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## NOTES

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### RES IPSA LOQUITUR: ITS NATURE AND EFFECT

#### I

In the effort to define a category of cases in which the plaintiff can rely upon the doctrine of *res ipsa loquitur* to prove the defendant's negligence, three general limitations have been laid down. It is conventionally required: (1) that no act of the plaintiff's contribute to his injury; (2) that the injury be caused by a machine in the exclusive control of the defendant; (3) that the machine be not apt to cause injury without human fault.<sup>1</sup>

Upon analysis, these propositions lend but little certainty to a branch of law admittedly vague and unpredictable. (1) A voluntary act of the plaintiff contributing to the injury, whether negligent or not, would be a substantive defense, going to the defendant's culpability and not to the means of establishing it. (2) Exclusive control is not a close limitation, but extends to the pos-

<sup>1</sup> 5 Wigmore, Evidence § 2509 (2d ed. 1923).

session of houses,<sup>2</sup> water-tanks,<sup>3</sup> and bridges.<sup>4</sup> Often it is merely the plaintiff's usual burden of establishing the identity of the wrongdoer.<sup>5</sup> (3) Requiring that the machine be not apt to cause harm without human fault, is equivalent to limiting the application of the doctrine to cases in which negligence can be inferred from the nature of the accident.<sup>6</sup> This is the original problem of when *res ipsa loquitur* applies, masquerading as an affirmative proposition. The requirements, then, furnish no criteria for determining when negligence is more inferable than not,<sup>7</sup> other than those found in the general law of evidence and

<sup>2</sup> The cases of a house falling or of a piece of a house falling are very frequent. *Mullen v. St. John*, 57 N.Y. 567 (1874) (helpful opinion by Dwight, C.); *Martin v. Dufalla*, 50 Ill. App. 371 (1893); *Patterson v. Jos. Schlitz Brewing Co.*, 16 S.D. 33, 91 N.W. 336 (1902). See also, *Schmidt v. Johnson Co.*, 145 Wis. 49, 129 N.W. 657 (1911) (wall falling); *Connors v. Richards*, 230 Mass. 436, 119 N.E. 831 (1918) (ice falling from roof); *DeMun Estate Corp. v. Frankfort General Ins. Co.*, 196 Mo. App. 1, 187 S.W. 1124 (1916) (fall of a cornice); *Kean v. Smith-Reis Piano Co.*, 206 Mo. App. 170, 227 S.W. 1091 (1921) (fall of flagpole).

<sup>3</sup> *Duerr v. Consolidated Gas Co. of N.Y.*, 83 N.Y.S. 714 (1903).

<sup>4</sup> *Kearney v. London B. & S. C. R. Co.*, L.R. 5 Q.B. 411 (1870) (leading case); *Baltimore & O. R. Co. v. Wilson*, 117 Md. 198, 83 Atl. 248 (1912) (in this case the defendant succeeded in rebutting the presumption by showing due care in the construction of the bridge). Any typical list of cases in which the doctrine has been applied will include such odd cases as *Ash v. Childs*, 231 Mass. 86, 120 N.E. 396 (1918) which involved a tack in a piece of blueberry pie (Wigmore criticised this case for not applying the doctrine); *Adams v. University Hospital*, 122 Mo. App. 675, 99 S.W. 453 (1907) which involved the hiring of nurses (it was held that the dropping of a hot-water bottle on a patient by a nurse was evidence of the head of the hospital's negligence in selecting competent nurses; the defendant was not held liable, because the hospital was a charitable institution). For collections of cases with brief descriptions, see Wigmore, *supra* note 1; 3 *Cooley, Torts* 383 (4th ed. 1932). Such lists suggest that "machine" is not being used in the narrow sense of man-made object capable of automatic motion, the sense in which an automobile is a machine, but a house is not, but in the broad sense of structure. It might be noted that *Cooley* uses the word "thing" instead of machine. It may be concluded that "machine" does not supply a useful material criterion.

<sup>5</sup> See for example, *Obertoni v. Boston and M. R. R.*, 186 Mass. 481, 71 N.E. 980 (1904). A signal torpedo was found on the tracks by an infant. The court held that the evidence was insufficient to warrant the inference that it was the defendant who was negligent. See also *Lowner v. New York, N. H. & H. R. Co.*, 175 Mass. 166, 55 N.E. 805 (1900); and *Schmidt v. Stern*, 119 Misc. 529, 196 N.Y.S. 727 (1922) (the plaintiff was injured by the fall of a radiator while engaged in construction work on a building. A radiator had been placed so as to make its toppling over highly probable. The real question in the case was who had placed the radiator in so precarious a position).

