Missouri Revised Statutes, Section 311.740 (1949), provides that any house or building where intoxicating liquor is sold in violation of the Liquor Control Law[4] "is hereby declared to be a public and common nuisance." *Missouri Revised Statutes,* Section 311.750 (1949), provides that an action to enjoin any nuisance defined in Chapter 311 may be brought by the Attorney General of Missouri or any prosecuting attorney as an action in equity and on the finding by the court that the material allegations of the petition are true, the court shall order that no liquors shall be sold

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1. 270 S.W.2d 88 (Mo. App. 1954).
2. Defined in MO. REV. STAT. § 312.010 (2) (1949) as a beer ". . . having an alcoholic content of more than one-half of one per cent by volume and not exceeding three and two-tenths per cent by weight."
3. Defined in MO. REV. STAT., § 311.020 (1949) as ". . . containing in excess of three and two-tenths per cent of alcohol by weight."
4. MO. REV. STAT., Ch. 311 (1949).

or kept in the house or building, and the court may order that the building shall not be used for a period not to exceed a year.

The prosecuting attorney did not base his petition on these sections, although he did allege unlawful sales of intoxicating liquor on the premises which would bring the case within the terms of Sections 311.740 and 311.750.[5] Instead, the petition was drawn as an equity suit to enjoin a public nuisance.

There seems to be some doubt about Story's statement that "In regard to public nuisances, the jurisdiction of Courts of Equity [to abate a public nuisance on information of the attorney general] seems to be of a very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth."[6] Story cites as authority Eden on *Injunctions,* Chapter 11, p. 224, 225 (1852). Professor Schofield of Northwestern University in an article[7] discusses Eden's interpretation of what the cases stand for. Schofield, at page 20, says: "The fact is, equity jurisdiction to abate and enjoin public nuisance of any kind at the suit of the attorney general is a rather modern subject [late 18th century]."[8] At page 30, Schofield says: ". . . there is no instance in Anglo-American law where a court on an attorney general's bill in equity, not authorized by statute, issued an injunction, either preliminary . . . or final to restrain and prevent a saloon-keeper from opening the saloon again." Schofield believes the legal remedy (*i.e.,* criminal prosecution) is adequate. The case criticized by Schofield is *Stead v. Fortner,*[9] apparently a case where no disorderly conduct took place as distinguished from the present case. The saloon in the *Stead* case merely violated the Illinois Local Option Act of 1907.

The defendants in the present case urged that the trial court had no authority to padlock the building and enjoin the defendants from use of the building for lawful purposes for sixty days, unless the action was brought under Sections 311.740 and 311.750. Defendants further urged that plaintiff failed to prove sales of intoxicating liquor at the trial, but the trial court found that such sales had been made.[10]

State ex rel. *Circuit Attorney v. Uhrig*[11] stated that equity exercised jurisdiction to enjoin public nuisance upon information brought and presecuted on behalf of the public only in three classes of cases:

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5. If defendants had no intoxicating liquor license (the decision does not state whether defendants did or not), they violated Section 311.050. If they had an intoxicating liquor license, the defendants violated Section 311.710 or Section 311.680.

6. 2 STORY, EQUITY JURISPRUDENCE, § 921 (5th ed. 1849).

7. Schofield, *Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances,* 8 ILL. L. REV. 19 (1913).

8. In State *ex rel.* Circuit Attorney v. Uhrig, 14 Mo. App. 413, 414 (1883), Thompson, J. said: "So far as I can ascertain after an extensive search, it has never been exercised, either in England or in this country, except in the three following classes of cases. . . ." These classes of cases are discussed *infra,* at notes 11-12.

9. 255 Ill. 468, 99 N.E. 680 (1912).

10. State *ex rel.* Davenport v. Henry, No. 2131, Circuit Court of Christian County, Mo., Order, Findings, Judment and Decree: ". . . by reason of the sale and consumption of such beer and intoxicants. . . ."

11. 14 Mo. App. 413 (1883), *supra,* note 8.

1. To restrain purprestures[12] of public highways or navigable waters;
2. To restrain threatened nuisances dangerous to the health of a whole community; and
3. To restrain ultra vires acts of corporations injurious to public right.

Accordingly, the court in that case refused to enjoin an unlicensed dram-shop, though it recognized it was a public nuisance. No statute was in existence at the time capable of being used by the court. The present case may be distinguishable because of the disorderly conduct involved here.

