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NOTES

THE APPLICATION OF RES IPSA LOQUITUR IN SUITS AGAINST MULTIPLE DEFENDANTS

Res ipsa loquitur applies where an accident occurs that ordinarily does not happen without negligence, caused by an instrumentality over which the defendant had exclusive control at the time of the negligent act, and which was caused in no part by the plaintiff.¹ If Mrs. A purchased a bottle of soda from grocer X, brought the bottle home to her little six year old girl B who carried the bottle with her into a car, whereupon the bottle exploded injuring B, would res ipsa apply against X? Would it apply against the distributor of the soda? Would it apply against the bottler?

In 1953 the Supreme Court of Kansas allowed res ipsa against the bottler, the distributor, and the retailer joined as defendants in the same action.² As unusual as this decision might seem, there has arisen within the last two decades a small line of cases which allows a plaintiff to rely on the doctrine of res ipsa loquitur to establish the liability of multiple defendants. This note will set forth these cases, analyze how they came about, indicate difficulties they present, and submit a solution to the problem the cases are attempting to solve.

I

In *Smith v. Claude Neon Lights, Inc.*,³ a 1933 New Jersey case, the defendant sign company had contracted to erect and to maintain a neon sign on the defendant landowner's building. Unknown to the landowner the sign company annexed to the main sign a small sign, not provided for in the contract, which advertised the name of the sign company. The contract to maintain the main sign apparently gave the sign company the unrestricted right of entry to inspect the sign. The court held that a user of the public way who was injured when the small sign fell could maintain an action based on res ipsa against both the occupier of the land and the sign company.

The user of a public way, injured by defective abutting premises was allowed to maintain res ipsa against multiple defendants in *Schroeder v. City & County Savings Bank of Albany*,⁴ a 1944 New York decision. In that case the defendant bank let one floor of its building to a lessee. The bank hired one contractor and the lessee hired another to do work on the premises. During the alterations a

1. PROSSER, TORTS 295-301 (1941).

2. *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953).

3. 110 N.J.L. 326, 164 Atl. 423 (1933).

4. 293 N.Y. 370, 57 N.E.2d 57 (1944).

protective barrier, erected by one of the contractors, collapsed injuring the plaintiff, who was allowed to bring an action based on *res ipsa* against the bank, the contractor of the bank, and the contractor of the lessee. The lessee was not joined.⁵

In a 1937 case, *Weddle v. Phelan*,⁶ Louisiana held that *res ipsa* was available to an injured passenger of one vehicle against the operators of two private carriers which sideswiped without any apparent reason. The court said the accident would not have happened without the negligence of one or both, and that it was the duty of the drivers to exonerate themselves. In a similar 1942 Louisiana case, *Bonner v. Boudreaux*,⁷ two cars collided at an intersection, causing one of them to careen into the plaintiff pedestrian. The court characterized the drivers as joint tortfeasors and allowed the plaintiff to proceed against both of them under the doctrine of *res ipsa loquitur* on the authority of *Weddle v. Phelan*. The jury returned a verdict against only one of the drivers and in favor of the other. The court affirmed both jury findings on the grounds that the other driver had presented enough evidence for the jury to conclude that she was not negligent.

In 1953 Pennsylvania ruled in *Loch v. Confair*,⁸ a bursting bottle case, that *res ipsa* was available against both the bottler and the retailer in whose store the bottle burst. In that case a husband and wife were shopping in the defendant's store; the husband took from a shelf a bottle which then exploded, injuring the wife. A warranty action against the bottler was dismissed on demurrer. In a subsequent negligence action based on *res ipsa* against both retailer and bottler the trial judge granted a non-suit as to the retailer, and directed a verdict for the bottling company. The court en banc reversed the non-suit as to the retailer, from which decision an appeal does not lie in Pennsylvania, and granted a new trial to the bottling company, whose appeal from that decision was the issue in *Loch v. Confair*. The rulings below were affirmed and the right of the plaintiff to proceed against both defendants on *res ipsa loquitur* was upheld.

It should be noticed that the Pennsylvania bursting bottle decision worked a twofold extension of the *res ipsa* doctrine in Pennsylvania. First it extended the doctrine to cover a situation where there was no contractual relationship, to which *res ipsa* had not previously been applicable in Pennsylvania,⁹ and at the same time extended it to cover multiple defendants.

All of the above cases were "sports," appearing more or less without

5. The lessee could have been joined because of his non-delegable duty to maintain the premises.

6. 177 So. 407 (La. App. 1937).

7. 8 So.2d 309 (La. App. 1942).

8. 372 Pa. 212, 93 A.2d 451 (1953).

9. *Id.* at 216, 93 A.2d at 453. Note, 15 U. OF PITT. L. REV. 325 (1954).

precedent in their respective jurisdictions. A more coherent and cohesive development allowing *res ipsa loquitur* against multiple defendants occurred in California. It had been held generally that *res ipsa loquitur* was available to injured passengers against the common carrier in whose vehicle they were riding at the time of collision.¹⁰ It should be noted that these cases do not involve true *res ipsa* situations, for the driver of the other vehicle has control over one of the instrumentalities causing the accident.¹¹ However, in 1934 in *Godfrey v. Brown*,¹² California extended the doctrine of the common carrier cases and held that *res ipsa loquitur* was also available to an injured guest against the driver of a private conveyance which collided with another moving car. Once the court took this step, ignoring the requirement of exclusive control and allowing *res ipsa* to be used against a single defendant who shared control of the cause of the accident with another person, then in principle there was no valid objection against joining both persons in a single action with the plaintiff relying on *res ipsa loquitur*.

In *Armstrong v. Wallace*,¹³ the California court took this next step and, relying on *Godfrey v. Brown*, said that *res ipsa loquitur* was available against both doctor and hospital in a malpractice case. The transition was almost completed in 1944 when California decided in *Ybarra v. Spangard*,¹⁴ that *res ipsa loquitur* was available against two doctors, the hospital owner, the nurse and anesthetist who were hospital employees, and a special nurse.

