PLEADING IN RES IPSA LOQUITUR CASES

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In Ohio *res ipsa loquitur* is a rule of evidence, not a rule of substantive law. It "permits the jury, but not the court in a jury trial, to draw an inference of negligence" when (1) the instrumentality causing the injury "is under the exclusive management and control" of the party charged, and (2) an accident occurs "under circumstances where in the ordinary course of events it would not occur when ordinary care is observed."[1] This rule establishes an evidential inference to be considered by the jury under proper instructions, but it is not controlling on the jury.[2]

A petition in a *res ipsa loquitur* case, like any other petition under the Ohio code, must contain a statement of facts constituting the cause of action in ordinary and concise language.[3] Thus, the petition in a *res ipsa loquitur* case must state facts showing that the instrumentality causing the injury was "under the exclusive management and control" of the defendant sought to be charged and that the accident occurred "under circumstances where in the ordinary course of events it would not occur when ordinary care is observed."[4] The mere recitation of such statements in the petition would appear to violate the established rule that it is the pleader's positive duty to avoid pleading mere legal conclusions.[5]

Of course the evidence adduced must support the facts pleaded. Since *res ipsa loquitur* is a rule of evidence, and not a rule of pleading,[6] it may be invoked when the proven facts warrant. Conversely, regardless of the allegations of the petition, the rule will not be applied if there is a failure to prove any of the requisite facts.

Identification of the Instrumentality Causing the Injury

It is essential that the instrumentality causing the injury be identified. This is a necessary antecedent of the requirement that such

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1 Sweeney v. Erving, 228 U.S. 233 (1913); Schafer v. Wells, 171 Ohio St. 506, 172 N.E.2d 708 (1961); Fink v. New York Cent. R.R. Co., 144 Ohio St. 1, 56 N.E.2d 456 (1944); Glowacki v. North Western Ohio Ry. & Power Co., 116 Ohio St. 451, 157 N.E. 21 (1927); St. Mary's Gas Co. v. Brodbeck, 114 Ohio St. 423, 151 N.E. 323 (1926).

2 Glowacki v. North Western Ohio Ry. & Power Co., *supra* note 1.

3 Ohio Rev. Code § 2309.04 (1953), Dansby v. Dansby, 165 Ohio St. 112, 133 N.E.2d 358 (1956).

4 *Supra* note 1.

5 Winzeler v. Knox, 109 Ohio St. 503, 143 N.E. 24 (1924).

6 Glowacki v. North Western Ohio Ry. & Power Co., *supra* note 1; Beeler v. Ponting, 116 Ohio St. 432, 156 N.E. 599 (1927).

instrumentality be shown to be under the exclusive management and control of the defendant.

For example, in a case in which the plaintiff merely alleged that he drove his truck to the defendant's plant to purchase ice, and while there was violently struck and crushed due to the defendant's negligence, a demurrer to the petition was sustained on the ground that the petition failed to state a cause of action.[7] It was held that *res ipsa loquitur* did not apply because the pleader did not identify the instrumentality that caused the injury.[8]

A similar case involved an alleged insect bite, but the insect or bug was not identified. In sustaining a directed verdict for the defendant hotel keeper, the court held that general averments of the petition would not control over specific statements of fact in the opening statement of the case.[9]

The "instrumentality" is not necessarily an object. It may be the force exerted on an object as, for example, in a revolving door case wherein the court held that the door did not operate itself but depended on force applied by the person or persons using it.[10] That case also illustrates the point that there is a close relationship between the identification of the instrumentality and the determination of control over it.

Exclusive Management and Control

Perhaps the most important of the factual elements warranting application of the rule of *res ipsa loquitur* is the requirement that the instrumentality causing the injury be under the "exclusive management and control" of the defendant sought to be charged. This rule has been reaffirmed within the past year by the Ohio Supreme Court.[11]

Yet the court has also stated that this question is usually relatively simple to determine, and the difficulty in applying the doctrine arises in deciding whether "the accident occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed."[12]

The latest consideration of the control rule in *Schafer v. Wells*[13] contains some interesting discussion of the necessity of showing "ex-

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7 Ohio Rev. Code § 2309.08 (1953).

