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Application of Tomich, 221 F. Supp. 500 (Dist. Ct. Mont. 1963)

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court stated that the right of survivorship was not limited to the estate of joint tenancy,[27] and in considering section 67-312, the court stated that a tenancy in common was created by a conveyance to two or more persons which conveyance did not expressly state that the interest created was other than a tenancy in common.[28]

It is submitted that the Montana Supreme Court must define its position on the right of the spouses to the use and enjoyment of the whole of property conveyed to both of them, on the complexity of creating the estate by the entirety, and on the rights of creditors. Until the court so defines its position, the question as to what type of estate is created by language which ordinarily would create the tenancy by the entirety will remain unanswered and lawyers and clients will be forced into litigation to determine their rights.

FRED RATHERT.

FEDERAL COURTS HAVE THE POWER TO GRANT A WRIT OF HABEAS CORPUS IF THE STATE COURT HAS DEPRIVED PETITIONER OF A CONSTITUTIONAL RIGHT. — The defendant was convicted of burglary and sentenced to twenty years imprisonment. No appeal was taken within the statutory period. Applications were made to the Montana Supreme Court for writs of certiorari and habeas corpus. Each application alleged that evidence used against the defendant was obtained by illegal search and seizure, and that he was not represented by competent counsel. All applications were denied. The defendant than applied to the federal district court for a writ of habeas corpus. That court, finding the allegations to be true, *held:* granted. Petitioner's conviction and present confinement are illegal and in violation of his rights under the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States, and that the conviction should be put aside and he should be released from confinement.[1] *Application of Tomich,* 221 F. Supp. 500 (Dist. Ct. Mont. 1963).

Long before an established system of law was brought to the United States, habeas corpus was considered "[T]he most celebrated writ in the English law."[2] Although it was permanently secured for the American people by the Constitution,[3] its use is largely governed by statute. In 1789, Congress specifically stated that all federal courts, and judges thereon should have the power to issue writs of habeas corpus.[4]

[27]Instant case at 910.

[28]Ivins v. Hardy, 120 Mont. 35, 179 P.2d 745 (1947). In consideration of this problem, it is necessary to note also, R.C.M. 1947, § 67-313, and the Montana cases of *Shaw v. Shaw, supra* note 16, and Emery v. Emery, 122 Mont. 201, 200 P.2d 251 (1948).

[1]Because the First Ten Amendments as a whole do not apply to the states, it is believed the court here meant that the accused had been deprived of rights under the Fourth and Sixth Amendments, as applied to the states *through* the Fourteenth.

[2]3 BLACKSTONE COMMENTARIES 129, as cited in Fay v. Noia, 372 U.S. 391, 400 (1963).

[3]"'The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the Public Safety may require it.'" U.S. CONST. art. I, § 9.

[4]1 Stat. 81-2 (1789).

Under this statute there were two distinct limitations of the federal courts' power to grant the writ: (1) the writ could not be granted to prisoners of state courts, since the statute expressly limited its use to prisoners held in custody by authority of the United States or who were committed to trial before a United States court.[5] (2) Even on the federal level, the writ could only be granted where the lower court lacked general jurisdiction. The United States Supreme Court affirmed this well established common law proposition in *Ex parte Watkins,*[6] stating that the writ will not be issued for merely an erroneous decision.

Nearly a century later Congress passed an Act stating that the federal courts and judges thereon "shall have the power to grant writs of habeas curpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States; . . ."[7] This Act was repealed in 1868, but the doctrine was re-established in 1885.[8] It has been judicially interpreted as giving federal courts power to grant the writ to petitioners in state courts, when the state is acting without jurisdiction.[9] Several of the early decisions following this statute indicate that the federal courts required such a violation of fundamental justice in the state court that the decision was utterly void. In such an instance, the writ would be granted even though the state court possessed general jurisdiction originally. As an example, the Supreme Court held in the case of *Ex parte Royall* that:[10]

> . . . if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity.

In 1949 Congress again gave consideration to the power of federal courts to issue writs of habeas corpus.[11] This recent legislation made no substantial changes in the existing law, but was, for the most part, simply a restatement of the 1885 Act. However, the statute expressly required that a petitioner in a state court exhaust his state remedies before applying to a federal court for the writ.[12]

The recent Supreme Court cases of *Fay v. Noia*[13] and *Townsend v. Sain,*[14] decided in 1963, present a full discussion of the historical background of the writ, as well as an attempt to settle once and for all the law concerning the power of federal courts to grant the write to state

[5] *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[6] 28 U.S. (3 Pet.) 200, 202 (1830).

[7] 14 Stat. 385-86 (1867).

