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Milton F. Rosenthal

THE PROCEDURAL EFFECTS OF RES IPSA LOQUITUR IN NEW YORK

MILTON F. ROSENTHAL

Professor Wigmore has said:[1]

> "With the vast increase, in modern times, of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a specific mode, the question has come to be increasingly common whether the fact of the occurrence of an injury . . . is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. 'Res ipsa loquitur' is the phrase appealed to as symbolizing the argument for such a presumption."[2]

While refusing to prophecy the ultimate scope of the doctrine, Professor Wigmore submits that it should be limited by the following considerations:

> "(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) both inspection and user must have been at the time of the injury in the control of the party charged; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the presumption, regarded as

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[1] 5 WIGMORE, EVIDENCE (2d ed. 1923) §2509.

[2] It is not to be assumed that res ipsa loquitur is inapplicable to cases involving damage to property. Clarke v. Nassau Elec. R. Co., 9 App. Div. 51, 41 N. Y. Supp. 78 (2d Dept. 1896); Greco v. Bernheimer, 17 Misc. 592, 40 N. Y. Supp. 677 (Sup. Ct. App. Term 1896); Stallman v. N. Y. Steam Co., 17 App. Div. 397, 45 N. Y. Supp. 161 (1st Dept. 1897); Simon-Reigel Cigar Co. v. Gordon-Burham Battery Co., 20 Misc. 598, 46 N. Y. Supp. 416 (Sup. Ct. App. Term 1897); Smith v. Brooklyn Heights R. Co., 82 App. Div. 531, 81 N. Y. Supp. 838 (2d Dept. 1903). See note (1931) 4 So. CAL. L. REV. 400. It may be interesting in this connection to refer to the bailor-bailee presumption. When a bailor delivers property to a bailee and the property is either returned in a damaged condition or is not returned at all, in either case without explanation by the bailee, there arises a presumption of negligence. 5 WIGMORE, EVIDENCE (2d ed. 1923) §2508; *cf.* GEN. BUS. LAW, §95. Although this presumption has a basis similar to that of res ipsa loquitur, it is recognized as a separate doctrine. It is worthy of note that Professor Wigmore, in his discussion of res ipsa loquitur (*op. cit.*, §2509) says that "as against a common carrier, the presumption against a bailee has perhaps helped to confirm the rule where injury to goods or passengers is involved." Another interesting connection between the bailee presumption and res ipsa loquitur is to be found in Goldstein v. The Pullman Co., 220 N. Y. 549, 116 N. E. 376 (1917).

The use of the phrase res ipsa loquitur has not met with universal approbation. Plumb v. Richmond etc. R. Co., 233 N. Y. 285, 288, 135 N. E. 504 (1922); Galbraith v. Busch, 267 N. Y. 230, 238, 196 N. E. 36 (1935); Maslenka v. Brady, 188 App. Div. 661, 176 N. Y. Supp. 842 (2d Dept. 1919). See Bond, *The Use of the Phrase Res Ipsa Loquitor* (1908) 66 CENT. L. J. 386 for a discussion of the origin of the phrase.

a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."[3]

It is not the purpose of this paper to consider the numerous situations to which res ipsa loquitur has been held applicable, nor to determine when the doctrine ought properly be applied. Rather we are engaged in a study of the procedural consequences of the doctrine once it has been held that the case is a res ipsa case. For reasons of convenience, the study is confined to the New York decisions.

It may be said without fear of contradiction that a good deal of the confusion surrounding this subject is caused by the loose use of terms without adequate definition. Even the highest courts of the state are not free from this error. "Prima facie case", "inference of negligence", "presumption of negligence"—all are used indiscriminately to refer to the same or to different procedural effects, often in the same case.[4] A definition of terms is not only proper but necessary.

Our tort law is based upon the fundamental premise of no liability without fault. Negligence is one aspect of fault, and in every negligence case it is incumbent upon the plaintiff to plead and prove the negligence of the defendant. The necessary quantum of "proof" of the ultimate proposition ("the defendant was negligent") is generally said to be a preponderance of the evidence. This last phrase is intelligible only in terms of probabilities:[5]

[3]WIGMORE, *op. cit.* § 2509. *Cf.*: Duhme v. Hamburg-American Packet Co., 184 N. Y. 404, 77 N. E. 386 (1908); Griffin v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901). See HARPER, TORTS (1933) 183.

[4]*Cf.* Plumb v. Richmond etc. R. R. Co., 233 N. Y. 285, 135 N. E. 504 (1922) wherein the court uses the terms "inference of culpability", "prima facie case", and "presumption of negligence", all without distinction as to procedural effect.

[5]The statement in the text treats of negligence as an issue subject to discussion in terms of probabilities and is thus misleading without further explanation. "The existence of negligence depends upon broad considerations of general utility, of public policy as consisting of convenience of the community as a whole, upon what protection can be given to the person and property of one citizen without unduly hampering the liberty of the others. So no act is wrongful as being negligent unless it threaten a probable injury to some person or class of persons, an injury to a right sufficiently important to be worth preserving even at the cost of the restricted freedom of the wrongdoer, an injury grave enough to warrant the imposition of precautions to prevent it." BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 259. Therefore, before one can brand the conduct of another negligent, two questions must be posited. First, is the interest invaded by the act of the defendant one which the law protects? It is apparent that this presents a problem of policy, of law making. Second, if the first question be answered affirmatively, would "the average man in the defendant's position and knowing what he knew or should have known, . . . have regarded injury to the plaintiff as likely to result if care were not taken?" BOHLEN, *op. cit.*, 260. Here "the probability of injury raises the duty of care". The discussion in the text of the issue of negligence in terms of probabilities is directed to the second phase of the problem.

the plaintiff has the burden of persuading the tribunal that it is more probable that the defendant was negligent than that he was not negligent. According to traditional analysis, the plaintiff has the "burden of persuasion" as to the defendant's negligence. The party having the burden of persuasion (or the "risk of non-persuasion", as Professor Wigmore terms it) must initiate the process of proof, i.e., he bears what is called the burden of going forward with the evidence. If the plaintiff would render himself immune from a nonsuit, he must proceed with the evidence to the extent that, when he rests, the jury may reasonably find that the defendant was negligent. If he has done this, defendant's motion for a dismissal of the complaint will be denied. At this point the plaintiff has sustained his burden of going forward with the evidence. This does not mean he is entitled to a directed verdict or that the burden has shifted to the defendant. The defendant need not put in any evidence, but the plaintiff may go to the jury; a verdict for either plaintiff or defendant will not be disturbed on appeal. This is the proper meaning of "prima facie case".

The plaintiff may, however, prove the defendant's negligence to be so probable that unless the defendant puts in evidence in opposition the plaintiff will be entitled to a directed verdict.[6] At this point only has the burden of going forward with the evidence shifted to the defendant, and he must discharge this burden if he would avoid a directed verdict for the plaintiff.

It is apparent that the ultimate proposition of negligence or no negligence does not express, when it is asserted by the court, the tribunal's direct sensory knowledge, but is arrived at by a process of inference. Indeed, what is traditionally known as circumstantial proof is merely the passing by inference from what we do know to that which we did not know. Thus the proposition that the defendant was negligent is the conclusion of a step of circumstantial proof, and what is described as an inference of negligence takes place whenever the verdict of the jury is for the plaintiff, or whenever the court, as a matter of law, directs a verdict for the plaintiff. When a plaintiff has proved the defendant's negligence to be so probable that he has made out a prima facie case, he is entitled to a *permissible* inference of negligence; when he has proved this proposition to possess such a probability that, if the defendant fails to put in any evidence, the plaintiff will receive a directed verdict, he is at that point entitled to a *necessary* inference of negligence.[7]

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[6]It should be noted that the credibility of a party's witnesses enters into the probability value to be assigned to the propositions sought to be proved by their testimony. The statement in the text concedes that a verdict will be directed for the proponent only when there is uncontradicted testimony clearly establishing proponent's case, but even though the credibility of witnesses is attacked on cross-examination, this does not avoid the power of the court to keep the jury within the bounds of reasonableness by the use of the directed verdict. For a thorough analysis of the problem, see Smith, *The Power of the Judge to Direct a Verdict* (1924) 24 COL. L. REV. 111.

[7]Anyone who makes a study of the res ipsa loquitur cases will find the courts con-

The remaining term awaiting definition is "presumption". It has been pointed out that circumstantial evidence is the basis of passing by inference from what we know to what we did not know. The vehicle by which the inference is accomplished is a proposition which represents an empirical generalization. Thus plaintiff seeks to prove proposition P (the defendant was negligent); by proof he establishes propositions A, B, and C (the injury was caused by the operation of an appliance or instrumentality in the exclusive possession and control of the defendant; the appliance was such as ordinarily would not produce injury unless carelessly constructed, inspected or used; the injury occurred without voluntary action of the plaintiff); the empirical generalization is, *if* A, B, and C, *then* P. It is clear then that the procedural effect to be given to the plaintiff's case depends on the probability value to be assigned to this proposition. Should this proposition be deemed so highly probable that if the defendant fails to put in any evidence the plaintiff will be entitled to a directed verdict, then to describe the inference of negligence as a presumption is to obscure realities and create confusion. That is to say, if a presumption makes no addition to the actual probability of this empirical generalization, it accomplishes naught to talk about presumptions; presumptions are important only when they assign an additional increment of probability to the ordinary probative force of evidence. The term will here be used as descriptive of its ordinary effect in the law of evidence, i.e., entitling the proponent to a directed verdict in the absence of a rebuttal of the presumption.[8]

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stantly employing the phrase "inference of negligence". Whether the particular judge is using the term in the sense of a permissible or necessary inference is often difficult, if not impossible, to ascertain. Nor is it to be assumed that when "permissible inference of negligence" appears in a decision the procedural effect to be ascribed to it is as set forth in the text.