In 1953 Kansas, relying heavily on the New York bank contractors

10. *Capital Transit Co. v. Jackson*, 149 F.2d 839 (D.C. Cir. 1945); *Loudoun v. Eighth Ave. R.R.*, 162 N.Y. 380, 56 N.E. 988 (1900).

11. For an excellent analysis of these cases see Prosser, *Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles*, 30 ILL. L. REV. 980, 984-985 (1936).

12. 220 Cal. 57, 29 P.2d 165 (1934).

13. 8 Cal. App. 2d 429, 47 P.2d 740 (1935). In answer to the defendant doctor's objection that *res ipsa* is not applicable where there are multiple defendants the court said, ". . . the fact there are two defendants does not preclude the application of the doctrine in question." *Id.* at 438, 47 P.2d at 744. Perhaps this was an unnecessary holding, since the court below had already decided that the hospital corporation, a charitable institution, was not liable for the acts of its nurse. The nurse was not made a party defendant. But the underlying theory here is the same as in *Godfrey v. Brown*, 220 Cal. 57, 29 P.2d 165 (1934). Even though there had been no judgment against the other defendant or potential defendant, the party defendant's position in regard to the plaintiff is no different than if the other persons were held liable. The court apparently recognized this and felt compelled to take the next step from *Godfrey v. Brown* and hold that *res ipsa* was available against multiple defendants in this type of situation.

14. 25 Cal. 2d 486, 154 P.2d 687 (1944), *rehearing denied*, 93 Cal. App. 2d 43, 208 P.2d 445 (1949). The court was careful to point out that this decision was no broader than the special facts in the case. *But cf.* *Ayers v. Parry*, 192 F.2d 181 (3d Cir. 1951), which held that no inference of negligence arose on facts similar to those in the *Ybarra* case. The multiple defendant aspects of *res ipsa loquitur* were not even discussed. It is interesting to note that *Ayers v. Parry* was a 1951 federal decision governed by New Jersey law, and *Smith v. Claude Neon Lights, Inc.*, see note 3 *supra*, was a 1933 New Jersey case apparently allowing *res ipsa* against multiple defendants.

case, the Pennsylvania bursting bottle decision, and *Ybarra v. Spangard*, decided *Nichols v. Nold*,¹⁵ which amalgamated most of the various growth on the problem. In that case the plaintiff, a six-year-old girl, was injured by the explosion of a bottle of Pepsi-Cola which her mother had purchased for her. Plaintiff sued the bottler, the distributor, and the retailer, relying on the doctrine of *res ipsa loquitur* to establish her case against all three defendants. The defendants contended the doctrine of *res ipsa loquitur* does not apply where there are plural defendants. On appeal the court affirmed judgment for the plaintiff saying: "There is no reason to limit the number of defendants to one in a [*res ipsa loquitur*] case where the circumstances pleaded disclose that two or more may be liable."¹⁶

It will be noticed that these decisions fall into four factual types. In one type the user of a public way injured by defective abutting premises is allowed to use *res ipsa* against the several parties who might possibly have been responsible for the defect, as in *Smith v. Claude Neon Lights, Inc.* and the *Schroeder* case. In the second type a passenger or pedestrian has maintained *res ipsa* against the operators of colliding vehicles, as in *Godfrey v. Brown*, *Weddle v. Phelan*, and *Bonner v. Boudreaux*. In the third type patients injured while in a hospital (while undergoing an operation in the decided cases) have relied on *res ipsa* against all who might have caused it, as in *Armstrong v. Wallace* and *Ybarra v. Spangard*. In the fourth type *res ipsa* has been made available to the injured intended consumer of a manufactured product (a bursting bottle in the decided cases) against all who have handled the product, as in *Loch v. Confair* and *Nichols v. Nold*.

II

The three generally recognized prerequisites of a *res ipsa loquitur* case are: (1) the occurrence of an accident that does not ordinarily happen without negligence, (2) caused by an instrumentality over which the defendant had at least the right of exclusive control, and (3) which was in no part caused by the plaintiff.¹⁷ Some courts recognize a highly controversial fourth condition, *viz.*, that evidence of the cause of the accident must be more accessible to the defendant than to the plaintiff.¹⁸ It is generally recognized that *res ipsa loquitur* is not a rule of law but a rule of evidence allowing the proof of negligence by a permissible inference drawn by the jury from circumstantial

15. 174 Kan. 613, 258 P.2d 317 (1953). One judge concurred in the result because he wanted to broaden the doctrine of *res ipsa loquitur*, but expressed doubts as to the soundness of the majority's reasoning. *Id.* at 631, 258 P.2d at 331.

16. *Id.* at 620, 258 P.2d at 323.

17. PROSSER, TORTS at 295-301; 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940); Note, 1951 WASH. U.L.Q. 216, 217.

18. See 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940). But see PROSSER, TORTS at 301.

evidence. It is thus in its procedural aspects properly no more than a specialized branch of circumstantial evidence.¹⁹

Consistent with the requisites of a *res ipsa loquitur* situation there are several types of cases where *res ipsa loquitur* may properly be used against multiple defendants. One is in the case of joint tortfeasors, who are, in legal effect, as a single defendant.²⁰ Another type is where there exists the relationship of master and servant, principal and agent, or principal and independent contractor in a non-delegable duty situation, where the principal's vicarious liability is derivative from the liability of the employee or contractor.²¹

The line of cases culminating in *Nichols v. Nold*, the Kansas bursting bottle case, works violence to the requirement of control,²² and represents a radical extension of the doctrine of *res ipsa loquitur*. This extension will be analyzed first by a study of the line of cases, represented by *Weddle v. Phelan*, in which the courts have failed to draw a distinction between *res ipsa loquitur* and an ordinary circumstantial evidence situation. This will be followed by a consideration of the effect of the cases applying *res ipsa* to common carriers, and an analysis of the import of cases allowing it against joint tortfeasors. Then the underlying policy behind these lines of cases leading to *Nichols v. Nold* will be discussed.

Weddle v. Phelan applied *res ipsa* against operators of two vehicles which sideswiped without any apparent reason. Although the decision is partially predicated on the cases allowing *res ipsa* against common carriers, it is more directly the result of a failure to distinguish between *res ipsa* and ordinary circumstantial evidence situations.²³ Consider the following two cases which led to *Weddle v. Phelan*.

