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# THE PROCEDURAL EFFECT OF RES IPSA LOQUITUR[1]

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THERE is magic in a formula, especially if it be in Latin. Res ipsa loquitur means nothing more than "the thing speaks for itself." The phrase is at least as old as Cicero,[2] and it has long been familiar to the law. It seems to have been used first in 1614, where usury was apparent upon the face of an instrument.[3] It has been employed in connection with the revocation of a license to use a way,[4] and misrepresentations in a sale of goods.[5] In 1863 Baron Pollock casually let it fall in the course of argument with counsel in a negligence case.[6] From this small beginning, there has developed an extensive "doctrine" of res ipsa loquitur, which is the source of endless confusion in the courts.

There is more general agreement upon the conditions required for the application of the doctrine than as to its effect when applied. The principle was first stated by Chief Justice Erle, in *Scott v. London Dock Co.*:[7]

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

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[1]See generally Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur, (1928) 22 Ill. L. Rev. 724; Carpenter, The Doctrine of Res Ipsa Loquitur, (1934) 1 U. Chi. L. Rev. 519; note, (1935) 3 U. Chi. L. Rev. 126.

[2]Oration in Defense of Milo, pars. 53 and 66.

[3]Roberts v. Trenayne, (1614) Cro. Jac. 508. See also Bank of United States v. Waggener, (1835) 9 Pet. (U.S.) 399, 9 L. Ed. 163.

[4]Nichols v. Peck, (1898) 70 Conn. 441, 39 Atl. 803, 40 L. R. A. 81, 66 Am. St. Rep. 122.

[5]Patterson v. Landsberg & Son, (1905) 7 Fraser (Sess. Cas.) 675.

[6]Byrne v. Boadle, (1863) 2 H. & C. 722.

[7](1865) 3 H. & C. 596.

Dean Wigmore has suggested[8] three requirements for the application of res ipsa loquitur, which have been more or less uniformly accepted. The plaintiff must have been injured by an apparatus or instrumentality whose nature is such that injury is not ordinarily to be expected in the absence of negligence.[9] At the time of the injury, both inspection and user must have been in the exclusive control of the defendant.[10] And the injurious occurrence or condition must not have been due to any voluntary action on the part of the plaintiff.[11] The purpose of these limitations is evident. The circumstances must be such as to give rise to an inference that someone has been negligent, and the defendant's control of the situation must be such that the inference will point to the defendant. The mere occurrence of an accident alone, without these attendant circumstances, never will be sufficient to establish a res ipsa loquitur case, since it creates no reasonable inference that the defendant has been negligent.[12]

Dean Wigmore says further[13] that the force and justification of the principle lies in the fact that the evidence of the true cause of the accident is accessible to the defendant, and not accessible to the plaintiff. In other words, that the defendant is in a position to explain the accident, while the plaintiff is not. This certainly is mentioned in many cases[14] as a reason for the

[8] 5 Wigmore, Evidence, 2d ed., sec. 2509, p. 498.

[9] See for example Ash v. Childs Dining Hall Co., (1918) 231 Mass. 86, 120 N. E. 396, 4 A. L. R. 1556; Piehl v. Albany Ry., (1900) 30 App. Div. 166, 51 N. Y. S. 755, aff'd (1900) 162 N. Y. 617, 57 N. E. 1122. See Carpenter, The Doctrine of Res Ipsa Loquitur, (1934) 1 U. Chi. L. Rev. 519.

[10] Sullivan v. Minneapolis St. Ry., (1924) 161 Minn. 45, 200 N. W. 922; Narbonne v. Storer, (1913) 121 Minn. 505, 141 N. W. 535; Mathews v. Chicago & N. W. Ry., (1925) 162 Minn. 313, 202 N. W. 896; Klan v. Security Motors, (Md. 1933) 164 Atl. 235; Sylvia v. Newport Gas Light Co., (1924) 45 R. I. 515, 124 Atl. 289; Scellars v. Universal Service, (1924) 68 Cal. App. 252, 228 Pac. 879.

But a too literal application of this limitation leads to such results as in Kilgore v. Shepard & Co., (R. I. 1932) 158 Atl. 720, where, in defendant's store, plaintiff sat down in a chair which collapsed. It was held that res ipsa loquitur did not apply, and that a verdict was properly directed for defendant, because plaintiff was in "control" of the chair at the time of injury. Of course this is wrong. All that is necessary is that all factors operating to cause the injury (here only the condition of the chair) be under defendant's control. Cf. Goldman & Freiman Bottling Co. v. Sindell, (1922) 140 Md. 488, 117 Atl. 866. The Rhode Island court has lost sight of the inference, in attempting to reduce res ipsa loquitur to a rule of law.

[11] Cf. Vergeldt v. Hartzell, (C.C.A. 8th Cir. 1924) 1 F. (2d) 633.

[12] Benedick v. Potts, (1898) 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; Kemp v. McNeill Cooperage Co., (1918) 7 Boyce (Del.) 146, 104 Atl. 639.

[13] 5 Wigmore, Evidence, 2d ed., sec. 2509, p. 498.

[14] See cases cited in 45 C. J. 1205, sec. 773, footnote 45.

application of the rule, and there are even decisions[15] to the effect that res ipsa loquitur is not available to a plaintiff who is in a better position to produce evidence than the defendant. But this factor seems not to be indispensable, and may have been overemphasized, in the light of cases[16] applying the principle where the defendant is dead, or unable to produce any evidence at all. A few early decisions[17] refused to find a res ipsa case in the absence of a contractual relation between the parties; but this requirement is now rejected generally.[18]

When the plaintiff succeeds in making out a res ipsa loquitur case, he obtains a procedural advantage over the defendant. As to the extent of this advantage, and the effect to be given to it, the courts are not at all in harmony. Since much of the confusion results from the various meanings assigned to terms such as "presumption," "inference," "prima facie case," "burden of proof," "burden of going forward with the evidence," and the like, it is necessary to begin any discussion of the problem with definitions. The following terms will be used hereafter in the senses indicated.

1. *Permissible Inference.* The least effect which may be given to res ipsa loquitur is to permit the jury to infer from the plaintiff's case, without other evidence, that the defendant has been negligent. Such an inference is enough to satisfy, in the first instance, the burden which rests upon the plaintiff to introduce

[15]Bahr v. Lombard, (1890) 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; Cass v. Sanger, (1909) 77 N. J. L. 412, 71 Atl. 1126; Levendusky v. Empire Rubber Mfg. Co., (1913) 84 N. J. L. 698, 87 Atl. 338; Lynch v. Ninemire Packing Co., (1911) 63 Wash. 423, 115 Pac. 838, L. R. A. 1917E 178; Pronnecke v. Westliche Post Pub. Co., (1927) 220 Mo. App. 640, 291 S. W. 139.

[16]See for example Weller v. Worstall, (Ohio App. 1934) 197 N. E. 410; Monkhouse v. Johns, (La. App. 1932) 142 So. 347. Compare the cases cited in the annotation, (1934) 93 A. L. R. 609, as to the application of res ipsa loquitur where plaintiff has introduced specific evidence of negligence. See also Galbraith v. Busch, (1935) 267 N. Y. 230, 196 N. E. 36.

[17]Kepner v. Harrisburg Traction Co., (1897) 183 Pa. St. 24, 38 Atl. 416; Stearns v. Ontario Spinning Co., (1898) 184 Pa. St. 519, 39 Atl. 292, 39 L. R. A. 842, 63 Am. St. Rep. 807; Kirby v. Canal Co., (1897) 20 App. Div. 473, 46 N. Y. S. 777.

[18]Griffen v. Manice, (1901) 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; Bloom v. City of Cullman, (1916) 197 Ala. 490, 73 So. 85; Beall v. City of Seattle, (1902) 28 Wash. 593, 69 Pac. 12, 61 L. R. A. 583, 92 Am. St. Rep. 892. See also cases cited in 45 C. J. 1205, sec. 776, footnote 65.

The idea still survives in Pennsylvania, in the form of a requirement that the defendant must have undertaken a responsibility for the plaintiff's safety. This is admitted to be out of line with other jurisdictions. Fitzpatrick v. Penfield, (1920) 267 Pa. St. 564, 109 Atl. 653; Johns v. Pennsylvania R.R., (1910) 226 Pa. St. 319, 75 Atl. 408, 28 L. R. A. (N.S.) 591; Fox v. City of Philadelphia, (1904) 208 Pa. St. 127, 57 Atl. 356.

evidence upon which reasonable men may find in his favor. It is enough to avoid a nonsuit, or a dismissal. It is not enough to entitle him to a directed verdict, even though the defendant rests without evidence. It shifts no "burden" to the defendant, except in the sense that if the defendant offers no evidence, he runs the risk that the jury may find against him. The jury will be permitted to accept the inference, but it is not compulsory; if they see fit to find for the defendant, they are free to do so. A verdict either way will be sustained.[19] In other words, a "permissible inference" makes enough of a case to get to the jury, and no more. Sometimes it is called a "prima facie case," but as that term is used by some courts to designate a presumption, it will be avoided in this discussion.

2. *Presumption.* A greater advantage is given to the plaintiff if his res ipsa loquitur case is treated as creating a presumption. This means that the jury will not merely be permitted to infer the defendant's negligence, but, in the absence of evidence to the contrary, will be required by the court to do so. In other words, if the defendant rests without evidence, the plaintiff will be entitled to a directed verdict. The burden of going forward with evidence is placed upon the defendant, in the sense that if he does not offer evidence, a verdict will necessarily be directed against him. If the defendant does offer substantial evidence, the presumption is "rebutted;" it is more correct to say that since there is now evidence on either side, the jury may find either way, and there is no occasion for a directed verdict—the presumption merely disappears. The presumption does not transfer to the defendant the "burden of proof" in the sense of requiring the defendant to produce evidence of greater weight than that offered by the plaintiff. If, when all the evidence is in, it is evenly balanced, the verdict must be for the defendant.[20]

3. *Burden of Proof.* The greatest effect given to res ipsa loquitur is to place upon the defendant the ultimate burden of proof. This means that the defendant is required to prove by a preponderance of the evidence that the injury was not caused by his negligence. He is required to produce evidence which will

[19]Carpenter, The Doctrine of Res Ipsa Loquitur, (1934) 1 U. Chi. L. Rev. 519, 523. Cf. Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur, (1928) 22 Ill. L. Rev. 724, 729.

[20]5 Wigmore, Evidence, 2d ed., sec. 2490, p. 449; Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur, (1928) 22 Ill. L. Rev. 724, 730; Carpenter, The Doctrine of Res Ipsa Loquitur, (1934) 1 U. Chi. L. Rev. 519, 524.

have greater weight than that offered by the plaintiff. Upon all the evidence, the defendant's case must outweigh that of the plaintiff; if the two are evenly balanced, the defendant must lose. Since the weight of evidence ordinarily is for the jury, the question usually arises upon instructions to the jury; but if it is clear that the defendant has failed to sustain the burden, the court must direct a verdict against him.[21]

Although it must be assumed that these terms will be given different meanings by many courts, they have been adopted by most writers,[22] and it is convenient to make use of them.

Any attempt to classify cases involving the effect of res ipsa loquitur must necessarily depend upon the interpretation placed on very ambiguous language in the opinions, much of which was written casually, and without thought of the above distinctions. It seems clear, however, that the greater number of courts treat res ipsa loquitur as giving rise to nothing more than a mere permissible inference, which neither creates a presumption, nor shifts any burden to the defendant. This appears to be the view taken in Arizona,[23] Connecticut,[24] Georgia,[25] Iowa,[26] Kentucky,[27]

[21]5 Wigmore, Evidence, 2d ed., sec. 2485, p. 437; Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur, (1928) 22 Ill. L. Rev. 724, 730; Carpenter, The Doctrine of Res Ipsa Loquitur, (1934) 1 U. Chi. L. Rev. 519, 525.

[22]See Thayer, Preliminary Treatise on Evidence, ch. VIII, IX; 5 Wigmore, Evidence, 2d ed., secs. 2485-2494, pp. 437-459; Morgan, Some Observations About Presumptions, (1931) 44 Harv. L. Rev. 906; Morgan, Presumptions and Burden of Proof, (1933) 47 Harv. L. Rev. 59; Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, (1920) 68 U. Pa. L. Rev. 307; Harper, Law of Torts, sec. 77, pp. 184-186.

[23]Pickwick Stages Corp. v. Messinger, (Ariz. 1934) 36 P. (2d) 168.

[24]Stebel v. Connecticut Co., (1915) 90 Conn. 24, 96 Atl. 171; Sliwowski v. New York, N. H. & H. R.R., (1920) 94 Conn. 303, 108 Atl. 805; Hunt v. Central Vermont Ry., (1923) 99 Conn. 657, 122 Atl. 563; Ruerat v. Stevens, (1931) 113 Conn. 333, 155 Atl. 219; Jump v. Ensign-Bickford Co., (Conn. 1933) 167 Atl. 90; Motiejaitis v. Johnson, (Conn. 1933) 169 Atl. 606; Gorfain v. Gorfain, (Conn. 1934) 172 Atl. 924. Apparently in favor of a presumption are Feeney v. New York Waist House, (1927) 105 Conn. 647, 136 Atl. 554; Schiesel v. S. Z. Poli Realty Co., (1928) 108 Conn. 115, 142 Atl. 812. See also Hutchins, Res Ipsa Loquitur, (1929) 3 Conn. Bar. J. 35.

[25]Chenall v. Palmer Brick Co., (1903) 117 Ga. 106, 43 S. E. 443; Palmer Brick Co. v. Chenall, (1904) 119 Ga. 837, 47 S. E. 329; Sinkovitz v. Peters Land Co., (1909) 5 Ga. App. 788, 64 S. E. 93; Atlanta Coca-Cola Bottling Co. v. Danneman, (1920) 25 Ga. App. 43, 102 S. E. 542; Bonita Theatre v. Bridges, (1924) 31 Ga. App. 807, 122 S. E. 255; Candler v. Automatic Heating, (1929) 40 Ga. App. 280, 149 S. E. 287.

