Are We Allowing the Thing to Speak for Itself? Linnear v. CenterPoint Energy and Res Ipsa Loquitur in Louisiana

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I. INTRODUCTION

"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."

And such is the doctrine of res ipsa loquitur.

Latin for "the thing speaks for itself," it is a jurisprudential rule of evidence that allows a plaintiff to meet the burden of proving a defendant’s breach in a negligence claim using only circumstantial evidence. The fact finder infers negligence based on his experience that such accidents do not occur in the absence of negligence. For example, in a case where human toes are found in a sealed package of chewing tobacco, a plaintiff is likely to have no direct evidence of the manufacturer’s negligence—only the circumstances surrounding his injury. Yet, it is clear that the harm was, more likely than not, caused by a breach of the manufacturer’s duty to its customer. The unusual circumstance of finding the toes "speaks for itself"—that the manufacturer was probably negligent. If the plaintiff’s case meets the requirements for res ipsa loquitur, he receives the benefit of the doctrine—permitting the fact finder to infer the defendant’s breach based on the available circumstantial evidence. The plaintiff can survive the defendant’s motions for both summary judgment and directed verdict, allowing his case to reach a jury despite the absence of direct evidence.

Although the purpose of res ipsa loquitur is clear, the elements, effect, and burden of proof of the doctrine differ from jurisdiction
1092  LOUISIANA LAW REVIEW  [Vol. 71
to jurisdiction. In some courts the plaintiff always bears the burden of proof, and in other courts, the burden shifts to the defendant when the plaintiff successfully invokes the res ipsa doctrine. Sometimes the doctrine creates a presumption of negligence; other times it only permits a fact finder's inference of such. Louisiana courts have had similar conflicting opinions over the doctrine's rules, despite the efforts of the Louisiana Supreme Court to clear up some of the confusion.

In 2007 in Linnear v. CenterPoint Energy, the Louisiana Supreme Court addressed the requirements for a plaintiff to be entitled to a res ipsa loquitur jury instruction. That opinion heightened the standard to obtain such an instruction, making it extraordinarily difficult for the issue to reach a jury. This Note argues that the court erred in creating such a high standard for applicability of the doctrine. Additionally, even if the plaintiff can meet this standard, Linnear makes the procedural effect of the doctrine only a permissive inference, as opposed to a rebuttable presumption. Because res ipsa loquitur continues to have this light procedural effect and narrow applicability due to the difficult Linnear requirements, the doctrine, as it stands today in Louisiana, is no longer efficacious. Ironically, this evidentiary doctrine that was originally created to assist a plaintiff in bringing a negligence claim now hampers his ability to do so. This Note argues that the doctrine should either, in some instances, produce a rebuttable presumption or be eliminated from Louisiana law altogether.

Part II of this Note explores the history of res ipsa loquitur and explains the current state of the doctrine in Louisiana, including

8. See infra note 9 and accompanying text.
9. Although some courts recognize a shifting burden toward the defendant, this burden is usually the burden of producing evidence. See Annotation, Res Ipsa Loquitur in Its Relation to Burden of Proof and Burden of Evidence, 59 A.L.R. 486 (1929); 92 A.L.R. 653 (1934).
10. Courts frequently and fallaciously interchanged the terms "presumption" and "inference," referring to a presumption of negligence when the actual effect was a permissive inference of negligence. See Annotation, "Res Ipsa Loquitur" as a Presumption or a Mere Permissible Inference, 53 A.L.R. 1494 (1928); 167 A.L.R. 658 (1947).
14. Linnear, 966 So. 2d at 43.
the requirements for its applicability and its procedural effect. Part III discusses *Linnean*, particularly its statement of the rule for obtaining a res ipsa loquitur jury instruction. Part IV argues that res ipsa loquitur should, in some cases, amount to a rebuttable presumption, and if the courts hold that it does not, the doctrine should be abolished from Louisiana law.

II. BIRTH AND EVOLUTION OF THE DOCTRINE

A. Origins of the Doctrine

The first reported use of the term “res ipsa loquitur” in court was during the *Byrne v. Boadle* case in 1863 by the Assessor of the Court of Passage at Liverpool. The “res” described in the case was the circumstance of the plaintiff’s injury caused by a barrel of flour that fell out of a warehouse window. Noting the obvious negligence of the warehouse owner, even in the absence of direct evidence, Chief Baron Pollock said, “There are certain cases of which it may be said res ipsa loquitur, and this seems one of them.”

A similar case arose two years later, in 1865, in the Court of Exchequer. In *Scott v. London & St. Katherine Docks Co.*, the plaintiff claimed that he was injured by a bag of sugar dropped from a crane. Without reference to *Byrne* or the words “res ipsa loquitur,” Chief Justice Erle stated the first explanation of this new principle:

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

The merging of both the phrase and doctrine, however, did not occur until *Briggs v. Oliver* in 1866, when a packing case fell on

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15. (1863) 159 Eng. Rep. 299 (Exch.).
19. *Id.*
20. *Id.*
the plaintiff's foot. In that case, the barons of the Court of Exchequer referenced Baron Pollock's phrase "res ipsa loquitur" and held that the mere occurrence of the injury allowed the plaintiff to take his case to the jury.

Since its inception, the doctrine has confused American courts. Many judges confused res ipsa loquitur cases with typical carrier cases. Because carriers contracted to safely transport passengers, they were held to a strict standard and bore the burden of proof in those cases in which passengers were injured. Courts then mistakenly held that res ipsa loquitur only applied when a defendant had undertaken responsibility for the plaintiff's safety. Because of this misguided line of thinking, some courts later held that the applicability of the res ipsa loquitur doctrine created a presumption of the defendant's negligence. Further perpetuating confusion about the doctrine's effects, courts were very careless with the terminology used in their opinions, frequently interchanging the terms "presumption" and "inference." Despite the confusion that resulted from the crossbreeding of earlier carrier cases and the Latin utterance of Baron Pollock, the doctrine continued to develop in the United States.