There is substantial authority in Missouri, not cited by the court in the principal case, on which to base the injunctive part of the decree. The abatement of disorderly houses[13] as a public nuisance by the state without statutory authority is recognized in several cases.[14] The court could not find a Missouri case in which a building was padlocked without statutory authority and the writer of this note has found none.

The difficulty with decisions which result in padlocking is that lawful activities (operation of the cafe and the selling of non-intoxicating beer pursuant to a license, and other lawful acts) are prohibited. In the case of *State* ex rel *Wallach v. Oehler*,[15] the court recognizes the doctrine that a court of equity is always reluctant to grant a perpetual injunction against the carrying on of a legitimate business. There are undoubtedly good arguments for both sides. Revocation or suspension of licenses often works only as a hand-slap, considered by some liquor retailers as a normal cost of the business. In the principal case, the court found[16] that defendant Francis Henry possessed a license to sell beer which was suspended, and Earl Henry thereupon took out a license; this indicates one difficulty with revocation or suspension measures. Furthermore, unless landlords are penalized by preventing for a period of time any business on the premises, they will be more likely to do nothing to prevent unlawful sales of liquor on their premises. By penalizing the landlords, more effective control will be exercised by them in the future.

It is submitted that the better procedure in cases where padlocking is sought

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12. 25 AM. JUR. 566: ". . . obstruction of an encroachment upon a highway, made without right or proper authorization, constitutes a public nuisance, as well as a purpresture. . . ."

13. Defined in State *ex rel.* Crow v. Canty, 207 Mo. 439, 454, 105 S.W. 1078, 1082 (1907): "A disorderly house is any place of public resort in which unlawful practices are habitually carried on, or which become a rendezvous or place of resort for thieves, drunkards, prostitutes, or other idle, vicious and disorderly persons . . . and a place where liquor is sold under a license in excessive quantities, whereby persons become intoxicated, and where brawls resort therefrom, is a disorderly house, and indictable as a nuisance . . ." (citing 1 WOOD, LAW OF NUISANCE § 38 (3 ed. 1893,

14. State *ex rel.* Thrash v. Lamb, 237 Mo. 437, 141 S.W. 665 (1911) [illegal sale of liquor and disorderly house]; State *ex rel.* Crow v. Canty, 207 Mo. 439, 105 S.W. 1078 (1907) [bull-fight]; State *ex rel.* Wallach v. Oehler, 159 S.W.2d 313 (Mo. App. 1942) [illegal sale of liquor and disorderly house]; State *ex rel.* Lashly v. Kirkwood Leisure Hours Social and Pastime Club, 187 S.W. 819 (Mo. App. 1916) [evidence failed to sustain charges of distorderly conduct, although liquor was illegally sold].

15. 159 S.W.2d 313 (Mo. App. 1942), *supra,* note 14.

16. *Supra,* note 10.

is for prosecuting attorneys to use the statutes,[17] if possible. Where no statute is relied on, the courts should not decree padlocking, but should enjoin only the unlawful acts under penalty of contempt. This would prohibit the offensive conditions but would allow the defendants to carry on that part of their business which is lawful. When Section 311.740 and 311.750 are alleged and proved to have been violated, only then should the courts perpetually enjoin the liquor sales and padlock for periods up to a year as permitted by Section 311.750. Since the violations in this case were principally violations of chapter 312, which provides for revocation or suspension of the non-intoxicating beer license, and fine, imprisonment, or both, the undesirable activities should be remedied under that chapter. Such action would permit the lawful activities of the business to continue.

ALLEN S. PARISH

PARTNERSHIP—PARTNER'S IMMUNITY FROM SUIT

Aboussie v. Aboussie[1]

In the principal case, involving a tort suit by a minor unemancipated child against her father and two other doing business as partners for the negligent act of one of the partners, *not* the plaintiff's father, committed in the course of the partnership business, the Texas Court of Civil Appeals affirmed an order granting a motion for judgment non obstante filed by the father.

Recovery against the partners has been almost universally denied where the tort-feasor-partner was immune from suit because of his status as a parent or spouse of the plaintiff.[2] This has been true both at common law and under the prevailing construction of the Uniform Partnership Act, Section 13, which provides that for injuries caused by a partner acting in the ordinary course of the business, the *partnership* is liable *to the same extent as the* partner so acting or omitting to act.[3] Here the immune partner, plaintiff's father, was not the tort feasor, and while the court did not discuss the liability of the other two partners in approving the judgment non obstante in favor of the father, it is submitted that a sound basis for their individual liability can be established thus: 1) here is a tort committed by a non-immune partner, acting in the course of the partnership business, which is chargeable to the "partnership" under Section 13; 2) for this tort chargeable to the "partnership", a partner is sev-

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17. The members of the court concurring in result only may have recognized that the statutory infraction was substantially alleged in the petition and felt the injunction and padlocking was justified on that basis.