[26]Earlier cases apparently applied a presumption, or shifted the burden of proof. Fitch v. Mason City & C. L. Traction Co., (1904) 124 Iowa 665, 100 N. W. 618; Nicoll v. Sweet, (1913) 163 Iowa 683, 144 N. W. 615, L. R. A. 1918C 1099, Ann. Cas. 1916C 661; Weber v. Chicago, R. I. & P. R. R., (1915) 175 Iowa 358, 151 N. W. 852, L. R. A. 1918A 626;

Maine,[28] Minnesota,[29] Mississippi,[30] Missouri,[31] Montana,[32] New

Brown v. Des Moines Steam Bottling Works, (1916) 174 Iowa 715, 156 N. W. 829, 1 A. L. R. 835. See also Crozier v. Hawkeye Stages, (1929) 209 Iowa 313, 228 N. W. 320. But in Anderson v. Fort Dodge, D. M. & S. Ry., (1929) 208 Iowa 369, 226 N. W. 151, the court reviewed the situation, and pronounced definitely in favor of the inference theory. To the same effect are Duncan v. Fort Dodge Gas & Electric Co., (1922) 193 Iowa 1127, 188 N. W. 865; Whitmore v. Herrick, (1928) 205 Iowa 621, 218 N. W. 334; Harvey v. Borg, (1934) 218 Iowa 1228, 257 N. W. 190; Sutcliffe v. Fort Dodge Gas & Elec. Co., (1934) 218 Iowa 1386, 257 N. W. 406.

[27]Probably. Res ipsa loquitur has been treated as a presumption, or as shifting the burden of proof. T. B. Jones & Co. v. Pelly, (Ky. 1910) 128 S. W. 305; Louisville & N. R. R. v. Comley, (1917) 173 Ky. 469, 191 S. W. 96, L. R. A. 1917C 978; Quillen v. Skaggs, (1930) 233 Ky. 171, 25 S. W. (2d) 33. Other cases look like inference. Paducah Traction Co. v. Baker, (1908) 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N.S.) 1185; Wright v. Elkhorn Consolidation Coal & Coke Co., (1918) 182 Ky. 423, 206 S. W. 634; Watson v. Pullman Co., (1931) 238 Ky. 491, 38 S. W. (2d) 430. Finally, in Black Mountain Corp. v. Partin's Adm'r, (1932) 243 Ky. 791, 49 S. W. (2d) 1014, the court referred to the confusion in the earlier cases, and seems to have decided definitely in favor of the inference theory.

[28]Leighton v. Dean, (1917) 117 Me. 40, 102 Atl. 565, L. R. A. 1918B 922; Edwards v. Cumberland County Power & Light Co., (1929) 128 Me. 207, 146 Atl. 700; Chaisson v. Williams, (1931) 130 Me. 341, 156 Atl. 154.

[29]Keithley v. Hettinger, (1916) 133 Minn. 36, 157 N. W. 897, Ann. Cas. 1918D 376; Holt v. Ten Broeck, (1916) 134 Minn. 458, 159 N. W. 1073, Ann. Cas. 1918E 256; Kleinman v. Banner Laundry Co., (1921) 150 Minn. 515, 186 N. W. 123, 23 A. L. R. 479; Sullivan v. Minneapolis St. Ry., (1924) 161 Minn. 45, 200 N. W. 922; Ryan v. St. Paul Union Depot Co., (1926) 168 Minn. 287, 210 N. W. 32. Earlier cases, speaking of presumptions or shifting the burden of proof, are now overruled. Ryder v. Kinsey, (1895) 62 Minn. 85, 64 N. W. 94, 34 L. R. A. 557, 54 Am. St. Rep. 623; Gould v. Winona Gas Co., (1907) 100 Minn. 258, 111 N. W. 254, 10 L. R. A. (N.S.) 889; Jones v. Tri-State Tel. & Tel. Co., (1912) 118 Minn. 217, 136 N. W. 741, 40 L. R. A. (N.S.) 485.

[30]Alabama & V. Ry. v. Groome, (1910) 97 Miss. 201, 52 So. 703 (res ipsa loquitur ordinarily sets up merely an inference for the jury; on the particular facts, the inference is so strong as to amount to a presumption; a very good case); Pillars v. R. J. Reynolds Tobacco Co., (1918) 117 Miss. 490, 78 So. 365 (no mention of res ipsa loquitur); Waddle v. Sutherland, (1930) 156 Miss. 540, 126 So. 201; J. C. Penney Co. v. Evans, (Miss. 1935) 160 So. 779.

[31]A long line of cases, headed by Price v. Metropolitan St. Ry., (1909) 220 Mo. 435, 119 S. W. 932, 132 Am. St. Rep. 588, held that res ipsa loquitur shifted the burden of proof to the defendant. In McCloskey v. Koplar, (1932) 329 Mo. 557, 46 S. W. (2d) 557, the court executed a startling about-face and overruled all these cases, holding that it was error to charge the jury that the burden of proof in a res ipsa loquitur case is on defendant. It is not clear from the McCloskey Case whether the court regards res ipsa as presumption or inference; but it has been followed by later cases which clearly say that there is merely a permissible inference. Walsh v. Southwestern Bell Tel. Co., (1932) 331 Mo. 118, 52 S. W. (2d) 839; Glasco Elec. Co. v. Union Elec. Light & Power Co., (Mo. 1933) 61 S. W. (2d) 955; Harke v. Haase, (Mo. 1934) 75 S. W. (2d) 1001; Herries v. Bond Stores, (Mo. App. 1935) 84 S. W. (2d) 153; Tabler v. Perry, (Mo. 1935) 85 S. W. (2d) 471; Williams v. St. Louis-San Francisco Ry., (Mo. 1935) 85 S. W. (2d) 624. But compare Hartnett v. May Department Stores, (Mo. App. 1935) 85 S. W. (2d) 644, to the effect that in actions by a passenger against a carrier res ipsa loquitur still amounts to

Hampshire,[33] North Carolina,[34] Ohio,[35] Oklahoma,[36] South Dakota,[37] Tennessee,[38] Texas,[39] Utah,[40] Vermont,[41] Wisconsin,[42] and the federal courts.[43]

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a presumption. See also Gordon v. Muehling Packing Co., (1931) 328 Mo. 123, 40 S. W. (2d) 693.

[32]Lyon v. Chicago, M. & St. P. Ry., (1915) 50 Mont. 532, 148 Pac. 386 (semble); Johnson v. Herring, (1931) 89 Mont. 420, 300 Pac. 535 (semble); Maki v. Murray Hospital, (1932) 91 Mont. 251, 7 P. (2d) 228; Vonault v. O'Rourke, (1934) 97 Mont. 92, 33 P. (2d) 535. The court talks of "presumptions" in Hardesty v. Largey Lbr. Co., (1906) 34 Mont. 151, 86 Pac. 29; John v. Northern Pac. Ry., (1910) 42 Mont. 18, 111 Pac. 632, 32 L. R. A. (N.S.) 85, but it is not clear that it means anything more than a permissible inference.

[33]"Res ipsa loquitur" is not mentioned in the New Hampshire cases, but apparently the court applies the principle as an inference. Boucher v. Boston & Maine R. R., (1911) 76 N. H. 91, 79 Atl. 993, 34 L. R. A. (N.S.) 728, Ann. Cas. 1912B 847; Kenney v. Wong Len, (1925) 81 N. H. 427, 128 Atl. 343; McCourt v. Travers, (N.H. 1934) 175 Atl. 165 (citing English res ipsa loquitur cases).

[34]Womble v. Merchants Groc. Co., (1904) 135 N. C. 474, 47 S. E. 493; Stewart v. Van Deventer Carpet Co., (1905) 138 N. C. 60, 50 S. E. 562 (semble); Lyles v. Brannon Carbonating Co., (1905) 140 N. C. 25, 52 S. E. 233; Ross v. Double Shoals Cotton Mills, (1905) 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N.S.) 298; Fitzgerald v. Southern Ry., (1906) 141 N. C. 530, 54 S. E. 391, 6 L. R. A. (N.S.) 337; Morrisett v. Elizabeth City Cotton Mills, (1909) 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N.S.) 848; Ridge v. Norfolk Southern R. R., (1914) 167 N. C. 510, 83 S. E. 762, L. R. A. 1917E 215; Page v. Camp Mfg. Co., (1920) 180 N. C. 330, 104 S. E. 667; White v. Hines, (1921) 182 N. C. 275, 109 S. E. 31; Modlin v. Chandler Sales Co., (1922) 183 N. C. 63, 110 S. E. 661; Harris v. Mangum, (1922) 183 N. C. 235, 111 S. E. 177; McDowell v. Norfolk Southern R. R., (1923) 186 N. C. 570, 120 S. E. 205, 42 A. L. R. 857; Howard v. Texas Co., (1933) 205 N. C. 20, 169 S. E. 832.

[35]St. Mary's Gas Co. v. Brodbeck, (1926) 114 Ohio St. 423, 151 N. E. 323; Glowacki v. North Western Ohio Ry. & Power Co., (1927) 116 Ohio St. 451, 157 N. E. 21; Howard v. Pennsylvania R. R., (1930) 42 Ohio App. 96, 182 N. E. 663; Class v. Young Women's Christian Ass'n, (1934) 47 Ohio App. 128, 191 N. E. 102. Earlier cases defined the doctrine in terms of "presumption." Mansfield Public Utility & Service Co. v. Grogg, (1921) 103 Ohio St. 301, 133 N. E. 481; cf. Cincinnati Traction Co. v. Holzenkamp, (1906) 74 Ohio St. 379, 78 N. E. 529, 6 L. R. A. (N.S.) 800, 113 Am. St. Rep. 980; Loomis v. Toledo Rys. & Light Co., (1923) 107 Ohio St. 161, 140 N. E. 639.

[36]Muskogee Elec. Traction Co. v. McIntire, (1913) 37 Okla. 684, 133 Pac. 613, L. R. A. 1916C 351; Sand Springs Park v. Schrader, (1921) 82 Okla. 244, 198 Pac. 983, 22 A. L. R. 593; Carter Oil Co. v. Independent Torpedo Co., (1924) 107 Okla. 209, 232 Pac. 419. See also Chicago, R. I. & P. Ry. v. Jones, (1920) 77 Okla. 140, 187 Pac. 233.

[37]Barger v. Chelpon, (1932) 60 S. D. 66, 243 N. W. 97, clearly says inference. Patterson v. Joseph Schlitz Brewing Co., (1902) 16 S. D. 33, 91 N. W. 326, looks like presumption, but is not at all definite.

[38]Young v. Bransford, (1883) 12 Lea (Tenn.) 232; Gill v. Brown, (1914) 130 Tenn. 174, 169 S. W. 752; North Memphis Savings Bank v. Union Bridge & Const. Co., (1917) 138 Tenn. 161, 196 S. W. 492; Lewis v. Casenburg, (1928) 151 Tenn. 187, 7 S. W. (2d) 808; Oliver v. Union Transfer Co., (1934) 17 Tenn. App. 694, 71 S. W. (2d) 478. The case of Gorsuch v. Swan, (1902) 109 Tenn. 36, 69 S. W. 1113, 97 Am. St. Rep. 836, seems definitely overruled.

[39]McCray v. Galveston, H. & S. A. Ry., (1896) 89 Tex. 168, 34 S. W.

On the other hand, there are a number of jurisdictions which say that res ipsa loquitur amounts to a presumption, and entitles the plaintiff to a directed verdict unless defendant introduces evidence to meet it. This seems to be the position of Illinois,[44] Indiana,[45]

95; Gulf, C. & S. F. Ry. v. Wood, (Tex. Civ. App. 1901) 63 S. W. 164; Houston, E. & W. T. Ry. v. Roach, (1908) 52 Tex. Civ. App. 95, 114 S. W. 418; Gulf, C. & S. F. Ry. v. Dunman, (Tex. Comm'n App. 1930) 27 S. W. (2d) 116; Wichita Falls Traction Co. v. Elliott, (Tex. Comm'n App. 1935) 81 S. W. (2d) 659 (inference not compulsory, but "burden of going forward" shifted to defendant! Quaere—see (1935) 14 Tex. L. Rev. 113). The case of Southwestern Tel. & Tel. Co. v. Sheppard, (Tex. 1916) 189 S. W. 799, which says the burden of proof is on defendant, appears to be out of line.

[40]Christensen v. Oregon Short Line R. R., (1909) 35 Utah 137, 99 Pac. 676, 20 L. R. A. (N.S.) 255, 18 Ann. Cas. 1159; Furkovich v. Bingham Coal & Lbr. Co., (1914) 45 Utah 89, 143 Pac. 121, L. R. A. 1915B 426; Williamson v. Salt Lake & O. Ry., (1918) 52 Utah 84, 172 Pac. 680, L. R. A. 1918F 588; Zoccolillo v. Oregon Short Line R. R., (1918) 53 Utah 39, 177 Pac. 201; Angerman Co. v. Edge, (1930) 76 Utah 394, 290 Pac. 169. But cf. Dearden v. San Pedro, L. A. & S. L. R. R., (1907) 33 Utah 147, 93 Pac. 271.

[41]Houston v. Brush, (1894) 66 Vt. 331, 29 Atl. 380; Desmarchier v. Frost, (1917) 91 Vt. 138, 99 Atl. 782; Spinney's Adm'x v. O. V. Hooker & Son, (1917) 92 Vt. 146, 102 Atl. 53; Stewart v. Barre & Montpelier Traction & Power Co., (1920) 94 Vt. 398, 111 Atl. 526; Humphrey v. Twin State Gas & Elec. Co., (1927) 100 Vt. 414, 139 Atl. 440.