B. The Doctrine in Louisiana Law

1. Origin

Although not considered a res ipsa loquitur case at the time, Maus v. Broderick in 1899 may be the first Louisiana case to use the doctrine. In this New Orleans case, a "vicious and strong-bodied" horse raced down St. Charles Avenue unattended.

23. One commentator claims that the roots of the doctrine go further back than the carrier cases to the "English fire cases." Id. at 1081.
24. KEETON ET AL., supra note 6, § 39, at 243; Prosser, supra note 16, at 185.
26. Id. at 188.
27. Annotation, "Res Ipsa Loquitur" as a Presumption or a Mere Permissive Inference, 167 A.L.R. 658, 660 (1946) ("[T]he expressions 'presumption of negligence' and 'inference of negligence' have been erroneously used interchangeably, creating a labyrinthic confusion as to whether one rule or the other rule prevails in a particular jurisdiction . . . .").
29. 25 So. 977 (La. 1899).
30. Id.
Pulling a heavy vehicle, it crashed into a dairy wagon, throwing the wagon’s driver onto the ground. The plaintiff-driver had no evidence of the horse owner’s negligence except for the circumstances of the injury. Still, the Louisiana Supreme Court awarded damages to the driver, despite the fact that she could not explain the defendant’s specific breach.

Since that opinion, Louisiana courts have continuously developed the doctrine, but much like the common law courts, they experienced significant confusion about the requirements for the doctrine’s applicability and its effects. However, the Louisiana Supreme Court has over the years clarified the ambiguous language and misconceptions concerning res ipsa loquitur, including issues of available evidence, burden of proof, requirements for applicability, and the doctrine’s effects.

2. Evidentiary Requirements

Although both direct and circumstantial evidence can satisfy a plaintiff’s burden of proof in typical negligence cases, most negligence cases are decided largely upon circumstantial evidence. Res ipsa loquitur assists the plaintiff in using the available circumstantial evidence to present a prima facie case of negligence.

The most important requirement for the use of res ipsa loquitur is the lack of direct evidence to explain the injury, and Louisiana jurisprudence only applies the doctrine when no direct evidence

31. Id.
32. Id. at 978.
33. Id. at 979.
34. See infra Part II.B.2–3.
35. See infra Part II.B.2–3.
36. Malone, supra note 2, at 71. “Circumstantial evidence . . . is ‘evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred.’” Cangelosi v. Our Lady of the Lake Reg’l Med. Ctr., 564 So. 2d 654, 664–65 (La. 1990) (quoting KEETON ET AL., supra note 6, § 39, at 242). Direct evidence, on the other hand, establishes a fact “which has been testified to by witnesses as having come under the cognizance of their senses.” Id. at 664 (citing J. WIGMORE, EVIDENCE § 25, at 954 (1983)). On the denial of rehearing for Linnear, the Louisiana Second Circuit Court of Appeal judges stated that circumstantial evidence is more reliable than eye witness testimony “since there is usually no bias or interest associated with [it] (such as fingerprints, DNA, blood types).” Linnear v. CenterPoint Energy Entex/Reliant Energy, 945 So. 2d 1, 24 (La. Ct. App. 2d 2006), rev’d, 966 So. 2d 36 (La. 2007).
37. Cangelosi, 564 So. 2d at 665 (citing J. LEE & B. LINDAHL, MODERN TORT LAW § 1522 n.4 (rev. ed. 1898)).
exists to assist the plaintiff in presenting his negligence case.\textsuperscript{38} If direct evidence is available, nothing is left for the fact finder to infer, so the doctrine of res ipsa loquitur is not available to the plaintiff.\textsuperscript{39} In fact, the unavailability of direct evidence to the plaintiff is the reason to invoke res ipsa loquitur because the defendant is usually in a better position to explain the cause of the accident where he has more access to evidence.\textsuperscript{40} For example, in the case involving tobacco and human toes, the manufacturer had exclusive control over its production and packaging processes, so it had more evidence to present its case—a denial of negligence.\textsuperscript{41}

3. Criteria

In \textit{Cangelosi v. Our Lady of the Lake Regional Medical Center}, the Louisiana Supreme Court established three criteria for the doctrine’s applicability: (1) the injury is the kind that does not ordinarily occur in the absence of negligence; (2) the evidence must sufficiently eliminate other more probable causes of the injury, such as the conduct of the plaintiff or a third person; and (3) the negligence of the defendant must fall within the scope of his duty to the plaintiff.\textsuperscript{42} If the judge finds that the plaintiff meets