In *Washburn v. R. F. Owens Co.*,²⁴ the defendant's truck hit a moving wagon from behind and the plaintiff wagon driver secured a judgment. The court said that considering the condition of the highway,

19. PROSSER, TORTS at 303. There has however been much conflict and confusion in the application of the doctrine. Some courts treat it as giving rise to an inference, some as creating a presumption, with varying procedural applications within each group. For an explanation of the confusion in Missouri see Note, 1953 WASH. U.L.Q. 464. See Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

20. *Koskela v. Albion Lumber Co.*, 25 Cal. App. 12, 142 Pac. 851 (1914); PROSSER, TORTS at 1096, 1097; Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 199 (1949).

21. See PROSSER, TORTS at 473, 482, 483.

22. Of the three commonly accepted requisites for a *res ipsa* case the control requirement seems to have caused the most difficulty to those courts wishing to apply the doctrine broadly. It has been relaxed in many jurisdictions which have held that the defendant must merely have control at the time of the negligent act, not necessarily at the time of the injury. *Goldman & Freiman Bottling Co. v. Sindell*, 140 Md. 488, 117 Atl. 866 (1922). The *Sindell* rationale opened the way to the result of the *Nichols* case (Kansas bursting bottle case) and is relied on by the court in that decision.

23. See note 30 *infra*.

24. 252 Mass. 47, 147 N.E. 564 (1925).

the amount of traffic, the speed of the parties, and the fact that the defendant hit the plaintiff from behind, the evidence "certainly justifies, though it may not require, a conclusion that someone was negligent." They properly treated this as a typical circumstantial evidence case, not a *res ipsa loquitur* situation for the driver of the wagon was in control of one of the instrumentalities involved in the accident.

The second case leading to *Weddle v. Phelan* was *Harvey v. Borg*²⁵ which relied on the *Washburn* case. There a truck hit from behind the moving car in which the plaintiff was a passenger. The plaintiff had a judgment against the truck company in the trial court, apparently on a general negligence declaration, with excessive speed proved by circumstantial evidence.

On appeal the supreme court relied upon some carrier precedents which were not directly applicable, but rested most heavily on the *Washburn* case. Though the *Washburn* case was not a *res ipsa* case, the court in *Harvey v. Borg* affirmed on the ground that *res ipsa loquitur* was applicable against the defendant truck driver, although a *res ipsa* instruction had not been submitted to the jury.

The *Washburn* and *Borg* cases involved basically similar factual situations. The court in the *Borg* case specifically recognized the exclusive control requirement of *res ipsa*, but said, even in view of conflicting testimony, that the possible inference that the driver of the other moving car was partly responsible was too remote to be applied.²⁶ This situation would not ordinarily satisfy the control requirement of *res ipsa*, which was therefore inappropriately applied.²⁷

25. 218 Iowa 1228, 257 N.W. 190 (1934).

26. *Harvey v. Borg*, 218 Iowa 1228, 1234, 257 N.W. 190, 193 (1934).

The same considerations that applied to the decision in *Godfrey v. Brown* apply here. That is, once it is decided that *res ipsa* may be used against one of the parties to a collision, it should logically be applicable against both, as in *Weddle v. Phelan*. See text at notes 12, 13 *supra*.

But there is a distinction between the facts of the *Borg* and *Brown* cases. In the *Borg* case there was clear circumstantial evidence by which the plaintiff could prove negligence on a general negligence charge, and there was no need to say *res ipsa* applied. In the *Brown* case (*res ipsa* held applicable against one driver in collision at intersection) there was no indication who was at fault, and it was necessary, if there was to be liability, to allow the jury to draw any inference of negligence they might choose from the mere facts of the accident.

27. That *res ipsa* was not properly applied in these cases would seem to be substantiated by Blashfield who says that in determining whether a driver negligently breached his duty not to follow the preceding car too closely the factors to consider are:

. . . the speed . . . the condition of the road, the amount of traffic, the condition of his brakes, and his ability, acting with ordinary care, to stop his car if required so to do by a situation not produced by another's negligence. . . .

The mere fact that a motorist collides with a car preceding him along the highway does not invoke the doctrine of *res ipsa loquitur*. . . . The question [of negligence] . . . depends on the circumstances. . . . 2 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 942 (Perm. ed. 1951).

The court said in *Harvey v. Borg*, 218 Iowa 1228, 1230, 257 N.W. 190, 192:

Blashfield states in his treatise on automobile law that *res ipsa* may be applied to cases involving collisions between moving vehicles,²⁸ but the only authority cited to support this proposition is *Harvey v. Borg*. This statement is thus based solely on a highly questionable decision, and is in direct conflict with another statement by Blashfield that the mere fact a driver collides with the car preceding him does not invoke *res ipsa*.²⁹

The decision in *Weddle v. Phelan* is based directly on Blashfield's proposition to the effect that *res ipsa* is applicable to collisions between moving vehicles. But we have seen the doubtful background of this statement. It thus appears that the *Weddle* case resulted from the failure of the Iowa court in *Harvey v. Borg* to make the distinction between a normal circumstantial evidence case and the special *res ipsa loquitur* situation.³⁰ Although available as precedent, *Weddle v.*

Res ipsa loquitur has been . . . applied in diverse cases and to a great variety of facts. . . . To undertake to define its limitations would lead only to confusion and uncertainty.

Failure to define and distinguish is the very heart of the confusion in the problem which this note treats. That Iowa generally fails to make the distinction between the ordinary circumstantial evidence and a specialized *res ipsa* situation see *Luther v. Jones*, 220 Iowa 95, 100, 261 N.W. 817, 819 (1935) (equating general negligence to *res ipsa loquitur*).