[42]Probably. Kirst v. Milwaukee, L. S. & W. Ry., (1879) 46 Wis. 489; Kaples v. Orth, (1884) 61 Wis. 531, 21 N. W. 633; Klitzke v. Webb, (1904) 120 Wis. 254, 97 N. W. 901 ("sufficient when plaintiff rested to take the case to the jury"); Lipsky v. C. Reiss Coal Co., (1908) 136 Wis. 307, 117 N. W. 803; Rost v. Roberts, (1923) 180 Wis. 207, 192 N. W. 38. But see Dehmel v. Smith, (1929) 200 Wis. 292, 227 N. W. 274, which may be presumption.

[43]Sweeney v. Erving, (1913) 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815; Central R. R. of N. J. v. Peluso, (C.C.A. 2d Cir. 1923) 286 Fed. 661; Atlas Powder Co. v. Benson, (C.C.A. 3d Cir. 1923) 287 Fed. 797; Dierks Lbr. Co. v. Brown, (C.C.A. 8th Cir. 1927) 19 F. (2d) 732 (semble); Cochran v. Pittsburgh & L. E. R. R., (D.C. Ohio 1928) 31 F. (2d) 769; Blanton v. Great Atlantic & Pacific Tea Co., (C.C.A. 5th Cir. 1932) 61 F. (2d) 427. The Sweeney Case would seem to have overruled such presumption cases as Delaware & H. R. R. v. Dix, (C.C.A. 3d Cir. 1911) 188 Fed. 901; Chicago Rys. Co. v. Kramer, (C.C.A. 7th Cir. 1916) 234 Fed. 245. Res ipsa loquitur, as a rule of evidence, logically should be governed by state law under the Conformity Act, but the federal courts apparently follow the Supreme Court.

[44]Hart v. Washington Park Club, (1895) 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298; New York, C. & St. L. Ry. v. Blumenthal, (1895) 160 Ill. 40, 43 N. E. 809; Chicago Union Traction Co. v. Crosby, (1903) 109 Ill. App. 644; Everett v. Foley, (1907) 132 Ill. App. 438; Heimberger v. Frog & Switch Co., (1911) 165 Ill. App. 317; Mueller Bros. Art & Mfg. Co. v. Fulton St. Mkt. Co., (1913) 181 Ill. App. 685; Feldman v. Chicago Rys., (1919) 289 Ill. 25, 124 N. E. 334, 6 A. L. R. 1291 (possibly inference); Bollenbach v. Bloomenthal, (1930) 341 Ill. 539, 173 N. E. 670.

[45]Terre Haute & I. R. Co. v. Sheeks, (1900) 155 Ind. 74, 56 N. E. 434; Indianapolis St. Ry. v. Schmidt, (1904) 163 Ind. 360, 71 N. E. 201; Pittsburgh, C. C. & St. L. Ry. v. Higgs, (1905) 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N.S.) 1081; Cleveland, C. C. & St. L. Ry. v. Hadley, (1907) 170

Maryland,[46] New York,[47] Rhode Island,[48] Virginia,[49] and West Virginia.[50]

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Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N.S.) 527, 16 Ann. Cas. 1; Knoefel v. Atkins, (1907) 40 Ind. App. 428, 81 N. E. 600; Pittsburgh, C. C. & St. L. Ry. v. Arnott, (1920) 189 Ind. 350, 126 N. E. 13, 20 N. C. C. A. 414; Baltimore & O. S. W. R. R. v. Hill, (1925) 84 Ind. App. 354, 148 N. E. 489 (possibly inference). But National Biscuit Co. v. Wilson, (1907) 169 Ind. 442, 80 N. E. 33, 82 N. E. 916, looks like inference. It is settled that the burden of proof is not shifted. Pittsburgh, C. C. & St. L. Ry. v. Higgs, (1905) 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N.S.) 1081; Cleveland, C. C. & St. L. Ry. v. Hadley, (1907) 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N.S.) 527, 16 Ann. Cas. 1.

[46]Probably. Strasburger v. Vogel, (1906) 103 Md. 85, 63 Atl. 202; Walter v. Baltimore Elec. Co., (1909) 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N.S.) 1178 (semble); Chesapeake Iron Works v. Hochschild, Kohn & Co., (1913) 119 Md. 303, 86 Atl. 345 (clearly presumption); Goldman & Freiman Bottling Co. v. Sindell, (1922) 140 Md. 488, 117 Atl. 866; Potomac Edison Co. v. Johnson, (1930) 160 Md. 33, 152 Atl. 633. But there are cases looking like mere inference. Howser v. Cumberland & P. R. R., (1894) 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332; Benedick v. Potts, (1898) 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; Heim v. Roberts, (1920) 135 Md. 600, 109 Atl. 329; Bernheimer-Leader Stores v. Burlingame, (1927) 152 Md. 284, 136 Atl. 622. And Pindell v. Rubenstein, (1921) 139 Md. 567, 115 Atl. 859, talks of inference, presumption, and shifting the burden of proof. It was held in Potomac Edison Co. v. Johnson, (1930) 160 Md. 33, 152 Atl. 633, that the burden of proof is not shifted.

[47]Most of the New York cases support the presumption view. Edgerton v. New York & Harlem R. R., (1868) 39 N. Y. 227; Hogan v. Manhattan Ry., (1896) 149 N. Y. 23, 43 N. E. 403; Loudoun v. Eighth Ave. R. R., (1900) 162 N. Y. 380, 56 N. E. 988; Kay v. Metropolitan St. Ry., (1900) 163 N. Y. 447, 57 N. E. 751; Duerr v. Consolidated Gas Co., (1903) 86 App. Div. 14, 83 N. Y. S. 714; Cunningham v. Dady, (1908) 191 N. Y. 152, 83 N. E. 689; Moglia v. Nassau Elec. Ry., (1908) 127 App. Div. 243, 111 N. Y. S. 70; Levine v. Brooklyn, Q. C. & S. Ry., (1909) 134 App. Div. 606, 119 N. Y. S. 315; Plumb v. Richmond Light & R. Co., (1922) 233 N. Y. 203, 135 N. E. 504, 25 A. L. R. 685; Goldstein v. Pullman Co., (1917) 220 N. Y. 549, 116 N. E. 37, L. R. A. 1918B 1060. Occasional cases make res ipsa loquitur amount merely to an inference. Griffen v. Manice, (1901) 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; Eaton v. New York Cent. & H. R. R. R., (1909) 195 N. Y. 267, 88 N. E. 378; Schachter v. Interborough Rapid Transit Co., (1911) 146 App. Div. 139, 130 N. Y. S. 549; Marceau v. Rutland R. R., (1914) 211 N. Y. 203, 105 N. E. 206, 51 L. R. A. (N.S.) 1221, Ann. Cas. 1915C 511. It is settled that the burden of proof is not shifted. Kay v. Metropolitan St. Ry., (1900) 163 N. Y. 447, 57 N. E. 751; Cunningham v. Dady, (1908) 191 N. Y. 152, 83 N. E. 689; Goldstein v. Pullman Co., (1917) 220 N. Y. 549, 116 N. E. 37, L. R. A. 1918B 1060; Plumb v. Richmond Light & R. Co., (1922) 233 N. Y. 285, 135 N. E. 504, 25 A. L. R. 685.

[48]Ellis v. Waldron, (1896) 19 R. I. 369, 33 Atl. 869; Kearner v. Charles S. Tanner Co., (1910) 31 R. I. 203, 76 Atl. 833; 29 L. R. A. (N.S.) 537; Minutilla v. Providence Ice Cream Co., (1929) 50 R. I. 43, 144 Atl. 884; Di Sandro v. Providence Gas Co., (1918) 40 R. I. 551, 102 Atl. 617 (semble). See also Laforrest v. O'Driscoll, (1905) 26 R. I. 550, 59 Atl. 923; Himes v. Cole Teaming Co., (1916) 39 R. I. 504, 98 Atl. 897.

[49]Richmond Ry. & Elec. Co. v. Hudgins, (1902) 100 Va. 409, 41 S. E. 736; Norfolk Ry. & Light Co. v. Spratley, (1905) 103 Va. 379, 49 S. E. 502; Norfolk Southern R. R. v. Tomlinson, (1914) 116 Va. 153, 81 S. E.

There are occasional decisions[51] in many courts supporting the third view, that the ultimate burden of proof is shifted to the defendant, who is required to prove by a preponderance of all the evidence that the injury was not due to his negligence; but this position is adopted consistently only by Alabama,[52] Arkansas,[53] Louisiana,[54] and Pennsylvania.[55]

89; Hines v. Beard, (1921) 130 Va. 286, 107 S. E. 717; Riggsby v. Tritton, (1925) 143 Va. 903, 129 S. E. 493, 133 S. E. 580, 45 A. L. R. 280. In the last three cases it is held that the burden of proof is not shifted, contrary to Washington-Virginia Ry. v. Bouknight, (1912) 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E 546.

[50]Hodge v. Sycamore Coal Co., (1918) 82 W. Va. 106, 95 S. E. 808; Edmonds v. Monongahela Traction Co., (1916) 78 W. Va. 714, 90 S. E. 230.

[51]See for example Bush v. Barnett, (1892) 96 Cal. 202, 31 Pac. 2; Green v. Pacific Lbr. Co., (1900) 130 Cal. 435, 66 Pac. 747; Weber v. Chicago, R. I. & P. Ry., (1916) 175 Iowa 358, 151 N. W. 852; T. B. Jones & Co. v. Pelly, (Ky. 1910) 128 S. W. 305; Pindell v. Rubenstein, (1921) 139 Md. 567, 115 Atl. 859; Bond v. St. Louis-San Francisco Ry., (1926) 315 Mo. 987, 1002, 288 S. W. 777; Breen v. New York Cent. & H. R. R. R., (1888) 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; Washington-Virginia Ry. v. Bouknight, (1912) 113 Va. 696, 75 S. E. 1032; Johnson v. Grays Harbor R. & Light Co., (1927) 142 Wash. 520, 253 Pac. 819. All of these cases are contradicted by others in the same courts.

[52]Montgomery & E. Ry. v. Mallette, (1891) 92 Ala. 209, 9 So. 363; Alabama Great Southern Ry. v. Johnson, (1916) 14 Ala. App. 318, 85 So. 257. In other cases the court treats res ipsa loquitur as a presumption, without considering the burden of proof. Mathews v. Alabama Great Southern R. R., (1917) 200 Ala. 251, 76 So. 17; Central of Georgia R. R. v. Robertson, (1919) 203 Ala. 358, 83 So. 102; Lawson v. Mobile Elec. Co., (1920) 204 Ala. 318, 85 So. 257.

[53]Jacks v. Reeves, (1906) 78 Ark. 426, 95 S. W. 781; Southwestern Tel. & Tel. Co. v. Bruce, (1909) 89 Ark. 581, 117 S. W. 564; St. Louis, I. M. & S. Ry. v. Armbrust, (1915) 121 Ark. 351, 181 S. W. 131, Ann. Cas. 1917D 537. To the contrary is Arkansas Light & Power Co. v. Jackson, (1925) 166 Ark. 633, 267 S. W. 359. And Gurdon & Ft. Smith Ry. v. Calhoun, (1908) 86 Ark. 76, 109 S. W. 1017, says "presumption" without reference to the burden of proof.

[54]Lykiardopoulo v. New Orleans & C. R. Light & Power Co., (1910) 127 La. 209, 53 So. 575, Ann. Cas. 1912A 976; Dotson v. Louisiana Central Lbr. Co., (1918) 144 La. 78, 80 So. 205; Vargas v. Blue Seal Bottling Works, (La. App. 1930) 126 So. 707; Dragg v. Dorsey, (1930) 13 La. App. 115, 126 So. 724; Motor Sales & Service v. Grasseli Chemical Co., (1930) 15 La. App. 623, 131 So. 623; Horrell v. Gulf & Valley Cotton Oil Co., (1930) 15 La. App. 603, 131 So. 709. Contra, Monkhouse v. Johns, (La. App. 1932) 142 So. 347.

[55]Johns v. Pennsylvania R. R., (1910) 226 Pa. St. 319, 75 Atl. 408, 28 L. R. A. (N.S.) 591; Davis v. Kerr, (1913) 239 Pa. St. 151, 86 Atl. 1007, 46 L. R. A. (N.S.) 611; Shaughnessy v. Director General of Railroads, (1922) 274 Pa. St. 413, 118 Atl. 390, 23 A. L. R. 1211.

Pennsylvania originally based res ipsa loquitur upon a contract relation between plantiff and defendant. Sullivan v. Philadelphia & Reading R. R., (1858) 30 Pa. St. 234; Kepner v. Harrisburg Traction Co., (1897) 183 Pa. St. 24, 38 Atl. 416; Stearns v. Ontario Spinning Co., (1898) 184 Pa. St. 519, 39 Atl. 292, 39 L. R. A. 842, 63 Am. St. Rep. 807. Later it was extended to any situation where the defendant has undertaken to be responsible for the plaintiff's safety. Fox v. City of Philadelphia, (1904) 208 Pa. St. 127, 57 Atl. 356. It has not been extended to other

In addition to the foregoing, there are a dozen or more jurisdictions in which the language used by the courts is so uncertain or conflicting that it is virtually impossible to say what position they have taken as to the effect of res ipsa loquitur. The list would seem to include California,[56] Colorado,[57] Delaware,[58] Florida,[59] Kansas,[60] Massachusetts,[61] Nebraska,[62] New Jersey,[63] North

cases. Joyce v. Black, (1910) 226 Pa. St. 408, 75 Atl. 602, 27 L. R. A. (N.S.) 863; Lanning v. Pittsburgh Rys., (1911) 229 Pa. St. 575, 79 Atl. 136, 32 L. R. A. (N.S.) 1043; Fitzpatrick v. Penfield, (1920) 267 Pa. St. 564, 109 Atl. 653. See note, (1922) 70 U. Pa. L. Rev. 105. This restricted interpretation of res ipsa loquitur accounts for placing the burden of proof upon the defendant.