[8]Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1920) 68 U. OF PA. L. REV. 307, 310 says:

> "The term presumption is used by both text writers and judges in a variety of senses, among others the following:
>
> (1) As a synonym for inference.
>
> (2) As laying down a rule for requiring the assumption, the taking for granted, of certain facts upon data whose probative force falls short of that strength usually required to justify or require such fact to be inferred.
>
> (3) As stating a change in the substantive law while apparently exercising the court's long admitted power to supervise the jury's exercise of its function of judging the effect of evidence produced before it."

And, at p. 313, the same writer says:

> "The legal force of a presumption is then the additional weight given by it to data not in itself of sufficient probative force to permit or require the jury to find the existence of the fact presumed. All such presumptions are, therefore, created by some policy of law which requires this abnormal weight to be given to meet some judicially felt need or to accomplish some purpose judicially recognized as desirable."

It is not forgotten here that "where a presumption is involved . . . the authorities

We may now sketch the *possible* procedural effects of a res ipsa loquitur case, once it is agreed that such a case has been established. These effects are four in number.

1. The doctrine merely enables the plaintiff to make out a prima facie case.[9]
2. The doctrine creates a true rebuttable presumption of law, shifting the burden of going forward with evidence.[10]
3. The doctrine has the effect of shifting the burden of persuasion as to the issue of the defendant's negligence.
4. The doctrine has no uniform procedural effect in all the cases in which it is applied.[11]

What is the effect given to a res ipsa case in New York? At the outset, it may be stated with assurance that except for a few early instances in which the courts were not aware of the implications which might be drawn from their language, the New York courts have definitely rejected the view that the doctrine shifts the burden of persuasion.[12] Furthermore, the cases

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exhibit a wide variety of views with reference to its effect." Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59, 60. The different effects which Prof. Morgan describes, however, are operative in the *rebuttal* of the presumption. See *infra* note 10.

[9]This phrase is used with the meaning developed above in the text, not as shifting the burden of going forward with evidence, but merely enabling plaintiff to avoid a nonsuit or a directed verdict for the defendant. There apparently is a good deal of confusion as to the distinction between these terms, not only in the cases (*supra* note 3) but in the writings on the subject as well. *Cf.* (1927) 25 MICH. L. REV. 470; (1929) 7 TEX. L. REV. 485.

[10]This procedural effect may be called into play at two different periods of the trial: (1) at the close of the plaintiff's case and (2) at the close of the whole case. As to the former, the effect is clear, namely, the plaintiff has sustained his burden of going forward with the evidence and has indeed shifted that burden to the defendant, who must proceed with his defense to avoid a directed verdict for plaintiff; as to the latter, the problem (assuming no rebuttal of the plaintiff's case as a matter of law) is how the court shall charge as to the amount of evidence which the defendant must have presented so that the jury may find that he has sustained his burden of going forward with the evidence. In other words, this is the question of what quantum of proof is necessary to rebut a res ipsa case to which the jurisdiction accords the effect of a true presumption; this problem will be considered in the text.

[11]See, generally, Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724; Carpenter, *The Doctrine of Res Ipsa Loquitur* (1934) 1 U. OF CHI. L. REV. 519; Prosser, *The Procedural Effect of Res Ipsa Loquitur* (1936) 20 MINN. L. REV. 241. See Michael and Adler, *The Trial of An Issue of Fact* (1934) 34 COL. L. REV. 1224, 1462, for a discussion of the proper meanings of the terms here used.

No special category is made for the inference of negligence view, because, as stated in the text, describing the situation as an inference of negligence is merely saying that the tribunal is confronted with a step of circumstantial proof tending to establish that the defendant was negligent.

[12]Jones v. Union Ry. Co., 18 App. Div. 267, 46 N. Y. Supp. 321 (2d Dept. 1897);

are legion in which it is held that when the plaintiff proves facts sufficient to warrant the application of the doctrine, he is at least entitled, in the absence of a conclusive explanation by the defendant, to go to the jury.[13] The

Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988 (1900); Kay v. Metropolitan St. Ry. Co., 163 N. Y. 447, 57 N. E. 751 (1900); Hollahan v. Metropolitan St. Ry. Co., 73 App. Div. 164, 76 N. Y. Supp. 751 (1st Dept. 1902); Adams v. Union Ry. Co., 80 App. Div. 136, 80 N. Y. Supp. 264 (1st Dept. 1903); Lynch v. Metropolitan St. Ry. Co., 90 N. Y. Supp. 378 (App. Term 1st Dept. 1904); Munzer v. Interurban St. Ry. Co., 45 Misc. 568, 91 N. Y. Supp. 21 (App. Term 1st Dept. 1904); Maher v. Metropolitan St. Ry. Co., 102 App. Div. 517, 92 N. Y. Supp. 825 (1st Dept. 1905); Greer v. Union Ry. Co., 50 Misc. 560, 99 N. Y. Supp. 428 (App. Term 1st Dept. 1906); Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689 (1908); Spinneweber v. Every, 189 App. Div. 35, 177 N. Y. Supp. 801 (3d Dept. 1919). *See* Plumb v. Richmond, etc. R. Co., 233 N. Y. 285, 288, 135 N. E. 504 (1922); Galbraith v. Busch, 267 N. Y. 230, 239, 196 N. E. 36 (1935). In Dean v. Tarrytown etc. Ry. Co., 113 App. Div. 437, 439, 99 N. Y. Supp. 250 (2d Dept. 1906), the Court said:

> "I can understand that the court had in mind the principle that often in view of the character of an accident the defendant is put to an explanation of it, but in attempting to express this rule the courts sometimes fall into the general expression that the burden of proof is on the defendant. . . . The fact that the very nature of the accident may call upon him who is charged with negligence therefor to explain the occurrence, does not lift the burden upon the issue of negligence from him who asserts it, and put it upon him who is charged therewith."

[13]In the following cases, appellate tribunals, deciding that res ipsa loquitur was applicable, ruled that the dismissal of the complaint by the trial court was error. Hill v. Ninth Ave. R. Co., 108 N. Y. 239, 16 N. E. 61 (1888); Volkmar v. Manhattan Ry. Co., 134 N. Y. 418, 31 N. E. 870 (1892); Dohn v. Dawson, 84 Hun. 110 (1st Dept. 1895); Dumes v. Sizer, 3 App. Div. 11, 37 N. Y. Supp 929 (4th Dept. 1896); Gilmore v. Brooklyn Heights Ry., 6 App. Div. 117, 39 N. Y. Supp. 417 (2d Dept. 1896); Clarke v. Nassau Elec. R. Co., 9 App. Div. 51, 41 N. Y. Supp. 78 (2d Dept. 1896); Poulson v. Nassau Elec. R. Co., 18 App. Div. 221, 45 N. Y. Supp. 941 (2d Dept. 1897); Guldseth v. Carlin, 19 App. Div. 588, 46 N. Y. Supp. 357 (2d Dept. 1897); Kennedy v. McAllaster, 31 App. Div. 453, 52 N. Y. Supp. 714 (4th Dept. 1898); Kaiser v. Washburn, 55 App. Div. 159, 66 N. Y. Supp. 764 (3d Dept. 1900); Peck v. N. Y. C. & H. R. Co., 165 N. Y. 347, 59 N. E. 206 (1901); Allen v. United Traction Co., 67 App. Div. 363, 73 N. Y. Supp. 737 (3d Dept. 1901); D'Arcy v. Westchester Elec. R. Co., 82 App. Div. 263, 81 N. Y. Supp. 952 (1st Dept. 1903); Smith v. Brooklyn Heights R. Co., 82 App. Div. 531, 81 N. Y. Supp. 838 (2d Dept. 1903); Dorff v. Brooklyn Heights R. Co., 95 App. Div. 82, 88 N. Y. Supp. 463 (2d Dept. 1904); Cummings v. Kenny, 97 App. Div. 114, 89 N. Y. Supp. 579 (2d Dept. 1904); Williams v. N. Y. and Q. C. R. Co., 97 App. Div. 133, 89 N. Y. Supp. 669 (2d Dept. 1904); Samuels v. McKesson, 113 App. Div. 497, 99 N. Y. Supp. 294 (2d Dept. 1906); Haggblad v. Brooklyn Heights R. R. Co., 117 App. Div. 838, 102 N. Y. Supp. 1039 (2d Dept. 1907); Glassman v. Surpless, 53 Misc. 586, 103 N. Y. Supp. 789 (Sup. Ct. App. Term 1907); Higgins v. Ruppert, 124 App. Div. 530, 108 N. Y. Supp. 919 (2d Dept. 1908); Konigsberg v. Davis, 57 Misc. 630, 108 N. Y. Supp. 595 (Sup. Ct. App. Term 1908); Morris v. Zimmerman, 138 App. Div. 114, 122 N. Y. Supp. 900 (1st Dept. 1910); Huston v. Dobson, 138 App. Div. 810, 123 N. Y. Supp. 892 (1st Dept. 1910); Pearson v. Ehrich, 148 App. Div. 680, 133 N. Y. Supp. 273 (1st Dept. 1912); Furlong v. Winne and McKain Co., 166 App. Div.