[8] 23 Stat. 437 (1885).

[9] *Ex parte* Bridges, 4 Fed. Cas. 98, 105 (No. 1862) (C.C.N.D. Ga. 1875).

[10] 117 U.S. 241, 248 (1885). The court in the *Royall* case cited with approval *Ex parte* Yarbrough, 110 U.S. 651 (1883), and *Ex parte* Siebold, 100 U.S. 371 (1879), which used the same terminology as *Royall.* However, these cases refer to situations where the Supreme Court reviewed *circuit court* action by way of habeas corpus. In this sense, they are not in point.

[11] 28 U.S.C. § 2241 (1949).

[12] *Id.* § 2254. This simply made mandatory what had become an established courtesy extended to the state courts. See note 10 *supra* at 251.

[13] 372 U.S. 391 (1963).

[14] 372 U.S. 293 (1963).

prisoners. The primary question presented in *Noia* concerned whether the defendant was entitled to a federal writ of habeas corpus even though he had allowed the time for appeal to lapse. The facts show that the defendant had been convicted of a felony-murder by the New York state court and sentenced to life imprisonment. Fearing a death sentence on retrial, the defendant allowed the time for appeal to lapse. However, two of his co-defendants, convicted of the same crime on the same evidence, were eventually released after numerous legal proceedings.[15] The Supreme Court granted the writ, holding that the facts alleged, if true, presented a cause for relief, and stated that the federal court has power to grant the writ to state prisoners where an unconstitutional restraint is alleged.[16] Specifically, it was held that the prisoner did not fail to exhaust his state remedies, since the remedies must be available at the time the writ is applied for.[17]

The *Sain* case went a step further than *Noia* by making it mandatory that the federal court, in certain situations, grant a plenary hearing on the application for the writ of habeas corpus. The facts alleged established that defendant confessed to a charge of murder after being injected with a substance which tended to act as a truth serum. Allegedly, this fact was not clearly explained during the trial. The defendant exhausted his state remedies, and applied to a federal district court for habeas corpus, which was denied without a hearing. The Supreme Court granted certiorari, and concluded that the federal district court should have held a hearing.[18] This case set out as a general rule that: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding."[19] Concluding that some particularization would be useful, the court stated that the federal court must grant an evidentiary hearing where:[20]

(1) the merits of the factual dispute were not resolved in the state hearing;

(2) the state factual determination is not fairly supported by the record as a whole;

(3) the fact finding procedure employed in the state court was not adequate to afford a full and fair hearing;

(4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequately developed at the state court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

[15]*Supra* note 13 at 395 n.l.
[16]*Id.* at 426.
[17]*Id.* at 435.
[18]The alternative is for the federal district judge to rely on the state court transcript.
[19]*Supra* note 14 at 312.
[20]*Id.* at 313.

Four judges dissented in the *Sain* case, saying that although they agreed that the federal courts have power to grant the writ in cases where the applicant alleges facts entitling him to relief, they felt such facts had not been alleged here. The dissent particularly criticized the majority's "sunburst" approach to the problem, saying:[21]

> The Court has done little more today than to supply new phrases—imprecise in scope and uncertain in meaning—for the habeas corpus vocabulary of District Court judges. And because they purport to establish mandatory requirements rather than guidelines, the tests elaborated in the Court's opinion run the serious risk of becoming talismanic phrases, the mechanistic invocation of which will alone determine whether or not a hearing is to be had.
>
> More fundamentally, the enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case before us . . . .

Nevertheless, the apparent effect of the *Noia* and *Sain* decisions is to require that federal courts grant an evidentiary hearing upon a mere allegation of unconstitutionality and grant the writ whenever these allegations are found to be true even though the state court has found the same allegations to be false. This power is subject only to the restriction that the petitioner must reach a point where he has no possible state remedies available to him.

The importance of these two cases lies in the effect they may have on the judicial system, which has traditionally been comprised of state and federal levels, each being substantially autonomous in its own realm. Especially in the area of criminal law, the state courts have been free from federal interference, except for the rare granting of an appeal or certiorari by the United States Supreme Court. As the situation now stands, every state defendant seemingly has an automatic "appeal" to a federal court by way of habeas corpus, by simply alleging a denial of Constitutional privileges. For this reason, the power recently established in federal courts may be subject to the criticism of upsetting the delicate "balance" of power which has existed between the state and federal courts.