8 Hoffman v. City Ice & Fuel Co., 69 Ohio L. Abs. 315, 125 N.E.2d 216 (1951).

9 Cunningham v. Neil House Hotel Co., 33 Ohio L. Abs. 157, 33 N.E.2d 859 (1940).

10 Farina v. First Nat'l Bank, 72 Ohio App. 102, 51 N.E.2d 36 (1943).

11 Schafer v. Wells, *supra* note 1, approving and following Soltz v. Colony Recreation Center, 151 Ohio St. 503, 87 N.E.2d 167 (1949); Renneckar v. Canton Terminal Restaurant, Inc., 148 Ohio St. 119, 73 N.E.2d 498 (1947).

12 Soltz v. Colony Recreation Center, *supra* note 11.

13 *Supra* note 1.

clusive" control of the instrumentality. In this four-to-three decision, Judge Herbert, speaking for the majority, refers to the language of Judge Stewart in the *Koktavy* case,[14] as follows:

> We conclude, therefore, that *ordinarily* there must be custody, control and management of an injury-causing instrumentality by a party in order to render applicable against him the rule of *res ipsa loquitur*, and that before the rule may be applicable against a party out of such custody, control and management, there must be a complete showing that the instrumentality could not have been mishandled or tampered with between the time of its leaving the custody of the one sought to be charged and the time of the accident causing the injury. (Emphasis of "ordinarily" added.)

Judge Herbert then expresses the view that by the use of the word "ordinarily" in the syllabus of the *Koktavy* case "the court did not require continuing 'control and management' right up to the moment of injury but rather that there be a complete showing of no intervening 'control and management' between that of the defendant and the occasion of the injury." That statement appears to be in accord with the comment of Judge Zimmerman in his dissenting opinion in *Koktavy*[15] that "it should suffice to show that the defendant had control of the offending instrumentality at the time of the negligent act claimed, and a showing of control at the time of the injury is unnecessary."

However, in Judge Taft's dissenting opinion in *Schafer* (in which Judge Zimmerman joined) it is contended that the opinion and decision of the majority completely disregard the limitations of paragraph two of the syllabus in *Renneckar*[16] and the unanimous decision of the court in *Soltz*.[17] The limitation in *Rennecker* requires proof (and presumably pleading) of negligence when the occurrence "could have been due as well to the intervention of an outside force or of a third person as to any negligence of the defendant." The unanimous decision in the *Soltz* case is grounded primarily on the point next to be discussed in this paper, namely, that in the ordinary course of events the accident would not have occurred if ordinary care had been observed.

Furthermore, in his separate dissent in *Schafer*,[18] Judge Zimmerman expressed the view that the fire and accompanying loss could "reasonably be ascribed to causes other than the claimed negligence of the defendant."

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14 Koktavy v. United Fireworks Mfg. Co., 160 Ohio St. 461, 117 N.E.2d 16 (1954).

15 *Id.* at 473.

16 *Supra* note 11.

17 *Supra* note 11.

18 Schafer v. Wells, *supra* note 1, at 516.

Conceding that the conflicting evidence in *Schafer* made it a difficult case for the establishment of express rules of law, its conclusion is generally in accord with the view taken in other jurisdictions on the issue of control.[19] However, it does appear to apply the rule of exclusive control somewhat less strictly than have some of the earlier cases.[20]

ACCIDENT WOULD NOT HAVE OCCURRED HAD CARE BEEN OBSERVED

The last of the factual elements warranting the application of *res ipsa loquitur* is that "the accident occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed."[21] According to Judge Taft in the *Soltz* case,[22] "the court must be warranted in taking judicial notice of the fact that the accident does not happen in the ordinary course of events unless there is negligence."

That reference to judicial notice was taken from the *Holzenkamp* case,[23] wherein Judge Summers stated that "the court was warranted in taking judicial notice of the fact, as it did, that such a thing as the breaking of the trolley pole and the falling of the trolley with a portion of the pole does not happen in the ordinary course of events unless there was some negligence either in its construction or in the management of it."

Of course, the very general rule is that "matters of which judicial notice is taken need not be stated in a pleading."[24] However, there is a question as to how far this rule can be extended in a *res ipsa loquitur* case. For example, in *Holzenkamp*, the plaintiff averred that just as she was about to step upon a street car "the trolleys fell and struck and injured her by reason of the negligence of the defendant in that the trolleys were defective and were improperly handled."[25] The court held that upon proof of those facts "a presumption of negligence" arose.[26] Strictly speaking, the matters of which judicial notice was

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19 Note, "Torts—Res Ipsa Loquitur—Control of the Instrumentality," 30 Cin. L. Rev. 543, 546 (1961).