real question is whether New York adheres to the prima-facie-case, the rebuttable-presumption, or the no-uniform-procedural-effect view. Most of

882, 152 N. Y. Supp. 245 (3d Dept. 1915); Fisher v. City of N. Y., 93 Misc. 481, 157 N. Y. Supp. 287 (App. Term 1st Dept. 1916); Gallagher v. Halpern, 95 Misc. 185, 159 N. Y. Supp. 160 (App. Term 1st Dept. 1916); Hackett v. Lenox Sand and Gravel Co., 187 App. Div. 211, 175 N. Y. Supp. 361 (1st Dept. 1919); Rice v. Von Der Lieth, 111 Misc. 418, 181 N. Y. Supp. 767 (App. Term 1st Dept. 1920); Storms v. Lane, 223 App. Div. 79, 227 N. Y. Supp. 482 (4th Dept. 1928); Bennett v. Edward, 239 App. Div. 157, 267 N. Y. Supp. 417 (1st Dept. 1933); Sasso et al. v. Randforce Amusement Corp., 243 App. Div. 552, 275 N. Y. Supp. 891 (2d Dept. 1934).

In the following cases, appellate tribunals, deciding that res ipsa loquitur was applicable, ruled that the verdict of the jury in plaintiff's favor could not be disturbed. Holbrook v. The Utica etc. Ry. Co., 12 N. Y. 263 (1855); Field v. N. Y. Cent. R. Co., 32 N. Y. 339 (1865); Case v. N. C. Ry. Co., 59 Barb. 644 (4th Dept. 1871); Vincett v. Cook, 4 Hun. 318 (Sup. Ct. 1875); Cole v. N. Y. Bottling Co., 23 App. Div. 177, 48 N. Y. Supp. 893 (2d Dept. 1877); Murphy v. Coney Island etc. Ry., 36 Hun. 199 (2d Dept. 1885); Goll v. Manhattan Ry. Co., 24 N. Y. St. Rep. 24, 5 N. Y. Supp. 185 (Super. Ct. N. Y. C. 1889), *aff'd without opinion,* 125 N. Y. 714, 26 N. E. 756 (1889); Miller v. S. S. Co., 118 N. Y. 199, 23 N. E. 462 (1890); Brooks v. Kings' C. El. Ry., 4 Misc. 288, 23 N. Y. Supp. 1031 (City Ct. B'klyn 1893), *aff'd without opinion,* 144 N. Y. 647, 39 N. E. 493 (1895); Morris v. Strobel, & Wilken Co., 81 Hun. 1, 30 N. Y. Supp. 571 (1st Dept. 1894); Solarz v. Ry., 8 Misc. 656, 29 N. Y. Supp. 1123 (Super. Ct. N. Y. C. 1894), *aff'd without opinion,* 155 N. Y. 645, 49 N. E. 1104 (1894); Wittenberg v. Leitz, 8 App. Div. 439, 40 N. Y. Supp. 899 (4th Dept. 1896); Horn v. N. J. Steamboat Co., 23 App. Div. 302, 48 N. Y. Supp. 348 (1st Dept. 1897); O'Flaherty v. Nassau Elec. Ry. Co., 34 App. Div. 74, 54 N. Y. Supp. 96 (2d Dept. 1898), *aff'd without opinion,* 165 N. Y. 624, 59 N. E. 1128 (1900); Wiley v. Bondy, 23 Misc. 658, 52 N. Y. Supp. 68 (Sup. Ct. App. Term 1898); Bartnik v. Erie R. Co., 36 App. Div. 246, 55 N. Y. Supp. 266 (2d Dept. 1899); Bishof v. Leahy, 54 App. Div. 619, 66 N. Y. Supp. 342 (2d Dept. 1900); Mentz v. Schieren, 36 Misc. 813, 74 N. Y. Supp. 889 (Sup. Ct. App. Term 1902); Braham v. Nassau Elec. Ry. Co., 72 App. Div. 456, 76 N. Y. Supp. 578 (2d Dept. 1902); Scheider v. Amer. Bridge Co., 78 App. Div. 163, 79 N. Y. Supp. 634 (1st Dept. 1903); Travers v. Murray, 87 App. Div. 552, 84 N. Y. Supp. 558 (2d Dept. 1903); Connor v. Koch, 89 App. Div. 33, 85 N. Y. Supp. 93 (1st Dept. 1903); Klinger v. United Traction Co., 92 App. Div. 100, 87 N. Y. Supp. 864 (3d Dept. 1904), *modified,* 181 N. Y. 521, 73 N. E. 1125 (1905); Lubelsky v. Silverman, 49 Misc. 133, 96 N. Y. Supp. 1056 (Sup. Ct. App. Term 1905); Van Inwegen v. Erie R. Co., 126 App. Div. 297, 110 N. Y. Supp. 959 (2d Dept. 1908); Zettel v. Taylor, 128 App. Div. 251, 112 N. Y. Supp. 639 (2d Dept. 1908); Sturza v. I. R. T. Co., 113 N. Y. Supp. 974 (Sup. Ct. App. Term 1909); Goldstein v. Levy, 74 Misc. 463, 132 N. Y. Supp. 373 (Sup. Ct. App. Term 1911); Marceau v. Rutland R. Co., 211 N. Y. 203, 105 N. E. 206 (1914); Larkin v. Reid Ice Cream Co., 161 App. Div. 77, 146 N. Y. Supp. 230 (2d Dept. 1914); Duncan v. Internat. Comm., Y. M. C. A. Ass'ns, 176 App. Div. 672, 163 N. Y. Supp. 945 (1st Dept. 1917); Plumb v. Richmond, etc. Ry., 233 N. Y. 285, 135 N. E. 504 (1922); Schmidt v. Stern et al., 119 Misc. 529, 196 N. Y. Supp. 727 (App. Term 1st Dept. 1922); Reinze v. Tilyou, 252 N. Y. 97, 169 N. E. 101 (1929); Losee v. Paramount Hotel Corp., 137 Misc. 530, 242 N. Y. Supp. 608 (Sup. Ct. 1930).

the New York cases involve the question whether the court below correctly dismissed the complaint, or whether the verdict in plaintiff's favor is against the weight of evidence. The cases arising on the trial court's charge to the jury are largely unsatisfactory from our point of view because of the failure of the courts to adhere to any well-defined meanings of terms. It is obvious, then, that one of the best indications of the position that this jurisdiction takes is to be found in the action of the courts in those cases where the plaintiff has made out an admittedly res ipsa loquitur case and the defendant has failed to introduce any evidence.

A clear holding in point is *Hogan v. Railway Company.*[14] Here the plaintiff was driving under the defendant's elevated railway when an iron bar fell upon him from the tracks. The plaintiff put in his case, and upon the failure of the defendant to introduce any evidence, the plaintiff moved for a directed verdict. This motion was granted, the court leaving to the jury only the question of damages. On appeal, the judgment for the plaintiff was affirmed. The Court of Appeals felt that "the case was properly disposed of at the trial for the reason that the undisputed evidence raised a presumption of negligence against the defendant". The Court posited the rule that "if anything falls from them [buildings, bridges or other structures] upon a person lawfully passing along the street or highway the accident is *prima facie* evidence of negligence, or, in other words, the presumption of negligence arises."[15]

A second holding on the same question is found in *Moglia v. Nassau Elec. Co.,*[16] a determination of the Appellate Division, Second Department. The plaintiff, a pedestrian, received an electric shock while brushing past a pole maintained by the defendant. The trial court charged that a presumption of negligence arose from the circumstances of the accident which called upon the defendant for an explanation, and that, the defendant having offered no explanation, the only question for the consideration of the jury was the amount of plaintiff's damages. The defendant on appeal contended that the jury was not bound to believe the plaintiff, and that it was a question for the jury whether plaintiff had received his injuries in the manner described. The Court disposed of this, however, by the observation that it was assumed at the trial by both sides that the accident happened in the manner testified to by the plaintiff.[17] Defendant's second contention was that even though res ipsa loquitur applied, it was still for the jury to draw the in-

[14]149 N. Y. 23, 43 N. E. 403 (1896).

[15]*Id.* at 25.

[16]127 App. Div. 243, 111 N. Y. Supp. 70 (2d Dept. 1908).

