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COMMENT

How Much is Too Much? — Pleading, Proof and Res Ipsa Loquitur

If a plaintiff wishes to make use of the doctrine of res ipsa loquitur in a personal injury action, he must prove that the injury was caused by an instrumentality under the exclusive control of the defendant and that the accident was such that in the ordinary course of events it would not have occurred if those who had its management or control had used proper care.[1] Once these background facts have been proved, the trial court must decide two issues before it allows the jury to infer negligence: (1) Has plaintiff by his pleadings waived the doctrine of res ipsa loquitur? (2) Has plaintiff by his proof waived the doctrine of res ipsa loquitur? Failure of the courts to distinguish clearly between these two issues has accounted for much conflict.

I. GENERALLY

A. *Waiver By Pleading*

Since res ipsa loquitur is generally regarded as a rule of evidence, it need not be pleaded.[2] The manner of pleading the cause of action, however, may well determine whether the doctrine can be invoked.

The decisions are in sharp conflict as to when, if ever, the rule of waiver by pleading should be applied in res ipsa loquitur cases.[3] In those juris-

[1] 65 C.J.S. 987.

[2] Beeler v. Ponting, 116 Ohio St. 432, 156 N.E. 599 (1927).

[3] Note, 79 A.L.R. 48; Niles, *Pleading Res Ipsa Loquitur*, 7 N.Y.U.L.Q. REV. 415 (1929-1930).

dictions where general allegations of negligence are permitted, the authorities are practically uniform in holding that if the allegation of negligence is general only and is unaccompanied by specific averments of negligence, the plaintiff may rely on res ipsa loquitur.[4] When specific acts of negligence are pleaded however, courts have taken four distinct positions.[5]

1. According to the "strict rule," the plaintiff by pleading specific allegations of negligence has waived or lost his right to rely on the doctrine.[6] The courts reason that a petition containing specific allegations misleads defendant and causes him to prepare his case to meet those allegations only. The petition thus fails to serve its notice-giving function.[7] Specific allegations are also inconsistent with res ipsa loquitur, a rule of necessity, which is applied only when, by the nature of the accident, the evidence is more accessible to the defendant.[8] If the plaintiff by his pleadings appears cognizant of the exact negligent acts causing his injury, there is no longer a need to invoke the rule.[9]

2. When a plaintiff alleges specific acts of negligence, his proof must be based on them alone, but he is given the benefit of res ipsa loquitur so far as those acts are concerned.[10] This view emphasises the evidentiary nature of the doctrine.[11]

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[4] 65 C.J.S. 1033.

[5] PROSSER, TORTS 307 (1941).

[6] Harvey v. Borg, 218 Iowa 1228, 257 N.W. 190 (1934); Sanders v. City of Carthage, 330 Mo. 844, 51 S.W.2d 529 (1932); Austin v. Dilday, 55 Nev. 361, 36 P.2d 359 (1934); Note, 79 A.L.R. 48, 50.

[7] 71 C.J.S. 181; Niles, *Pleading Res Ipsa Loquitur,* 7 N.Y.U.L.Q. REV. 415, 420 (1929-1930).

[8] Note, 160 A.L.R. 1450, 1451.

[9] Roscoe v. Metropolitan Street Ry. Co., 202 Mo. 576, 587, 101 S.W. 32, 34 (1907) ("General allegations of negligence are permitted because plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of presumptive negligence [res ipsa loquitur] is indulged. But if plaintiff by his petition, is shown to be sufficiently advised of the exact negligent acts causing, or contributing to, his injury, as to plead them specifically, as in this case, then the reason for the doctrine of presumptive negligence has vanished. . . . In other words, the burden of proof is upon plaintiff, as it would be in any other kind of a case. The rule of presumptive negligence and the rule allowing the pleading of negligence, generally, are rules which grow up out of necessity in cases of this character, and are exceptions to the general rules of pleading and proof. When plaintiff, by his petition, admits that there is no necessity, the reason for the rule, *ex necessitati,* fails and with it the rule itself."); Winslow v. Ohio Bus Line Co., 148 Ohio St. 101, 73 N.E.2d 504 (1947).

