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Problems of Proof: The Function and Application of Res Ipsa Loquitur In Louisiana

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PROBLEMS OF PROOF: THE FUNCTION AND APPLICATION OF RES IPSA LOQUITUR IN LOUISIANA

From its inception the doctrine of res ipsa loquitur has produced conflict, confusion, and doubt.[1] The phrase had its birth during argument of an ordinary negligence case, but developments in subsequent years have added a special meaning not originally intended.[2] Basically, however, the application of res ipsa loquitur differs very little from proof of negligence by inference from circumstantial evidence[3] which is employed in the vast majority of tort cases.[4]

In order to make out a successful tort action the plaintiff must show that the defendant breached some duty owed to the plaintiff and that this breach caused the plaintiff's injuries.[5] Failure to produce evidence of the breach inevitably results in a dismissal, but inability to produce *direct* evidence of the breach will not preclude recovery.[6] If plaintiff can show sufficient facts from which it may reasonably be inferred that the defendant conducted himself in a negligent manner and that this conduct caused the injury, recovery is allowed.[7] The application of res

1. "If that phrase had not been in Latin, nobody would have called it a principle." Lord Shaw in Ballard v. North British Ry., Sess. Cas. H.L. 43, 56 (1923). Dean Prosser would prefer that this "tag," which leads only to confusion, be consigned to the "legal dustbin." Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 271 (1936), quoting Bond, C.J., dissenting in Potomac Edison Co. v. Johnson, 160 Md. 33, 40, 152 Atl. 633, 636 (1930): " 'It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule.' " For a collection of some of the many writings on the subject, see Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 255, n.4 (1948); Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, n.2 (1949).

2. According to Dean Prosser the phrase is an offspring of a casual word of Pollack, B., with counsel in Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863). See Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949). See also Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 255 (1948).

3. Malone, *Res Ipsa Loquitur and Proof by Inference — A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 71-72 (1941) [hereinafter cited Malone].

4. Malone 71.

5. PROSSER, TORTS § 30 (3d ed. 1964).

6. *Id.* at 216.

7. Footprints in the snow provide the simplest illustration of circumstantial evidence: from the mere existence of such footprints it is reasonable to infer that someone has recently crossed the area. By contrast, direct evidence exists if an eye witness can testify that he saw someone cross the area. The footprints would have probative value of the passage notwithstanding the declaration of several witnesses that they saw no one cross the area. See *id.* § 39. Where there is direct evidence of defendant's conduct, it must be determined merely, whether such conduct was substandard before the plaintiff can recover. Where, however, the evidence is circumstantial, the existence of alleged substandard conduct must first be inferred by weighing the probabilities of existence versus nonexistence,

ipsa loquitur embodies this process of inferential reasoning, revealing a recognition that it is unjust to deny a plaintiff any possibility of recovery when the nature of his injury speaks strongly of negligent causation and circumstances are sufficient to attribute this negligent causation to the defendant.[8] The difference between application of res ipsa loquitur and the usual proof of negligence by inference thus appears to be one of degree rather than of kind.[9] This Comment seeks to show that the Louisiana jurisprudence recognizes the underlying purpose and nature of the doctrine of res ipsa loquitur while articulating its application in terms of the traditional elements of the doctrine.

I. TRADITIONAL ELEMENTS OF RES IPSA LOQUITUR

Res ipsa loquitur — usually understood as "the thing speaks for itself"[10] — generally is applied if there is no evidence to show negligence other than the fact that injury occurred under circumstances which indicate negligent causation.[11] In attributing this negligent causation to the defendant courts generally refer to certain time-honored elements[12] and proceed to decide

based on other facts presented, and then the conduct must be evaluated to determine if it was substandard. See generally *id.* §§ 36, 39.

8. See Rubsamen, *Res Ipsa Loquitur in California Malpractice Law — Expansion of a Doctrine to the Bursting Point*, 14 STAN. L. REV. 251 (1962).

9. See Malone 72.

10. For a historical development, see Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 257 (1948); Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

11. There seems to be no definite criterion to determine exactly what the "res" in res ipsa loquitur is for all cases; normally it is regarded as a limited fact group from which an inference of negligence is drawn by reason of the particular circumstances of the plaintiff's injury. For a distinction between the res ipsa loquitur situation and the negligence situation where proof is made by circumstantial evidence, see Malone 72-74.

The proper function of res ipsa loquitur appears to have been recognized in the RESTATEMENT (SECOND), TORTS § 328D, comment *b* at 40 (Tent. Draft No. 5, 1960): "Negligence and causation, like other facts, may be proved by circumstantial evidence. Without resort to Latin, the jury may be permitted to infer, when a runaway horse is found in the highway, that its owner has been negligent in looking after it; or when a driver runs down a visible pedestrian, that he has failed to keep a proper lookout. When the Latin phrase is used in such cases, nothing is added. A res ipsa loquitur case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event itself and the defendant's relation to it."

12. The "final development" of the doctrine of res ipsa loquitur is said to have occurred when Dean Wigmore sought to define what a res ipsa loquitur case was in words which intimated a "formula" for its application in 4 WIGMORE, EVIDENCE § 2509 (1st ed. 1905). Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 187-88 (1949). This "formulary" or elemental criterion has been referred to as the "orthodox" statement of res ipsa loquitur. Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519, 520 (1934).

the case according to their presence or absence. Following this approach Louisiana courts have consistently held that to utilize the doctrine of res ipsa loquitur the plaintiff must show that (1) the accident is of a kind that does not ordinarily occur in the absence of negligence, (2) the injury was caused by an agency or instrumentality within the actual or constructive control of the defendant, and (3) evidence of the full cause of the accident is more readily accessible to the defendant.[13] While the Louisiana courts seem to apply res ipsa loquitur only when these three elements are present, it appears that they actually look for the most plausible cause or explanation of the plaintiff's injury and use these artificial criteria as a means of either connecting defendant with plaintiff's injury or exonerating him.[14]

