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WEX MALONE AND RES IPSA LOQUITUR IN LOUISIANA TORT LAW

Albert Tate, Jr.*

Elsewhere this issue celebrates Wex Malone's national contributions to American tort law through his writings and his twenty-odd years of service on the Committee of Advisers to the Reporter of the American Law Institute that shaped the *Restatement (Second) of Torts*. In Louisiana, however, his impact on tort law has been more than contributive; his writings and the law review commentaries produced under his tutelage by his students in the last half of this century have totally shaped current Louisiana tort concepts and analyses.¹ The present article discusses Malone's perceptions in his first important writing on Louisiana tort law, "Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases,"² and their subsequent influence. His res ipsa article was published in the *Louisiana Law Review* in 1941, soon after North Carolina-born Wex Malone came to the Louisiana State University in 1939 as an Assistant Professor of Law, eight years out of the University of North Carolina School of Law, and after a career as a Wall Street lawyer and professor of law at the University of Mississippi.

I

A reader in the 1980's still receives stimulation and insight from Malone's initial general analysis, brilliant and still valid, of the doctrine

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1. The sole exception is the return by Louisiana courts in the 1970's to civilian principles of strict liability under the Louisiana Civil Code. Professor Malone profoundly disapproves this departure from the common law approach. See Malone, *Ruminations on Liability for the Acts of Things*, 42 LA. L. REV. 979 (1982).

Malone's impact on Louisiana tort concepts and analyses also undoubtedly resulted from the two generations of law students led into tort thinking and analysis through his dramatic and stimulating lectures as a law teacher. A symposium less scholarly in concept than the present might have contained a discussion of his role as one of the two or three most outstanding classroom performers ever to have taught law in this state.

2. Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70 (1941) [hereinafter referred to as his res ipsa article or simply his article]. Malone's prior writings on Louisiana law included only a six-page note on Louisiana fair trade legislation, Comment, *The Louisiana Fair Trade Act and Interstate Transactions: The Krauss Company Case*, 3 LA. L. REV. 814 (1941) and two contributions discussing the year's decisions of the Louisiana Supreme Court in criminal law and procedure. *The Work of the Louisiana Supreme Court for the 1939-1940 Term*, 3 LA. L. REV. 267, 379 (1941); *The Work of the Louisiana Supreme Court for the 1938-1939 Term*, 2 LA. L. REV. 31, 97 (1939). For a bibliography of his writings, see Wade, *Ruminations on a Premier Torts Professor*, 44 LA. L. REV. 1161 (1984).

of *res ipsa loquitur* and its application in the first part of his *res ipsa* article.³ The second part of his article⁴ analyzed Louisiana decisional law on the subject—demolishing much of its technical reasoning, a critique eventually accepted by the subsequent jurisprudence—and suggested the proper utilization of *res ipsa loquitur* in Louisiana's procedural and substantive scheme. The subsequent triumph of Malone's perceptions in the second portion of the article has been so complete, however, that a 1980's Louisiana reader cannot possibly imagine the excitement of discovery and the catalytic understanding his article created in the Louisiana practitioner and judge of the 1940's and 1950's, and even into the 1960's.

This article will not attempt to restate here Malone's initial brilliant analysis of *res ipsa loquitur* and its application. It includes discussion of the duty-risk factor in the doctrine's application, the interplay between causation and negligence implicated in the doctrine's utilization, and the "exclusive control by the defendant" criterion, a criterion which was sometimes mechanically and erroneously required before the doctrine could be invoked. Malone stated initially in what may serve also as a thumbnail sketch of his conclusion:

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 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. Shorn of its classical garb, the phrase means simply that the thing—the accident—speaks for itself; it is datum from which the trier may infer negligence.⁵

The second part of his article addressed (and demolished) tendencies of the Louisiana judicial applications to regard the *res ipsa loquitur* principle not as "only a species of proof by inference"⁶ (the proper utilization as Malone viewed it), but rather "as a law unto itself,"⁷ creating "a unique piece of litigation involving new elements"⁸ of pleading and

3. Malone, *supra* note 2, at 70-83.

4. *Id.* at 83-95. A third section of the paper discusses the uses of *res ipsa loquitur* in particular categories of substantive Louisiana cases. *Id.* at 95-106. See *infra* text accompanying notes 37-45.

5. *Id.* at 72-73 (footnote omitted).

6. *Id.* at 82.

7. *Id.* at 83.

8. *Id.*

proof. Malone summarized the judicial expressions, which sometimes were taken seriously with overtechnical results;

(1) When *res ipsa loquitur* applies, the defendant must sustain the burden of proving that he was free of negligence.

(2) The plaintiff who alleges specific acts or omissions which he claims amount to negligence loses the "benefit" of the doctrine.