Perhaps *Harvey v. Borg* is the result of the failure of the Iowa court to distinguish between negligence as a matter of law and *res ipsa loquitur*. By construction of a statute, IOWA CODE ANN. c. 321, § 321.285 (1949), it is negligence as a matter of law under the "assured clear distance ahead" rule to be unable to stop without hitting the preceding vehicle. See Note, 24 IOWA L. REV. 128 (1938) (See especially footnote 21 that "the statute as applied to defendants is somewhat similar to the doctrine of *res ipsa loquitur*. . . ." (citing *Harvey v. Borg*)). (First italics added.) But the court in *Harvey v. Borg* did not consider the line of cases under the statute. See also *Schroeder v. Kindschuh*, 229 Iowa 590, 594, 294 N.W. 784, 786 (1940), an excellently reasoned decision which discusses both the "assured clear distance rule" under the statute, and *res ipsa loquitur* in a situation comparable to *Harvey v. Borg*, and casts serious doubts on *Harvey v. Borg* in distinguishing it.

28. 9 BLASHFIELD, *op. cit. supra* note 27, § 5983.

29. See 2 *Id.* § 942, *supra* note 27. *Godfrey v. Brown*, the 1934 California case where two cars collided at an intersection (note 12 *supra*), was another decision which would tend to support Blashfield's statement. The *Godfrey* case also represented a questionable extension of *res ipsa*. See text at note 12 *supra* and note 55 *infra*.

30. The basic distinction is, of course, that in the usual circumstantial evidence situation the "control" and "no contributing cause" elements of a *res ipsa* situation are lacking.

Query whether there is an actual difference in the proof process in a *res ipsa loquitur* case and in an ordinary circumstantial evidence case. That is, must the circumstantial evidence in a circumstantial evidence case, as distinguished from the inference in a *res ipsa* case, point to any specific act of negligence? Or is it sufficient that the circumstances merely indicate, as in the *res ipsa* case, only with a greater degree of certainty, that the defendant was probably negligent somewhere? It seems that the Iowa court did not accept the latter idea, for they were hesitant to uphold the decision for the plaintiff on the general negligence (circumstantial evidence) determination, apparently because the proof pointed to no specific act of negligence; however they had no qualms about sustaining the verdict on *res ipsa* grounds. But query whether they were hesitant to uphold the decision as a regular circumstantial evidence case because the evidence did not point to a specific act of negligence, or because there was not a sufficient preponderance of evidence pointing to negligence in general? If it is the latter situation, then not the type, but only

Phelan has not been relied on by the other jurisdictions which have allowed *res ipsa* against multiple defendants and was not relied on by the Kansas court in *Nichols v. Nold*.

The Kansas court did, however, amalgamate all the other lines of growth on the subject. We have shown that the application of *res ipsa* to multiple defendants in the hospital situation in California was the direct result of the misapplication to a private carrier situation of precedents which allowed a plaintiff to rely on *res ipsa* against a common carrier in which he was a passenger.³¹ This California development, which was strongly relied on by the Kansas court in *Nichols v. Nold*, indicates the significant part the common carrier cases have had in the development of the cases allowing *res ipsa* to be used against multiple defendants.

Of course *res ipsa loquitur* was always available against joint tortfeasors,³² and the multiple defendant situations offered an easy analogy to a court which failed or refused to make the distinction between joint and merely concurrent tortfeasors.³³ The joint tortfeasor concept probably underlies the *Schroeder* and *Claude Neon Light* decisions where the users of a public way were injured. In the latter case a sign company contracted to maintain a sign on another's property and affixed to the sign a smaller one without the landowner's permission. Both the company and the landowner were held liable on *res ipsa* to a plaintiff injured when the small sign fell. The court evidently based the application of *res ipsa* on the theory that *res ipsa* is available against multiple defendants who are joint tortfeasors. They took great pains to find the sign company had "partial possession and control,"³⁴ *i.e.*, that it was a joint occupier of the land. But the two defendants were not joint tortfeasors for the contractor had only a right of entry to inspect the main sign.³⁵

the quantum of evidence would distinguish the proof process of a regular circumstantial evidence case from a *res ipsa* situation. The treatment of this problem does not come within the scope of this note, nor has this writer been able to find any treatment thereof, though it is implicit in the development of many of the cases in the note.

31. See text at notes 10-14 *supra*.

32. See note 20 *supra*.

33. Cases allowing *res ipsa* against joint tortfeasors which the Kansas court cited to support the *Nichols* (Kansas bursting bottle) decision were *Waterbury v. Riss & Co.*, 169 Kan. 271, 219 P.2d 673 (1950), and *Woods v. Kansas City, K. V. & W. Ry.*, 134 Kan. 755, 8 P.2d 404 (1932). Even Dean Prosser suggests that in the *Ybarra* (second California hospital) case "liability might perhaps have rested on the ground that all were engaged in a joint enterprise." Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 223 (1949). But Professor Seavey seems clearly correct when he says this could not be a joint enterprise. Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*. 63 HARV. L. REV. 643, 648 (1950). Note that the 1942 Louisiana case, *Bonner v. Boudreaux*, 8 So.2d 309 (La. App. 1942), treats the defendants as joint tortfeasors in applying the rule of *Weddle v. Phelan*.

34. *Smith v. Claude Neon Lights, Inc.*, 110 N.J.L. 326, 331, 164 Atl. 423, 425 (1933).

35. The case might yield to an analysis based upon a non-delegable duty rationale. The court, however, did not attempt to place its decision on that ground,

The case can rest, however, on a relatively sound basis. Here there were two persons with independent duties to the plaintiff arising from their relation to the same sign.³⁶ The owner's duty arose from his position as occupier of the land. It was his duty to use due care to discover defects, and *res ipsa loquitur* was applicable as a result of his exclusive control of the premises. The sign company's duty arose from the fact that it was their sign which fell. They had exclusive control at the time of any negligent acts by virtue of their access to inspect the main sign. If the sign company was negligent in creating the defect, the landowner was negligent in not discovering it. The fall of the sign would tend strongly to show a breach of both duties. The case was in effect, therefore, two separate actions based on *res ipsa loquitur*, and is of doubtful value as a precedent for allowing *res ipsa* against multiple defendants, since the decision can be placed on this ground.