[56]California courts have said repeatedly that there is merely an inference, and that it is not proper to charge the jury in terms of presumptions. Dowd v. Atlas Taxicab & Auto Service Co., (1921) 187 Cal. 523, 202 Pac. 870; Atkinson v. United Railroads of San Francisco, (1925) 71 Cal. App. 82, 234 Pac. 863; Crooks v. White, (1930) 107 Cal. App. 304, 290 Pac. 497; Even v. Pickwick Stages System, (1930) 109 Cal. App. 636, 293 Pac. 700; Hilson v. Pacific Gas & Elec. Co., (1933) 131 Cal. App. 427, 21 P. (2d) 662. Cf. Thomas v. Visalia Elec. Ry., (1915) 169 Cal. 658, 147 Pac. 972. But there are numerous cases which clearly say that there is a presumption. Judson v. Giant Powder Co., (1895) 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; Osgood v. Los Angeles Traction Co., (1902) 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; Housel v. Pacific Elec. Ry., (1914) 167 Cal. 245, 139 Pac. 73, 51 L. R. A. (N.S.) 1105, Ann. Cas. 1915C 665; Morris v. Morris, (1927) 84 Cal. App. 599, 258 Pac. 616; Lejeune v. General Petroleum Corp., (1932) 128 Cal. App. 404, 18 P. (2d) 429; Lynch v. Market St. Ry., (1933) 130 Cal. App. 302, 19 P. (2d) 1009. Notwithstanding early cases to the contrary, such as Bush v. Barnett, (1892) 96 Cal. 202, 31 Pac. 2, it seems settled that the burden of proof is not shifted. Osgood v. Los Angeles Traction Co., (1902) 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; Kahn v. Triest-Rosenberg Cap Co., (1903) 139 Cal. 340, 73 Pac. 164; Diller v. Northern California Power Co., (1912) 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D 908; Scarborough v. Urgo, (1923) 191 Cal. 341, 216 Pac. 584; Seitzman v. Shere Corp., (1931) 116 Cal. App. 674, 3 P. (2d) 58. See, generally, note (1924) 12 Cal. L. Rev. 138. Professor Carpenter, of California, classifies California as a presumption state, Carpenter, The Doctrine of Res Ipsa Loquitur, (1934) 1 U. Chi. L. Rev. 519, 525.

[57]Colorado Springs & Interurban Ry. v. Reese, (1917) 69 Colo. 1, 169 Pac. 572, looks like inference. But Velotta v. Yampa Valley Coal Co., (1917) 63 Colo. 489, 167 Pac. 971, L. R. A. 1918B 917 looks like presumption; and Denver City Tramway Co. v. Hills, (1911) 50 Colo. 328, 116 Pac. 725, casually says "presumption."

[58]Wood v. Wilmington City Ry., (1905) 5 Pen. (Del.) 269, 64 Atl. 246 (presumption); Edmanson v. Wilmington & Philadelphia Traction Co., (1922) 2 W. W. Har. (Del.) 177, 120 Atl. 923 (presumption); Thompson v. Cooles, (Del. 1935) 180 Atl. 522 (inference).

[59]The only case found is Louisville & N. R. R. v. Rhoda, (1917) 73 Fla. 12, 74 So. 19, which talks of both "presumption" and "inference."

[60]Mayes v. Kansas City Power & Light Co., (1926) 121 Kan. 648, 249 Pac. 599; Ratliffe v. Wesley Hospital, (1932) 135 Kan. 306, 10 P. (2d) 859; Clarke v. Cardinal Stage Lines, (1934) 139 Kan. 280, 31 P. (2d) 1, all look like inference. But Potter v. Rorebaugh-Wiley Dry Goods Co., (1911) 83 Kan. 712, 112 Pac. 613, 32 L. R. A. (N.S.) 45, clearly says the burden of proof is on defendant; and Southern Kan. Ry. v. Walsh, (1891) 45 Kan. 653, 26 Pac. 45, and St. Louis S. F. R. R. v. Burrows, (1900) 62

Dakota,[64] Oregon,[65] Washington,[66] Wyoming,[67] and the English courts.[68]

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Kan. 89, 61 Pac. 439, talk of "presumptions," without specifically mentioning res ipsa loquitur.

[61]Most of the Massachusetts cases say inference. Carmody v. Boston Gas Light Co., (1895) 162 Mass. 539, 39 N. E. 184; Graham v. Badger, (1895) 164 Mass. 42, 41 N. E. 61 ("presumption of fact"); Melvin v. Pennsylvania Steel Co., (1902) 180 Mass. 196, 62 N. E. 379; Hull v. Berkshire St. Ry., (1914) 217 Mass. 361, 104 N. E. 747, 5 A. L. R. 1330; St. Louis v. Bay State St. Ry., (1913) 216 Mass. 255, 103 N. E. 639, 49 L. R. A. (N.S.) 447, Ann. Cas. 1915B 706; O'Neil v. Toomey, (1914) 218 Mass. 242, 105 N. E. 974; Washburn v. Owens, (1925) 252 Mass. 47, 147 N. E. 564. The uncertainty arises from the fact that these cases are not clear holdings, and that a strong presumption case, Uggla v. West End St. Ry., (1894) 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481, which required a directed verdict for the plaintiff, is not expressly contradicted, and continues to be cited with approval.

[62]Spellman v. Lincoln Rapid Transit Co., (1893) 36 Neb. 890, 55 N. W. 270; Omaha St. Ry. v. Boesen, (1905) 74 Neb. 764, 105 N. W. 303, 4 L. R. A. (N.S.) 122; Lincoln Traction Co. v. Shepherd, (1906) 74 Neb. 369, 107 N. W. 764, all look like presumption. The first two do not mention res ipsa loquitur by name. Rocha v. Payne, (1922) 108 Neb. 246, 187 N. W. 804, looks like inference. The burden of proof is not shifted. Omaha St. Ry. v. Boesen, (1905) 74 Neb. 764, 105 N. W. 303, 4 L. R. A. (N.S.) 122; Lincoln Traction Co. v. Shepherd, (1906) 74 Neb. 369, 107 N. W. 764; Mercer v. Omaha & C. B. St. Ry., (1922) 108 Neb. 532, 188 N. W. 296.

[63]The cases seem to be in hopeless confusion. Sheridan v. Foley, (1895) 58 N. J. L. 230, 33 Atl. 484 (presumption); Trenton Passenger Ry. v. Cooper, (1897) 60 N. J. L. 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592 (inference); Najarian v. Jersey City, H. & P. R.R., (1909) 77 N. J. L. 704, 73 Atl. 527, 23 L. R. A. (N.S.) 751 (presumption ?); Hughes v. Atlantic City & S. R.R., (1914) 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916A 927 (inference, but the burden of going forward with evidence shifted to defendant!); Higgins v. Goerke-Krich Co., (1918) 91 N. J. L. 464, 103 Atl. 37, aff'd (1919) 92 N. J. L. 424, 106 Atl. 394 (presumption); Polony v. James Brady's Sons' Co., (N.J.L. 1924) 126 Atl. 675 (presumption); Crawford v. American Stores Co., (1927) 103 N. J. L. 320, 136 Atl. 715 (inference); Rapp v. Butler-Newark Bus Line, (1927) 103 N. J. L. 512, 138 Atl. 377 (presumption); Noonan v. Great Atlantic & Pacific Tea Co., (1927) 104 N. J. L. 136, 139 Atl. 9 (clearly inference); Gilroy v. Standard Oil Co., (1930) 107 N. J. L. 170, 151 Atl. 598 (presumption); Bud Dress Shop v. Newark Glass Co., (N.J.L. 1932) 160 Atl. 212 (clearly inference); Gordon v. Weinreb, (N.J.L. 1935) 181 Atl. 435 (inference; "it is well settled"—sic!). It seems to be settled that the burden of proof is not shifted. Shay v. Camden & S. Ry., (1901) 66 N. J. L. 334, 49 Atl. 547; Niebel v. Winslow, (1915) 88 N. J. L. 191, 95 Atl. 995; Nemecz v. Morrison & Sherman, (1932) 109 N. J. L. 577, 162 Atl. 622. Expressions to the contrary in such cases as Polony v. James Brady's Sons' Co., (N.J. 1924) 126 Atl. 675, probably are to be interpreted as shifting merely the burden of going forward with evidence.

[64]Wyldes v. Patterson, (1915) 31 N. D. 282, 153 N. W. 630 (presumption); Leiferman v. White, (1918) 40 N. D. 150, 168 N. W. 569 (inference).

[65]The note, (1934) 13 Or. L. Rev. 340, concludes that the decisions are about evenly divided in their language, as between presumption and inference, and that no case has squarely presented the issue. Koontz v. Oregon Ry. & Nav. Co., (1890) 20 Or. 3, 23 Pac. 820 (presumption; no mention of res ipsa); Esberg-Gunst Cigar Co. v. City of Portland, (1899) 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651 (inference); Boyd v. Portland General Elec. Co., (1901) 40 Or. 126, 66 Pac. 810, aff'd (1902) 41 Or.

Finally, both Michigan[69] and South Carolina[70] reject the en-

336, 68 Pac. 810 (presumption); Chaperon v. Portland General Elec. Co., (1902) 41 Or. 39, 67 Pac. 928 (apparently inference; burden of proof not shifted); Duntley v. Inman, Poulsen & Co., (1902) 42 Or. 334, 70 Pac. 529, 59 L. R. A. 785 (inference); Goss v. Northern Pac. Ry., (1906) 48 Or. 439, 87 Pac. 149 (inference); Chenoweth v. Southern Pac. Co., (1909) 53 Or. 111, 99 Pac. 86 (presumption); Kelly v. Lewis Inv. Co., (1913) 66 Or. 1, 133 Pac. 826 (inference); Caraduc v. Schanen-Blair Co. (1913) 66 Or. 310, 133 Pac. 636 (presumption); Coblentz v. Jaloff, (1925) 115 Or. 656, 239 Pac. 825 (presumption); Gillilan v. Portland Crematorium Ass'n, (1926) 120 Or. 286, 249 Pac. 627 (inference); Francisco v. Circle Tours Sightseeing Co., (1928) 125 Or. 80, 265 Pac. 801 (burden of proof not shifted); Phillipson v. Hunt, (1929) 129 Or. 242, 276 Pac. 255 (clearly inference; burden of proof not shifted); Eldred v. United Amusement Co., (1931) 137 Or. 452, 2 P. (2d) 1114 (inference).

[66]The cases are in confusion. Beall v. City of Seattle, (1902) 28 Wash. 593, 69 Pac. 12, 61 L. R. A. 583, 92 Am. St. Rep. 892 (presumption ?); Anderson v. McCarthy Dry Goods Co., (1908) 49 Wash. 398, 95 Pac. 325, 16 L. R. A. (N.S.) 931, 126 Am. St. Rep. 870 (inference ?); Graaf v. Vulcan Iron Works, (1910) 59 Wash. 325, 109 Pac. 1016 (inference); Gibson v. Chicago, M. & St. P. Ry., (1911) 61 Wash. 639, 112 Pac. 919 (burden of proof shifted ?); Wodnik v. Luna Park Amusement Co., (1912) 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N.S.) 1070 (inference); Briglio v. Holt & Jeffery, (1915) 85 Wash. 155, 147 Pac. 877 (burden of proof not shifted; language indicating both presumption and mere permissible inference); Poth v. Dexter Horton Estate, (1926) 140 Wash. 272, 248 Pac. 374 (burden of proof shifted ?); Johnson v. Grays Harbor R. & Light Co., (1927) 142 Wash. 520, 253 Pac. 819 (burden of proof shifted ?); Highland v. Wilsonian Inv. Co., (1932) 171 Wash. 34, 17 P. (2d) 631 (inference). It seems clear that the Washington court never has seriously considered the question.

[67]The only case found is Acme Cement Plaster Co. v. Westman, (1912) 20 Wyo. 143, 122 Pac. 89, which throws no light on the question.

[68]The original case, Byrne v. Boadle, (1863) 2 H. & C. 722, looks like presumption. So do Chaproniere v. Mason, (1905) 21 T. L. R. 633, and The Kite, [1933] P. 154. But Scott v. London Dock Co., (1865) 3 H. & C. 596; Briggs v. Oliver, (1866) 4 H. & C. 403; Gee v. Metropolitan Ry., (1873) L. R. 8 Q. B. 161; Skinner v. London, Brighton & S. C. Ry., (1850) 5 Ex. 787; Parker v. Miller, (1926) 42 T. L. R. 408, and Ellor v. Selfridge & Co., (1930) 46 T. L. R. 236, all look decidedly like inference. Kearney v. London, Brighton & S. C. Ry., (1870) L. R. 5 Q. B. 411, aff'd (1871) L. R. 6 Q. B. 659, supports either view.

