22.00

BURDEN OF PROOF--*RES IPSA LOQUITUR*

22.01 ***Res Ipsa Loquitur*--**Burden Of Proof--No Contributory Negligence

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First: That [the plaintiff was injured] [or] [the plaintiff's property was damaged.]

Second: That the [injury [damage] was received from a [name of instrumentality, e.g., a folding chair] which [was] [had been] under the defendant's [control] [management].

Third: That in the normal course of events, the [injury] [damage] would not have occurred if the defendant had used ordinary care while the [instrumentality] was under his [control] [management].

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the [instrumentality] while it was under his control or management.

If you do draw such an inference, and if you further find that the plaintiff's injury was proximately caused by that negligence, your verdict shall be for the plaintiff under this Count. On the other hand, if you find that any of these propositions has not been proved, or if you find that the defendant used ordinary care for the safety of the plaintiff in his [control] [management] of the [instrumentality], or if you find that the defendant's negligence, if any, was not a proximate cause of the plaintiff's [injury] [damages], then your verdict shall be for the defendant under this Count.

Notes on Use

"Highest degree of care consistent with the type of vehicle used and the practical operation of its business as common carrier by (rail)" rather than "ordinary care" should be used when the case is one involving a common carrier. *See* IPI 100.02.

Fill in the blanks with the name of the instrumentality under the defendant's management.

Use "had been" in the second element if the instrumentality was not under the defendant's control at the time of the injury.

In professional negligence cases, use IPI 105.09.

Comment

The elements now necessary to establish a *res ipsa loquitur* case are:

1. The result must be caused by an agency or instrumentality which was within the defendant's control or management at the time of the injury or when the negligence, if any, occurred.

2. The result must be one which normally does not occur without negligence in the control or management of the agency or instrumentality.

The former requirement of proving the plaintiff's due care has been eliminated with the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981); *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8, 102 Ill.Dec. 386 (1986); *Daniels v. Standard Oil Realty Corp.*, 145 Ill.App.3d 363, 495 N.E.2d 1019, 99 Ill.Dec. 284 (1st Dist.1986); *Mileur v. Briggerman*, 110 Ill.App.3d 721, 442 N.E.2d 1356, 66 Ill.Dec. 443 (5th Dist.1982).

The agency or instrumentality which causes the injury need not be in the control or management of the defendant at the time the injury occurs. It is sufficient if the instrumentality has been in the control of the defendant at a time prior to the injury and there is insufficient evidence of an intervening cause to explain the occurrence since the instrumentality left the defendant's control. *Cobb v. Marshall Field & Co.*, 22 Ill.App.2d 143, 152; 159 N.E.2d 520, 524 (1st Dist.1959).

The element "Second" uses the terms "control" and "management" rather than "exclusive control." The Illinois Supreme Court recognizes that it is not always necessary that the instrumentality have been in the "exclusive" control of the defendant at the relevant time. *Lynch v. Precision Mach. Shop, Ltd*., 93 Ill.2d 266, 443 N.E.2d 569, 66 Ill.Dec. 643 (1982). The standard of control is a flexible one--sufficient control, under the facts of each case, to infer that it was defendant who was responsible for the negligence, if any, that caused the injury. *Douglas v. Board of Education*, 127 Ill.App.3d 79, 468 N.E.2d 473, 82 Ill.Dec. 211 (1st Dist.1984). It is not necessary that the defendant have had actual physical control if the defendant at all relevant times had a duty to maintain or supervise the instrumentality in question. Lynch, *supra*; *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill.2d 446, 207 N.E.2d 305 (1965).

Whether the maxim, *res ipsa loquitur*, may be applied in a given case is a question of law, but whether the presumption arising when the maxim has been applied has been overcome by proof is a question of fact. *McCleod v. Nel-Co Corp.*, 350 Ill.App. 216, 112 N.E.2d 501 (2d Dist.1953); *Roberts v. Economy Cabs*, 285 Ill.App. 424, 2 N.E.2d 128 (4th Dist.1936).