[10] Pickwick Stages Corp v. Messinger, 44 Ariz. 174, 36 P.2d 168 (1934); Aponaug Mfg. Co. v. Carroll, 183 Miss. 793, 184 So. 63 (1938); Cosgrove v. Tracy, 156 Ore. 1, 64 P.2d 1321 (1937); Notes, 79 A.L.R. 48, 55; 160 A.L.R. 1450, 1451.

[11] Pickwick Stages Corp. v. Messinger, 44 Ariz. 174, 36 P.2d 168 (1934); Niles, *Pleading Res Ipsa Loquitur,* 7 N.Y.U.L.Q. REV. 415, 424 (1929-30).

3. The doctrine may be applied if the specific allegations are accompanied by a general allegation.[12] Adhering to the rule that where there are both general and specific allegations of negligence, the specific allegations control the general so that only the acts specified may be proven,[13] some courts hold that the scope of proof and of inference of negligence raised by res ipsa loquitur will be limited by the specific allegations.[14] Other courts hold that the specific allegations are mere surplusage and that the general allegations remain in the case to support the doctrine of res ipsa loquitur, whether or not evidence is introduced to support the specific allegations.[15]

4. According to the "liberal rule," the doctrine is available so long as a cause of action in negligence is alleged.[16] Technical rules of pleading and proof as to general and specific allegations are ignored, and plaintiff may rely on the inference of negligence inherent in the factual situation.[17] The

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[12] Clarke v. Cardinal Stage Lines, 138 Kan. 280, 31 P.2d 1 (1934); Salyer Oil Co. v. Miller, 181 Okla. 171, 73 P.2d 147 (1937); Mahlum v. Seattle School Dist., 21 Wash.2d 89, 149 P.2d 918 (1944).

[13] CLARK, CODE PLEADING 303 (1947).

[14] Palmer Buick Co. v. Chenall, 119 Ga. 837, 847, 47 S.E. 329, 332 (1904) ("The application of the maxim in cases where it may be applied will result in an inference of negligence, upon which a recovery may be based, but this inference is simply that the defendant is negligent in the respect alleged. The inference takes the place of direct proof, and as direct proof as a basis of recovery would be limited to the specific act of negligence alleged, so the inference, under the operation of the maxim would be in like manner limited; and, the moment that the jury are satisfied that the defendant is not negligent in the respect alleged, the inference of negligence resulting from the circumstances of the occurrence can no longer be looked to as the basis of recovery."); Note, 160 A.L.R. 1450, 1464; Niles, *Pleading Res Ipsa Loquitur*, 7 N.Y.U.L.Q. REV. 415, 423 (1929-1930).

[15] Nashville Interurban Ry. Co. v. Gregory, 137 Tenn. 422, 193 S.W. 1053 (1917); Notes, 79 A.L.R. 48, 59; 160 A.L.R. 1450, 1464.

[16] Angerman Co. Inc. v. Edgeman, 76 Utah 394, 290 Pac. 169 (1930); Dearden v. San Pedro L.A.&S.R. Co., 33 Utah 147, 154, 93 Pac. 271, 273 (1907) ("All that the plaintiff here was required to aver and prove to entitle him to recover was the relation of passenger and carrier, that the accident through which he received his injuries was connected with the means or instrumentality used by the defendant in the transportation, and injury resulting therefrom. When such facts were shown, a prima facie presumption arose that the accident was occasioned by the defendant's negligence, and the burden was cast on it to show that it was not at fault and the the accident was not caused by its negligence. Because the plaintiff alleged and attempted to prove more than he was required to do did not displace the presumption of negligence as an element in his case nor change the rule of evidence with respect to the burden of proof. . . . The essential and ultimate fact alleged in the complaint and in dispute was the negligence of the defendant in causing the collision. . . . That the plaintiff averred and undertook to show a defective brake chain as evidence of negligence causing the collision, did not waive nor affect the presumption of negligence arising from the circumstances, which was in itself sufficient to show such negligence.")

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

policy behind this rule is that defendants shall be held strictly responsible for injuries caused by them.[18]

B. *Waiver By Proof*

It is universally acknowledged that the doctrine of res ipsa loquitur never applies when all the facts attending the injury are known to the plaintiff and are disclosed by the evidence so that nothing is left to be inferred.[19] Another real issue then is how far plaintiff may go in the proof of his pleadings before he will be held to have actual knowledge of the negligent acts which caused his injury and, therefore, to have waived the doctrine.

