# TRIAL JUDGE'S DUTY TO CALL WITNESSES IN RES IPSA LOQUITUR CASES*

IN an effort to elicit more complete testimony, trial judges often depart from the passive role of umpire to call witnesses both in criminal[1] and civil[2] actions. A recent dissenting opinion by Mr. Justice Frankfurter in *Johnson v. United States*[3] suggests a further broadening of the trial judge's role by making his failure to call material witnesses in cases involving res ipsa loquitur grounds for a new trial.[4]

In the *Johnson* case a seaman sought to recover under the Jones Act[5] for injuries caused by the alleged negligence of a fellow-servant. Plaintiff relied on the doctrine of res ipsa loquitur,[6] arguing that the instrument which caused

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* Johnson v. United States, 333 U.S. 46 (1948).

1. Courts will call witnesses when the State is unwilling to vouch for their credibility, *e.g.*, People v. Peterson, 364 Ill. 80, 4 N.E.2d 37 (1936), and will call expert witnesses and eyewitnesses to crimes. *E.g.*, State v. Horne, 191 N.C. 787, 83 S.E. 433 (1916) (expert witnesses); Young v. United States, 107 F.2d 490 (5th Cir. 1939) (eyewitnesses to crimes). See in general cases cited 9 WIGMORE, EVIDENCE § 2484 (3d ed. 1940); MODEL CODE OF EVIDENCE (1942), Comment to Rule 105 (d): ". . . a judge may call a witness of his own motion or at the request of a party in both civil and criminal cases."

The general judicial power which is expressly allotted in every state constitution implies the power to investigate, summon, and question witnesses. 9 WIGMORE, EVIDENCE § 2484. See Notes, 42 HARV. L. REV. 445 (1929), 27 MICH. L. REV. 354 (1929), 15 MINN. L. REV. 350 (1931), 18 TEX. L. REV. 530 (1940).

2. Marin Water & Power Co. v. R. R. Commission of Cal., 171 Cal. 706, 154 Pac. 864 (1916) (upholding power of a commission, as a judicial tribunal, to call witnesses); Merchants Bank v. Goodfellow, 44 Utah 349, 140 Pac. 759 (1914) (in a suit by bank on a bill of exchange, court permitted to call and question last endorser of bill). *See* Herron v. Southern Pacific Co., 283 U. S. 91, 95 (1931); Chalmette Petroleum Corp. v. Chalmette Oil Distributing Co., 143 F.2d 826, 828-9 (5th Cir. 1944). *Contra:* South Covington & Cincinnati Ry. v. Stroh, 23 Ky. L. Rep. 1807, 66 S. W. 177 (1902) (court had no power to present expert testimony above the objection of one party).

3. 333 U. S. 46, 50 (1948).

4. *Id.* at 53.

5. 38 STAT. 1185 (1915), as amended, 41 STAT. 1007 (1920), 46 U. S. C. § 688 (1946): "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . and in such actions all statutes . . . modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

Although the Jones Act contains no consent on the part of the United States to be sued, seamen may pursue their Jones Act remedy against the government under the Suits in Admiralty Act, 41 STAT. 525 (1920), 46 U. S. C. § 741-52 (1946), but only in admiralty by a libel in personam. Sevin v. Inland Waterways Corp., 88 F.2d 988 (5th Cir. 1937). *See* Crescitelli v. United States, 66 F. Supp. 894, 896 (E. D. Pa. 1946) and Baker v. Moore-McCormack Lines, 57 F. Supp. 207, 208 (N. D. Cal. 1944). See also Willock, *Commentary on Maritime Workers*, 46 U. S. C. A. 211, 258 (1944).

6. The necessary elements of a res ipsa loquitur case are listed in PROSSER, TORTS 291 (1941): "The accident is of a kind which ordinarily does not occur in the absence of someone's negligence, and it is caused by an instrumentality within the exclusive control

the accident was under the exclusive control of the defendant's servant and that the accident would not ordinarily have occurred without the servant's negligence.[7] Although neither party had called the allegedly negligent fellow-servant,[8] who was the sole witness of the accident, the Supreme Court held that res ipsa loquitur applied and sustained the plaintiff's claim. Dissenting along with Justices Jackson and Burton on grounds not discussed in the majority opinion, Mr. Justice Frankfurter argued that res ipsa loquitur was inapplicable since the court had failed to call a witness who might have been able to explain the cause of the accident.