(3) If the plaintiff is in as good a position as the defendant to explain the cause of the injury, he cannot rely upon *res ipsa loquitur*.⁹

Due to a large extent to Malone's demolition of these jurisprudential misconcepts, now regarded as incongruous as belief in witchcraft, the present-day Louisiana lawyer finds it difficult to believe that lawyers and judges of my early days at the bar took these misconceptions seriously, implicating unnecessary procedural complexity and technicality upon mere mention of the term in tort litigation.

As Malone convincingly showed, these misconceptions essentially derived from the uncritical importation into Louisiana of *res ipsa* rules and concepts from the other (then) forty-seven common law American states, where the *res ipsa loquitur* doctrine's primary role was to enable the tort plaintiff (a) to survive a motion for directed verdict at the close of his case, and (b) at the close of the evidence, to get the negligence issue to the jury for its determination. In Louisiana, however, the invocation of *res ipsa* could play no such role. Jury trials were rare and did not then permit a directed verdict. Ordinarily, the trial judge made the decision on the merits, without the intervention of a jury, after all the evidence of both parties was taken.

Malone concluded that *res ipsa loquitur* does not implicate a different rule of pleading or substantive principle than ordinary tort law. Its proper use in Louisiana tort law and practice is ordinarily¹⁰ only to permit an inference of the defendant's negligence, without specific proof of it or its details—an inference that may arise from all the factual circumstances of the accident after all the evidence is in; the weight of the inference in the light of all the evidence may permit the trier of fact to conclude by a preponderance of the evidence that the defendant's negligence caused the accident. This permissible inference is not governed by any special rule and is no different in requirement than that applied to any other proof by inference. By invoking *res ipsa loquitur* principles to infer negligence, the tort plaintiff, who always bears the burden of ultimate persuasion in proof of his claim, simply "has the burden of satisfying

9. *Id.* (footnotes omitted).

10. *But see infra* text accompanying notes 37-61.

the court that the inference [of the defendant's negligence that] he wishes to see drawn is more plausible than any other inference that could arise."¹¹

II

Professor Malone's analysis as to the proper application of *res ipsa loquitur* in Louisiana tort cases received increasing acceptance in Louisiana tort decisions of the 1940's and 1950's, although vestiges of past misconceptions persisted in a small number of cases. It was not until the 1970's, however, that Louisiana courts finally accepted his perceptions as to the weight of the inference of negligence required for the plaintiff to prevail, *i.e.*, only that the defendant's negligence be shown to be the "more plausible" cause of the plaintiff's injury.

In 1942, not long after the publication of Malone's 1941 *res ipsa loquitur* article, the Louisiana Supreme Court, in denying recovery for a plaintiff, spoke to this issue.

It is the duty of the plaintiff to prove negligence affirmatively; and, while the inference allowed by the rule of *res ipsa loquitur* constitutes such proof, it is only where the circumstances leave no room for a different presumption that the rule applies. When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it can not be invoked.¹²

This formulation implies that the *res ipsa* inference of negligence does not apply unless the facts leave "no room" for a different presumption, and that the inference may be dispelled where the accident "might have happened" for another cause. It thus suggests that the defendant may defeat application of *res ipsa loquitur* in favor of the plaintiff if he can argue any other cause for the plaintiff's accident, whether or not the defendant's argument is as plausible an explanation for the occurrence as the defendant's negligence.

This formulation, although reiterated by citation, was gradually diluted in the succeeding jurisprudence before its final repudiation in the 1970's. This process can best be illustrated by describing two cases in which the writer participated as an appellate judge, one decided in 1956 and the other in 1972.

A

In *Larkin v. State Farm Mutual Automobile Insurance Co.*,¹³ at daylight a driver and his passenger were found drowned in an automobile

11. Malone, *supra* note 2, at 90.

12. *Morales v. Employers' Liab. Assurance Corp.*, 202 La. 755, 769, 12 So. 2d 804, 808 (1943).

13. 91 So. 2d 94 (La. App. 1st Cir. 1956), *rev'd*, 233 La. 544, 97 So. 2d 389 (1957).

upside down in a canal alongside the highway. No witness was found, but the time of the accident was fixed by the vehicle's occupants' stopped wristwatches at 2:30 *a.m.* The only other evidence as to the occurrence of the accident was the tracks of the vehicle, which indicated that the automobile had run off the concrete at the right hand shoulder and had travelled along that shoulder with all wheels off the pavement for a distance of 118 feet. The tracks were three to four inches deep on the right shoulder. The vehicle had reentered the paved portion of the highway and at a forty-five degree angle had skidded across the opposite shoulder, where it had flipped over into the canal.

The passenger's widow brought the action for wrongful death against the deceased driver's liability insurer. In granting recovery, the trial court invoked *res ipsa loquitur*, as established by a *prima facie* case of the driver's negligence, therefore calling upon the defendant to offer an explanation to overcome the presumption of the driver's negligence. No explanation being forthcoming, the widow recovered.