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\item \textsuperscript{38} Linnear v. CenterPoint Energy Entex/Reliant Energy, 966 So. 2d 36, 42 (La. 2007) ("[R]es ipsa loquitur is only applicable where the plaintiff offers only circumstantial evidence from which negligence might be inferred . . . ."); Lawson v. Mitsubishi Motor Sales of Am., Inc., 938 So. 2d 35, 44 (La. 2006) ("The doctrine does not apply if direct evidence sufficiently explains the injury."); Walker v. Union Oil Mill, Inc., 369 So. 2d 1043, 1048 (La. 1979) ("Res ipsa loquitur does not apply if there is sufficient direct evidence explaining the occurrence and establishing the details of the negligence charged."). A plaintiff is allowed to present expert testimony in res ipsa loquitur cases. \textit{See Cangelosi}, 564 So. 2d at 667 n.11. Also, "a plaintiff cannot take advantage of the doctrine where direct evidence of defendant’s possible negligence is available, but [cannot] be considered because the plaintiffs [have] tampered with the evidence before the defendants [can] examine it." Linnear, 966 So. 2d at 42.
\item \textsuperscript{40} Cangelosi, 564 So. 2d at 665 n.7 ("This lack of direct evidence to prove the defendant’s negligence ‘actually furnishes the occasion and necessity for invoking the rule in its strict and distinctive sense.’" (quoting Larkin v. State Farm Mut. Auto. Ins. Co., 97 So. 2d 389, 391 (La. 1957))); Prosser, supra note 39, at 242 ("Dean Wigmore says further that the force and justification of the principle lies in the fact that the evidence of the true cause of the accident is accessible to the defendant, and not accessible to the plaintiff.").
\item \textsuperscript{41} \textit{See} Pillars v. R.J. Reynolds Tobacco Co., 78 So. 365, 366 (Miss. 1918).
\item \textsuperscript{42} Cangelosi, 564 So. 2d at 665–66. These are the same criteria found in the \textit{Restatement (Second) of Torts}. \textit{RESTATEMENT (SECOND) OF TORTS} § 328D (1965).
\end{itemize}
these three criteria, the judge will give the res ipsa loquitur instruction to the jury.\textsuperscript{43}

Initially, Louisiana courts held that res ipsa loquitur was inapplicable if the defendant could show any other reasonably possible explanation for the plaintiff's injury.\textsuperscript{44} However, the Louisiana Supreme Court in \textit{Boudreaux v. American Insurance Co.} narrowed this defense, holding that the defendant's explanation of the accident must be equally as probable as or more probable than the plaintiff's inference of the defendant's negligence.\textsuperscript{45} For example, in \textit{Spott v. Otis Elevator Co.}, the plaintiffs were injured by the jerkiness of an elevator while loading pallets of paper.\textsuperscript{46} Their claim was against the elevator company for negligent maintenance, but the court held that the plaintiffs' own negligence was equally or more plausibly the cause of the injury.\textsuperscript{47} The court reasoned that a piece of the plaintiffs' pallet may have broken off and fallen into the elevator shaft, interrupting the interlock's electrical current.\textsuperscript{48}

Additionally, Louisiana courts once considered the defendant's exclusive control of the injury-causing instrument a necessary element for the applicability of res ipsa loquitur.\textsuperscript{49} Courts, however, have not strictly applied this requirement.\textsuperscript{50} Currently, a plaintiff can use evidence of the defendant's exclusive control to exclude the possibility of his own negligence or a third party's negligence because physical control of the instrument by the

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\item \textsuperscript{43} \textit{Cangelosi}, 564 So. 2d at 666.
\item \textsuperscript{44} See, e.g., \textit{Larkin}, 97 So. 2d at 392.
\item \textsuperscript{45} 264 So. 2d 621, 636 (La. 1972).
\item \textsuperscript{46} 601 So. 2d 1355, 1356–57 (La. 1992).
\item \textsuperscript{47} \textit{Id.} at 1363.
\item \textsuperscript{48} \textit{Id.} at 1358.
\item \textsuperscript{49} Weber v. Fid. & Cas. Ins. Co. of N.Y., 250 So. 2d 754, 765 (La. 1971) (Hamlin, J., dissenting) ("It is settled in our law that the doctrine of res ipsa loquitur applies only when the instrumentality alleged to have caused the damage is in the actual or constructive control of the defendant, or where plaintiff has proved freedom of fault on the part of all whose hands the instrumentality passed after leaving defendant."); Nw. Mut. Fire Ass'n v. Allain, 77 So. 2d 395, 397 (La. 1955) ("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 . . . .").
\item \textsuperscript{50} \textit{Spott}, 601 So. 2d at 1362; Hake v. Air Reduction Sales Co., 28 So. 2d 441, 445 (La. 1946) ("While it is true that the possession test seems to have been employed in many of the cases in our jurisprudence to determine the applicability of the res ipsa loquitur doctrine, it is also true that there are other cases, involving a certain type of accident, wherein the matter of possession in the defendant was not an important consideration.").
\end{itemize}
defendant allows little room for inferences other than an inference of the defendant's negligence.\(^51\)

The Cangelosi court further explained the standard to apply its three-pronged test, stating that it was the same as the directed verdict standard: "whether the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict."\(^52\) The court added, "If reasonable minds could reach different conclusions on whether the defendant’s negligence caused the plaintiff’s injury, then the judge must present the issue to the jury and instruct the jury on the doctrine of res ipsa loquitur."\(^53\)

4. Effect

Because negligence must always be proved by a preponderance of the evidence, the applicability of res ipsa loquitur does not change the plaintiff’s burden of proving that the defendant’s negligence was more likely than not the cause of the injury.\(^54\) After all, res ipsa loquitur is only a rule of evidence to help a plaintiff satisfy his burden of producing evidence.\(^55\)

As in typical negligence cases, res ipsa loquitur never shifts the burden of proof to the defendant.\(^56\) In the past, however, Louisiana courts differed on this issue, with some courts holding that the burden does in fact shift to the defendant.\(^57\) Part of the