The majority of the courts that have considered the question have held that, under a general allegation of negligence, the mere introduction of evidence of specific acts of negligence which are not proven to be the precise cause of the injury does not prevent plaintiff from relying on res ipsa loquitur so long as the evidence does not preclude *any* inference of negligence.[20] The distinction is one between proving a prima facie case as to the precise cause of the injury which will be held to waive the doctrine, and merely submitting evidence which does not clearly establish the cause or leaves the matter doubtful.[21]

In *Partin v. Black Mountain Corp.*,[22] the deceased was killed by the uncoupling of mine cars. Under a general allegation of negligence, evidence was introduced that the link which coupled the runaway cars was worn and broken. While recognizing that in general the cause of the accident was the uncoupling of the cars, the court held that the precise cause had not been proven prima facie by the evidence introduced and that res ipsa loquitur had not been waived. "The cause of the break might have been an excessive load on the link or an unnecessary jerk or some other cause."[23]

Would a specific allegation of a defective link withstand the waiver by pleading rule? If not, a different test is being applied when the issue is waiver by pleading rather than waiver by proof.[24] Different tests are illogical and unjustified when both waiver rules are derived from the same

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[18] Niles, *Pleading Res Ipsa Loquitur*, 7 N.Y.U.L.Q. REV. 415, 424 (1929-1930).

[19] Chaisson v. Williams, 130 Me. 341, 156 Atl. 154 (1931); Gibson v. International Trust Co., 177 Mass. 100, 58 N.E. 278 (1900); Winslow v. Ohio Bus Line Co., 148 Ohio St. 101, 73 N.E.2d 504 (1947).

[20] Cassady v. Old Colony Street R. Co., 184 Mass. 156, 68 N.E. 10 (1903); Porter v. St. Joseph Ry., Light, Heat & Power Co., 311 Mo. 66, 277 S.W. 913 (1925); Note, 93 A.L.R. 609, 610.

[21] Seney v. Pickwick Stages, 82 Cal. App. 226, 255 Pac. 279 (1927).

[22] 248 Ky. 32, 58 S.W.2d 234 (1933).

[23] Partin v. Black Mountain Corp., 248 Ky. 32, 58 S.W.2d 234, 235 (1933).

[24] Winslow v. Ohio Bus Line Co., 148 Ohio St. 101, 73 N.E.2d 504 (1947); Fink v. N.Y.C. Ry. Co., 144 Ohio St. 1, 56 N.E.2d 456 (1944).

proposition, that there is no necessity for applying the doctrine of res ipsa loquitur when the plaintiff indicates actual knowledge of the exact negligent acts causing his injury.

II. OHIO

A. *Pleading Background Facts Without Allegations of Negligence in Terms*

An allegation of background facts showing a breach of duty and an injury, without an allegation of negligence in terms, has been held general enough by the Ohio courts to invoke res ipsa loquitur.[25]

The doctrine has been invoked where a plaintiff in his pleadings without alleging negligence in specific terms which state: that he was a passenger in defendant's railway car and was injured when the car left the track;[26] that he was a guest at defendant's hotel and was injured in his room by falling plaster;[27] that he was an employee of the defendant and was injured by the explosion of defendant's engine and the subsequent derailment of cars;[28] that he was a pedestrian and was injured by defendant's auto which rolled down a hill without a driver;[29] that he was a customer in defendant's service station and was injured by a gasoline explosion.[30]

The feasibility of such pleading, that of stating the background facts upon which res ipsa loquitur can be invoked without an allegation of negligence in specific terms, depends upon the strength of the background facts pleaded. If these facts, as pleaded and proven, clearly indicate exclusive control by the defendant and an accident which would not have occurred had due care been exercised by defendant, then plaintiff is in an advantageous position. If, however, the facts alleged would not give rise to a prima facie case of negligence with the use of the doctrine, or if plaintiff has little proof, then the case might be lost by demurrer, motion to dismiss, or directed verdict.