The Louisiana First Circuit Court of Appeal, on which the writer was then sitting, affirmed.¹⁴ Distinguishing decisions that had articulated some of the former technicalities of *res ipsa* cases,¹⁵ and relying heavily on Malone's 1941 *res ipsa* article, the court concluded:

A presumption (or probability) of negligence may be posed by the plaintiff's testimony either of the accident itself or of certain facts surrounding the accident, but in either event it is open to defendant to rebut same—that is, to present evidence as to facts from which it may be inferred or deduced that defendant's conduct cannot be considered the sole legal proximate cause of the accident in question. If defendant fails to do so, in either event, plaintiff has borne his burden of proving by a preponderance of the evidence that defendant's negligent conduct was the actionable cause of the injuries received.

For instance in this case, the tracks tell the entire story. Our common sense tells us that ordinarily a carefully driven automobile does not ride the shoulder of the road when conditions are such as this for a distance of one hundred and eighteen feet and then swerve off diagonally across the road and into a ditch. The most plausible explanation seems to be that the driver was going too fast or that he did not have his car under proper control. The tracks establish the probability of negligence, and this is all that the law requires in order to conclude that the plaintiff has made out his case. The plaintiff had to persuade; he succeeded in persuading. The tracks plus our common sense tell the whole story.

14. *Id.*

15. See *supra* text accompanying note 8.

The plaintiff has borne his burden of preponderantly proving defendant's actionable negligence¹⁶

The Louisiana Supreme Court reversed.¹⁷ Preliminarily, the court observed that the *res ipsa loquitur* "maxim means only that the facts of the occurrence warrant the inference of negligence, not that they compel [it]."¹⁸ The court also observed that the occasion and necessity for invoking the rule "is the lack of direct evidence indicating negligence on the part of the defendant as the responsible human cause of a particular accident."¹⁹ Sweeping away much of the technical brushwood that springs up around incantation of the phrase *res ipsa loquitur*,²⁰ the court summarized the proper use of the *res ipsa* principle:

It is generally conceded that *res ipsa loquitur* in no way modifies the rule that negligence will not be presumed. The application of the rule does not, therefore, dispense with the necessity that the plaintiff prove negligence, but is simply a step in the process of such proof, permitting the plaintiff, in a proper case, to place in the scales, along with proof of the accident and enough of the attending circumstances to invoke the rule, an inference of negligence, thereby obtaining an advantage and placing on the defendant the burden of going forward with proof to offset that advantage. When all the evidence is in, the question is still whether the preponderance is with the plaintiff.²¹

The court found that the instant facts did not permit an inference

16. 91 So. 2d at 98. As author of the opinion, I must confess the erroneous statement deleted at the end of the quotation in the text: "and it is incumbent upon defendant to rebut this presumption or conclusion in order to defeat recovery. The defendant failed to do so." *Id.* This statement, of course, represents a remnant of the former technicalities implicated by invocation of *res ipsa loquitur*, see *supra* text accompanying note 8, whereby it was frequently stated that the plaintiff's prima facie case of negligence required the defendant to rebut it, *i.e.*, that the *res ipsa loquitur* inference was not merely a factor to be weighed in the judgmental process, but that it somehow shifted the burden of persuasion to the defendant requiring him to produce rebuttal evidence.

This misconception resulted from the uncritical importation of the common law use of *res ipsa loquitur* (the common law explanation for the denial of a directed verdict), as well as from the undifferentiated use of a *res ipsa loquitur* principle applicable only in specialized circumstances whereby, equally described under the *res ipsa loquitur* label, the burden of persuasion or of liability was actually changed. See *infra* text accompanying notes 37-61.

17. 233 La. 544, 97 So. 2d 389 (1957).

18. 233 La. at 551, 97 So. 2d at 391.

19. 233 La. at 551, 97 So. 2d at 391.

20. See *supra* text accompanying note 8. Although the court did not cite Professor Malone's *res ipsa* article in support of the statement quoted in the text, the opinion is liberally sprinkled with citations to that article, and the summary of the use of *res ipsa loquitur* in ordinary tort litigation, quoted *infra* text accompanying note 21, was undoubtedly influenced by and is in accord with Malone's article.