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51. Malone, supra note 2, at 81.
53. Id. at 667.
54. Id. at 665.
55. FRANK L. MARAIST, EVIDENCE AND PROOF § 4.3, in 19 LOUISIANA CIVIL LAW TREATISE 78 (2d ed. 2007).
56. Cangelosi, 564 So. 2d at 665; see also Malone, supra note 2, at 91 ("If the courts shift the burden of persuasion under res ipsa loquitur, they thereby place a premium upon ignorance and weakness. It is not the usual policy under any modern system of law to relieve the plaintiff of the normal burden of proving his case merely because he does not have the available evidence.").
57. See Lawson v. Mitsubishi Motor Sales of Am., Inc., 938 So. 2d 35, 44 (La. 2006) ("[T]he doctrine does not dispense with the rule that negligence must be proved. It simply gives the plaintiff the right to place on the scales, ‘along with proof of the accident and enough of the attending circumstances to invoke the rule, an inference of negligence’ sufficient to shift the burden of proof.”); Spott v. Otis Elevator Co., 601 So. 2d 1355, 1362 (La. 1992) ("The plaintiff, of course, bears the initial burden of proof."); Cangelosi, 564 So. 2d at 666 ("Use of the doctrine of res ipsa loquitur in a negligence case, as in any case involving circumstantial evidence, does not relieve the plaintiff of the ultimate burden of proving by a preponderance of the evidence all of the elements necessary for a recovery."); Pilie v. Nat’l Food Stores of La., Inc., 158 So. 2d 162, 165 (La.
inconsistency may be due to an incorrect adoption of the doctrine from common law courts with respect to its burden-shifting effect.58 When common law courts stated in the past that the burden of proof rests with the defendant, they may have actually meant that the plaintiff’s case will not be dismissed solely because of the inadequacy of his own proof.59 Unfortunately, by expressly stating that the doctrine has a burden-shifting effect, courts established a precedent that created confusion in later res ipsa loquitur cases.

If all of the required elements of res ipsa loquitur are present and the court instructs the jury on the doctrine, its current procedural effect is only a permissive inference of negligence, rather than a presumption of such.60 This means that the jury may or may not infer a defendant’s negligence based on the evidence presented.61 Previous Louisiana jurisprudence has stated that the doctrine creates a “presumption” of negligence, as opposed to an “inference,” but this is most likely due to a careless interchanging of the two words by judges.62 Because of this effect of a

1963) (“It is the duty of the plaintiff to prove negligence affirmatively . . . .”); Day v. Nat’l U.S. Radiator Corp., 128 So. 2d 660, 664 (La. 1961) (“When the doctrine of res ipsa loquitur is applicable to a case, the accident which has caused plaintiff’s damages makes out a prima facie case of negligence by the defendant, and the burden is then on the defendant to show absence of negligence on his part.”).

58. Professor Wex Malone believed that Louisiana courts erroneously adopted a shifting burden of persuasion from common law courts. When he wrote his article in 1941, a motion for directed verdict in Louisiana could only be made after both sides presented their cases. Because a defendant in a common law court could move for a directed verdict after the plaintiff presented his evidence, the shifting burden mentioned in common law courts was only the burden of producing evidence. Thus, the applicability of res ipsa loquitur only allowed a plaintiff to avoid a directed verdict for the defendant, and the defendant then must have presented evidence to rebut the inference of his negligence. Malone, supra note 2, at 84–86.

59. Id. at 89.
61. Cangelosi, 564 So. 2d at 666.
62. See Spott, 601 So. 2d at 1362 (“Res ipsa loquitur as a ‘qualification of the general rule that negligence is not to be presumed,’ must be sparingly applied.” (quoting Day, 128 So. 2d at 665)); Pilie, 158 So. 2d at 165 (“It is the duty of the plaintiff to prove negligence affirmatively; and, while the inference allowed by the rules of res ipsa loquitur constitute such proof, it is only where the circumstances leave no room for a different presumption that the rule applies.”); Day, 128 So. 2d at 664 (“When the doctrine of res ipsa loquitur is applicable to a case, the accident which has caused plaintiff’s damages makes out a prima facie case of negligence by the defendant, and the burden is then on
permissive inference, the burden of persuasion in a res ipsa loquitur case is on the plaintiff to convince the fact finder that the inference of the defendant’s negligence is more probable than any other possible inference regarding the cause of the plaintiff’s injury.

Because of Cangelosi and other recent Louisiana Supreme Court decisions, the law on res ipsa loquitur was, until recently, relatively clear. The plaintiff always bears the burden of proof by a preponderance of the evidence; to invoke the doctrine, the plaintiff must have no direct evidence available to support his cause of action; the plaintiff’s case must succeed on all three Cangelosi factors before the judge will give a res ipsa loquitur instruction to the jury; and once reaching a jury, the effect of the doctrine is only a permissive inference. Some problems, however, still existed after Cangelosi. Lower courts, for example, had problems applying the three factors coherently with the same “directed verdict” language set forth in Cangelosi. The Louisiana Supreme Court attempted to resolve this issue and the applicability of the Cangelosi factors in Linnear.

III. LINNEAR V. CENTERPOINT ENERGY

In Linnear, plaintiffs Charles and Dronzy Linnear sued defendant CenterPoint Energy for injuries caused by a sinkhole in their yard. Eleven days before the injury, agents for CenterPoint arrived at the Linnears’ house to investigate a gas leak. The
agents dug a trench around the house to install a new gas line and later filled and resodded the trench.\textsuperscript{70} Mrs. Linnear alleged that when she was exiting her car days later, she stepped into a sinkhole that came up to her right knee.\textsuperscript{71} She was diagnosed with a herniated disk and, as a result, underwent surgery.\textsuperscript{72} The Linnears alleged that CenterPoint’s negligence in filling the trench and resodding the area caused the injuries.\textsuperscript{73}

The trial court refused Mrs. Linnear’s request for a res ipsa loquitur jury instruction, and the jury returned a verdict in favor of CenterPoint.\textsuperscript{74} The Louisiana Second Circuit Court of Appeal concluded that the refusal to give the res ipsa loquitur jury instruction constituted legal error that impeded the jury’s fact-finding process.\textsuperscript{75} On a de novo review, the court granted judgment in favor of the plaintiffs for $273,032.74.\textsuperscript{76} The Louisiana Supreme Court granted writs.

