IN THE YEAR 1863 a barrel of flour rolled out of the window of an English warehouse and into the lives of all tort lawyers. It fell upon a passing pedestrian, who sued the owner of the warehouse for his injuries. At the trial a question arose as to the necessity of some affirmative proof of the defendant's negligence; and in the course of a brief colloquy with counsel, Baron Pollock made use of a familiar and homely phrase. He said, "The thing speaks for itself." Unfortunately, since he was a classical scholar in the best tradition of English judges, he said it in Latin.¹

From that casual utterance, dignified and magnified by the cloak of the learned tongue, there has grown by a most extraordinary process the "doctrine" of res ipsa loquitur. It is a thing of fearful and wonderful complexity and ramifications, and the problems of its application and effect have filled the courts of all our states with a multitude of decisions, baffling and perplexing alike to students, attorneys and judges. The courts of California, like the rest, have wrestled for more than half a century with res ipsa loquitur. At the cost of adding to an already excessive amount of literature on the subject,² this article proposes to review the California cases, to determine so far as possible what the law now is in this state, and to venture with some timidity to chart a course for the future.

¹ "There are certain cases of which it may be said res ipsa loquitur, and this seems one of them." Byrne v. Boadle (1863) 2 H. & C. 722, 725, 159 Eng. Rep. 299, 300.


The best discussion of res ipsa loquitur is certainly in Malone, Res Ipsa Loquitur and Proof by Inference (1941) 4 LA. L. REV. 70. One of the least satisfactory is Shain, Res Ipsa Loquitur (1944) 17 So. CALIF. L. REV. 187, which succumbs to the general confusion.
1. THE DEVELOPMENT OF THE "DOCTRINE"

"Res ipsa loquitur," of course, means nothing more than "the thing itself speaks." The phrase is at least as old as Cicero, and it has long been familiar to the law. It has been used from time to time in other connections, and there is no special witchcraft in it. Once uttered by Baron Pollock, it immediately was involved in other negligence cases in which unlucky plaintiffs continued to be struck by various falling objects. The first statement of principle was the language of Chief Justice Erle in Scott v. London & St. Katherine Docks Co. in 1865, which is still often repeated by the California courts:

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

Within the next five years two other decisions allowed the plaintiff to get to the jury upon the same reasoning, stated in very similar terms.

Thus far it is apparent that "res ipsa loquitur" is nothing new or startling, and that it amounts to no more than a matter of common

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3 ORATION IN DEFENSE OF MILO, pars. 53 and 66.
6 "Was there then evidence . . . ? I think there was, and that this is one of those cases in which . . . 'res ipso loquitur.' Packing cases carefully placed in a proper position do not naturally tumble down of their own accord; . . . and as in Scott v. London Dock Company, it was said . . . the facts shew a prima facie case." Bramwell, B., in Briggs v. Oliver (1866) 4 H. & C. 403, 407.

"But inasmuch as our experience of these things is, that bricks do not fall out when brickwork is kept in a proper state of repair, I think that where an accident of this sort happens, the presumption is that it is not the frost of a single night, or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that care on the part of the plaintiffs which it was their duty to apply . . . Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants . . ." Cockburn, C. J., in Kearney v. London, Brighton & South Coast R. Co. (1870) L. R. 5 Q. B. 411, 415-416, aff'd (1871) L. R. 6 Q. B. 759 (italics supplied).
sense. From the circumstantial evidence of an unusual accident the jury is permitted to draw the obvious conclusion that it was the defendant's fault. If no more than this had ever been involved, res ipsa loquitur would have remained a very simple matter. Shortly after 1870, however, the Latin phrase became inextricably intermingled and confused with an older and entirely different rule.

Fifty-four years before the barrel of flour, the axle of a stagecoach broke and a passenger was hurt. Sir James Mansfield declared that the burden lay upon the carrier to show "that the coach was as good a coach as could be made, and that the driver was as skillful a driver as anywhere be found." Later decisions stated the rule broadly, that the mere fact of injury to a passenger cast upon the carrier the burden of proving that it was not at fault. In time it was limited to situations where the accident was clearly caused by the carrier's equipment or operation, as distinguished from some outside agency over which it had no control. The decisions, as well as the early text writers on the law of carriers, explained this burden of proof on the basis that the carrier had contracted to transport the passenger safely, that in the absence of explanation the fact that it had not done so was on its face a breach of the contract, and that the carrier had undertaken a special responsibility toward the passenger which required it not only to exercise the highest possible degree of care, but to pay for his damages unless it could prove by the greater weight of evidence that they were not due to its negligence. Both explanations are obviously echoes of the law which requires the carrier "to carry

11 Angell, LAW OF CARRIERS 539-40 (1849); Cooley, TORTS 662-3 (1880); Shearman and Redfield, NEGLIGENCE 10-11 (1869); Story, COMMENTARIES ON THE LAW OF BAILMENTS 379 (1840); Thompson, CARRIERS OF PASSENGERS 209-210 (1887).
12 The leading case, Christie v. Griggs (1809) 2 Camp. 79, 170 Eng. Rep. 1088, was itself an action in assumpsit.
goods, against all events but the acts of God, and the enemies of the king."

The law of negligence of the late nineteenth century was to a considerable extent the law of railway accidents. It was perhaps inevitable that Baron Pollock's Latin phrase should become involved in passenger cases, and that it should there cross-breed with the carrier's burden of proof and produce a monster child. After a period of uncertainty as to its nature the "presumption" against the carrier became merged with res ipsa loquitur, and is now so far identified with it that only one court recognizes any distinction. There was thus a fusion of two very different ideas, one concerned only with what the facts in evidence may be taken to prove, and the other only with the necessity of any such proof at all.

The marriage was not a happy one. One of its early effects was the notion, given currency by Judge Thompson and still accepted in Pennsylvania but now rejected everywhere else, that res ipsa loquitur could apply only where the defendant had undertaken to be responsible for the plaintiff's safety. Another was the gradual modifi-

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14 See, for example, Southern Pacific Co. v. Cavin (C. C. A. 9th 1906) 144 Fed. 348 (based on defendant's exclusive knowledge of the facts); George v. St. Louis, I. M. & S. R. Co., supra note 9 (burden of proof shifted); Central R. Co. v. Freeman (1885) 75 Ga. 331 (permissible inference of negligence only); Cleveland, C. C. & I. R. Co. v. Newell (1885) 104 Ind. 264, 3 N. E. 836 (a rule of policy); Cleveland, C. C. & I. Ry. v. Newell (1881) 75 Ind. 542 (presumption which defendant is "required to rebut"); Le Blanc v. Sweet (1901) 107 La. 355, 31 So. 766 (rests on contract); Baltimore & Ohio R. Co. v. State (1884) 63 Md. 135 (evidentiary "presumption").


