RES IPA LOQUITUR—A NEW PARADOX IN BLASTING CASES

The appropriate basis of liability in blasting cases has been a subject of discussion for some time. The familiar controversies have been whether, as a matter of social policy, recovery should be based on strict liability or negligence, and whether the theory of liability should depend upon the presence or absence of a technical trespass. The commentators have long protested the artificial distinction between "direct" and "consequential" damages following the historic difference between trespass and case. That debate also seems to have run its course in the case law.

The frequent use of *res ipsa loquitur* in the last decade suggests a new controversy in the blasting cases. The new conflict arises out of the incompatibility of Section 519 of the *Restatement of Torts* with one of the underlying premises of a *res ipsa* case. The former presupposes an inherently dangerous activity, whereas the latter is applicable only to activity which is harmless unless negligently conducted. The purpose of this note is to explore that contradiction.

1 A prominent modern concern has been an examination of the blasting cases in terms of superior risk-bearing. See *Morriss, Torts* 248-53 (1953); Keeton, *Conditional Fault in the Law of Torts*, 72 Harv. L. Rev. 401 (1959).

2 The writers would apply the same standard of liability whether damages resulted from debris thrown onto the plaintiff's property or from vibration or concussion of the atmosphere. See *Prosser, Torts* 80 (1941) where the distinction between "direct" and "consequential" damages is referred to as "a marriage of legal technicality with scientific ignorance;" *Gregory, Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359, 378-79 (1951); Smith, *Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future*, 33 Harv. L. Rev. 542, 544 (1920).

3 See, e.g., *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 513 (2d Cir. 1931); *Whitman Hotel Corp. v. Elliott & Watrous Eng'g Co.*, 137 Conn. 562, 569-71, 79 A.2d 591, 595-96 (1951); *Louden v. City of Cincinnati*, 90 Ohio St. 144, 158, 106 N.E. 970, 974 (1914).


5 *Restatement, Torts* § 519 (1938).
I

The question now should be whether blasting really is inherently dangerous. Neither the cases nor the commentators have attempted to treat the problem adequately. Use of *res ipsa loquitur* to prove negligence would seem to force the issue, since one of the prerequisites for a *res ipsa* case is that "the accident must be one that ordinarily would not occur in the absence of negligence," or as it is sometimes put, the instrumentality causing injury must be such that no injury would ordinarily result from its use unless there was negligent construction, inspection or use. . . ."6

The cases are numerous and almost unanimous to the effect that blasting is extremely dangerous.7 Courts following the majority rule of strict liability hold that blasting is a hazardous activity necessarily exposing persons and property to serious risk of harm even though properly conducted. This is also the accepted view in most minority jurisdictions, which require that the plaintiff prove negligence in order to recover.8

If there has been a genuine change of attitude toward blasting, so that blasting is no longer considered dangerous, *res ipsa loquitur* might be a legitimate method of proof. It may well be that improved technology demands

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6 James, *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)*, 37 Va. L. Rev. 179, 200 (1951). The two other requirements listed by Professor James are: "(2) both inspection and use must have been at the time of the injury in defendant's control; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action on plaintiff's part." For an often-quoted statement, see Gerhart v. Southern Cal. Gas Co., 56 Cal. App. 2d 425, 132 P.2d 874 (1942).


8 For example, a leading New York case denying recovery for property damage resulting from concussion and vibration stated: "For aught that appears, the defendant may have taken all those precautions incumbent upon him in the performance of such a work, and nevertheless the damage may have happened to the plaintiff's building as a natural result, influenced, possibly, in addition, by some weakness of construction. That a vibration of the earth or of the atmosphere is the invariable accompaniment of an explosion is a fact of universal observation...." Holland House Co. v. Baird, 169 N.Y. 136 142, 62 N.E. 149, 151 (1901).
a general reexamination of the category of ultrahazardous activities and a
critical analysis of the theory of accident-causing behavior on which section
519 rests. There is nothing in the cases, however, that indicates any notable
technological advance toward increasing the safety of blasting. Moreover,
even if blasting is taken out of the ultrahazardous category, it still may not
be harmless enough to warrant the application of res ipsa loquitur.