[17]It should be noted that in the infrequent case where the defendant refuses to introduce any evidence, the case may well be for the jury because the credibility of the plaintiff's witnesses has been attacked on cross-examination and suspicious circumstances disclosed. *Supra* note 6.

ference of negligence, even in the absence of any explanation by the defendant. The Court rejected this argument with the statement that "it was incumbent upon the defendant either to dispute the facts from which the legal presumption arose or to offer some evidence tending to rebut such presumption. A prima facie case must prevail unless there is some evidence to rebut it."[18]

A third decision in favor of the presumption theory is *Levine v. Brooklyn etc. R. Co.*,[19] also a decision by the Appellate Division, Second Department. There the plaintiff was a passenger on one of defendant's street cars which collided with the car of another company. The defendant introduced no testimony and the trial court, apparently sitting without a jury, gave judgment for the defendant. On appeal the Appellate Division reversed and remanded, holding res ipsa loquitur applicable. The Court said:

> "When the front of a car operated by the company upon which plaintiff was a passenger ran into a car owned and operated by another company, a presumption of negligence on the part of the carrying company arises which calls upon it for an explanation . . . While the burden of proof always remains upon the plaintiff to establish negligence, if there is no evidence to rebut the presumption which has arisen, the plaintiff has successfully borne his burden, and if there is proof of freedom from contributory negligence he is entitled to recover.... There was no suggestion of contributory negligence on the part of the plaintiff in this action, *and, therefore, he was entitled to judgment at least for nominal damages.*"[20] (Italics added.)

From these three decisions, the only direct holdings on the question, it might well be concluded that New York adheres to the presumption view. Certain further material, however, must first be examined.

In the next set of cases which engages our attention, the defendant failed to introduce any evidence but the case went to the jury on the issue of the defendant's negligence. In *Breen v. N.Y. etc. R. Co.*,[21] the plaintiff, passenger in defendant's train, was resting his arm on the window sill when his arm was struck by a swinging door on a passing freight train. The Court says that no explanation of the accident was given by the defendant. It is of course problemmatical whether this was the view taken of the case by the trial court, but assuming that it was, the question presents itself whether the trial court did not in effect rule that the prima facie case view was applicable to the situation. It is clear that the Court of Appeals believed that res ipsa loquitur was properly applicable to the case. *Maher v. Manhattan Ry. Co.*[22] and *Stallman v. New York Steam Co.*[23] are both cases in

[18]127 App. Div. 243, 245, 111 N. Y. Supp. 70 (2d Dept. 1908).
[19]134 App. Div. 606, 119 N. Y. Supp. 315 (2d Dept. 1909).
[20]*Id.* at 607.
[21]109 N. Y. 297, 16 N. E. 60 (1888).
[22]53 Hun. 506 (1st Dept. 1889).
[23]17 App. Div. 397, 45 N. Y. Supp. 161 (1st Dept. 1897).

which the defendant introduced no evidence whatever. The former was an action by a pedestrian against defendant railway for injuries sustained when an iron bar fell upon plaintiff from defendant's "L". The trial court submitted the case to the jury even though the defendant put in no evidence. The latter was an action to recover for damages to the plaintiff's goods caused by water flowing from a break in the pipes, allegedly caused by defendant's negligence during an excavation; again the defendant offered no evidence and the trial court submitted the case to the jury, with the result once more of a verdict for the plaintiff. It may well be contended that the trial courts, at least in the last two cases, believed that the sole procedural effect of a res ipsa case is to make out a prima facie case entitling the plaintiff to go to the jury. It may also be noted that the appellate courts, in sustaining the verdicts and judgments thereon, used language appropriate to that view. Thus the Supreme Court in the *Maher* case said:

> "Here it must not be forgotten that an accident, which if not in its nature negligence *per se,* is at least one which may be declared evidence of negligence by the jury, is not explained, and no effort is made to excuse it in any form."[24]

The Appellate Division in the *Stallman* case remarked:

> ". . . we think that the proof of the happening of the accident, under such circumstances and conditions, was of such legal value as to afford presumptive evidence of negligence and cast upon the defendant the burden of explanation. Having offered no explanation, the question was properly submitted to the jury, and their verdict should not be disturbed."[25]

There are several possibilities, however, to account for the actions of the trial courts. The most obvious is that the plaintiffs may not have moved for directed verdicts. In such case, there would be no obligation on the part of the trial court to direct a verdict, though he could upon motion to that effect set aside a verdict for the defendant as against the weight of the evidence. And secondly, even if the plaintiff moved for a directed verdict, it could be denied consistently with the presumption view. It is necessary, in order to invoke the doctrine, for the plaintiff to establish by proof the circumstances surrounding the accident with a view towards showing that the injury to the plaintiff was caused, without voluntary action of the plaintiff, by an appliance or instrumentality in defendant's exclusive possession and control at the time of the injury, which was of such a nature that ordinarily it would not have caused the injury had there not been some negligence in its construc-

[24]53 Hun. 506, 510 (1st Dept. 1889).

[25]17 App. Div. 397, 401, 45 N. Y. Supp. 161 (1st Dept. 1897). However, as will be noted at a later point, "casting the burden of explanation on the defendant" is consistent only with the presumption view. It is therefore unwise to place this case in either category.

tion, maintenance or operation. Briefly stated, the plaintiff must establish the "foundation" of the presumption. The elements of the "foundation" may be proved to possess varying degrees of probability. It follows that the plaintiff may not establish each one to the extent that if the whole case depended on the proof of that proposition, the plaintiff would be entitled to a directed verdict. Thus it may well be a jury question whether the plaintiff has proved the elements of the foundation by the required quantum of proof; clearly in this situation the plaintiff is not entitled to a directed verdict when he rests his case. Corollary to this possibility is the element of the credibility of the plaintiff's witnesses. The credibility of the witnesses testifying to the foundation of the presumption is an important element governing the probability of the propositions to which they testify and we have seen that it is on the basis of probabilities that the court determines whether it should grant or deny a motion for a directed verdict. Thus, even though the defendant introduces no evidence for purposes of impeachment, sufficient suspicious circumstances may be brought out on cross-examination to warrant the denial of a motion by the plaintiff to take the case from the jury.[26] Also allied with the problem of establishing the foundation of the presumption, and perhaps accounting for the actions of trial courts in submitting the case to the jury even though the defendant introduces no evidence, is the fact that the plaintiff must, in a negligence action in New York, prove his freedom from contributory negligence. The application of res ipsa loquitur works no exception to this rule.[27] It follows that it may well be a jury question whether plaintiff was contributorily negligent, and thus a directed verdict in plaintiff's favor may be denied even though the defendant introduces no evidence.

Another reflection of the attitude of trial courts in reference to the procedural effect of res ipsa loquitur is found in the decisions of the lower courts in non-jury cases. In *Freeman v. Schultz Bread Co.*[28], the plaintiff, while eating a slice of bread cut from a whole loaf, bit into a nail in the bread. The loaf was made by the defendant and sold to a grocer from whom

[26]*Supra* notes 6 and 17. Some courts have adopted the view that under no circumstances may a verdict be directed for the proponent. See Smith, *The Power of the Judge to Direct a Verdict* (1924) 24 COL. L. R. REV. 111, 121. Dean Smith points out that New York has not taken this extreme view, and a verdict may be directed even though the problem of credibility is involved. Thus in Hull v. Littauer, 162 N. Y. 567, 572, 57 N. E. 102 (1900), the Court of Appeals declared:

> "Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness."

[27]Sinay v. Chesebro-Whitman Co., 140 N. Y. Supp. 1074 (App. Term 1st Dept. 1914); German v. Brooklyn Heights R. R. Co., 107 App. Div. 354, 95 N. Y. Supp. 112 (2d Dept. 1905).

[28]100 Misc. 528, 163 N. Y. Supp. 396 (Mun. Ct. 1917).

the plaintiff purchased it. Apparently the plaintiff also introduced testimony to show that no nails were kept lying about either in his house or at the grocery, the defendant offered no evidence, and the Court felt impelled to give judgment for the plaintiff because of defendant's failure to meet the plaintiff's case. The plaintiffs in *Loesberg v. Fraad*[29] were dentists. Sand accumulated in their offices, allegedly because of defendant's sandblasting operations in the vicinity. The Court, summing up the evidence, held that res ipsa loquitur was applicable and rendered judgment for the plaintiff because of defendant's failure to give a satisfactory explanation of how the sand got into the plaintiff's premises. In *Ritchie v. Sheffields Farms*[30], the plaintiff sued for damages suffered when she took into her mouth a mouse which was in a bottle of milk delivered to the plaintiff by defendant. Testimony was given that the bottle had not been tampered with and the Court held for the plaintiff, believing that if it assumed that the mouse was in the bottle and the bottle had not been tampered with (as it did assume), then it was compelled as a matter of fact to find that there was negligence in the preparation of this milk. "That which is inferable must be inferred by the court."[31] Another instance of a foreign substance in food is *Cohen v. Dugan Bros. et al.*[32] The plaintiff bought a loaf of Dugan's bread in a grocery store in its original wrapper and bit into a nail in the bread. The Court said:

> "The plaintiff, by showing the purchase of the defendant's bread and the presence of the nail therein and the resulting injury has made out a *prima facie* cause of action in negligence. . . The presence of the nail in the bread bearing the name of Dugan's 100 per cent wheat bread in a sealed waxed wrapper, and particularly when the bread delivered to the plaintiff was in the same condition as when it left the possession of the manufacturers is an evidential fact from which negligence can be inferred. The defendant by its proof attempted to overcome the inference raised by the plaintiff's proof. This only raised a question of fact and I find that the precautions taken by the defendant did not rebut the proof that negligence of the defendant caused the presence of the nail in the loaf of bread."[33]

It is submitted that these non-jury cases show that the trial judges inclined towards the presumption view; that after the plaintiff introduced a typical res ipsa case the courts looked to the explanation of the defendant as the key to their judgments, assuming that the verdict must be in the plaintiff's

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[29]119 Misc. 447, 197 N. Y. Supp. 229 (Mun. Ct. 1922).