This criticism may or may not be justified, depending on the extent to which the federal courts utilize the power that is now theirs. If federal habeas corpus is granted almost automatically, the state has lost a substantial measure of its sovereign power. However, there are at least two requirements which tend to discourage frequent issuance of the writ: First, the writ is not to be granted unless the petitioner has utilized all the possible state remedies. As pointed out by *Noia,* this requires a diligent effort to exhaust the remedies while still available, and the federal judge has discretionary power to deny the writ where a petitioner deliberately fails to appeal.[22] Second, although a hearing will be granted

[21] *Id.* at 327.

[22] *Supra* note 13 at 439. It is interesting to note that *Noia* said the petitioner should be granted the writ, even though the only reason for failing to appeal was, as stated not by Mr. Noia but by his attorney, fear of a heavier sentence on retrial. See note 13 *supra* at 396 n.3.

upon allegation of a denial of Constitutional rights, certainly the writ will not be granted unless the petitioner clearly is correct in his allegation. In the ten year period from 1946 through 1955 there were 5,517 petitions for habeas corpus disposed of in the federal district courts. Approximately 1½ per cent of these were successful.[23]

The mere fact that the power exists, however, immediately raises the question whether the federal court sits in a better position than the state courts to judge an alleged violation of Constitutional rights. An answer to this question must take into consideration two distinct situations, which can and will occur: (1) where the state courts have provided an adequate procedural system to review all federal questions that have been raised by the petitioner. (2) Where the state has failed to provide some method by which to review these questions. Such a situation could arise where time for appeal lapses, and the state appellate court and the United States Supreme Court reject a petition for certiorari, or where the petitioner is seeking relief on grounds which do not appear in the record.

In the event that the state has given full consideration to the matter sought to be reviewed on the federal level, there is serious doubt as to the propriety of the federal court again trying the matter. The state courts are charged with the duty of applying federal law and of protecting Constitutional rights. There is no guarantee that the federal court is going to provide "absolute" or "true" justice. Certainly the federal courts are not infallible. Further, there is a recognized need for finality of judgment in all fields of the law, and especially in the area of criminal law. If the threat of punishment is to be an effective force in society, it should not become common practice to have this punishment evaded through successive petitions to various courts.

The effect on the state court judges from frequent "interference" by federal judges is another element that should be considered. One author has expressed that:[24]

> The problem . . . should not be seen in terms of the possible irritation of state judges at being reversed by federal district judges. The crucial issue is the possible damage done to the inner sense of responsibility, to the pride and conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of his business . . . .

It has been traditional in the area of criminal law for the defendant to be tried by his peers. Normally, a familiarity by the court of the accused and of local conditions will aid in a better understanding of the case. Assuming that the trial court follows a procedure designed to protect a defendant's Constitutional rights and to provide him with a fair trial, a decision on a state level should be *final.* It is when this familiarity of the local conditions is twisted into passion and prejudice, and this defect is not corrected by review on the state level, that the review by a federal court has its proper function.

[23]Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 19 (1956-7).

[24]Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 505-06 (1963).

By granting the writ in the instant case, the federal district court undoubtedly acted in accord with the present law. Petitioner here alleged that failure to appeal was due to incompetence of counsel. Under *Noia,* the right to federal habeas corpus should not have been lost, since the failure to appeal was not the petitioner's fault.[25] Also, a review of the facts in the instant case indicates that granting the writ could have been considered mandatory according to the list set forth in the *Sain* case. Use of evidence discovered by an illegal search was alleged. The Montana Supreme Court said this allegation was false, since petitioner had "consented" to the search of his car trunk. However, as the facts disclose, petitioner had a key to the trunk in his shoe at the time of arrest. He failed to acknowledge this, and required the arresting officers to go to considerable trouble to open the trunk. The federal court held that the finding of "consent" was not supported by the record, since the consent must be "unequivocal and specific and freely and intelligently given."[26]

In addition, the petitioner claimed he knew of two witnesses who could testify that he was in Helena at the time the robbery occurred in Great Falls. His counsel, however, refused to subpoena these witnesses. Under such circumstances it might be reasonable for a federal court to conclude that the state court did not employ an adequate fact finding procedure.

Under a showing of facts such as these, the question arises as to why the Montana Supreme Court failed to grant the writ. According to a Montana statute, the Court was not permitted to grant the writ, since the lower court had proper jurisdiction of the subject matter and the defendant.[27] Revised Codes of Montana 1947, sec. 94-101-14, referring to habeas corpus, provides:

> The court or judge, . . . must remand such party, if it appears that he is detained in custody—
>
> 1. * * *
>
> 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.