<sup>6</sup> That is, all the differences between any two accidents would arise from the differences between the agents of injury. Thus, the difference between an accident in which an auto runs off the road and an accident in which a house collapses can all be traced to the differences between the auto and the house.

<sup>7</sup> It should be noted that the inference of negligence is really complex. First, the conduct must be inferred; second, the value judgment of the conduct must be made. Failure to separate these questions has led to speculation as to whether *res ipsa loquitur* sounds in evidence or tort. For a case in which this separation of law and fact was highly subtle see *Jager v. Adams*, 123 Mass. 26 (1877) where a passer-by was hit by a brick falling from a wall the defendant was erecting. The lower court held that the mere falling of the brick was not evidence of negligence,

applicable to every issue of fact. There is, in fact, no typical *res ipsa loquitur* case.<sup>8</sup>

The practice of setting off *res ipsa loquitur* cases from the general law of evidence has produced unfortunate results. The courts, leaning heavily upon the phrase, have seldom realized that the real problem is simply one of weighing the probability that the defendant was negligent, not by itself, but together with all other possible causes.<sup>9</sup>

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defining negligence as careless handling of the brick. The upper court held that the mere falling was evidence of negligence, defining negligence to be not only careless handling of bricks but also failure to provide some canopy for protection of passers-by. Thus what at first glance might appear to be a difference of opinion as to the strength of the inference possible from the same evidence, is really a difference as to what the substantive definition of negligence for such a case is.

<sup>8</sup> "What is meant by *res ipsa loquitur* is that the jury are warranted in finding from their knowledge, as men of the world, that such accidents usually do not happen except through the defendant's fault, and hence, inferring that this one happened through the defendant's fault unless otherwise explained. But that depends on the kind of accident." Holmes, J. in *Pinney v. Hall*, 156 Mass. 225, 30 N.E. 1016 (1892).

"*Res ipsa loquitur* is merely a short way of saying that as far as the court can see, the jury from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case." Holmes, J. in *Graham v. Badger*, 164 Mass. 42, 41 N.E. 61 (1895).

"The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have occurred without negligence of the defendant that a reasonable jury could find without further evidence that it was so caused." Salmond, *Torts* 34 (7th ed. 1928).

"Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred." McSherry, J. in *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067 (1898).

"This phrase which literally translated means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of the accident." *Ibid.*

"The phrase is nothing but a picturesque way of describing a balance of probability on a question of fact on which little evidence either way has been presented." Thayer in *Selected Essays in Torts* 599, 604 (1924).

"Neither of these rules—that a fact may be proved by circumstantial evidence as well as by direct, and that where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation—is confined to any particular class of cases, but they are general rules of evidence applicable wherever issues of fact are to be determined either in criminal or in civil actions." Cullen, J. in *Griffen v. Manice*, 166 N.Y. 188, 59 N.E. 925 (1901).

<sup>9</sup> Consider the case of a house falling on a clear day. The court's function is to weigh the probability that this house fell because it was in bad repair against all other possible causes such as the act of a third party in undermining the foundations. When the probability of bad repair is evaluated not alone but in contrast to the probability of a third party undermining it, the certainty that bad repair was the cause becomes almost overwhelming. Such analysis makes clear why a small quantity of evidence is frequently sufficient for rigorous legal proof. For the final conclusion arises not from the evidence, but from the common experiences of mankind that houses generally do not fall unless in bad repair. Unfortunately the problem of where *res ipsa loquitur* applies has been made unduly bewildering because of the failure of courts explicit-

The universal justification for whatever benefit *res ipsa loquitur* gives the plaintiff is that the defendant apparently has greater access to the evidence and therefore is the proper one to furnish an explanation.<sup>10</sup> But the justification should be taken with reservations. While the plaintiff may have no evidence, the defendant may be in the same position. Also if the defendant can prove his own ignorance in the course of the trial, logic demands that the plaintiff's advantage be taken away.<sup>11</sup> Further, even if the defendant conceals his superior knowledge, the plaintiff ought not be permitted to use the defendant's silence until he has satisfied his own burden of producing evidence.<sup>12</sup> Therefore, in a jurisdiction where a *res ipsa* case merely satisfies the plaintiff's burden of producing evidence, the justification is not in point, even though a benefit has been conferred. It might be added that a benefit based on a permissible inference needs no justification.