After a review of the res ipsa loquitur doctrine, the Louisiana Supreme Court reversed the appellate court and held that the district court correctly refused to give the jury instruction.\textsuperscript{77} First, the court said that it was not a “circumstantial evidence only” case.\textsuperscript{78} Mrs. Linnear gave her testimony about the accident; both Mr. and Mrs. Linnear testified about the condition of the yard after the installation of the gas line; and two CenterPoint workers testified as to the procedure used in filling the trench.\textsuperscript{79} Second, the court held that the Linnears’ case did not pass the first criterion of the three-part \textit{Cangelosi} test: that the injury must be the kind that ordinarily does not occur in the absence of negligence.\textsuperscript{80} The court reasoned, “People fall in their yards and injure themselves all the time without any third party involvement at all.”\textsuperscript{81}

Most importantly, the court discussed the requirements for a res ipsa loquitur jury instruction previously discussed in \textit{Cangelosi}.\textsuperscript{82} The phrase “if reasonable minds could reach different

\begin{itemize}
\item\textsuperscript{70} Id. at 38–39.
\item\textsuperscript{71} Id. at 39.
\item\textsuperscript{72} Id.
\item\textsuperscript{73} Id. at 38–39.
\item\textsuperscript{74} Id. at 40.
\item\textsuperscript{75} Id. at 41; Linnear v. CenterPoint Energy Entex/Reliant Energy, 945 So. 2d 1, 11 (La. Ct. App. 2d 2006), rev’d, 966 So. 2d 36 (La. 2007).
\item\textsuperscript{76} Linnear, 945 So. 2d at 13.
\item\textsuperscript{77} Linnear, 966 So. 2d at 44.
\item\textsuperscript{78} Id. at 42. Plaintiffs did, however, present circumstantial evidence—a photograph of the footprint, taken by Mr. Linnear. \textit{Id.} at 39.
\item\textsuperscript{79} Id.
\item\textsuperscript{80} Id. at 44.
\item\textsuperscript{81} Id.
\item\textsuperscript{82} Id. at 41–44.
\end{itemize}
conclusions on whether the defendant’s negligence caused the plaintiff’s injury” confused judges in the lower courts, so the Louisiana Supreme Court decided that a clarification was necessary. Some courts believed it meant that the instruction must be given any time the parties presented conflicting evidence of negligence and reasonable minds could reach different conclusions as to whether the defendant’s negligence harmed the plaintiff. According to that analysis, every case would present only two options: either a directed verdict for the defendant or a res ipsa loquitur jury instruction for the plaintiff. The Linnear court explained that the test was actually if reasonable minds could differ on the presence of all three criteria, taking each criterion individually and sequentially. If reasonable minds could differ on all three, then the res ipsa loquitur instruction should be given. If reasonable minds could not differ as to the non-fulfillment of any single criterion, the instruction should not be given, and the analysis ends.

The court also had to clarify the language from Cangelosi that held that the standard for a res ipsa loquitur jury instruction was the same for a directed verdict. In that opinion, Justice Lemmon held that the standard to grant a res ipsa loquitur instruction was “whether the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict.” Two ad hoc judges from the Louisiana Second Circuit criticized this standard. In a dissent for a denial of rehearing in Linnear, they stated that Justice Lemmon cited no direct authority for applying the standard. Furthermore, the judges called it a “single-Justice opinion,” arguing that none of the other justices (either in the dissents or concurrence) agreed

83. Id. at 43.
84. Id. at 42–43 (citing Linnear v. CenterPoint Energy Entex/Reliant Energy, 945 So. 2d 1, 8–9 (La. Ct. App. 2d 2006)).
85. Id. at 43.
86. Id. at 44.
87. Id.
88. Id.
89. Id. at 43.
91. Six of the nine judges in the Louisiana Second Circuit Linnear opinion recused themselves because Mr. Linnear had previously been a supervisor in the court’s building. Linnear, 966 So. 2d at 40–41. Judges Gallagher and Gonzales were the two ad hoc judges. Linnear v. CenterPoint Energy Entex/Reliant Energy, 945 So. 2d 1, 1 (La. Ct. App. 2d 2006), rev’d, 966 So. 2d 36 (La. 2007).
92. Linnear, 945 So. 2d at 28 (Gallagher & Gonzales, JJ., dissenting from denial of rehearing).
with the standard. The Linnear court explained this “directed verdict” language in a footnote, stating that it really meant that if facts and inferences point so strongly and overwhelmingly in favor of the defendant on the three points, the instruction should not be given.

Currently, because of Linnear, plaintiffs in Louisiana must meet a very high standard to be entitled to a res ipsa loquitur jury instruction. First, they must have no direct evidence available to them. Second, they must satisfy each part of the Cangelosi test, with the judge examining each of the three criteria individually and determining if reasonable minds could differ as to each criterion. Third, the jury, as fact finder, determines the existence of each of the three criteria again. Finally, the determination by the jury that the plaintiff met all criteria only creates a permissive inference of the defendant’s negligence, meaning that the jury may or may not infer a breach of the defendant’s duty based on the evidence presented at trial.

IV. PROBLEMS AND PROPOSED SOLUTIONS

The current standard for res ipsa loquitur under Linnear presents two problems: the prerequisites for a jury instruction are exceedingly difficult to satisfy, and the procedural effect, once it reaches the jury, is very light. After the plaintiff succeeds on the three-part “reasonable minds” Cangelosi test twice (once with the judge and once with the jury), the effect is simply a permissive inference of the defendant’s negligence—the least possible effect of the doctrine. This high standard and light procedural effect severely limit the doctrine’s applicability and seem to stray from the purpose of the doctrine, which is to assist a plaintiff in bringing a prima facie case of negligence based on the available circumstantial evidence.