Compare this case with the *Schroeder* case, which cannot be supported by an adequate rationale. There a bank and a lessee from the bank hired separate contractors to work on the premises. When a protective barrier constructed by one of the contractors fell injuring the plaintiff, *res ipsa* was allowed against both contractors and the bank. The situation there, however, was entirely different from that in the *Neon Lights* case. It was not clear who constructed the barrier, or who was in control when the accident happened. No specific duty concerning the barrier was ever assumed by contract. The court was not concerned with finding the defendants in concurrent control, as was the New Jersey court in the *Neon Lights* case. In the *Schroeder* case the court said, "The three defendants either simultaneously or in necessary rotation . . . were in possession of the instrumentality" (Italics added.) This court nevertheless seemed to consider the defendants in the nature of joint tortfeasors, characterizing them as "interdependent defendants."³⁵ A perusal of the cases cited in the

nor does this writer think it can be adequately supported by such an analysis. If under New Jersey decisions a landowner is vicariously liable for the negligence of an independent contractor who does work on the premises over a public way, the question remains whether this was "collateral negligence," for which the landowner is not vicariously liable.

It clearly seems that it is "collateral negligence." The distinction between risks inherent in the work itself and "collateral negligence" is suggested by Dean Prosser to be a distinction between risks inherent in the performance of the work in the normal manner contemplated by the contract (whether or not the result of incidental negligence), and those risks which arise from the abnormal departure from usual methods. It appears that the negligent erection of a sign not included in the agreement between landowner and contractor is not performance in the normal manner contemplated by the contract, but is an abnormal departure from usual methods. See PROSSER, TORTS at 490 and the cases cited there in note 20.

36. See PROSSER, TORTS at 1099.

37. *Schroeder v. City & County Savings Bank of Albany*, 293 N.Y. 370, 374, 57 N.E.2d 57, 59 (1944).

38. *Ibid.*

Schroeder case indicates great skill of counsel in presenting for the court's consideration cases involving several contractors which seemed analogous to the case at bar. An analysis of the facts of these cases, however, reveals that they were non-delegable duty situations where *res ipsa* is properly applicable against multiple defendants.³⁹

Bonner v. Boudreaux, the Louisiana case where two cars collided at an intersection and a pedestrian injured in the accident was allowed to maintain *res ipsa* against both, readily illustrates the misapplication of the joint tortfeasor label and concept to defendants who were at the most mere concurrent tortfeasors. This case also illustrates the incongruity of denominating the defendants in these cases as joint tortfeasors and then allowing the jury to find them severally liable.

Part of the underlying policy behind all these cases is a desire by the courts to compensate plaintiffs where they cannot prove negligence under the existing rules of evidence.⁴⁰ This is clearly seen in *Loch v. Confair*, the Pennsylvania bursting bottle case, where the court slashed through the control requirement of *res ipsa loquitur* and, on grounds of "reason and justice," allowed the plaintiff to use *res ipsa* against both the retailer and the bottler although the retailer did not satisfy the usual requirements of *res ipsa*.⁴¹

Res ipsa would not ordinarily be applicable against a retailer alone in the bursting bottle type of case, for this is the kind of accident that could often happen without the retailers' negligence. Moreover, the plaintiff is and has been in control for some time at the time of the accident, and the greater probability is that either the manufacturer

39. The result of this case could have been reached under the N.Y. CIV. PRAC. ACT § 213:

Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties.

Under this act New York held in *S. & C. Clothing Co. v. United States Trucking Corp.*, 216 App. Div. 482, 215 N.Y. Supp. 349 (1st Dep't 1926), that the plaintiff had established a prima facie case against both defendants when he showed that he had delivered cases containing cloth to the defendant trucking company for delivery to the defendant warehouse company, who in turn delivered them to a customer of the plaintiff, whereupon the cases were opened and found to contain only cinders and a log. But the *Schroeder* case was decided on *res ipsa* grounds without any reference to this statute.

40. An interesting case involving another phase of the principle problem is *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948). There the plaintiff was shot in a hunting accident by one of two recognizedly negligent defendants. The problem was one of causation. The court said ". . . reasons of policy and justice shift the burden to each of the defendants to absolve himself if he can. . . ." *Id.* at 88, 199 P.2d at 5. The *Summers* case relies on *Ybarra v. Spangard* (the second California hospital case), and in turn the court in denying a rehearing in *Ybarra v. Spangard* relies on *Summers v. Tice*, thus making a complete circle. See Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643, 648 (1950); 37 GEO. L.J. 627 (1949); 23 SO. CALIF. L. REV. 412 (1950) (excellent criticism of *Summers* case); 27 TEX. L. REV. 732 (1949). See also the discussion of *S. & C. Clothing Co. v. United States Trucking Corp.*, note 39 *supra*.

41. 372 Pa. 212, 217, 93 A.2d 451, 454 (1953).

or the distributor was in control at the time of the negligent act. The cases generally have not allowed recovery against the retailer except on warranty or on proof of specific negligence.⁴² The trial court had in fact granted a nonsuit as to the retailer in the *Loch* case. Since the plaintiff had not yet purchased the soda there was no chance of a warranty action. But to allow *res ipsa* against the bottler alone might not result in recovery since the bottler might be able to produce enough evidence to show that no negligence should be inferred against him,⁴³ and in this case the facts had seemed so favorable to the bottling company that the trial court had directed a verdict for them. To effect their policy of allowing the plaintiff recompense for his injury, the appellate court allowed the plaintiff to join the retailer with the bottler in a *res ipsa* action when they probably would not have allowed *res ipsa* against the retailer alone in the first instance, and probably would have affirmed a directed verdict for the bottling company alone, if that had been the issue appealed. From this it would logically seem to follow that the court would extend the doctrine to cover the situation where the retailer alone is being sued. To effectuate their policy of compensating plaintiffs, the courts have thus forced the doctrine of *res ipsa* beyond its normal limits.

III

Although the results of these decisions might seem desirable, they present serious difficulties, and the jurisdictions which will refuse to follow the reasoning of *Nichols v. Nold*, the Kansas bursting bottle case, will have cogent support for their position.