21. 233 La. at 551-52, 97 So. 2d at 391. This summary is still valid in ordinary tort litigation. But see *infra* text accompanying notes 37-61.

that the driver's negligence was the cause of the accident. In doing so, the court relied partly upon its 1943 jurisprudential expression that *res ipsa* applies only where there is "no room" for a different presumption than the defendant's negligence,²² as well as upon prior Louisiana judicial interpretations²³ that it is improper to assume a driver's negligence when the accident "might have been caused by factors outside the control"²⁴ of the driver, or where "it is reasonable to assume that the actions of the defendant [driver] may have been caused by the negligence of another."²⁵

The supreme court's holding appears to be that application of *res ipsa loquitur* is defeated if the defendant can advance *any* reasonably possible explanation for the accident other than the defendant's negligence, without the court's determination whether it is *as* plausible an explanation as that of the defendant's negligence. In refusing to apply *res ipsa* to permit recovery, the court stated:

[T]here is nothing to show what caused [the driver's] car to leave the pavement; it may have been forced off the narrow highway by oncoming traffic, or by a skidding motorist alongside, and the fact of his having driven onto the adjoining shoulder does not of itself warrant an inference of negligence since it does not *exclude* other reasonable hypotheses consistent with proper driving on Swilley's part. It occurs to us that the very fact that all four wheels of the car were off the highway is a circumstance from which it would be fair to infer that a car approaching in Swilley's lane of traffic forced him completely off the pavement as an alternative to a collision.²⁶

Similarly, the supreme court rejected the court of appeal's inference of the driver's excessive speed and his lack of control, deduced by the length and depth of the skidmarks when his vehicle first went off the highway, by what the writer can view only as a far less likely hypothesis of causes that possibly could have been exculpatory of the driver's negligence.²⁷

22. *Morales v. Employers' Liab. Assurance Corp.*, 202 La. 755, 769, 12 So. 2d 804, 808 (1943). The quotation upon which it relied is stated *supra* text accompanying note 11.

23. *See, e.g., Dunaway v. Maroun*, 178 So. 710 (La. App. 2d Cir. 1937).

24. 233 La. at 553, 97 So. 2d at 392 (emphasis added).

25. 233 La. at 553, 97 So. 2d at 392 (emphasis added; footnote omitted).

26. 233 La. at 554-55, 97 So. 2d at 392-393 (emphasis added).

27. The supreme court stated:

Nor can we agree with our learned brothers of the Court of Appeal, who thought that the most plausible explanation of the car having traveled 118 feet on the shoulder then swerved diagonally across the road, was that the driver was going too fast or that he did not have his car under proper control. The record contains nothing to indicate the speed of the car, but a distance of 118 feet on the shoulder is not inconsistent with prudent driving—which dictates that when a car has left the paved highway it is better practice not to try to immediately regain the pave-

The supreme court's apparent holding in *Larkin*—that the inference of the defendant's negligence arising from the facts of the accident may be dispelled if the defendant shows *any* other reasonably possible explanation, whether or not as plausible as that of the defendant's negligence—is thus contrary to the thesis of Malone's *res ipsa* article. Under Malone's thesis, to meet the inference of his negligence, the defendant must show or prove an explanation of the accident at least *equally* plausible as that of his negligence. Consequently, whether, in the light of all the evidence, the inference of the defendant's negligence is sufficient to prove the plaintiff's case by a preponderance of the evidence—*i.e.*, whether the defendant's negligence more probably than not was the cause of the accident—²⁸is essentially a question of fact for the trier, as in the case of other proof by circumstantial evidence.

B

The difference between the *Larkin* and the Malone approaches is clearly highlighted in the 1972 opinions of the Louisiana Supreme Court in *Boudreaux v. American Insurance Co.*²⁹ The majority opinion on original hearing, essentially adopting the *Larkin* test, affirmed a denial by both trial court and court of appeal of the plaintiff's recovery, sought on the basis of *res ipsa* principles. On rehearing, the majority adopted the analysis first suggested in Louisiana by Malone's *res ipsa* article and reversed the denial of recovery.

Boudreaux was a suit by the surviving widow and children for the wrongful death of Edward Boudreaux. He died in his apartment in the early hours of the morning as a result of suffocation due to smoke inhalation, which had resulted from a fire originating in the kitchen of an adjacent restaurant shortly after it had closed. The evidence indicated that

ment, but to travel along the shoulder until it is felt safe to attempt to maneuver. [How about a prudent driver slowing or stopping on the shoulder?] The evidence does disclose that Swilley's tire tracts in the soft mud of the shoulder were three or four inches deep; he necessarily had to insure sufficient momentum to lift the car from the shoulder over the edge of the concrete slab so as to regain the pavement; a wheel may have locked with the edge, and the additional power applied to free the wheel may have caused the car to leap forward so that Swilley lost control— yet those acts cannot be branded as negligence since a prudent and careful driver would very possibly have acted in the same manner under like circumstances. No causal connection between the accident and some phase of negligent operation of the car has been shown, and it is our opinion that when all the facts are considered, this case is not one in which the doctrine of *res ipsa loquitur* is applicable. 233 La. at 555-56, 97 So. 2d at 393.

28. See, e.g., *Jordan v. Travelers Ins. Co.*, 257 La. 995, 1008, 245 So. 2d 151, 155 (1971) ("Whatever the descriptive term used, however, proof by direct or circumstantial evidence is sufficient to constitute a preponderance, when, taking the evidence as a whole, such proof shows that the fact or causation sought to be proved is more probable than not.").