The presumption of negligence is not a true presumption. It is an instructed inference of fact and is circumstantial evidence to be considered by the jury. It does not vanish when defendant introduces evidence of his due care in managing the injuring instrumentality, but remains in the case. The jury must weigh the circumstantial evidence of the plaintiff against the direct evidence of the defendant. *Cobb v. Marshall Field & Co.*, 22 Ill.App.2d 143, 152; 159 N.E.2d 520, 524 (1st Dist.1959); *Bornstein v. Metropolitan Bottling Co.*, 26 N.J. 263, 270; 139 A.2d 404, 409 (1958); *McCleod v. Nel-Co Corp.*, 350 Ill.App. 216, 112 N.E.2d 501 (2d Dist.1953); *McCormick's Handbook of the Law of Evidence*, §§309, 311 (E. Cleary, ed., 3d ed. 1984). In *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8, 102 Ill.Dec. 386 (1986), the Court stated:

> A plaintiff need not conclusively prove all the elements of *res ipsa loquitur* in order to invoke the doctrine. He need only present evidence reasonably showing that elements exist that allow an inference that the occurrence is one that ordinarily does not occur without negligence. [Citation.] The inference that there was negligence does not disappear if the defendant simply presents direct evidence to the contrary, but the defendant's evidence will be considered with all of the other evidence in the case.

The application of the doctrine has been extended to medical malpractice and hospital negligence

cases. *Edgar County Bank & Trust Co. v. Paris Hosp., Inc.*, 57 Ill.2d 298, 312 N.E.2d 259 (1974); *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980); *McMillen v. Carlinville Area Hosp.*, 114 Ill.App.3d 732, 450 N.E.2d 5, 70 Ill.Dec. 792 (4th Dist.1983). In such cases, however, a different form of the instruction is proper. *See* IPI 105.09.

B22.01 ***Res Ipsa Loquitur***--Burden Of Proof--Contributory Negligence

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First: That [the plaintiff was injured] [or] [the plaintiff's property was damaged.]

Second: That the [injury] [damage] was received from a [name of instrumentality, e.g., a folding chair] which [was] [had been] under the defendant's [control] [management].

Third: That in the normal course of events, the [injury] [damage] would not have occurred if the defendant had used ordinary care while the [instrumentality] was under his [control] [management].

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the [instrumentality] while it was under his control or management.

If you do draw such an inference, and if you further find that the plaintiff's injury was proximately caused by that negligence, you must next consider the defendant's claim that the plaintiff was contributorily negligent.

As to that claim, the defendant has the burden of proving each of the following propositions:

A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

B: That the plaintiff's negligence was a proximate cause of [his injury] [and] [the damage to his property].

If you find from your consideration of all the evidence that the defendant has not proved both of the propositions required of him, then your verdict shall be for the plaintiff and you shall not reduce the plaintiff's damages.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of him, and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of him, and if you find that the plaintiff's contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce the plaintiff's damages in the manner stated to you in these instructions.

On the other hand, if you find that any of the propositions required of the plaintiff has not been proved, or if you find that the defendant used ordinary care for the safety of the plaintiff in his [control] [management] of the [instrumentality], or if you find that the defendant's negligence, if any, was not a proximate cause of the plaintiff's [injury] [damages], then your verdict shall be for the defendant under this Count.

Notes on Use

This instruction has been modified to meet the requirements of P.A. 84-1431 effective for causes of action accruing on and after November 25, 1986. *See* 735 ILCS 5/2-1107.1 (1994). For causes of action accruing prior to November 25, 1986, use IPI 22.01 in lieu of this instruction. IPI 22.01 may be used if there is no issue as to the plaintiff's contributory negligence.

Unlike the old version of IPI 22.01, this instruction is now a complete burden of proof instruction. This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should *not* be given when this instruction is used.

"Highest degree of care consistent with the type of vehicle used and the practical operation of its business as common carrier by (rail)" rather than "ordinary care" should be used when the case is one involving a common carrier. *See* IPI 100.02.

Fill in the blanks with the name of the instrumentality under the defendant's management.

Use "had been" in the second element if the instrumentality was not under the defendant's control at the time of the injury.

In professional negligence cases, use IPI 105.09.

Comment

The elements now necessary to establish a *res ipsa loquitur* case are:

1. The result must be caused by an agency or instrumentality which was within the control or management of the defendant at the time of the injury or when the negligence, if any, occurred.

2. The result must be one which normally does not occur without negligence in the control or management of the agency or instrumentality.

The former requirement of proving the plaintiff's due care has been eliminated with the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981); *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8, 102 Ill.Dec. 386 (1986); *Daniels v. Standard Oil Realty Corp.*, 145 Ill.App.3d 363, 495 N.E.2d 1019, 99 Ill.Dec. 284 (1st Dist.1986); *Mileur v. Briggerman*, 110 Ill.App.3d 721, 442 N.E.2d 1356, 66 Ill.Dec. 443 (5th Dist.1982).

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Co., 22 Ill.App.2d 143, 152; 159 N.E.2d 520, 524 (1st Dist.1959).