[30]129 Misc. 765, 222 N. Y. Supp. 724 (Mun. Ct. 1927).

[31]It should be noted that the Court did not mention res ipsa loquitur, but the opinion sufficiently indicates that the Court was talking in terms of that doctrine.

[32]132 Misc. 896, 230 N. Y. Supp. 743 (Sup. Ct. 1928), *amount of judgment reduced*, 227 App. Div. 714, 236 N. Y. Supp. 769 (1st Dept. 1929).

[33]*Id.* at 898.

favor in the absence of a satisfactory explanation. Of course, these cases may be summarily dismissed by some with the observation that the court, sitting without a jury, is merely giving expression to the reasoning by which it weighs the evidence, in the nature of a special verdict. It may also be conceded that these cases are of little value as precedents, for on appeal the problem would be whether the "verdict" of the tribunal below was supported by the evidence.[34] Yet the writer cannot help but feel that they furnish a valuable index to the attitude of trial courts with regard to the procedural consequences of a res ipsa loquitur case.

It has already been pointed out that cases arising on the charge to the jury are largely inconclusive because of the constant use by the courts of such expressions as "prima facie evidence of negligence", "inference of negligence", and "presumption of negligence", all without adequate definition.[35] But they may be examined for what they are worth. In *Edgerton v. N.Y. & H.R. Co.*,[36] the plaintiff, while riding in defendant's train, was injured in a derailment. The Court upheld a judgment for the plaintiff, interpreting the charge that "the defendant must by proof answer and rebut this *prima facie* case against it, and show itself free from the negligence to be presumed from the facts proved by the plaintiff, *or it was liable.*"[37] The plaintiff in *Caldwell v. N.J. Steamboat Co.*[38] was a passenger on defendant's steamboat and was injured by escaping steam due to the explosion of the boiler. In affirming a judgment for the plaintiff, the case arising on the charge to the jury, the Court said:

> "The burden of maintaining the affirmative of the issue, and, properly speaking, the burden of proof, remained upon the plaintiff throughout the trial; but the burden or necessity was cast upon the defendant to relieve itself from the presumption of negligence raised by the plaintiff's evidence. . . . This conveyed to the jury *the correct rule, that the presumption arising from the plaintiff's proof, unless overthrown by the evidence produced by the defendant, must prevail.*"[39] (Italics added.)

These cases point to the presumption view.

On the other hand, there are cases arising on the charge to the jury which are consistent only with the prima facie case view. *Schacter v. Interborough Rapid Transit Co.*[40] presents a clear statement adopting the prima facie case view, albeit by way of dictum. The Court, after reversing on other grounds and expressing its doubt as to the applicability of the doctrine of res ipsa loquitur to the facts of the case, went on to say:

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[34]See in this regard Greco v. Bernheimer, 17 Misc. 592, 40 N. Y. Supp. 677 (App. Term 1st Dept. 1896); Simon-Reigel Cigar Co. v. Battery Co., 20 Misc. 598, 46 N. Y. Supp. 416 (Sup. Ct. App. Term 1897).

[35]*Supra* note 4.

[36]39 N. Y. 227 (1868).

[37]*Id.* at 230. Italics added.

[38]47 N. Y. 282 (1872).

[39]*Id.* at 290.

[40]146 App. Div. 139, 130 N. Y. Supp. 549 (1st Dept. 1911).

"Moreover, the court in these instructions overstated the rule, and in effect charged the jury that the facts stated in the request gave rise to a presumption of negligence on the part of the defendant as matter of law; whereas, even if the rule of *res ipsa loquitur* were applicable, a presumption of negligence as matter of law does not arise, but the facts with respect to the happening of the accident are sufficient to present a *prima facie* case, upon which the jury *may*, if no evidence be offered on the part of the defendant, infer negligence."[41] (Italics by the Court.)

Baum v. N. Y. & Q. C. R. Co.[42] is also in point here. The plaintiff, a passenger in defendant's street car, was injured by the flying up of a trap door in the floor of the car. The Appellate Division sustained a judgment in plaintiff's favor by a questionable interpretation of the charge of the trial court concerning the incidence of the burden of proof as to the defendant's negligence. The Court further said:

"The maxim that the thing speaks for itself applies, *i. e.*, the flying up of the door raised a presumption that there was something wrong

[41] *Id.* at 142. An interesting case in this connection is Wetsell v. Reilly, 159 App. Div. 688, 145 N. Y. Supp. 167 (2d Dept. 1913). This was a suit brought under the wrongful death statute; the defendant contractor had a shanty in which he kept his tools; an employee lit a fire in the stove, left the shanty, and a short while after there was an explosion which resulted in the death of plaintiff's intestate, who was walking on the street. The trial resulted in a verdict for the plaintiff, in reversing which for error in the charge, the appellate court had this to say:

" . . . it [the jury] could well believe that the court had told it that as matter of law the plaintiff had made out a *prima facie* case of the defendant's negligence, and that inquiry was confined to the question whether the defendants had explained the accident, and if not the verdict must go against them. And if it did so believe the defendants were in a far worse plight before the jury than if the court had told it that, although the burden of proof as to negligence was upon the plaintiff and could not shift, yet the explosion and its attending circumstances were of such a character in themselves as might justify an inference of negligence, and that if the jury drew such inference the jury should inquire whether the defendants had gone forward with proof which exonerated them. . . . In fine, the charge was tantamount to saying to the jury, the court submits this case to you to determine the liability of the defendants for negligence, with the peremptory instruction that the proof is sufficient to require the defendant to explain this accident, and *not* that the proof is sufficient to justify your determination that it required the defendants to go forward with proof in explanation." (Pp. 690, 693.)

This case is explicable on two hypotheses. Either the appellate court felt that the trial court charged the jury that the plaintiff had established the foundation of the presumption as a matter of law, and thus committed error, or else the appellate court adopted the prima facie case view and reversed the judgment because the trial court erroneously adopted the presumption view. While the matter is not wholly free from doubt, the subsequent discussion of the court points to the former of these two explanations.

[42] 124 App. Div. 12, 108 N. Y. Supp. 265 (2d Dept. 1908).

with the car by the defendant's negligence, and that presumption was evidence which made out a case *for the plaintiff to go to the jury.* The defendant was therefore required at that stage of the trial by the rules of evidence to put in any evidence which it had to show the cause of the occurrence — or, in other words, that the occurrence did not happen from its negligence—*if it desired to do so.*"[43] (Italics added.)

It will be noted that thus far the case is wholly consistent with the prima facie case view. However, the Court also said:

"The plaintiff must make out a case to avoid being nonsuited, and then the defendant must take up his own burden to meet that case . . ."[44]

This statement manifests an error of which the New York courts have frequently been guilty in their discussions of res ipsa loquitur.[45] They use

[43] *Id.* at 14. [44] *Id.* at 15.

[45] Cases illustrative of this error follow: In Stallman v. N. Y. Steam Co., 17 App. Div. 397, 401, 45 N. Y. Supp. 161 (1st Dept. 1897), the Court remarked:

" . . . . we think that the proof of the happening of the accident, under such circumstances and conditions, was of such legal value as to afford presumptive evidence of negligence and *cast upon the defendant the burden of explanation.* Having offered no explanation, *the question was properly submitted to the jury* . . . " (Italics added).

In Adams v. Union Ry. Co., 80 App. Div. 136, 139, 80 N. Y. Supp. 274 (1st. Dept. 1903), the Court said:

"Where the doctrine of *res ipsa loquitur* applies the happening of the accident and the attending circumstances raise a presumption of negligence *sufficient to warrant a finding of negligence in the absence of any explanation on the part of defendant. It is then incumbent upon the defendant in order to escape liability to offer evidence tending to rebut this presumption of negligence . . .*" (Italics added.)

See also Breen v. N. Y. etc. R. R. Co., 109 N. Y. 297, 16 N. E. 60, (1888) where the Court said that "the presumption of a want of proper care . . . may arise from circumstances attending the injury, and so *cast upon the defendant the burden of disproving it* . . . " (p. 300). The Court stated that the defendant had given no explanation of the accident and therefore concluded that *"the conclusion reached by the jury was . . . justified by the evidence."* (p. 300). (Italics added.) This case has already been alluded to in the text in connection with the attitude of trial courts, as has Maher v. Manhattan Ry. Co., 53 Hun 506 (1st Dept. 1889). The quotation from the latter case in the text, supra page 00, is also illustrative of the inconsistency of the courts that we note here.