[69]Michigan defines res ipsa loquitur as a presumption of negligence from the mere occurrence of the injury alone, and says it is not in force in that state. Burghardt v. Detroit United Ry., (1919) 206 Mich. 545, 173 N. W. 360, 5 A. L. R. 1333; Fuller v. Magatti, (1925) 231 Mich. 213, 203 N. W. 868; Loveland v. Nelson, (1926) 235 Mich. 623, 209 N. W. 835; Camp v. Spring, (1928) 241 Mich. 700, 217 N. W. 917; Sampson v. Veenboer, (1930) 252 Mich. 660, 234 N. W. 170; Kerr v. City of Detroit, (1931) 255 Mich. 446, 238 N. W. 190; Eaton v. Consumers' Power Co., (1932) 256 Mich. 549, 240 N. W. 24; A. J. Brown & Son v. City of Grand Rapids, (1933) 265 Mich. 465, 251 N. W. 561. But the principle is applied consistently in the form of an inference from circumstantial evidence. Barnowski v. Hilson, (1891) 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33; Sewell v. Detroit United Ry., (1909) 158 Mich. 407, 123 N. W. 2; Burghardt v. Detroit United Ry., (1919) 206 Mich. 545, 173 N. W. 360, 5 A. L. R. 1333; Loveland v. Nelson, (1926) 235 Mich. 623, 209 N. W. 835; Weaver v. Motor Transit Management Co., (1930) 252 Mich. 64; Eaton v. Consumers Power Co., (1932) 256 Mich. 549, 240 N. W. 24; Durfey v. Milligan, (1933) 265 Mich. 97, 251 N. W. 356. And see Waidleich v. Andros, (1914) 182

tire doctrine of res ipsa loquitur in express terms, and say it is not to be given effect, but proceed nevertheless to apply the principle under different names when the situation calls for it.

All this confusion reigns where there is no evidence before the courts except plaintiff's res ipsa case—that is, the occurrence of the accident under circumstances where accidents ordinarily do not occur without negligence, and defendant's control of the situation. When the plaintiff goes further, and introduces specific evidence of the defendant's failure to use proper care, the problem becomes more complex. It is commonly said that if the facts as to the cause of the accident are disclosed by evidence, nothing is left to inference, there is no room for any "presumption," and the doctrine has no application and is not available to the plaintiff.[71] It is also said that the attempt to prove negligence by specific evidence does not destroy the inference normally to be drawn from the occurrence of the accident, or waive plaintiff's right to rely on it.[72] These statements are carried over into questions of pleading,

Mich. 374, 148 N. W. 824, where the court even used the words "res ipsa loquitur." See discussion in 45 C. J. 1194.

[70]The court says res ipsa loquitur is not in force in South Carolina. Weston v. Hillyer, (1931) 160 S. C. 541, 159 S. E. 390; Correll v. City of Spartanburg, (1933) 169 S. C. 403, 169 S. E. 84; Heath v. Town of Darlington, (1934) 175 S. C. 27, 177 S. E. 894; Montgomery v. Conway Lbr. Co., (1934) 171 S. C. 483, 172 S. E. 620. And there are cases where it would seem to be applicable, where the court refuses to permit even an inference of negligence. Holmes v. Davis, (1923) 126 S. C. 231, 119 S. E. 249; Watson v. Charleston Stevedoring Co., (1927) 141 S. C. 355, 139 S. E. 778. But compare Steele v. Southern Ry., (1899) 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756 (presumption); Sutton v. Southern Ry., (1909) 82 S. C. 345, 64 S. E. 401 (presumption); Shelton v. Southern Ry., (1910) 86 S. C. 98, 67 S. E. 899 (presumption); Sullivan v. Charleston & W. C. Ry., (1910) 85 S. C. 632, 67 S. E. 905 (presumption); Thompson v. Atlantic Coast Line R. R., (1920) 113 S. C. 261, 102 S. E. 112 (presumption); Bunch v. American Cigar Co., (1923) 126 S. C. 324, 119 S. E. 828 (presumption); Bailey v. Union-Buffalo Mills Co., (1929) 151 S. C. 83, 148 S. E. 703 (presumption); Correll v. City of Spartanburg, (1933) 169 S. C. 403, 169 S. E. 84 (inference).

[71]Heffter v. Northern States Power Co., (1927) 173 Minn. 215, 217 N. W. 102; Dentz v. Pennsylvania R. R., (1908) 75 N. J. L. 893, 70 Atl. 164; Anderson v. Northern Pac. Ry., (1915) 88 Wash. 139, 152 Pac. 1001; Lyon v. Chicago, M. & St. P. Ry., (1915) 50 Mont. 532, 148 Pac. 386; Riggsby v. Tritton, (1925) 143 Va. 903, 129 S. E. 493, 133 S. E. 580, 45 A. L. R. 280; Stangy v. Boston Elev. Ry., (1915) 220 Mass. 414, 107 N. E. 933; Baldwin v. Smitherman, (1916) 171 N. C. 772, 88 S. E. 854; McAnany v. Shipley, (1915) 189 Mo. App. 396, 176 S. W. 1079; Texas Co. v. Charles Clarke & Co., (Tex. Civ. App. 1915) 182 S. W. 351; Cook v. Union Elec. Light & Power Co., (Mo. App. 1921) 232 S. W. 248; Heckfuss v. American Packing Co., (Mo. App. 1920) 224 S. W. 99; Conduitt v. Trenton Gas & Elec. Co., (Mo. 1930) 31 S. W. (2d) 21.

[72]Kilgore v. Brown, (1928) 90 Cal. App. 555, 266 Pac. 297; Partin's Adm'r v. Black Mountain Corp., (1933) 248 Ky. 32, 58 S. W. (2d) 234; Cassaday v. Old Colony St. Ry., (1903) 184 Mass. 156, 68 N. E. 10, 63

where the plaintiff has alleged specific negligence on the part of defendant in his complaint, and seeks to take advantage of res ipsa loquitur at the trial. No less than four positions have been taken as to whether he may do so.[73] It is said that plaintiff, by pleading the specific allegations, has waived or lost his right to rely on the doctrine;[74] that he may take advantage of it provided the inference of negligence to be drawn supports the specific allegations;[75] that it may be applied provided the specific pleading is accompanied by a general allegation of negligence;[76] and that it is available without regard to the form of the pleading.[77] Missouri

L. R. A. 285; Sullivan v. Rowe, (1907) 194 Mass. 500, 80 N. E. 459; McNamara v. Boston & M. Ry., (1909) 202 Mass. 491, 89 N. E. 131; McDonough v. Boston Elev. R.R., (1911) 208 Mass. 436, 94 N. E. 809; Porter v. St. Joseph Ry., L. H. & P. Co., (1925) 311 Mo. 66, 277 S. W. 913, 26 N. C. C. A. 284; Glasco Elec. Co. v. Union Elec. L. & P. Co., (1933) 332 Mo. 1079, 61 S. W. (2d) 955; Kinchlow v. Kansas City, K. V. & W. Ry., (Mo. 1924) 264 S. W. 416; Cullen v. Pearson, (1934) 191 Minn. 136; Borg & Powers Furn. Co. v. Clark, (Minn. 1935) 260 N. W. 316; D'Arcy v. Westchester Elec. Co., (1903) 82 App. Div. 263, 81 N. Y. S. 952. See the annotation, (1934) 93 A. L. R. 609.

[73]See annotations, (1908) 24 L. R. A. (N.S.) 788; (1915) L. R. A. 1915F 992; (1932) 79 A. L. R. 48.

[74]Midland Valley Ry. v. Conner, (C.C.A. 8th Cir. 1914) 217 Fed. 956; Moore v. Clagett, (1919) 48 App. D. C. 410; Connor v. Atchison, T. & S. F. Ry., (1922) 189 Cal. 1, 207 Pac. 378, 22 A. L. R. 1462; O'Rourke v. Marshall Field & Co., (1923) 307 Ill. 197, 138 N. E. 625, 27 A. L. R. 1014, 22 N. C. C. A. 766; Chicago Union Traction Co. v. Leonard, (1906) 126 Ill. App. 189; Byers v. Essex Inv. Co., (1920) 281 Mo. 375, 219 S. W. 570; Lyon v. Chicago, M. & St. P. Ry., (1915) 50 Mont. 532, 148 Pac. 386; Austin v. Dilday, (Nev. 1934) 36 P. (2d) 359; Dowdy v. Southern Traction Co., (Tex. Civ. App. 1916) 184 S. W. 687, rev'd in (Tex. 1920) 219 S. W. 1092.

[75]Pickwick Stages Corp. v. Messinger, (Ariz. 1934) 36 P. (2d) 168; Atkinson v. United Ry., (1925) 71 Cal. App. 82, 234 Pac. 863; Palmer Brick Co. v. Chenall, (1904) 119 Ga. 837, 47 S. E. 329; Terre Haute & I. Ry. v. Sheeks, (1900) 155 Ind. 74, 56 N. E. 434; Alabama & V. Ry. v. Groome, (1910) 97 Miss. 201, 52 So. 703; Gallagher v. Edison Illuminating Co., (1897) 72 Mo. App. 576; Boyd v. Portland General Elec. Co., (1901) 40 Or. 126, 66 Pac. 576, aff'd (1902) 41 Or. 336, 68 Pac. 810; Johnson v. Galveston, H. & N. Ry., (1902) 27 Tex. Civ. App. 616, 66 S. W. 906.

[76]Rosenzweig v. Hines, (D.C. N.Y. 1922) 280 Fed. 247; Roberts v. Sierra Ry., (1925) 14 Cal. App. 180, 200, 111 Pac. 519, 527; Burdette v. Chicago Auditorium Ass'n, (1911) 166 Ill. App. 186; Rauch v. Des Moines Elec. Co., (1928) 206 Iowa 309, 218 N. W. 340; McDonough v. Boston Elev. Ry., (1911) 208 Mass. 436, 94 N. E. 809; Kleinman v. Banner Laundry Co., (1921) 150 Minn. 515, 186 N. W. 123, 23 A. L. R. 479; Schaff v. Sanders, (Tex. Civ. App. 1923) 257 S. W. 670, aff'd (Tex. 1925) 269 S. W. 1034; Washington Virginia Ry. v. Bouknight, (1912) 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E 546.

[77]Biddle v. Riley, (1915) 118 Ark. 206, 176 S. W. 134, L. R. A. 1915F 992; Lippert v. Pacific Sugar Corp., (1917) 33 Cal. App. 198, 164 Pac. 810; Briganti v. Connecticut Co., (Conn. 1934) 175 Atl. 679; Waidleich v. Andros, (1914) 182 Mich. 374, 148 N. W. 824; Rapp v. Butler-Newark Bus Line, (1927) 103 N. J. L. 512, 138 Atl. 377, aff'd (1928) 104 N. J. L. 444, 140 Atl. 921; McNeill v. Durham & C. Ry., (1902) 130 N. C. 256, 41

has gone off into a controversy as to the distinction between general and specific pleadings, which has filled the courts of that state with cases, and apparently has done nothing to advance the cause of justice.[78]

Still further complications arise when the defendant offers evidence of his own due care. Quite apart from the question of the burden of proof, it is said that the "presumption" of res ipsa loquitur is itself evidence, to be weighed against that of the defendant;[79] it is also said that it is not evidence, has no weight whatever, and disappears from the case when the defendant offers substantial evidence in his own favor.[80] There are many decisions to the effect that defendant's evidence, even if uncontradicted, merely carries the issue to the jury;[81] others to the effect that it entitles him to a directed verdict;[82] while at least two courts have

S. E. 383; Union Gas & E. Co. v. Waldsmith, (1929) 31 Ohio App. 118, 166 N. E. 588; Nashville Interurban Ry. v. Gregory, (1917) 137 Tenn. 422, 193 S. W. 1053; Dearden v. San Pedro, L. A. & S. L. Ry., (1907) 33 Utah 147, 93 Pac. 271; Kluska v. Yeomans, (1909) 54 Wash. 465, 103 Pac. 819, 132 Am. St. Rep. 1121.

[78]See May Dept. Stores Co. v. Bell, (C.C.A. 8th Cir. 1932) 61 F. (2d) 830, discussing the Missouri cases, and concluding that they cannot be harmonized.

[79]Bush v. Barnett, (1892) 96 Cal. 202, 31 Pac. 2; Brown v. Davis, (1927) 84 Cal. App. 180, 257 Pac. 877; Michener v. Hutton, (1928) 203 Cal. 604, 265 Pac. 238; Cleveland, C. C. & St. L. Ry. v. Hadley, (1907) 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N.S.) 527, 16 Ann. Cas. 1; Kay v. Metropolitan St. Ry., (1900) 163 N. Y. 447, 57 N. E. 751; Duerr v. Consolidated Gas Co., (1903) 86 App. Div. 14, 83 N. Y. S. 714.

[80]Lawson v. Mobile Elec. Co., (1920) 204 Ala. 318, 85 So. 257; Langley Bus Co. v. Messer, (1931) 222 Ala. 533, 133 So. 287; Bollenbach v. Bloomenthal, (1930) 341 Ill. 539, 173 N. E. 670; Scarpelli v. Washington Water Power Co., (1911) 63 Wash. 18, 114 Pac. 870; Spaulding v. Chicago & N. W. Ry., (1873) 33 Wis. 582.

[81]S. H. Kress & Co. v. Barrett, (1933) 226 Ala. 455, 147 So. 386; Morris v. Morris, (1927) 84 Cal. App. 599, 258 Pac. 616; Hunt v. Central Vermont Ry., (1923) 99 Conn. 657, 122 Atl. 563; Chicago City Ry. v. Barker, (1904) 209 Ill. 321, 70 N. E. 624; Potomac Edison Co. v. Johnson, (1930) 160 Md. 33, 152 Atl. 633; Maki v. Murray Hospital, (1932) 91 Mont. 251, 7 P. (2d) 228; Vonault v. O'Rourke, (1934) 97 Mont. 92, 33 P. (2d) 535; Volkmar v. Manhattan Ry., (1892) 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678; Marceau v. Rutland R.R., (1914) 211 N. Y. 303, 105 N. E. 206, 51 L. R. A. (N.S.) 1221, Ann. Cas. 1915C 511; Goldstein v. Levy, (1911) 74 Misc. Rep. 463, 132 N. Y. S. 373; Turner v. Southern Power Co., (1910) 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N.S.) 848; Weller v. Worstall, (1935) 129 Ohio St. 596, 196 N. W. 637; Chaperon v. Portland General Elec. Co., (1902) 41 Or. 39, 67 Pac. 928; Caraduc v. Schanen-Blair Co., (1913) 66 Or. 310, 133 Pac. 636; Coblentz v. Jaloff, (1925) 115 Or. 656, 239 Pac. 825; Gillilan v. Portland Crematorium Ass'n, (1926) 120 Or. 286, 249 Pac. 627; Minutilla v. Providence Ice Cream Co., (1929) 50 R. I. 43, 144 Atl. 884; Angerman Co. v. Edge, (1930) 76 Utah 394, 290 Pac. 169; Poth v. Dexter Horton Estate, (1926) 140 Wash. 272, 248 Pac. 374; Lipsky v. C. Reiss Coal Co., (1908) 136 Wis. 307, 117 N. W. 803.