First, since the transition that led to the *Nichols* case works violence on the requirement of exclusive control in the defendant, the rule should be evaluated in regard to the significance of exclusive control in the doctrine of *res ipsa loquitur*. One view is that control is significant because it focuses the inference of negligence on the defendant.⁴⁴ This is Dean Prosser's theory. Dean Wigmore suggests that control is significant because it indicates that the defendant has more access to the evidence than the plaintiff and that this is the underlying philosophy behind *res ipsa loquitur*.⁴⁵ Dean Prosser, however, has rejected this as ". . . no more than a makeweight. . . ."⁴⁶

42. See *Burnham v. Lincoln*, 225 Mass. 408, 114 N.E. 715 (1917), and *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 228, 65 N.E.2d 305, 307 (1946). In the latter case the court said, "The explosion of the bottle does not appear to have been due to any fault or negligence of the defendant. . . . There could be no warranty in the absence of sale or contract. . . ."

43. Perhaps also the plaintiff could not give evidence to put himself within the doctrine. See PROSSER, *TORTS* at 683, 684.

44. PROSSER, *TORTS* at 298.

45. 9 WIGMORE, *EVIDENCE* § 2509 (3d ed. 1940).

46. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 204 (1949). See note 18 *supra*.

If Dean Prosser's⁴⁷ view, that the inference of negligence must be focused on a particular defendant, is correct, the cases allowing *res ipsa loquitur* against multiple defendants are clearly wrong.⁴⁸ But the decisions in the multiple defendant cases seem clearly predicated on the ground that the evidence is more accessible to the defendant.⁴⁹ Dean Prosser, though rejecting Dean Wigmore's theory, has defended the results of at least some of these cases,⁵⁰ apparently on the premise that policy grounds alone sufficiently support the decisions. He apparently feels that recovery is warranted in these situations without the inference being focused on any one defendant.⁵¹

An analysis of the basic fact situations involved, however, raises doubts that these cases, where *res ipsa* has been allowed against multiple defendants, can be supported on either theory of the significance of control in *res ipsa loquitur*. Under either view it seems there should be a distinction between the situation where the defendants were in concurrent control and where they were in successive control. If the accident happens while the parties are in concurrent control, it seems clear that they are better able than the plaintiff to explain the accident, and also that the inference of negligence focuses on them. If the accident happens when the parties have been in successive control, certainly the inference of negligence is not focused on any person or persons; nor do the defendants, except one, have greater access to the evidence. In the first cases which allowed *res ipsa* against multiple defendants, the parties were in fact in concurrent control,⁵² in the later cases, however, the defendants were in successive control.⁵³ The

47. See note 44 *supra*.

48. Professor Seavey contends they are wrong. Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643, 646 (1950).

49. *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944) (quoting Dean Wigmore at 490, 154 P.2d at 689, and saying at 493, 154 P.2d at 691, "[T]here will rarely be any compensation for patients injured while unconscious."); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317, 322 (1953) (quoting the *Ybarra* case extensively); *Schroeder v. City & County Savings Bank of Albany*, 293 N.Y. 370, 374, 57 N.E.2d 57, 59 (1944) ("They [defendants] were the one who know the cause of the collapse."); *Loch v. Confair*, 372 Pa. 212, 217, 93 A.2d 451, 454 (1953) (that defendants were "in a position to explain").

50. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949).

51. *Id.* at 207. This position seems to involve Dean Prosser in a basic inconsistency, for the question remains: What are these policy reasons? In accepting these decisions one must recognize that a large part of the policy behind them was the defendants' greater access to the evidence. See note 49 *supra*. Yet Prosser denies this is material in a *res ipsa* situation. See note 46 *supra*. Or is the greater accessibility of the evidence not a policy reason in itself, but merely a shorthand expression for other policy reasons?

52. *Armstrong v. Wallace*, 8 Cal. App. 2d 429, 47 P.2d 740 (1935); *Weddle v. Phelan*, 177 So. 407 (La. App. 1937); *Smith v. Claude Neon Lights, Inc.*, 110 N.J.L. 326, 164 Atl. 423 (1933).

53. *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944), *rehearing denied*, 93 Cal. App. 2d 43, 203 P.2d 445 (1949) (control concurrent and successive); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953) (successive control); *Schroeder v. City & County Savings Bank of Albany*, 293 N.Y. 370, 57 N.E.2d 57 (1944) (simultaneously or in rotation); *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953) (successive control).

failure of the courts to make this distinction might indicate that the true basis of the doctrine in the multiple defendant situations is not any theory of control in *res ipsa loquitur* at all. The courts are not really concerned with applying the technical requirements of *res ipsa* to the multiple defendant situations. They are instead more concerned with the underlying desire to compensate the plaintiffs and to mold the *res ipsa* doctrine to effectuate their desired result.

The cases applying *res ipsa* to multiple defendants, except in a few special situations previously mentioned, are historically on weak ground. The carrier collision cases on which some later cases are based are not true *res ipsa* situations,⁵⁴ and the extension of *res ipsa* to the private carrier cases and thence to the hospital cases was without authority.⁵⁵ Joint tortfeasor precedents were misapplied to situations factually different from the joint tortfeasor cases. The Pennsylvania bursting bottle case, *Loch v. Confair*, and the New Jersey falling sign case, *Smith v. Claude Neon Lights, Inc.*, had no precedent. The procedural effect of *res ipsa* was confused with proof of negligence by circumstantial evidence under an allegation of general negligence.

The historical development demonstrates why following the result of the *Nichols* case would lead to confusion in the rules of evidence and the law of negligence.⁵⁶ *Res ipsa loquitur* is a rule of evidence relating to proof of negligence. But to hold these multiple defendants liable under it is an anomaly, for the greater probability is that any given defendant was not negligent.⁵⁷ Thus the doctrine of *res ipsa loquitur*, a concept predicated on negligence, is twisted because of policy reasons to achieve, in effect, liability without fault against defendants who cannot produce exculpatory evidence.⁵⁸ And the decision in *Nichols v. Nold*, in holding without limitation that the doctrine of *res ipsa loquitur* is available against multiple defendants who were either in concurrent or successive control of the injurious article, has fused the development into a ready rule.

