

### **3.02 Res Ipsa Loquitur (Inference of Negligence in Civil Proceedings)**

**(1) The doctrine of res ipsa loquitur permits an inference of a defendant's negligence from the happening of an event and thereby creates a prima facie case of negligence sufficient for submission to a jury.**

**(2) To warrant submission of the inference for the jury's consideration, the plaintiff must show:**

**(a) the event was of a kind that ordinarily does not occur in the absence of someone's negligence;**

**(b) the event must be caused by an agency or instrumentality within the exclusive control of the defendant at the time of the act of negligence, thereby affording a rational basis for concluding that the defendant was probably responsible for any negligence connected with the event; and**

**(c) the event must not have been due to any voluntary action or contribution by the plaintiff.**

**(3) A defendant may rebut the inference of negligence with evidence that tends to cast doubt on the plaintiff's proof.**

**(4) A jury may, but is not required to, draw the inference of negligence.**

**(5) Expert testimony may be admissible where it is necessary to help the jury "bridge the gap" between its own common knowledge and the specialized knowledge and experience necessary to reach a conclusion that the event would not normally take place in the absence of negligence.**

**(6) A plaintiff may both rely on the doctrine of res ipsa loquitur and introduce specific evidence of the defendant’s negligence.**

**Note**

**Subdivisions (1), (2), (3), and (4)** are derived from *Dermatossian v New York City Tr. Auth.* (67 NY2d 219 [1986]) and its progeny. (E.g. *James v Wormuth*, 21 NY3d 540 [2013]; *Morejon v Rais Constr. Co.*, 7 NY3d 203 [2006]; *States v Lourdes Hosp.*, 100 NY2d 208 [2003]; see 1A NY PJI3d 2:65 at 431 [2022].)

“Res ipsa loquitur” is Latin for “the thing speaks for itself.” (Black’s Law Dictionary [11th ed 2019], res ipsa loquitur.) As explained by *Dermatossian*, the doctrine of res ipsa loquitur permits:

“an inference of negligence [to] be drawn solely from the happening of the accident . . . . The rule simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence. Res ipsa loquitur does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstance of the occurrence. The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may—but is not required to—draw the permissible inference. . . .

“[S]ubmission of the case on the theory of res ipsa loquitur is warranted only when the plaintiff can establish the following elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. . . .

“Courts do not generally apply [the exclusive control] requirement as it is literally stated. For example, res ipsa loquitur has been applied even though the accident occurred after the instrumentality left the defendant’s control, where it was shown that the defendant had exclusive control at the time of the alleged act of negligence.

“The exclusive control requirement . . . is that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it. The purpose is simply to eliminate within reason all explanations for the injury other than the defendant’s negligence. The requirement does not mean that the

possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door." (*Dermatossian* at 226-227 [internal quotation marks and citations omitted].)

By way of emphasis, a plaintiff "need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence. Stated otherwise, all that is required is that the likelihood of other possible causes of the injury be so reduced that the greater probability lies at defendant's door." (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495 [1997] [internal quotation marks and citations omitted]; *Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987] ["The proof did not adequately refute the possibility that the escalator—located in a subway station used by approximately 10,000 persons weekly—had been damaged by a member of the public either through an act of vandalism or, as defendant's witness suggested, by permitting an object such as a hand truck to become caught in the space between the step and sidewall. Plaintiff did not establish that the likelihood of such occurrences was so reduced that the greater probability lies at defendant's door" (internal quotation marks and citations omitted)]; *James v Wormuth*, 21 NY3d at 548 ["Whether the doctor was in control of the operation does not address the question of whether he was in exclusive control of the instrumentality, because several other individuals participated to an extent in the medical procedure. Given that plaintiff failed to produce any evidence that the doctor had exclusive control of the wire, or sufficient proof that 'eliminate(s) within reason all explanations for the injury other than the defendant's negligence,' the control element clearly has not been satisfied"].)

It should be emphasized that contrary to some *old decisional law*, "res ipsa loquitur does not create a presumption of negligence against the defendant. Rather, the circumstantial evidence allows but does not require the jury to infer that the defendant was negligent." (*Morejon v Rais Const. Co.*, 7 NY3d at 209.) Given that it is an inference, "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." (*Id.*)

The inference of negligence "may be rebutted with evidence from defendant that tends to cast doubt on plaintiff's proof." (*States v Lourdes Hosp.*, 100 NY2d at 214.)

**Subdivision (5)** is derived from *Kambat* (89 NY2d at 497) and *States* (100 NY2d at 212). *Kambat* recognized that expert testimony may be warranted to meet the second and third foundation requirements (i.e. exclusive control and absence of plaintiff's contributory conduct); *States* concluded that expert testimony in a medical malpractice "may be properly used to help the jury 'bridge the gap'

between its own common knowledge, which does not encompass the specialized knowledge and experience necessary to reach a conclusion that the occurrence would not normally take place in the absence of negligence, and the common knowledge of physicians, which does.” (*States* at 212.) In doing so, the Court relied in part on the Restatement (Second) of Torts § 328D, Comment *d*, which recognized that the inference from *res ipsa loquitur* in the “usual case” is based on past experience “common to the community”; however, there may be in some cases “no fund of common knowledge which may permit laymen reasonably to draw the conclusion.” (*States* at 212-213; *cf. Monzon v Chiaramonte*, 140 AD3d 1126, 1128-1129 [2d Dept 2016] [“This case is not one of the narrow category of factually simple medical malpractice cases which require no expert to enable a jury to reasonably conclude that the injury would not have happened without negligence”].)

**Subdivision (6)** is derived from *Abbott v Page Airways* (23 NY2d 502, 511 [1969] [“(T)he mere fact that the plaintiff seeks to bolster his case by introducing specific evidence of the defendant’s negligence should not compel the plaintiff to forego reliance on the rule of *res ipsa loquitur*”). In *Abbott*, the Court added that relying on both would not be permissible when “the two alternate modes of proof are fundamentally or inherently inconsistent.” (*Id.* at 512.)