29. 262 La. 721, 264 So. 2d 621 (1972).

a possible cause of the fire could have been an ignited piece of grease lodged in the negligently-uncleaned ductwork above the stoves of the establishment, although it was proved only that the fire *had* originated in this ductwork and was of such intensity when first discovered some fifty minutes after the restaurant's closing that it was already through the roof of this two-story building.

On original hearing the supreme court, in affirming the denial of recovery, denied application of *res ipsa loquitur*. The majority stated:

A review of this record does not reflect that the alleged negligence of defendant's insured excludes every other reasonable hypothesis as to the cause of the fire. [The restaurant owner] had knowledge of the physical arrangement of his kitchen; he had knowledge of the operation of the restaurant and bar; he had knowledge of the daily and nightly routine of his employees; he had no knowledge of the cause of the fire. We agree with the Court of Appeal that the fire *could* have started from a number of sources in the kitchen, but it would be illogical to infer that there was *no other reasonable cause* to which it could be ascribed (vandalism, carelessness of parties other than [the restaurant owner] and his employees, combustion, and sudden electrical malfunction are only a few that could be mentioned). We cannot say that under the facts proved at trial a reasonable and fair conclusion would be that the instant accident was due to an omission by [the restaurant owner] or his employees.³⁰

On rehearing, the supreme court reversed the denial of recovery. The court first pointed out:

[T]he circumstantial evidence requisite in civil negligence cases need not negate *all* other *possible* causes of injury, as the opinions of the previous courts seemed to hold. It suffices if the circumstantial proof excludes other reasonable hypotheses only with a fair amount of certainty, so that it be more probable than not that the harm was caused by the tortious conduct of the defendant. . . .

In this respect, the principle of "*res ipsa loquitur*" (the thing speaks for itself) sometimes comes into play as a rule of cir-

30. 262 La. at 743, 264 So. 2d at 628-29 (emphasis added). The majority went on to add:

Even if we were to admit, for the sake of argument, that *res ipsa loquitur* applied to this matter and that plaintiffs had placed in the scales proof of the accident and sufficient attending circumstances, we must find that the defendant under the present facts and circumstances exculpated itself from negligence. Petrossi and his employees proved that the cause of the fire was unknown: they proved that the operation of Charlie's Steak House was clean, painstaking, and considerate of danger.

262 La. at 743-44, 264 So. 2d at 629.

cumstantial evidence, whereby negligence is inferred on the part of a defendant because the facts indicate this to be the more probable cause of injury *in the absence of other as-plausible explanation* by witnesses found credible. . . . Thus, by this principle where properly applied, the circumstantial evidence indicates that the injury was caused by some negligence on the part of the defendant, without necessarily proving just what negligent act caused the injury.³¹

Applying these principles, the rehearing majority found that "the evidence as a whole shows that the defendant's insured's negligence was the most plausible or likely cause of the fire which caused the decedent's death"³² and that it could not "as reasonably ascribe any other cause."³³

The rehearing majority relied upon a number of facts³⁴ in concluding that "the evidence as a whole proves the most reasonable cause of the fire to have been the defendant's insured's negligence in leaving fire alive on his premises, which contained inflammable substances."³⁵ Unlike the original majority that had denied both *res ipsa loquitur* application and recovery, the rehearing majority permitted the *res ipsa* inference of negligence to arise in the absence of explanations as plausible as the defendant's negligence and also, unlike the original majority, did not require the plaintiff to pin point exactly what negligent act of the defendant had caused the fire. (The original majority, it may be recalled, had denied *res ipsa* application because of the reasonable *possibility* of cause by vandalism, third-party carelessness, or electrical malfunction, although the record was devoid of evidence that any such events had actually occurred.)³⁶

31. 262 La. at 762-63, 264 So. 2d at 636 (citations & footnotes omitted).

32. 262 La. at 765, 264 So. 2d at 636-37 (footnote omitted).

33. 262 La. at 765, 264 So. 2d at 637.

34. The court summarized these facts.

The fire was spread through half the building in a little more or less than an hour after the restaurant was closed tight for the night. (This indicated it must have burned for some time before it had flared to this extent.) No one other than the insured's employees is shown to have had access to these premises subsequent to the time the restaurant was closed. Prior to then, the insured's employees had exclusive control of the kitchen premises in which the fire originated. The kitchen was a large scale commercial enterprise, likely to accumulate hazardous quantities of grease and other highly combustible substances.

If all fire had been extinguished in the kitchen premises when the employees left, the evidence indicates no other cause for the fire's start: i.e., the conflagration was most reasonably caused by some fire (smoldering grease, or spark, or unextinguished flame fed by gas from the pilots) left alive in the premises when the employees locked up, for no other cause is even suggested by the evidence. Further, the evidence indicates that, if the extinguishing equipment worked as it should have, the fire could not have started or have spread so rapidly.