It is apparent from a reading of these statements in conjunction with the fact situations of the cases that one cannot resolve the inconsistency wholly in favor of the presumption view by interpreting the language of the courts in reference to casting the burden of explanation on the defendant to apply to the situation at the end of the plaintiff's case, and by restricting the language responsive to the prima facie case view to the situation at the end of the whole case. In the Stallman, Maher, and probably the Breen, cases, the defendant introduced no evidence whatever, whereas in the Adams case the prima facie view language is coupled with the assumption of an absence of explanation on the part of the defendant. However, it is only just to note that the attention of the court in these cases was not directed to a choice between the prima facie and presumption views; thus in the Stallman, Maher and Breen

language which may well be interpreted as according to a res ipsa case the effect of a prima facie case, and in the same breath say that the burden of explanation or of going forward with the evidence has now devolved upon the defendant. It is obvious that this burden shifts only when the plaintiff's case is such that, should the defendant fail to assume this burden, the plaintiff would be entitled to a directed verdict. While this consequence is one of the normal effects of a presumption, a true prima facie case does not impose such a burden. For this reason, cases manifesting this inconsistency cannot be placed in any definite category.

One of the best known cases in the Court of Appeals reveals the same confusion of thought, which is perhaps attributable to faulty terminology. *Plumb v. Richmond etc. R. Co.*[46] was a suit by a passenger against a carrier for damages sustained in a collision between a trolley car, on the running board of which the plaintiff stood, and a motor truck. The trial court charged that by the occurrence of the collision a presumption of negligence arose on the part of the carrier "which called upon it for an explanation". The judgment for the plaintiff was affirmed, the Court approving the charge of the trial judge. The Court apparently accepted the view of the trial court that the occurrence of the collision called upon defendant for an explanation. The Court also differentiated the situation from "the shifting of the burden of proof" effect, saying that:

> "Shifting the burden of explanation or of going on with the case does not shift the burden of proof. If a satisfactory explanation is offered by the defendant, the plaintiff must rebut it by evidence of negligence or lose his case. On the whole case there must be a preponderance of evidence in favor of plaintiff's contention."[47]

Thus far the case is wholly consistent with, and indeed looks toward, the presumption view. But the Court added:

> "Although the plaintiff's case rested wholly on proof of the accident, the surrounding circumstances and the absence of an explanation, *he would, at the close of his case, have been entitled to go to the jury on*

cases the question before the court was simply whether a verdict for the plaintiff might stand, and in the Adams case the issue was whether the trial court committed error in charging that res ipsa loquitur shifted the burden of proof.

The same inconsistency of position is to be found in the following set of cases, all arising on plaintiff's appeal from the dismissal of the complaint. Hill v. Ninth Ave. R. R. Co., 109 N. Y. 239, 16 N. E. 61 (1888); Poulsen v. Nassau Elec. R. R. Co., 18 App. Div. 221, 45 N. Y. Supp. 941 (2d Dept. 1897); Peck v. N. Y. Cent. & H. R. R. Co., 165 N. Y. 347, 59 N. E. 206 (1901); Konigsberg v. Davis, 57 Misc. 630, 108 N. Y. Supp. 595 (Sup. Ct. App. Term 1908); Furlong v. Winne & McKain Co., 166 App. Div. 882, 152 N. Y. Supp. 245 (3d Dept. 1915); Gallagher v. Halpern, 95 Misc. 185, 159 N. Y. Supp. 160 (Sup. Ct. App. Term 1916).

[46] 233 N. Y. 285, 135 N. E. 504 (1922).

[47] *Id.* at 288.

the question of fact thus presented, if no further evidence had been offered."[48] (Italics added.)

This speaks the language of the prima facie case view.[49]

The above analysis also leads to the conclusion that cases which describe the effect of a res ipsa case as casting the burden of explanation upon the defendant, while refraining from the use of language indicative of the prima facie case view, may be interpreted as pointing to the presumption view. There are many such cases arising on appeals from the charge,[50] from the dismissal of the complaint,[51] and from a verdict in plaintiff's favor.[52] The same tendency is to be noted in cases where the court holds, on defendant's appeal, that the defendant has or has not met this burden as a matter of law.[53]

We may now examine those cases arising other than on the charge to the jury which look to the prima facie case view. These are divisible into two groups—the cases holding that the dismissal of the complaint was error, and those upholding a verdict for the plaintiff. It will readily be noted that inasmuch as the plaintiff, to win his case on appeal, had to argue only for the

[48]*Ibid.*

[49]It is interesting to note in this connection that the Plumb case is cited as authority for the prima facie case view in New York by note (1923) 12 CALIF. L. REV. 138, 140, and, on the other hand, Carpenter, *The Doctrine of Res Ipsa Loquitur* (1934) 1 U. OF CHI. L. REV. 519, 525, cites the case as authority for the proposition that New York adheres to the presumption view.

[50]Curtis v. Rochester etc. R. Co., 18 N. Y. 534 (1859); Lyons v. Rosenthal, 11 Hun 46 (1st Dept. 1877); Jones v. Union Ry. Co., 18 App. Div. 267, 46 N. Y. Supp. 321 (2d Dept. 1897); Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988 (1900); Dean v. Tarrytown etc. R. Co., 113 App. Div. 437, 99 N. Y. Supp. 250 (2d Dept. 1906); Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689 (1908).

[51]Clarke v. Nassau Elec. R. R. Co., 9 App. Div. 51, 41 N. Y. Supp. 78 (2d Dept. 1896); Kaiser v. Washburn, 55 App. Div. 159, 66 N. Y. Supp. 764 (3d Dept. 1900); D'Arcy v. Westchester Elec. Ry. Co., 82 App. Div. 263, 81 N. Y. Supp. 952 (1st Dept. 1903); Williams v. N. Y. & Q. C. R. Co., 97 App. Div. 133, 89 N. Y. Supp. 669 (2d Dept. 1904); Morris v. Zimmerman, 138 App. Div. 114, 122 N. Y. Supp. 900 (1st Dept. 1910); Maslenka v. Brady, 188 App. Div. 661, 176 N. Y. Supp. 842 (2d Dept. 1919); Rice v. Von Der Lieth, 111 Misc. 418, 181 N. Y. Supp. 767 (App. Term 1st Dept. 1920); Bennett v. Edward, 239 App. Div. 157, 267 N. Y. Supp. 417 (1st Dept. 1933).

[52]Case v. Northern Central Ry. Co., 59 Barb. 644 (Gen. Term 4th Dept. 1871); Murphy v. The Coney Island & B. Ry., 36 Hun 199 (2d Dept. 1885); Hughes v. B'ldg. & Saving Ass'n., 131 App. Div. 185, 115 N. Y. Supp. 320 (2d Dept. 1909); Kisten v. Einhorn, etc. Corp., 232 App. Div. 144, 249 N. Y. Supp. 205 (1st Dept. 1931), *aff'd without opinion*, 258 N. Y. 549, 180 N. E. 327 (1931).

[53]These cases will be discussed shortly. In addition to the cases cited, see also Paine v. Geneva etc. Co., 115 App. Div. 729, 101 N. Y. Supp. 204 (4th Dept. 1906); Robinson v. Consol. Gas Co., 194 N. Y. 37, 86 N. E. 805 (1909); O'Donohue v. Duparquet etc. Co., 67 Misc. 435, 123 N. Y. Supp. 193 (Sup. Ct. App. Term 1910); De Roire v. Lehigh Valley R. Co., 205 App. Div. 549, 199 N. Y. Supp. 652 (4th Dept. 1923).

prima facie case view, these cases contain the merest dicta. They are not entirely worthless, however, from the point of view of our inquiry, and merit some discussion. In the first group is *Dumes v. Sizer*,[54] where the Court said that

> " . . . this case, with its attendant circumstances, can very properly be classified as one of those in which the presumption of negligence arises from the fact that the accident would not, in the ordinary course of affairs, have happened, but for the omission of reasonable care upon the part of the person charged with its exercise, and, consequently, *in the absence of any explanation by the defendant, it is one in which the jury would have been warranted in reaching the conclusion that the defendant had been negligent . . .*"[55] (Italics added.)

Decisions upholding verdicts for the plaintiff contain comparable language. Thus in *Solarz v. Railway*,[56] the Court said:

> ". . . the unexplained breaking down of the scaffolding made out a case sufficiently strong to go to the jury on the subject of negligence . . ."

In *Larkin v. Reid Ice Cream Co.*,[57] the plaintiff sued for the death of plaintiff's intestate, killed while trying to stop a runaway horse; a snap hook used to connect the bit ring on one side with the jaw strap gave way, allowing the bit to fall from the horse's mouth and rendering the driver powerless to control the animal. The Court ruled:

> "Even if the plaintiff could not specify which of these causes let out the bit, yet, as the occurrence was one that in common experience could not happen without negligence, it presented a *prima facie* case for the jury. . . . *The jury, therefore, could find for plaintiff upon the defendant's failure to account for this slipping out of the bit without negligence on the part of defendant . . .*"[58] (Italics added.)