(1) The Inference That the Accident Is Due to Negligent Causation

The first accepted requirement for application of res ipsa loquitur is that the accident must be one which common knowledge indicates does not ordinarily occur in the absence of negligence.[15] This requirement, which assumes that trier of fact has such "common" or ordinary knowledge of everyday events, is consistent with the fundamental principle of circumstantial evidence that there must be sufficient basis in fact to conclude that one probability is more reasonable than another.[16] Hence, res ipsa loquitur is usually applied to cases in which past experience of ordinary events forms a fund of common knowledge from which the court draws to conclude that negligence was

13. Practically all the Louisiana cases applying res ipsa loquitur mention these three factors. Northwestern Mut. Fire Ass'n v. Allain, 226 La. 788, 793, 77 So. 2d 395, 397 (1954) is illustrative: "It is well established in the Louisiana jurisprudence that the doctrine of res ipsa loquitur must be applied to a case if the accident which damaged plaintiff was caused by an agency or instrumentality within the actual or constructive control of the defendant, if the accident is of a kind which does not occur in the absence of negligence, and if the evidence as to the true explanation of the accident is more readily accessible to the defendant than to the plaintiff."

14. *Cf.* Pilie v. National Food Stores, 245 La. 276, 158 So. 2d 162 (1963); Larkin v. State Farm Mut. Auto. Ins. Co., 233 La. 544, 97 So. 2d 389 (1957), noted 19 LA. L. REV. 336 (1957); Gershiner v. Gulf Ref. Co., 171 So. 399 (La. App. 1st Cir. 1936).

15. See note 13 *supra*.

16. 2 HARPER & JAMES, TORTS § 19.5 (1956); *cf.* Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 193 (1949); Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 255, 260 (1948). See also Malone 73-79.

more probably present than not;[17] for example, the case of a rear end collision occurring in broad daylight,[18] or an automobile swerving or running off the road for no apparent reason.[19] In such cases the court is sufficiently familiar with the events surrounding accidents of this kind, as matters of ordinary experience, to conclude that the accident is one which warrants an initial inference of negligence, even though the defendant may later be exonerated by other factors considered.[20]

On the other hand, proof of a type of injury which is as easily attributable, under ordinary experience, to unavoidable accident as it is to negligence does not tend to establish anyone's negligence; for example, where lightning strikes a telephone wire causing the telephone to crack in plaintiff's ear and

17. See Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 193 (1949); RESTATEMENT (SECOND), TORTS § 328D, Comment *d* at 41 (Tent. Draft No. 5, 1960); *cf.* 2 HARPER & JAMES, TORTS § 19.5, at 1079 (1956).

A suggestion has been made that as the accident becomes more freakish and improbable, interrupting the usual current of events, it becomes easier for the court to attribute the accident to negligent causation. See Malone 79. See also Prosser, *supra* at 192; 2 HARPER & JAMES, *op. cit. supra*, at 1082. This suggestion appears best illustrated by the classic statement of the Mississippi court in Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 500, 78 So. 365, 366 (1918): "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless." It seems reasonable to conclude that a person, when drawing upon the fund of common knowledge made of past experience, would not ordinarily encounter human toes while enjoying tobacco. Consequently, a basic inference that someone has been "very careless" is reasonable under these circumstances. For other examples, see Vogt v. Hotard, 144 So. 2d 714 (La. App. 4th Cir. 1962) (tree fell on plaintiff); Hawayek v. Simmons, 91 So. 2d 49 (La. App. Orl. Cir. 1956), noted 18 LA. L. REV. 364 (1958) (fishing lure in eye); Yates v. Williams, 32 So. 2d 505 (La. App. 1st Cir. 1947) (unattended automobile roaming street).

18. See Loprestie v. Roy Motors, Inc., 191 La. 239, 185 So. 11 (1930).

19. See, *e.g.*, Adams v. Spellman, 130 So. 2d 460 (La. App. 4th Cir. 1961); Levy v. Indemnity Ins. Co. of North America, 8 So. 2d 774 (La. App. 2d Cir. 1942); *cf.* Tymon v. Toye Bros. Yellow Cab Co., 10 So. 2d 599 (La. App. Orl. Cir. 1942); see also Yates v. Williams, 32 So. 2d 505 (La. App. 1st Cir. 1947).

20. See, *e.g.*, Larkin v. State Farm Mut. Auto. Ins. Co., 233 La. 544, 97 So. 2d 389 (1957) (overturned automobile; other reasonable causes than defendant's negligence not eliminated); Turner v. Continental Southern Lines, Inc., 161 So. 2d 139 (La. App. 3d Cir. 1964) (other probable causes than building owner's negligence not eliminated); Fourroux v. Security Co., 144 So. 2d 566 (La. App. 4th Cir. 1962) (other probable causes not eliminated); Bauer v. Columbia Cas. Co., 126 So. 2d 398 (La. App. 2d Cir. 1960) (plaintiff's own acts not eliminated as probable cause); Williams v. Barton, 81 So. 2d 22 (La. App. 2d. Cir. 1955) (overturned bus; other probable causes); Peranio v. Superior Ins. Co., 76 So. 2d 315 (La. App. 1st Cir. 1954) (sudden emergency; LA. R.S. 32:234 (1950) eliminated defendant's negligence from consideration as probable cause); Guiteau v. Southern Parking Co., 49 So. 2d 880 (La. App. Orl. Cir. 1951) (intervention of third party eliminated defendant's negligence as probable cause); Hebert v. General Acc., Fire & Life Assur. Corp., 48 So. 2d 107 (La. App. Orl. Cir. 1950) (presence of plaintiff in car prevented inference that most probable cause was defendant's negligence).

resulting in injury to his hearing.[21] Refusal to apply res ipsa loquitur on the mere showing of these facts is understandable. There is no basis in fact to warrant an inference of negligence as a matter of probabilities. It is no more likely that the accident occurred as the result of defendant's negligence than because of factors over which defendant had no control. If, however, the plaintiff would introduce one additional fact, for example, that certain lightning grounds reduce the risk of such an accident considerably, the court might then have sufficient basis in fact to infer that the defendant did not take the additional precautions that should have been taken for the protection of telephone users, and a different result might be obtained.[22]