Another objection to this type of pleading has received little, if any, consideration by the courts. A jurisdiction recognizing the "strict" waiver by pleading rule, which generally applies only to allegations of negligence

[25] Lake Shore Electric Ry. Co. v. Hobart, 13 Ohio C.C. (N.S.) 592 (1909).

[26] *Ibid.*

[27] Halterman v. Hansard, 4 Ohio App. 268 (1915) (The court at p. 274 quoted *Weis v. City of Madison,* 75 Ind. 241, 246 (1881): "If the facts stated are sufficient to show negligence, the absence of epithets does not impair their force; if they are not sufficient, no mere epithets can supply the want.")

[28] Walters v. B. & O. & Southwestern Ry. Co., 111 Ohio St. 575, 146 N.E. 75 (1924).

[29] Roseman v. Serman, 12 Ohio L. Abs. 603 (1932).

[30] Hiell v. Golco Oil Co., 137 Ohio St. 180, 28 N.E.2d 561 (1940); *See* Kovacs v. G. M. McKelvey Co., 24 Ohio L. Abs 625 (1937).

in specific terms, may someday apply this rule to the pleading of background facts which are too specific.

B. *Alleging General and Specific Negligence — Waiver By Pleading*

The Ohio courts have not invoked the waiver by pleading rule to petitions which stated: that plaintiff purchased a ticket and was seated in defendant's theater, and that shortly thereafter, the seat broke, causing plaintiff's injuries, and that defendant's negligence was the sole and proximate cause of plaintiff's injuries;[31] that defendant negligently allowed its wires to become weak, defective and unable to bear their weight, so that they would be likely to break and fall down without warning;[32] that plaintiff was a passenger in a car owned and operated by defendant, and that without warning defendant negligently drove the car off the highway or that defendant negligently permitted the steering wheel to escape his control so that the car plunged over an embankment causing plaintiff's injuries;[33] that plaintiff, while a customer in defendant's store, was injured by a falling sign, the result of negligent erection and maintenance, insecure anchoring and fastening, failure to inspect, absence of screens or net to arrest its fall, and failure to post warning signs;[34] and that defendant was negligent in operating his auto at an unreasonable speed on the wrong side of the road, in failing to keep his auto under proper control, and in failing to slacken his speed or divert his auto from striking plaintiff's car.[35]

The Ohio courts, in deciding the above cases, have adopted the views that the specifications are superfluous;[36] or that pleading particulars does not waive the doctrine;[37] the res ipsa loquitur inference may be supported by the background facts of the accident regardless of the type of pleading so long as a cause of action is alleged;[38] and, so long as plaintiff does not

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[31] Fox v. Bronx Amusement Co., 9 Ohio App. 426 (1918) (The court said that plaintiff also alleged specific grounds of negligence in her petition and that it was not necessary for her to do so. The case apparently stands for the proposition that the "specifications" are superfluous so long as the background facts are established.)

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

[33] Manker v. Shaffer, 161 Ohio St. 285, 118 N.E.2d 641 (1954); Weller v. Worstall, 129 Ohio St. 596, 196 N.E. 637 (1935).

[34] Benjamin v. Sears, Roebuck & Co., 62 Ohio App. 83, 23 N.E.2d 447 (1939).

[35] Motorists Mutual Ins. Co. v. Calland, 93 Ohio App. 543, 114 N.E.2d 162 (1952).

[36] Fox v. Bronx Amusement Co., 9 Ohio App. 426 (1918).

[37] *See* Fink v. N.Y.C. Ry. Co., 144 Ohio St. 1, 56 N.E.2d 456 (1944); Benjamin v. Sears, Roebuck & Co., 62 Ohio App. 83, 23 N.E.2d 447 (1939); Weller v. Worstall, 50 Ohio App. 11, 197 N.E. 410 (1934).