16 In Missouri it is held that in passenger cases res ipsa loquitur amounts to a presumption, but in other cases to a mere permissible inference. Gordon v. Muehling Packing Co. (1931) 328 Mo. 123, 40 S. W. (2d) 693; Hartnett v. May Department Stores (Mo. App. 1935) 85 S. W. (2d) 644.

17 2 Thompson, Negligence 1227-8 (1886); Thompson, Carriers of Passengers 210 (1887).

cation of the carrier's burden of proof, which, except in a very few jurisdictions, has become a mere presumption or a bare permissible inference of negligence. Another was the bewildering confusion as to the application of res ipsa loquitur and its procedural effect which will be apparent from what follows. Still another was the invention of new reasons for the "doctrine," including in particular the idea, derived from the carrier cases and closely connected with the burden of proof, that the defendant must have superior knowledge of the cause of the accident, and so should be required to explain it.

The final development came in 1905, when Dean Wigmore, seeking to define what he found in the cases, stated the requirements of res ipsa loquitur in words which likewise have often been referred to by the California courts:

(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.

With this statement in our greatest legal text, res ipsa loquitur was reduced to a formula—a catchword easy to repeat as a substitute for consideration of the evidence. Unhappily the proof of facts by facts is not capable of reduction to a formula; it has an inconvenient

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22 The idea appears to have originated with Sir James Mansfield in Christie v. Griggs, supra note 12 at 80, 170 Eng. Rep. at 1088: "He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers a mere accident."

23 Wigmore, Evidence § 2509 (1st ed. 1905).
habit of depending always upon the facts. Text writers have much to answer for in this world. The strict and literal application of Wigmore’s formula has led to such absurd results as the Rhode Island case\(^2\) in which, in the defendant’s department store, the plaintiff sat down in a chair that collapsed, and a directed verdict for the defendant was affirmed upon the ground that both “user” and “control” of the chair were in the plaintiff “at the time of the injury.”

In California the growth of the doctrine followed the general pattern. The earliest cases were those of overturned stagecoaches\(^2\) and other accidents injuring passengers,\(^2\) in which it was held that the carrier had the burden of proving by a preponderance of the evidence that the injury was not caused by its fault. The Latin phrase was foreshadowed in 1893, when a chisel fell from a scaffold upon a pedestrian’s head\(^2\) and the court repeated the language of Chief Justice Erle\(^2\) without saying “res ipsa loquitur.” The first use of the words was in 1895 in *Judson v. Giant Powder Co.*,\(^2\) in connection with the unexplained explosion of a nitroglycerine factory. The court found an analogy in the “presumption of negligence” arising in passenger cases, and rejected the contention that the “presumption” was limited to contractual relations between the parties. It went on to review the early decisions involving res ipsa loquitur, rather hopelessly confusing the two ideas and coming out with a “prima facie case.” This decision was promptly cited, and Erle’s language again repeated, when the sudden jerk of a train injured a passenger.\(^2\) The court found a “presumption of negligence” casting upon the carrier the burden of proof. After a number of similar decisions the presumption was

\(^{24}\) Kilgore v. Shepard Co. (1932) 52 R.I. 151, 158 Atl. 720.
\(^{26}\) Mitchell v. Southern Pacific R. R. Co. (1890) 87 Cal. 62, 25 Pac. 245 (derailment of train); Lawrence v. Green (1886) 70 Cal. 417, 11 Pac. 750 (broken wheel of stagecoach); Yeomans v. Contra Costa Steam Navigation Co. (1872) 44 Cal. 71 (boiler explosion in depot).
\(^{27}\) Dixon v. Pluns (1893) 98 Cal. 384, 33 Pac. 268.
\(^{28}\) Text at page 184 supra.
\(^{29}\) (1895) 107 Cal. 549, 40 Pac. 1020.
\(^{30}\) McCurrie v. Southern Pacific Co. (1898) 122 Cal. 558, 55 Pac. 324.
held not to throw upon the carrier the burden of the greater weight of evidence but merely the necessity of producing evidence to equalize.\textsuperscript{32} By 1909, when res ipsa loquitur was first mentioned by name in a passenger case,\textsuperscript{33} the fusion of the two ideas was complete, and the doctrine was well on its way to standardization along the lines of Wigmore's formula.

With this background, we may proceed to consider the California cases.

2. THE INference THAT SOMEONE HAS BEEN NEGligent

At the outset it should be clear that what we are dealing with is merely one kind of circumstantial evidence. When a man is found with his throat cut and the defendant was the last person seen with him, the defendant's footprints are found leading away from the scene of the crime, and the defendant is found in possession of a blood-stained knife together with the deceased's watch and wallet, nothing is said about "res ipsa loquitur"; but the state's attorney does not fail to tell the jury that the facts cry aloud to high heaven the name of the murderer. When a barrel of flour falls from a window, whence barrels do not ordinarily fall unless someone has been negligent, and the defendant is in full control of the building, the evidence of negligence is of no different kind or quality, and it is no more weighty, dignified or sacrosanct.\textsuperscript{34}

Negligence may, of course, be proved by circumstances.\textsuperscript{35} Long before the courts of California had ever heard of res ipsa loquitur they were recognizing as sufficient evidence of negligence the fact that soon after the passage of a train a fire had started beside the right of way in the direction in which the wind was blowing.\textsuperscript{36} Without any mention of res ipsa loquitur it has been held that the slippery condition of a waxed floor is sufficient evidence of negligence on the part of the

\textsuperscript{32} Patterson v. San Francisco & San Mateo Electric R. Co. (1905) 147 Cal. 178, 81 Pac. 531.
\textsuperscript{33} Wyatt v. Pacific Elec. R. Co. (1909) 156 Cal. 170, 103 Pac. 892.
\textsuperscript{34} This paragraph is repeated in substance from Prosser, \textit{The Procedural Effect of Res Ipsa Loquitur} (1936) 20 Minn. L. Rev. 241, 257-8.
owner;\(^{37}\) that skid marks and other traces of an accident are sufficient evidence of speed;\(^{38}\) that running down a visible pedestrian is evidence of failure to keep a proper lookout;\(^{39}\) and that a defective condition of premises of long standing is proof of failure to inspect.\(^{40}\) There are, of course, many hundred other instances of the same thing.\(^{41}\)