It is thus necessary to ascertain the reasons for the rule to see if they apply to all defendants who might be affected, regardless of their relation to the plaintiff. If the courts reach a result as to certain kinds of defendants, which result is in fact a decision of policy, and state the decision as a general rule without mentioning the policy which

54. See note 11 *supra*.

55. See PROSSER, TORTS at 299; Note, 18 ST. LOUIS L. REV. 54, 61 (1932); 48 HARV. L. REV. 328 (1934).

56. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 224 (1949); Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950).

57. Seavey, *supra* note 56, at 646; 18 SO. CALIF. L. REV. 310, 312 (1945).

58. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 224 (1949). See Judge Traynor's excellent discussion of this phase of the problem in *Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 514, 523, 203 P.2d 522, 528 (1949) (dissenting and concurring), and in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (dissenting and concurring).

gave it birth, the courts thereby establish precedent available against any defendant regardless of his classification. The reason for the rule becomes lost in the rigidity of the rule. The courts must then be faced with the problem of either applying *res ipsa loquitur* against multiple defendants to whom it was never meant to apply, or to draw illogical or confusing distinctions which would only be further expressions of the original policy.

Another very practical problem that the courts will soon have to face is what jury verdicts will be allowed to stand where the trial court allowed *res ipsa* against multiple defendants. For example, if a pedestrian were injured by flying glass from an auto collision of which no explanation was offered, would a verdict against one driver and not the other be allowed to stand? If the evidence is the same as to all defendants, and the sole question for the consideration of the jury is whether to apply the inference permissible under *res ipsa*, it would seem logically inconsistent for the jury to find for one defendant and against the other. This problem was alluded to in *Ybarra v. Spangard* where the court said in remanding:

It may appear at the trial that, consistent with the principles outlined above, one or more defendants will be found liable and others absolved, but this should not preclude the application of the rule of *res ipsa loquitur*.⁵⁹

The court did not explain how this would be consistent with the principles of *res ipsa loquitur*. But the case was retried without a jury and the court held all defendants liable.⁶⁰ This is, of course, distinguishable from the above hypothetical situation where the pedestrian is injured by flying glass and both drivers were involved to the same extent, for in the *Ybarra* case the defendants were involved to different degrees.⁶¹ Therefore, the above quotation would not necessarily be applicable to the situation where the parties defendant are equally involved. It would perhaps not have been a bad result in the *Ybarra* case to allow a judge or jury to hold some defendants liable, and others not liable, though the standard of judgment would be a little vague. However, the question remains whether, in a situation such as the auto collision case hypothesized, a jury would be allowed to find some defendants liable and absolve others. Apparently they would if the court adopted the view of the *Ybarra* case.

59. 25 Cal. 2d 486, 492, 154 P.2d 687, 690 (1944).

60. 93 Cal. App. 2d 43, 208 P.2d 445 (1949).

61. However, there seems implicit in *Godfrey v. Brown*, the California case where two cars collided at an intersection, the suggestion that if a verdict against one of two parties involved in an accident can stand where the other is not joined, a verdict could stand against one where both were joined. It likewise appears in *Weddle v. Phelan* (where two vehicles sideswiped) that a verdict against either driver would be allowed. This seems logically unsound and legally unjust.

IV

All the logical, historical, legal, and procedural difficulties inherent in the rule which allows *res ipsa loquitur* against multiple defendants suggest that the rule “. . . is no more to be accounted for by the legal reasoning generally used to sustain it than is any other rule of law,”⁶² as Professor Fleming James Jr. said of the last clear chance rule. Consider the words of Judge Traynor of the California Supreme Court in his dissenting and concurring opinion in *Gordon v. Aztec Brewing Co.*,⁶⁴ which case the majority decided in favor of the plaintiff on the basis of *res ipsa*:

[A] manufacturer incurs an absolute liability when an article that he had placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.⁶⁴

[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health. . . .⁶⁵

In that case the plaintiff restaurant operator was injured when a bottle of beer bottled by the defendant and delivered by a distributing company exploded while the plaintiff was transferring it from its case to the icebox. A case similar to the *Aztec* case is *Escola v. Coca-Cola Bottling Co. of Fresno*,⁶⁶ except that in the *Escola* case the bottling company had delivered the soda itself. In both cases the court held that *res ipsa loquitur* applied against the bottler. In both cases Judge Traynor concurred in the result, on the grounds of absolute liability indicated in the above quotation, but dissented strongly from the holding in *Aztec* that *res ipsa* was applicable. He maintained that exclusive control was lacking, and that the greater probabilities did not indicate the defendant was negligent.

In Judge Traynor's view of absolute liability two factors become paramount. One is the necessity of reliance by the injured party upon the conduct of the defendant.⁶⁷ The other is the ability of the de-

62. 47 YALE L.J. 704 (1938).

Prosser states:

There are cases where a special relation between the parties should impose upon the defendants the burden of proof. . . . The law has had no great benefit from the marriage between this burden and the inference from circumstantial evidence [which arises in a *res ipsa loquitur* situation], and a divorce would at least clear the air. The rule has nothing to do with *res ipsa loquitur* as it is commonly understood and applied, and it should be recognized as a distinct and separate rule of policy.

Prosser, *Res Ipsa Loquitur in California*. 37 CALIF. L. REV. 183, 234 (1949).

63. 33 Cal. 2d 514, 523, 203 P.2d 522, 528 (1949) (dissenting and concurring).

64. *Id.* at 530, 203 P.2d at 532.

65. *Id.* at 531, 203 P.2d at 533.

66. 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Judge Traynor dissenting and concurring).

67. 33 Cal. 2d 514, 531, 203 P.2d 522, 533 (1949). “He [the consumer] does not ordinarily inspect bottles, and in any event it is not likely that he is qualified to detect latent defects. He accepts the bottle on faith.”

fendant to absorb or distribute a reasonably foreseeable loss.⁶⁸ The similarity between the situation in the *Aztec* case and that of the multiple defendant cases is readily apparent. In both situations, by allowing a plaintiff to use *res ipsa* where it would not ordinarily be applicable, the court imposed a liability not normally possible. Judge Traynor agreed in the *Aztec* case as to the result, but felt that the more basic reasons for the decision lay in a rule of absolute liability as measured by his two criteria. An analysis of the multiple defendant cases shows that they all meet the two requirements indicated by Judge Traynor, and the dissimilar factual situations can be harmonized on that test.