In recommending strict liability for ultrahazardous activities,9 the writers
of the Restatement declared that "blasting is ultrahazardous because high
explosives are used and it is impossible to predict with certainty the extent
or severity of its consequences."10 They defined an ultrahazardous activity,
of which blasting is the example par excellence, as one which:

(a) necessarily involves a risk of serious harm to the person, land or chattels of
others which cannot be eliminated by the exercise of the utmost care, and (b) is
not a matter of common usage.11

A paradox arises upon the introduction of res ipsa loquitur.12 Use of the
doctrine in a blasting case demands acceptance of the as yet unsubstantiated
proposition that, in the ordinary course of events, the blasting would not
have caused harm unless the defendant had been negligent. Only that proposi-
tion permits the inference of negligence from the injury, lets the thing speak
for itself—res ipsa loquitur. If the activity is naturally dangerous, the inference
of negligence from the harm is not justified.

Within the confines of the same case, courts have referred to explosives
as "extra-hazardous"13 or "a dangerous instrumentality"14 and then have
awarded damages on the basis of res ipsa loquitur. Logically, the admission
of inherent danger should foreclose any use of the doctrine.

Almost all of the courts which resort to res ipsa loquitur distinguish between
"direct" and "consequential" damages. It is interesting to note how the
attitudes of these courts change, depending on the case before them. Where
the facts present a technical trespass calling for the application of strict
liability, explosives are described as "ultrahazardous," "intrinsically danger-
ous," or "a deadly agency." When the damage is a cracked foundation and
the sanding up of a well, without any debris cast onto the plaintiff's property,
negligence must be found to permit recovery. In such a case, the same courts
may lapse into the jargon of res ipsa loquitur and describe blasting in the most

9 Restatement, Torts § 519 (1938).
10 Id. § 520, comment c.
11 Id. § 520.
12 The problem may be viewed as one of classification under one of two classic common
Fletcher, [1868] 3 H.L. 330. The contradiction in the blasting cases is that the same activity
is classified sometimes under the former case, and other times under the latter.
innocuous terms. Apparently the courts see no need to reconcile the two lines of cases since they rest on different principles of liability. The discrepancy seems to indicate that the liability theory on which the plaintiff must recover determines whether blasting is regarded for the moment as inherently dangerous or as harmless unless negligently conducted.

II

The following commentary by Professor Jaffe on how the law progresses may explain why the courts have not been concerned with the logical inconsistencies of using *res ipsa loquitur* in blasting cases. "The law has traditionally moved from one doctrinal peak to another through the misty vales of fiction. . . . An outright rejection of an old doctrine in favor of a new may seem a gross assertion of naked power."

The "fiction" used by the *res ipsa* courts is that blasting is harmless unless negligently conducted. (As suggested earlier, there may be some substance to this "fiction," but support does not appear in the cases.) The use of *res ipsa loquitur* in blasting cases by means of this startling new view of blasting probably reflects an uncertain stage of liability theory rather than a technological advance.

Although nominally within the negligence system, the operation of *res ipsa loquitur* in practice has led some writers to regard the doctrine generally as a step in an evolution toward liability without fault. Whenever a negligence court is attracted by the notion of strict liability, and yet is unwilling to undergo a reversal and declare itself in favor of strict liability, *res ipsa loquitur* has a special appeal. At least where modern discovery process is not available, it would be difficult in many cases for a plaintiff with a meritorious cause to sustain his burden of proof without recourse to *res ipsa loquitur*. Inherent in the doctrine is a relaxation in rigidity of proof. By making it easier for the

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16 Prosser, *supra* note 6, at 224 ("This is a step along the road to liability without fault."); Gregory, *supra* note 2, at 381 ("The result is tantamount to absolute liability without fault."). Professor James attributes the expansion of *res ipsa loquitur* to "the strong general trend towards strict liability and social insurance—a trend which is corroding a system of liability nominally based on fault." James, *supra* note 6, at 198–99.