93. Id. at 29.
94. Linnear, 966 So. 2d at 44 n.5.
95. See infra note 125 for an example of a res ipsa loquitur jury instruction.
96. See supra Part II.B.2.
97. See supra Part II.B.2.
98. See supra Part II.B.2.
99. See supra Part II.B.3.
100. Cf. Prosser, supra note 39, at 243.
A. Does Res Ipsa Loquitur Ever Create More Than a Permissive Inference?

The effect of a permissive inference does little to help plaintiffs prove negligence. When a judge instructs a jury that it may or may not infer negligence from the evidence provided, the only benefit that the plaintiff receives is a "nudge." This "nudge" stems from the authoritative position of the judge and may possibly sway a jury toward a finding for the plaintiff. Otherwise, juries in res ipsa loquitur cases simply do what they do in all negligence cases—choose to infer or not to infer a defendant's negligence based on the evidence.

This permissive inference shifts no "burden" to the defendant. In fact, if a defendant offers no evidence to rebut the plaintiff's claim, he only runs the risk that the jury may rule against him. A rebuttable presumption, on the other hand, would shift the burden of producing evidence to the defendant. Thus, he must produce evidence of greater weight than the plaintiff's evidence to survive a summary judgment or directed verdict motion.

In Louisiana res ipsa loquitur should, in special situations, have the effect of a rebuttable presumption. In Cangelosi, the Louisiana Supreme Court held that the standard for receiving a res ipsa loquitur jury instruction is the same for a directed verdict—"if reasonable minds could reach different conclusions on whether the defendant's negligence caused the plaintiff's injury." The court in Linnear clarified that statement, averring that the standard is only akin to a directed verdict standard when the defendant has overwhelming evidence on all three factors. In that situation, the res ipsa loquitur jury instruction will not be given. The court, however, failed to address what occurs when the plaintiff has

102. MARAIST, supra note 55, § 4.3, at 73.
103. Id.
105. Prosser, supra note 39, at 244.
106. Id. "A 'presumption' is an inference created by legislation that the trier of fact must draw if it finds the existence of the predicate fact unless the trier of fact is persuaded by evidence of the nonexistence of the fact to be inferred." LA. CODE EVID. ANN. art. 302(3).
107. Prosser, supra note 39, at 244.
110. Id. at 44.
overwhelming evidence on all three criteria. Although this occurrence would be rare because the plaintiff must rely solely on circumstantial evidence, it is still a possibility. For example, the man who was poisoned by a decaying human toe has no direct evidence that the tobacco manufacturer's packaging process allowed for the toe to be mixed with the tobacco. But the circumstances of the injury, including the presence of the rotten toe and the previously sealed condition of the tobacco pouch, overwhelmingly point to the manufacturer as the cause of the incident.\textsuperscript{111}

When a plaintiff presents overwhelming evidence like this, the effect of res ipsa loquitur should be raised to a rebuttable presumption. In a dissent on a denial for rehearing of \textit{Linnear} in the Louisiana Second Circuit, two ad hoc judges argued that this is a viable solution.\textsuperscript{112} Their opinion is rooted in the \textit{Restatement (Second) of Torts}, which posits, "It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn."\textsuperscript{113} So when the judge determines whether the res ipsa loquitur instruction reaches the jury, he can also determine the procedural effect of the doctrine. In essence, two possible procedural effects of res ipsa loquitur would exist based on the strength of the plaintiff's circumstantial evidence: one of a permissive inference and one of a rebuttable presumption. The ad hoc judges argued that this presumptive effect "is the strong help that the doctrine was intended to give."\textsuperscript{114}

Having res ipsa loquitur amount to a rebuttable presumption, as opposed to a permissive inference, is a more equitable procedural effect. A plaintiff's circumstantial evidence in some cases is so strong that common sense would warrant something higher than a permissive inference. After all, res ipsa loquitur, as an evidentiary rule, serves to appraise the value of circumstantial evidence.\textsuperscript{115} If the natural probative evidence presented by the plaintiff shows that

\textsuperscript{111} Louis L. Jaffe, \textit{Res Ipsa Loquitur Vindicated}, 1 Buff. L. Rev. 1, 3 (1951) ("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. It requires evidence which shows at least probability that a particular accident could not have occurred without legal wrong by the defendant.").

\textsuperscript{112} Judges Gallagher and Gonzales were the two ad hoc judges. \textit{Linnear} v. CenterPoint Energy Entex/Reliant Energy, 945 So. 2d 1, 15 (La. Ct. App. 2d 2006), rev'd, 966 So. 2d 36 (La. 2007).

\textsuperscript{113} \textit{Restatement (Second) of Torts} § 328(D)(2) (1965). The three requirements in \textit{Cangelosi} are the same as the three requirements in the \textit{Restatement (Second) of Torts}.

\textsuperscript{114} \textit{Linnear}, 945 So. 2d at 28 n.8.

\textsuperscript{115} Jaffe, supra note 111, at 3.
reasonable minds must find that the defendant was negligent, the doctrine should effect a presumption.