When the leg of the defendant's chair collapses, it is permissible, without resorting to Latin and as a matter of circumstantial evidence alone, to draw the conclusion that the accident was due to a defect which the defendant ought to have discovered.\(^{42}\) When a runaway horse is found in the street, it is evidence that his owner has been negligent in looking after him.\(^{43}\) When there are impurities in a manufacturer's product, it is evidence that he has not used due care in making it.\(^{44}\) When a rope breaks and injures a workman, it is evidence that the employer has been negligent in supplying the rope.\(^{45}\) The thing speaks for itself; and when, in all these cases,\(^{46}\) the magic words

\(^{37}\) Hatfield v. Levy Bros. (1941) 18 Cal. (2d) 798, 117 P. (2d) 841; Rothschild v. Fourth & Market St. Realty Co. (1934) 139 Cal. App. 625, 34 P. (2d) 734.

\(^{38}\) Walker v. Adamson (1937) 9 Cal. (2d) 287, 70 P. (2d) 914; Finley v. Steiner (1940) 40 Cal. App. (2d) 331, 104 P. (2d) 819.


\(^{40}\) Morton v. Manhattan Lunch Co. (1940) 41 Cal. App. (2d) 70, 106 P. (2d) 212.

\(^{41}\) For example, Szopieray v. West Berkeley Express & Draying Co. (1924) 194 Cal. 106, 227 Pac. 720 (movement of truck which ran over child); Peters v. McKay (1902) 136 Cal. 73, 68 Pac. 478 (derailment of car due to rough track); Hall v. San Joaquin L. & P. Co. (1935) 5 Cal. App. (2d) 755, 43 P. (2d) 856 (fire due to defective electric wiring); Hilson v. Pacific G. & E. Co. (1933) 131 Cal. App. 427, 21 P. (2d) 662 (fire went out in bakery oven); Greenleaf v. Pacific Tel. & Tel. Co. (1919) 43 Cal. App. 691, 185 Pac. 872 (fire due to hot ashes against warehouse wall).

\(^{42}\) Sheward v. Virtue (1942) 20 Cal. (2d) 410, 126 P. (2d) 345 (no mention of res ipsa loquitur).


\(^{44}\) Tingey v. E. F. Houghton & Co. (1947) 30 Cal. (2d) 97, 170 P. (2d) 807 (no mention of res ipsa loquitur).


\(^{46}\) Compare with the cases cited in notes 42-45 the following, in which the decision rested upon res ipsa loquitur:


Anderson v. I. M. Jameson Corp. (1936) 7 Cal. (2d) 60, 59 P. (2d) 952 (cow on the highway); Kenney v. Antonetti (1931) 211 Cal. 336, 295 Pac. 341 (horse on the highway); Breidenbach v. McCormick Co. (1912) 20 Cal. App. 184, 128 Pac. 423 (earlier decision in the same case).
res ipsa loquitur are uttered, nothing is added and nothing is taken away.

When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant upon the occurrence, we speak of it as a case of "res ipsa loquitur"; when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence. 47

Circumstantial evidence means that from facts in evidence other facts may reasonably be inferred. The inference rests upon a process of reasoning, based upon past experience. It may be strong or weak, depending entirely upon the facts. For many years defense counsel in criminal cases have made us familiar with its weaknesses; but there is still no man who would not accept the evidence of dog tracks in the mud against the sworn testimony of a hundred eye-witnesses that no dog has passed by.

A res ipsa loquitur case is a circumstantial evidence case which permits the jury to infer negligence from the mere occurrence of the accident itself. Its first requirement is a basis of past experience which will permit the triers of fact to conclude that such events do not ordinarily happen unless someone has been negligent. There is no room for that conclusion where the plaintiff has merely tumbled down the stairs 48 or fallen in alighting from a stationary street car, 49 since

47 Cullen, J., in Griffin v. Manice (1901) 166 N.Y. 188, 196, 59 N.E. 925, 927.
everyone knows that such accidents commonly occur without the fault of anyone unless it is the plaintiff himself. A broken milk bottle is no proof of anyone’s fault. But when a guest in an automobile is thrown with great violence against the top, or glass is baked in a loaf of bread, or a railway company attempts to run two trains past one another on the same track, or a steam roller wanders across a lawn and rams a building, we immediately recognize that these are abnormal events, and not the sort of thing that happens if people have used reasonable care.

There is an element of drama and of the freakish and improbable in the typical res ipsa case which on occasion has led the California

50 Honea v. City Dairy, Inc. (1943) 22 Cal. (2d) 614, 140 P. (2d) 369.

51 "We know that there are a million and more automobiles hastening over the highways of our state. We know several millions of people occupy the rear seats of such automobiles. We do not believe anyone really expects the occupants of the rear seats of these automobiles to be thrown or catapulted against the top of the car, and more particularly with such force that as a result of their impact their backs are broken either by the force of the impact or by falling back on the seat or on the floor of the machine. While unquestionably a person riding in a machine, either in the front or rear seat, may be conscious of the movement of the car caused, for instance, by a rough stretch in the road, and such movement might be called jolting, and still remain in the class of the ordinary or expected incidents of travel, yet when the jolting becomes so severe that as a result thereof persons are catapulted through space and thrown against the top of cars, human experience itself, without legal principle, declares them to be not ordinary, not to be expected, a happening that would not occur in the ordinary course of things, if the driver of the car had used proper care. We doubt not that many persons riding in the rear seat, or front seat for that matter, have been thrown from the seat against the top of machines; neither do we doubt that in every instance where persons have been so thrown, where no explanation is made, the driver has not been using due care." Warner, J., in Ireland v. Marsden (1930) 108 Cal. App. 632, 642-3, 291 Pac. 912, 917.

52 "It is a case where the accident proves its own negligent cause . . . ." Dryden v. Continental Baking Co. (1938) 11 Cal. (2d) 33, 39, 77 P. (2d) 833, 836.


