

## Alleged Chemical Release Did Not "Speak for Itself"

November 18, 2011 by [Sean Wajert](#)

Contractors working at a refinery who were allegedly exposed to chemical fumes cannot rely on the venerable *res ipsa loquitur* theory because their claimed injuries may have had other causes. See [Pearson v. BP Products North America Inc.](#), 10-40442 (5th Cir., 11/10/11).

As a precaution due to Hurricane Rita, BP Products North America decided to shut down all of its Texas City Refinery. before starting up again, BP decided to audit, evaluate, and "turn around" each of the units at the Refinery on an individual basis before resuming production. To complete the turnaround, BP used independent contractors for most of the work.

Plaintiffs were among the 450 contractors working on the turnaround when, one night in 2007, they began smelling an odor "unlike those one usually smells in a refinery." None of the hundreds of monitors and detectors designed to detect the release of any harmful gases was triggered. The foremen stopped work and allowed any worker to be examined at a local hospital; about one hundred workers went. Upon medical examination, no workers were found to have any exposure injuries that required hospital admission or required them to miss work.

Nevertheless, one hundred plaintiffs filed suit in the Southern District of Texas, claiming injuries from the incident. Ten workers' claims were consolidated for trial. None of these Trial Plaintiffs' experts could identify the alleged odor's source or its cause. The closest thing to proof that the Trial Plaintiffs marshaled was that the gas was carbon disulfide was a mask worn by one of the Trial Plaintiffs was found to have had exposure to carbon disulfide. But, the laboratory technician who tested the mask admitted that the mask had not been appropriately maintained for proper scientific study.

BP moved for judgment as a matter of law, which the district court denied, and the claims were submitted to the jury. As part of the jury's charge, the district court instructed the jury that it could infer the Appellant's/BP's negligence through the doctrine of *res ipsa loquitur*. The jury returned a verdict for the Trial Plaintiffs and awarded approximately \$325,000 in compensatory damages amongst the ten Trial Plaintiffs and also \$100 million in punitive damages (\$10 million per Trial Plaintiff). The district court entered final judgment for the Trial Plaintiffs but vacated the jury's award of punitive damages because the Trial Plaintiffs failed to prove gross negligence, as required under Texas law. Already, red flags should be flying, as clearly the punitives claim should never have gone to the jury, and yet the ability to argue it would have inflamed the emotion of the jury, contaminating the compensatory award.

BP timely appealed. (Seven Trial plaintiffs settled, leaving the three for this opinion to handle.) BP argued that it was improper for the district court to have instructed the jury on *res ipsa loquitur* and that absent that instruction, Appellees could not show that it was negligent. Under Texas law, *res ipsa loquitur*, meaning "the thing speaks for itself," is used in certain limited types of cases when the circumstances surrounding the accident constitute sufficient evidence of the defendant's negligence to support such a finding. *Res ipsa loquitur* is applicable only

when two factors are present: (1) the character of the accident is such that it would not ordinarily occur in the absence of negligence; and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant. *Res ipsa loquitur* is simply a rule of evidence by which negligence may be inferred by the jury; it is not a separate cause of action from negligence.

Importantly, the Texas Supreme Court had already noted in a chemical release case that a *res ipsa* instruction was inappropriate because escaping gas in the vicinity of a complex chemical plant could be due to an unexpected and unforeseeable mechanical failure or it could be due to negligence. The instrumentality causing the injury could have been in the control of the owner of the refinery or the contractors turning around the unit.

Here, none of the Appellants' experts could identify where the odor came from or whether it was even from BP's property. The Appellees had shown neither that the character of the accident was one that would not usually occur absent negligence nor that the injury-causing instrumentality was in BP's control. In such circumstances, the district court should not have instructed the jury on *res ipsa loquitur*. Without a *res ipsa* instruction, the Appellees could not meet their burden of proof as to negligence. Judgment reversed.