Res Ipsa Loquitur and Proof by Inference -- A Discussion of the Louisiana Cases

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WEX S. MALONE*

I

One day during the closing year of the last century Mrs. Maus was driving her dairy wagon along Saint Charles Avenue in New Orleans, proceeding toward Second Street. At this moment a "vicious and strong-bodied" horse belonging to one Broderick raced down the street unattended, pulling a heavy vehicle. It crashed into the dairy wagon and upset it, throwing Mrs. Maus onto the "hard unyielding asphalt pavement" of Saint Charles Avenue. Mrs. Maus was unable to learn how the horse happened to be at large without a driver. She knew only the circumstances surrounding the collision and the name of the animal's owner. When Broderick was sued for the damage inflicted he either could not explain or did not care to do so. He argued that Mrs. Maus should not be allowed to recover unless she could show that the horse was at large through his negligence. Mrs. Maus prevailed, and was awarded substantial damages.  

The case was not a difficult one for the court despite the fact that no statute or city ordinance condemning the defendant's conduct was produced. The situation required only the application of simple ideas of circumstantial evidence. Observation and experience confirm the conclusion that carefully tended horseflesh does not gallivant through the streets of New Orleans without an escort. Negligence, therefore, was the most plausible explanation of the occurrence, and this inference the court was prepared to draw unless a better explanation were forthcoming. There was no talk of presumptions supplying the place of missing evidence, and no discussion of res ipsa loquitur. The case was decided on actual testimony which convinced the court of the correctness of Mrs. Maus' contention that Broderick was negligent. True, past observations and common experience were

* Assistant Professor of Law, Louisiana State University.
brought into play to complete the picture; but this is always the case where facts must be translated into a judgment involving a standard of conduct.

Most negligence cases are decided largely upon circumstantial evidence. Naked evidentiary facts are meaningless until they have acquired significance by being correlated with other portions of human experience. The use of deductions and inferences is the usual, not the unusual, process in passing judgment on negligence cases. Sometimes the conclusion that the defendant was careless is inferred directly from the existence of some fact or group of facts presented by the evidence; the given fact serves as the immediate datum from which the final conclusion is drawn. When this happens, the given fact is usually regarded as direct evidence, although even here an inference must be made if the fact is to be of any legal importance. At other times one fact is inferred from the existence of some other independent fact offered by the evidence. This inferred fact in turn serves as a basis for the drawing of further inferences. When a double inference of this type is necessary, the given fact is regarded as circumstantial evidence.

Often the process is so complex as to defy analysis, and it is virtually impossible to determine whether the given fact gives rise merely to an inference of some other fact, or whether it affords immediate datum for an inference of negligence. The distinction between direct and circumstantial evidence is by no means a clear one. For example, in Mrs. Maus’ case the proved fact was that Broderick’s horse was unattended on Saint Charles Avenue. Did the court infer from this that some other independent but undisclosed fact probably existed—that Broderick allowed the horse to remain alone while he delivered a package, or that he maintained a defective fence around his pasture, or left the barn door open? Any one or combination of these inferred facts might serve as data from which the further inference of negligence could be made. On the other hand, however, it is equally probable that the court adopted the homely attack of proceeding directly from the proved fact of the accident to the final conclusion that the defendant was negligent: Carefully tended horses do not run at large in city streets. For practical purposes it matters little what mental operations took place. In either event the result reached reflects a wide use of inferences, and probably satisfies most of us.
Circumstantial evidence is normally dealt with in almost precisely the same way as direct evidence. At times, however, the proper inference to be drawn from a given fact or fact group is not as obvious as at others. The disclosures of common experience are not always equally lucid. Competing inferences, any one of which is as plausible as another, present themselves, and the choice of conclusions may prove to be a vexatious matter for the trier.

It also may be noted that the importance of the inference in arriving at the final judgment will vary from case to case. In one case, an inference may be enlisted only to corroborate or bolster an otherwise fairly plausible conclusion, or it may be used only in the solution of a fraction of the problem. In other cases, such as Mrs. Maus', the outcome of the litigation will depend entirely upon the inference to be drawn.

As the inference becomes increasingly attenuated and less surely supported by the stock of common experience, and further, as its importance to the final outcome becomes increasingly obvious, there arises a need for a special technique in handling it. Thus, there comes into being new language equipment, and we find the court employing such terms as *presumption*, and *res ipsa loquitur*, which lend themselves satisfactorily to this purpose. In this way the use of inferences becomes indoctrinated, hemmed in by technical reservations and procedures which invade even the province of paper pleadings. As a result, litigation that depends largely upon inferential proof tends to be regarded as sui generis. Courts speak of *res ipsa loquitur* cases as though they involve novel elements not found in ordinary litigation, and plaintiff lawyers seek to invoke the doctrine because they believe that it gains for them certain procedural advantages not otherwise available.

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. Shorn of its classical garb, the phrase means

2. See p. 83, infra.
3. Carpenter, The Doctrine of Res Ipsa Loquitur (1933) 1 U. of Chi. L.
simply that the thing—the accident—speaks for itself; it is datum from which the trier may infer negligence.

The mere statement of the doctrine immediately gives rise to new questions: Is the trier to infer negligence from the occurrence of any and all accidents? If not, how is it to be determined which accidents “speak for themselves”? Can the situations be classified according to some prearranged scheme, or is the court free to employ its own discretion in the matter? Does the doctrine create new rules of law to be substituted for the normal business of weighing inferences according to their logical probabilities, or does it merely remind the trier that he is free to treat the occurrence of an accident like any other pregnant fact and to infer negligence when his sound judgment so dictates?

The term “accident”—the res in res ipsa loquitur—is one of very uncertain meaning. To return again to Mrs. Maus and her dairy wagon: What was the accident in that case? Was it only her fall onto the “hard unyielding asphalt”? Or was it the overturning of the milk wagon; or the striking of the milk wagon by another horse; or, perhaps, the striking of the milk wagon by a horse which at the time was unattended upon a city street? In this sense of the word at least, the res certainly does not ipsa loquitur even to the extent of identifying itself. “Accident” is employed as a word of art which can be restricted to the bare occurrence of the injury, or can fan out to embrace a wide variety of circumstances susceptible to direct proof. The court, without any undue straining at the leash, might well have included all Mrs. Maus’ testimony within the conception of “accident,” stated that res ipsa loquitur applied and then proceeded to render precisely the same judgment that it in fact pronounced without the doctrine’s assistance.4

It is clear that the term “accident” means more than merely that a fall was encountered or a blow was given. Sometimes we find the phrase, “the accident together with all the attending circumstances.” Usually the court in determining whether or not

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5. See the comment of Professor Cowan on Loprestie v. Roy Motors, Inc., 191 La. 289, 155 So. 11 (1934) in The Work of the Supreme Court for the
the doctrine is applicable requires a showing of the same nature that would be required in any case of circumstantial evidence in order to warrant a logical inference of negligence based upon the trier's own sense of probabilities.\(^6\)

It is Hornbook law that in order to recover for an injury inflicted by the negligence of another, the plaintiff must show that a duty to use reasonable care was owed to him by the defendant at the time of the injury.\(^7\) If the accident is to speak effectively for itself, it must indicate that there was such a duty. Its existence will usually be established by expanding the zone of circumstances surrounding the accident—as where a plaintiff alleges that he was a passenger in an elevator on the defendant's premises which at the time were open to the public, and that the elevator fell, causing the injuries complained of. Sometimes supplemental proof is required, particularly if the injury occurred on premises open only to a limited group of persons. A plaintiff, for example, would not be allowed recovery for injuries inflicted by a collapsing water tank merely upon showing that he was standing underneath the tank on the defendant's railroad premises when, for reasons unknown to him, the hoops encircling the tank gave way, causing the structure to collapse and fall upon him.\(^8\) Although the accident may give rise to a natural inference of negligence, it affords no indication as to the status of the plaintiff—who may have been either a business guest, a licensee, or a trespasser.\(^9\)

It is also axiomatic that the plaintiff must satisfy the trier that a causal connection exists between the defendant's negligence and the injury. In the usual res ipsa loquitur case the issues of negligence and causation either merge completely or at least are closely intervolved. The inquiry is often a single one: Should the accident be attributed to inferred negligence on the part of the defendant, or is it more plausibly accounted for by reference to some independent factor or factors? Once the responsibility

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\(^6\) In the following cases this idea was particularly stressed: Boudreaux v. Louisiana Power & Light Co., 16 La. App. 664, 135 So. 90 (1931); Bruchis v. Victory Oil Co., 179 La. 242, 153 So. 828 (1934); Davis v. Hines, 154 La. 511, 97 So. 794 (1923).