In many types of injuries arising out of specialized activities, it is likewise difficult, if not impossible, for the court to isolate any probable negligence without some knowledge of the probable cause; for example, where a person is severely burned while undergoing X-ray treatment.[23] Until the court has sufficient technical knowledge of the factors which produce such burns, it cannot grasp the problem sufficiently to allow an inference of negligence from the mere existence of the injury.[24] In these cases the doctrine of res ipsa loquitur serves no practical purpose, since the plaintiff must acquaint the court with the factors pertinent to the probable cause of the injury. The application of a Latin formula does not result in a special inference that would not ordinarily be drawn under the usual rules of circumstantial evidence.[25]

It is never enough, however, for the plaintiff to prove he was injured by the negligence of someone. The plaintiff must also establish sufficient facts to provide a reasonable basis for

21. Burdett v. Southern Bell Tel. & Tel. Co., 72 So. 2d 595 (La. App. 1st Cir. 1954).

22. *Cf.* Ledet v. Lockport Light & Power Co., 132 So. 272 (La. App. 1st Cir. 1931).

23. See Lett v. Smith, 6 La. App. 248 (1927), where res ipsa loquitur was not applicable on ground that mere occurrence of this type of injury does not warrant inference of negligence, but evidence was sufficient to show specific negligence.

24. See *ibid.* See also Meyer v. St. Paul-Mercury Indem. Co., 225 La. 618, 73 So. 2d 781 (1953); Jacobs v. Beck, 141 So. 2d 920 (La. App. 4th Cir. 1962).

25. See Meyer v. St. Paul-Mercury Indem. Co., 225 La. 618, 73 So. 2d 781 (1953); Jacobs v. Beck, 141 So. 2d 920 (La. App. 4th Cir. 1962); Lett v. Smith, 6 La. App. 248 (1927); *cf.* Roark v. Peters, 2 La. App. 448 (2d Cir. 1925). *But see* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). For a criticism of application of res ipsa loquitur to malpractice cases see Rubsamen, *Res Ipsa Loquitur in California Malpractice Law—Expansion of a Doctrine to the Bursting Point*, 14 STAN. L. REV. 251 (1962).

the court to conclude that the defendant's negligence is the most plausible explanation for the accident.[26] To spin this web of circumstantial evidence the courts have required the plaintiff to show the additional fact that the agency or instrumentality which caused[27] the injury was within the control of the defendant, thus making it more reasonable for the court to look to the defendant for an explanation.

(2) Control of the Instrumentality in the Defendant

The Louisiana courts have stated that res ipsa loquitur applies only if the instrumentality causing the harm was within the control of the defendant.[28] Certainly it is true that if the accident is one which does not ordinarily occur in the absence of negligence and the defendant can be shown to have had control of the instrumentality causing the injury at the time of the accident, it is very likely that his negligence was the cause of the accident; but to apply the control element as a rigid formula could lead to questionable results. In a Rhode Island case, for example, plaintiff, sitting down in a chair which collapsed in defendant's department store, was denied recovery on the ground that plaintiff was in "control" of the chair at the time of the injury.[29] Such a rigid application of the criterion of control by the defendant overlooks the very purpose for which the element of control was designed. Control of the instrumentality by the defendant is merely one effective way of reasonably and fairly connecting the defendant with the negligent causation of the plaintiff's injury.[30] Consequently, it should be enough that de-

26. *Cf., e.g.*, Pilie v. National Food Stores, 245 La. 276, 158 So. 2d (1963); Larkin v. State Farm Mut. Auto. Ins. Co., 233 La. 544, 97 So. 2d 389 (1957); Fourroux v. Security Co., 144 So. 2d 566 (La. App. 4th Cir. 1962); Bauer v. Columbia Cas. Co., 126 So. 2d 398 (La. App. 2d Cir. 1960); Monroe v. H. G. Hill Stores, 51 So. 2d 645 (La. App. Orl. Cir. 1951); Lognion v. Peters, 44 So. 2d 381 (La. App. 1st Cir. 1950); Fitzgerald v. Big Chain Stores, 22 So. 2d 133 (La. App. 2d Cir. 1945).

27. It is axiomatic that the plaintiff must satisfy the court that a causal connection exists between the defendant's negligence and the injury. This requirement is not relaxed in the res ipsa loquitur case but must be satisfied by a preliminary showing through positive evidence that if defendant was negligent in some manner, this negligence caused plaintiff's injury. See Malone 74-75. *Accord*, Bourgon v. Traders & Gen. Ins. Co., 146 So. 2d 535 (La. App. 4th Cir. 1962); see also Langlinais v. Geophysical Serv., Inc., 237 La. 585, 111 So. 2d 781 (1959).

28. See note 13 *supra*.

29. Kilgore v. Shepard Co., 52 R.I. 151, 158 Atl. 720 (1932).

30. The proper function of the control requirement in applying res ipsa loquitur appears to be recognized by the RESTATEMENT (SECOND), TORTS § 328D, comment *g* at 42 (Tent. Draft No. 5, 1960): "The plaintiff may sustain [his] burden of proof with the aid of a second inference, based upon a showing of specific

fendant has the right of control and the opportunity or responsibility of exercising it,[31] or shares this responsibility.[32] For example, if defendant obtains, arranges, and installs ropes for use in felling a tree, and plaintiff, acting on defendant's instructions, is injured by the falling tree, the court will properly look to the defendant for an explanation of the accident, if the plaintiff can eliminate other probable causes.[33] The defendant will be held responsible, not because the second element of a Latin maxim was met, but because the fact that defendant has responsibility for controlling the apparatus in the undertaking makes it all the more reasonable to infer defendant's negligence as the most plausible explanation of the accident.

If control of the instrumentality is merely one method of linking defendant with plaintiff's injury, there is no logical necessity for showing actual control if a nexus can be established in some other way. Fortunately, the Louisiana courts

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cause for the event which was within the defendant's responsibility, or a showing that the defendant is responsible for all reasonably probable causes to which the event can be attributed. Usually this is done by showing that a specific instrumentality which has caused the event or all such instrumentalities or reasonably probable causes were under the exclusive control of the defendant. Thus the responsibility of the defendant is proved by eliminating that of any other person.