A case dramatically revealing a confusion of *res ipsa loquitur* with strict liability in a different setting involved a water tank which burst so that the escaping water damaged the plaintiff's property. "No matter in what the negligence consisted, it is proved by the bursting of the tank. The rule of *res ipsa loquitur* applies." Weaver Mercantile Co. v. Thurmond, 68 W.Va. 530, 532, 70 S.E. 126, 127 (1911). Then later in the same paragraph: "He [the owner of the tank] is bound, at his peril, to prevent it from injuring the property of his neighbor."

Courts have used *res ipsa loquitur* in cases of products liability where they were unwilling to imply a warranty running from the manufacturer to the injured plaintiff. Judge Traynor said of this use of *res ipsa*: "In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability." Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (concurring opinion).
plaintiff to recover, res ipsa loquitur assures results as close to strict liability as the negligence system can provide.  

A transitional use of res ipsa loquitur in the evolution of a new theory of liability may be seen in Washington history before that state abandoned the negligence requirement and adopted strict liability as the rule for blasting cases. In the 1892 case of Klepsch v. Donald, recovery was had for wrongful death. Plaintiff's deceased was hit in his own house by a rock allegedly thrown by defendant's blasting. Influenced by the hazards of the defendant's activity, the Supreme Court of Washington reasoned:

The appellants [defendants] conceded at the trial that the mere fact that the rock was blown to so great a distance and off the appellants' premises, might be taken as prima facie evidence of negligence in the management of the blast, which, if not rebutted, would be sufficient to sustain a verdict. ... [W]e think that it should be the law of such cases, where the agency used is of a nature so dangerous. ... We hold ... the liability of the appellants depended upon whether they were negligent or not to prove which ... the fact of the injury was sufficient prima facie evidence. ...  

The Washington court appeared to be motivated less by the probabilities of fault than by the dangers of the defendant's activity. By 1913 the court had become so impressed with the hazards of blasting that, in an action to recover for depletion of water in the plaintiff's well, it established strict liability for damages from blasting even without technical trespass.

Kentucky's experience is equally instructive, although that state has not yet adopted strict liability. Dissatisfaction with the negligence requirement probably dates back at least to the 1930 case of Brooks-Calloway Co. v. Carroll. There the Kentucky Court of Appeals admitted somewhat reluctantly that proof of negligence was necessary to recovery. Nevertheless, it was willing to relax the rules of evidence in the plaintiff's favor. It was held not to be error to admit the plaintiff's nonexpert testimony that the defendant's blasting could have been accomplished with lesser quantities of explosives.

Then in 1956 the same court, in Aldridge-Plage, Inc. v. Parks, registered "serious doubt" concerning the soundness of its rule requiring proof of negligence in an action for property damages from blasting vibrations. The court said:

17 See James, supra note 6, at 219 ("Plaintiffs rarely lose res ipsa loquitur cases at the jury's hands.").  

18 4 Wash. 436, 30 Pac. 991 (1892) (reversed and remanded to permit defendant to rebut the inference of negligence). A second appeal was affirmed in favor of the plaintiff in 8 Wash. 162, 35 Pac. 621 (1894).  

19 4 Wash. at 439-43, 30 Pac. at 992-93 (emphasis added).  


21 235 Ky. 41, 9 S.W.2d 592 (1930).  

22 297 S.W.2d 632 (Kt. Ct. App. 1956).
[U]nder the rule prevailing in this state, there is no liability on the part of the Aldridge-Poage Company for damage so caused unless it is shown that the company performed its work negligently, and that the injury was the result of its negligence. ... While we have serious doubt of the soundness of this rule, we have concluded not to re-examine it in this particular case.  

The next year, amidst this “serious doubt” about the propriety of the negligence requirement, *Marlowe Constr. Co. v. Jacobs* introduced the doctrine of *res ipsa loquitur for the first time* in the state’s history of blasting cases. 

The incongruity of *res ipsa loquitur* in a blasting case leads to the almost inescapable conclusion that all courts so employing the doctrine reflect this vacillation between competing theories of liability. Perhaps the Kentucky courts have just been more frank than most in disclosing their ambivalence.