\(^7\) 2 A.L.I., Restatement of the Law of Torts (1934) § 281(a), (b); Prosser, Handbook of the Law of Torts (1941) 175-190, §§ 30-31.


\(^9\) See also Vargas v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (1930) (licensee observing operations in a bottling plant injured when bottle exploded. Semble, application of doctrine refused.)
is placed upon circumstances within the defendant's control, the inference of negligence usually follows.

There is, however, an additional preliminary showing of causation that the plaintiff must make by positive evidence. He must convince the trier that the injury for which he seeks compensation was caused by the accident complained of. For example, the body of a deceased person is found underneath a bridge into the side of which the defendant's car had crashed after weaving across the highway. If the deceased was struck by the car or was jolted from the bridge by the impact, the inference of negligence can be drawn from the occurrence of the accident; but the doctrine will be of no avail to the deceased's representatives until they have convinced the trier by direct or circumstantial evidence that the injury was caused by the accident.10

The doctrine of res ipsa loquitur clearly does not apply indiscriminately to any and all accidents, even if it is demonstrated both that the defendant owed a duty to the plaintiff and that the plaintiff's injury resulted from the occurrence. The statement that the accident speaks for itself is a misleading figure of speech. Most accidents tell us only that there has been a mishap; they afford no indication as to where the responsibility should be placed. An accident may be the product of the negligence of either of the parties, the negligence of them both, or the negligence of neither of them. Furthermore, it may have been entirely unavoidable, or it may have followed from the carelessness of some third person or persons. Usually there is no natural inference one way or the other, and the plaintiff desiring to shift the loss onto the shoulders of the defendant must assume the burden of establishing the latter's fault by satisfactory proof.

It is commonly stated that two conditions must be met be-

10. Wolfe v. Baumer Food Products Co., 171 So. 155 (La. App. 1936). See also Smart v. Southern Advance Bag & Paper Co., 174 So. 206 (La. App. 1937), where plaintiff received a blow on the head while he was a business guest on defendant's premises, resulting in partial paralysis and loss of memory. It is claimed that he was struck by a descending elevator while standing in the shaft. The court declined to adopt this version of the accident and refused to apply the doctrine. Cf. Jones v. Southern Kraft Corp., 160 So. 147 (La. App. 1935).

Hearsey v. New Orleans, 192 So. 148 (La. App. 1940), affords an interesting illustration of the above remarks. The plaintiff suffered considerable damage to her property by reason, she claims, of the use of paving breakers and other equipment in the construction of a New Orleans sewer, and which is alleged to have caused a subsidence of the soil supporting her premises. The court refused to accept this explanation in the absence of expert testimony. Soil subsidence, the court observed, is natural in New Orleans.
fore the doctrine can apply. First, the accident must be one that ordinarily would not occur in the absence of negligence. This, of course, is merely a restatement of a fact observed earlier with respect to all cases that depend upon inferential proof. The inference drawn must always be plausible. If it is far-fetched or is accompanied by a large number of competing inferences, it should be rejected.

Let it be supposed that a soft drink bottle falls from the ledge of a balcony in a movie theater onto the head of a patron below. Should negligence on the part of the management be inferred from the occurrence of this mischance? Is the accident one which would not normally happen in the absence of negligence? To answer this question the trier will enlist many observations drawn from his personal experience, together with a review of several independent principles of law. There is the darkened condition of the theater—a condition that invites an indeterminate number of perils and one which is created by the management as a regular state of affairs in the conduct of its business. If the management is to be allowed to utilize darkness for commercial profit, it may be that it should answer for any accidents the possibility of whose occurrence is substantially enhanced by darkness. This is a matter of policy that will commend itself in different degrees to different triers. There is the further fact that the defendant has enlarged his profit-making capacity by installing two tiers or levels for patrons. This creates new hazards, such as falling objects or collapsing balconies, and may suggest to some judges or jurors that a higher degree of responsibility should be imposed upon the management. Also, the seriousness of the injury to be anticipated will figure in the final conclusion. These and other considerations may likely prompt the trier to feel that the management should have anticipated that a bottle or some similar object might very probably fall from the balcony onto a patron below.

A second inquiry follows. What means were available to the defendant to minimize the likelihood that such an accident would occur, and which of the various duties that might prevent the

misfortune is the trier willing to impose upon him? It may well be that in view of the danger involved, attendants present at the entrance to the theater should have been required to prohibit patrons from taking soft drinks in bottles to the balcony; or perhaps the management failed to so construct the balustrade as to discourage its use as a shelf for dangerous objects. The possibilities of minimizing the foreseeable peril were many.

Whether or not any or all of the preventatives at hand were resorted to is not known. Without effort, however, the trier will likely envisage the defendant, doing or failing to do, as a prominent feature of each hypothesis that could explain the accident. Other hypotheses not involving the defendant are available, of course, but those in which the latter's conduct looms prominently are the more obvious.

The extent in law of the defendant's duty to the plaintiff is certain to play an important role in determining whether or not the accident is one which would not ordinarily happen in the absence of negligence. The term negligence is a convenient but elusive concept that is susceptible of infinite shades of meaning. In some cases it permits a large interplay of judicial discretion, while in others it is as biting as the law of nuisance or absolute liability. The duty of "reasonable care" owed by a theater owner to his patrons is in reality a very exacting requirement. The fact that the management induces the public at large to enter a dark place, that it does not discriminate among those who present themselves with tickets, that the conditions of safety are largely within the exclusive control of the defendant—all these factors make for only spare sympathy with the management of the movie theater. His position has been regarded by the supreme court as analogous to that of the common carrier of passengers,13

13. Bentz v. Saenger-Ehrlich Enterprises, Inc., 197 So. 659, 661 (La. App. 1940): "This duty [of due care by theater operators], while not on all-fours with that of a common carrier, is somewhat similar in character. As regards the liability of a common carrier, it is only necessary to make out a prima facie case, that the injured passenger prove the contract of carriage, the accident and the injury. He need not prove the cause of the injury or damage, whereas a patron of a picture show, injured by accident therein, is required in order to establish a prima facie case for damages, to prove that he was a patron, that there was an accident with consequent injury and the cause of the accident. Slight evidence is sufficient to meet the burden of proof. If the cause of the accident is ascribable to a defect as such (in legal contemplation) in building or equipment, of which the owner or operator has or should have had knowledge, an action in damages will lie; and when the injured patron has made out a prima facie case, of course, it then devolves upon the sued owner or operator to exculpate himself from the inference of negligence arising therefrom if he would escape an adverse
who must always undertake affirmatively to exonerate himself from blame.\(^1\) He is not an insurer of the safety of his patrons—but he is the next thing to it. Since liability attaches more frequently in this relationship than in many others, the inference of negligence becomes all the easier to draw. As the precautions that the defendant must take to avoid injury increase there is a proportionate increase in the number of available hypotheses involving his carelessness.

From the above observations it is not difficult to conclude that the accident of the falling bottle “speaks for itself” and leads to an easy inference of negligence. In truth, the falling of the bottle tells only a small part of the story. It is rather the place of the accident and the relationship of the parties that sets into motion the train of inferences that convince the trier that negligence by the management is the most plausible explanation—nothing else appearing.

