1145 RES IPSA LOQUITUR

If you find (defendant) had (exclusive control of) (exclusive right to the control of) the (name the instrument or agency involved) involved in the accident and if you further find that the accident claimed is of a type or kind that ordinarily would not have occurred had (defendant) exercised ordinary care, then you may infer from the accident itself and the surrounding circumstances that there was negligence on the part of (defendant) unless (defendant) has offered you an explanation of the accident which is satisfactory to you.

COMMENT

This instruction and comment were approved by the Committee in 1977. The comment was updated in 1989 and 2001.

The alternate phrase "exclusive right to the control of" should be used in those cases where defendant disavows exclusive control because he has delegated (by contract or otherwise) the duty of repair or maintenance of the instrument or agency to another. Turk v. H. C. Prange Co., 18 Wis.2d 547, 119 N.W.2d 365 (1963); Koehler v. Thiensville State Bank, 245 Wis. 281, 14 N.W.2d 15 (1944). Goebel v. General Bldg. Serv. Co., 26 Wis.2d 129, 131 N.W.2d 852 (1964), is a situation where several parties might have exercised control.

The following conditions must be present before the doctrine of res ipsa loquitur is applicable: (1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the agency of instrumentality causing the harm must have been within exclusive control of the defendant. When these two conditions are present, they give rise to a permissible inference of negligence, which the jury is free to accept or reject. Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis.2d 804, 623 N.W.2d 751.

The court decides as a preliminary matter of law that the inference is reasonable; if not, the instruction is not given.

Insert the facts of the case in the instruction if desired. This instruction was approved by implication in Brunner v. Van Hoof, 4 Wis.2d 459, 464, 90 N.W.2d 551 (1958); Colla v. Mandella, 271 Wis. 145, 149-50, 72 N.W.2d 755 (1955); and Georgia Casualty Co. v. American Milling Co., 169 Wis. 456, 460, 172 N.W. 148 (1919).

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The mere happening of a collision is not probative that someone has been negligent. Millonig v. Bakken, 112 Wis.2d 445, 334 N.W.2d 80 (1983). In Millonig, the court said that res ipsa loquitur "only creates a permissive inference" and for the doctrine to apply one of the necessary elements is that the accident probably would not have occurred but for the negligent of the defendant. 112 Wis.2d, at p. 457.

The instruction does not cover negligence on the part of plaintiff, since Wisconsin has a comparative negligence law.

This instruction applies to host-guest cases. Turk v. H. C. Prange Co., supra. Henthorn v. MGC Corp., 1 Wis.2d 180, 187, 83 N.W.2d 759 (1957); Modl v. National Farmers Union Prop. & Casualty Co., 272 Wis. 650, 656, 76 N.W.2d 599 (1956).

Res ipsa can be used in strict liability cases. Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 211 N.W.2d 810 (1973).

This instruction is proper even though plaintiffs have tried to prove specific negligence and have failed. Commerce Ins. Co. v. Merrill Gas Co., 271 Wis. 159, 168, 72 N.W.2d 771 (1955).

If res ipsa loquitur rests on data which was used as the basis for an allegation of a specific act of negligence, but the inference of negligence so raised was rebutted, then res ipsa loquitur is not in the case. Brunner v. Van Hoof, supra at 464, citing Gay v. Milwaukee Elec. Ry. & Light Co., 138 Wis. 348, 353-54, 120 N.W. 283 (1909).

Where an event which caused injury to the plaintiff might have been caused by a specific act of X or by inferred negligence of the defendant who was in control of the situation, the jury should be instructed that res ipsa would be applicable only if it first found that the specific act did not cause the event. Mixis v. Wisconsin Pub. Serv. Comm'n, 26 Wis.2d 488, 132 N.W.2d 769 (1965).

The burden of proof (persuasion) does not shift from plaintiff to defendant, and it is error to so state. Ziino v. Milwaukee Elec. Ry. & Transp. Co., 272 Wis. 21, 24, 74 N.W.2d 791 (1956).

See Drechsler, "The Doctrine of Res Ipsa Loquitur," Wis. Bar Bulletin, April 1957, at 13.

If no instruction is requested in the trial court, the supreme court will not consider res ipsa loquitur for the first time on appeal. Ahola v. Sincock, 6 Wis.2d 332, 349, 94 N.W.2d 566 (1959).

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