While the power to call witnesses has generally been recognized as a valid exercise of the trial judge's discretion,[9] appellate courts have usually rejected the doctrine set forth by Mr. Justice Frankfurter on grounds that appellant's prior opportunity to subpoena the witness makes a new trial unjustified.[10] The only direct authority for his position comes from Mississippi where the Supreme Court has three times reversed its chancery bench for failure to elicit pertinent facts not presented by either party.[11] One court has suggested that in criminal trials the judge might be under a duty to call eyewitnesses not subpoenaed by either party.[12]

Although Mr. Justice Frankfurter's reform would undoubtedly lead to securing more testimony, it would be accompanied by questionable consequences in the field of accident liability. The recent history of accident law reveals an increased use of the evidentiary rule of res ipsa loquitur in the

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of the defendant, and the possibility of contributing conduct which would make the plaintiff responsible is eliminated." For general discussion, see Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519 (1934); Niles, *Pleading Res Ipsa Loquitur*, 7 N. Y. U. L. Q. REV. 415 (1929); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

7. Petition for Writ of Certiorari, United States Supreme Court, No. 138, October term, 1947, pp. 20–4.

8. Although the witness' deposition had been taken, it had not been introduced in evidence, apparently because it contained material harmful to both sides. The plaintiff argued that he was under no duty to present adverse witnesses while the government claimed that the witness should have been called by the plaintiff since the plaintiff had the burden of proving negligence. See opinion of lower court, 160 F.2d 789, 791 (9th Cir. 1947).

9. See notes 1 and 2 *supra*.

10. Outside of the Mississippi Chancery Court, reversal because of a judge's failure to probe for evidence seems to have been sought on only five occasions and all appeals were unsuccessful. Steinberg v. United States, 162 F.2d 120 (5th cir. 1947); United States v. Pape, 144 F.2d 778 (2d cir. 1944); Hirschfeld v. United States, 54 F.2d 62 (7th cir. 1931); People v. Burke, 382 Ill. 488, 48 N. E.2d 415 (1943); Halloran-Judge Trust Co. v. Carr, 62 Utah 10, 218 Pac. 138 (1923). Wigmore, without annotation, dismisses the idea that it is a judge's duty to call witnesses: "That [the judge] has no burden or duty of doing so is plain in the law." 9 WIGMORE, EVIDENCE § 2484.

11. Moore v. Sykes' Estate, 167 Miss. 212, 149 So. 789 (1933); Kirby v. Gay, 136 Miss. 781, 101 So. 705 (1924); Stoner & Co. v. Blocton Export Coal Co., 135 Miss. 390, 100 So. 5 (1924). None of these is a res ipsa loquitur case.

12. *See* People v. Baskin, 254 Ill. 509, 513, 98 N. E. 957, 959 (1912).

judicially sanctioned trend to facilitate compensation of accident victims.[13] Mr. Justice Frankfurter's proposal clearly cuts across this current by diminishing the practical effectiveness of res ipsa loquitur as an aid to plaintiffs.[14] Resulting testimony of any witness called by the court might prove specific acts of negligence, but this possible advantage is of small value to the plaintiff: res ipsa loquitur as a rule of circumstantial evidence already provides at least an inference of negligence,[15] and the additional testimony might eliminate some element[16] on which that inference is based or might overcome it by showing due care on the part of the employer. Moreover, a defendant could leave dubious witnesses, whom he would be inclined to call under the present system,[17] to be called by the court, and thereby gain not only the benefit of the witness' affirmative evidence in his behalf, but in addition, the valuable opportunity to cross-examine[18] with its attendant power to impeach[19] and ask

13. For an excellent analysis of recent trends away from the strict logic of "fault" and the role of res ipsa loquitur in that trend, see James, *Accident Liability: Some Wartime Developments,* 55 YALE L. J. 365, 388–93 (1946). The best discussion of the procedural advantages obtained by res ipsa loquitur is in Prosser, *The Procedural Effect of Res Ipsa Loquitur, supra* note 6.

14. A Jones Act case would appear to be particularly unsuitable for the proposal of a doctrine which will impede the recovery of plaintiff seamen. Although the Act is unquestionably a "fault" statute, its essentially remedial purpose in making compensation available to injured seamen is hardly furthered by Mr. Justice Frankfurter's new doctrine. See Comment, 57 YALE L. J. 243, 258 (1947). Moreover, it may be assumed that the "negligence" under this remedial statute was intended to be construed no more stringently than in other cases. Res ipsa loquitur is a creature of judicial invention designed expressly to assist plaintiffs in situations where the evidence would not otherwise permit them to win. In Mr. Justice Frankfurter's suggestion there is a subordination of the pragmatic results of res ipsa loquitur to the debatable objective of ascertaining strict fault.