"It is not, however, essential to the inference that the defendant have exclusive control; and exclusive control is merely one way of proving his responsibility. He may be responsible, and the inference may be drawn against him, where he shares the control of another, as in the case of the fall of a party wall which each of two defendants is under a duty to inspect and maintain. He may be responsible where he is under a duty to the plaintiff which he cannot delegate to another, as in the case of a landlord who leases premises dangerous to persons on the public highway, which his tenant undertakes to maintain. He may be responsible where he is under a duty to control the conduct of a third person, as in the case of a host whose guests throw objects from his windows. It may be enough that the defendant was formerly in control, at the time of the probable negligence, as in the case of a beverage bottler whose product poisons the consumer, when there is sufficient evidence to eliminate the responsibility of intermediate dealers. Exclusive control is merely one fact which establishes the responsibility of the defendant; and if it can be established otherwise, exclusive control is not necessary to a res ipsa loquitur case. The essential question becomes one of whether the probable cause of the injury is one which the defendant was under a duty to the plaintiff to anticipate or guard against."

Cf. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 201 (1949): "It would be far better, and much confusion would be avoided, if the idea of 'control' were to be discarded altogether, and if we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."

31. See Gillis v. Great Atl. & Pac. Tea Co., 95 So. 2d 186 (La. App. 1st Cir. 1957); Mercer v. Tremont & G. Ry., 19 So. 2d 270 (La. App. 2d Cir. 1944); see also PROSSER, TORTS § 39 (3d ed. 1964).

32. See Arrington v. Hearin Tank Lines, 80 So. 2d 167 (La. App. 2d Cir. 1955); Washington v. T. Smith & Son, 68 So. 2d 337 (La. App. Orl. Cir. 1953); *cf.* Dorman v. T. Smith & Son, Inc., 223 La. 29, 64 So. 2d 833 (1953); see also PROSSER, TORTS § 39 (3d ed. 1964).

33. Vogt v. Hotard, 144 So. 2d 714 (La. App. 4th Cir. 1962).

have avoided the questionable result reached in the Rhode Island case[34] and have apparently recognized the artificial nature of the control element. Illustrative are the cases in which the court has found sufficient evidence to infer negligence of defendant as the most plausible explanation of the plaintiff's injury, although defendant had parted with actual control or possession of the instrumentality causing the injury. In such cases the court has found control and possession not an essential element; for example, where a soft drink bottle explodes in the hands of the plaintiff,[35] or a drum of acid leaks while in the hands of a common carrier,[36] or a plug in an acetylene cylinder breaks while stored on plaintiff's premises,[37] or a rubber hose connection on an installed air conditioning unit breaks and causes flooding of plaintiff's house.[38] In these cases, however, the court has required the plaintiff to eliminate equally reasonable explanations of the accident, by showing that there was no tampering by anyone through whose hands the instrumentality passed and that there was no fault on the part of the plaintiff himself.[39] If such explanations are not eliminated[40] as probable causes,

34. Dean Prosser terms the result in *Kilgore*, *supra* note 29, an "absurdity." Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 188 (1949).

35. Employers' Liab. Assur. Corp. v. Thommassie, 293 F.2d 110 (5th Cir. 1961); Ortego v. Nehi Bottling Works, 199 La. 599, 6 So. 2d 677 (1942); Hudnall v. Travelers Ins. Co., 148 So. 2d 840 (La. App. 4th Cir. 1963); Bonura v. Barq's Beverages, 135 So. 2d 338 (La. App. 1st Cir. 1961); Johnson v. Louisiana Coca Cola Bottling Co., 63 So.2d 459 (La. App. Orl. Cir. 1953); Boucher v. Louisiana Coca Cola Bottling Co., 46 So. 2d 701 (La. App. Orl. Cir. 1950); Meyers v. Alexandria Coca Cola Bottling Co., 8 So. 2d 737 (La. App. 1st Cir. 1942); Lanza v. DeRidder Coca Cola Bottling Co., 3 So. 2d 217 (La. App. 1st Cir. 1941).

36. Motor Sales & Serv., Inc. v. Grasselli Chem. Co., 15 La. App. 353, 131 So. 623 (Orl. Cir. 1930).

37. Hake v. Air Reduction Sales Co., 210 La. 810, 28 So. 2d 441 (1946).

38. Saunders v. Walker, 229 La. 426, 86 So. 2d 89 (1956); see also Plunkett v. United Elec. Serv., 214 La. 145, 36 So. 2d 704 (1948) (heating unit installed in plaintiff's house).

39. In virtually all cases where the instrumentality causing plaintiff's injury has left the defendant's possession there is a discussion of this showing by plaintiff. See cases cited in notes 35-38 *supra*. Typical is the statement found in Plunkett v. United Elec. Serv., 214 La. 145, 159, 36 So. 2d 704, 709 (1948): "But the fact of possession and control by the defendant is not always an essential element. The doctrine [of res ipsa loquitur] has been held to be applicable in numerous actions where the offending articles were not possessed and controlled by the defendants on the occurrence of the accidents such as those resulting from exploding bottles of carbonated beverages, from leakage of drums of acid, and from the blow out of a plug in a cylinder of acetylene gas. Important though in actions of this class is that the plaintiff prove freedom of fault on the part of all through whose hands the instrumentality passed after it left the defendant."

40. To require the plaintiff to negative his own fault has been criticized as being contrary to the principle that contributory negligence is an affirmative defense. See *The Work of the Louisiana Supreme Court for the 1938-1939 Term — Torts and Workmen's Compensation*, 2 LA. L. REV. 89 (1939). Professor

then the negligence of the defendant is simply not the most plausible explanation of the accident.[41] If, however, the plaintiff can eliminate such equally reasonable causes, the only inquiries that should be made are whether the defendant had control of the instrumentality at the time negligence most probably occurred,[42] and whether defendant's duty of care extends to plaintiff.[43]

(3) Evidence more Accessible to the Defendant

As part of the doctrine of res ipsa loquitur the Louisiana courts have stated that evidence on the true cause of the accident must be more readily accessible to the defendant, or that the defendant must have superior knowledge of the true cause of the accident.[44] This statement has been used as the principal reason for allowing[45] or denying[46] recovery under the doctrine of res ipsa loquitur, but in truth it is difficult to accept this as the sole and essential element upon which a res ipsa loquitur case should turn. For example, in *Yates v. Williams*[47] plaintiff was standing by a bus stop when he was struck by an unattended automobile rolling down an incline from a lot in which defendant, a service station owner, parked automobiles. Defendant admitted he was notified of the accident and had a customer take plaintiff to a hospital but later declined to disclose ownership of the automobile. The court, applying res ipsa loquitur,

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Malone, however, takes the position that since the plaintiff's burden in a res ipsa loquitur case is to show that the most plausible inference is the defendant's negligence, the plaintiff's fault should not be treated differently from any other competing inference. Malone 105, n.98.