In summing up the situation thus far, we find that there are several holdings and numerous dicta in favor of the presumption view. Many of the expressions of the courts smacking of the prima facie case view (as to which the writer has been unable to find an express holding) mean little,

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[54]3 App. Div. 11, 17, 37 N. Y. Supp. 929 (4th Dept. 1896).

[55]See also Cummings v. Kenny, 97 App. Div. 114, 89 N. Y. Supp. 579 (2d Dept. 1904); Higgins v. Ruppert, 124 App. Div. 530, 108 N. Y. Supp. 919, (2d Dept. 1908); Huston v. Dobson, 138 App. Div. 810, 123 N. Y. Supp. 892 (1st Dept. 1910).

[56]8 Misc. 656, 657, 29 N. Y. Supp. 1123 (N. Y. Super. Ct. 1894), *aff'd without opinion*, 155 N. Y. 645, 49 N. E. 1104 (1898).

[57]161 App. Div. 77, 78, 146 N. Y. Supp. 230 (2d Dept. 1914).

[58]See also Cole v. N. Y. Bottling Co., 23 App. Div. 177, 48 N. Y. Supp. 893 (2d Dept. 1897); Wiley v. Bondy, 23 Misc. 658, 52 N. Y. Supp. 68 (Sup. Ct. App. Term 1898); German v. Brooklyn Heights Ry. Co., 107 App. Div. 354, 95 N. Y. Supp. 112 (2d Dept. 1915); Duncan v. Internat. Comm. Y. M. C. A. Ass'ns., 176 App. Div. 672, 163 N. Y. Supp. 945 (1st Dept. 1917).

either because they are coupled with other expressions in turn consistent only with the presumption view, or else because they occur in cases where it was necessary to espouse only the prima facie case theory to sustain the plaintiff's position. Added to this is the consideration that confusion in terminology should make one hesitate in rejecting a position upheld by actual decisions and denied by a distinct minority of the dicta, almost all of which were voiced in the presence of extenuating circumstances. On the basis of the authorities considered thus far, therefore, it may well be concluded that New York adheres to the view that a res ipsa loquitur case has the procedural effect of a true presumption.

A caveat to this conclusion leads to the next topic. The procedural effect of the presumption view may be invoked at two stages of the trial: (1) at the close of plaintiff's case; (2) at the close of the whole case. We have been paying a good deal of attention to the first, but it should be noted that the problem there is of relatively slight practical importance because in most cases the defendant, when his motion for a non-suit is denied, introduces evidence himself. Once the defendant introduces evidence, how is it to be determined by the tribunal when he has rebutted the presumption? Here we must realize that while the conclusion that the plaintiff has the benefit of a presumption has a definite procedural consequence when the defendant introduces no evidence, yet there are varying quanta of proof which may be required of a defendant for the successful rebuttal of a presumption. Professor Morgan lists six.[59] Have the New York courts determined the precise burden cast upon the defendant who seeks to rebut a res ipsa loquitur case?

It may first be noted that the defendant may either rebut the foundation of the presumption or the presumed proposition ("the defendant was negligent"). Thus the defendant may show either that the instrumentality was set into motion by the voluntary act of the plaintiff, or that the instrumentality was not at the time of the accident in the exclusive possession or control of the defendant, or that the accident was not one which in the ordinary course of events would not have occurred but for some negligence in the construction, maintenance, or use of the instrumentality. We are more interested, however, in how the presumed proposition may be rebutted. While the courts have often declared that the burden is on the defendant to show how the accident occurred,[60] yet, when the question is

[59]Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59, 60.

[60]Edgerton v. N. Y. & H. R. R. Co., 39 N. Y. 227 (1868); Murphy v. Coney Island etc. R. Co., 36 Hun 199 (2d Dept. 1885); Guldseth v. Carlin, 19 App. Div. 588, 46 N. Y. Supp. 357 (2d Dept. 1897); D'Arcy v. Westchester Elec. R. R. Co., 82 App. Div. 263, 81 N. Y. Supp. 952 (1st Dept. 1903); Klinger v. United Traction Co., 92 App. Div. 100, 87 N. Y. Supp. 864 (3d Dept. 1904), *modified*, 181 N. Y. 521, 73 N. E. 1125 (1905); Williams v. N. Y. & Q. C. R. R., 97 App. Div. 133, 89 N. Y. Supp. 669 (2d

squarely raised, they have corrected themselves and said that it is incumbent upon the defendant to show only that he was not negligent;[61] in other words, the manner in which the presumed proposition is to be rebutted is by the proof of its contradictory. But proof to what extent? As was stated above, New York has definitely taken the position that res ipsa loquitur does not have the effect of shifting the burden of persuasion as to the issue of the defendant's negligence. With this possibility eliminated, it may be said that no New York court has definitely answered this question, though certainly enough cases have presented the issue.[62] And perhaps this is explicable on the ground that the courts do not talk in terms of quanta of proof, but rather in terms of circumstances and causes. The most complete statement of how the presumption may be overcome is found in *Huscher v. N. Y. & Queens etc. R. Co.*,[63] where the Court wrote:

> "This presumption may be overcome by evidence showing precisely the cause of the occurrence, and that the cause is attributable to some

Dept. 1904); Schnizer v. Phillips, 108 App. Div. 17, 95 N. Y. Supp. 478 (2d Dept. 1905); O'Leary v. Glen Falls Gas & El. L. Co., 107 App. Div. 505, 95 N. Y. Supp. 232 (3d Dept. 1905); Morris v. Zimmerman, 138 App. Div. 114, 122 N. Y. Supp. 900 (1st Dept. 1910); Rice v. Von Der Lieth, 111 Misc. 418, 181 N. Y. Supp. 767 (Sup. Ct. App. Term 1920); Bennett v. Edward, 239 App. Div. 157, 267 N. Y. Supp. 417 (1st Dept. 1933).

[61]Thus in Sweeney v. Edison Elec. I. Co., 158 App. Div. 449, 452, 143 N. Y. Supp. 636 (2d Dept. 1913), the Court said:

> "The burden of explanation is thrown upon the defendant, but to explain that it is not negligent, rather than the cause of the accident."

In Klein v. Fraser, 169 App. Div. 812, 814, 155 N. Y. Supp. 848 (1st Dept. 1915) the Court remarked:

> "What was cast upon the defendant by the fact of the accident was, not to prove just how the accident happened, but that she had exercised due care to guard against the happening of such an accident."

In Courtney v. Gainsborough Studios, 186 App. Div. 820, 829, 174 N. Y. Supp. 855 (1st Dept. 1919) it was said:

> " . . . assuming the plaintiff had established a *prima facie* case by showing an accident, yet the only duty upon the defendant was to show that it exercised reasonable care, and . . . there was no duty upon defendant to explain how the accident happened."

[62]In almost every case taken to an appellate tribunal in which the lower court applied res ipsa loquitur and the jury found for the plaintiff, the defendant-appellant contends that he overcame the presumption as a matter of law. The affirmances, however, are legion. In the following cases this contention of the defendant was upheld: Hubener v. Heide, 73 App. Div. 200, 76 N. Y. Supp. 758 (1st Dept. 1902); Papazian v. Baumgartner, 49 Misc. 244, 97 N. Y. Supp. 399 (Sup. Ct. App. Term 1904); Nigro v. Willson et al., 50 Misc. 656, 99 N. Y. Supp. 344 (Sup. Ct. App. Term 1906); Cohen v. Farmers' Loan and Trust Co., 70 Misc. 548, 127 N. Y. Supp. 561 (Sup. Ct. App. Term 1911); Courtney v. Gainsborough Studios, 186 App. Div. 820, 174 N. Y. Supp. 855 (1st Dept. 1919); Michaels v. City of N. Y., 231 App. Div. 455, 247 N. Y. Supp. 781 (1st Dept. 1931); Burns v. City of N. Y., 233 App. Div. 98, 251 N. Y. Supp. 77 (1st Dept. 1931).

[63]158 App. Div. 422, 425, 143 N. Y. Supp. 639 (2d Dept. 1913).

person other than the defendant, for whose acts he is not responsible, or by evidence showing precisely the cause of the occurrence, and that such cause, although not attributable to a third person, is of such a character that defendant is not culpable in connection therewith, but that such occurrence is in the nature of an accident unavoidable by the use of that degree of care with which defendant is chargeable, or finally, by evidence which, while it may not be sufficient to disclose the precise cause of the occurrence, is sufficient to show that defendant's entire duty in connection therewith was discharged. [Citing authorities.] If at the close of the entire case the presumption arising from the happening of the accident and the attendant circumstances does not fairly preponderate over that introduced by defendant respecting his freedom from culpability, plaintiff has failed to make out a case, and defendant should be absolved."