15. The minimum effect given to res ipsa loquitur, that of a permissible inference of negligence, prevails in the federal courts and in the majority of jurisdictions. See Carpenter, *supra* note 6, at 523. A defendant is under no duty to introduce evidence to overcome the res ipsa loquitur case, but if he fails to introduce evidence, "the plaintiff will be entitled to have the jury consider under proper instructions whether or not the facts shown warrant them in making the inference that the defendant was guilty of the negligence which caused the injury." *Ibid.* And even if some explanation is offered, application of the doctrine permits a finding of fact favorable to the plaintiff in many cases which he would otherwise lose as a matter of law.

16. See note 6 *supra.*

17. It seems likely that the witness ultimately called by the judge would be one whom the defendant, if anyone, would otherwise have called, since the plaintiff has little incentive to risk the testimony of an equivocal witness when res ipsa loquitur is available to assist his case. The defendant, on the other hand, often must take the risk of calling an equivocal witness to overcome the effect of res ipsa loquitur.

18. Decisions upholding a trial judge's right to call witnesses also uphold the right of both parties to cross-examine. *See, e.g.,* Chalmette Petroleum Corp. v. Chalmette Oil Distributing Co., 143 F.2d 826, 829 (5th Cir. 1944); Litsinger v. United States, 44 F.2d 45, 47 (7th Cir. 1930). See cases cited 3 WIGMORE, EVIDENCE § 918 n.3.

19. The right of impeachment by both parties when a judge calls a witness is particularly significant in criminal cases. See 3 WIGMORE, EVIDENCE § 918. But this right is

leading questions.[20] And while reversal for the trial judge's failure to call a material witness could deprive either the plaintiff or the defendant of a favorable trial verdict, plaintiffs as a class would be more seriously harmed because of the larger incidence of verdicts for plaintiffs in negligence actions[21] and the likelihood of a still larger incidence in res ipsa loquitur cases.

But the full effect of Mr. Justice Frankfurter's proposal would not be limited to substantive changes in accident law. Res ipsa loquitur cases would be plagued with administrative problems far outweighing the possible evidentiary advantages of calling equivocal witnesses. An obligation to call witnesses established, the trial court will to that extent be forced to undertake active investigatory duties, however ill-equipped it may be, as presently constituted, to perform this function. How, during a trial, is he to locate witnesses and pass on their importance? This inability of a judge to determine and call all material witnesses would enable parties to hold back witnesses and then use the judge's failure to call as grounds for reversal. The resulting burden of never-ending litigation would weigh especially heavily on financially limited plaintiffs, typically the complainants in res ipsa loquitur cases, who must undergo new trials whenever the defendant produces an uncalled witness considered "material" by an appellate court. Perhaps the entire process of calling witnesses would be altered, for even where the judge is obviously able to determine the existence of material witnesses,[22] only the most essential will be called by the litigants themselves, since by not calling, the party could question the witness under the more favorable circumstances of cross-examination,[23] and be assured of a reversal if the witness were not called by the court. Would the proposal also require courts to assume the tremendous administrative task not only of calling available witnesses but also of taking the depositions of witnesses who could not be reached by process?

And, finally, there is no reason why the application of Mr. Justice Frank-

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also available in civil actions. Chalmette Petroleum Corp. v. Chalmette Oil Distributing Co., 143 F.2d 826, 829 (5th Cir. 1944). See also 3 WIGMORE, EVIDENCE § 910. In some jurisdictions the right of impeachment might be limited by the rule which confines the cross-examining party to questions relating to information obtained by the opponent's direct examination. In these jurisdictions, once the party asks about his own case, the witness is said to be his own and the rule against impeaching one's own witness would apply. *Id.* § 914.

20. The right to ask leading questions only in cross-examination is based on the assumption that the opponent's witness is biased. If the court calls the witness, however, it would appear that the right to ask leading questions in cross-examination could be curtailed if the witness is biased in favor of the cross-examiner. 3 WIGMORE, EVIDENCE § 773.

21. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW AND CONTEMPORARY PROBLEMS 476, 477 (1936).

22. The judge could easily determine the existence of the material witness in the instant case, because the witness was the fellow-servant whose negligence was the issue of controversy. Other eyewitnesses to the accident, however, might never be known to the judge unless specifically mentioned by the parties.

23. See notes 18–20 *supra*.