Traditionally Montana courts have granted the writ only when the lower court lacked jurisdiction to try the case. In the case of *In re Shaffer,*[28] the Montana Supreme Court stated:

> The office of the writ of habeas corpus is not that of an appeal or writ of error. Its only office is to present the inquiry whether the court *a quo* had jurisdiction of the subject matter and the defendant, and rendered such a judgment as the law authorizes

[25]See note 13 *supra* at 439. Where circumstances indicate that a decision is at all questionable, and there is some hope of reversal, mere failure to appeal may persuade a federal judge that counsel was not diligent, and that habeas corpus should be granted.

[26]Instant case at 502.

[27]The twenty year sentence imposed on the defendant was valid in view of his prior convictions.

[28]*In re* Shaffer, 70 Mont. 609, 613, 227 Pac. 37 (1924).

in the particular case. When it appears that this was the condition, the writ will be discharged.

In spite of the statute, the holding in *Shaffer* has seemingly been relaxed in recent cases. In *Dryman v. State of Montana*[29] the court denied a writ of habeas corpus to a defendant who had failed to appeal from a conviction within the statutory limit. But the court based the decision on the fact that there was no valid reason for the failure to appeal, and that no adequate proof was shown that a confession had been coerced. In *Petition of Diserly*,[30] the court again denied the writ, this time to a defendant who claimed that a district court of Montana was without jurisdiction to try him, because he was an Indian ward. The court said that a district court did have jurisdiction to try and punish Indians, but also stated that there was no showing of prejudice sufficient to overcome the presumption that the court performed its judicial duty properly, implying at least, that if such evidence was presented, the writ may have been granted. Again, in the final petition of Tomich to the Supreme Court of Montana, the allegations of incompetent counsel and the admission of illegal evidence were considered by the court. However, it was decided that "from our many examinations of this entire matter . . . no cause exists for granting the application of Tomich and therefore the application is denied."[31] In none of these cases did the court deny the writ on the basis of the jurisdictional requirement, but apparently decided them on the merits.

It is submitted that if it was within the power of the Montana Supreme Court to grant the writ of habeas corpus in the instant case, it should have done so. The voluntariness of the "consent" to the search of petitioner's car was at best questionable, and it has been recognized that competent counsel is one of the fundamental requisites for a fair trial.[32] The court, in denying the application, said that the counsel was "an experienced attorney, and we will not 'second guess' nor speculate on tactics of the trial."[33] However, experience and prior competence should not have been the criteria for determining whether the defendant in the instant case received proper counseling. It is interesting to note in this regard that defendant's counsel was suspended from practice by the Montana Supreme Court on the grounds that he was ". . . disordered in his mind."[34]

If the court was prevented by statute from granting the writ, it is submitted that this is a weakness of the state system which should be overcome. No one would deny that a person deprived of his liberty by unconstitutional means should have some method of obtaining a review of his case. A remedy to such a situation could and should be handled by the state courts. Nevertheless, if the state fails to clean its own house in this matter, the logical and necessary result, however undesirable, is federal action.

DAVID NIKLAS.

[29]Dryman v. Montana, 139 Mont. 141, 361 P.2d 959 (1961).
[30]Petition of Diserly, 140 Mont. 219, 370 P.2d 763 (1962).
[31]Tomich v. Montana, 141 Mont. 487, 488, 379 P.2d 114 (1963).
[32]Gideon v. Wainwright, 372 U.S. 335 (1963).
[33]*Supra* note 30.
[34]390 P.2d 209 (Mont. 1964).

AN EVALUATION OF RES IPSA LOQUITUR IN MONTANA. — Defendant was fighting a forest fire in the immediate vicinity of the Plaintiff's property, using aerial fire retardant. One of the aerial drops spread retardant over the Plaintiff's property. In an action for the resulting property damage, Plaintiff was nonsuited. The trial court ruled that no evidence had been produced showing that the injury was such that it would not normally occur without negligence. On appeal to the Supreme Court of Montana, *held,* affirmed. Evidence of the normal procedure of aerial fire fighting should have been introduced in order to establish the necessary element of *res ipsa loquitur. Stocking v. Johnson Flying Service,* 387 P.2d 312 (Mont. 1963) (Mr. Justice Castles concurred specially. Mr. Justice Adair dissented).