1. 270 S.W.2d 636 (Tex. App. 1954), rehearing denied September, 1954.

2. David v. David, 161 Md. 532, 157 Atl. 755 (1932); Karalis v. Karalis, 4 N.W.2d 632 (Minn. 1942); Belleson v. Skilbeck, 185 Minn. 537, 242 N.W. 1 (1932); Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935).

3. MO. REV. STAT. § 358.130 (1949).

erally liable under Section 15,[4] which provides that all partners are jointly and severally liable for everything chargeable to the "partnership" under Section 13.

The prevailing view in this country is that in the interest of preserving family harmony and/or parental discipline, a minor unemancipated child cannot sue his parent for negligent injury.[5] A few courts have allowed recovery where the parent was protected by liability insurance or was acting in a non-parental capacity at the time of the injury, on the ground that where the reason for the rule of parental immunity does not exist, the rule should not be followed; that where a tort is committed by a parent upon his child while acting in a vocational capacity or where there is insurance covering such tortious acts, reason for parental immunity is removed.[6]

In the *Aboussie* case, we have a situation analogous to the cases where the parent is protected by liability insurance. The non-negligent partners, one of whom is the plaintiff's father, would be entitled to recover from the tort-feasor-partner for liability imposed upon them for his negligent acts,[7] so that the parent would not be out of pocket, and "parental discipline" and "family harmony" would not be undermined.

It is submitted that recovery should have been sustained against the father-partner as well as against the other members of the firm in this case. While the traditional view is that a partnership is not a legal entity, so viewing it in this case would enable the court to avoid the technical rule of parental immunity, the reason for which does not exist in this case.[8]

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4. MO. REV. STAT. § 358.150 (1949).

5. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928); Baker v. Baker, 263 S.W.2d 29 (Mo. 1953), containing an excellent review of the cases.

6. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930) (master and servant relationship between parent and injured child); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939) (carrier-passenger relationship between parent and child); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1923) (carrier-passenger relationship); Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952) (father operating automobile for business purposes). For a good discussion of the reasons underlying the doctrine of parental immunity, their validity, and some proposed solutions to the problem, see McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 1072-1077 (1930). See also PROSSER ON TORTS 907-908 (1941). For a late annotation of cases involving tort actions against a parent see 19 A.L.R.2d 405 at 423 (1951). It should be noted that in the cases cited *supra* this note, the presence of liability insurance was a factor heavily relied upon.

7. United Brokers' Co. v. Dose, 143 Ore. 283, 22 P.2d 204 (1933); Kiffer v. Bienstock, 128 Misc. 451, 218 N.Y. Supp. 526 (2nd Dep't 1926); 68 C.J.S. 538, *Partnership* § 97; see also, Note, 29 COL. L. REV. 66, 73-74 (1929).

8. For some instances where the partnership was treated as having an existence separate and apart form that of the constituent partners, see Dunbar v. Farnum, 196 Atl. 237, 114 A.L.R. 996 (1937) (action for damages for breach of agreement to convey realty not maintainable against the partnership where the contract, though signed by one of the two partners, was not signed in the partnership name); Caswell v. Maplewood Garage, 149 Atl. 746, 73 A.L.R. 433 (N.H. 1930) (in action against the partnership for injuries done to third party, the partnership was not bound by admissions made by a partner outside the scope of the partnership business); Hartigan v. Casualty Co. of America, 227 N.Y. 175, 124 N.E. 789 (1919) (liability insurance policy issued in

TORTS—RES IPSA LOQUITUR AND SKIDDING AUTOMOBILES

Triplett v. Beeler[1]

The plaintiff and three other men drove four cars to an auction sale in another city for the defendants, who operate a motor car business. The defendants arranged to have their agent, defendant Roberts, meet the men and return with them. During the return trip, the car, operated by Roberts, skidded off the highway as it entered a curve, causing the plaintiff severe injury. The plaintiff in his petition charged general negligence and was allowed to submit his case to the jury under the doctrine of *res ipsa loquitur*. The evidence showed that during the return trip Roberts had driven at excessive speeds up to 110 m.p.h. and at the time of the accident was driving between 60 and 85 m.p.h. through a very heavy rain. Evidence was entered by the plaintiff, though denied by the defendant, that immediately prior to the accident, the defendant was looking down, leaning over toward the right, driving with one hand; and while so doing he allowed the car to start to head off the pavement; and to correct the direction of the car, he turned the steering wheel slightly to the left and the car began to slide. The plaintiff received a verdict in the trial court. On appeal to the supreme court the decision was affirmed. The court held that evidence of speed combined with the inattention of the driver was such an occurrence from which the jury might infer that the skidding was due to the driver's negligence and, therefore, justified the submission of the case to the jury under the *res ipsa loquitur* doctrine.