55 "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." Malone, Res Ipsa Loquitor and Proof by Inference (1941) 4 La. L. Rev. 70, 79, citing Armstrong v. New Orleans Public Service, Inc. (La. App. 1939) 188 So. 189 (uninvited street car entering plaintiff’s restaurant); Pillars v. R. J. Reynolds Tobacco Co. (1918) 117 Miss. 490, 78 So. 365 (human toe in chewing tobacco); Marshall v. Suburban Dairy Co. (1921) 96 N. J. L. 81, 114 Atl. 750 (horse leaped over hood of motor truck and ensconced himself in the cab); Wolfe v. Feldman (1936) 158 Misc. 636, 286 N. Y. S. 118 (the extraordinary case of the unfortunate dentist).
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Courts to say that the event must be an "unusual" one. The latest decisions on the matter have recognized, however, that this is not indispensable, and that a very ordinary movement of a street car at the wrong time, as when a passenger is alighting, may be enough for res ipsa loquitur to apply.

In the usual case the basis of past experience from which the conclusion can be drawn is one common to all of us, which the court recognizes without calling it judicial notice, and which the jury, if they stop to give it a name at all, call common sense. It may, however, be supplied by the evidence of the parties. In four California cases expert testimony that water mains do not normally break, and that beer and other beverage bottles do not ordinarily explode if proper precautions are taken, has been held a sufficient basis for the application of res ipsa loquitur. Such testimony may be essential to the plaintiff's case, particularly in actions for malpractice or injuries to consumers of manufactured goods. Without it the court may not consider that there is any fund of common knowledge which permits the conclusion that ordinary care will detect all flaws in a bottle.

This idea appears to have originated in Rystinski v. Central California Traction Co. (1917) 175 Cal. 336, 165 Pac. 952, where the court endeavored to mend an error in an instruction given in Steele v. Pacific Elec. R. Co. (1914) 168 Cal. 375, 143 Pac. 718, permitting the jury to find negligence from the mere fact of injury to the plaintiff without any proof that it was due to any movement of the defendant's car. In the Rystinski case the court corrected this by instructing that the jury must find a "sudden, unusual or violent jerking, or swinging, or swaying of the car." The same idea was repeated in McIntosh v. Los Angeles R. Corp. (1936) 7 Cal. (2d) 90, 59 P. (2d) 959; Jorgenson v. East Bay Transit Co. (1941) 46 Cal. App. (2d) 189, 115 P. (2d) 556; and Karsey v. San Francisco (1933) 130 Cal. App. 655, 20 P. (2d) 751.

or keep minute particles of glass out of a can of spinach. It depends, of course, upon the facts; and when twenty-seven bottles explode, or the pieces of glass are larger, or the foreign object in the can is a set of false teeth, it requires no expert to say that the facts speak for themselves.

In civil cases the plaintiff has the burden of proving his case by a bare preponderance of the evidence. This means that he must satisfy the triers of fact that fifty-one per cent of the probabilities are in his favor. In negligence cases he is required only to convince the jury that it is more likely that his injuries were caused by negligence than that they were not. He must do so by evidence, and not by mere speculation and conjecture; and where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof. A case of res ipsa loquitur is no exception to these familiar rules. It is the plaintiff's task to make out a case from which, on the basis of experience, the jury may draw the conclusion that negligence is the most likely explanation of the accident. That conclusion is not for the court


Of the millions of bottled beverages sold every year, how many leave the bottler's plant in such condition that they will explode in the purchaser's face? The elimination of other causes, such as mishandling by intervening parties after the bottle leaves the plant, is quite another matter. See text at pages 197-198 infra.

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67 Benedick v. Potts (1898) 88 Md. 52, 40 Atl. 1067.

to draw, or to refuse to draw so long as there is enough to permit the jury to draw it; and even though the court would not itself infer negligence, it must still leave the question to the jury where reasonable men may differ as to the balance of probabilities.

It is still true that where it is entirely clear that there is no basis of experience from which a reasonable man may conclude that negligence is a more probable explanation than any other, the court will hold that res ipsa loquitur does not apply, and that as a matter of law the plaintiff has not sustained his burden of proof.\(^6\) In three cases of this kind,\(^7\) however, the California courts have fallen into the error of saying that the inference of negligence must be so compelling as to exclude all other inferences and leave no other acceptable cause for the accident. Of course this is wrong. It requires the plaintiff to prove a civil case beyond a reasonable doubt, and to bring in enough for a directed verdict. There are few res ipsa cases in which all other possible inferences can be excluded. When plaster falls from the ceiling of a hotel room, it suggests a variety of causes ranging from jolts from passing street cars, through over-enthusiastic festivities on the part of people upstairs or previous guests, to an earthquake. All such inferences, including in this state even the last, are entirely reasonable and by no means excluded; and it is for the jury to say whether on the whole the most probable explanation is negligence in having the plaster in such condition.\(^7\) The derailment of a train,\(^7\) the washout

\(^6\) Honea v. City Dairy, Inc., \textit{supra} note 50 (broken milk bottle); La Porte v. Houston (1948) 189 P. (2d) 544 (automobile with hydroinatic gear shift starting into motion while motor was being tested); Owen v. Beauchamp (1944) 66 Cal. App. (2d) 750, 152 P. (2d) 756 (wax on floor of dentist's office); Weaver v. Shell Oil Co. (1936) 13 Cal. App. (2d) 643, 57 P. (2d) 571 (fire on premises to which defendant delivered gasoline); Gold v. Arizona Realty Co. (1936) 12 Cal. App. (2d) 676, 55 P. (2d) 1254 (slippery substance on apartment house stairs equally likely to have been recently left there by third person); Scellars v. Universal Service (1924) 68 Cal. App. 252, 228 Pac. 879 (damage to engine of automobile left to be washed, equally likely to be due to defective parts or crystallization).

Compare also the cases where the plaintiff's own responsibility is not excluded, notes 107-110 \textit{infra}; and where a third person is in "control," notes 78-85 \textit{infra}. Also the collision cases, notes 129-130 \textit{infra}.


of a railroad bridge, the fall of an elevator, the collapse of an automobile wheel, and the parked car which starts down a hill all suggest similar alternative possibilities; yet they are proper cases for res ipsa loquitur. The more recent decisions have recognized the error, and have held that the inference is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it.

3. THE INFERENCE THAT THE NEGLIGENCE WAS THE DEFENDANT'S

It is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone unidentified. Even though there is, beyond all possible doubt, negligence in the air, it is still necessary to bring it home to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where it is quite clear that it is at least equally probable that the negligence was that of a third person, the court must direct the jury that the plaintiff has not proved his case.