Two major issues are presented by the instant case: (1) When is the doctrine of *res ipsa loquitur* applicable in Montana; and (2) when the doctrine is applied, what is its effect?[1]

In an action not involving the doctrine of *res ipsa loquitur,* the Plaintiff has the burden of proving the facts constituting negligence. That is, he must present sufficient evidence to establish negligence, and he must support the burden of the risk of non-persuasion. Whether the former responsibility has been met and the case is to be sent to the jury will be a determination for the court. Whether the latter burden has been discharged is resolved by the jury at the trial's conclusion. The facts which determine the negligence are proven by direct testimony of witnesses, or by circumstantial evidence. If the evidence indicates a breach of "due care," in the eyes of the jury, the defendant will be found negligent. Finally, the plaintiff must show that the negligence of the defendant caused his injuries.[2]

The doctrine of *res ipsa loquitur* alters this basis mode of trial procedure in negligence cases.[3] One writer has questioned the importance

[1]To date, in Montana, there has been no decision emphasizing *res ipsa loquitur* or making clear the elements of the doctrine or its effect. It is therefore the purpose of this review to present what seems to be the law in this jurisdiction. As a result there will be no attempt to limit the discussion of *res ipsa loquitur* to the aerial bombardment of fires.

The instant case, when referring to the doctrine, is at times obscure as to what may be the necessary elements of *res ipsa loquitur* or its particular effect on trial procedure. Further, it seems as if the Supreme Court might have erred in affirming the nonsuit if it had not been for the fact that the circumstances were such as to warrant an *immunity* for negligence. The doctrine of *Salus populi est suprema lex* apparently has appropriate application, as would, perhaps the doctrine of necessity; but they shall not be considered in the writing. It is on these grounds alone that Justice Castles concurs specially with the majority of the court, indirectly indicating some dissatisfaction with the majority's handling of *res ipsa loquitur.*

[2]A comprehensive consideration of burden of proof may be found in 9 WIGMORE, EVIDENCE §§ 2485 - 2489 (3rd ed. 1940). See also HARPER & JAMES, TORTS §§ 19.1 - 19.4 (1956). A Montana case emphasizing the necessity of these factors is Glover v. Chicago, Milwaukee & St. P. Ry. Co., 54 Mont. 446, 171 Pac. 278 (1918).

[3]The doctrine was officially announced in 1865 when Chief Justice Erle said:

> There must be reasonable evidence of negligence. But where the thing is shewn 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 defendants, that the accident arose from want of care.

Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 601, 159 Eng. Rep. 665, 667 (1865). The seed of the doctrine was first planted, however, in 1863 when Baron

of the doctrine, and considers it a form of circumstantial evidence only. As such, it would be hybrid of the "sufficiency of circumstantial evidence" and the "burden of proof."[4] Others regard the doctrine as being simply a legal theory founded on common experience.[5] Under this theory, the doctrine is utilized whenever:[6]

> There is no evidence, circumstantial or otherwise, . . . to show negligence, apart from the postulate—which rests on common experience and not on the specific circumstances of the instant case —that physical causes of the kind which produced the accident in question do not ordinarily exist in the absence of negligence.

The elements for the application of *res ipsa loquitur* have been defined in nearly all jurisdictions which have accepted the doctrine.[7] Generally, three elements are required: First, the injury must have resulted from the use or operation of an instrumentality in the exclusive position and control of the defendant; second, the damage or injury must be such that it would not usually occur without someone's negligence; third, the injured individual must not have been contributorily negligent.[8] Some courts additionally require a further condition that information regarding the accident be more easily available to the defendant than to the plaintiff.[9]

Pollock, arguing for the recovery of the plaintiff who had been injured when struck by a barrel of flour which had somehow rolled out of a warehouse window, declared, "the thing speaks for itself." Byrne v. Boadle, 2 H. & C. 722, 725, 159 Eng. Rep. 299, 300 (1863).

[4]PROSSER, TORTS 201 (2d ed. 1955). Prosser further considers the doctrine as being "the source of so much trouble to the courts that the use of the phrase itself has become a definite obstacle to any clear thought, and it might better be discarded entirely."

[5]Montana seems to have adopted this view. Maki v. Murray Hosp., 91 Mont. 251, 263, 7 P.2d 228, 231 (1932). ". . . this doctrine (*res ipsa loquitur*) is not . . . proof of negligence by a species of circumstantial evidence, the inference to be drawn by the jury from the probability of negligence resting, not upon evidence, direct or circumstantial, but upon a postulate from common experience that accidents of the kind involved do not ordinarily occur in the absence of negligence." Further, the Montana courts indicate the doctrine, where applicable (that is, where its required elements have been met) is an exception to the rule that negligence is "not inferable from the mere occurrence of the accident." Hardesty v. Largey Lumber Co., 34 Mont. 151, 157, 86 Pac. 29, 30 (1906).

[6]See Annot., 59 A.L.R. 468, 470 (1929).

[7]Michigan and South Carolina courts have both declared the doctrine is not in force in their respective jurisdictions. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 253 (1936).

[8]9 WIGMORE, EVIDENCE § 2509 (3rd ed. 1940); Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519 (1934); Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 SO. CAL. L. REV. 166 (1937).