The element "Second" uses the terms "control" and "management" rather than "exclusive control." The Illinois Supreme Court recognizes that it is not always necessary that the instrumentality have been in the "exclusive" control of the defendant at the relevant time. *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill.2d 266, 443 N.E.2d 569, 66 Ill.Dec. 643 (1982). The standard of control is a flexible one--sufficient control, under the facts of each case, to infer that it was defendant who was responsible for the negligence, if any, that caused the injury. *Douglas v. Board of Education*, 127 Ill.App.3d 79, 468 N.E.2d 473, 82 Ill.Dec. 211 (1st Dist.1984). It is not necessary that the defendant have had actual physical control if the defendant at all relevant times had a duty to maintain or supervise the instrumentality in question. Lynch, *supra*; *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill.2d 446, 207 N.E.2d 305 (1965).

Whether the maxim, *res ipsa loquitur*, may be applied in a given case is a question of law, but whether the presumption arising when the maxim has been applied has been overcome by proof is a question of fact. *McCleod v. Nel-Co Corp.*, 350 Ill.App. 216, 112 N.E.2d 501 (2d Dist.1953); Roberts v. Economy Cabs, 285 Ill.App. 424, 2 N.E.2d 128 (4th Dist.1936).

The presumption of negligence is not a true presumption. It is an instructed inference of fact and is circumstantial evidence to be considered by the jury. It does not vanish when defendant introduces evidence of his due care in managing the injuring instrumentality, but remains in the case. The jury must weigh the circumstantial evidence of the plaintiff against the direct evidence of the defendant. *Cobb v. Marshall Field & Co.*, 22 Ill.App.2d 143, 152; 159 N.E.2d 520, 524 (1st Dist.1959); *Bornstein v. Metropolitan Bottling Co.*, 26 N.J. 263, 269-270; 139 A.2d 404, 409 (1958); *McCleod v. Nel-Co Corp.*, 350 Ill.App. 216, 112 N.E.2d 501 (2d Dist.1953); McCormick, Evidence, §§342, 344 (3d ed. 1984). In *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8, 102 Ill.Dec. 386 (1986), the Court stated:

> A plaintiff need not conclusively prove all the elements of *res ipsa loquitur* in order to invoke the doctrine. He need only present evidence reasonably showing that elements exist that allow an inference that the occurrence is one that ordinarily does not occur without negligence. [Citation.] The inference that there was negligence does not disappear if the defendant simply presents direct evidence to the contrary, but the defendant's evidence will be considered with all of the other evidence in the case.

The application of the doctrine has been extended to medical malpractice and hospital negligence cases. *Edgar County Bank & Trust Co. v. Paris Hosp., Inc.*, 57 Ill.2d 298, 312 N.E.2d 259 (1974); *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980); *McMillen v. Carlinville Area Hosp.*, 114 Ill.App.3d 732, 450 N.E.2d 5, 70 Ill.Dec. 792 (4th Dist.1983). In such cases, however, a different form of the instruction is proper. *See* IPI 105.09.

22.02 *Res Ipsa Loquitur* and Specific Negligence As Alternative Theories of Recovery

Under our law [a plaintiff] [[plaintiff's name]] may attempt to prove in either of two ways that [a defendant] [[defendant's name]] was negligent. He may prove either what [a defendant] [defendant's name] actually did or did not do, or, on the other hand, he may attempt to prove the following propositions: [[complete this instruction by using IPI B22.01, omitting the first sentence of that instruction.]]

Notes on Use

If the court allows both specific negligence and *res ipsa loquitur* to go to the jury, this instruction should be used in lieu of IPI B22.01.

Comment

"If there is an inference of general negligence and proof of specific negligence, but reasonable men may differ as to the effect of this evidence, it should then be for a jury to determine under which theory, if any, the plaintiff should prevail." *Erckman v. Northern Ill. Gas Co.*, 61 Ill.App.2d 137, 149-150; 210 N.E.2d 42, 47, 48 (2d Dist.1965). *Accord*: *Coffey v. Brodsky*, 165 Ill.App.3d 14, 518 N.E.2d 638, 116 Ill.Dec. 16 (4th Dist.1987); *Smith v. General Paving Co.*, 24 Ill.App.3d 858, 321 N.E.2d 689 (3d Dist.1974); *Freer v. Rowden*, 108 Ill.App.2d 335, 341-342; 247 N.E.2d 635, 638-639 (4th Dist.1969); *Decatur & Macon County Hosp. Ass'n v. Erie City Iron Works*, 75 Ill.App.2d 144, 160; 220 N.E.2d 590, 598 (4th Dist.1966); *Turner v. Wallace*, 71 Ill.App.2d 160, 167-168; 217 N.E.2d 11, 14 (3d Dist.1966).