[82]Lawson v. Mobile Elec. Co., (1920) 204 Ala. 318, 85 So. 257; Central

expressed the opinion that there is no true case of res ipsa loquitur in which a verdict ever has been directed for the defendant.[83]

In short, there seems to be no single question as to the procedural effect of res ipsa loquitur on which statements may not be found, in the opinions, on either side.

All this is rather marvelous. It suggests that there is a notion abroad that words spoken in Latin are somehow transcended, and acquire greater significance than their English equivalents. It suggests that res ipsa loquitur is used in different types of cases to mean different things, and that if the doctrine is to be considered as a unit, there is no such thing. It recalls the late Percy Haughton's observation on the Yale football system, that it was fearfully and wonderfully complicated, and fundamentally foolish.

If it be supposed that Baron Pollock had said merely, in English, "the things speaks for itself," and that no unwieldy "doctrine" ever had developed, would it not be possible to answer all these questions, without difficulty and without confusion, upon the basis of common sense?

In the first place, it should be clear that what we are dealing with is nothing more than a matter of circumstantial evidence.[84] Negligence may be proved by circumstances,[85] and in a res ipsa case, since there is no direct proof of negligence, the circumstances are the evidence.[86] When a man is found with his throat

of Georgia R.R. v. Robertson, (1919) 203 Ala. 358, 83 So. 102; Bollenbach v. Bloomenthal, (1930) 341 Ill. 539, 173 N. E. 670; Ryder v. Kinsey, (1895) 62 Minn. 85, 64 N. W. 94, 34 L. R. A. 557, 54 Am. St. Rep. 623; Jenkins v. St. Paul City Ry., (1908) 105 Minn. 504, 117 N. W. 928, 20 L. R. A. (N.S.) 401; Swenson v. Purity Baking Co., (1931) 183 Minn. 289, 236 N. W. 310; Cohen v. Farmers' Loan & Trust Co., (1911) 70 Misc. Rep. 548, 127 N. Y. S. 561; Goss v. Northern Pac. Ry., (1906) 48 Or. 439, 87 Pac. 149; Coca-Cola Bottling Co. v. Rowland, (1932) 16 Tenn. App. 184, 66 S. W. (2d) 272; Oliver v. Union Transfer Co., (1934) 17 Tenn. App. 694, 71 S. W. (2d) 478; Klitzke v. Webb, (1904) 120 Wis. 254, 97 N. W. 901.

[83]Glowacki v. North Western Ohio Ry. & Power Co., (1927) 116 Ohio St. 451, 157 N. E. 21; Humphrey v. Twin State Gas & Elec. Co., (1927) 100 Vt. 414, 139 Atl. 440.

[84]"What is a res ipsa loquitur case anyhow? Reduced to simple terms, does it not merely mean that negligence can be proved by circumstantial evidence and that certain circumstances, as to the character of an accident, are sufficient to take the case to the jury?" Harke v. Haase, (Mo. 1934) 75 S. W. (2d) 1001.

[85]Mulligan v. Atlantic Coast Line, (1916) 104 S. C. 173, 77 S. E. 445; Mathews v. Alabama Great Southern R.R., (1917) 200 Ala. 251, 76 So. 17; Weleetka Cotton Oil Co. v. Brookshire, (1917) 65 Okla. 293, 166 Pac. 408; Loveland v. Nelson, (1926) 235 Mich. 623, 209 N. W. 835.

[86]"Res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it

cut, and the defendant was the last person seen with him, the defendant's footprints are found leading away from the scene of the crime, and the defendant is found in possession of a blood-stained knife, together with the deceased's watch and wallet, nothing is said about "res ipsa loquitur," but the state's attorney does not fail to tell the jury that the facts cry aloud to high heaven the name of the murderer. When a brick falls upon the plaintiff from a building, whence bricks do not ordinarily fall unless someone has been negligent, and defendant is in full control of the building, the evidence is of no different kind or quality.

"When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant upon the occurrence, we speak of it as a case of 'res ipsa loquitur;' when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence."[87]

The ill-starred attempt to distinguish between the two,[88] and to say that one means more than the other, is at the bottom of most of the confusion. In the nature of the proof involved, a res ipsa case does not differ from the ordinary case in which the circumstances indicate that someone must have been negligent, and point to the defendant as the one responsible.

Circumstantial evidence leads to an inference from the facts

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may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient. . . ." Sweeney v. Erving, (1913) 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815.

". . . the doctrine of res ipsa loquitur is a rule of common sense, and not a rule of law which dispenses with proof of negligence. It is a convenient formula for saying that a plaintiff may, in some cases, sustain the burden of proving that the defendant was more probably negligent than not, by showing how the accident occurred, without offering any evidence to show why it occurred. . . ." Stebel v. Connecticut Co., (1915) 90 Conn. 24, 96 Atl. 171.

"The phrase is nothing but a picturesque way of describing a balance of probability on a question of fact on which little evidence either way has been presented." Thayer, in Selected Essays on Torts 599, 604.

"The principal difference between a res ipsa loquitur case and a specific negligence case would seem to be that the very basis of liability, *the existence of some negligence,* may be shown by a particular kind of circumstantial evidence, namely, an *unusual* occurrence of a character which ordinarily results only from negligence . . . and from which, therefore, negligence is a reasonable inference; while in a specific negligence case the careless acts or omissions which constitute negligence must be stated and proven. In other words, in a res ipsa case the ultimate fact, *some kind of negligence* is inferred without any evidential facts except the unusual occurrence itself; while in a specific negligence case there must be evidential facts sufficient to show some negligent acts or omissions which were the proximate cause of the occurrence." Harke v. Haase, (Mo. 1934) 75 S. W. (2d) 1001.

[87]Cullen, J., in Griffen v. Manice, (1901) 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630.

[88]See annotations, (1907) 6 L. R. A. (N.S.) 337; (1917) L. R. A. 1917E 4; (1929) 59 A. L. R. 468; (1932) 78 A. L. R. 731.

in evidence to the ultimate fact. A res ipsa case permits the jury to infer that defendant has been negligent. Does it necessarily do more—does it make the inference compulsory, in the absence of evidence to the contrary? In other words, does it create a presumption? Professor Carpenter argues[89] that if res ipsa loquitur amounts to no more than a permissible inference, there is no point in the requirement of an instrumentality in the exclusive control of the defendant, since it may be inferred from the nature of the accident alone that there has been negligence. The answer would appear to be obvious: the defendant's control of the situation is necessary in order that we may infer negligence, not merely on the part of someone, but on the part of defendant. But a sounder argument may be advanced. If the thing speaks for itself, if the inference is sufficiently strong to induce the court to say that it may be drawn, why permit a perverse jury to refuse to draw it? If the obvious conclusion from the circumstances is that defendant has been negligent, why not direct a verdict for the plaintiff?

The answer is, that in the usual res ipsa case the inference of negligence is not exclusive, nor is it so strong that we may say as a matter of law that the jury could not reject it. If the defendant's elevator falls while the plaintiff is riding in it, it may be inferred that there has been negligent construction, failure to inspect, negligent operation. But it may also be inferred that there was a defective cable which could not have been discovered by all reasonable care, or that some unavoidable accident has happened to the machinery. Whether one inference is more reasonable than the other is a question which cannot be determined as a matter of law, and must be left to the jury.[90] It is not enough for a directed verdict that the court itself would

[89]Carpenter, The Doctrine of Res Ipsa Loquitur, (1934) 1 U. Chi. L. Rev. 519, 529.

[90]". . . but that inference is still one for the jury and not for the court. They may not believe the witnesses; the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do; they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and, in any event, they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant." Swayze, J., in Hughes v. Atlantic City & S. R. R., (1914) 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916A 927.

Cf. Galbraith v. Busch, (1935) 267 N. Y. 230, 196 N. E. 36, a case involving an automobile running off the road, where the court refuses to apply res ipsa loquitur, on the ground that the inference pointed with equal probability to conditions of which plaintiff assumed the risk.

infer negligence, unless it can say that reasonable men could not fail to do so.

In the simplest res ipsa loquitur case, there is only a permissible inference of negligence. It is significant that many of the jurisdictions which give the doctrine greater effect have been compelled to recognize, under other names, the existence of a type of res ipsa case where there is no more than an inference.[91] The source of the presumption idea is not difficult to trace. It rests largely upon the feeling that all the evidence must be in the possession of defendant, and he should be called upon to explain, under penalty of a decision against him. But it never has been a sufficient defense in a res ipsa case that the defendant has no evidence, and knows no more about the cause of the accident than the plaintiff; and there is no policy of the law in favor of permitting a party who has the burden of proof in the first instance to obtain a directed verdict merely by a showing that he knows less about the facts than his adversary.[92] Another explanation lies in the fact that many of the early cases were actions by passengers against carriers, and, by analogy to the cases of damage to goods, it was considered that plaintiff had established his case by proving breach of the contract of safe transportation, and defendant thereafter had the affirmative of the issue as to his own due care.[93] This point of view has merged and become lost in the general "doctrine" of res ipsa loquitur, and carrier cases

[91]Baker v. Baker, (Ala. 1929) 124 So. 740; Mathews v. Alabama Great Southern R. R., (1917) 200 Ala. 251, 76 So. 17; Shafer v. Lacock, (1895) 168 Pa. St. 497, 32 Atl. 44; Durning v. Hyman, (Pa. 1926) 133 Atl. 569; Pope v. Reading Co., (1931) 304 Pa. St. 326, 156 Atl. 106; Maltz v. Carter, (1933) 311 Pa. St. 550, 166 Atl. 852; Minutilla v. Providence Ice Cream Co., (1929) 50 R. I. 43, 144 Atl. 884. Cf. Dei v. Stratigos, (1926) 287 Pa. St. 475, 135 Atl. 111, Lesick v. Proctor, (1930) 300 Pa. St. 347, 150 Atl. 618; Lineaweaver v. John Wanamaker, (1930) 299 Pa. St. 45, 149 Atl. 91; Burghardt v. Detroit United Ry., (1919) 206 Mich. 545, 173 N. W. 360, 5 A. L. R. 1333.

[92]Galbraith v. Busch, (1935) 267 N. Y. 230, 196 N. E. 36.

[93]Thompson, Carriers of Passengers 210; Laing v. Colder, (1848) 8 Pa. St. 479, 49 Am. Dec. 533; Sullivan v. Philadelphia & Reading R.R., (1858) 30 Pa. St. 234; Curtis v. Rochester & Syracuse R.R., (1859) 18 N. Y. 534; Brignoli v. Chicago & Great Eastern Ry., (1871) 4 Daly (N.Y.) 182; Baltimore & Yorktown Turnpike Road v. Leonhardt, (1886) 66 Md. 70, 5 Atl. 346; Spear v. Philadelphia. W. & B. R. R., (1888) 5 Pa. County Ct. Rep. 393; Patton v. Pickles, (1898) 50 La. Ann. 857, 24 So. 290; Steele v. Southern Ry., (1899) 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756; Falke v. Second Ave. R.R., (1899) 38 App. Div. 49, 55 N. Y. S. 984; Elgin, A. & S. Traction Co. v. Wilson, (1905) 217 Ill. 47, 75 N. E. 436; see note, (1907) 113 Am. St. Rep. 986, 1003; note, (1922) 70 U. Pa. L. Rev. 105; 5 Wigmore, Evidence, secs. 2508, 2509, pp. 491-493.

now are treated like others,[94] but it has left its mark in many states.

Thus far we have been concerned with the simplest case. But there are other cases where the inference of neglignce from the circumstances is so strong that the jury could not reasonably be permitted to disregard it—where, in other words, the inference amounts to a presumption, and unless defendant offers evidence to meet it, a verdict must be directed for the plaintiff. The original case of *Byrne v. Boadle*,[95] where a barrel of flour fell upon the plaintiff from defendant's window, seems to be of this kind. It is difficult to conceive of any reasonable explanation except negligence, and Baron Pollock quite properly said there was a presumption. If a small piece of mortar falls on the plaintiff from defendant's building, it may be that negligence cannot even be inferred; if a brick falls from the same building, an inference may be permitted; but suppose the falling object is an elephant? Could any reasonable jury infer that those in charge had used due care? If a single bottle of Coca Cola explodes, perhaps negligence may not be inferred, since there may have been undiscoverable defects in the glass; if twenty-seven bottles explode, there is an inference of negligent bottling;[96] but suppose a thousand bottles explode? If minute particles of glass are found in a can of spinach, it may be that there is no inference, since they might have escaped even careful inspection; if the pieces of glass are larger, the inference is permissible;[97] but what if the article found in the can is a set of false teeth? In the absence of explanation, is any conclusion possible except that the canner has been at fault?

"We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless."[98]

[94]Dobie, Bailments and Carriers, sec. 188, p. 608; 4 Elliott, Railroads, sec. 1644, p. 573; 3 Moore, Carriers, 2d ed., p. 1477; 3 Hutchinson, Carriers, 3d ed., secs. 1413, 1414, pp. 1700 ff. But see Gordon v. Muehling Packing Co., (1931) 328 Mo. 123, 40 S. W. (2d) 693; Hartnett v. May Dept. Stores, (Mo. App. 1935) 85 S. W. (2d) 644, to the effect that carrier cases involve a presumption, other res ipsa cases a mere inference.