The doctrine of *res ipsa loquitur* asserts that whenever the instrumentalities which produced an injury are shown to have been under the sole control and management of the defendant, and the occurrence resulting in injury was such as in the ordinary course of events does not happen if due care has been exercised by those in charge and the accident is one which the defendant will more likely possess superior knowledge or means of information than the plaintiff as to the true cause of the injury, the fact of the injury itself and the attendant circumstances will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his lack of care.[2]

It is well settled in Missouri that the mere skidding of an automobile is, in and of itself, not such an occurrence that will permit an inference of negligence because skidding as a matter of experience may occur without fault.[3] Where skidding is

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partnership name held not to cover liability of partners for act of agent); De Martini v. Industrial Accident Commission, 202 P.2d 828 (Calif. 1949) (employee-employer relationship held to exist between working partner and the partnership for purposes of a workmen's compensation award).

1. 268 S.W.2d 814 (Mo. 1954).

2. Warner v. Terminal Ry. Ass'n. of St. Louis, 363 Mo. 1082, 257 S.W.2d 75 (1953); McClosky v. Koplar, 329 Mo. 527, 46 S.W.2d 557, 92 A.L.R. 641 (1932).

3. Girrantono v. Kansas City Public Service Co., 363 Mo. 359, 366, 251 S.W.2d 59, 63 (1952); Neely v. Freeze, 240 Mo. App. 1001, 1009, 225 S.W.2d 144, 154 (1949);

shown to have been the proximate or sole cause of the accident, the doctrine of *res ipsa loquitur* has been held inapplicable unless there is evidence of some fact or circumstance connected with the skidding from which negligence may be inferred.[4] It was held that if the facts and circumstances lead us to different conclusions, one conclusion being due care and the other of negligence, both being reasonable conclusions, the rule of *res ipsa loquitur* does not apply.[5] Where the evidence was conflicting, a few years later the court said it was for the jury to decide whether the death of the plaintiff's husband was due to the skidding of the pavement while the driver was exercising the highest degree of care but that from the evidence the jury might conclude that the defendant was driving too fast and ran off the highway at the curve by reason of lack of attention short of the highest degree of care.[6] Unless the evidence shows that the skidding was the sole factual cause of the automobile leaving the highway, the application of the *res ipsa loquitur* doctrine is not excluded.[7]

In practically all situations where the automobile for some reason other than skidding is permitted to leave the highway along which it is being driven and injures

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Quadlander v. Kansas City Public Service Co., 240 Mo. App. 1134, 1138, 224 S.W.2d 396, 399 (1949); Annin v. Jackson, 340 Mo. 331, 339, 100 S.W.2d 872, 876 (1936); Polokoff v. Sanell, 52 S.W.2d 443, 446 (Mo. App. 1932); Story v. People's Motorbus Co. of St. Louis, 327 Mo. 719, 725, 37 S.W.2d 898, 900, 93 A.L.R. 1120 (1931); Heidt v. People's Motorbus Co. of St. Louis, 9 S.W.2d 650, 652, 64 A.L.R. 262 (Mo. App. 1928); Heidt v. People's Motorbus Co. of St. Louis, 219 Mo. 683, 688, 284 S.W. 840, 841 (1926). For an early English case see Wing v. London General Omnibus Co., 2 K.B. (Eng.) 652, 5 A.L.R. 1246 (1909).

4. The court suggests in Heidt v. People's Motorbus Co. of St. Louis, *supra* note 3, that the improper application of the brakes by the bus driver or swerving to avoid hitting another car might be such acts from which would infer that the skidding was caused by negligence. In Story v. People's Motorbus Co. of St. Louis, *supra* note 3, the court said the jury could infer from the facts of speed and icy conditions of the street, that the skidding was due to the driver's negligence.