[38] *Cf.* Curry v. Great Atlantic & Pacific Tea Co., 119 N.E.2d 142 (Fayette Com. Pl. 1954), Kaltenbach v. Cleve., C. & C. Hwy., Inc., 82 Ohio App. 10 80 N.E.2d 640 (1948); Weller v. Worstall, 50 Ohio App. 11, 197 N.E. 410 (1934); Union Gas & Electric Co. v. Waldsmith, 31 Ohio App. 118, 166 N.E. 588 (1929); Fox v. Bronx Amusement Co., 9 Ohio App. 426 (1918).

indicate that he is cognizant of the exact negligence causing his injuries.[39] The rationale of the courts in adopting those liberal views is to relieve plaintiff in a case in which res ipsa loquitur would apply, from being compelled at his peril to adopt one or the other view of his case.[40]

The courts indicated that the allegations in the above petitions were specific but did not particularize the exact negligence to such a degree that a strict waiver rule should be applied. It seems, however, that the allegations were merely general statements of the occurrences leading up to the injury which may or may not have been the specific cause of injury.[41] The cases seem to turn not on whether the allegations are technically general or specific, but rather on whether plaintiff, by his petition, has shown himself cognizant of the exact cause of his injury, so that he no longer needs the res ipsa loquitur inference.

The problem as to what sort of allegation will waive the doctrine is further confused by *Rospert v. Old Fort Mills*,[42] wherein plaintiff sought recovery for damage to his trailer dropped from a tipped position while defendant was attempting to unload its cargo by means of a hoist. The petition alleged that defendant was negligent in handling the trailer, that defendant failed to attach properly the fasteners or sling in a safe manner, and that defendant, well knowing the weight of the trailer and the load contained therein, used an insufficient power hoist and tackle to support the weight. While the court called these allegations general so that res ipsa loquitur was not waived, it seems that these allegations are no more general than those which the courts called specific in the petitions set out above.[43] In both instances, however, the doctrine was held not to have been waived.

A similar result occurred in *Pierce v. Gooding Amusement Co.*,[44] where plaintiff alleged that defendant's merry-go-round had revolved at a high speed, causing plaintiff to be thrown off, and that defendant neglected to keep the fixtures on the merry-go-round securely fastened, whereby one of the fixtures came loose, striking and throwing plaintiff off. The court said:

> It is doubtful if the averments of negligence are specific. It is a general statement of all the occurrences leading up to plaintiff's injury of

[39] Winslow v. Ohio Bus Line Co., 148 Ohio St. 101, 73 N.E.2d 504 (1947); Kaltenbach v. Cleve., C. & C. Hwy., Inc., 82 Ohio App. 10, 80 N.E.2d 640 (1948); Welch v. Rollman & Sons Co., 70 Ohio App. 515, 44 N.E.2d 726 (1942).

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

[41] Pierce v. Gooding Amusement Co., 55 Ohio L. Abs. 556, 90 N.E.2d 585 (1949).

[42] 81 Ohio App. 241, 78 N.E.2d 903 (1948).

[43] The court itself apparently recognized that these allegations were specific when it granted a motion to certify to the Supreme Court, 81 Ohio App. 241, 248 *(motion overruled)* because of conflict with *Shadwick v. Hills*, 79 Ohio App. 143, 69 N.E.2d 197 (1946), wherein it was held that specific allegations waive res ipsa loquitur.

[44] 55 Ohio L. Abs. 556, 90 N.E.2d 585 (1949).

> which she had knowledge. Although the petition charges that defendant failed to keep the fixtures securely fastened, it does not state of what the specific negligence consisted, whether it was a failure to tighten a nut or a bolt, set a screw or do any other act which would have prevented an accident.[45]

The court recognized that a great degree of particularity is required to classify the petition as specific. A clarification of the problem by the courts as to the degree of particularity fatal in this type of pleading would be better than artificially labeling an allegation general or specific. Four or more categories could easily be recognized:

1. An allegation so general as to be subject to motion to make definite and certain.

2. A general allegation which is specific enough to give sufficient notice to the defendant and thus withstand the motion.

3. A specific allegation not so particular as to reveal plaintiff's knowledge of defendant's exact negligent acts but still allowing res ipsa loquitur to be invoked.

4. A specific allegation so particularizing defendant's negligent acts that there is no necessity for applying the doctrine.

The court in *Pierce v. Gooding Amusement Co.*,[46] in effect, classified the pleading as being in category number three.