[95](1863) 2 H. & C. 722.

[96]Cf. Loebig's Guardian v. Coca Cola Bottling Co., (Ky. 1935) 81 S. W. (2d) 910, with Coca Cola Bottling Works v. Shelton, (1926) 214 Ky. 118, 282 S. W. 778.

[97]Cf. O'Brien v. Louis K. Liggett Co., (1926) 255 Mass. 553, 152 N. E. 57, with Richenbacher v. California Packing Corp., (1924) 250 Mass. 198, 145 N. E. 281.

[98]Cook, C. J., in Pillars v. R. J. Reynolds Tobacco Co., (1918) 117 Miss. 490, 78 So. 365.

—is, after all, something of an understatement; the situation really calls for a presumption.

So far as plaintiff's right to a directed verdict is concerned, the effect of a res ipsa case must vary according to the strength of the inference of negligence to be drawn from the circumstances in evidence. It may be a permissible inference, or a presumption. A few courts have recognized this,[99] but most of them continue to cram all such cases into one basket, label them "res ipsa loquitur," and treat them all as leading to the same procedural result, whatever that result may be. Confusion is inevitable, and unnecessary. There is no uniform procedural effect of res ipsa loquitur; it means no more than circumstantial evidence, which may be strong or weak, according to the facts of the case.[100]

Where the plaintiff has introduced specific evidence of negligence, the problem would seem to be no more difficult. Plaintiff is of course bound by his evidence; but proof of specific facts does not necessarily exclude inferences. When the plaintiff shows that he was a passenger on defendant's train, and that the train was derailed, there is an inference that defendant has been negligent, and a res ipsa case. When he goes further, and shows that the derailment was caused by an open switch, he destroys any inference that it was caused by excessive speed or defective construction of the track, but the inference that defendant has not used due care in looking after its switches is not destroyed, but is so strengthened that perhaps it becomes a presumption. To say that res ipsa loquitur does not apply is to say that the weaker inference may be drawn, but the stronger may not. If plaintiff goes still further, and shows that the switch was thrown by an escaped convict with a grudge against the railroad, the last inference is destroyed, and plaintiff has proved himself out of court.[101] It is only in this sense that when the facts are known there is no room for inference, and res ipsa loquitur vanishes from the case. Particularly where plaintiff introduces only slight

[99]Keithley v. Hettinger, (1916) 133 Minn. 36, 157 N. W. 897, Ann. Cas. 1918D 376; Kleinman v. Banner Laundry Co., (1921) 150 Minn. 515, 186 N. W. 123, 23 A. L. R. 479; Alabama & V. Ry. v. Groome, (1910) 97 Miss. 201, 52 So. 703; Zoccolillo v. Oregon Short Line R. R., (1918) 53 Utah 39, 177 Pac. 201; Angerman Co. v. Edge, (1930) 76 Utah 394, 290 Pac. 169. Cf. Hilson v. Pacific Gas & Elec. Co., (1933) 131 Cal. App. 427, 21 P. (2d) 662.

[100]An excellent statement of the nature of res ipsa loquitur is found in Heim, Res Ipsa Loquitur, (1918) 63 Ohio L. B. 369, 372.

[101]See Gray v. Baltimore & O. R. R., (C.C.A. 7th Cir. 1928) 24 F. (2d) 671; cf. Gibson v. International Trust Co., (1900) 177 Mass. 100, 58 N. E. 278.

circumstantial evidence suggesting a definite cause of the accident, it cannot be said that the normal inferences are lost. There is little real dispute about this in the cases; it is only the language of the courts which is confusing.[102]

When the specific negligence is pleaded in the complaint, the problem is somewhat different. If plaintiff pleads specific allegations, such as failure to close the switch, and proves at the trial a case giving rise to a specific inference supporting the allegation, it seems clear that he ought to have the benefit of the inference, and to that extent res ipsa loquitur should apply.[103] The question is, if he proves no such case, but only the fact of the derailment, whether he should be permitted to rely on the general inference of negligence—excessive speed, defective track, defective rolling stock, or other unknown cause? This is not a question of evidence, for the inference is there; it is a question of the policy of the court as to the effect of specific allegations in the pleading in limiting the issue.[104]

If plaintiff pleads only the specific negligence, without general allegations, the general inference does not support the specific pleading. A derailment alone is no proof of an open switch. Even here it is arguable that the essential fact of negligence has been pleaded, and the rest may be disregarded as surplusage.[105] The plaintiff might have pleaded negligence generally;[106] should his attempt to be more specific be penalized by a damaging technical rule? But on the other hand, the defendant has received notice of nothing but the specific claim; he comes into court prepared to litigate only the issue of the open switch. Plaintiff has committed himself definitely to a theory of the facts as to the cause of the accident. In these days of liberal amendments, it is an undue hardship upon defendant to require him to meet inferences based on a theory which is advanced for the first time at the trial. There is a real policy underlying the rule that specific pleadings have the function of limiting proof. Plaintiff should be limited by his allegations, at least in any jurisdiction where a general

[102]See annotation, (1934) 93 A. L. R. 609.

[103]See cases cited in footnote 75.

[104]Discussed in Niles, Pleading Res Ipsa Loquitur, (1930) 7 N. Y. U. L. Q. Rev. 415; notes, (1933) 31 Mich. L. Rev. 817; (1925) 13 Cal. L. Rev. 424.

[105]See Nashville Interurban Ry. v. Gregory, (1917) 137 Tenn. 422, 193 S. W. 1053; Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur, (1928) 22 Ill. L. Rev. 724, 727.

[106]See 6 Thompson, Negligence, 2d ed., sec. 7447.

allegation of negligence would have been permitted to stand in the first instance, and he need not have pleaded specially at all. If more specific pleading is required to begin with,[107] or if the defendant succeeds in a motion to make the pleading more definite,[108] a refusal to apply res ipsa loquitur would be in effect to abrogate the doctrine entirely.

Where the plaintiff, in addition to the specific negligence pleaded, also alleges negligence in general terms, this reason for excluding the general inference of res ipsa loquitur does not exist. Defendant has at least received notice that plaintiff is not relying exclusively upon the specific allegations, and can scarcely claim to have been surprised or misled. A good attorney will be put upon his guard. It is true that there is an accepted principle of pleading that specific allegations control or limit general ones; but the principle has little reason behind it where the specific allegations clearly are intended, not in furtherance or explanation of the general pleading, but as additional specific claims over and above the general allegation, and not designed to affect it.[109] Plaintiff might plead generally in one count, and specifically in another,[110] or he might even plead in the alternative;[111] it certainly is open to him

[107]See Palmer Brick Co. v. Chenall, (1904) 119 Ga. 837, 47 S. E. 329; Hudgins v. Coca Cola Co., (1905) 122 Ga. 695, 50 S. E. 974; Fulton Ice Co. v. Pece, (1923) 29 Ga. App. 567, 116 S. E. 57.

[108]In Rapp v. Butler-Newark Bus Line, (1927) 103 N. J. L. 512, 138 Atl. 377, aff'd (1928) 104 N. J. L. 444, 140 Atl. 921, plaintiff pleaded negligence generally, and defendant demanded a bill of particulars. It was held that plaintiff did not abandon res ipsa loquitur by alleging specific acts of negligence in the bill of particulars. The court said: "The theory that a defendant, by the making of such a demand, can deprive a plaintiff of the protection afforded by the doctrine of res ipsa loquitur, seems to us to be absolutely without any basis to rest upon. If it be sound, then counsel has discovered a method of entirely abrogating this doctrine; for it can readily be imagined that in all actions of this kind hereafter brought the course of procedure adopted in the present case would be followed." See also Sutcliffe v. Fort Dodge Gas & Elec. Co., (1934) 218 Iowa 1386, 257 N. W. 406.

It should be noted that the possibility that res ipsa loquitur will be relied on furnishes an excellent reason for denying a motion to make the pleading more definite. See Harvey v. Borg, (1934) 218 Iowa 1228, 257 N. W. 190.

[109]See Christiansen v. Chicago, M. & St. P. Ry., (1909) 107 Minn. 341, 120 N. W. 300; Baufield v. Warburton, (1930) 181 Minn. 506, 233 N. W. 237; Clark, Code Pleading 208.

[110]Schaff v. Sanders, (Tex. Civ. App. 1924) 257 S. W. 670, aff'd (Tex. 1925) 269 S. W. 1034; Gray v. Baltimore & O. R. R., (C.C.A. 7th Cir. 1928) 24 F. (2d) 671; Burdette v. Chicago Auditorium Ass'n, (1911) 166 Ill. App. 186; see Sutcliffe v. Fort Dodge Gas & Elec. Co., (1934) 218 Iowa 1386, 257 N. W. 406.

[111]MacDonald v. Metropolitan St. Ry., (1909) 219 Mo. 468, 118 S. W. 78, 16 Ann. Cas. 810. See Hankins, Alternative and Hypothetical Pleading, (1924) 33 Yale L. J. 365.

to plead specifically all possible forms of negligence which might be involved in the case, and thereby unduly lengthen and encumber his complaint. If he elects instead to condense a part of his pleading into a general allegation, he is aiding the court. Furthermore, plaintiff's attorney may be uncertain whether he has really a res ipsa case; he may feel that he may make his best showing by proving the specific facts, and yet his witnesses may fail him at the trial. It is a strange rule which discourages him from pleading the best case he has because he may lose the benefit of a weaker one.[112]

Sometimes it is urged that by pleading specific negligence, plaintiff has admitted that the cause of the accident is within his knowledge, and so is not entitled to rely on res ipsa loquitur.[113] The assumption is that res ipsa is based primarily upon plaintiff's inability to produce definite evidence—in other words, that an inference should not be drawn in favor of one who has other evidence of the facts. But there is no such principle of evidence,[114] and the assumption is not borne out by the cases.[115] In any event, if the assumption be granted, it does not follow that the specific allegation of negligence is an assertion of definite knowledge, or anything more than a notice that plaintiff expects to introduce some evidence in support of his claim, which may not be at all conclusive or destroy the general inference. Where both general and specific negligence are pleaded, the Minnesota rule[116] which permits the plaintiff to rely upon res ipsa loquitur even if he does not prove the specific facts seems less artificial, and more likely to lead to a fair result on the merits.

The final question, as to the effect of res ipsa loquitur when the defendant introduces evidence that the accident was not caused by his negligence, perhaps has given the most difficulty of all. The controversy as to whether the "presumption" has weight as evidence, and is to be balanced against the evidence of the defendant,[117] arises out of a confusion of terms. It seems clear that a permissible inference is always evidence, has weight as evidence, and remains to be considered by the jury as long as it may reason-

[112]See Niles, Pleading Res Ipsa Loquitur, (1930) 7 N. Y. U. L. Q. Rev. 415, 426-430.

[113]See Roscoe v. Metropolitan St. Ry., (1907) 202 Mo. 576, 101 S. W. 32.

[114]2 Wigmore, Evidence, sec. 1286.

[115]See footnote 16.

[116]Kleinman v. Banner Laundry Co., (1921) 150 Minn. 515, 186 N. W. 123, 23 A. L. R. 479.

[117]See footnotes 79 and 80.

ably be drawn from all the facts presented. This is merely to say that circumstantial evidence is entitled to consideration so long, as reasonable men might base a conclusion on it. On the other hand, a presumption, defined as the plaintiff's right to a directed verdict in the absence of contrary evidence, is defeated when the defendant puts in evidence which will permit the jury reasonably to find in his favor. It is said to be rebutted; more properly, the occasion for it is gone, and it vanishes from the case. A presumption is a rule of law, to be applied by the court, and it cannot, by definition, be determined by the jury.[118]

But every presumption necessarily includes an inference. Presumptions are based upon inferences drawn from common human experience. and in most cases have developed historically from permissible inferences.[119] The presumption is the legal effect to be given to the inference in the absence of contrary evidence; but the inference must reasonably be there, or there can be no presumption, and even the legislature cannot create one.[120] When the presumption disappears because of evidence which will permit the jury to find otherwise, the inference remains behind. The circumstances which give rise to the inference are still in evidence, and still entitled to consideration.[121]

In cases where res ipsa loquitur amounts merely to a permissible inference, the inference should have weight so long as the jury may reasonably draw it from all the facts in evidence.[122] Where the inference is so strong as to amount to a real presumption, plaintiff's procedural right to a directed verdict may disappear in the face of defendant's evidence, but the inference remains. The stronger case surely cannot have less effect than the weaker. The circumstances still point to negligence, and the inference is not lost until the defendant puts in evidence which destroys it entirely.[123]

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[118]5 Wigmore, Evidence, secs. 2490-2491, pp. 449-452.

[119]See Thayer, Preliminary Treatise on Evidence 317 ff, tracing the development in various instances from mere suggested inferences into presumptions and rules of law.

[120]See Western & Atlantic R.R. v. Henderson, (1929) 279 U. S. 639, 49 Sup. Ct. 445, 73 L. Ed. 884; note, (1934) 18 MINNESOTA LAW REVIEW 806; annotations, (1927) 51 A. L. R. 1139; (1933) 86 A. L. R. 179.

[121]5 Wigmore, Evidence, sec. 2491, p. 453.

[122]Motiejaitis v. Johnson, (Conn. 1933) 169 Atl. 606; Humphrey v. Twin State Gas & Elec. Co., (1927) 100 Vt. 414, 139 Atl. 440; Lipsky v. C. Reiss Coal Co., (1908) 136 Wis. 307, 117 N. W. 803; cf. Minutilla v. Providence Ice Cream Co., (1929) 50 R. I. 43, 144 Atl. 884.

[123]Morris v. Morris, (1927) 84 Cal. App. 599, 258 Pac. 616. Cf. Minutilla v. Providence Ice Cream Co., (1929) 50 R. I. 43, 144 Atl. 884.