Of the states denying strict liability, Vermont probably presents the judicial climate most cordial to the next emergence of *res ipsa loquitur* in blasting, as evidenced by the recent case of *Thompson v. Green Mountain Power Corp.* In that case the plaintiff recovered for lessened productivity of his hens allegedly caused by the defendant’s failure to warn the plaintiff. The court said in passing, “The doctrine of absolute liability has not been accepted in this jurisdiction.... Notwithstanding, this Court has judicially recognized that those who deal with a deadly agency should be held accountable to all those whose likelihood of injury could reasonably be foreseen.”

The foreseeability requirement, evidently intended to differentiate the court’s rationale from strict liability, is embodied almost verbatim in the Restatement’s recommendation of strict liability. Thus the Vermont court has denounced strict liability and in the same paragraph has paraphrased unwittingly the rule as it is commonly applied. Since the Vermont court has manifested a confused attitude toward liability, it has shown itself ripe for the use of *res ipsa loquitur* in a blasting case.

Two new *res ipsa* cases, one in Delaware and the other in Louisiana, may indicate an uncertain or transitional state of liability theory, but both

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23 Id. at 633.
24 302 S.W.2d 612 (Kt. Ct. App. 1957).
26 It does not appear from the opinion what the plaintiff could have done to prevent the damage if he had been warned.
27 120 Vt. at 482, 144 A.2d at 788.
28 Restatement, Torts § 519 (1938): “[O]ne who carries on an ultrahazardous activity is liable to another whose person, land, or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.” See also 35 C.J.S. Explosives § 8 (1960).
29 Note Professor Harper’s approval of the result in Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892), on the ground that the plaintiff was not part of the class imperiled. Harper, Law of Torts 205 (1933).
seem to reverse the normal direction. Since Delaware and Louisiana were
never firmly committed to a negligence basis of recovery, they cannot be
regarded as part of a general trend from negligence to strict liability via
res ipsa loquitur. Indeed the Louisiana case has been noted as taking the state
from strict liability to negligence.\textsuperscript{32}

If res ipsa loquitur is being used in the manner suggested by Professor Jaffe,
as a transitional device,\textsuperscript{33} perhaps it is understandable why the otherwise
expected sharp debate over the nature of blasting is lacking. Indicative
of the lack of dispute is the startling ease with which the res ipsa courts have
accepted the proposition that blasting is harmless unless negligently con-
ducted. In none of the cases does this proposition emerge from careful
reflection. Rather, it is asserted as self-evident.

For example, the Texas Court of Civil Appeals in McKay v. Kelly stated
categorically, "We believe it to be a matter of general knowledge that blasting
by the use of explosives will not cause damage to adjacent property unless
negligently conducted."\textsuperscript{34} Similarly, the emphatic declaration of the Maine
court in Cratty v. Samuel Aceto & Co. seems excessive: "It is... rare that
damage is caused to adjoining property, if the blaster uses the reasonable
care that the law requires that he should use. This is common knowledge
to every school boy and to every adult citizen."\textsuperscript{35}

Doubtless these judges were familiar with the view espoused in the Restate-
ment\textsuperscript{36} and followed in most jurisdictions. While they might well deem that
view erroneous, it is hard to believe that they felt their own characterization
of blasting to be a matter of "common knowledge" obvious to every informed
observer.

Because the Restatement also classifies aviation as ultrahazardous, the
res ipsa cases in that field resemble the blasting sequence. The Restatement
had this to say of aviation:

\textsuperscript{32} 34 Tut. L. Rev. 409 (1960). For a background of strict liability, see the case relied

For another example of the predilection for res ipsa loquitur of a court moving from strict
liability to negligence theory, see Randall v. Shelton, 293 S.W.2d 559, 561–62 (Ky. Ct.
App. 1956) overruling Louisville Ry. Co. v. Sweeney, 157 Ky. 620, 163 S.W. 739 (1914),
the former indicating by dictum the appropriateness of res ipsa loquitur for a case of unin-
tentional trespass.

\textsuperscript{33} See text accompanying notes 15 supra and 48 infra.