20 *E.g.*, Fink v. New York Cent. R.R. Co., *supra* note 1; Worland v. Rothstein, 141 Ohio St. 501, 49 N.E.2d 165 (1943); Glowacki v. North Western Ohio Ry. & Power Co., *supra* note 1; Cincinnati Traction Co. v. Holzenkamp, 74 Ohio St. 379, 78 N.E. 529 (1906).

21 Schafer v. Wells, *supra* note 1; Soltz v. Colony Recreation Center, *supra* note 11.

22 *Supra* note 11, at 511.

23 *Supra* note 20, at 389.

24 43 Ohio Jur. 2d § 11, 24-25 (1960).

25 *Supra* note 20, at 379-380.

26 See Glowacki v. North Western Ohio Ry. & Power Co., *supra* note 1 at 459, wherein Marshall, C. J. states: "It will be found that the more carefully considered opinions of this and other courts have avoided treating the rule as a presumption."

taken were not stated in the pleading, but the petition did charge specific negligence of the defendant, albeit in somewhat general terms.

In *Soltz*[27] it was alleged that a building was destroyed by fire and that "this damage was caused by the negligence of the defendants." The court held that the court would not be "warranted in taking judicial notice of the fact that this fire would not have occurred in the ordinary course of events unless there was some negligence."[28] That case was not determined on a question of pleading, but it indicates that in such a fact situation there should be allegations and proof of facts to show that the accident was, at least, more probably the result of the defendant's negligence than of some other cause.

In *Glowacki*[29] it was alleged that the defendant was negligent in that it failed "to provide against the separation of said [live] wire over, and its precipitation upon said public highway." Although a judgment for the plaintiff was reversed for error in the trial court's charge to the jury, the significant point in the opinion, as respects this discussion, is the statement of Chief Justice Marshall[30] that "the doctrine of *res ipsa loquitur* should not be applied, where, by the pleadings and the evidence of the defendant, another cause equally efficient is shown."

When a truck was driven off the street, across the sidewalk, and into the corner of a building, the court ruled that there was only one cause of the damage to the building, namely, the collision of the truck with the building.[31] In the opinion, Chief Justice Marshall stated:

> The truck was the instrumentality which caused the injury. It was under the exclusive management and control of the defendant, and the accident occurred under circumstances where, in the ordinary course of events, it would not have occurred if ordinary care had been observed.

In a later case, involving similar facts,[32] Judge Zimmerman observed that when an automobile unexplainedly left the highway and plunged down an embankment, this "was certainly not a commonplace or usual occurrence and presented circumstances sufficient to permit an inference of negligence." The inference, however, is no more than an inference of negligence; it would not amount to an inference of

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27 *Supra* note 11, at 504.

28 *Id.* at 512.

29 *Supra* note 1, at 452.

30 Glowacki v. Northwestern Ohio Ry. & Power Co., *supra* note 1, at 463-464.

31 Scovanner v. Toelke, 119 Ohio St. 256, 163 N.E. 493 (1928).

32 Weller v. Worstall, 129 Ohio St. 596, 197 N.E. 410 (1935). See also Manker v. Shaffer, 96 Ohio App. 350, 121 N.E.2d 908 (1953), *aff'd* 161 Ohio St. 285, 118 N.E.2d 641 (1954).

willful or wanton misconduct.[33] If the plaintiff seeks a recovery on such grounds, it is incumbent on him to plead and prove the facts.[34]

Doctrine Need Not Be Pleaded

The rule is well established that it is not necessary to plead the doctrine of *res ipsa loquitur*.[35] Where the facts and circumstances developed by the evidence make the rule applicable, it is the duty of the court to charge the jury thereon.[36] It is important to note, however, that the omission of the court so to charge is not error in the absence of a request by counsel on the subject.[37]

Despite the above-stated rule, the fact remains that the petition must allege sufficient facts so that evidence may be admitted on the factual elements warranting the application of *res ipsa loquitur*. Having done so, the plaintiff has performed his task. The defendant has the duty to explain the occurrence and his answer should be sufficiently broad to permit him to do this. However, even if the defendant pleads in avoidance of his liability, it is still his responsibility to adduce evidence on the subject, if his answer is traversed by a reply.[38]

Pleading Specific Acts of Negligence

Until the decision in *Fink v. New York Central Rd. Co.*,[39] there was no clear expression in the Ohio cases as to the effect of pleading specific acts of negligence in the petition. For example, in *Weller v. Worstall*,[40] Judge Zimmerman said of *res ipsa loquitur*: "It is founded on an absence of specific proof of acts or omissions constituting negligence."