This is at once apparent if the setting of the occurrence be altered. Let it be supposed, for example, that an empty soft drink bottle drops from the counter of a concessionaire in a crowded office building lobby onto the foot of a patron who is standing nearby.\(^5\) Here an entire new set of inferences arises and new rules of law are brought into play. The possibility that someone will be injured if a bottle should drop from the counter to the floor is comparatively small, and the demands of the occasion on the proprietor are correspondingly less exacting. The placing of soft drink bottles on a convenient counter is a much more acceptable practice than the placing of them upon a theater balustrade, and we are not prepared to say that the proprietor must see to it that they are not put there. Perhaps allowing bottles to remain on the counter for a considerable period of time extends the trivial peril to such an extent that the recognized danger demands action on the part of the proprietor; but we cannot infer from the falling of the bottle that it had previously rested upon the counter for any particular length of time.\(^6\) The competing inference that some customer had immediately or shortly thereto-

\(^{14}\) See cases cited note 89, infra.


fore set down the bottle at the spot from which it fell cannot so lightly be brushed aside. Add to this the difference in the relationships obtaining in the two situations described—the crowded space facilities available for the operation of the concessionaire's business, the transient nature of the picture, and the constant interjection of independent human agencies upon the scene—and the difference in the inference of negligence or no negligence to be drawn here as compared with the theater situation is fairly obvious.\(^1\)

In determining whether an inference of negligence may properly be drawn from the occurrence of a given accident, the trier's sense of drama will likely play a dominant role. Novel and dramatic situations, which interrupt the usual current of events, are easily attributed to unusual, and hence possibly negligent conduct. A properly attended horse, for example, is not likely to leap over the hood of a motor truck and ensconce himself in the cab.\(^2\)

The Mississippi Supreme Court appropriately observed, "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."\(^3\)

This aspect of res ipsa loquitur is exemplified in many Louisiana cases. The doctrine has been unhesitatingly applied where an automobile leaves the highway and crashes into abutting structures or injures pedestrians upon the sidewalk,\(^4\) or a street car leaves the track and enters the plaintiff's restaurant uninvited.\(^5\)

As the dramatic element features more and more prominently in the picture, the courts show themselves correspondingly more willing to accept negligence as the most plausible explanation and require increasingly more detailed and convincing evidence in rebuttal, until finally a point may be reached where the accident fairly screams of negligence and the defendant is treated virtually as an insurer.\(^6\)

\(^1\) It is interesting to compare other instances of injuries by falling objects. Davis v. Hines, 154 La. 511, 97 So. 794 (1923) (sack falling from pile onto employee; doctrine denied); Ramon v. Feitel House Wrecking Co., 17 La. App. 193, 134 So. 426 (1931) (debris falling onto passerby during course of demolition of a building; doctrine applied); Pizzitola v. Letellier Transfer Co., Inc., 167 So. 158 (La. App. 1938) (bail of paper falling from moving truck onto pedestrian; doctrine applied).


\(^3\) Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 500, 78 So. 365, 366 (1919).


\(^5\) See, for example, the extraordinary case of the unfortunate dentist: Wolfe v. Feldman, 158 Misc. 656, 286 N.Y. Supp. 118 (1936).
A second requirement in the application of the doctrine relates to the extent to which the defendant participated at the scene of the accident. It is commonly said that res ipsa loquitur is not available unless it is shown that the defendant was in exclusive control of the agency that caused the injury. The purpose of this requirement is to limit sharply the number of inferences not connected with the defendant's conduct which might be drawn from the occurrence of the accident. If it is accepted merely as a guide for the trier, and not as an arbitrary prerequisite to the doctrine's use, this requirement is unobjectionable and perhaps even helpful.

In connection with the above, it has been previously suggested that the issues of causation and negligence are usually inextricably associated in res ipsa loquitur. Very often the determination of negligence or no negligence is not so much a matter of passing judgment upon the quality of the defendant's conduct as of seeking to elicit all hypotheses that point the finger of responsibility toward or away from him. If the injury can be attributed solely to the defendant's conduct, the inference that accidents do not usually happen in the absence of carelessness will normally warrant calling upon the defendant to explain.

The term "exclusive control" or "exclusive possession" when used in connection with res ipsa loquitur should be accepted cautiously. Of course, if at the time of the accident the defendant or his representative was in physical possession of the agency that gave rise to the injury there is a much greater likelihood that negligence is properly inferable than if he were not. But "possession," as ordinarily understood, is an artificial conception existing largely in contemplation of law only. It follows that it cannot always serve adequately as datum from which a logical inference of fact can be drawn. Where bailed goods, for example, are destroyed by a general fire of unexplained origin on the


25. Shartel, The Meanings of Possession (1932) 16 Minn. L. Rev. 611; Readings on Personal Property (1938) 130.
bailee's premises, no inference of negligence arises despite the unusualness of the occurrence and the fact that the bailee is commonly regarded as being in exclusive possession and control of both the premises and the goods.26 The fact remains that the defendant's situation with respect to the occurrence was not such as to exclude a large number of inferences as to the cause of the fire—all pointing away from responsibility on his part. The peril of fire from almost unlimited sources is too omnipresent to permit of such free conjecture.

If it be shown, however, that the bailed property was an automobile in the defendant's garage, and that it was destroyed by fire which originated at a time when the defendant or his employee was actively at work upon the car, and further, if it appears that the flame was restricted in area to the immediate vicinity of the vehicle itself—the doctrine might properly be applied.27 The narrow area of the conflagration excludes many inferences which otherwise would present themselves, and the defendant's close physical relationship to the vehicle serves to subordinate still other explanations as to how the fire might have arisen. In short, the requirement of physical control by the defendant appears to mean no more than that the defendant's situation with respect to the accident must be such as to leave little room for competing inferences with respect to the cause of the mishap.

Res ipsa loquitur has been applied repeatedly to situations in which the defendant was far removed from the scene of the accident and had completely relinquished control of the agency that gave rise to the injury. A common illustration is afforded by the myriad of cases involving deleterious substances in soft drinks. The presence of snakes or spiders and other insects in a supposedly refreshing bottled beverage nearly always shouts lustily of the bottler's negligence.28 The sealed cap on the bottle effectively excludes all probability of intervention by outside agencies.

26. The usual procedure in such cases is for the bailor to show that the goods were not returned on demand or that they were returned in damaged condition. It is then incumbent upon the bailee to establish the use of due and reasonable care. McDonald v. Badie, 198 So. 545 (La. App. 1940). If, however, the bailee shows that the goods were destroyed by fire, the plaintiff must show affirmatively that the fire was the result of defendant's negligence. Scott v. Sample, 148 La. 627, 87 So. 478 (1921); Austin v. Heath, 168 La. 605, 122 So. 865 (1929). The cases are collected in Notes (1920) 9 A.L.R. 559, (1931) 71 A.L.R. 767.


28. See p. 98, infra, notes 75 and 76.
The fact that the accident gives rise to several inferences, each of which suggests a different cause of the occurrence, is of little importance so long as they all involve the defendant’s participation. This may be true even though the injury-producing agency is outside the defendant’s control. In Motor Sales and Service, Incorporated v. Grasselli Chemical Company the defendant chemical company capped a drum of acid and delivered it to an independent drayman for carriage. While the latter was transporting it by truck the cap blew off and acid was spouted upon the plaintiff’s car. This mishap might be attributed to a defective cap or careless capping, or to negligence in the transportation, or to both. The chemical company, although not responsible for the negligence of the independent drayman, nevertheless was a purveyor of a dangerous substance and consequently under an obligation to prepare the drum in such manner that it would withstand all jolts that might reasonably be expected during the course of transportation—including even many which might result from negligence. Although the evidence in the case did not exonerate the drayman of all imputations of carelessness, it was clear that there was nothing in the manner of carriage so unusual that it could not have been anticipated in advance by the defendant. The supreme court applied res ipsa loquitur.

The Grasselli Chemical Company case affords an excellent illustration of the difficulty experienced in any attempt to distinguish a case of res ipsa loquitur from other instances of proof by inference. The plaintiff introduced detailed evidence discrediting the possibility that the mishap was due to unusual conduct on the part of the drayman. The cap which had been dislodged by the explosion was presented in evidence, together with the testimony of witnesses who had observed the truck immediately preceding the occurrence. Apparently the accident was allowed to speak its piece only after everyone else had spoken.

How much detailed evidence of this nature may be presented before the case loses its qualifications for res ipsa loquitur? This question is of merely academic importance if res ipsa loquitur is only a species of proof by inference. Each new item of evidence

29. See Horrell v. Gulf & Valley Cotton Oil Co., Inc., 15 La. App. 603, 131 So. 709 (1930), where the court found three possible independent causes, any of which might have been responsible for the accident; res ipsa loquitur was applied.
30. 15 La. App. 353, 131 So. 623 (1930), noted in (1931) 4 So. Calif. L. Rev. 400. See Professor Carpenter’s comment on this case: Carpenter, supra note 3, at 530.
pointing the finger of suspicion toward the defendant would strengthen the plaintiff's case just that much.

If, on the other hand, the res ipsa loquitur case is a unique piece of litigation involving new elements and conferring novel advantages upon the plaintiff, the attorney will do well to observe its limitations and refrain from proving more than the doctrine admits of. He will confine his pleadings to the "theory" of the doctrine and will establish in evidence only the bare skeleton of his case lest he transcend the limits of res ipsa loquitur and find himself deprived of its special privileges.31

II

There is considerable evidence from the cases that the res ipsa loquitur situation is regarded as a law unto itself; that it differs in kind from the usual suit for damages occasioned by negligence. The following statements in support of this view have appeared in opinions of the Louisiana courts:

(1) When res ipsa loquitur applies, the defendant must sustain the burden of proving that he was free of negligence.32

(2) The plaintiff who alleges specific acts or omissions which he claims amount to negligence loses the "benefit" of the doctrine.33

(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.34

It can be said at the outset that all three of these propositions have at one time or another been denied by the Louisiana courts, and on numerous other occasions they have been diluted with apologia and qualifying statements, or ignored without comment. As a result, their proper place in the Louisiana law is problematical.