It will be noted that the court says "by showing that". To show here means to prove, but the question still remains by what quantum of proof must the defendant "show" that one of the various alternatives exists. This further analysis has never been made in New York. In fact, the usual charge is one less definite than the test of the *Huscher* case and runs somewhat as follows:

"The management and control of the transportation of the passenger is wholly confided to the employees operating the car, and the passenger cannot be expected to account for a collision if one takes place. When such a collision takes place, there arises, as a rule of evidence, a presumption of negligence upon the part of the carrier which calls upon it for an explanation. I do not mean, in making this statement, that this rule of evidence shifts the burden of the proof from the shoulders of the plaintiff on to the shoulders of the defendant, but only that the company from the fact of the collision, if you find that there was a collision, is called upon to make an explanation; and then it is for you to determine on the whole case, on all the evidence, whether there is a preponderance of the evidence in favor of the plaintiff's contention that there was negligence upon the part of the defendant."[64]

There remains the question whether any New York cases have taken the fourth position regarding the effect of res ipsa loquitur, namely, that the doctrine has no uniform procedural effect in all the cases to which it applies. Thus a court might rule that while a uniform effect applies to all

[64]This is the charge upheld on appeal in Plumb v. Richmond etc. R. Co., 233 N. Y. 285, 135 N. E. 504 (1922). Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724, 729, conclude after a consideration of the cases throughout the country that the following are the results attending the adoption of the presumption view when the plaintiff introduces a res ipsa case: (1) If the defendant introduces no evidence, directed verdict for plaintiff; (2) If the defendant introduces a "mere scintilla" of evidence, the case goes to the jury; (3) If the defendant introduces a "whole lot" of evidence, the case goes to the jury; (4) If the defendant rebuts completely, directed verdict for the defendant if plaintiff does not counter-rebut.

cases in the same type situations, different effects apply depending on the particular type situation involved. A court might also take the view that the effect of a res ipsa case depends entirely on actual, as distinguished from artificial, probability values. No New York court, however, has made any differentiation according to the particular factual classifications to which they assign the designation res ipsa loquitur. The cases discussing the problem assume, it would seem, that once a case attains the status of a res ipsa case, a uniform procedural effect follows, and this regardless of the situation involved.[65] Such a view is, of course, inconsistent with the actual-probabilities theory. It does not require argument to show that there is no uniform *actual* probability inherent in each situation where the doctrine is applied; it may be assumed that reasonable men would assign different probability values and hence different procedural consequences to the varying fact situations. In connection with this aspect of the problem, it is worthy of note that the Court of Appeals recently spoke as follows:[66]

> "The doctrine of *res ipsa loquitur* is not an arbitrary rule. It is rather a common-sense appraisal of the probative value of circumstantial evidence."

Again, in an earlier decision of the Court of Appeals, we find this comment:[67]

> "This rule ..... was not the declaration of the discovery of some new legal principle, available to a complainant to supplement the deficiency in the required proof of the charge of negligence. The doctrine, simply, regulates the degree of the proof required under certain circumstances."

In both cases, however, the Court was considering whether res ipsa loquitur applied, and not the procedural effect which ought to be accorded that doctrine. In order to bring his case within the doctrine, a plaintiff must show that the accident was one which, in the ordinary course of events, would not have occurred but for some negligence, and the circumstances must point towards the defendant as the guilty party. In determining whether the plaintiff's case falls within the purview of the doctrine, that is, whether the foundation of the doctrine is established, it is obviously necessary to weigh the case in the balance of actual probabilities, but this necessity is not present once it is ruled that the case is within the doctrine.

Under the present state of the authorities, in the absence of judicial declaration to the contrary, one would appear to be justified in concluding that New York views the doctrine of res ipsa loquitur as according uniform

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[65]In his study of the New York law, the writer separated all the cases into fact categories to determine whether different procedural effects are attributed to different fact situations, but reached the conclusion stated in the text.

[66]Galbraith v. Busch, 267 N. Y. 230, 234, 196 N. E. 36 (1935).

[67]Eaton v. N. Y. Cent. & H. R. R. Co., 195 N. Y. 267, 270, 88 N. E. 378 (1909).

procedural effects to cases coming within its scope; that that procedural effect is in the nature of a rebuttable presumption, requiring a directed verdict for the plaintiff in case the defendant fails to introduce evidence in rebuttal, but not as yet completely developed concerning the nature of the defendant's burden when he seeks to rebut the presumption. It is clear, however, that the doctrine does not have the effect of shifting the burden of persuasion to the defendant.

Having set forth the present state of the New York law on the procedural effects of res ipsa loquitur, it remains to consider the problem upon principle.

The prima facie case view is open to obvious criticism. One of the prerequisites for the application of res ipsa loquitur is that the accident was one which, in the ordinary course of events, would not have happened had the required degree of care been observed.[68] If one can show this and in addition the absence of contributory negligence, coupled with exclusive possession and control in the defendant, it would seem that a reasonable estimate of the probative force of the plaintiff's case would at least entitle plaintiff, upon the defendant's failure to introduce evidence in opposition, to take his case to the jury. Thus, if that doctrine connotes only the prima facie case view, there does not appear to be any need to resort to res ipsa loquitur.

It would seem clear that the procedural effect which should be given res ipsa loquitur hinges upon the function the doctrine is designed to perform. That function, it has been stated, is to relieve a party to whom specific and direct proof of negligence is inaccessible from the dilemma he faces and to bring pressure to bear upon the one who presumably is both negligent in the premises and possesses the information which will establish responsibility or absence of responsibility, to produce that information or demonstrate his freedom from guilt. The prima facie view would not attain this end, since the defendant, under that view, could refrain from introducing evidence and still go to the jury. If this purpose of the doctrine be deemed desirable, it is clear that the procedural effect ought be sufficient to require the defendant to assume the burden of explanation. Only a directed verdict for the plaintiff in case the defendant fails to introduce testimony has this effect. This is the argument for the presumption effect when the defendant introduces no evidence. Also, to carry out the policy of the doctrine, it should have a persistent effect, even after the defendant begins to introduce evidence in rebuttal. Let us turn to this phase of the subject.

There are not lacking advocates for the view that res ipsa loquitur should shift the burden of persuasion.[69] It has been suggested that the dogma that the burden of proof never shifts "has not the slightest foundation in reason when applied to situations where a presumption is involved, and should be

[68] *Supra* note 3.

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

entirely disregarded where the question arises as to the effect of evidence upon the persistence of a presumption."[70] One argument for according this procedural effect to a res ipsa case is that the plaintiff has not the evidence at his disposal with which to counter-rebut the defendant's case if the defendant can overcome the presumption by less than a preponderance of evidence.[71] It would seem that this contention takes an extreme view. There are intermediate positions between a full burden of persuasion and the duty of introducing merely a scintilla of evidence. Merely because a defendant has not the burden of persuasion to show that he was not negligent does not mean that he is enabled to avoid liability without meeting crucial issues. It is very doubtful whether a defendant bearing this burden of proof will introduce more evidence in explanation of the cause of the accident than in the cases where a lesser burden is placed upon him. If he knows that the jury will be charged that he bears the burden of going forward with the evidence in explanation of the accident or in proof of the absence of culpability on his part, it may safely be assumed that he will not lag in his defense. It appears unnecessary to cast such a burden upon the defendant simply to assure his introduction of such evidence. Truly "the persistence of a presumption should depend upon the considerations which gave rise to it."[72] Res ipsa loquitur, it seems, can be accorded a sufficiently persistent procedural effect, carrying out the function of the doctrine, while not disturbing a settled principle of evidence as applied to the law of negligence.[73] For example, it would seem sufficient to rule that a res ipsa case places upon the defendant the burden of persuading the jury that the existence of the presumed fact (the defendant was negligent) is so doubtful that the jury cannot determine whether it exists. It may be added that even if a burden of proof comparable to that imposed upon the prosecution in criminal cases were cast upon the defendant in a res ipsa case, the plaintiff's inability to counter-rebut the defendant's case would not be materially, if at all, decreased.

It has also been argued that casting the burden of persuasion upon the defendant would be "the simplest and most easily understood method of handling a complicated case before the jury."[74] The advantage of simplicity is undeniable, but it should not be assumed that no other understandable formula can be evolved. It would appear that the New York courts have gone far in the development of a satisfactory solution.

The foregoing discussion has assumed the desirability of uniform procedural consequences. There are those, however, who feel that the artificial effects inherent in such a system are nnjustifiable, and hence advocate the

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[70]Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof,* (1933) 47 HARV. L. REV. 59, 83.

[71]Carpenter, *supra* note 69, at 535.

[72]*Id.* at 533.

[73]See HARPER, TORTS (1933) 185.

[74]Carpenter, *supra* note 69, at 535.

repudiation by the courts of the doctrine of res ipsa loquitur. The question, by and large, is whether it is desirable in cases where one person is injured and the circumstances point to the culpability of another and the possession by him of the evidence which will show whether he is responsible or not, to require that person to bring in that evidence. Since the use of actual probabilities would fail, in many cases, to achieve that end, those who answer this question in the affirmative must reject the use, in all cases, of actual probabilities as the index to procedural consequences.

In conclusion, it should be said that the position of New York upon these important problems has not been sufficiently defined by the courts. Res ipsa loquitur is a living doctrine in the trial courts today. Justice to litigants requires that the procedural effects of the doctrine be more fully explained by the appellate courts.