262 La. at 766, 264 So. 2d at 637.

35. 262 La. at 766-67, 264 So. 2d at 637.

36. See *supra* note 30. The rehearing majority did not attempt to determine the specific

The opinion on rehearing in *Boudreaux* in 1972 thus marked the triumph and the adoption by Louisiana courts of the conceptions Malone advanced in his *res ipsa* article. The proper use of *res ipsa loquitur* in ordinary tort suits is merely as a principle of circumstantial evidence which permits, but does not require, an inference of causal negligence, and which may suffice as preponderant proof of negligence if, as in all other tort cases, it is more probable than not that, in the light of all of the evidence, the defendant's negligence was the cause of the accident. The *Boudreaux* rehearing majority thus rejected the thesis that when *res ipsa loquitur* is invoked to permit proof of negligence by circumstantial inference, the case then becomes governed by an esoteric special *res ipsa* formula.

III

Nevertheless, beyond the circumstantial-evidence use of *res ipsa loquitur*, Louisiana courts have sometimes used a principle identically labelled as "*res ipsa loquitur*" to perform a more substantive function. In essence, whether by placing the burden upon the defendant to *prove* that he was *not* negligent or by in effect placing an irrebutable presumption of negligence upon him, in certain generic circumstances Louisiana courts have invoked *res ipsa* as a means of shifting the risk of loss caused by an accident from the victim to the defendant. In these situations, reasons essentially of social policy direct that innocent victims should be compensated, and that the defendants who set into motion the harming agencies should bear the losses occasioned by their activities, although in reality the accident occurred without demonstrable lack of ordinary care (*i.e.*, negligence) on the part of anyone.

Not the least of Malone's perceptions in his *res ipsa* article was his recognition of this different functional use in some circumstances of what Louisiana courts indistinguishably termed an application of *res ipsa loquitur*; not even the courts articulated that they were applying the doctrine differently. Thus each differentiation contributed to the occasional indiscriminate importation of principles from this specialized use of *res ipsa*³⁷ into the ordinary-tort, circumstantial-evidence context.

In the third portion of his article,³⁸ Malone discussed in detail the Louisiana courts' uses of *res ipsa loquitur* in four situations: those dealing with (1) dangerous substances and instruments, (2) food and drink, (3) injuries on business premises, and (4) traffic and transportation. He observed "that the purpose served by the doctrine varies with the subject

origin of the fire. It also pointed out that improper fire extinguishing equipment may have contributed to the start and rapid spread of the fire.

37. See *supra* note 16 (the writer as organ of the court in the intermediate decision in *Larkin* placed the burden upon the defendant to produce evidence to rebut the *res ipsa* presumption of his negligence).

38. Malone, *supra* note 2, at 95-106.

matter or activity with which the litigation is concerned.”³⁹ For purposes of the present discussion, the writer notes only that Malone’s research indicated that the Louisiana courts did not ordinarily utilize a *res ipsa* inference of negligence in the described third and fourth general categories,⁴⁰ that they unnecessarily employed it in the second category,⁴¹ but that they used it in a different sense in the first (hazardous substance or instrument) category. In the first category of cases, Malone concluded, *res ipsa loquitur* is nothing “more than a convenient gadget which assists the courts in hitching the standard of care up to top notch.”⁴²

With regard to injuries inflicted by electricity, complicated industrial machinery, and other highly dangerous substances, Malone noted that, although the use of *res ipsa* “is framed by the court in the language of negligence, the outcome reflects a virtual insurer’s liability”⁴³ and that “an inference of ‘negligence’ will readily be drawn from the bare occurrence of an accident resulting from the use of one of these dangerous agencies.”⁴⁴ As he explained,

the idea that a high degree of liability exists for injuries inflicted by such agencies permeates the decisions. The language of negligence is used, but the case is heavily weighted against the defendant. It is frequently stated that the more dangerous the instrumentality employed the more care required in its use and maintenance. It sometimes happens that after all reasonable precautions have been taken in carrying on an ultrahazardous activity there still remains a large but irreducible residue of danger. The attitude of most courts approaches the position that injuries resulting therefrom should be borne by the defendant, who chose to make use of the dangerous agency.⁴⁵

39. *Id.* at 95.

40. He noted two exceptions: As to business premises, a *res ipsa* presumption was permitted to apply if the injury was occasioned by a defect in the plan of the premises, the method of construction, or a condition of decay brought about by long neglect. *Id.* at 99. As to vehicle accidents, he found that the *res ipsa loquitur* presumption was applied with appreciable consistency in only one type of automobile accident: where a vehicle leaves the highway and strikes a pedestrian on the sidewalk or crashes into property adjoining the road. *Id.* at 101.