31. The following quotation from the opinion in Harrelson v. McCook, 198 So. 532, 533 (La. App. 1940), affords a somewhat amazing instance of the uneasiness with which res ipsa loquitur is regarded in practice:

"Plaintiff did not specifically charge that the action of the car in leaving the highway and turning over was attributable to the negligence of McCook. The petition, on this score, is conspicuously silent. . . . The omission of allegations of negligence was not due to inadvertence. Plaintiff's theory is that the facts of the case, so far as known to him and as reflected from his petition, warrant the application of the res ipsa loquitur rule." See also, Aden v. Allen, 3 So. (2d) 907, 909 (La. 1941).
32. Discussed infra p. 84 et seq.
33. Discussed infra p. 91 et seq.
34. Discussed infra p. 94 et seq.
RES IPSA LOQUITUR AND THE BURDEN OF PROOF

The statement that the doctrine of res ipsa loquitur shifts the burden of proof to the defendant was borrowed by the Louisiana courts from the common law and has been used indiscriminately under Louisiana rules of practice and procedure without inquiry as to whether or not it is adaptable to the local method of trial. Yet res ipsa loquitur is a creature of the judge-jury set-up of the common law, and, like most of the theories, rules, and doctrines of that system it can be understood only by reference to the common law machinery that administers torts controversies. This observation is particularly appropriate where matters affecting presumptions and the burden of proof are concerned. For that reason, we may venture a brief excursus into the traditional procedure of trial at common law as compared with the Louisiana practice in similar controversies.

The fact that judgment at common law is passed through the joint efforts of a judge and a jury has profoundly influenced both the form and content of the myriad rules that make up the law of negligence. A trial involves not only a burden of proving but likewise a burden of deciding. The question of how much, if any, of a controversy should be determined by the jury and how much by the judge is one that must be answered in every case.\textsuperscript{35}

In order that the judge may effectively apportion the controversy between himself and the jurors and frame instructions restricting the latter's deliberations, he must have available language equipment suitable to the purpose. The rules and doctrines of torts law must be adaptable to jury control. As will be explained later, the chief justification for an independent doctrine of res ipsa loquitur lies in the fact that it is well adapted to this function—a function which, obviously, is seldom exercised in Louisiana trials.

There are two grand divisions of the common law trial. First, there is the initial stage in which the plaintiff attempts to make out his case through his own testimony and the testimony of his witnesses. He must succeed or fail upon his own evidence. If, after closing his case, he has failed to make a plausible showing, the court will not impose upon its own and the defendant's time by requiring a rebuttal. Hence, in all common law jurisdictions it is customary that at the close of the plaintiff's case the defen-

\textsuperscript{35} Green, Analysis of Tort Cases (1929) 35 W. Va. L. Q. 323; Green, Judge and Jury (1930) 21.
dant assert by motion that the plaintiff has not made a plausible showing through his evidence, and ask that the case be dismissed without more ado. This, in effect, is a plea directed to the court asking that it pass judgment in favor of the defendant without consulting the jury. It is sometimes termed a motion for judgment on the plaintiff’s evidence; in other jurisdictions it is called a motion for a directed verdict. Matters of terminology are not important for our purpose; the result is the same everywhere.36

If the defendant’s motion succeeds, the effect is a judgment against the plaintiff just as final as though it were rendered by the jury after hearing the evidence on both sides. For present purposes, however, it is much more important to observe what effect is produced by the refusal of such a motion. After his motion is denied, the defendant is still permitted to introduce his own testimony and that of his witnesses in rebuttal. Final judgment cannot be entered against him at this stage of the trial, unless he elects to rest his case without offering any evidence.

The common law procedure as described is in sharp contrast with the practice in Louisiana,37 where both sides of the dispute are generally presented in full before any request for judgment is made by either plaintiff or defendant. Although the defendant in this jurisdiction is accorded the privilege of moving for judgment without presenting his own witnesses, yet if he receives an adverse ruling, final judgment against him is entered without more ado. The free bite at the cherry accorded the defendant at common law, wherein he may move for judgment on the plaintiff’s evidence without imperilling his own opportunity to present his case, does not obtain in Louisiana. Yet it is important to observe that this common law motion for a directed verdict constitutes the very stage of the trial at common law where the doctrine of res ipsa loquitur is most frequently brought into play.

It has been seen that if at common law the plaintiff is to avoid an adverse ruling on the defendant’s motion for a directed verdict, he must have made a plausible showing by his own testimony or that of his witnesses. He must present facts which, in the court’s opinion, would warrant reasonable jurors in concluding that the defendant was negligent. It will be observed that

the judge does not at this point express his opinion on the merits of the controversy further than to determine whether the case is one upon which reasonable minds could differ.

If the plaintiff shows merely the occurrence of the accident, and no more, he will ordinarily find himself out of court. If, however, the accident happened under such circumstances that a jury could reasonably infer negligence from the bare occurrence under the doctrine of res ipsa loquitur, then the court will switch on the green light by refusing the defendant's motion for a directed verdict, and the trial can proceed to its second stage—the stage at which the defendant makes out his own case in rebuttal.

In the light of the foregoing, what is the meaning of the statement that res ipsa loquitur shifts the burden of proof to the defendant? Up until the time the plaintiff rests his case and the defendant asks for and is refused a directed verdict it is clear that the burden of carrying the ball in every respect rested upon the plaintiff. It follows that if the application of res ipsa loquitur shifts a burden of any sort to the defendant, the shift takes place by reason of the court's denial of his motion for a directed verdict.

How does the denial affect the defendant's position? There is obviously no immediate change in the status of the parties if the defendant enters upon his own proof. Suppose, however, that he rests his case along with the plaintiff; what action should the court take? The authorities here are meager, because the defendant, realizing that he cannot win on the shortcomings of the plaintiff's case alone, will usually proceed with his own evidence. The few decisions in point, however, appear to be in hopeless conflict. Some courts have stated that if the defendant introduces no evidence the case will be submitted to the jury under the usual instruction that the plaintiff must sustain the burden of satisfying them that the defendant was negligent. Under this view they are permitted to infer negligence, but they are not required to do so. Others have held that an unrebutted case of res ipsa loquitur requires a directed verdict for the plaintiff.


Under the first view it is clear that upon denial of his motion the defendant suffers no disadvantage beyond what has already been pointed out. He has lost his free shot, but he shoulders no new burden of any sort. He entered the trial with the assurance that the plaintiff would be required to persuade the jury that he (the defendant) should be held liable; he still has that assurance.

Under the second view, the defendant must produce evidence if he wishes to avoid an adverse judgment. Perhaps, in a narrow sense of the word, a "burden" of producing evidence or going forward with evidence does rest upon the defendant under such circumstances. A more apt statement, however, is that the defendant, upon the refusal of his motion for a directed verdict, must now take advantage of his privilege of introducing rebuttal evidence (a privilege which does not obtain in Louisiana in similar circumstances) under penalty of an adverse judgment if he refuses.  

It is clear that any such burden of this nature as there may be is an exclusive by-product of the common law trial system. It is equally clear that this type of burden could not obtain in Louisiana. Once the defendant in this state has asked for judgment upon the plaintiff's case alone, he is thereafter precluded from producing any evidence himself, and final judgment one way or the other is pronounced. To say, then, that the defendant has the burden of going forward with evidence is a manifest contradiction in terms. Yet there are several passages in the Louisiana decisions which strangely emphasize that res ipsa loquitur serves only to shift the burden of going forward with evidence.40

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41. Professor Wigmore, in introducing his reader to the rules relating to the burden of producing evidence, states: "Apart from the distinction of functions between judge and jury, these rules need have had no existence. They owe their existence chiefly to the historic and unquestioned control of the judge over the jury, and to the partial and dependent position of the jury as a member of the tribunal whose functions come into play only within certain limits." IX Wigmore, op. cit. supra note 40, at 278, § 2487.

42. Gomer v. Anding, 146 So. 704, 707 (La. App. 1933): "It is not a shifting of the burden of proof, but the imposition of the duty of explaining that the accident and resulting injury was not due to his want of proper care."