C. *Waiver By Proof*

The general rule in Ohio is that evidence may be introduced of specific acts of negligence, and res ispa loquitur is not thereby waived unless the proof is such that a prima facie case is made, removing all doubt as to the precise negligent acts of the defendant.[47] Where plaintiff offers proof of specific acts of negligence so that no reasonable inference could be drawn but that of defendant's negligence, plaintiff has waived the necessity of res ipsa loquitur. If plaintiff's proof is not rebutted, he may even be deemed to have proved his case as a matter of law.[48]

D. *Failure to Distinguish Waiver By Pleading and Waiver By Proof*

The doctrine of res ipsa loquitur applies to a case wherein plaintiff is unable to supply a crucial fact in the causal chain, that fact being the precise cause of the accident which defendant is in a better position to know. In

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[45] Pierce v. Gooding Amusement Co., 55 Ohio L. Abs. 556, 558, 90 N.E.2d 585, 587 (1949).

[46] 55 Ohio L. Abs. 556, 90 N.E.2d 585 (1949).

[47] Fink v. N.Y.C. Ry. Co., 144 Ohio St. 1, 56 N.E.2d 456 (1944); Kaltenbach v. Cleve., C. & C. Hwy., Inc., 82 Ohio App. 10, 80 N.E.2d 640 (1948); Union Gas & Electric Co. v. Waldsmith, 31 Ohio App. 118, 166 N.E. 588 (1929).

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

Fink v. N.Y.C. Ry. Co.,[49] plaintiff, having alleged only the necessary background facts,[50] offered evidence that the emergency brakes of the train were not applied and that its speed was not slackened prior to the collision. The court held that res ipsa loquitur applied and said that plaintiff did not prove any specific act of negligence.

The test of waiver as to pleading and as to proof should logically be the same, since both are based on the same rule of necessity — plaintiff's need of assistance when he has no knowledge of the specific acts of negligence. Since the evidence of specific acts of negligence in the *Fink* case did not waive the doctrine, would specific allegations in a petition that defendant negligently failed to slacken his speed and apply his emergency brakes withstand a waiver by pleading rule? Again, as was pointed out before, if a court were to invoke the waiver rule as to these allegations on the ground that plaintiff had too much knowledge to entitle him to rely on the doctrine, a different standard is being applied to waiver by pleading than to waiver by proof.[51] Why should a plaintiff, under a general allegation showing background facts, be allowed to attempt to prove a prima facie case, fail, and still rely on the doctrine,[52] when, if the same plaintiff were to *plead* the same specific acts, he would waive the doctrine[53] and be subject to a motion for directed verdict unless he could prove them?

The Ohio courts which have attempted to treat waiver by pleading and waiver by proof in a single analysis have seemingly not clarified the problem as to which test should be applied. The courts have apparently not invoked a strict waiver by pleading rule in these cases but have said that where *both* the pleadings and proof indicate that plaintiff is cognizant of the exact cause of the injury, he has waived the necessity of the res ipsa loquitur inference.[54]

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[49] 144 Ohio St. 1, 56 N.E.2d 456 (1944).

[50] Plaintiff alleged that he was in the employ of the U.S. Government as a railway mail clerk; that at the time of his injuries he was engaged upon a mail car which was a part of a train being operated by defendants; and that at a certain time and place, defendants carelessly and negligently caused or permitted the train to be derailed whereby plaintiff was injured.

[51] In *Winslow v. Ohio Bus Line Co.*, 148 Ohio St. 101, 73 N.E.2d 504 (1947), among plaintiff's allegations was one of failure by defendant to apply its brakes. The court held that plaintiff had waived res ipsa loquitur. A similar allegation was made against defendant streetcar company in *Kaltenbach v. Cleve., C. & C. Hwy., Inc.*, 82 Ohio App. 10, 80 N.E.2d 640 (1948), wherein it was held that plaintiff could not rely on res ipsa loquitur.

[52] Fink v. N.Y.C. Ry. Co., 144 Ohio St. 1, 56 N.E.2d 456 (1944).

[53] Winslow v. Ohio Bus Line Co., 148 Ohio St. 101, 73 N.E.2d 504 (1947); Kaltenbach v. Cleve., C. & C. Hwy., Inc., 82 Ohio App. 10, 80 N.E.2d 640 (1948).