In 38 American Jurisprudence it is said:[41]

> The res ipsa loquitur doctrine is based in part upon the theory that the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it, and that the plaintiff has no such knowledge and therefore is compelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence.

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33 Lombardo v. DeShance, 167 Ohio St. 431, 433, 149 N.E. 914 (1958). See also Phillips v. Noble, 50 Cal. 2d 163, 323 P.2d 385 (1960); Harvey v. Clark, 232 Ia. 729, 6 N.W.2d 144 (1942); Schenk v. Gwaltney, 43 Tenn. App. 459, 309 S.W.2d 424 (1957).

34 See also Vecchio v. Vecchio, 131 Ohio St. 59, 1 N.E.2d 624 (1936).

35 Scovanner v. Toelke, *supra* note 31; Beeler v. Ponting, *supra* note 6.

36 Scovanner v. Toelke, *supra* note 31, at 260-261.

37 Beeler v. Ponting, *supra* note 6.

38 Scovanner v. Toelke, *supra* note 31.

39 *Supra* note 1.

40 *Supra* note 32, at 600.

41 38 Am. Jur. 995, § 299 (1941).

The *Fink* case was one in which no specific act of negligence was pleaded. The petition merely alleged that while the plaintiff was performing his duties as a railway mail clerk on the defendants' train, the defendants carelessly and negligently caused or permitted the train to be derailed, whereby plaintiff was injured. The case was tried upon the theory that *res ipsa loquitur* applied. Plaintiff did not prove any specific act of negligence on the part of the defendants.

In the opinion of Judge Bell[42] is found the following statement:

> In some jurisdictions it is held that a plaintiff who relies upon the rule of *res ipsa loquitur* is not permitted to plead specific acts of negligence in his petition. If he does plead any specific acts of negligence he is denied the benefit of the rule. This state has adopted the rule, which is supported by the great weight of authority, that if the allegations of the petition and the proof in support thereof call for the application of the rule it should be applied irrespective of whether the petition contains allegations of specific acts of negligence.

Although that statement is *obiter dictum*, it has been cited with approval by the United States Court of Appeals for the Sixth Circuit[43] and by at least one Ohio appellate court.[44] Conversely, several Ohio courts of appeals have held (subsequent to the announcement of the *Fink* decision) that the rule of *res ipsa loquitur* does not apply where the plaintiff, in his petition, charges the defendant with specific acts of negligence.[45]

Some of those decisions cite and rely upon *Winslow v. Ohio Bus Line Co.*,[46] wherein the first paragraph of the syllabus holds:

> The doctrine of *res ipsa loquitur* is not applicable in a case where the petition and proof disclose that plaintiff had knowledge of the facts and circumstances showing the claimed negligence of defendant.

It should be noted that in his opinion in *Winslow*, Judge Turner says:[47]

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42 *Supra* note 1, at 7.

43 Williamson v. Jones & Laughlin Steel Corp., 213 F.2d 246, 249 (6th Cir. 1954).

44 Joyce v. Union Carbide & Carbon Corp., 114 Ohio App. 51, 57 (1961), motion to certify overruled by supreme court, October 4, 1961. See also Manker v. Shaffer, *supra* note 33; Pierce v. Gooding Amusement Co., Inc., 55 Ohio L. Abs. 556, 562, 90 N.E.2d 585.

45 Corriveau v. Defenbach, 56 Ohio L. Abs. 57, 91 N.E.2d 39 (1949), motion to certify overruled by supreme court, January 25, 1950; Kaltenbach v. Cleveland, Columbus & Cincinnati Highway, Inc., 82 Ohio App. 10, 16, 80 N.E.2d 640 (1948); Shadwick v. Hills, 79 Ohio App. 143, 67 N.E.2d 197 (1946), motion to certify overruled by supreme court, December 11, 1946.

46 Winslow v. Ohio Bus Line Co., 148 Ohio St. 101, 73 N.E.2d 504 (1947).

47 *Id.* at 107.