Monkhouse v. Johns, 142 So. 347, 351 (La. App. 1932): "...in cases where the doctrine is applied, the affirmative burden of proof does not shift from plaintiff to defendant, but that having made out a prima facie case, with the aid of the presumption or inference of negligence of defendant as the proximate cause of the accident, the burden does devolve upon defendant, if he desires to or can do so, of continuing with the evidence and adducing proof explanatory of the negligence imputed to him and in support of his
It is noteworthy that in these decisions both plaintiff and defendant had introduced their full quota of evidence and no problem relating to the burden of going forward was before the court.

The term "burden of proof" has another and entirely different meaning. It is often used to denote the burden of ultimately persuading the trier. The party upon whom this burden rests is the party who must lose if, after all the facts have been presented, the trier's mind is undecided. This burden does not come into existence until the final moment of deliberation, and is important even then only if a state of indecision exists.

In cases involving a jury trial the judge must instruct the jury what verdict to return if the evidence appears to be in complete equipoise. Errors in this respect are grounds for reversal. Hence problems with respect to the burden of persuasion are brought into fairly sharp focus under the jury system. Where, however, the judge tries the case alone, all admonitions with respect to the burden of persuasion amount to no more than a soliloquy on the part of the judge by which he attempts to fix his own attitude toward the testimony, and statements with respect to the burden are made only after the final judgment has been decided on. If, as is usually the case, one side appears to have the better of the dispute, no problem with respect to the burden of persuasion will arise. In fact, it has been questioned whether this burden merits at all the extended and loving discussion that has been bestowed upon it by writers and judges. Certainly, more often than not, references to it in the opinions serve as little more than window dressing to fortify an otherwise plausible-enough judgment.

In other words, a plaintiff is entitled to judgment when the fact of accident has been established and the facts of the case warrant application of the rule, if defendant offers no proof." In Lawson v. Nossek, 15 La. App. 207, 210, 130 So. 669, 671 (1930), the court of appeal quoted liberally from Sweeney v. Erving, 228 U.S. 233, 240, 33 S.Ct. 416, 418, 67 L.Ed. 815, 819 (1913): "'In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence . . . ; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forswall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions.'"

IX Wigmore, op. cit. supra note 40, at § 2485.

See, for example, McCormick, Charges on Presumptions and Burden of Proof (1927) 5 N.C. L. Rev. 281, 309.
The burden of persuasion usually rests upon the plaintiff, who seeks to move the court to action, and Professor Wigmore has denied that this burden ever shifts.\textsuperscript{45} In only three common law jurisdictions have the courts maintained with any degree of consistency that res ipsa loquitur serves to shift the burden of persuasion to the defendant.\textsuperscript{46}

Although respectable Louisiana authority has asserted that the doctrine does not affect the “ultimate burden of proof,”\textsuperscript{47} the opinions in general leave the contrary impression. Usually it is said that the happening of the accident “calls for an explanation by the defendant” or “casts upon the defendant the burden of explaining,” and sometimes the opinions state without qualification that the burden of proof is upon the defendant.\textsuperscript{48} All this is ambiguous language and serves only to confuse both counsel and court in future controversies.

If the statement that the defendant must explain the occurrence of the accident amounts to an admonition to the defendant that he must produce evidence at the peril of an adverse judgment, it comes too late at the close of all the testimony. In virtually all of the Louisiana cases the defendant has offered an explanation of some sort—good, bad, or indifferent.

It is possible that the court, in saying that the burden of proof or explanation rests upon the defendant, means to convey the idea that the plaintiff’s claim will not be dismissed solely on the ground of inadequacy of his own proof without reference to the defendant’s explanation. This amounts merely to saying that

\textsuperscript{45}IX Wigmore, op. cit. supra note 40, at § 2485.
\textsuperscript{46}Alabama, Arkansas, and Pennsylvania. Moreover, Pennsylvania limits the application of the doctrine to cases where there is a contractual relationship. Prosser, The Procedural Effect of Res Ipsa Loquitur (1936) 20 Minn. L. Rev. 241, 250, n. 52, 53, 55.
\textsuperscript{47}Note 42, supra.
Defendant must “absolve itself from negligence, which must be presumed . . . from the mere happening of the accident”: Motor Sales and Service, Inc. v. Grasselli Chemical Co., 15 La. App. 353, 355, 131 So. 623, 624 (1930).
 “[B]urden was shifted to Ober [defendant] to show that the collision was due to some cause other than the negligence of his driver”: Overstreet v. Ober, 14 La. App. 659, 637, 130 So. 649, 650 (1930).
 “The plaintiff . . . had the right to rest on this prima facie showing of negligence, and it then became the duty of the drivers of the vehicles to exonerate themselves”: Weddle v. Phelan, 177 So. 407, 410 (La. App. 1937).
the defendant's explanation, as well as the plaintiff's showing, enters into the composite picture upon which judgment must be pronounced. In other words, proof of the accident affords some inferential proof of negligence; how strong the inference ultimately will prove to be depends in some measure upon the plausibility of the explanation made by the defendant. Hence, the latter will do well to make his rebuttal as strong as possible. This strikes the writer as being the idea that the Louisiana courts probably have in mind.49 Under such a view the burden of persuasion does not really shift at all. If after all the evidence on both sides has been presented, the trier is undecided as to whether the inference is strong enough to warrant a recovery, judgment against the plaintiff will be entered. The burden of persuasion upon the final determination rests, as usual, upon the party who seeks to move the court to action.

There is left for consideration a final interpretation—that the burden of persuasion actually shifts to the defendant once it is determined that the plaintiff has established a case under res ipsa loquitur—that the trier will resolve all doubts in favor of the plaintiff. It has been observed that this view has been repudiated by the vast majority of the common law courts.50 Since the burden of proof remains constantly with the plaintiff in cases where it is sought to establish liability by direct evidence, why should it shift where the plaintiff can support his case only by an inference from the occurrence of the accident?

Ordinarily proof by inference is regarded exactly like proof by direct evidence; the plaintiff has the burden of satisfying the court that the inference he wishes to see drawn is more plausible than any other inference that could arise. Of course some inferences will commend themselves very strongly to the judge's mind, so that he may feel ready to pass judgment for the plaintiff

49. In common law jurisdictions difficult problems would arise in connection with this statement. How much evidence must the defendant introduce in order to deprive the plaintiff of his right to a directed verdict (in those jurisdictions where an unrebutted res ipsa loquitur case gives rise to such a right)? See the interesting discussion in Carpenter, supra note 3, at 531 et seq. It is clear that the implications of this problem do not exist apart from the judge-jury set-up of the common law. Such considerations come into play only in determining (1) all the testimony being introduced, shall the controversy be submitted to the jury? and (2) how shall the jury be instructed? These refinements lose all significance when it is sought to apply them to the silent monologue of the court preparing to pass judgment upon the entire case. For him there is only a single problem: If the evidence leaves the mind in doubt, for whom shall judgment be given?

50. P. 88, supra.
RES IPSA LOQUITUR unless the defendant makes a good showing. This, however, does not mean that the burden of carrying the ball has shifted to the defendant, but, rather, that the plaintiff is carrying it himself with great success.

There is no reason why a different attitude should prevail where the datum from which the inference of negligence is sought to be elicited is the occurrence of the accident. 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.

It is not a sufficient answer that shifting the burden of persuasion would force the hand of the defendant, who is in a better position to explain than the plaintiff could be. If, when the plaintiff rests his case, it appears to the defendant that an inference of negligence is at all plausible, considerations of self-interest are certain to move him into action. If, on the other hand, negligence is not reasonably to be inferred, the defendant will conclude that the doctrine does not apply, and will rest accordingly.

Under any view, it is not likely that a statement by the court to the effect that the burden of proof has shifted will be of much importance in the solution of the average controversy. It is important, however, that misleading statements of this nature, which might profoundly influence the course to be adopted by future litigants, be omitted from the opinions. Their effect is to clothe the doctrine of res ipsa loquitur with an air of distinction which it either does not or should not enjoy, and consequently to detract attention from the real issues of the case.

In the light of the observation that res ipsa loquitur probably does not (and certainly should not) shift the burden of proof, it follows that cases involving the doctrine's use do not differ essentially from other controversies in which the evidence is largely by way of inference. Since the doctrine confers no special benefits, there is no reason why novel restrictions should be imposed upon its use. Thus, the statement that a party who is able to prove specific acts of negligence and who attempts to do so loses thereby the benefit of the doctrine,51 is subject to criticism. The pleader who has in mind a definite theory upon which he wishes

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to proceed and who is in possession of special facts he wants to present in evidence should not be denied the benefit of any natural inference which may arise from the occurrence of the accident, merely because he does not care to rest his chances of recovery upon that inference alone.\textsuperscript{52} Sound administrative policy demands that both parties be encouraged to tell as much about the occurrence as they possibly can. Any rule that encourages either litigant to withhold a part of his case is basically unsound and will result in a denial of justice.