But to say that the inference shifts the burden of proof, and requires the defendant to produce evidence which will affirmatively outweigh the plaintiff's case,[124] is to give to circumstantial evidence greater effect than direct evidence could have. The defendant is required to do no more than to introduce evidence which, if believed, will permit the jury to say that it is as probable that he was not negligent as that he was.[125] The question is largely academic, since few if any cases are ever evenly balanced; but the inference is nothing more than an element which the jury may consider in determining whether plaintiff has sustained his burden by a preponderance of all the evidence in the case.

When the defendant in turn seeks a directed verdict, he is not entitled to it so long as the jury may reasonably find for the plaintiff. This means that he must produce evidence which will destroy the possibility of an inference of negligence, or so completely contradict it that the jury could not reasonably accept it. Naturally the evidence necessary to do this will vary with the strength of the inference. It takes more of an explanation to justify a falling elephant than a falling brick, more to account for a hundred defective bottles than for one. If the defendant proves definitely by uncontradicted evidence that the accident was caused by some outside agency over which he had no control,[126] that it

[124]Carpenter, The Doctrine of Res Ipsa Loquitur, (1934) 1 U. Chi. L. Rev. 519, 534.

Bohlen, The Effect of Rebuttable Presumptions of Law upon the Burden of Proof, (1920) 68 U. Pa. L. Rev. 307, 315, considers that the view that res ipsa loquitur shifts the burden of proof to the defendant is "in part due to a failure to discriminate between proof by satisfactory evidence of the facts and persuasion as to whether those facts show conduct conforming to or falling short of that of a reasonable man under like circumstances,—and in part is due to a growing tendency to a compromise between the modern theory of tort liability as based exclusively on fault and the more modern renaissance of the ancient concept that every one must answer for the harm done even by his most innocent acts, by not only raising the presumption of negligence upon the mere fact of harm done, but by holding that such presumption requires the defendant to rebut it by proving that he has done all that is possible to prevent the harm that his activities have caused."

[125]Manuel v. Pacific Gas & Elec. Co., (1933) 134 Cal. App. 513, 25 P. (2d) 509; Pittsburgh, C. C. & St. L. Ry. v. Higgs, (1905) 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N.S.) 1081; Cleveland, C. C. & St. L. Ry. v. Hadley, (1907) 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N.S.) 527, 16 Ann. Cas. 1; Potomac Edison Co. v. Johnson, (1930) 160 Md. 33, 152 Atl. 633; Vonault v. O'Rourke, (1934) 97 Mont. 92, 33 P. (2d) 535; Loudoun v. Eighth Ave. R.R., (1900) 163 N. Y. 380, 56 N. E. 988; White v. Hines, (1921) 182 N. C. 275, 107 S. E. 31; Chaperon v. Portland General Elec. Co., (1902) 41 Or. 39, 67 Pac. 928.

[126]Nawrocki v. Chicago City Ry., (1910) 156 Ill. App. 563; Scarpelli v. Washington Water Power Co., (1911) 63 Wash. 18, 114 Pac. 870. But the mere introduction of inconclusive evidence suggesting another cause will

was of a kind which commonly occurs without negligence on the part of anyone,[127] or that it could not have been avoided by the exercise of all reasonable care,[128] it would seem that the inference of negligence is no longer permissible, and the verdict should be directed for defendant. Defendant has overthrown plaintiff's res ipsa case by showing that it is not a res ipsa case. The essential elements upon which the inference is based—defendant's exclusive control, the probability that the accident would not have occurred without negligence—have been removed.

But if defendant merely offers evidence of his own acts and precautions amounting to reasonable care, it seems more difficult to justify a directed verdict in his favor. The fact remains that the accident has happened, and that such accidents ordinarily do not occur without negligence. The defendant testifies that he used due care to insulate his wires—but the current escaped, and current does not escape through proper insulation.[129] He testifies that he inspected his chandelier—but it fell, and properly inspected chandeliers do not fall.[130] He says that he drove carefully—but the bus went into the ditch, and carefully driven vehicles do not do so.[131] There is enough in the way of common human experience

not entitle the defendant to a directed verdict. Glowacki v. North Western Ohio Ry. & Power Co., (1927) 116 Ohio St. 451, 157 N. E. 21; Poth v. Dexter Horton Estate, (1926) 140 Wash. 272, 248 Pac. 374. The court in the Glowacki Case is clearly in error in saying that a verdict never has been directed for defendant.

[127]Bollenbach v. Bloomenthal, (1930) 341 Ill. 539, 173 N. E. 670.

[128]Oliver v. Union Transfer Co., (1934) 17 Tenn. App. 694, 71 S. W. (2d) 478; Ryder v. Kinsey, (1895) 62 Minn. 85, 64 N. W. 94, 34 L. R. A. 557, 54 Am. St. Rep. 623; Richards v. Oregon Short Line R. R., (1912) 41 Utah 99, 123 Pac. 933.

[129]"The trouble with the defendant's position here is that its case does not come within the rule invoked. The evidence tending to negative its negligence was not so decisive as to justify a directed verdict. There was evidence, to be sure, tending to show that the defendant had discharged the duty of care which the law imposed upon it. But the current escaped. Whether the tie wire broke without the defendant's fault, or whether it broke through insufficiency in size and strength, through lack of guying, or through other causes for which the defendant was chargeable, was an open question, too plainly for the jury to merit discussion." Humphrey v. Twin State Gas & Elec. Co., (1927) 100 Vt. 414, 139 Atl. 440.

[130]"Evidence tending to show that inspections were carefully and regularly made is insufficient to establish that the accident itself was not caused by defendant's negligence. The circumstances and character of the occurrence were such as to call for the application of the doctrine of res ipsa loquitur. The accident was unusual. The plaintiff could not be expected to define its exact cause. If the inspections which the defendant claimed were made had been carefully made, it is not inconceivable that the defect which caused the shade to fall might have been discovered." Goldstein v. Levy, (1911) 74 Misc. Rep. 463, 132 N. Y. S. 373. Cf. Hunt v. Central Vermont Ry., (1923) 99 Conn. 657, 122 Atl. 563.

[131]Francisco v. Circle Tours Sightseeing Co., (1928) 125 Or. 80, 265 Pac. 801.

to permit the jury to say that defendant's witnesses are not to be believed, that the care used was not enough, that upon all the evidence no better explanation of the occurrence is to be found than defendant's negligence. Even though it be the rule that uncontradicted testimony must be accepted, still the defendant's evidence is contradicted by the normal inference to be drawn from the circumstances.[132] Perhaps it is not entirely impossible that evidence of due care may be so conclusive as to require a directed verdict,[133] but in all but the most unusual cases it should be denied.[134]

In Minnesota, the question was presented in interesting fashion in *Swenson v. Purity Baking Co.*[135] Plaintiff found a larva of a Mediterranean flour moth in a loaf of bread baked by defendant. Defendant's evidence described in detail defendant's plant, the process of manufacturing bread, the apparatus used, the care taken to keep the plant clean and to avoid such an occurrence, and the fact that the plant had been passed by public food inspectors. It appeared that defendant bought only the best grade of flour, and sifted it through a number of small mesh screens, through which the larva could not have passed. "Uncontradicted evidence described the measures taken to keep foreign substances of any nature from getting into the bread," and apparently every reasonable precaution was taken. Upon this evidence, the court affirmed a directed verdict for the defendant, saying that, "How this larva became embedded in the loaf of bread is a mystery."

With deference to the learned court, and recognition that opinions may differ, it may be suggested that there is no great mystery. The larva got into the bread in defendant's bakery; it

[132]Cf. Ford v. Schall, (1925) 114 Or. 688, 236 Pac. 745.

[133]The possibility is recognized in May Dept. Stores Co. v. Bell, (C.C.A. 8th Cir. 1932) 61 F. (2d) 830; Paducah Traction Co. v. Baker, (1908) 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N.S.) 1185; Boyd v. Portland General Elec. Co., (1901) 40 Or. 126, 666 Pac. 516, (1902) 41 Or. 336, 68 Pac. 810. Or at least so it appears.

[134]Morris v. Morris, (1927) 84 Cal. App. 599, 258 Pac. 616; Hunt v. Central Vermont Ry., (1923) 99 Conn. 657, 122 Atl. 563; May Dept. Stores Co. v. Bell, (C.C.A. 8th Cir. 1932) 61 F. (2d) 830; Chicago City Ry. v. Barker, (1904) 209 Ill. 321, 70 N. E. 624; Paducah Traction Co. v. Baker, (1908) 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N.S.) 1185; Potomac Edison Co. v. Johnson, (1930) 160 Md. 33, 152 Atl. 633; Najarian v. Jersey City, H. & P. St. R.R., (1909) 77 N. J. L. 704, 73 Atl. 527, 23 L. R. A. (N.S.) 751; Francisco v. Circle Tours Sightseeing Co., (1928) 125 Or. 80, 265 Pac. 801; Humphrey v. Twin State Gas & Elec. Co., (1927) 100 Vt. 414, 139 Atl. 440; Lipsky v. C. Reiss Coal Co., (1908) 136 Wis. 307, 117 N. W. 803.

[135](1931) 183 Minn. 289, 236 N. W. 310.

could have come from nowhere else. It got in because the defendant's process of manufacture permitted it to do so. It is a matter of common human experience that worms do not get into bread in properly managed bakeshops. The presence of the larva is itself important evidence that something has gone wrong with defendant's system. It might lead a reasonable man to conclude that defendant's witnesses are not entitled to belief, that the precautions described were in this instance not faithfully carried out, that the whole truth has not been told.[136] As the defendant's evidence approaches absolute proof that the larva could not be there at all, it becomes more obviously contradicted by the fact that the larva is there. Should the jury not be permitted to consider the inference that if defendant's evidence were true there would have been no worm?

All of these questions seem to be capable of solution without real difficulty. The trouble lies in the Latin formula. Res ipsa loquitur may be convenient shorthand for designating a particular kind of case. But so long as its procedural effect is surrounded by the prevailing uncertainty, its use can do little to clarify and much to confuse the issues of a case. It is used in different senses, to denote evidence of different strength; it means inference, it means presumption, it means no one thing—in short it means nothing. Perhaps its most unfortunate result is to suggest that it is something separate and apart from ordinary circumstantial evidence, and that if the technical requirements for a res ipsa case cannot be met, negligence cannot be inferred.[137] The phrase means

[136]Compare the English court's method of dealing with the same problem, in Chaproniere v. Mason, (Ct. App. 1905) 21 T. L. R. 633: "The unexplained presence of the stone in the bun was prima facie evidence of negligence on the part of the person who made the bun. This was admitted, and the defendant produced evidence to rebut this prima facie presumption of negligence. He called witnesses who gave evidence to the effect that in the manufacture of his buns he made use of a system which rendered it impossible that a stone should be present in the dough. One of the witnesses said that it was not feasible, in the system adopted by the defendant, for a stone to pass into the dough of which the buns were made. He must have meant that it was not feasible if proper care had been used. That did not rebut the presumption of negligence, but, on the contrary, it showed that the system was not properly carried out—that there was negligence. A stone did get into the dough, and that fact was evidence that the system followed by the defendant was not carried out with proper care and skill. There was, therefore, certainly evidence of negligence causing the injury."

[137]See for example Lanning v. Pittsburgh Rys., (1911) 229 Pa. St. 575, 79 Atl. 136, 32 L. R. A. (N.S.) 1043; Kilgore v. Shepard Co., (R.I. 1932) 158 Atl. 720.

Another illustration is found in the controversy over the application of res ipsa loquitur where a passenger is injured by a collision of two vehicles, one of which is under the carrier's control while the other is not. See

nothing more than "the thing speaks for itself." Why not say so instead? Along with res gestae and other unhappy catchwords, the Latin tag should be consigned to the legal dustbin.

"It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule."[138]

annotations, (1923) 25 A. L. R. 690; (1933) 83 A. L. R. 1163. It is held by many courts, as in Plumb v. Richmond Light & R. R. Co., (1922) 233 N. Y. 285, 135 N. E. 504, 25 A. L. R. 685, that res ipsa loquitur applies as against the carrier, but not against the driver of the other vehicle. This idea may perhaps be traced to the early view that the carrier has the affirmative of the issue of due care. See footnote 93 and text. Other courts, as in Klan v. Security Motors, (Md. 1933) 164 Atl. 235, hold that res ipsa loquitur does not apply, since the instrumentalities causing the accident are not within the exclusive control of either defendant. Cf. Sullivan v. Minneapolis St. Ry., (1924) 161 Minn. 45, 200 N. W. 922.

But why should it make any difference whether res ipsa loquitur applies or not? The essential question is whether negligence on the part of either driver may be inferred. There is some basis in ordinary experience for the conclusion that collisions between vehicles do not occur in the usual case unless both drivers are at fault. If the court considers the probability sufficiently great to permit the jury to draw the inference, it should be permitted against either defendant, without regard to the fact that one is a carrier. If not, then the inference should not be permitted against one more than the other. The use of the Latin phrase has entirely obscured the real problem.

[138]"In this case, as in similar cases, the expression res ipsa loquitur has been the basis of much of the argument, and I venture to urge upon the attention of the profession in the state an objection to the continued use of it. It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule.

"It is merely a common argumentative expression of ancient Latin brought into the language of the law by men who were accustomed to its use in Latin writings. . . . It may just as appropriately be used in argument on any subject, legal or otherwise. Nowhere does it mean more than the colloquial English expression that the facts speak for themselves, that facts proved naturally afford ground for an inference of some fact inquired about, and so amount to some proof of it. The inference may be one of certainty, as when an excessive interest charge appeared on the face of an instrument, or one of more or less probability only, as when negligence in the care of a barrel of flour was found inferable from its fall out of a warehouse." Bond, C. J., dissenting, in Potomac Edison Co. v. Johnson, (1930) 160 Md. 33, 152 Atl. 633.