5. Polokoff v. Sanell, 52 S.W.2d 443, 446-447 (Mo. App. 1932), where the court said that speed alone is not such an act that would infer the skidding was due to negligence. In Quadlander v. Kansas City Public Service Co., 240 Mo. App. 1134, 1138, 224 S.W.2d 396, 399 (1949) the court said assuming the bus was traveling at a negligent speed, it must be shown that the speed of the bus was the specific cause of the skidding and the collision. This is where skidding might have been the result of various causes; such as slick or worn tires, a coating of mud making an unusually slick place in the street, mechanical defect in brake or the improper application of them. See also Bear v. Devore, 176 S.W.2d 862, 864 (Mo. App. 1944) where skidding may be considered, along with other circumstances, in determining the question of negligent speed.

6. Tabler v. Perry, 337 Mo. 154, 165-169, 85 S.W.2d 471, 478-479 (1935), where the court allowed the plaintiff to submit his case to the jury under the *res ipsa loquitur* doctrine where the facts indicated that the defendant might have allowed the car to run off the pavement first and then the car skidded. The court cited with approval 1 BERRY ON AUTOMOBILES 598, § 723 (6th Ed.) which said in part that it has been held that the *res ipsa loquitur* doctrine applies to skidding automobiles and whether the defendant's explanation that a sudden shower caused the car to skid was a sufficient defense (to nullify the inference of negligence created by the doctrine) was a question for the jury.

7. Rodefeld v. St. Louis Public Service Co., 275 S.W.2d 256 (Mo. 1955); Dodson v. Maddox, 359 Mo. 742, 223 S.W.2d 434 (1949).

a guest riding in the car[8] or a person along side of the highway[9] the doctrine of *res ipsa loquitur* has been held to apply.[10] This is because a car being properly driven does not ordinarily leave the road way without negligence. It may be said to be such an occurrence which does not ordinarily happen if the driver had been exercising due care. The jury is allowed to infer negligence from the fact that an injury occurred, providing of course that the cause of the occurrence is not shown and is left in doubt.[11] Facts which would exonerate the defendant are questions for the jury.[12]

Perhaps the distinction that should be made in a case where the automobile just leaves the highway for no apparent reason and in a case where the automobile skids before leaving the highway is that in the former case there is no factor present which is apparently outside the control of the driver which could have caused the automobile to have left the highway except his own negligence; but in the latter case put forth, there is apparently a factor present outside of the driver's control which *might* have caused the accident aside from any negligence of the driver. In one case, the fact that a wheel might have locked did not destroy the presumption of negligence for it was a part of the mechanical condition of the automobile, a factor apparently within the control of the driver. Unless the automobile leaves the highway by reason of factors within the control of the driver, it can not be said that this is an accident which does not ordinarily happen without the driver being negligent. Since an automobile may skid by reason of factors totally outside of the driver's control, negligence cannot be presumed from the fact of injury but must be proven specifically.[13] When an automobile leaves the highway by reason of factors apparently outside the control of the driver, he can not be said to have been in sole control and management of the thing which produced the injury.[14] However, even though

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8. Tabler v. Perry, 337 Mo. 154, 165, 85 S.W.2d 471, 477 (1935); Vesper v. Ashton, 233 Mo. App. 204, 208, 118 S.W.2d 84, 87 (1938).

9. Harke v. Haase, 335 Mo. 1004, 1108-1109, 75 S.W.2d 1001, 1003 (1934).

10. Lindsey v. Williams, 260 S.W.2d 472 (Mo. 1953). Where the car left the highway and collided with a tree injuring a guest passenger, the doctrine of *res ipsa loquitur* is applicable. The court cited 15-16 HUDDY'S ENCYCLOPEDIA OF AUTOMOBILE LAW 280, § 157 (9th Ed. 1931): "The doctrine of *res ipsa loquitur* applies where an automobile runs wild, overturns, or runs off the roadway and strikes a person on the sidewalk, or collides with a tree, with a pole, or with a building."

11. Cases cited note 19, *infra*.

12. Mackler v. Barnert, 49 S.W.2d 244, 245-246, 93 A.L.R. 1106 (Mo. App. 1932). The court said the extraordinary performance of the automobile criscrossing the highway was sufficient to give rise to a presumption of negligence. Whether a defect in the steering apparatus or a locked wheel would exculpate the defendant was a question for the jury to decide.