B. If It Never Creates More Than a Permissive Inference, Why Have the Doctrine at All?

If the Louisiana Supreme Court holds that the effect of res ipsa loquitur is always a permissive inference and never a presumption, then there may be no need for the doctrine in our jurisprudence. After all, a plaintiff's burden of proof—a preponderance of the evidence—can be met with circumstantial evidence, direct evidence, or both.117

As previously mentioned, the res ipsa loquitur doctrine aids in determining the strength of circumstantial evidence. According to the facts of a case, the resulting inference from the available evidence could be either strong or weak.119 There is no need, however, for an elaborate doctrine to determine the strength of evidence.120 If the "res"—the situation in which the injury occurred—is to speak for itself, then the courts should let it speak for itself. The jury, with its common knowledge and experiences, is quite qualified to determine from the evidence if the injury is of the type that normally occurs in the absence of negligence and if the defendant was the negligent party.

116. Prosser, supra note 39, at 258 ("In the nature of the proof involved, a res ipsa case does not differ from the ordinary case in which the circumstances indicate that someone must have been negligent, and point to the defendant as the one responsible."). South Carolina is the only state that does not recognize the doctrine of res ipsa loquitur. Orr v. Saylor, 169 S.E.2d 396, 397 (S.C. 1969).
117. Prosser, supra note 39, at 257 ("Negligence may be proved by circumstances, and in a res ipsa case, since there is no direct proof of negligence, the circumstances are the evidence.").
118. Jaffe, supra note 111, at 3.
119. Prosser, supra note 39, at 262 ("There is no uniform procedural effect of res ipsa loquitur; it means no more than circumstantial evidence, which may be strong or weak, according to the facts of the case.").
120. Malone, supra note 2, at 72 ("In truth, a case in which the doctrine of res ipsa loquitur applies does not differ essentially from any other case in which the making of inferences plays a dominant role. Its distinguishing characteristic lies only in the fact that the occurrence of the accident constitutes the given fact group from which the inference of negligence is drawn. Whether this alone warrants the creation of a special doctrine and the setting apart of the situation as one that requires specific rules is a question that is open to serious debate."); James S. Holliday, Jr., Comment, Problems of Proof: The Function and Application of Res Ipsa Loquitur in Louisiana, 25 LA. L. REV. 748, 748 (1965) ("[A]pplication of res ipsa loquitur differs very little from proof of negligence by inference from circumstantial evidence which is employed in the vast majority of tort cases.").
Therefore, the standard for negligence cases in which the plaintiff has no direct evidence should be the same as for all other tort cases. Abolition of the doctrine of res ipsa loquitur has support from tort scholar William Prosser, who wrote in 1936, “Along with res gestae and other unhappy catchwords, the Latin tag should be consigned to the legal dustbin . . . . It adds nothing to the law, has no meaning, which is not more clearly expressed for us in English, and brings confusion to our legal discussions.”

Some writers claim that the purpose of res ipsa loquitur is to allow a plaintiff to present his case when the defendant is in a superior position with regard to evidence. However, under the Linnean rules, a plaintiff in Louisiana has many hurdles to overcome before he even gets the benefit of the “nudge.” Abolishment of the doctrine would assuage this inequity in two ways. First, the plaintiff would not have to pass the previously mentioned Cangelosi three-factor test for his case to reach the jury. If there is no doctrine, there is no doctrinal test. Second, the plaintiff has the opportunity to receive a directed verdict in his favor. If the circumstantial evidence that he presents is overwhelmingly in his favor, he meets the directed verdict standard and should receive the benefit of such.

Also, although res ipsa loquitur may, in theory, allow a plaintiff with no direct evidence to survive both a pre-trial summary judgment motion and a motion for directed verdict, the heightened Linnean standard makes this extremely difficult.

121. Prosser, supra note 39, at 271.
122. Id. at 242-43 (“[T]he force and justification of the principle lies in the fact that the evidence of the true cause of the accident is accessible to the defendant, and not accessible to the plaintiff. In other words, that the defendant is in a position to explain the accident, while the plaintiff is not. This certainly is mentioned in many cases as a reason for the application of the rule, and there are even decisions to the effect that res ipsa loquitur is not available to a plaintiff who is in a better position to produce evidence than the defendant.” (footnotes omitted)).
123. Charles E. Carpenter, The Doctrine of Res Ipsa Loquitur in California, 10 S. CAL. L. REV. 166, 171 (1937) (“It is to be observed that, under this view, the plaintiff is only entitled to the natural probative force of the evidence. In fact, where the probative force of the evidence in a particular case is very great, that alone ought to entitle a plaintiff to a directed verdict.”).
124. See, for example, recent cases in which a plaintiff pleaded res ipsa loquitur and the defendant’s summary judgment motion was granted: Dronette v. Shelter Ins. Co., 998 So. 2d 942 (La. Ct. App. 3d 2008) (granting summary judgment because the plaintiff failed to eliminate equally probable causes of the injury); Trent v. PPG Indus., 930 So. 2d 324 (La. Ct. App. 3d 2006) (affirming summary judgment because res ipsa loquitur was held inapplicable, but with the dissent commenting that the doctrine was applicable and that summary judgment should be denied).
Before the judge can infer negligence, he must determine if reasonable minds could differ as to all three criteria. However, the judge can make the inference more easily based on the circumstantial evidence alone, instead of applying the factors. For example, the tobacco-chewing plaintiff may allege the following facts: (1) he was poisoned by a human toe in his chewing tobacco; (2) the tobacco pouch was sealed prior to use; and (3) he did not tamper with the pouch or the tobacco in any way. It is very clear from these alleged facts that the tobacco manufacturer was probably negligent; however, that inference is less likely to be drawn when applying the three factors with the strict Linnear standard. Using common sense to appraise the totality of the available circumstantial evidence, a judge could reasonably hold a plaintiff’s allegations sufficient to defeat summary judgment and directed verdict motions. The same may not be true, however, when applying the more stringent test involving the Cangelosi factors with the Linnear standard. Using the test developed from these two opinions, the heightened “reasonable minds” standard must be applied to each criterion, and the defendant will succeed if the judge holds reasonable minds could not differ on the non-fulfillment of any single criterion.