[9]The lack of the fourth element generally does not preclude an application of the doctrine. In most instances it is alluded to solely as an indication of the theory behind *res ipsa loquitur* as Lyon v. Chicago, Milwaukee & St. P. Ry. Co., 50 Mont. 532, 537, 148 Pac. 386, 388 (1915) seems to indicate. "The maxim applies in negligence cases upon the theory that the plaintiff is not in a position to show the particular circumstances which caused the offending instrumentality to operate to his injury, but that the defendant, having its exclusive management and control, and being thus more favorably situated, possesses the knowledge of the cause of the accident, and should, therefore, be required to produce the evidence in explanation."

It further must be noted the doctrine of *res ipsa loquitur* is not applicable where the plaintiff is in a position to allege specific acts of negligence. This is the rule followed in *Lyon v. Chicago, Milwaukee & St. P. Ry. Co.* A number of jurisdictions

The earliest pronouncement of the elements of *res ipsa loquitur* in Montana is in *Hardesty v. Largey Lumber Company*:[10]

> . . . [W]here the thing which causes the injury is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of ordinary care by the defendant.

Regarding the first element, a number of Montana decisions have hinged upon whether the defendant had exclusive control of the instrumentality. For example, *Davis v. Trobough*[11] dealt with a malpractice action against a doctor for the misapplication of cold and warm packs by a nurse not directly under his control. The court held the doctor not guilty as he did not have control of the nurse and therefore *res ipsa loquitur* could not be applied.

The second element requires a showing that the circumstances of the injury were such that the accident would not have occurred without negligence. Therefore, the factual situation must warrant a reasonable deduction that negligence was involved.[12]

Accidents which usually occur without fault do not justify a conclusion of negligence. The blowout of an automobile tire would be such a case. Also, *res ipsa loquitur* is generally not applied when experimental instrumentalities, or those about which there is little knowledge, are involved. In the early days of aviation, for example, the courts in many cases refused to apply the doctrine:[13]

> In several instances in which the doctrine has been held inapplicable the decision has been based upon the novelty of air navigation and the absence of a reliable background of experi-

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follow other rules: (1) the plaintiff may take advantage of the doctrine if the presumption of negligence supports the specific allegations pleaded; (2) the doctrine has application provided the specific pleading is accompanied by a general allegation of negligence; and (3) the doctrine is available regardless of the form of the pleading. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 255 (1936).

Also, where there is an introduction, under a general allegation of negligence, of specific acts of negligence which are *not* proved to be the exact cause of the accident, *res ipsa loquitur* will be allowed. Whitney v. N.W. Greyhound Lines, Inc., 125 Mont. 528, 242 P.2d 257 (1952).

[10]34 Mont. 151, 157, 86 Pac. 29, 30 (1906); see note 6 *supra.*

[11]139 Mont. 322, 363 P.2d 727 (1961).

[12]Frequently expert witnesses are used to establish this fact. In the instant case no such evidence was produced, thus this element of the doctrine was not fulfilled. It is *not* the duty of the plaintiff to show negligence, for then the doctrine would be of no value, but he must show that in the usual bombardment of fires this kind of accident does not occur. This was not done, or if it were, it was not done sufficiently to satisfy the majority of the court. Also since the nonsuit was sustained and the case was not returned to the lower court for further fact finding it seems quite probable that the result was pinioned on the doctrine of immunity from suit because of the circumstances rather than an ineffective application of the doctrine of *res ipsa loquitur* as seems to be the case at first glance. See note 1 *supra.*

[13]Annot., 6 A.L.R.2d 528, 531 (1949).

> ence for determining the balance of probabilities, as between negligence and natural hazards, as causative factors.

However, aviation has progressed beyond the experimental stages, and the doctrine is commonly accepted by the courts as a basis of liability in airplane accidents.[14] The same historical development has been followed in the cases of exploding beverage bottles.[15] The Montana court has also required that the second element be shown to exist.[16] In *Harding v. H. F. Johnson, Inc.*, the court stated:[17]

> '. . . the rule of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed.'

The third element, no contributory negligence on the part of the plaintiff, has met with no particular difficulty in any jurisdiction.

The jurisdictions which have adopted the doctrine of *res ipsa loquitur* have, however, not agreed as to its procedural effect. Three distinct views have developed. First, the doctrine may raise a permissible inference of negligence. Where it has been held to have this character, it simply makes a case which goes to the jury. "It shifts no 'burden' to the defendant, except in the sense that unless he produces evidence he runs the risk that the jury may find against him."[18] Thus, the doctrine may *permit* the jury "to infer negligence and say whether upon all the evidence the plaintiff has sustained his allegations."[19] Two cases seemingly indicate that the Montana Court follows this view: *Johnson v. Herring*[20] and *Vonault v. O'Rourke*.[21] However, because of ambiguity of language the authority cited in support of the arguments, the court's conclusions do not seem to be the accepted law in this jurisdiction.