[54] Winslow v. Ohio Bus Line Co., 148 Ohio St. 101, 73 N.E.2d 504 (1947); *See* Fink v. N.Y.C. Ry. Co., 144 Ohio St. 1, 56 N.E.2d 456 (1944); Kaltenbach v. Cleve., C. & C. Hwy., Inc., 82 Ohio App. 10, 80 N.E.2d 640 (1948).

Thus, in *Pierce v. Gooding Amusement Co.*,[55] plaintiff alleged that defendant neglected to keep the fixtures on its merry-go-round securely fastened, as a consequence of which one of the fixtures came loose, striking and throwing plaintiff off. The evidence indicated that the fixture which struck plaintiff was the head of a horse which had become loose. The court held that plaintiff did not waive the doctrine by her pleading or by her proof.

> . . . res ipsa loquitur, being a rule of evidence, need not be pleaded. Fundamentally, this is true but the opposing party and the court must determine from the petition and the nature of the averments whether or not the plaintiff in the first instance is depending upon res ipsa and when the proof is in if specific averments have been made, the trial judge must determine if there is proof tending to establish one or more of such averments. If the plaintiff, having charged specific negligence, makes sufficient proof to go to the jury there is no necessity of invoking the res ipsa doctrine which would accomplish no more than plaintiff is already entitled to by her specific proof.[56]

The decisive factor, however, is not very clear, the case being another example of the court's failure to distinguish between waiver by pleading and waiver by proof.

The court would have clarified the problem if it had applied the following analysis:

1. The petition, though specific, was not so specific as to waive the doctrine, since a greater degree of particularity is required for waiver.

2. The petition was specific enough to invoke the general rule that specific allegations limit the proof.

3. The doctrine may be invoked if the inference to be derived is supported by the specific allegations.

4. If the proof is so certain as to present a prima facie case as to defendant's negligent acts, then the doctrine cannot be invoked because it would accomplish no more than plaintiff is already entitled to by her proof.

5. If the proof is not so certain as to present a prima facie case, but admits of some doubt as to the exact negligent cause, then the doctrine may be invoked upon the specific allegations if they support the inference.

In *Sieling v. Mahrer*,[57] a malpractice action, the court held that res ipsa loquitur does not apply when specific acts of negligence are pleaded. The specification upon which the court invoked the waiver rule was:

> Plaintiff further says that she remained thereafter in the care of the defendant . . . during which period of time the defendant negligently prescribed for and treated the plaintiff for the purpose of reducing the

[55] 55 Ohio L. Abs. 556, 90 N.E.2d 585 (1949).

[56] *Ibid.*

[57] 113 N.E.2d 373 (Ct. App., 1953).

> injuries so by her sustained as a result of the x-ray therapy but that said treatment was of no effect and contrary to good medical practice, and the condition above described continued unabated. . . . [58]

The court created confusion when it said:

> The petition of plaintiff pleaded, and her evidence was addressed to the establishing of, negligence of the defendant's in diagnosing and treating plaintiff's disability.[59]

Again the court attempts to combine both pleading and proof to invoke the waiver rule. Furthermore, even if this allegation is held to be specific, since no attempt was made to particularize the exact manner of defendant's alleged negligent treatment it might have been that the proof and not the pleading was the real basis for waiver. The holding is not easily reconcilable with that in the *Pierce* case.

III. CONCLUSION

In Ohio, if plaintiff pleads the background facts without an allegation of negligence in specific terms, res ipsa loquitur may be invoked. There has been little actual analysis, if any, of applying the waiver rule to the background facts; thus this method of pleading is advantageous.

In Ohio, when negligence is pleaded generally *and* specifically, there is little discussion of the significance thereof. The Ohio courts should give some consideration to the classification of allegations in pleadings. The courts should first categorize allegations as general or specific and, if the latter, then decide the degree of particularization required to waive the doctrine in keeping with the rule of necessity as the basis of waiver. Furthermore, there should be some discussion of the effect of specific allegations upon the evidence which may be introduced. Thus when a court says that the pleading of specific allegations does not waive the doctrine of res ipsa loquitur, does it mean that the doctrine applies to prove negligence generally, or to prove negligence in support of the specific allegations only?[60]

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[58] Sieling v. Mahrer, 113 N.E.2d 373, 374 (Ct. App., 1953).

[59] *Ibid.*

[60] See Note, 160 A.L.R. 1450, 1460.