13. Heidt v. People's Motor Bus Co., 219 Mo. App. 683, 688, 284 S.W. 840, 841 (1926).

14. Probably the best illustration of this rule is where two private motor vehicles collide and a guest attempts to submit his case to the jury under the doctrine of *res ipsa loquitur*. The driver can not be in sole control and management of the instruments producing the injury since it took the collision of both cars to obtain this result. No inference of the driver's negligence is allowed to be drawn since the other driver might have been at fault. The elements of *res ipsa* are lacking. State *ex rel* Brancato v. Trimble, 322 Mo. 318, 18 S.W.2d 4, 5 (1929). However, though the same reasoning

all of the factors contributing to the cause of the injury are apparently within the control of the driver, the plaintiff will not be entitled to an instruction on general negligence if he has himself pleaded allegations[15] of or introduced evidence[16] of

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would apply where a motor bus and a private truck collided, the supreme court said that such facts would not preclude a passenger from recovering from the public carrier under the *res ipsa* rule. Hill v. St. Louis Public Service Co., 359 Mo. 220, 227, 221 S.W.2d 130, 134 (1949). Where motor buses collide belonging to the same company, see Venditti v. St. Louis Public Service Co., 226 S.W.2d 599, 360 Mo. 42 (1950). Also Rothweiler v. St. Louis Public Service Co., 361 Mo. 259, 234 S.W.2d 552 (1950) where bus passenger made out a case of general negligence against carrier and specific negligence against a private auto. See also Prosser, *Res Ipsa Loquitur: Collision of Carriers With Other Vehicles*, 30 ILL. L. REV. 980 (1936).

The conflict in the law between the two situations is more than academic but indicates an attitude of the court that should not be overlooked in briefing a *res ipsa loquitur* case. While the court itself in private automobile cases cites cases as authority involving the passenger-carrier relationship and vice versa, Triplett v. Beeler, 268 S.W.2d 814 (Mo. 1954), Quadlander v. Kansas City Pub. Ser. Co., 240 Mo. App. 1134, 224 S.W.2d 396 (1949), and in Venditti v. St. Louis Pub. Ser. Co., *loc. cit.* 360 Mo. *loc. cit.* 47, 263 S.W.2d *loc. cit.* 602 the court states, "The rule originates from the nature of the act and not from the relationship between the parties", it is apparent in other decisions of the court that there is a difference and that difference may be important. Thus, in State *ex rel.* Brancato v. Trimble, *supra*, the court dismisses the plaintiff's contention saying, "Those are passenger and carrier cases." In Hill v. St. Louis Pub. Ser. Co., *supra*, the court dismisses a contention of the defendant saying, "None of the cases cited are passenger-carrier cases."

The distinction to be made in these cases is that the court will accept something less to support a passenger's *res ipsa* case against a carrier than what a guest will need against a private car owner. Therefore in citing cases, if the court ruled in favor of the carrier, the authority and reasoning would apply equally, if not more so, to all other *res ipsa* cases. But the authority will be weak if the ruling of the court was in favor of the passenger, except of course in other passenger-carrier cases.

History provides the best explanation for the conflict. As early as 1809 presumptive negligence was indulged in by the courts against carriers for the reason that the carrier contracted to safely carry the plaintiff, and the injury to the plaintiff raised a presumption that the carrier had been negligent. Yet the doctrine of *res ipsa loquitur* by which negligence could be inferred did not originate until 1865 in England. Though having different reasons for their existence, their similarity was destined to clash as cases of both situations became more prevalent and interchangibly cited. Though today the two theories have been molded together under *res ipsa loquitur*, their conflicting past is likely to persist in one form or another, as pointed out in the above distinctions. For a rather complete analysis of this history see Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1936).

15. Girratono v. Kansas City Pub. Ser. Co. 363 Mo. 359, 366, 251 S.W.2d 59, 63 (1952); Lukitsch v. St. Louis Pub. Ser. Co., 362 Mo. 1071, 1078, 246 S.W.2d 749, 752 (1952) with its concurring and dissenting opinions.

16. Venditti v. St. Louis Pub. Ser. Co., 360 Mo. 42, 47-48, 266 S.W.2d 599, 603 (1950); Appeal of retrial in 362 Mo. 339, 240 S.W.2d 921 (1951): Powell v. St. Joseph Ry., Light, Heat and Power Co., 336 Mo. 1016, 1021, 81 S.W.2d 957, 960 (1935); Grimes v. Red Line Service, 337 Mo. 743, 747, 85 S.W.2d 767, 769 (1935); Harke v. Haase, 335 Mo. 1104, 75 S.W.2d 1001 (1934). Evidence by one of plaintiff's witnesses that snow and ice caused car to skid onto the sidewalk plus evidence that another car sideswiped the defendant's car causing it to go out of control, would not destroy the presumption of negligence of *res ipsa loquitur* since such evidence did not definitely show what specific negligent act caused the accident. In Heidt v. People's Motorbus Co., 219 Mo. App. 683, 686, 284 S.W. 840, 841 (1926), the court said that the plaintiff's evidence showed that the bus hit the curb because it skidded and since the specific thing which caused the accident was shown, there is no inference of negligence.