[14]McTarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55 (1951).

[15]PROSSER, TORTS 203 nn.12 & 13 (2d ed. 1955).

[16]Glover v. Chicago, Milwaukee & St. P. Ry. Co., 54 Mont. 446, 455, 171 Pac. 278 (1918). "There is not a word to indicate that the break was due to any defect known, obvious, or observable . . . to the defendant . . . [a]s the happening of the accident is not necessarily inconsistent with ordinary care, *res ipsa loquitur* cannot apply"; McGowan v. Nelson, 36 Mont. 67, 76, 92 Pac. 40 (1907). "The doctrine of *res ipsa loquitur* does not apply to this case for the reason the thing does not speak for itself . . . . the plank fell, but why it fell, by what agency, or from what cause, does not appear. Under these circumstances, it is impossible to apply the rule . . ."; Scheytt v. Gallatin Valley Milling Co., 54 Mont. 565, 172 Pac. 321 (1918) claimed *res ipsa loquitur* would have no application as there was no evidence showing with any degree of certainty how the accident occurred. In Johnson v. Herring, 89 Mont. 420, 300 Pac. 535 (1931) the argument centered on whether the third element of the doctrine had been fulfilled and what weight should be given the concept as a whole, which is discussed later in the body of the article.

[17]126 Mont. 70, 78, 244 P.2d 111 (1952).

[18]Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 217 (1949).

[19]Annot., 53 A.L.R. 1494 (1928).

[20]Johnson v. Herring, 89 Mont. 420, 300 Pac. 535 (1931) which cited McGowan v. Nelson, 36 Mont. 67, 92 Pac. 40 (1907) and Hardesty v. Largey Lumber Co., 34 Mont. 151, 86 Pac. 29 (1906) both of which indicate the doctrine has the force of a rebuttable presumption. However, the *Johnson* case is cited in 167 A.L.R. 667 (1947) as supporting the position of a permissible inference.

[21]Vonault v. O'Rourke, 97 Mont. 92, 33 P.2d 535 (1934) which cites the *Johnson* case, *supra* note 20, and is also cited in 167 A.L.R. 667 (1947) as supporting the position of a permissible inference.

Other jurisdictions have stated that the effect of the doctrine is to place upon the defendant the ultimate burden of proof.[22] Here the defendant, as opposed to the plaintiff in the ordinary case, must undertake the burden of the risk of non-persuasion. He is required to produce evidence which will have a greater weight than that offered by the plaintiff. Only a few jurisdictions have held the doctrine to have this effect.[23] Some authors note a considerable advantage in adopting this view, stating that it presents one of the simplest ways of handling a complicated case before the jury.[24]

The third view is that the doctrine serves to raise a rebuttable presumption of negligence. Giving the doctrine this effect compromises the two extremes. *Res ipsa loquitur* viewed as having the force of a rebuttable presumption gives the plaintiff an advantage because the jury is required to infer the defendant's negligence. If the defendant rests his case instead of producing contrary evidence, the plaintiff will receive a directed verdict. The result is to shift the burden of going forward with the evidence to the defendant, but not the burden of the risk of non-persuasion, which remains with the plaintiff.

Two arguments have been advanced to the effect that if the doctrine is not given the weight of a presumption it has no use. As previously noted, in order for *res ipsa loquitur* to apply, the accident must be such that it does not usually happen without negligence. The first of the two arguments is pinioned upon this element. That is, if this aspect of the doctrine is present, though the other elements are lacking, the case, quite likely, will remain one which will be submitted to the jury as ordinary negligence may have been shown. This requirement is *always* necessary before *res ipsa loquitur* will apply. Therefore, there would be little use in employing the doctrine at all if the evidence is merely to have its usual probative force, which would be the result of the permissible inference theory. Further, if the doctrine is only to have the value of normal evidence the effort of the court is needlessly wasted, as there would occur a diversion from the material issues of the case while trying to establish the other two fundamental elements.[25]

A second argument stems from the fundamental nature of a presumption. A presumption has four basic purposes:[26]

> (a) to furnish an escape from an otherwise inescapable dilemma or to work a purely procedural convenience, (b) to require the litigant to whom information as to the facts is the more easily accessible to make them known, (c) to make more likely a finding in accord with the balance of probability, or (d) to encourage a finding consonant with the judicial judgment as sound social policy.