In the situations out of which the auto collision cases arise, pedestrians or passengers must certainly rely upon the safe conduct of the drivers with a high degree of attendant risk if the drivers are negligent. Then too, with the spread of compulsory insurance and financial responsibility laws, ability to distribute the loss through insurance has become, as a practical matter, almost a prerequisite to driving an automobile.⁶⁹ In the user of the public way situations the pedestrian must rely on the maintenance of the abutting premises, and certainly there is a reasonably foreseeable insurable risk, especially in the case of business property where the cases are more likely to arise. In the hospital cases the necessity of reliance bears great weight, and malpractice insurance would distribute the loss. In the case of injuries resulting from manufactured products it is evident the products will usually be used without inspection; the manufacturer and the retailer are well able to absorb the loss through insurance, and they have the added option of absorption in their pricing system.

The courts, however, do not appear ready to accept Judge Traynor's view and apply absolute liability to manufacturers at this time. Note that in both the Pennsylvania and Kansas bursting bottle cases the plaintiff attempted to hold the manufacturer on warranty grounds.⁷⁰ Although some jurisdictions have held that a remote vendee has a remedy against the manufacturer on a warranty running with the goods,⁷¹ the Kansas court was apparently not ready to accept that rule, perhaps feeling it worked too great a violation on the law of warranty.⁷² Yet they worked an equally violent and, as a matter of

68. *Ibid.* "[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."

69. See note, 1954 Wash. U.L.Q. 244.

70. *Nichols v. Nold*, 174 Kan. 613, 620-631, 258 P.2d 317, 324-331 (1953). In *Loeh v. Confair*, 372 Pa. 212, 214, 93 A.2d 451, 452 (1953), a suit in assumption against the bottler had been dismissed.

71. Some jurisdictions have allowed recovery based on other fictions. See Jeanblanc, *Manufacturers' Liability to Persons Other than their Immediate Vendees*, 24 Va. L. Rev. 134 (1937).

72. Although the court in *Nichols v. Nold* talked very loosely about the nature of the warranty action, it is significant that they did not place their decision on

precedent, more unwarranted change on the doctrine of *res ipsa loquitur* in order to achieve substantially the same result. Why did they make this choice? Two answers are suggested. One is that, whereas the law of warranty deals with the substantive law of contract, the doctrine of *res ipsa loquitur* deals with rules of evidence, and a court would probably tend to be less hesitant about changing a procedural rule of evidence than a rule of substantive law. The second is that American courts have been markedly reluctant to impose absolute liability.⁷³ Whenever an alternative exists the courts will attempt to ground liability on a fault theory, and frequently this alternative, as here, has been the application of *res ipsa loquitur*.⁷⁴ The result secured is substantially the same, but the courts thereby protect themselves from those who would criticize them for establishing liability without fault.

In view of the policy factors basic to these four types of cases, perhaps it is time for the formulation of a rule of law somewhat along the following lines: Where a special relationship exists between person *A* and person or persons *B*, by virtue of which it is necessary that person *A* rely upon persons *B* conducting themselves so as not to injure person *A*; where there is a high degree of attendant risk to person *A* if persons *B* are negligent; and where persons *B* are able to distribute the loss that might result to person *A* by insuring against a reasonably foreseeable risk or by absorption of the loss in their operations; there arises a rebuttable presumption⁷⁵ that each of the persons *B* was negligent.⁷⁶

Such a rule would be a presumption applied by the courts rather than a permissible inference to be drawn by the jury, and it would place the defendants at a procedural disadvantage even though there may in fact have been no circumstances from which negligence could logically be inferred against any or all defendants. The factual situations of most of the multiple defendant situations are not such that

that ground. In the Pennsylvania case the plaintiff had not yet purchased the soda; there was therefore less ground on which to find a warranty running with the goods.

73. See the history of the rule of *Rylands v. Fletcher* as applied in the United States. PROSSER, TORTS at 450-452. And note that Judge Edmonds in the Aztec case, 33 Cal. 2d 514, 533, 203 P.2d 522, 534 (1949), agreed with Judge Traynor that *res ipsa* did not apply, but refused to agree to the rule of absolute liability.

74. See PROSSER, TORTS at 451.

75. A court might prefer to shift the burden of proving no negligence to the defendant.

76. In view of this formulation, consider what Illinois has done in cases involving a situation much like *Weddle v. Phelan* (the Louisiana case where two vehicles sideswiped) or *Godfrey v. Brown* (the California case where two cars collided at an intersection). Illinois has held that there is a presumption that both of the defendants were negligent, for, "[e]ither one or both of the defendants was guilty," and, "... plaintiff has a right to recover from someone." *Turner v. Cummings*, 319 Ill. App. 225, 227, 48 N.E.2d 964, 965 (1943); see *Pearlman v. W. O. King Lumber Co.*, 302 Ill. App. 190, 23 N.E.2d 826 (1939).

negligence can be inferred in the light of common experience. A presumption would more certainly implement the policy of compensating plaintiffs⁷⁷ since the presumption would always be applied in a proper case, while a permissible inference might not be drawn by the jury. If a defendant could produce clear evidence pointing to specific acts of due care in regard to the harmful instrumentality, sufficiently indicating that he was not negligent, the presumption would then be rebutted and the jury could weigh the evidence. This would do two things. First, it would assure the plaintiff of compensation for his injury from those defendants who failed to produce exculpatory evidence. Second, it would allow those defendants who were clearly not negligent an opportunity to avoid liability. This proposed rule would attain the results that the courts which allow *res ipsa loquitur* against multiple defendants are trying to reach in a limited class of cases. If a court, clearly recognizing the factors involved, is ready to make the original policy determination that this is the desired result, it seems to this writer that a rule such as the one proposed would more readily implement that policy, make for more clarity and certainty in both the procedural and substantive law of negligence, and help to clear away some of the debris which surrounds that abused Latin phrase, *res ipsa loquitur*.

WILLIAM A. RICHTER

⁷⁷ See Prosser, *Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles*, 30 ILL. L. REV. 980, 986-988 (1936).