> The doctrine of *res ipsa loquitur* furnishes a bridge by which a *plaintiff*, without knowledge of the cause, reaches over to defendant who knows or should know the cause, for any explanation of the care exercised by the defendant in respect of the matters of which the plaintiff complains.

The Court of Appeals for Hamilton County discussed both the *Fink* case and the *Winslow* case in a recent consideration of the question: "Is it the law of Ohio that the allegation of specific acts of negligence excludes the application of *res ipsa loquitur*?"[48] The court answered the question in the negative but without a very satisfactory reconciliation of the conflicting views. In fact, the real basis for the decision is found in the following paragraph in the opinion of Matthews, P. J.:

> Finally, we are of the opinion that under the allegations of the plaintiff's petition, she was not precluded from relying on the doctrine of *res ipsa loquitur*. She alleged that there was a defective mechanism and that defendant was negligent in operating its bus in that condition, but she did not allege the specific act of negligence in that regard. So far as we know none of the cases holds that such an allegation precludes reliance on the doctrine of *res ipsa loquitur*.

Scarcely more helpful is a recent decision of the Court of Appeals for Lucas County.[49] Judge Deeds, delivering the majority opinion, held that the doctrine of *res ipsa loquitur* was applicable, even though six specific negligent acts and omissions were charged in the petition. Judge Conn concurred in the judgment of reversal. Judge Fess cited the *Winslow* case[50] in support of his view that the doctrine of *res ipsa loquitur* should not be applied. In so doing, Judge Fess was not entirely consistent with his earlier expression, as a common pleas judge,[51] when he stated that under the *obitur dictum* of the *Fink* case it apparently was unnecessary to plead specific acts of negligence in a *res ipsa loquitur* case, but that this holding was contrary to the second syllabus of *Railroad Co. v. Kistler*.[52]

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[48] Rigney v. Cincinnati Street Ry. Co., 99 Ohio App. 105, 131 N.E.2d 413 (1954), motion to certify overruled by supreme court, May 4, 1955.

[49] Hartford Fire Ins. Co. v. Henry J. Spieker Co., 103 Ohio App. 455, 146 N.E.2d 138 (1957), motion to certify overruled by supreme court, May 22, 1957.

[50] *Supra* note 46.

[51] Brown v. Pennsylvania Greyhound Lines, Inc., 29 Ohio Ops. 442 (1944).

[52] In New York, Chicago & St. Louis R.R. Co. v. Kistler, 66 Ohio St. 326, 64 N.E. 130 (1902), the second paragraph of the syllabus holds:

> In an action founded upon negligence, the petition should state the acts of commission or omission which the plaintiff claims to have caused the injury; and that statement being made, it is sufficient to aver that such acts were carelessly or negligently done or omitted.

This case did not involve the doctrine of *res ipsa loquitur*.

It is interesting to note that in an earlier case, decided prior to *Fink*, the Lucas County court expressly held that: "A plaintiff, by pleading that the defendant was negligent in certain particulars, does not thereby waive his right to the application of the doctrine of *res ipsa loquitur*."[53]

The Court of Appeals for Marion County refused to follow the decision of the Franklin County court in the *Shadwick* case[54] and applied *res ipsa loquitur* despite the pleading in the petition of several specific charges of negligence against the defendant.[55] That court expressed the view that the supreme court had established the rule of law on this subject in *Beeler*,[56] *Fink*,[57] and *Winslow*.[58] That the supreme court takes the same position is evidenced by its overruling of motions to certify in at least six cases in which the pleading question was involved,[59] and by its affirmance of the judgment in *Manker v. Shaffer*.[60]

In *Manker*, the same court of appeals that decided *Shadwick*, expressly stated: "The pleading of specific acts of negligence does not necessarily prevent the application of the doctrine of *res ipsa loquitur* in a proper case." In so holding that court followed its earlier decision in *Pierce v. Gooding Amusement Co., Inc.*,[61] wherein Judge Hornbeck classified the statement in *Fink* as *obiter*, but noted that "it seems to be well supported by other adjudications."

In *Manker* there were four specific charges of negligence and one averment which might have been construed as a general allegation of negligence. The court of appeals stated: "Some evidence was presented in support of the specific charges of negligence, but such evidence fell far short of proving negligence on the part of the defendant."