\textsuperscript{34} 229 S.W.2d 117, 120 (Tex. Civ. App. 1950). The possibility of using the doctrine
under similar circumstances has been considered and rejected shortly before. Sanoline
Oil & Gas Co. v. Lambert, 222 S.W.2d 125, 126 (Tex. Civ. App. 1949) ("Proof of the fact
that appellee's wells sanded up immediately after the appellant had set off certain charges
of explosives is insufficient of itself to establish liability."); Universal Atlas Cement Co. v.
Oswald, 138 Tex. 159, 157 S.W.2d 636 (1941) (res ipsa held inapplicable on ground that
specific negligence was charged); Standard Paving Co. v. McClinton, 146 S.W.2d 466,
468 (Tex. Civ. App. 1940) ("Proof of the happening of an accident constituted no proof
of negligence.").

\textsuperscript{35} 151 Me. 126, 131, 116 A.2d 623, 627 (1955).

\textsuperscript{36} See note 10 supra and accompanying text.
Aviation in its present stage of development is ultrahazardous because even the best constructed and maintained aeroplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained and operated may crash to the injury of persons, structures and chattels on the land over which the flight is made. Yet according to United States v. Kesinger, a suit to recover for damage to a building hit by a plane, the modern trend of authority is to hold the rule of res ipsa loquitur applicable to airplane accidents. Curiously, the plaintiff in Kesinger sought to recover on the basis of strict liability, or in the alternative he urged the application of res ipsa loquitur, thus advancing contradictory views of the degree of danger involved.

The underlying proposition on which res ipsa loquitur rests, however, has been subjected to close scrutiny in the aviation cases. One writer has observed that in all cases where the courts have considered fully the premise that "in the ordinary experience of mankind aircraft do not crash unless the airline management or its employees were negligent," they have concluded that the experience in aviation did not warrant application of res ipsa loquitur. Why then has the comparable premise in the blasting cases gone unchallenged? Perhaps because a serious inquiry in the case of blasting would result in a conclusion even more obvious, and the usefulness of the doctrine would thereby be foreclosed. Or perhaps the difference is explained by the superior organization and defense of the aviation interests. Their great economic interest in avoiding the ultrahazardous category and in opposing the use of res ipsa loquitur has, no doubt, forced consideration of the issue and has produced studies unfavorable to liability.

IV

In connection with the rule of res ipsa loquitur, other means should be considered whereby the courts have relaxed rigidities of proof of fault in blasting cases. These too may indicate dissatisfaction with the negligence requirement. One such technique is to permit the plaintiff to make his case on the defendant's admission that he could have used less dynamite. Thus a Kansas reviewing court concluded with regard to the blaster's testimony, He... said that one stick would not cause as great concussion as two, and probably this is common knowledge, as well as that six sticks would cause a much greater concussion, which the jury has a right to take into consideration. In connection with the proven effects of the explosions on the building, this evidence was sufficient of itself to justify the jury in finding him guilty of negligence.

37 Restatement, Torts § 520, comment on clauses (a) and (b) (1938).
38 190 F.2d 529 (10th Cir. 1951).
39 Id. at 532.
40 McLarty, supra note 6 at 74.
41 City of Cherryvale v. Studyvin, 76 Kan. 285, 288, 91 Pac. 60, 61 (1907). See also Brooks-Calloway Co. v. Carroll, 235 Ky. 41, 43, 29 S.W.2d 592, 593 (1930) (allowing plaintiff's own testimony that the work could have been done with a lesser amount of explosives).
Another device as effective as res ipsa loquitur is submission of the case to the jury when the only evidence of negligence is nonexpert testimony of the res ipsa variety—that if damage occurred, it would be because the blasting was improperly conducted. Cases of this type should probably be classified as pure res ipsa cases. They require, however, something more than proof of damage, defendant's blasting, and the likelihood of a causal connection between the two in order to permit the inference of negligence. They require that the plaintiff provide testimony that the accident could not have happened without negligence on the defendant's part. Admittedly the additional requirement is an artificial step, especially when the plaintiff's own testimony will suffice. The court then talks about the nonexpert testimony as proof of negligence without referring to res ipsa loquitur. In short, this device allows the witness, instead of the court, to formulate the doctrine for the jury.

