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Res Ipsa Loquitur: Pleading Acts of Negligence: *Nuclear Corp. of America v. Lang*, 338 F. Supp. 914 (D. Neb. 1972)

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RES IPSA LOQUITUR: PLEADING ACTS OF NEGLIGENCE *Nuclear Corp. of America v. Lang*, 338 F. Supp. 914 (D. Neb. 1972).

The doctrine of res ipsa loquitur has been a source of confusion to the courts since its inception in the famous case of *Byrne v. Boadle*,[1] where a barrel of flour rolled out of a warehouse window and injured a passing pedestrian. From its birth to the present, the doctrine has been riddled with various nuances concerning both its application and effect.[2] Despite a lack of uniformity among the courts with respect to its use,[3] there has been general agreement that proper analysis of the doctrine presents two considerations.[4] First, whether the particular facts and circumstances necessary to invoke res ipsa are present. Second, assuming the doctrine applies, what are its procedural consequences? While most courts agree on the factual situations giving rise to the doctrine, there has been considerable disagreement as to the doctrine's procedural effects.[5]

Nuclear Corp. of America v. Lang[6] raises an issue regarding the procedural effects of res ipsa loquitur in diversity actions. To what extent do the Federal Rules of Civil Procedure supplant the various procedural aspects given the doctrine by the forum state? This note will examine the impact of *Lang* on the effect of pleading specific acts of negligence in diversity actions.

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1. 159 Eng. Rep. 299 (Ex. 1863).
2. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 39-40 (4th ed. 1971).
3. *Id.* § 40 at 228.
4. Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519 (1934); James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179 (1951); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936); *See also* Comment, *Res Ipsa Loquitur—An Analysis of Its Application and Procedural Effects in Nebraska*, 41 NEB. L. REV. 747 (1962).
5. For example, whether the doctrine acts as a presumption or an inference of negligence; whether the doctrine is available where the plaintiff introduces evidence of specific acts of negligence; whether the doctrine is available where the plaintiff has pleaded specific acts of negligence; and the effect of defendant's evidence in rebuttal. For a discussion of the various positions taken by the courts on these issues, see note 4 *supra* and the authorities cited therein.
6. 337 F. Supp. 914 (D. Neb. 1972).

The action in *Lang* was brought for property damage resulting from a collision between plaintiff's truck, driven by one of its employees, and the defendant farmer's black angus heifer. The defendant left his farm unattended for a period of twelve hours prior to the accident. When he returned, he discovered both his heifer, which had been killed, and the plaintiff's truck in his feedlot. The state patrolman who investigated the accident found traces of black hair and hide on the highway. In addition, he found scuff marks from the dead heifer on the shoulder of the road. From these facts the court inferred that the collision had occurred on the highway.[7]

The defendant admitted that he had left one gate open, and had failed to check at least one other gate before he left. Although the gate which had been left open enclosed an area of the farm in which the defendant did not keep cattle, there was testimony by a state patrolman that he had observed animal tracks leading out of this enclosure.

The court noted that the testimony concerning the adequacy of defendant's fences was conflicting. Nevertheless, the court observed that the heifer was not confined at the time of the accident and inferred that either the fences were inadequate, or a gate to where the animals were enclosed was left open, or both.[8] Even though the complaint contained allegations of specific acts of negligence,[9] the judge sitting without a jury held the doctrine of res ipsa loquitur applicable.[10] The opinion was concerned primarily with the doctrine of res ipsa loquitur. However, in its first footnote, the court also stated that the defendant's failure to close the gate which normally did not confine his livestock was negligence in itself. The court reasoned that since there was potential access to this area from either the feedlot, catch pen or pasture, the defendant should have anticipated that cattle may get into this area, and closed the gate prior to his departure.[11]

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7. *Id.* at 917.
8. *Id.* at 919.
9. The specific acts alleged were as follows:

   > (1) In failing to keep his heifer adequately confined or fenced so as to prevent it from wandering upon the public highway. (2) In failing to anticipate that such unconfined animal could collide with a motor vehicle traveling upon the public highway. (3) In permitting the animal to be without proper care and attendance to prevent its escape from confinement, and to wander at will in and about the public highway, thereby endangering the property and person of members of the public lawfully using said highway, particularly the property of the plaintiff.