41. Malone pointed out that in Louisiana the manufacturer of food or drink for human consumption insures that its product is wholesome and free from deleterious substances; once it is shown that the substance is unwholesome, there is no need to prove negligence. *Id.* 97-98. The employment of *res ipsa loquitur* in this type of situation is not necessary, and the courts’ use of it “amounts to little more than window dressing in the opinion.” *Id.* at 99.

42. *Id.* at 97 (footnote omitted).

43. *Id.* at 96.

44. *Id.* (footnote omitted).

45. *Id.* at 95-96 (footnote omitted).

Thus, in this situation, Louisiana courts have not limited the use of *res ipsa loquitur* simply to supporting a logical inference that the defendant was negligent. Rather, in certain specialized legal and social areas, *res ipsa* is used to support a policy-based substantive principle that the defendant ordinarily should bear the loss occasioned by an accident resulting from the type of hazard he creates, whether or not the instrumentality attributable to him was used with all the ordinary care possible.⁴⁶ This unarticulated basis for the shifting of responsibility to the actor with regard to his hazardous substances or activities is thus not unlike the articulated reasons for strict liability under Louisiana Civil Code articles. When in 1975, in *Löescher v. Parr*,⁴⁷ the state supreme court interpreted Civil Code article 2317 in accord with its civilian sources to impose strict liability on the custodian of things that injure others—a development that common law lawyer Professor Malone thoroughly deplores⁴⁸—the court similarly summarized the principle of *fault* that imposed strict liability on a defendant in favor of an injured person who was himself without fault.

When harm results from the conduct or defect of a person or thing which creates an unreasonable risk of harm to others, a person legally responsible under these code articles for the supervision, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no personal negligent act or inattention on the former's part is proved. The liability arises from his legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injuries to others.

The *fault* of the person thus liable is based upon his failure to prevent the person or thing for whom he is responsible from causing such unreasonable risk of injury to others. Thus, the person to whom society allots the supervision, care, or guardianship (custody) of the risk-creating person or thing bears the loss

46. *Tassin v. Louisiana Power & Light Co.*, 250 La. 1016, 201 So. 2d 275 (1967) vividly illustrates this conclusion. The operator of an electrical power line was held liable by reason of *res ipsa loquitur* to a victim injured by an unexplained power surge. The supreme court affirmed the intermediate court's opinion to the same effect, *Tassin v. Louisiana Power & Light Co.*, 191 So. 2d 338 (La. App. 3d Cir. 1966), where the facts of want of negligence on the part of the power company are fully set forth in the dissenting opinion, *id.* at 342-46 (Hood, Savoy, JJ., dissenting), and are not essentially controverted by the majority, which stated that nevertheless the evidence presented by the power company was "insufficient to refute the inference that its negligence was not the most plausible explanation of the accident in view of the high duty of care that accompanies those who exercise exclusive control over dangerous instrumentalities such as electricity." *Id.* at 341.

47. 324 So. 2d. 441 (La. 1975).

48. See *supra* note 1.

resulting from the creation of the risk, rather than some innocent third person harmed as a consequence of his failure to prevent the risk. His fault rests upon his failure to prevent the risk-creating harm and upon his obligation to guard against the condition or activity (by the person or thing for which he is responsible) which creates the unreasonable risk of harm to others.⁴⁹

Even though Louisiana courts even today have expressly eschewed application of strict liability in hazardous-substance-or-activity cases, such as high-voltage electricity lines, the defendant in such cases is held to a duty "to exercise the utmost care to reduce hazards to life as far as practicable."⁵⁰ Such a defendant, despite his precautions that might usually be considered ordinary care, may be held liable because of "the greater options, the greater knowledge, the direct control over the source of injury"⁵¹ by which the defendant "should have taken other proper and reasonable precautions to prevent injury."⁵²

Similarly, even before the Louisiana courts in late 1974, based on codal principles, imposed strict liability on the part of the owner of an animal for harm it caused,⁵³ the courts had placed a virtually impossible burden of explanation upon the owner of cattle that had escaped onto the highway in a fence-law area and had caused injury to an oncoming motorist. In order to escape liability, the owner was required to prove facts that established "his complete freedom from any negligence of even the slightest degree."⁵⁴ The exculpatory evidence could not consist of "a general showing of fences in good condition,"⁵⁵ but was required also to show "how the animal escaped in order to overcome the presumption of negligence and to prove freedom from fault in the slightest degree."⁵⁶ It might be noted that the required evidence, to be exculpatory, could consist only of superseding fault on the part of a third person or of an irresistible force (act of God), the same defenses that, in addition to fault of the victim, would exculpate from liability a defendant responsible under strict-liability principles.⁵⁷

The heavy burden of exculpatory explanation placed upon a fence-law cattle owner, however, was not couched in terms of an application

49. 324 So. 2d at 446.

50. *Hebert v. Gulf States Util. Co.*, 426 So. 2d 111, 114 (La. 1983).

51. *Id.* at 116.