A similar fallacy underlies the statement that res ipsa loquitor applies only where the facts are peculiarly within the knowledge of the defendant and are not available to the plaintiff. This smacks of the idea that the doctrine is an extraordinary measure which should be resorted to only in extreme instances and where there is dire need. It has been observed that in Louisiana res ipsa loquitur cannot serve successfully as a device for exacting from the defendant evidence which otherwise might be unavailable. Moreover, no such limitation obtains with respect to inferential proof generally. The strength of an inference is not measured in terms of how badly it is needed.\textsuperscript{53}

\textbf{Res Ipsa Loquitor in the Pleadings}

The statement is frequently made that res ipsa loquitor is not a rule of pleading.\textsuperscript{54} This, the writer believes, is correct. The appropriate moment when the inference of negligence should be accepted or rejected comes after the testimony is in and the trier is prepared to review it in its details and with all its implications. Of course the plaintiff who intends to rely upon the doctrine at the trial will find his efforts frustrated in advance if he is required to allege in his pleadings facts which he knows he will never be able to establish by evidence. As will be shown hereafter, the common law courts have a convenient formula which is better adapted to the solution of this problem than the device of res ipsa loquitor.

The result of applying res ipsa loquitor is, at common law, to place the controversy in the hands of the jury. Hence all the

\textsuperscript{52} The prevailing attitude in Louisiana is to regard specific allegations of negligence as "surplusage." Horrell v. Gulf & Valley Cotton Oil Co., 15 La. App. 603, 131 So. 709 (1930); Monkhouse v. Johns, 142 So. 347 (La. App. 1932); Pizzitola v. Letellier Transfer Co., Inc., 167 So. 158 (La. App. 1936).


considerations attendant on the respective functions of court versus jury enter the picture. In Louisiana the effect is a final judgment for plaintiff. In either case the demand is for language equipment which will allow the court free play and yet make it possible to hold the calf by a short rope when necessary. The phrases of res ipsa loquitur with its convenient, yet elusive, limitations afford a mechanism well adapted to this purpose.

The chief function of the pleadings is to give notice to the court and the opponent. The court must ascertain whether the chances of recovery are sufficient to warrant the time and inconvenience of trial; the opponent is entitled to reasonable safeguards against surprise. In passing upon the pleadings in a case that shows promise of involving res ipsa loquitur the court is aware that if the plaintiff makes an initial showing sufficiently plausible to warrant a submission to the jury, the defendant, motivated by considerations of self interest, will complete the picture. For this reason, it will be fairly reluctant to dismiss the plaintiff's claim until it has had an opportunity to gather from the evidence just what the plaintiff has "on the ball." This properly makes for a liberal attitude toward the pleadings. The vital interests of neither party are put in jeopardy by a ruling sustaining the plaintiff's allegations, for the court still retains the right to administer and control the case once it goes to trial. However, res ipsa loquitur, with its doctrinal limitations, is poorly adapted for use at this stage of the proceeding. Something more liberal and straightforward is needed.

Under the rules of common law pleading prior to modern codes of practice, a general allegation of negligence was sufficient. It is clear that under this system there was no need for an attempted resort to res ipsa loquitur in the pleadings. Several of the modern codes require no more, and this is clearly the situation under the federal rules.

In those states where fact pleading prevails the plaintiff is required to set forth the ultimate facts upon which he intends to rely. The point at which an ultimate fact becomes a mere de-

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55. See, for example, Williams v. Holland, 10 Bing. 112, 131 Eng. Reprint 848 (C.P. 1833) where the court sustained a petition that alleged merely that the defendant so carelessly drove his horse that through his carelessness his horse struck the plaintiff's horse and cart, injuring the plaintiff. 2 Chitty, Pleading (7 ed. 1844) 529.

56. For example, Mass. Gen. Laws (1921) c. 231, § 147, no. 13.

tail of the evidence which need not be alleged has not been made clear. This ambiguity has been seized upon in cases where it is apparent that the plaintiff intends to rely upon res ipsa loquitur on the trial.

Sometimes the courts state that the pleadings need allege no more facts than the possibilities of the case permit, and emphasize that the facts are peculiarly within the knowledge of the defendant. 58 When it is apparent that res ipsa loquitur will be employed in the proof, this fact is often noted as a reason for a liberal approach to the pleadings. 59 It by no means follows, however, that res ipsa loquitur provides the test by which the sufficiency of the pleadings is determined. Such a proposition has been repeatedly denied by the courts. The technique employed is much more liberal than the limitations of res ipsa loquitur would conveniently admit.

The fact that the Louisiana courts purport to use res ipsa loquitur as a rule of pleading 60 is not, perhaps, of great importance. It has, however, led to some confusion in the decisions, due to the fact that the courts are more liberal in determining whether the defendant's exception of no cause of action should be sustained than they could possibly be in pronouncing final judgment on the controversy. For example, in sustaining the pleadings, the courts have emphasized that the outstanding reason for a resort to res ipsa loquitur lies in the fact that the defendant has superior knowledge. 61 This is a valid observation in determining the sufficiency of the pleadings, 62 but it leads only to confusion when used with reference to the final determination of the dispute. The writer suggests that the same doctrine cannot be used to test the sufficiency of both the pleadings and the


62. Most of the cases emphasizing the superior knowledge of the defendant involved an exception of no cause of action. Note 61, supra.
evidence, and much confusion would be avoided if a simple technique similar to that employed in other jurisdictions were adopted in Louisiana in passing upon the plaintiff's petition.

III

The uses to which res ipsa loquitur has been put by the Louisiana courts can be appreciated best by a review of the cases. A few preliminary observations, however, are appropriate: It will be found that the purpose served by the doctrine varies with the subject matter or activity with which the litigation is concerned. In the majority of the cases the occurrence of the accident played only a part, and sometimes a small one, in influencing the outcome of the suit. Usually detailed evidence both confirming and denying negligence was presented and considered. The reader may well be left with the impression that the same result would have been reached in each instance even though the Latin shibboleth had not been referred to—and in this I believe he would be correct.

DANGEROUS SUBSTANCES AND INSTRUMENTS

Cases involving injuries inflicted by steam, electricity, fire, gas, complicated industrial machinery and other highly dangerous agencies furnish perhaps the clearest instances of the use of res ipsa loquitur. By the English law, a person who makes use of a dangerous substance on his premises is an insurer against any damage that follows its escape.63

Although this doctrine has not been formally adopted by the majority of the American courts,64 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.65 It is frequently stated that the more dangerous the instrumentality employed the more care required in its use and maintenance.66 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

65. Prosser, op. cit. supra note 7, at 470, § 61.
borne by the defendant, who chose to make use of the dangerous agency. Although the line of attack is framed by the court in the language of negligence, the outcome reflects a virtual insurer's liability. Such statements as the following are commonly employed:

"The fact that frequent inspections of the line were made to ascertain the condition of the wires and remedy defective insulation does not relieve the company of liability. If the span wire had become dangerously charged with the electrical current the company's inspection should have been thorough enough to have detected it. . . . It was its business to know the span wire in question was a 'live' wire through leakage from the trolley which it suspended."  

"The owner must manage to keep machinery in order, or else in case of accident he is exposed to liability. That is another issue settled by repeated decisions."

It follows 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. This is primarily

67. As applied to fire arms, see Inbau, Fire Arms and Legal Doctrine (1933) 7 Tulane L. Rev. 529.  
because the person in control of such an agency is bound to see to it that accidents do not happen. Hence res ipsa loquitur affords a ready phrase for articulating this extraordinary type of liability, and the litigation usually terminates in a judgment for the plaintiff. Of course if the injury cannot be attributed to the dangerous agency, or if the situation of the defendant was such that we could not expect him to be in substantial control of the circumstances, recovery should be denied. In these cases the courts simply say that res ipsa loquitur is not applicable. In cases involving the use of dangerous devices or substances it is doubtful that res ipsa loquitur is anything more than a convenient gadget which assists the courts in hitching the standard of care up to top notch.

**FOOD AND DRINK**

Whatever may be the state of the law in other jurisdictions, it is settled in Louisiana that the manufacturer of food or drink for human consumption insures that his product is wholesome...
and free from deleterious substances. The employment of res ipsa loquitur in this type of litigation does not, then, result in a logical inference of negligence; for the existence of negligence is an immaterial issue. Yet the doctrine is frequently invoked and is sometimes applied by the courts.