On that state of the record, the supreme court held that the doctrine of *res ipsa loquitur* applied. The syllabus states:

> Where a motor vehicle and the operation thereof are exclusively within the control of the driver, and a paying passenger in such motor vehicle is injured when the vehicle runs off the road,

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53 Benjamin v. Sears, Roebuck & Co., 62 Ohio App. 83, 23 N.E.2d 447 (1939), motion to certify overruled by supreme court, May 24, 1939.

54 *Supra* note 45.

55 Rospert v. Old Fort Mills, Inc., 81 Ohio App. 241, 243-244, 78 N.E.2d 909 (1947), motion to certify overruled by supreme court on November 5, 1947. The court of appeals also denied a motion to certify Rospert as being in conflict with the judgment in Shadwick and, in so doing, cited Fink and Winslow.

56 *Supra* note 36.

57 *Supra* note 1.

58 *Supra* note 46.

59 *Supra* notes 44, 45, 48, 49, and 55.

60 *Supra* note 44.

61 *Supra* note 44.

> *and the accident is unexplained* and is one which is not commonly incident to the operation of a motor vehicle, the occurrence itself raises a permissible inference of negligence on the part of the driver and presents a question for submission to the jury in an action against the driver based on such injury. (Emphasis added.)

Throughout the country there is "a sharp conflict of authority as to whether pleading a specific act of negligence waives the pleader's right to rely upon the doctrine of *res ipsa loquitur*."[62] In a proper case, general allegations of negligence are sufficient to invoke the doctrine of *res ipsa loquitur*, but the confusion arises when the averments of negligence are either specific or a combination of specific and general.[63]

In Ohio, the rule stated by way of *obiter dictum* in *Fink*[64] has received reasonably general acceptance and is probably controlling, although the effect of the *Winslow* decision will continue to raise some doubts until the supreme court makes a positive statement on the subject in a case in which the question is directly presented.

CONCLUSION

The conclusion reached today is fundamentally the same as that expressed in 1929 by Judge Allread sitting with Judges Mauck and Kunkle as members of the Court of Appeals for Hamilton County. In *Union Gas & Electric Co. v. Waldsmith*,[65] Judge Allread said:

> It is further objected in the present case that the plaintiff below did not rely upon the doctrine of *res ipsa loquitur*, but alleged in his petition negligence of the company in the maintenance of its overhead wires, and also that he attempted to prove such negligence on the trial. This, it is claimed, is a waiver of the doctrine.
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> In the present case, however, the plaintiff, Waldsmith, evidently did not know that the doctrine of *res ipsa loquitur* would apply, and he took the precaution of offering the evidence at hand tending to prove the company's negligence in the maintenance of its wires.

After pointing out the then-existing conflict of decisions of other states, Judge Allread noted that the majority favored the rule that by alleging specific negligence and attempting to prove it, the pleader did not waive the doctrine of *res ipsa loquitur*. He concluded:

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62 38 Am. Jur. *Negligence* § 305 (1941).

63 Annot., 79 A.L.R.2d 6, 44-52 (1961); 160 A.L.R. 1450 (1946); 79 A.L.R. 48 (1932). *Cf.*, Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944), wherein the plaintiff alleged specific acts of negligence and also stated that he would not be confined thereto but would also rely "on the general allegations of explosion and defectiveness and overcharging of said bottle."

64 *Supra* note 1.

65 Union Gas & Electric Co. v. Waldsmith, 31 Ohio App. 118, 122, 166 N.E. 588 (1929).

> This is the broader and more liberal rule. It prevents plaintiff, in a case where the doctrine of *res ipsa loquitur* would ordinarily apply, from being compelled, at his peril, to adopt one or the other view of his case.

That conclusion appears consistent with the theory of *res ipsa loquitur*, which is "that the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it," that the knowledge or opportunity for explanation of the defendant is superior to that of the plaintiff, and that the plaintiff "therefore is compelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence."[66]

Thus, under what appears to be the law in Ohio today, the plaintiff in a case believed to involve the doctrine of *res ipsa loquitur* (1) should plead the facts constituting his cause of action in ordinary and concise language, should (2) allege the negligence of the defendant at least in general terms, and (3) if he believes he can prove specific acts or omissions of the defendant, as negligence, may allege them in the petition and endeavor to make his proof. If the case is a proper one for the application of *res ipsa loquitur*, it must be submitted to the jury on that basis, whether or not the plaintiff succeeds in proving his charges of specific negligence.

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[66] 38 Am. Jur. *Negligence* § 299 (1941).