41. See, *e.g.*, the following cases which have denied recovery under the doctrine of res ipsa loquitur because the plaintiff did not bear this burden of proof: Monroe v. H. G. Hill Stores, 51 So. 2d 645 (La. App. Orl. Cir. 1951); Piacun v. Louisiana Coca Cola Bottling Co., 33 So. 2d 421 (La. App. Orl. Cir. 1948); see also Pittman v. Gulotta, 25 So. 2d 343 (La. App. Orl. Cir. 1946).

42. See note 30 *supra*. See also Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 255, 268 (1948).

43. See RESTATEMENT (SECOND), TORTS § 328D (Tent. Draft No. 5, 1960): "Res Ipsa Loquitur. (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff . . . ." See also note 30 *supra*; Malone 77.

44. See note 13 *supra*.

45. *E.g.*, Yates v. Williams, 32 So. 2d 505 (La. App. 1st Cir. 1947); see also Carter v. Middleton, 76 So. 2d 594 (La. App. 2d Cir. 1955).

46. *E.g.*, Lognion v. Peters, 44 So. 2d 381 (La. App. 1st Cir. 1950); see also Gershner v. Gulf Ref. Co., 171 So. 399 (La. App. 1st Cir. 1936).

47. 32 So. 2d 505 (La. App. 1st Cir. 1947).

gave judgment for the plaintiff, emphasizing that the defendant had control of the automobile and had greater access to the facts explaining why this automobile was rolling away, and that, therefore, defendant should come forward with such information and exculpate himself from the inference of negligence.[48]

There can be no quarrel with the result in *Yates*. The service station was on a slope; the defendant was obliged to know that improperly attended automobiles sometimes roll down inclines, and his duty of care obviously extended to plaintiff.[49] The responsibility for seeing that the vehicles remained on the lot rested on the defendant.[50] Consequently, the fact that the automobile did roll down the incline made it reasonable to infer under these circumstances that the mishap resulted from negligence of defendant. Whether defendant had superior knowledge of the true cause would thus be virtually immaterial. By not coming forth with the evidence he supposedly possessed on the ownership of the car or other pertinent factors concerning its venture, he was really declining to rebut the inference that his negligence was the most probable cause of the plaintiff's misfortune.[51]

To say that *Yates* stands for the proposition that liability was imposed because of defendant's superior knowledge would be to put an unusual premium on a plaintiff's ignorance.[52] Furthermore, to require that the plaintiff must be without access to evidence of the true cause of his injury before the doctrine of res ipsa loquitur can be applied is to intimate that the doctrine is an extraordinary legal device available only in an extreme case.[53] Such a view overlooks the very purpose of the doctrine. Res ipsa loquitur serves only to point the finger of responsibility at defendant by inference. An inference varies in strength with the degree of probability, and an inference of negligence will be raised by all the circumstances surrounding

48. *Id.* at 507.

49. The court in *Yates* did not even discuss this obvious fact and defendant evidently did not seek to deny it.

50. There was some indication in the testimony that the lot was used indiscriminately by the public as a parking lot, but the court in considering this point said: "It is intimated by the testimony of some of the defendants that this parking lot was used indiscriminately by the public but regardless of whether it was or not the fact remains that it was used by the defendants to park the cars which they serviced in their service station." *Id.* at 507.

51. *Cf.* Carter v. Middleton, 76 So. 2d 594 (La. App. 2d Cir. 1955).

52. See 2 HARPER & JAMES, TORTS § 19.9, at 1095 (1956).

53. Malone 92.

the accident, not merely by the ignorance of the plaintiff.[54] Accessibility to the evidence thus appears to serve no valid purpose other than, perhaps, encouraging the parties with access to the evidence to bring it before the court.

II. LOUISIANA APPLICATIONS — ROLE OF DEFENDANT'S DUTY

The doctrine of res ipsa loquitur has been a part of the Louisiana jurisprudence for at least half a century,[55] and during this period it has been applied to cases involving automobile accidents,[56] fires,[57] explosions,[58] exploding bottles,[59] injuries sus-

54. *Cf.* Monkhouse v. Johns, 142 So. 347 (La. App. 2d Cir. 1932).

55. The first reported Louisiana case in which res ipsa loquitur was applied with any real significance appears to be Lykiardopolous v. New Orleans & C. R. Light & Power Co., 127 La. 309, 53 So. 575 (1910) (plaintiff injured by exploding boiler). For a comprehensive analysis of the application of res ipsa loquitur as applied in Louisiana through the year 1941, see Malone 70.

56. See, *e.g.*, Loprestie v. Roy Motors, Inc., 191 La. 239, 185 So. 11 (1938) (rear end collision); Adams v. Spellman, 130 So. 2d 460 (La. App. 4th Cir. 1961) (auto swerved and hit parked car); Yates v. Williams, 32 So. 2d 505 (La. App. 1st Cir. 1947) (unattended automobile struck pedestrian); Levy v. Indemnity Ins. Co. of North America, 8 So. 2d 774 (La. App. 2d Cir. 1942) (automobile left road); Harrelson v. McCook, 198 So. 532 (La. App. 2d Cir. 1940) (automobile left highway and went into ditch); Monkhouse v. Johns, 142 So. 347 (La. App. 2d Cir. 1932) (automobile ran off road and into tree); Lawson v. Nossek, 15 La. App. 207, 130 So. 669 (2d Cir. 1930) (guests of defendant injured in auto accident).