## II

The vagueness in defining the class of cases to which *res ipsa loquitur* applies is accompanied by an equal vagueness in defining the procedural benefit it confers upon the plaintiff when it does apply. There are three views current.<sup>13</sup> According to the first view,<sup>14</sup> the plaintiff has merely satisfied his original burden of going forward and still has the burden of proof; according to the second view,<sup>15</sup> the plaintiff still has the burden of proof, but the burden of going forward has shifted to the defendant; and according to the last view,<sup>16</sup> both burdens have shifted to the defendant.<sup>17</sup>

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ly to weigh these probabilities. But see *Galbraith v. Busch*, 267 N.Y. 230, 196 N.E. 36 (1935), where Lehman, J. in an excellent opinion in a case involving an automobile running off the road, balances the probability of careless operation against the probability of careless maintenance.

<sup>10</sup> See 5 Wigmore, Evidence § 2509 (2d ed. 1923); Thayer in Selected Essays in Torts 599, 604 (1924).

<sup>11</sup> If some benefit above that deserved by the strict probative force of the evidence is given in such cases making it easier for the plaintiff to get to the jury, the plaintiff should then be non-suited if the defendant can establish his own ignorance. This result seems so highly improbable as to cast serious doubt upon the relevance of accessibility to the evidence.

<sup>12</sup> See *Galbraith v. Busch*, 267 N.Y. 230, 196 N.E. 36 (1935). The dissent seems to have arisen because of a misunderstanding of this point.

<sup>13</sup> For an extensive analysis of these views see article by Heckel and Harper, 22 Ill. L. Rev. 724 (1928). Also Carpenter, 1 Univ. Chi. L. Rev. 519 (1934). For sample case notes see 7 Cinc. L. Rev. 431 (1933); 12 Minn. L. Rev. 184 (1927). For perhaps the most startling evidence of the actual currency of these views see *McCloskey v. Kopljar*, 329 Mo. 527, 46 S.W. (2d) 557 (1932) wherein the two majority and one minority opinions each express one of the views.

<sup>14</sup> "In our opinion *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference. . . . When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." Pitney, J. in *Sweeney v. Erving*, 228 U.S. 233, 240 (1912).

<sup>15</sup> *Plumb v. Richmond Light & R. R. Co.*, 233 N.Y. 285, 135 N.E. 504 (1922).

<sup>16</sup> *Price v. Met. St. Ry. Co.*, 220 Mo. 435, 119 S.W. 932 (1909).

<sup>17</sup> The distinction between the burden of proof and the burden of going forward with the

There has been much discussion of which of the three current views of *res ipsa loquitur* is the most sound.<sup>18</sup> Such discussion has not been fruitful because it has apparently been devoted to the procedural differences between the three views. But since all courts agree that if the case is doubtful upon the evidence, it goes to the jury, and that if it is highly probable there is a directed verdict, the three views must represent at least two different judgments of the probative force of what is presumably the same evidence, namely, the evidence making a *res ipsa loquitur* case. The third view is not simply a question in evidence.<sup>19</sup> Thus the procedural aspects of these views must reflect the attempt of the courts to deal differently with evidence to which they attribute different weights. Then any discussion of the respective merits of the three views must, if the question is genuine, center around a determination of what weight the evidence in a *res ipsa loquitur* case should have.

But any attempt to determine whether a *res ipsa loquitur* case contains doubtful or highly probable evidence of negligence must presuppose that there is a typical *res ipsa loquitur* case. Because of such an assumption, it is not realized that the evidence of negligence in a *res ipsa loquitur* case may vary in weight. The unexplained running off the road of an auto, which is a typical case,<sup>20</sup> merely permits the inference of negligence, whereas the unexplained collapsing of a house, which is an equally typical case,<sup>21</sup> compels such an inference.<sup>22</sup> Hence, any jurisdiction which conferred the same benefit upon every plaintiff seeking to establish negligence indirectly would be guilty of unjust indiscrimination.