A long array of California cases have reached this result. When the plaintiff is hit by the defendant's swinging door, it is quite as likely that the negligence was that of someone passing through. When the defendant's wall collapses while an independent contractor is working on it, it is at least as likely that the negligence was that of the contractor. When gasoline mysteriously takes fire while it is being pumped, it is equally probable that it was due to the negligence of the person pumping it, the owner of the premises, or any third person in the vicinity. When there is a leakage of gas, or water or electric power.

\[\text{\textsuperscript{73} Connor v. Atchison, T. \& S. F. Co. (1922) 189 Cal. 1, 207 Pac. 378.} \]
\[\text{\textsuperscript{74} O'Connor v. Mennie (1915) 169 Cal. 217, 146 Pac. 674.} \]
\[\text{\textsuperscript{75} Brown v. Davis (1927) 84 Cal. App. 180, 257 Pac. 877.} \]
\[\text{\textsuperscript{78} Olson v. Whitthorne \& Swan (1928) 203 Cal. 206, 263 Pac. 518.} \]
tricity, it must be traced to the defendant’s pipes or wires rather than others over which he had no control. When an automobile hoist suddenly starts up, it is no proof of the owner’s negligence so long as the apparatus for starting it was in the hands of another. There are, of course, many similar instances.

Thus, even though the facts cry loudly of someone’s negligence, it is still the plaintiff’s task to fix that negligence upon the defendant. This he may do by a second inference, based on a showing of some specific cause for the accident within the defendant’s responsibility, or on a showing that the defendant was responsible for all reasonably


84 There are, of course, many similar instances.

82 Rosenbaum v. First Doe Luce (1929) 96 Cal. App. 149, 273 Pac. 862.


84 Speddel v. Lacer (1934) 2 Cal. App. (2d) 528, 38 P. (2d) 477.

85 Larson v. St. Francis Hotel (1948) 83 Cal. App. (2d) 210, 188 P. (2d) 513 (armchair falling from hotel window might have been thrown out by guest); Cunningham v. Coca Cola Bottling Co. (1948) 198 P. (2d) 333 (beverage vending machine explosion might have been due to sodium inserted as a practical joke); Owen v. Beauchamp (1944) 66 Cal. App. (2d) 750, 152 P. (2d) 756 (slippery substance on floor of dentist’s office); Gerber v. Faber (1942) 54 Cal. App. (2d) 674, 129 P. (2d) 485 (exploding root beer bottle might have been cracked after leaving defendant’s plant); Alexander v. Wong Yick (1938) 25 Cal. App. (2d) 265, 77 P. (2d) 476 (iron bar might have been left out of place by third person); Gold v. Arizona Realty Co. (1936) 12 Cal. App. (2d) 676, 55 P. (2d) 1254 (slippery substance on apartment house stairs which might have been recently left by a stranger); Mattocks v. F. W. Woolworth Co. (1935) 8 Cal. App. (2d) 489, 47 P. (2d) 805 (sidewalk elevator operated by unauthorized person); White v. Spreckels (1909) 10 Cal. App. 287, 101 Pac. 920 (explosion of steam radiator in control of sublessee).

86 “There is, however, a wide distinction between demanding as a requisite to the application of the doctrine res ipsa loquitur that the instrumentality which caused the accident shall have been under the exclusive control of the defendant, and demanding that the evidence exclude any other inference than that the defendant negligently handled it. It is of course true that though an agency be under a defendant’s exclusive control and though the accident be one which in the usual course of things does not occur when ordinary care is used, there remains a possibility that the occurrence was not due to the defendant’s fault. As against that possibility, however, the doctrine res ipsa loquitur permits the jury to infer negligence. When, however, the instrumentality itself is not clearly within the exclusive control of the defendant the situation is different. Since the general rule is that the occurrence of an accident in itself raises no presumption of negligence, dependence must be had upon some inference in addition to the fact that there was an accident, and manifestly it must be an inference additional to the further fact that the accident was one of a sort that does not usually occur when due care is used. That inference may be entertained though no specific act of negligence be proved if, in addition to the circumstances just noted, it appear that the instrumentality which caused the accident was under the exclusive control of the defendant.” Hubbert v. Aztec Brewing Co., supra note 80 at 692, 80 P. (2d) at 1018.
probable causes to which the accident could be attributed.87 Here again the plaintiff needs only a preponderance of the evidence, and he need not definitely exclude all other possible conclusions. When the defendant's street light globe falls to the sidewalk, it is easy to suggest that it might have been tampered with by a meddling stranger, but the jury may still find the more probable explanation to be the company's neglect in looking after it.88 When a parked car starts down a hill there is always the possibility that the same meddling stranger may have set it in motion, but it may still be found more likely that the fault was that of the man who parked it.89 Where such other causes are in the first instance equally probable, there must be evidence which will permit the jury to eliminate them; and the plaintiff may be required to make some sufficient showing that a beer bottle was not cracked by mishandling after it left the defendant's plant.90 Only enough is required, however, to permit a finding as to the greater probability.91


89 Price v. McDonald, supra note 76.

90 Res ipsa loquitur was applied where such a showing was made in Gordon v. Aztec Brewing Co. (1949) 33 A.C. 490, 203 P. (2d) 522; Hoffing v. Coca Cola Bottling Co. (1948) 197 P. (2d) 56; Tinge v. E. F. Houghton & Co. (1946) 172 P. (2d) 715, aff'd (1947) 30 Cal. (2d) 97, 179 P. (2d) 807; Escola v. Coca Cola Bottling Co. (1944) 24 Cal. (2d) 453, 150 P. (2d) 436, reversing (Cal. App. 1943) 140 P. (2d) 107.

The court refused to apply it where such evidence was lacking in Gerber v. Faber (1942) 54 Cal. App. (2d) 674, 129 P. (2d) 485.

RES IPSE LOQUITUR IN CALIFORNIA

It is commonly said, in California as elsewhere, that the plaintiff must establish this second element of res ipsa loquitur by a showing that the "instrumentality" which caused the accident was under the defendant's "exclusive control." The statement, which is borrowed from Wigmore's formula, is misleading and pernicious. There are a great many situations in which the defendant's responsibility is apparent even though the "instrumentality" is in the control of another. This is, of course, obvious where the other is the defendant's agent, or the defendant is otherwise responsible for his conduct, or where the two are engaged in a joint enterprise so that each is responsible for what is done by the other. It is equally clear where the defendant is under a duty which he cannot delegate, as in the case of the obligation of the owner of premises to the public, or that of a contractor

adjustment of burners); Wright v. Southern Counties Gas Co. (1929) 102 Cal. App. 656, 283 Pac. 823 (circumstantial evidence explosion due to gas cock left open and defendant only person with access to it); cf. Juchert v. Cal. Water Service Co. (1940) 16 Cal. (2d) 500, 106 P. (2d) 886 (breakage of water pipe laid in the street). See also the cases cited note 90, supra.