57. See, *e.g.*, Northwestern Mut. Fire Ass'n v. Allain, 226 La. 788, 77 So. 2d 395 (1954) (house caught fire when paint being removed with blowtorch); Plunkett v. United Elec. Serv., 214 La. 145, 36 So. 2d 704 (1948) (fire in home central heating unit); Hake v. Air Reduction Sales Co., 210 La. 810, 28 So. 2d 441 (1946) (plug in acetylene cylinder blew out); Jones v. Shell Petroleum Corp., 185 La. 1067, 171 So. 447 (1936) (plaintiff's building damaged by fire starting in defendant's service station); Dotson v. Louisiana Cent. Lumber Co., 144 La. 78, 80 So. 205 (1918) (fire in defendant's sawmill killed employee); National Sur. Corp. v. Travelers Ins. Co., 149 So. 2d 438 (La. App. 3d Cir. 1963) (fire on front end loading equipment); Maryland Cas. Co. v. Rittiner, 133 So. 2d 172 (La. App. 4th Cir. 1961) (flash fire caused by hot tar); Carter v. Middleton, 76 So. 2d 594 (La. App. 2d Cir. 1954) (fire in truck spread to barn); New York Underwriters Ins. Co. v. B. H. Prewitt & Sons, 55 So. 2d 303 (La. App. 2d Cir. 1951) (home furnace ignited floor finishing liquid); Letts v. Krause & Managan, 26 So. 2d 838 (La. App. 1st Cir. 1946) (home fire when varnish remover ignited); Gulf Ins. Co. v. Temple, 187 So. 814 (La. App. 2d Cir. 1939) (automobile caught fire while defendant using blowtorch for repair); see also Gerald v. Standard Oil Co., 204 La. 690, 16 So. 2d 233 (1943) (while unloading gasoline plaintiff lit cigaret which ignited fumes; court said doctrine of res ipsa loquitur *might* be applicable on remand).

58. See, *e.g.*, Langlinais v. Geophysical Serv., Inc., 237 La. 585, 111 So. 2d 781 (1959) (dynamite blast ruptured levee); Watkins v. Gulf Ref. Co., 206 La. 942, 20 So. 2d 273 (1944) (oil well blew out); Lykiardopolous v. New Orleans & C. R. Light & Power Co., 127 La. 309, 53 So. 575 (1910) (boiler explosion); Horrell v. Gulf & Valley Cotton Oil Co., 15 La. App. 603, 131 So. 709 (Orl. Cir. 1930) (deodorizing tank exploded killing nearby employee); Drago v. Dorsey, 13 La. App. 115, 126 So. 724 (Orl. Cir. 1930) (child crushed by falling fence due to explosion of defendant's boiler). *But see* Day v. National U. S. Radiator Corp., 241 La. 288, 128 So. 2d 660 (1961) (boiler explosion but res ipsa loquitur held inapplicable since cause of explosion fully established at trial).

59. See, *e.g.*, cases cited note 35 *supra*.

tained from falling objects,[60] fishing lure in plaintiff's eye,[61] leaking acid,[62] drowning in a public pool,[63] and consumption of foreign matter contained in foodstuffs.[64] These cases contained factual situations in which the three elements of res ipsa loquitur were ostensibly present, but in many instances application of res ipsa loquitur appears to serve no useful purpose. In some cases the defendant's duty was such that merely introducing evidence of due care did not eliminate the defendant's negligence as the most probable cause of the accident. For example, in *Ortego v. Nehi Bottling Works*[65] plaintiff was injured by flying glass from an exploding soft drink bottle just after its delivery by defendants' employee. Plaintiff, invoking the doctrine of res ipsa loquitur, showed that she herself was free from fault and that there was no improper handling by anyone else. Defendant countered with an impressive array of evidence showing that only the most scientific and modern appliances and methods were used in the bottling process.[66] The court, after carefully considering all the evidence, allowed recovery under

60. Vogt v. Hotard, 144 So. 2d 714 (La. App. 4th Cir. 1962) (tree fell on plaintiff while helping defendant under latter's direction); Washington v. T. Smith & Sons, 68 So. 2d 337 (La. App. Orl. Cir. 1953) (falling crate); Landry v. News-Star-World Pub. Corp., 46 So. 2d 140 (La. App. 2d Cir. 1950) (metal pipe fell from scaffolding); Mercer v. Tremont & G. Ry., 19 So. 2d 270 (La. App. 2d Cir. 1944) (railroad car wheel fell on plaintiff); Pizzitola v. Letellier Transfer Co., 167 So. 158 (La. App. Orl. Cir. 1936) (bale of paper fell off truck); Noble v. Southland Lumber Co., 4 La. App. 281 (2d Cir. 1926) (plank fell on plaintiff in lumber yard); Lonatro v. Palace Theatre Co., 5 La. App. 386 (Orl. Cir. 1926) (soft drink bottle fell from balcony in theater).

61. Hawayek v. Simmons, 91 So. 2d 49 (La. App. Orl. Cir. 1956).

62. Motor Sales & Serv. Co. v. Grasselli Chem. Co., 15 La. App. 353, 131 So. 623 (Orl. Cir. 1930).

63. Rome v. Landon & Lancashire Indem. Co. of America, 169 So. 132 (La. App. Orl. Cir. 1936).

64. See, *e.g.*, Mayerhefer v. Louisiana Coca-Cola Bottling Co., 219 La. 320, 52 So. 2d 866 (1951) (soft drink with excessive iodine content); White v. Coca-Cola Bottling Co., 16 So. 2d 579 (La. App. 2d Cir. 1943) (soft drink with deleterious substance); Costello v. Morrison Cafeteria Co., 18 La. App. 40, 135 So. 245 (Orl. Cir. 1931) (cream cheese unfit for human consumption served to plaintiff). *But see* Rowton v. Ruston Coca-Cola Bottling Co., 17 So. 2d 851 (La. App. 2d Cir. 1944) and Dye v. American Beverage Co., 194 So. 438 (La. App. Orl. Cir. 1940), in which the court allowed recovery for drinking beverages with a deleterious substance contained therein making no mention of res ipsa loquitur, but indicating that recovery was allowed on a theory of warranty. The Supreme Court, apparently sensing the confusion, held in LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952) that plaintiff could recover for damages sustained upon consuming a soft drink containing a deteriorated housefly on a theory of implied warranty of fitness for human consumption. See notes 68-71 *infra* and accompanying text.