52. *Id.*

53. *Holland v. Buckley*, 305 So. 2d 113 (La. 1974); *see also* *Rozell v. Louisiana Animal Breeders Coop.*, 434 So. 2d 404 (La. 1983).

54. *Womack v. Rhymes*, 300 So. 2d 226, 229 (La. App. 2d Cir.), *cert. denied*, 303 So. 2d 179 (La. 1974).

55. *Id.* at 231.

56. *Id.*

57. *Loescher*, 324 So. 2d at 447.

of *res ipsa loquitur*. Rather, the courts imposed the burden by way of judge-created methodology designed to effectuate the legislative policy of the fence-law enactments (prohibiting cattle from being loose on highways in certain areas, with the legislative intent of preventing injury to traveling motorists).

In other particularized situations, Louisiana courts, without expressly invoking *res ipsa loquitur*, have imposed rules of explanation or burdens upon an actor who causes harm to an innocent victim, with the effect of shifting liability to the actor. These judge-created rules or burdens are similarly designed to effectuate legislative or social values which direct that the loss be borne by the actor, not the victim. One such instance, for example, is the jurisprudentially developed rule that, when a car on the wrong side of the road collides with another car in the correct lane of traffic, the driver of the car on the wrong side is required to exculpate himself of any fault, however slight, that contributed to the accident. Even if he proves his trespass onto the wrong side of the highway was due to a sudden emergency presented by a third person's negligent obstruction of his path, he is not exculpated from negligence. Thus, presumably, he should have wrecked by going into the ditch on his side, instead of endangering oncoming traffic by crossing the center line.⁵⁸

The particularized use of *res ipsa*, in the loss-shifting sense of which Malone spoke, stems, in the writer's view, from the same reasons that have motivated the particularized rules to shift liability, and that likewise motivated the Louisiana courts' return to the strict-liability principles of the Civil Code articles,⁵⁹ strict liability in food cases,⁶⁰ and the present *prima facie* presumption of the storekeeper's negligence. The presumption applies in favor of a customer in a store who slips and falls because of an obstruction in the aisle that *may* have been placed there by another customer and not the storekeeper himself, requiring the storekeeper to exculpate himself from negligence, a most difficult if not impossible burden for him to carry.⁶¹

58. *Rizley v. Cutrer*, 232 La. 655, 95 So. 2d 139 (1957); *Noland v. Liberty Mut. Ins. Co.*, 232 La. 569, 94 So. 2d 671 (1957); *see also* *Simon v. Ford Motor Co.*, 282 So. 2d 126 (La. 1973).

59. *See supra* text accompanying note 49.

60. *See supra* note 41.

61. Malone's *res ipsa* article had adverted to the possibility that *res ipsa loquitur* might be applicable to this type of situation, but found the jurisprudence incapable of formulation concerning this issue. Malone, *supra* note 2, at 90-91. For a discussion of the course of the subsequent Louisiana jurisprudence, *see* Note, *The Game's Afoot: The Storekeeper's Heightened Responsibility for Slip and Fall Accidents*, 37 LA. L. REV. 634 (1977). The state supreme court eventually in the mid-1970's resolved conflicts between the intermediate courts in favor of the heightened responsibility of the storekeeper noted in the text, although its explanation of the defendant storekeeper's exculpatory burden does not rely specifically upon the *res ipsa loquitur* terminology. *Gonzales v. Winn-Dixie Louisiana, Inc.*, 326 So. 2d 486 (La. 1976); *Kavlich v. Kramer*, 315 So. 2d 282 (La. 1975).

These loss-shifting mechanisms all stem from a conscious or unconscious judicial recognition that in an industrialized, crowded, highly interdependent, and machinery-hazardous society some harms must result to innocent bystanders as an incident of society, irrespective of personal fault by anyone. Therefore, in fairness such harm to an individual—a social cost and a risk shared by all who live in twentieth-century society—should be borne by society at large, not solely by the innocent victim. The conscious or unconscious judicial response has been to devise rules, at least in specialized instances where otherwise great unfairness is perceived, that will tend to fix the loss upon the actor who creates or maintains the hazard, through whom the loss will be passed to and shared by society at large, by such mechanisms as prices to consumers or insurance premiums charged to the class of ratepayers afforded liability coverage for the hazard.

Conclusion

Wex Malone's 1941 *res ipsa* article is an illustration of how his perceptions and evaluations of Louisiana decisional interpretations overwhelmingly shaped, on this particular issue, as well as on many other issues, the subsequent revision, development, and growth of Louisiana tort law. In a real sense, the Louisiana tort law of the latter half of this century owes its governing conceptions and doctrines to Malone's teaching, principally imparted by his writings, but also by the influence of his personal inspiration of hundreds of students who subsequently in practice, on the bench, or in the legislature, put into practical effect his prescient perceptions of what in wisdom and fairness the law should be.