"Evidence was presented which showed that La Salle trucks were not involved in accidents during August, 1944; that no accidents occurred in the Associated warehouse that month which might have affected the beer; that the driver who delivered the case to the plaintiff was not involved in an accident en route and did not bump the case; that it was in excellent condition on delivery, and that the plaintiff handled the case and bottle carefully. While this evidence was not conclusive it was the jury's province to determine, after being properly instructed, whether the plaintiff had sufficiently proved the absence of intervening harmful forces after the defendant shipped the bottle to entitle the plaintiff to rely on an inference inherent in the doctrine that the defendant's lack of care was the proximate cause of his injury." Gordon v. Aztec Brewing Co., supra note 90. [92]

92 Text at page 187 supra.
93 Weddle v. Loges (1942) 52 Cal. App. (2d) 115, 125 P. (2d) 914 (towed automobile hit a tree).
95 Koskela v. Albion Lumber Co. (1914) 25 Cal. App. 12, 142 Pac. 851 (stevedore injured when wire cable on loading apparatus gave way. "It was also necessary that both parties should assist in the operation of the appliances, and they were jointly operated by and for the joint benefit of both defendants.").

The case of Ybarra v. Spangard (1945) 25 Cal. (2d) 486, 154 p. (2d) 687, reversing (Cal. App. 1944) 148 P. (2d) 982, might perhaps be explained on this ground, but apparently goes further. See text at page 223 infra.
to the employees of a subcontractor, or the responsibility of a surgeon for the nurse who counts the sponges, or the obligation of one who supplies a chattel to inspect it even where he acquires it from someone else.

There are other cases, however, in which it is clear that "control" is simply the wrong word. The plaintiff who is riding a horse is in exclusive control of it; but when the saddle slips off, the inference is still that it was the fault of the defendant who put it on. The man operating a handcar is in control of it; but when the handle breaks, the conclusion is that only the defendant who supplied the handcar was negligent. The plaintiff's possession and exclusive control of a loaf of bread does not prevent the inference that the glass inside of it came from the defendant's bakery; and when a bottle explodes in the purchaser's hands, we may still infer, when all other probable causes are eliminated, that it was due to the negligence of the bottling company.

The California courts have said in such cases that "some con-

One case that looks wrong is Klenzendorf v. Shasta School Dist. (1935) 4 Cal. App. (2d) 164, 40 P. (2d) 878, where a high school student was injured while operating a defective hand joiner. The court refused to apply res ipsa loquitur on the ground that the joiner was used by other students. But the duty of supervision remained in the school district, and if other students were negligent it may be inferred that the defendant was negligent in failing to prevent it.


Cf. Hinds v. Weadon (1942) 19 Cal. (2d) 458, 121 P. (2d) 724 (explosion due to insufficient water in tank, injuring welder working on outside of it); Merino v. Pacific Coast Borax Co. (1932) 124 Cal. App. 336, 12 P. (2d) 458 (collapse of clay storage tank injured plaintiff filling sacks from it).


control," or a mere "right of control," is enough; or that it is sufficient that the defendant was in exclusive control at the time of the probable negligence. It would be far better, and much confusion would be avoided, if the idea of "control" were to be discarded altogether, and if we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it.

4. ELIMINATING THE PLAINTIFF AS A CAUSE

It is obvious that the inference of negligence does not point to the defendant until the plaintiff himself has been eliminated as a cause. The mere fact that a man falls down is no evidence of anyone's fault but his own, and it is still true when he falls down while on a street car. When he gets his clothing caught in machinery, or a heavy door falls on him while he is shaking it, there is no inference against anyone else.

However, the Rhode Island court to the contrary notwithstanding, the plaintiff's mere possession of a chattel which injures him does not prevent a res ipsa case where it is made clear that he has done

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104 Union Oil Co. v. Rideout (1918) 38 Cal. App. 629, 177 Pac. 196.

Thus res ipsa loquitur does not apply to the death of a conductor of a freight train killed without explanation while he was himself directing operations for the derailment of a car, and was in full charge. Dryden v. Western Pacific R. Co. (1934) 1 Cal. App. (2d) 49, 36 P. (2d) 394.
nothing abnormal and has used the thing only for the purpose for which it was intended. The plaintiff need only tell enough of what he did and how the accident happened to permit the conclusion that the fault was not his. Again he has the burden of proof by a mere preponderance of the evidence; and even though the question of his own contribution is left in doubt, res ipsa loquitur may still be applied under proper instructions to the jury.

5. Defendant's Superior Knowledge

In California, as in other states, it has been said in a number of cases that res ipsa loquitur applies only where the plaintiff is without information as to how the accident occurred, while the defendant has such information or access to it. This idea is derived from the carrier's burden of proof in passenger cases, and was included in Wigmore's formula as "the particular force and justice of the presumption." The statement has always been made either as an additional reason for applying res ipsa loquitur where it was otherwise applicable, or as an additional reason for refusing to apply it where it was otherwise inapplicable; and there is no California decision which has

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115 Two recent decisions to this effect are Johnson v. United States (1948) 333 U.S. 46; Jesionowski v. Boston & Maine R. Co. (1947) 329 U.S. 452.


116 Text at page 187 supra.


turned on this ground alone. In one case the court has doubted the correctness of an instruction so limiting res ipsa loquitur, and in another the theory has been described as merely "one of the reasons for applying the doctrine, and a factor in determining whether or not it should be available."

It is difficult to believe that this factor can ever be controlling. If the circumstances are such as to create a reasonable inference of the defendant's negligence, it cannot be supposed that the inference will ever be defeated by a showing that the defendant knows nothing about what has happened; and if the facts give rise to no such inference, a plaintiff who has the burden of proof in the first instance can scarcely make out a case merely by proving that he knows less about the matter than his adversary. Res ipsa loquitur has been applied where the defendant is dead in the accident, or his agent in charge has vanished. The very first case in which the Latin words were ever mentioned in California was one in which a nitroglycerine factory blew up, killing all possible witnesses and destroying all possible evi-


Parker v. James Granger, Inc. (1935) 4 Cal. (2d) 668, 52 P. (2d) 226.