65. 199 La. 599, 6 So. 2d 677 (1942).

66. The defendant showed that the bottles were purchased from a reputable manufacturer and that gas gauges used in the bottling process prevented any excessive gas pressure in the bottles. See *id.* at 607, 6 So. 2d at 680.

res ipsa loquitur saying: "Despite all this evidence the fact remains that the bottle did explode."[67]

The result in *Ortego* seems sound, since it appears that the defendant in these "bottling cases" is held to more than showing due care or even a high degree of care in the bottling process.[68] When a bottled beverage explodes, the bottling company is confronted with an almost irrefutable inference of negligence, so that the result is, for all practical purposes, the same as that which would be reached if a doctrine of warranty were applied[69] making the bottler virtually an insurer,[70] like the purveyor of beverages or food containing a deleterious substance.[71]

If injury results from defendant's use of explosives,[72] gas,[73] electricity,[74] or other highly dangerous substances[75] the court has, not surprisingly, refused to allow any evidence of due care by defendant to refute an inference of negligence.[76] Illustrative, perhaps, is *Langlinais v. Geophysical Serv. Inc.*[77] Defendant, acting under authority of an exploration permit from plaintiff, set off a dynamite charge in a hole drilled to a depth of about fifty feet at a spot on plaintiff's rice field. Less than an hour and a half thereafter a portion of plaintiff's six foot high levee collapsed. The point of collapse was about eight hundred and twenty feet from the explosion. Plaintiff was able to show by

67. *Id.* at 608, 6 So. 2d at 680.

68. See notes 69-71 *infra.*

69. See LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952); Rowton v. Ruston Coca-Cola Bottling Co., 17 So. 2d 851 (La. App. 2d Cir. 1944); Dye v. American Beverage Co., 194 So. 438 (La. App. Orl. Cir. 1940); see also *The Work of the Louisiana Supreme Court for the 1952-1953 Term — Torts*, 14 LA. L. REV. 182 (1953).

70. See Note, 23 LA. L. REV. 810 (1963). Application of res ipsa loquitur to these cases achieves no exceptional result when compared to other jurisdictions which hold the bottling company to a strict liability upon a contractual theory of implied warranty of fitness. See Note, 5 LA. L. REV. 344, 348 (1943); see also Note, 13 LA. L. REV. 624 (1953).

71. LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952); see also Rowton v. Ruston Coca-Cola Bottling Co., 17 So. 2d 851 (La. App. 2d Cir. 1944); Dye v. American Beverage Co., 194 So. 438 (La. App. Orl. Cir. 1940).

72. See, *e.g.*, Langlinais v. Geophysical Serv., Inc., 237 La. 585, 111 So. 2d 781 (1959) (dynamite).

73. See, *e.g.*, Watkins v. Gulf Ref. Co., 206 La. 942, 20 So. 2d 273 (1944) (oil well blew out).

74. *Cf.*, *e.g.*, Hebert v. Lake Charles Ice, Light & Waterworks Co., 111 La. 522, 35 So. 731 (1903); Ledet v. Lockport Light & Power Co., 132 So. 272 (La. App. 1st Cir. 1931).

75. See, *e.g.*, Northwestern Mut. Fire Ass'n v. Allain, 226 La. 788, 77 So. 2d 395 (1954) (fire damage by blowtorch).

76. *But see* Davis v. Teche Lines, Inc., 200 La. 1, 7 So. 2d 365 (1942).

77. 237 La. 585, 111 So. 2d 781 (1959), noted 34 TUL. L. REV. 409 (1960).

convincing circumstantial evidence that the collapse of the levee and consequent flooding of his fields was caused by the explosion; but he did not attempt to introduce proof showing any particular negligent conduct on the part of the defendant. The defendant attempted to rebut the inference that his negligence had caused the accident by showing that the methods used in setting off the dynamite in no way varied from the usual and customary procedure adopted in similar operations. The court allowed recovery under res ipsa loquitur, stressing that the occurrence itself remained as mute testimony contradicting defendant's claim that only approved methods were used.

The refusal of the court in *Langlinais* to accept defendant's evidence as sufficient to refute the inference that the defendant's negligence was the most plausible explanation of the accident is perhaps more understandable when viewed in light of the high duty that accompanies the use of such dangerous substances. Persons using dangerous instrumentalities will be regarded as virtual insurers for all damages causally attributed to such use.[78] Reliance on res ipsa loquitur in such cases adds nothing to obtain a result that could not have been obtained otherwise. At best, res ipsa loquitur is allowed to relieve the plaintiff of the necessity of proving the details of negligence because negligence is not such a serious issue.[79]

If the ultimate question confronting the court, in a suit for recovery under res ipsa loquitur, is whether the facts and circumstances of the accident suggest the negligence of the defendant, rather than some other cause, as the most plausible explanation of the accident, the extent of the defendant's duty will certainly play an important role in obtaining an answer. If a high degree of care is required (as evidently there is in

78. For example, the Louisiana courts have indicated an extremely high standard of care exists for users of electricity: "The fact that frequent inspections of the line were made to ascertain the condition of the wires and remedy defective insulation does not relieve the company of liability. If the span wire had become dangerously charged with an electrical current the company's inspection should have been thorough enough to have detected it. . . . It was its business to know the span wire in question was a 'live' wire through leakage from the trolley which it suspended." Potts v. Shreveport Belt Ry., 110 La. 1, 8, 34 So. 103, 105 (1903); *accord*, Hebert v. Lake Charles Ice, Light & Waterworks Co., 111 La. 522, 35 So. 731 (1903); Whitworth v. South Arkansas Lumber Co., 121 La. 894, 46 So. 912 (1908); *cf.* LA. CIVIL CODE art. 667 (1870). For cases indicating similar high degrees of care in other areas, see Malone 96. See also *The Work of the Louisiana Supreme Court for the 1956-1957 Term — Torts*, 18 LA. L. REV. 63 (1957).