specific negligence on the part of the defendant. For the reasons that, where the facts in evidence disclose the cause of the accident, nothing can be left to inference;[17] and by introducing specific evidence the plaintiff shows that he has definite information as to just what happened and it can not be said that the defendant has superior knowledge.[18] However, it is to be borne in mind that even though plaintiff's evidence tends to show the specific cause of the accident, the benefit of the *res ipsa loquitur* doctrine will not be lost if by this evidence the precise cause is still left and remains in doubt or is not clearly shown.[19] This is true even when such evidence is sufficient to make out a submissible issue as to specific negligence.[20] Moreover, where the plaintiff introduces evidence of the specific act which caused the injury, thereby showing that the plaintiff's knowledge is seemly equal to that which the defendant possesses, the plaintiff will still be entitled to an instruction on general negligence. While superior knowledge on the part of the defendant is an element which is usually present in a *res ipsa* case, it is not alone a reason for denying the plaintiff the benefit of the doctrine,[21] except in so far as by such knowledge the plaintiff proves specific negligence.[22]

But on retrial the plaintiff testified that she did not *know* whether the bus skidded or not. On appeal, 9 S.W.2d 651, the court held that the plaintiff made out a prima facie case of presumptive negligence under the *res ipsa* rule.

Polokoff v. Sanell, 52 S.W.2d 443, 446 (1932) the plaintiff proved that the efficient and proximate cause of the car leaving the highway was skidding and the *res ipsa* rule was held inapplicable.

17. Semler v. Kansas City Pub. Ser. Co., 355 Mo. 388, 392, 196 S.W.2d 197, 199 (1946).

18. Berry v. Kansas City Pub. Ser. Co., 343 Mo. 474, 484, 121 S.W.2d 825, 830 (1938); Semler v. Kansas City Pub. Ser. Co., *supra* note 17; Venditti v. St. Louis Pub. Ser. Co., 360 Mo. 42, 46, 226 S.W.2d 599, 601 (1950); *Ibid* at 46, 226 S.W.2d at 602, holding that the plaintiff should in good faith present all evidence reasonably within his power.

19. Quadlander v. Kansas City Public Ser. Co., 240 Mo. App. 1134, 1139, 224 S.W.2d 396, 399 (1949); Belding v. St. Louis Public Ser. Co., 215 S.W.2d 506, 510 (Mo. App. 1948); Conduitt v. Trenton Gas & Electric Co., 326 Mo. 133, 143, 31 S.W.2d 21, 25 (1930).

20. "The pleading and evidence may be such that a cause may be submitted on either general or specific negligence at plaintiff's election.", as long as the precise cause is not definitely shown. Williams v. St. Louis Pub. Ser. Co., 363 Mo. 625, 633, 253 S.W.2d 97, 101-102 (1952); followed in White v. St. Louis Pub Ser. Co., 259 S.W.2d 795, 799 (Mo. 1953). These two cases disapprove of dictum in prior cases, that specific negligence is shown and *res ipsa* is inapplicable if the plaintiff has entered sufficient evidence to make out a submissible issue on specific negligence, set out in Williams v. St. Louis Pub. Ser. Co., 245 S.W.2d 659, 662 (Mo. App. 1952); Venditti v. St. Louis Public Ser. Co., 360 Mo. 42, 48, 226 S.W.2d 599, 602-603 (1950); Hill v. St. Louis Pub Ser. Co., 359 Mo. 220, 225, 221 S.W.2d 130, 133 (1949).

21. In Berry v. Kansas City Pub. Ser. Co., 343 Mo. 474, 484, 121 S.W.2d 825, 830 (1938), the court said, "When a plaintiff *knows* the cause of the accident and *shows* that cause to the jury," *res ipsa loquitur* is not applicable, and thus indicating that something more than mere knowledge is required. *(italics mine)* Warner v. Terminal Ry Ass'n. of St. Louis, 363 Mo. 1082, 257 S.W.2d 75 (1953) discussed by Dean McCleary in 19 Mo. L. REV. 361 (1954) indicates the declining importance of superior knowledge on the part of the defendant, as an element necessary to support a *res ipsa* case.