[22]At the outset it was indicated that this was a burden, in usual negligence cases, which the plaintiff was to support.

[23]The states include Alabama, Arkansas, Louisiana, and Pennsylvania. See Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 250 (1936).

[24]Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519, 535 (1934).

[25]Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 So. CAL. L. REV. 166, 179 (1937).

[26]Morgan, *Instructing the Jury Upon Presumption and Burden of Proof*, 47 HARV. L. REV. 59, 77 (1933).

Reasons (b) and (c) are rationales for *res ipsa loquitur* at the outset. Thus, if its effect is considered less than a presumption, a number of the basic reasons for the existence of the doctrine are eliminated, therefore making its employment valueless.

The Montana court apparently gives the doctrine the effect of creating a rebuttable presumption. The earliest case indicating this is *Hardesty v. Largey Lumber Company*.[27] In that case, the court at the outset made it evident that the doctrine has a useful place in our law:[28] "It may be considered that, unaided by any presumption, the evidence offered by plaintiff is insufficient to charge the defendant with negligence." Thus, it appears the injured plaintiff would have had no recourse for injuries sustained if it had not been for the availability of the doctrine. The court then stated:[29]

> Under such circumstances [where the required elements of the doctrine are fulfilled] proof of the happening of the event raises a *presumption* (emphasis added) of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised.

A more recent Montana case, *Maki v. Murray Hospital*,[30] also seems to accept the disputable presumption theory. Throughout that case the court referred to the "raising of a presumption," and quoted two eminent authorities, Justice Holmes and Dean Wigmore,[31] who seemingly prefer this view.

Thus the language of the court in the *Hardesty* and *Maki* cases conflicts with that used in the *Johnson* and *Vonault* decisions. This confusion is further emphasized in the instant case. In discussing *res ipsa loquitur*, the court continued to make no distinctions. At one point it declared the doctrine raised an inference of negligence, while later stating it had the force of a disputable presumption.[32]

[27] *Supra* note 5.

[28] Hardesty v. Largey Lumber Co., 34 Mont. 151, 157, 86 Pac. 29 (1906). This case was cited in 53 A.L.R. 1504 as raising a presumption.

[29] *Hardesty, supra* note 28 at 157. A case decided the next year, McGowan v. Nelson, 36 Mont. 67, 92 Pac. 40 (1907), cited the *Hardesty* case as controlling authority for the doctrine affirming the view that a presumption is raised. The *McGowan* case is also cited in 53 A.L.R. 1504 as authority for *raising a presumption. Supra* note 20.

In John v. No. Pac. Ry. Co., 42 Mont. 18, 33, 111 Pac. 632 (1910) the court was even more explicit: "... in conformity with the maxim *res ipsa loquitur*, a presumption arises of negligence on the part of the carrier or his servants, which, unless rebutted by him *to the satisfaction of the jury*, will authorize a verdict and judgment against him for resulting damages." (Court's emphasis) The court continues, "If there is no countervailing evidence — nothing to explain the accident consistently with due care on the part of the defendant, the plaintiff is plainly, by force of this presumption, entitled to a verdict ...."

In Lyon v. Chicago, Milwaukee & St. P. Ry. Co., 50 Mont. 532, 537, 148 Pac. 386 (1915), the court said: "It (*res ipsa loquitur*) has the force and effect of a disputable presumption of law and supplies the place of proof necessarily wanting."

[30] 91 Mont. 251, 7 P.2d 228 (1932).

[31] *Supra* note 30, 91 Mont. 251, 263. Mr. Justice Holmes declares there is existing a "presumption of fact in the absence of explanation or other evidence ...." Dean Wigmore states: "... the particular force and justice of the presumption regarded as a rule throwing upon the party charged the duty of producing evidence ...."

[32] Stocking v. Johnson Flying Service, 387 P.2d 312, 316 (Mont. 1963).

It is submitted that whether the effect of the use of *res ipsa loquitur* is a rebuttable presumption or a permissible inference may be of no practical importance except with regard to the retention of the doctrine. The only real problem the plaintiff has in a *res ipsa loquitur* case is that he may not fulfill the needed elements of the doctrine. If he does, it matters little to him what effect the court places on the doctrine in considering a motion for a non-suit.[33] In conclusion, it is submitted the doctrine of *res ipsa loquitur* plays a useful role in the law. It occupies a position between the normal proof of negligence and strict liability. Without the doctrine, a more extensive use of strict liability would be necessary in order to avoid injustices that would certainly arise. Also the plaintiff is, in some circumstances, given a better opportunity for recovery for injury where no recovery would otherwise be available.

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[33]HARPER & JAMES, TORTS § 19.11 (1956).