The main problem facing the court in the food and drink cases is to determine whether the substance supplied was wholesome and free from foreign matter. Claims of injuries from food and drink are peculiarly susceptible to fraud, and even when it is shown that the substance was unwholesome there is a strong likelihood that the extent of the illness suffered will be exaggerated. A plaintiff seeking the benefit of res ipsa loquitur for injuries of this type must convince the trier that the food sup-


75. Hill v. Louisiana Coca-Cola Bottling Co., 170 So. 45, 46 (La. App. 1936): "Where the plaintiff shows by a preponderance of evidence that there was glass or other foreign substance contained in the beverage or bottle thereof, that he consumed such deleterious matter and suffered injury as a result, then the burden of proof shifts to the defendant company to excuse itself from liability by proving to the satisfaction of the court that the foreign substance or glass did not enter its product during the bottling or manufacturing process. In other words, upon proof of the fact by the plaintiff of the consumption of the foreign matter and injury caused to him thereby, the doctrine of res ipsa loquitur applies." Costello v. Morrison Cafeteria Co. of Louisiana, 18 La. App. 40, 135 So. 245 (1931); Dye v. American Beverage Co., 194 So. 438 (La. App. 1940). See also cases cited infra note 76.

76. Watts v. Alexandria Coca-Cola Bottling Co., 186 So. 151 (La. App. 1938) (plaintiff claims he was made very sick within fifteen minutes after drinking a Coca-Cola bottled by the defendant. There was evidence showing that plaintiff was somewhat atavistic in his approach to food and drink; that on one occasion he drank eleven glasses of water and one glass of beer at a single sitting, while on another memorable occasion he drank a half gallon of homemade whiskey without taking the jug from his lips. The court was perhaps not too reticent in doubting that the Coca-Cola was the cause of his illness.)

In the following cases recovery was denied because plaintiff was unable to prove that the injury complained of was caused by the substance supplied by defendant: Russo v. Louisiana Coca-Cola Bottling Co., 161 So. 909 (La. App. 1935); Lee v. Smith, 168 So. 727 (La. App. 1938); Hill v. Louisiana Coca-Cola Bottling Co., 170 So. 45 (La. App. 1938); Freeman v. Louisiana Coca-Cola Bottling Co., 179 So. 621 (La. App. 1938); Gunter v. Alexandria Coca-Cola Bottling Co., 197 So. 159 (La. App. 1940). Cf. Dean v. Alexandria Coca-Cola Bottling Co., 148 So. 448 (La. App. 1933) (res ipsa loquitur was not referred to); King v. Louisiana Coca-Cola Bottling Co., 151 So. 252 (La. App. 1933) (issue submitted to jury, which found for defendant. Res ipsa loquitur was not referred to); Kohlman v. Jefferson Bottling Co., 192 So. 113 (La. App. 1939) (res ipsa loquitur was not referred to).
plied was unwholesome and the damage resulting therefrom is genuine. When this is established recovery is uniformly allowed. It is obvious that resort to res ipsa loquitur is not necessary to recovery in this type of case, and its use by the courts amounts to little more than window dressing in the opinion.

INJURIES ON BUSINESS PREMISES

The occupier of business premises must take some measures of precaution for the safety of persons who enter thereon. The extent of the duties imposed upon him vary considerably, depending upon the status in law of the injured person (whether he is a business guest, licensee, or trespasser) and the nature of the business conducted upon the premises.

In these cases there is often a sharp conflict of interests. Stores and other places held open to the public for profit cannot be made foolproof. The hazards to which the buying public is exposed are often transitory—rain pours through open shop doors, or a careless customer drops a banana peel, kicks up a piece of carpet in a theater or leaves a beverage bottle on the edge of a counter. It is clear that both the patron and management must be reasonably alert to avoid accidents, and where an action is brought for customer injuries the opinion will likely be tailor-made to meet the occasion. For this reason res ipsa loquitur is not very serviceable here. Even in the case of swimming pools, where extraordinary care is required, the court of appeals took occasion to remark, “a presumption of fault, on the part of the owner, does not arise merely because a person is drowned in his swimming pool.”

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, the courts are fairly generous in applying res ipsa loquitur. On the other hand, if the accident can reasonably be attributed to some object deposited by a third person, or a condition of disrepair brought about by some inde-
pendent agency, the problem is much more difficult.\textsuperscript{70} No general rule can be formulated for accidents of this type. The courts usually require something more convincing in the way of evidence than merely the occurrence of the injury; unless, indeed, it is apparent that the occupier either owed a duty to control the conduct of the person who created the hazard\textsuperscript{80} or owed exceptionally high duties to the public.\textsuperscript{81}

**Traffic and Transportation**

The ever-increasing family of traffic and transportation problems furnishes the most difficult group of personal injury situations confronting modern courts. Accidents involving high

\textsuperscript{79} Powell v. L. Feibleman & Co., 187 So. 130 (La. App. 1939) (plaintiff slipped on banana peel in defendant's store; res ipsa loquitur not applicable); Joynes v. Vallot & Dreaux, 1 So. (2d) 108 (La. App. 1941) (soft drink bottle fell from counter, striking plaintiff's foot, res ipsa loquitur not applicable); Lanatro v. Palace Theater Co., 5 La. App. 366 (1926) (bottle fell from theater balustrade onto patron below; doctrine applied. See discussion supra, p. 76); Cavicchi v. Gailey Amusement Co., 173 So. 458 (La. App. 1937) (small boy, patron in movie theater, fell in passageway which was slippery from rain tracked in by other patrons, doctrine applied); McGregor v. Saenger-Ehrlich Enterprises, 195 So. 624 (La. App. 1940) (patron tripped on seam in theater carpet. In refusing to apply res ipsa loquitur, the court emphasized that it was not clear how long the defect had existed.); Bentz v. Saenger-Ehrlich Enterprises, 197 So. 659 (La. App. 1940), noted in (1940) 3 \textit{Louisiana Law Review} 246 (facts similar to those in preceding case; doctrine applied.) At first blush the two cases last mentioned may appear irreconcilable; however, it is important to note that in the McGregor case res ipsa loquitur was referred to at the time final judgment was pronounced and both plaintiff's and defendant's testimony was before the court. In the Bentz case the question arose on a motion of no cause of action, and the court was determining merely whether or not the case should proceed to trial.) Cf. Davis v. Hines, 154 La. 511, 97 So. 794 (1923). In this case plaintiff, an employee, unloading a pile of sacks, was struck by a sack which fell from the pile. The court refused to apply res ipsa loquitur. It may be observed that in the absence of workmen's compensation the duty owed by an employer to his employee is not nearly as exacting as the duty owed to business guests.

\textsuperscript{80} See p. 82, supra.

\textsuperscript{81} An illustration of the requirement of an exceptionally high degree of care on the part of a proprietor is furnished by the motion picture theater cases. Compare Cavicchi v. Gailey Amusement Co., 173 So. 458 (La. App. 1937) with Lawson v. D. H. Holmes Co., 200 So. 163 (La. App. 1941). See also the discussion supra p. 77 et seq.

Two interesting cases arose as the result of fires in the projection rooms of motion picture theaters. The flame in both cases was quickly extinguished and did not spread into the auditorium. However a blinding flash was thrown upon the screen, causing a cry of "fire" and a resulting stampede in which plaintiff was injured. In the first case the doctrine was held not applicable as against the distributor of the film who, it was alleged, had supplied film in which were splices. The court further held that a res ipsa loquitur case was not made out against the proprietor of the theater. It felt that any negligence that might be attributed to the defendant was not the proximate cause of the stampede. Strangely enough, the case was remanded in order to determine whether there were any acts of negligence in exhibiting the film. Cavaretta v. Universal Film Exchanges, 182 So. 135 (La. App. 1938). In Wilson v. Iberville Amusement Co., 181 So. 817 (La. App. 1938),
powered motor vehicles under the fast moving traffic conditions of today present a formidable challenge to the administration of justice.

The new difficulties arise from several different quarters. The fact that at the time of the injury both parties are normally in action, sometimes exposing each other to mutual risk, has complicated the picture and created a need for new rules and doctrines. We find the decisions in this type of case abounding in discussions of contributing fault, assumption of risk, last clear chance, and the humanitarian doctrine. Efforts have been made to reduce the element of fault to its simplest form through the use of traffic regulations and other statutory rules of thumb. But all attempts to simplify the administration of these controversies have been conspicuously unsuccessful. Ossa has been heaped upon Pelion in a futile struggle to maintain some appearance of doctrinal consistency. Nevertheless, the decisions become increasingly at odds with each other and are virtually without value as precedent. In this maze of ambiguities and veiled contradictions, it is to be expected that res ipsa loquitur should be brought into frequent play by both attorneys and judges.