22. It should be borne well in mind that even though a plaintiff recovers in the trial court in a *res ipsa* situation, many such cases *can be* and *are* reversed on appeal because the petition was not general enough but contained specific allegations of

The reason for the above distinctions is that the elements to support the *res ipsa loquitur* doctrine must be present. Whenever one of these elements is lacking the defendant can not be presumed to have been negligent and the jury is not allowed to infer from any of the facts that the defendant was guilty of negligence. The plaintiff must submit his case to the jury on the grounds of specific negligence and the jury will determine if the plaintiff proved such negligence. In the principal case there were other acts or omissions or combinations thereof which created a strong inference that this particular skidding was a result of the driver's lack of care and caution in driving and therefore a factor apparently within the control of the driver.

The defendant contended that the plaintiff's evidence showed that the proximate cause of the accident was the skidding of the automobile. Since this is a factor apparently outside the driver's control, negligence could not be presumed because the driver would not have been in sole control and management of the thing causing the injury. But as suggested by prior cases,[23] the plaintiff entered evidence that the skidding was not the sole cause of the accident, but merely a link in the chain of events resulting from the natural and probable consequences of some prior negligence of the defendant. In view of such circumstances, the court said, ". . . a jury may well have found that speed alone may not have caused the skidding; that speed

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negligence; though the petition was general, the plaintiff's evidence showed specific negligence; or as a result of the pleadings or evidence showing specific negligence, an instruction on general negligence was thereby in error. For a case briefly covering this whole problem see Girratono v. Kansas City Pub. Ser. Co., 363 Mo. 359, 251 S.W.2d 59 (1952).

The reasons for the rules on specific negligence in res ipsa cases: Where the plaintiff pleads specific negligence and his proof fails, he cannot rely on *res ipsa* and submit an instruction to the jury on general negligence, even though *res ipsa* might otherwise apply, because it is unfair to the defendant who came into court prepared to defend the specific allegation and unprepared to bear the burden of going forward with the evidence under *res ipsa*. Sanders v. City of Carthage, 330 Mo. 844, 850, 51 S.W.2d 529, 531 (1932); Roscoe v. Metropolitan St. Ry., 202 Mo. 576, 588, 101 S.W. 32, 34 (1907). But if the plaintiff pleads specific negligence, he may amend his petition before he has committed himself to one theory, to a general negligence theory. Conduitt v. Trenton Gas & Electric Co., 326 Mo. 133, 142, 31 S.W. 2d 21, 24 (1930). Where the plaintiff pleads general negligence and his evidence shows specific negligence, he abandons his theory of submission and must give instructions on specific negligence because the court will not permit the plaintiff to state that his injury happened in a certain way and then allow the jury to speculate on whether it was caused in some other manner. Elder v. Phillip, 252 S.W.2d 656, 658 (Mo. App. 1952). Where the petition contains both specific and general allegations, the specific allegations rule the case. Holler v. St. Louis Pub. Ser. Co., 199 S.W. 2d 7, 10 (Mo. App. 1947). However, here the defendant has sufficient warning on what he will be expected to defend and the plaintiff should not be penalized for being as specific as he can, so long as it is clear he is not exclusively committed himself to one theory of submission. Prosser, *Res Ipsa Loquitur in California,* 37 CAL. L. REV. 183, 215 (1949).

Some cases are reversed because in explaining *res ipsa loquitur* in the instruction to the jury, the instruction infers that the burden of proof was on the defendant to show that he was free from negligence rather than merely placing on the defendant the burden of going forward with the evidence. A complete discussion of the burden of proof in *res ipsa loquitur* cases in Missouri is found in McClosky v. Koplar, 329 Mo. 527, 46 S.W.2d 557, 92 A.L.R. 641 (1932).

23. Triplett v. Beeler, 268 S.W. 814, 817 (Mo. 1954).

combined with inattention may have been the cause."[24] The court then said that this case fell within the rule that even though the plaintiff's evidence tends to show the specific cause of the accident, the benefit of the *res ipsa loquitur* doctrine will not be lost if by the evidence the precise cause is left and remains in doubt or is not clearly shown.[25]

It should be borne in mind that Section 304.010, *Missouri Revised Statutes* (1949), requires the driver of a motor vehicle to exercise the highest degree of care in its operation. Under such a standard it should be easier to utilize the advantage of the submission of an instruction on general negligence, permitted by the doctrine of *res ipsa loquitur,* in automobile litigation, since the occurrence from which the inference of negligence is allowed to be drawn necessarily would not have to indicate as much carelessness by the defendant as in other areas of *res ipsa* litigation where ordinary and reasonable care is the standard.

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24. *Ibid.*
25. *Ibid.* at 818.