   Id. at 916.
10. *Id.* at 919-20.
11. *Id.* at 917-18. For a collection of authorities discussing a livestock

The defendant subsequently filed a motion for a new trial on the grounds that the factual situation did not warrant the application of res ipsa loquitur.[12] The court in a memorandum opinion[13] denied the motion and stated that the original opinion actually "predicated liability on two independent and separate rationales"[14] —actionable negligence and the doctrine of res ipsa loquitur. The court in support of its application of the doctrine asserted that pleadings in a federal district court should not be construed with exactness and that once a case proceeds to trial, judgment should be rendered on the evidence.[15] As authority for this proposition, the court relied on Federal Rule of Civil Procedure 15(b), which provides in part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

The Nebraska Supreme Court has specifically stated that the doctrine of res ipsa loquitur is a rule of evidence and not a rule of substantive law.[16] Under *Erie Railroad Co. v. Tompkins*,[17] this characterization would seem to compel federal courts to apply the federal rules to all aspects of the doctrine. Instead, since res ipsa loquitur does have a substantial effect on the outcome of the litigation,[18] federal courts in diversity actions under the authority of

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owner's liability for animals that are loose on public highways, see Annot., 59 A.L.R.2d 1328 (1958).

12. The defendant in addition to attacking the court's application of the doctrine of res ipsa loquitur also asserted that the plaintiff was not the real party in interest.
13. Nuclear Corp. of America v. Lang, Civil No. 03681 (D. Neb. Aug. 21, 1972).
14. *Id.* at 3.
15. *Id.* at 3-4.
16. Benedict v. Eppley Hotel Co., 161 Neb. 280, 283, 73 N.W.2d 228, 230, (1955); Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 925, 62 N.W.2d 127, 129 (1954).
17. 304 U.S. 64 (1938).
18. 2 F. HARPER & F. JAMES, TORTS § 19.5 (1956). The authors explain that the doctrine is a distinct advantage to the plaintiff where the issue of negligence is close:

    > [A] very significant aspect of the doctrine has been in meeting problems of proof, that is, in getting cases to the jury. And since juries incline heavily towards plaintiffs . . . the net practical effect of the doctrine is to shift the substantive burden of loss from unexplained accidents of these types from plaintiffs to defendants.

    Id. at 1081.

Guaranty Trust Co. v. York[19] have applied state law both as to its application[20] and effect.[21] Stated differently, if the doctrine has been applied in a particular jurisdiction only in certain factual situations, or has been treated as creating a presumption rather than an inference of negligence, federal courts have followed that jurisdiction's interpretation of the doctrine.[22]

The court in *Lang* did look to Nebraska law to determine whether the doctrine should be applied given the particular facts and circumstances. An additional, "procedural" aspect of the doctrine was also present: the effect which pleading specific acts of negligence has on the availability of the doctrine. Courts have adopted essentially four different positions regarding the effect of pleading specific acts of negligence: (1) the plaintiff thus waives the right to rely on the doctrine;[23] (2) the plaintiff may rely on the doctrine if the inference supports the specific allegations which were pleaded;[24] (3) the doctrine is available provided the specific allegation is accompanied by a general allegation of negligence;[25] (4) the doctrine is available regardless of the form of pleading.[26]

The Nebraska court follows the first view, or so-called "waiver" rule. The rule was stated in *Mischnick v. Iowa-Nebraska Light & Power Co.*:[27]

> The doctrine of *res ipsa loquitur* proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of *res ipsa loquitur* cannot be applied.[28]

Adherence to the "waiver" rule in Nebraska indicates that the court, in reality, treats the application of res ipsa loquitur as a sep-

