5.10D *RES IPSA LOQUITUR* (Approved 10/90)

In any case in which there is a claim that the defendant was negligent, it must be proven to you that the defendant breached a duty of reasonable care which was a proximate cause of the plaintiff's injuries.[1] Generally, the mere fact that an accident happened, with nothing more, does not provide proof that the accident was a result of negligence.[2]

In a negligence case, the plaintiff must prove that there was some specific negligent act or omission by the defendant which proximately caused the accident. However, in certain circumstances, the very happening of an accident may be an indication of negligence.

Thus, the plaintiff may, by providing facts and circumstances, establish negligence by circumstantial evidence. If the instrumentality causing the injury was in the exclusive control of the defendant, and if the circumstances surrounding the happening were of such a nature that in the ordinary course of events the incident would not have occurred if the person (entity) having control of the instrumentality

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[1] *Brown v. Racquet Club of Bricktown*, 95 *N.J.* 280, 288 (1984).

[2] *Buckelew v. Grossbard*, 87 *N.J.* 512, 525 (1981).

had used reasonable care under the circumstances, the law permits, but does not require, the jury to infer negligence from the happening of the incident.

Plaintiff's voluntary act[3] or neglect contributing to the occurrence prevents the inference from being drawn. However, the mere fact that plaintiff was present does not defeat the inference. Rather, you must find that plaintiff's action or negligence was a proximate cause of the occurrence to prevent the inference.[4]

For instance, assume someone was walking on a sidewalk under a piano, which was being lifted by a crane to go into the upper floor, and assume further that the piano fell onto the pedestrian. The falling piano would be an indication of negligence, since pianos do not usually fall from the sky without someone being negligent. The mere fact that the pedestrian was present is not a voluntary act or neglect.[5]

In summary, if you find by the greater weight of the evidence that at the time of the incident (1) the defendant had exclusive control of the instrumentality causing the occurrence, (2) that the circumstances were such

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[3]*Stec. v. Richardson*, 75 *N.J.* 304, 308 (1978); *Rose v. Port of N.Y. Auth.*, 61 *N.J.* 129, 136 (1972); *Lorenc v. Chemirad Corp.*, 37 *N.J.* 56, 70-71 (1962); *Kahalili v. Rosecliff Realty, Inc.*, 26 *N.J.* 595, 606 (1958).

[4]*See* footnote 6, below.

[5]*See* footnote 3, above.

that in the ordinary course of events the incident would not have occurred if the defendant had exercised reasonable care and (3) plaintiff's voluntary act or negligence did not contribute to the occurrence, then you may infer that the defendant was negligent.[6]

[Where "exclusive control" is in issue]

As to the requirement of "defendant having exclusive control", this implies that the control was of such type that the probabilities that the negligent act was caused by someone else is so remote that it is fair to permit an inference of negligence by defendant.[7]

If you infer that the defendant was negligent, then the plaintiff need not point out any specific conduct or inaction by the defendant that was a breach of his/her duty of reasonable care. This inference was drawn, even if plaintiff has introduced

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[6]In the event of evidence the plaintiff did contribute to the occurrence but no evidence of contribution to the instrumentality, state at (3), "...that there is no indication in the circumstances that the object causing the injury was the result of plaintiff's neglect."

[7]Note that in *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958), the New Jersey Supreme Court held the doctrine of *res ipsa loquitur* applied to a defendant bottler who had delivered filled soda bottles to a luncheonette and where one of those bottles exploded and injured the plaintiff who was an employee of the luncheonette. The Court found that even though possession and control of the bottles had been transferred to the luncheonette, there was no rational ground for imputing presumed negligence to the luncheonette where there was no suggestion of careless handling of the bottle by the luncheonette. *Id*. at 274. *See* J. Francis' pointed observation in concurrence at p. 275. Note also that the plaintiff has the burden of excluding the negligence of an intervening person in possession or control.

some evidence of defendant's specific negligence.

[If defendant provides explanation, add:]

If you do infer that the defendant was negligent, then you should consider the defendant's explanation of the accident. If the explanation causes you to believe that it is no longer reasonable to infer that the defendant was negligent, then the defendant is entitled to your verdict.[8] But if giving fair weight to all of the worthwhile evidence, you decide that it is more likely than not that the defendant was negligent, then your verdict should be for the plaintiff.

Treatise References:

> *3 Modern Tort Law (1977)*, by James A. Dooley, § 48.21, p. 349. *4 F. Harper and F. James, The Law of Torts*, (2nd Ed.) § 19.12, p. 78.
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> The inference arising from a res ipsa loquitur case may, however, be destroyed by sufficiently conclusive evidence that it is not in reality a res ipsa loquitur case. If the defendant produces evidence which is so conclusive as to leave no doubt that the event was caused by some outside agency for which he/she was not responsible, or that it was of a kind which commonly occurs without negligence on the part of anyone and could not be avoided by the exercise of all reasonable care, he/she may be entitled to a directed verdict. 2 *Restatement (Second) of Torts* § 328 E, comment o, p. 166.

[8] In *Bornstein*, *supra*, at 273, the Court noted that *res ipsa loquitur* "is not ordinarily applicable 'if it is equally probable that the negligence was that of someone other than the defendant,' but the plaintiff 'need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be the more probable explanation of the accident.'" Quoting from *Zentz v. Coca-Cola Bottling Co. of Fresno*, 247 *P.* 2d 344 (Sup. Ct. Cal. 1952). *See also Lynch v. Galler Seven-Up Pre-Mix Corp.*, 74 *N.J.* 146, 154 (1977).