Furthermore, abolishment of the res ipsa loquitur doctrine would also eliminate jury confusion. If courts were confused about the terms “presumption” and “inference” in the past, juries may be confused as well. In jury instructions for negligence cases, judges will often instruct juries that the mere occurrence of an injury does not warrant a presumption of negligence. In a res ipsa loquitur jury instruction, however, the jury will additionally be instructed that it may or may not infer negligence. That kind of mixed-up

125. An example of a res ipsa loquitur jury instruction reads:
In the ordinary case, the mere fact that the plaintiff may have suffered harm does not furnish evidence that it was caused by anyone’s negligence, and the plaintiff must introduce other evidence of some negligence on the part of the defendant. In a few exceptional cases, the circumstances involved in or connected with an accident are of such an unusual character as to justify, in the absence of other evidence bearing on the subject, the inference that the accident was due to the negligence of the person having control of the thing which caused the injury. This inference may be drawn because all of the circumstances surrounding the accident are of such a character that, unless an explanation can be given, the only fair and reasonable conclusion is that the accident was due to some omission of the defendant’s duty. This is simply another formulation of the burden of a plaintiff in a tort action to prove that, more probably than not, his injury was caused by the negligence of the defendant. If you believe from the fact of the accident itself and from the other evidence offered by the plaintiff that the defendant’s negligence is
terminology can certainly cause jury confusion, and it can take away from the beneficial "nudge" that the plaintiff receives from the instruction. On the other hand, instructions that mention the Latin phrase by name can have a "talismanic-like effect" on juries (who, presumably, do not know Latin) and possibly induce them to rule for the plaintiff when they would not do so otherwise. Without the res ipsa loquitur doctrine, these problems would be nonexistent. Juries would receive typical negligence instructions that would allow them to decide the issue of defendants' negligence without the confusing terminology.

The Linnear decision narrowed the scope of the doctrine and will limit the number of res ipsa loquitur jury instructions given. Now, plaintiffs must succeed with a stringent standard to receive a jury instruction, after which they only receive the slight benefit of a permissive inference. In order to alleviate the inequities in this strict standard, the procedural effect of res ipsa loquitur should be a rebuttable presumption in those cases in which the plaintiff's circumstantial evidence is overwhelmingly in his favor. Without this effect, the doctrine is no longer efficacious and has no place in Louisiana law.

V. CONCLUSION

So what happens with a man who finds human toes in his chewing tobacco? He has no direct evidence and no specific

the most plausible explanation for the harm which the plaintiff may have suffered, you may return a verdict for the plaintiff. If, on the other hand, you are not convinced by the plaintiff's evidence that it was the defendant's negligence rather than some other cause which is the most plausible explanation, then you must return a verdict for the defendant.

H. ALSTON JOHNSON, III, CIVIL JURY INSTRUCTIONS § 3.18, in 18 LOUISIANA CIVIL LAW TREATISE 92 (2d ed. 2001). In Linnear, the plaintiffs' counsel requested the following instruction: "Res ipsa loquitur is a rule of circumstantial evidence which allows a court to infer negligence on the part of the defendant if the facts indicate the defendant's negligence, more probably than not caused the injury." Linnear v. CenterPoint Energy/Entex Reliant Energy, 945 So. 2d 1, 7 (La. Ct. App. 2d 2006), rev'd, 966 So. 2d 36 (La. 2007).

126. Prosser, supra note 16, at 218 ("Trial lawyers have more than a suspicion that the jury either does not understand the instruction or pays no attention to it, and that it is chiefly a device for getting error into the record."); id. at 230 ("What a jury makes of such instructions is anyone's guess. It must be agreed that the average jurymen is no intellectual giant, and that he is not likely to be misled by what he cannot understand; but that is a poor reason for approving an instruction which even a lawyer must find contradictory and confusing.").

explanation of what happened. Yet, it is clear that the manufacturer is responsible, and the man should recover damages.

In order for him to receive a jury instruction on res ipsa loquitur in Louisiana, as a plaintiff, he must meet the following criteria: (1) the injury must be the kind that ordinarily does not occur in the absence of negligence; (2) the evidence must sufficiently eliminate other more probable causes of the injury, such as the conduct of the plaintiff or a third person; and (3) the negligence must fall within the scope of the defendant's duty to the plaintiff. The judge considers each criterion individually and sequentially, determining if reasonable minds could differ on the existence of each. If any of the elements are missing, the instruction will not be given. The Linnear court determined that if the issue reaches the jury and the jury finds the existence of all criteria, then the effect of the doctrine is merely a permissive inference.

This is a high standard for a plaintiff to meet before recovery. After twice passing the three-pronged test, the jury is instructed that it may or may not infer negligence. Instead, the strength of the plaintiff's circumstantial evidence should determine the effect of the doctrine. Therefore, in some situations the effect of the doctrine should be a rebuttable presumption instead of a permissive inference. After all, finding toes in tobacco is strong evidence against the manufacturer, especially if the pouch had not been tampered with.

If Louisiana courts continue to hold that the effect is merely a permissive inference, plaintiffs are better off without the doctrine altogether. The circumstance of finding a human toe in a tobacco pouch would speak for itself without the benefit of Latin nomenclature. A plaintiff who finds toes in his tobacco could both survive a directed verdict motion and win the lawsuit with the circumstances of his injury alone.

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130. Id.
131. Id. at 42.
* I would like to thank Professors John M. Church, William R. Corbett, and Frank L. Maraist for assistance in writing this Note.