19. 326 U.S. 99 (1945). *See* note 31 *infra* and accompanying text.
20. Simmons v. City Stores Co., 412 F.2d 897 (5th Cir. 1969); United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964); F.W. Martin & Co. v. Cobb, 110 F.2d 159 (8th Cir. 1940); 1A J. MOORE, FEDERAL PRACTICE ¶ 0.315 at 3514 (1959).
21. Skelly Oil Co. v. Holloway, 171 F.2d 670 (8th Cir. 1949); Mitchell v. Swift & Co., 151 F.2d 770 (1st Cir. 1946); Hagan & Cushing Co. v. Washington Water Power Co., 99 F.2d 614 (9th Cir. 1938).
22. 1A J. MOORE, FEDERAL PRACTICE ¶ 0.315 at 3514 (1959).
23. Kerby v. Chicago Motor Coach Co., 28 Ill. App. 2d 259, 171 N.E.2d 412 (1960); Sankey v. Williamsen, 180 Neb. 714, 144 N.W.2d 429 (1966).
24. Vogreg v. Shephard Ambulance Co., 47 Wash. 2d 659, 289 P.2d 350 (1955).
25. Sherman v. Hartman, 137 Cal. App. 2d 589, 290 P.2d 894 (1955).
26. Johnson v. Greenfield, 210 Ark. 985, 198 S.W.2d 403 (1946); Briganti v. Connecticut Co., 119 Conn. 316, 175 A. 679 (1934).
27. 125 Neb. 598, 251 N.W. 258 (1933).
28. *Id.* at 602, 251 N.W. at 259.

arate cause of action, inconsistent with pleading and proving specific acts of negligence. If the court actually treated res ipsa as a procedural rule of evidence, pleading it would be unnecessary. Because of this confusion, great care must be taken by the practitioner in order to insure that his "cause of action" is pleaded correctly or the doctrine will later be unavailable.[29] Since the "waiver rule" places the aggrieved party in a dilemma by forcing him to make an early estimate of whether he can prove specific acts of negligence, it has been the subject of criticism by legal commentators.[30]

On the basis of *Erie* federal courts in diversity actions have, in the past, also considered themselves bound by the applicable state rule concerning the effect of pleading specific acts of negligence.[31] The *Erie* doctrine, as interpreted for a time,[32] required federal courts to apply state law where necessary to insure that the outcome of the litigation would be substantially the same as it would have been had the action been tried in a state court. Using this objective as a guideline federal courts were justified in looking to state law to determine the effect pleading specific acts of negligence should have on the availability of the doctrine.

The rule showed its first signs of erosion in *Byrd v. Blue Ridge Rural Electric Cooperative Inc.*,[33] when the Supreme Court announced that "outcome" would no longer be the sole criterion. Instead, the Court introduced a balancing test. Federal interests and policies were to be balanced against those of the states to determine which law to apply.[34]

In *Hanna v. Plumer*,[35] the Court further clarified the judicial effect to be given the federal rules in a diversity action. The court

29. *See* Lund v. Mangelson, 183 Neb. 99, 158 N.W.2d 223 (1968); Weston v. Gold & Co., 167 Neb. 692, 94 N.W.2d 380 (1959).
30. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 40 at 233 (4th ed. 1971); Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 511, 528 (1934); Comment, *Res Ipsa Loquitur—An Analysis of its Application and Procedural Effects in Nebraska*, 41 NEB. L. REV. 747 (1962).
31. Williamson v. Jones & Laughlin Steel Corp., 213 F.2d 246 (6th Cir. 1954); Nichols v. Barton, 201 F.2d 110 (10th Cir. 1953); San Diego Gas & Electric Co. v. United States, 173 F.2d 92 (9th Cir. 1949); Skelly Oil Co. v. Holloway, 171 F.2d 670 (8th Cir. 1948); Mitchell v. Swift & Co., 151 F.2d 770 (5th Cir. 1945).
32. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Woods v. Interstate Realty Corp., 337 U.S. 535 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
33. 356 U.S. 525 (1958).
34. *Id.* at 540.
35. 380 U.S. 460 (1965).

was faced with the question of whether service of process in a diversity action should be made in a manner required by state law or as prescribed by Rule 4(d)(1). The outcome of the litigation at that point depended entirely on which law was applied. The Court reasoned, however, that virtually every procedural rule in some way determines the outcome of the litigation.[36] After concluding that Rule 4(d)(1) passed the requirement of the *Rules Enabling Act*,[37] the Court laid down the following mandate:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[38]