It should be observed that the third interpretation is unlike the other two in that it is not merely an evaluation of the strength of evidence. Either it is something more in the sense that it adds an increment of public policy to the probative force of the evidence or it is rank error resulting from the failure of

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evidence is as follows: In any argument when a proponent seeks to move a third party to action which an opponent opposes, the proponent has the burden of overcoming the inertia of the third party. Unless he makes out a stronger case than his opponent, i.e., unless he has a preponderance of the evidence in his favor, he fails. Thus, he is said to have the risk of non-persuasion or the burden of proof. In Anglo-American law, because the jury are triers, not of all issues of fact, but of doubtful issues only, there is a burden on the party whose case seems too improbable to cause rational disagreement to go forward with the evidence until the issue is once more doubtful or to suffer a directed verdict. This burden is initially on the plaintiff but may shift when his evidence is overwhelmingly in favor of his contention. The burden of going forward is simply the burden of bringing the issue into the realm of reasonable doubt. 5 Wigmore, Evidence §§ 2485-9 (2d ed. 1923); Thayer, Preliminary Treatise on Evidence c. IX (1898).

<sup>18</sup> *Supra* note 12.

<sup>20</sup> Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (1935).

<sup>19</sup> *Infra* p. 131.

<sup>21</sup> *Supra* note 2.

<sup>22</sup> A further range of weight is indicated by the case of plaintiff falling down defendant's stairs which does not permit any inference of negligence. Pinney v. Hall, 156 Mass. 225, 30 N.E. 1016 (1892). The other extreme is illustrated by the case of two trains belonging to the same defendant colliding. Elgin, Aurora, & Southern Traction Co. v. Wilson, 217 Ill. 47, 75 N.E. 436 (1905).

courts to distinguish between the burden of proof and the burden of producing evidence. In some cases involving extra-hazardous activity, the courts, being reluctant openly to defy the fault rule of liability, have raised a presumption in the plaintiff's favor and required the defendant to sustain the burden of proof in the rebuttal.<sup>23</sup> Since it is frequently impossible for the defendant to extricate himself from this situation, the courts really inflict absolute liability. Thus, by a circuitous method the case is taken out of the field of evidence and into the substantive law of torts. Whatever may be the merits of such a shift, it is far better to meet the issue of absolute liability in the open than to complicate the already bewildering law of presumptions.

If courts realized that the phrase furnishes absolutely no criteria for determining negligence, they would make better use of the wisdom embodied in the general principles of evidence. Further, if no longer pinned down by precedent, they would be more apt to make the procedural step proper to the weight of the evidence advanced in each case. But there is undeniable merit in any attempt to relieve trial court judges from making new evaluations of recurring fact situations. If negligence cases could be catalogued into three classes corresponding to the three procedural steps with a different formula for each class an invaluable aid would be given trial judges. However, until such a classification is made, only confusion can attend the use of the phrase *res ipsa loquitur*.

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#### THE RULE IN SHELLEY'S CASE AS APPLIED TO CONTINGENT REMAINDERS

In a recent Illinois case<sup>2</sup> the facts were these: G deeded land to B and her husband ". . . for and during their life time, then to the heirs of the body of our daughter, B, and if she leaves no child or children surviving her, then to her heirs according to law." B died childless. The defendant, B's husband, to whom she devised all her real estate maintained that the above grant gave a joint estate for life to him and his wife, then a contingent remainder to her children which never vested because she died without children, and finally a contingent remainder to her heir at law, which by the Rule in Shelley's Case, was given to her as the ancestor. The court held that the rule did not apply to contingent remainders, and gave the estate to the heirs at law.

The Rule in Shelley's Case epitomizes the layman's conception of the technicality of law. When ordinary rules of construction have determined that the grantor intended an estate of freehold for the ancestor and a remainder to his

<sup>23</sup> Bohlen, *Studies in the Law of Torts*, c. XV (1926), especially pp. 646, 647. See also Carpenter, *Doctrine of Res Ipsa Loquitur*, 1 *Univ. Chi. L. Rev.* 519, 534 (1934). Prof. Bohlen suggests this as a method of attaining absolute liability because of the difficulty the defendant would have in sustaining disproof. Prof. Carpenter advocates this view for all cases because it would simplify trial procedure. Since Prof. Carpenter can hardly be advocating a return to absolute liability, he must be implicitly disagreeing with Prof. Bohlen as to the difficulty the defendant would have in meeting the burden of proof.

<sup>2</sup> *Gehlbach v. Briegel*, 359 Ill. 316, 194 N.E. 591 (1934).