"It is true that in some cases where the complaint contained only specific allegations of negligence the court held that the doctrine of res ipsa loquitur was not applicable because it could not be said, that in view of such allegations, defendant was in a better position than plaintiff to explain what occurred. . . . While that theory may be one of the reasons for applying the doctrine, and a factor in determining whether or not it should be available, it is a general test for characterizing, in the first instance, various situations as justifying or not the invocation of the doctrine, and the main theory underlying the doctrine is that, because of the circumstances, there is a probability of negligence . . . , and the inference that flows therefrom is evidence in the case." Leet v. Union Pacific R. Co. (1944) 25 Cal. (2d) 605, 619-20, 155 P. (2d) 42, 50.


Compare the cases of collisions injuring a third person, infra notes 133 and 134, where it is at least clear that the defendant knew more about what occurred than the plaintiff.

Weller v. Worstall (1934) 50 Ohio App. 11, 197 N. E. 410.

Nicol v. Geitler (1933) 188 Minn. 69, 247 N. W. 8.
Res ipsa loquitur has been applied in other cases involving mysterious events where it seems quite apparent that the defendant could know no more than the plaintiff.\(^{125}\)

On the other hand the inference has been permitted where the plaintiff has pleaded specific acts of negligence,\(^{126}\) or has introduced definite evidence of his own,\(^{127}\) and so has indicated that he is not without information. The defendant’s “superior knowledge” appears to be no more than a makeweight thrown into the scale when the court has already reached its conclusion, and not an essential element or one which will ever be decisive. No case has been found in which the decision would not have been clearer if it had been entirely disregarded.

6. Collisions

The whole problem of the application of res ipsa loquitur is brought to a head in the collision cases.

When a vehicle operated by \(A\) collides with a vehicle operated by \(B\), there are four possibilities. \(A\) alone was negligent; \(B\) alone was negligent; both were negligent; or neither. Of these four only the first will result in liability of \(A\) to \(B\). The bare fact of a collision affords no basis on which to conclude that it is the preponderant probability. The odds are against it. Accordingly, it has been held that the collision is not in itself enough for the application of res ipsa loquitur in favor of one driver against another.\(^{128}\) The same is true when an automobile strikes a moving pedestrian.\(^{129}\) It is only where the plaintiff

\(^{125}\) "Of the many employees of appellant engaged in and about the nitroglycerine factory at the time of the disaster none were left to tell the tale. Hence, any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds." Judson v. Giant Powder Co. (1885) 107 Cal. 549, 553, 40 Pac. 1020.


\(^{127}\) See cases cited notes 195-197 infra.

\(^{128}\) See cases cited notes 186, 189 infra.


is shown to have been stationary,\textsuperscript{131} or his own fault is eliminated by some other specific evidence,\textsuperscript{132} that res ipsa loquitur can apply.

When the collision injures C, a guest riding in B's car or a mere bystander, the possibility that the plaintiff's own negligence may have been a factor is greatly reduced; but there is still no basis on which to conclude that the fault was that of A rather than B. For this reason the California courts have held that res ipsa loquitur cannot apply in favor of C against A.\textsuperscript{133} The fact that A is a common carrier operating on the public streets has made no difference.\textsuperscript{134} Again it is only where there is evidence definitely pointing to one vehicle that the inference is held to arise.

Where C is a passenger of carrier A, no reason is apparent at first glance for any different conclusion. The same two instrumentalities are involved, and the defendant's control is still limited to one. If the fact of the collision gives rise to no inference of A's negligence in the preceding cases,\textsuperscript{138} it should not be sufficient evidence here. Nevertheless, when the action is brought by a passenger against his carrier, the result is abruptly changed. In common with about a dozen other jurisdictions,\textsuperscript{135} the California courts have consistently held,


\textsuperscript{132} Linberg v. Stanto (1931) 211 Cal. 771, 297 Pac. 9 (automobile on sidewalk); Brandes v. Rucker-Fuller Desk Co. (1929) 102 Cal. App. 221, 282 Pac. 1009 (same); Smith v. Hollander (1927) 85 Cal. App. 535, 259 Pac. 958 (same); Sallee v. United Railroads (1919) 40 Cal. App. 51, 180 Pac. 74 (rope dangling from trolley caught pedestrian around the neck); Bauhofer v. Crawford, supra note 131 (defendant on wrong side of street).

\textsuperscript{133} Diamond v. Weyerhaeuser (1918) 178 Cal. 540, 174 Pac. 38; Busch v. Los Angeles R. Co., supra note 129; Staples v. L. W. Blinn Lumber Co. (1929) 97 Cal. App. 387, 275 Pac. 813.


\textsuperscript{135} Edwards v. Gullick (1931) 213 Cal. 86, 1 P. (2d) 11.

\textsuperscript{136} Text at pages 207–208 infra.

\textsuperscript{137} About half of the courts which have considered the question have reached the same conclusion. Cases are collected in Prosser, \textit{Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles} (1936) 30 Ill. L. Rev. 983.
after some initial uncertainty,\textsuperscript{138} that res ipsa loquitur applies in favor of the passenger against the carrier.\textsuperscript{139} The rule has been carried to the length of holding that even specific proof that the collision was due to the negligence of the other vehicle will not prevent the conclusion that the carrier also was at fault.\textsuperscript{140}

Struggling to explain the distinction, the court at one time\textsuperscript{141} supplied the reason that the carrier is held to the highest degree of care toward its passengers, and it must follow that when an accident occurs it is more likely to be the carrier's fault. The explanation is not very convincing. The existence of a duty to use great care is not necessarily proof that it has not been exercised. It seems evident that these decisions are speaking a different kind of Latin, and that they are not based upon a mere inference of negligence. In reality the original "presumption" against the carrier is being continued in its original form.\textsuperscript{42}

Because of the carrier's undertaking and its special relation

\textsuperscript{138} After it was held in Tompkins v. Clay Street R. Co., \textit{supra} note 134, that no presumption of negligence arises against the driver of the other vehicle, it was decided in Harrison v. Sutter Street R. Co., \textit{supra} note 134, that res ipsa loquitur did not apply against both vehicles. The case was explained on that basis, and the presumption applied against the carrier alone, in Osgood v. Los Angeles Traction Co. (1902) 137 Cal. 280, 70 Pac. 169; Houghton v. Market Street R. Co. (1905) 1 Cal. App. 576, 82 Pac. 972.

The case of Gritsch v. Pickwick Stages System, \textit{supra} note 118, holding that res ipsa loquitur applies against the carrier only when the other driver is joined as a defendant, can be explained only on the ground that all good courts have their occasional aberrations.