Under *Hanna*, once it has been judicially determined that a federal rule is applicable, it is controlling as long as the rule does not violate the *Rules Enabling Act* or the Constitution. Although no court has specifically[39] so held, it appears that *Hanna* overrules those prior decisions which had applied state law where the procedural effects of res ipsa loquitur were in issue.[40]

In the instant case, the court applied Rule 15(b) without any discussion of Nebraska's "waiver" rule. Although it is impossible to discern the court's rationale, it appears likely that the decision to disregard the Nebraska rule was based upon the mandate of the *Hanna* decision. Admittedly, there may be disagreement on whether Nebraska's "waiver" rule is really "procedural" for choice of law purposes.[41] However, the Court in *Hanna* recognized that federal power also exists to promulgate rules which govern matters falling between the traditional categories of substance and procedure.

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36. *Id.* at 468.
37. 28 U.S.C. § 2072 (1970).
38. 380 U.S. at 471.
39. *But cf.* Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967). In this case the issue before the court was whether the appellant was entitled to a directed verdict because of insufficient proof of defectiveness. The lower court applied state law which allowed the use of res ipsa in proving defectiveness. The court of appeals reversed and held that the test governing the sufficiency of the evidence is a matter of federal law and that if the application of res ipsa loquitur contravenes the federal test, state law is not controlling. The court concluded there was no rational basis from which the jury could infer that the appellee negated the other possible causes of injury. This decision can be distinguished because there was no federal rule in issue.
40. *See* note 20 *supra* and accompanying text.
41. *See* note 29 *supra*.

> [T]he constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.[42]

The obvious import of the *Lang* decision is to declare the "waiver" rule a nullity when a diversity action is tried in a federal district court. The practical effect of the decision is that Nebraska practitioners, in diversity actions, will no longer be bound by the strict rules of pleading required by state law in order to rely on the doctrine of res ipsa loquitur. A broader view of the holding implies that if Rule 15(b) is applicable in spite of the Nebraska rule, then other federal rules of pleading are also controlling. For example, Rule 8[43] of the federal rules would allow the plaintiff to plead both specific acts of negligence and res ipsa loquitur and still not preclude himself from relying on the doctrine at trial.[44]

Whether the facts and circumstances which bring the doctrine into play in the first place are present would still be a matter of state law.[45] Although this seems inconsistent with the characterization of the doctrine as a rule of evidence, commentators and courts alike have made a distinction between the factual elements necessary to invoke res ipsa and its procedural effects once applied. If it is merely a method of circumstantially proving negligence, arguably it should be treated as totally procedural, the same as any other rule of evidence. Nevertheless, since the many nuances surrounding res ipsa have raised it to the level of a cause of action, the factual aspect should remain a question for state law to avoid forum shopping.

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42. 380 U.S. at 472.

43. A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses . . . . A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds . . . .

FED. R. CIV. P. 8(e)(2).

44. *See* Banco Continental v. Curtiss Nat'l Bank, 406 F.2d 510 (5th Cir. 1969).

45. *See* Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 854 (5th Cir. 1967), where the court stated:

> Since this state rule conflicts with the federal test, this court will no longer rely solely on state law to determine the applicability of *res ipsa loquitur*. . . . The factors considered in deciding whether the doctrine applies are still relevant; the only thing that has changed is the quantum of proof necessary to negate the other explanations of the injury.

The court's use of Rule 15(b) in *Lang* is consistent not only with the *Hanna* decision, but also the purpose and scope of the Federal Rules of Civil Procedure. The primary purpose of the rules with respect to modern pleading is to allow as many claims as possible to be heard on the merits rather than unduly restricting the plaintiff with technical rules of pleading.[46] Where a party has been injured and all factors point to defendant's negligence, it seems unjust to restrict the aggrieved party because of the manner in which the cause of action is pleaded. The federal rules provide the flexibility necessary to avoid forcing the plaintiff to jeopardize his right of recovery at such an early stage in the proceeding.

Although the Nebraska court has consistently adhered to the "waiver" rule in pleading res ipsa loquitur, the better reasoned view of the doctrine is that it is merely a method of circumstantially proving negligence and should be available to the plaintiff regardless of the form of pleading. The *Lang* decision is in accord with this analysis.

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46. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 68 (2d ed. 1970).