Another technique favorable to liability where strict liability is not available is a liberal extension of the nuisance doctrine to cover any case where the vibration is recurring. Blasting is seldom an isolated event, and is ordinarily conducted over a prolonged period. The nuisance theory, therefore, affords a convenient way to award damages and yet avoid the choice between negligence and strict liability. This course was suggested by Dixon v. New York Trap Rock Corp., in which a New York court ignored the defendant's reliance on a classic New York case requiring that liability be predicated upon negligence. The court stated that the blasting constituted an unreasonable interference with the plaintiff's property—"a wrong in which failure to take proper care is not a necessary element of liability." Although the blasting in this case extended over a three-year period, the rationale is capable of application to shorter periods, so that conceivably it could be used to assure recovery in the majority of cases in a negligence jurisdiction.

Still another means of lessening the hardship of the negligence requirement, though less often available, is expansion of the third party beneficiary concept. The technique is demonstrated by Coley v. Cohen, a four to three decision in the New York Court of Appeals permitting the plaintiff to recover on a contract to indemnify where he would otherwise have been without remedy. The plaintiff had suffered property damage due to concussion from the defendant's non-negligent blasting in connection with the latter's contract to construct a sewer for the city. The court construed the defendant's contract as not only indemnifying the city for claims that might be brought against it, but also as imposing strict liability upon the contractor. He was thereby rendered liable although the city would have escaped liability under the law of New York.

42 293 N.Y. 509, 58 N.E.2d 517 (1944).
44 293 N.Y. at 513, 58 N.E.2d at 517-18.
45 289 N.Y. 365, 45 N.E.2d 913 (1942).
Because it is more often available, and because it is strikingly inappropriate in a blasting case, *res ipsa loquitur* remains the doctrine most likely to reflect doubts about liability theory. The use of *res ipsa* in a blasting case reminds one of Professor Gregory’s analysis of the distinction in New York between direct and consequential damages. A psychoanalytical hypothesis was suggested in the following language:

My belief is that the New York court had a sort of Freudian fixation on a concept which it consciously and outwardly purported to loathe—absolute liability without fault for the consequences of extrahazardous conduct. It was obviously fascinated by this sinister concept but did not dare to come out in the open and admit it in terms which meant adopting a theory of absolute liability as the common law of the state.46

Speaking specifically of *res ipsa loquitur*, Professor James made much the same point. If, as he maintains, “the practical impact and importance of *res ipsa loquitur* has consisted in its tendency to invite or encourage the assumption of broad and doubtful postulates favorable to liability in many situations where the courts would otherwise be understandably reluctant to adopt them,”47 then the blasting cases present the best possible example of the doctrine’s significance. Likewise, by Professor Jaffe’s standards, the use of *res ipsa loquitur* in blasting cases extends the doctrine to its highest. The blasting cases afford the best imaginable support for his vindication of the doctrine as part of the evolution to a new basis of liability.

The use of *res ipsa loquitur* in blasting cases, however, cannot be justified by logical consistency and intellectual adherence to the strict requirements of the doctrine. Justification for this use of *res ipsa*, if any there be, must be found in the realm of judicial expediency easing the transition between contradictory theories of liability. As Professor Jaffe remarked, “a slow approach allows an opportunity for discussion, for testing the implication of an emerging doctrine. It allows time for acclimation, for acceptance or rejection—by the bar and its clientele. It allows the court to beat a strategic or merely tactical retreat in the rare case where the application of a new doctrine is shocking.”48 This then is the real service the doctrine of *res ipsa loquitur* performs for a result-oriented court feeling its way along new paths of liability in blasting cases. Despite the sophistication of the justifications that can be advanced for this growth of judicial doctrine, there is still something to be said for the opposite view—namely, that the law would function better in the long run if doctrine, especially liability doctrine, were stated candidly and applied seriously.

46 Gregory, *supra* note 2, at 376.
47 James, *supra* note 6, at 198.
48 Jaffe, *supra* note 6, at 13.