Yet in no field of law is the doctrine likely to be more inappropriate than here. Auto accidents are not uncommon occurrences; they happen under a large variety of circumstances involving usually the fault of more than one person, and seldom is there any single inference which is more plausible than others.

**Vehicle leaving highway**

In only one type of automobile accident has res ipsa loquitur been applied with appreciable consistency. Where a vehicle leaves the highway and strikes a pedestrian on the sidewalk or crashes into property adjoining the road, the courts quite properly are prepared to draw an inference of negligence from the occurrence.82

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the court stated that res ipsa loquitur was applicable, but that the management had overcome the presumption of negligence arising from the occurrence. These cases present difficult problems with respect to the proprietor's duty, and are not adaptable to res ipsa loquitur.

In such cases the place where the injury happened suggests strongly that the plaintiff was not at fault himself. Furthermore, although collisions upon the highway frequently occur without the driver's fault, the same is not likely to be true where the car leaves its allotted channel and passes onto a place reserved for pedestrians. The dramatic element in situations of this type is conspicuous, and the occurrence suggests either that the vehicle was being operated at a high speed or that the driver had lost control of his machine.

Skidding

On several occasions plaintiffs have sought to invoke res ipsa loquitur by introducing evidence that the vehicle driven by defendant skidded at the time of the accident. This fact alone is not sufficient to bring the doctrine into operation, and on numerous occasions the courts have refused to apply it.8

"Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means partial or complete loss of control of the car under circumstances not necessarily implying negligence. Hence plaintiff's claim that the doctrine of res ipsa loquitur applies to the present situation is not well founded. In order to make the doctrine of res ipsa loquitur apply, it must be held that skidding itself implies negligence. This it does not do. It is a well-known physical fact that cars may skid on greasy or slippery roads without fault either on account of the manner of handling the car or on account of its being there."8

Of course, the fact that the vehicle skidded, when taken in connection with evidence of high speed, or a lack of control by the operator, may serve to warrant a judgment for the plaintiff.8

Caddo Transfer & Warehouse Co., 165 La. 1075, 116 So. 563 (1928) (truck skidded while attempting to make a turn on a sharp decline, knocked down an iron post supporting plaintiff's building. Court allowed recovery on specific evidence, but denied that res ipsa loquitur applied).

The mere fact that the plaintiff was struck at a time when the car was not upon the highway raises no inference of negligence. Deimel v. Etheridge, 198 So. 537 (La. App. 1940) (car entering public garage struck plaintiff standing inside).


In such cases, however, the situation cannot be regarded as one that calls for the application of res ipsa loquitur, and references to the doctrine add nothing to these decisions.

Passenger injuries in collision

A collision of two vehicles is not a proper accident for the application of res ipsa loquitur. In the absence of further proof it cannot be assumed that one driver, rather than the other, was negligent; nor is there any presumption that both were careless. Although, as one court has suggested, there may be a presumption that one or the other of the drivers was negligent, this is not enough, unless each is to be made responsible for the carelessness of the other. This is abundantly clear in cases where only one of the drivers is sued.

If one of the vehicles is a public carrier of passengers a different rule prevails. The public carrier is under special duties not imposed upon defendants in general. In the case of the carrier of goods the liability is absolute. Hence there is no need for resort to res ipsa loquitur. The carrier of passengers, on the other hand, is regarded as being liable only for his negligence. However, the fact that he is a common carrier has left its imprint upon the extent of his liability. It has long been settled that the injured passenger need show only a breach of the contract of carriage; there then devolves upon the carrier the burden of exonerating itself from the imputation of negligence. This shifting of the burden of proof is a part of the substantive law of carriers; it does not arise from the use of res ipsa loquitur, although it has become closely identified with that principle and it must be admitted that the two have much in common.

From the above it is clear that, if a passenger in a vehicle for hire is injured in a collision with another vehicle, the occurrence of the accident raises a presumption of negligence against

1935) (driver lost control of car); Scott v. Checker Cab Co., 12 La. App. 598, 126 So. 241 (1930) (car skidded from center of street to sidewalk; see p. 101 supra); Cosse v. Henley, 193 So. 206 (La. App. 1939) (truck with worn tires accelerated speed on down grade during rain).

86. See Weddle v. Phelan, 177 So. 407, 410 (La. App. 1937). This case is opposed to the weight of authority in Louisiana. See cases cited below, infra note 92.


90. Prosser, Res Ipsa Loquitur: Collisions of Carriers with other Vehicles (1936) 30 Ill. L. Rev. 980.
the carrier. It does not follow, however, that res ipsa loquitur is available against the other driver. The fact of the collision raises no natural inference either way. Likewise, if a guest is injured in a collision of two private vehicles, the doctrine has no application against either driver, and it has been so held.

Rear end collisions

It cannot be doubted that a plaintiff who establishes in evidence the mere fact that his car, or the car in which he was riding, was struck in the rear by a vehicle under the defendant's control is not entitled to judgment. To apply res ipsa loquitur to such a situation invites the reply, "Loquitur vere; sed quid in inferno vult dicere?" It is no more likely that the collision was the result of the defendant's negligence than that it was caused by the plaintiff's fault or by factors outside the control of both parties.

If, however, the plaintiff goes further and introduces evidence that eliminates all reasons that might account for the occurrence, other than the defendant's carelessness, the inference of negligence may become fairly plausible. This suggests again the close affinity between res ipsa loquitur and other instances of proof by inference.

"The mere fact that he [defendant] ran into it is not sufficient proof of his negligence. But the fact that he did, coupled with the facts that the road was open, had no defect in it and that he saw the truck ahead of him called for an explanation by him. . . ."

92. In both Dawson v. Toye Bros. Yellow Cab Co., 15 La. App. 326, 131 So. 716 (1931) and Thibodeaux v. Star Checker Cab Co., 143 So. 101 (La. App. 1932), the plaintiff introduced positive testimony showing negligence on the part of the driver of the other vehicle. In the Thibodeaux case the court remarked, "As far as Elwell [driver of the other car] is concerned, however, the plaintiffs were required under the rule in ordinary damage suits to prove that he was guilty of negligence which contributed to the accident." (143 So. at 102.) See also Dunaway v. Maroun, 178 So. 710 (La. App. 1937). Contra: Weddle v. Phelan, 177 So. 407 (La. App. 1937).
The only instance in which a rear end collision case has come to the attention of the supreme court is *Loprestie v. Roy Motors Company*. The question arose on the sufficiency of the pleadings on an exception of no cause of action. The plaintiff had alleged that at the place of the collision the roadway was straight and there were no obstructions in the view of the defendant. The supreme court reversed the ruling of the court of appeals which had sustained the defendant's exception. It is noteworthy that the only problem involved was whether the case should proceed to trial, and the higher court was justified in adopting a liberal position. The emphasis that the decision placed upon the fact that the defendant was in a better position than the plaintiff to explain the occurrence is, as we have observed, typical of the use of res ipsa loquitur in construing the pleadings.

Other injuries to automobile guests

The most misleading group of res ipsa loquitur cases in Louisiana are those which contain broad statements entirely by way of dicta to the effect that a passenger in a private automobile who is injured in virtually any sort of mishap can rely upon the doctrine. These cases are numerous, but without exception they either disclose detailed evidence of negligence or the circumstances surrounding the accident were such that carelessness on the part of the driver could readily be inferred.
passengers in private vehicles can be inflicted under a wide range of circumstances, some of which may give rise to a ready inference of negligence, while others do not. The generalities on res ipsa loquitur often indulged by the courts in these cases add little weight to the decision.

sharp curve, crossed a ditch and continued over two hundred feet, dragging a stump which it had uprooted on the way. The court found that the speed was excessive); Gomer v. Anding, 146 So. 704 (La. App. 1933) (car left highway and crashed into white balustrade of a bridge. Plaintiff had previously requested driver to reduce his speed. After the accident the engine was driven twelve to sixteen inches into the tonneau of the car); Galbraith v. Dreyfuss, 162 So. 246 (La. App. 1935) (facts similar to Lawson v. Nossek, supra); Harrelson v. McCook, 198 So. 532 (La. App. 1940) (car skidded on wet pavement and left the highway; excessive speed and driver not attentive).

It is noteworthy that in all the above cases the car left the highway. Compare the cases cited in note 82, supra.