79. *The Work of the Louisiana Supreme Court for the 1947-1948 Term — Torts*, 9 LA. L. REV. 224, 226 (1949).

the bottling cases and dangerous substances cases), then there are more precautions which a defendant must take to prevent an accident. This in turn will generate more reasonable hypotheses to support an inference of defendant's negligence. If, on the other hand, there are fewer precautions that a defendant must take, then there are fewer hypotheses upon which to predicate an inference of defendant's negligence and the inference is less likely to be drawn from the mere existence of the accident. Illustrative of this, perhaps, is *Pilie v. National Food Stores.*[80] Plaintiff was shopping in a self-service store when several bottles of soft drinks fell from a display, the shattered glass lacerating plaintiff's foot. Plaintiff offered no affirmative evidence of defendant's negligence and there was no evidence that plaintiff was at fault. The Supreme Court refused application of res ipsa loquitur, reasoning that there was not sufficient basis in fact from which to infer that it was the negligence of the defendant rather than the negligence of independent parties that caused the bottles to fall. In coming to this conclusion the majority was evidently not satisfied that negligence of the defendant was the most plausible explanation of the accident.[81] The concurring opinion felt that the presence and activity of heavy road machinery outside the store could well have vibrated the bottles loose.[82] The dissents, however, were of the opinion that it was the duty of the proprietor to see that the patrons of his store will not be injured in using self-service racks installed primarily for the owner's economy and benefit.[83] While the majority's conclusion that any one of the several competing inferences could have reasonably been drawn appears sound, this does not dispose of the issue, unless, as the dissents pointed out, the proprietor is to be considered as not coming under a duty to protect his patrons from such a risk. Consequently, a preliminary inquiry into the duty of a proprietor

80. 245 La. 276, 158 So. 2d 162 (1963).

81. "[O]ur own jurisprudence is in accord with the view that each case must be decided on its own facts and circumstances, and that res ipsa loquitur will not be applied unless the facts and circumstances indicate that negligence of the defendant, rather than the negligence of others, is the most plausible explanation of the accident. Accordingly in answer to plaintiff's question of law, the facts and circumstances of this case do not permit the application of res ipsa loquitur because from them we cannot draw the inference that it was [defendant's] negligence, rather than the negligence of others, that causes the cartons to fall." *Id.* at 287, 158 So. 2d at 166.

82. *Id.* at 298, 158 So. 2d at 170.

83. *Id.* at 289, 158 So. 2d at 167 (Fournet, C.J.); *id.* at 291, 158 So. 2d at 167 (McCaleb, J.).

of business premises is required before a determination of whether a plausible inference may be drawn.

The business guest, or invitee as he is sometimes called, is entitled to assume that preparations have been made in the premises for his safety. The proprietor of the premises, however, is not an insurer of the invitee's safety, but owes only a duty of reasonable care such as the duty of reasonable periodic inspections,[84] and it is not negligence to leave bottled goods on open display[85] unless such a display creates an unsafe condition which a reasonable inspection would have disclosed.[86] Consequently, the mere fact that the plaintiff was injured by a falling bottle in *Pilie* does not raise any inference of negligence in itself. However, had plaintiff been able to show the additional factors that, for example, a considerable time had elapsed since the defendant made any inspection, or that the vibrations from the construction outside tended to create abnormal conditions that should place a proprietor on notice that goods might fall from shelves, then the fact of plaintiff's injury might have been sufficient to raise an inference of negligence to allow recovery, perhaps without any resort to res ipsa loquitur.[87]

III. CONCLUSION

The doctrine of res ipsa loquitur is basically an application of principles of circumstantial evidence. The traditional elements that must be shown by a plaintiff who seeks to invoke the doctrine are merely factors by which the defendant may be so closely connected with the fact of plaintiff's injury as to make the inference that his negligence caused the injury more plausible than any other.

To be able to conclude that a particular occurrence would not have happened in the absence of negligence presupposes a

84. See PROSSER, TORTS § 61, at 402 (3d ed. 1964); *accord*, Landry v. News-Star-World Pub. Corp., 46 So. 2d 140 (La. App. 2d Cir. 1950); Riche v. Thompson, 6 So. 2d 566 (La. App. 2d Cir. 1942); Bartell v. Serio, 180 So. 460 (La. App. Orl. Cir. 1938); Farrow v. John R. Thompson Co., 137 So. 604 (La. App. Orl. Cir. 1931); Theodore v. J. G. McCrory Co., 137 So. 352 (La. App. Orl. Cir. 1931).

85. See Ellington v. Walgreen Louisiana Co., 38 So. 2d 177 (La. App. 2d Cir. 1949).

86. See *ibid.*; *cf.* Joynes v. Valloft & Dreaux, Inc., 1 So. 2d 108 (La. App. Orl. Cir. 1941).

87. See Ellington v. Walgreen Louisiana Co., 38 So. 2d 177 (La. App. 2d Cir. 1949); see also *The Work of the Louisiana Supreme Court for the 1963-1964 Term — Torts*, 25 LA. L. REV. 334 (1965).

fund of common knowledge of the probable causes from which a basic inference of negligent causation may be drawn. As the activity becomes more specialized, the mere occurrence of an injury is no basis for any inference whatsoever, and, consequently, additional technical information concerning probable causes involved in such specialized activity must be brought before the court.

Once the initial inference of negligence is drawn, the finger of responsibility may be pointed towards the defendant by showing circumstances such as control by the defendant of the presumably most relevant factors at the time negligence probably occurred. The plaintiff should not be required to show that the defendant's negligence caused the injury beyond a reasonable doubt, comparable to the state's burden of proof in criminal cases. It is a question of probabilities, and the extent of defendant's duty will play an important role in reducing the inquiry of the court's to a single one: do the facts and circumstances of the accident suggest negligence of the defendant, rather than some other factors, as the most plausible explanation of the accident?

James S. Holliday, Jr.