In Smith v. O'Donnell (1932) 215 Cal. 714, 12 P. (2d) 933, res ipsa loquitur was extended to an airplane carrier colliding with another plane.


\textsuperscript{141} Smith v. O'Donnell, Housel v. Pacific Electric R. Co., both \textit{supra} note 139.

\textsuperscript{142} Text at pages 185-187 \textit{supra}. The conclusion is borne out by the fact that the first two decisions merely applied the presumption against the carrier without mentioning
toward its passenger, a procedural disadvantage is imposed upon it which is not imposed upon the other party to the collision, and it is required to explain the accident or pay. Obviously this may lead to a very different procedural result.\textsuperscript{143}

If this is the explanation, the court entirely lost sight of it in \textit{Godfrey v. Brown},\textsuperscript{144} where it was held that res ipsa loquitur applies in favor of a guest in a private automobile against his host who collides with another vehicle. The court was unable to see any distinction between a carrier and a private driver when one riding in the vehicle is injured. It left entirely unexplained, and it appears quite impossible to explain, the distinction between the private host and the driver of the other car.

It may nevertheless be suggested that \textit{Godfrey v. Brown} did not go too far, that it did not go far enough, and that one further step remains to be taken. On the basis of inference alone, and without any question of carrier and passenger, there is room for a conclusion of the jury that when two vehicles collide and injure a third person the greater probability is that \textit{both} drivers were at fault. Certainly that is the experience of liability insurance companies, and the underlying reason for much of the recent agitation for vehicle accident compensation laws and comparative negligence statutes. Certainly the fact of the collision is ample evidence that someone has been negligent, as is demonstrated by the cases where the defendant has operated both vehicles.\textsuperscript{146} It is not a question of whether this negligence is more likely to be that of \textit{A} than \textit{B}, but of whether the collision itself is sufficient evidence against each. When a driver goes off of the highway,\textsuperscript{147} or collides with a stationary object, the normal inference is

\begin{footnotes}
\item \textsuperscript{143} See cases cited note 131 \textit{supra}.
\item \textsuperscript{144} (1934) 220 Cal. 57, 29 P. (2d) 165. The decision overrules Keller v. Cushman (1930) 104 Cal. App. 186, 285 Pac. 399. It apparently is wrong on another ground, since it overlooks the California Guest Law. Text at pages 209-210 \textit{infra}.
\item \textsuperscript{147} Text at pages 222-223 \textit{infra}.
\end{footnotes}
that he has been negligent, and res ipsa loquitur applies. Why any other conclusion when he collides with a moving object, which due care requires him to look out for and avoid? With millions of automobiles driven in safety on our highways every day, is it unreasonable to permit the jury to say that in ordinary human experience careful drivers do not have collisions?

In a few other states\(^\text{148}\) there are decisions indicating that res ipsa loquitur should apply against both drivers. It does not appear that these decisions ever have been urged upon the California courts; and in view of the apparent implications of Godfrey v. Brown, it is at least possible that they may yet be accepted in this state.

7. THE DEFENDANT’S DUTY

Res ipsa loquitur leads only to the conclusion that the defendant has not exercised reasonable care. It is not in itself any proof that he was under any duty to do so. Unless there is enough more to show such a duty, the plaintiff will be denied recovery even though he has otherwise made out a res ipsa case. Thus a trespasser\(^\text{149}\) or a bare licensee\(^\text{150}\) injured by the condition of premises has no right to get to the jury even though the facts speak for themselves. The same is true where the plaintiff is using a thing for a purpose for which it was not intended, and to which the defendant’s duty does not extend.\(^\text{151}\)

In many cases the problem becomes one of whether the apparent cause of the accident is one which lies within the scope of the defendant’s obligation. Occupiers of premises are required only to use reasonable care to keep them in condition for the benefit of invitees; and when a defect is of recent origin and might have come from an outside source, no inference is justified that reasonable inspection would have


\(^{149}\) Brust v. C. J. Kubach Co. (1933) 130 Cal. App. 152, 19 P. (2d) 845.

\(^{150}\) Pennebaker v. San Joaquin Light & Power Co. (1910) 158 Cal. 579, 112 Pac. 459 (fireman); see also Biondini v. Amship Corp., supra note 97.

discovered it.\textsuperscript{152} When the defect is obviously of long standing, the opposite conclusion may be drawn.\textsuperscript{153} In early cases it was held that res ipsa loquitur did not apply in favor of an employee against his employer because of the possibility that the injury might be due to the negligence of a fellow servant or a risk which the workman had assumed.\textsuperscript{154} When these possibilities are removed, either by statute\textsuperscript{155} or by specific testimony or the circumstances of the accident,\textsuperscript{156} the employee stands on the same footing as any other plaintiff.

In other states\textsuperscript{157} it has been held that when an automobile unaccountably leaves the road and injures a guest, res ipsa loquitur does not apply in his favor because of the equal likelihood that the accident may have been due to a latent defect as to which the driver owed the guest no duty. This idea has been ignored in California.\textsuperscript{158} The question has become moot in this state with the passage of the Guest Law,\textsuperscript{159} which now permits the guest to recover only for “intoxication

\begin{footnotes}
\item[154] Sappenfield v. Main Street & A. P. R. Co. (1891) 91 Cal. 48, 27 Pac. 590; Madden v. Occidental & Oriental Steamship Co. (1890) 86 Cal. 445, 25 Pac. 5; Campbell v. Southern Pac. R. Co. (1913) 21 Cal. App. 175, 131 Pac. 80; see also Connor v. Atchison, T. & S. F. R. Co., \textit{supra} note 118.
\item[157] Notably in Galbraith v. Busch, \textit{supra} note 122.
\item[158] Brown v. Davis (1927) 84 Cal. App. 180, 257 Pac. 877.
\item[159] Cal. Vwr. Code § 403 (1941). The original form of the statute, Cal. Stat. 1929, c. 787, provided that the guest could recover only for “gross negligence, intoxication or wilful misconduct.” The words “gross negligence” were eliminated by an amendment in 1931.
\end{footnotes}
or wilful misconduct.” Unhappily this limitation too has been ignored, and in several decisions,\(^{106}\) including the last word of the supreme court on the subject,\(^{161}\) res ipsa loquitur has been applied in favor of an automobile guest without any mention of the extent of the defendant’s obligation. It appears that the point never occurred to counsel. In three cases\(^{162}\) in which it has been raised, however, the court has come to the obviously correct conclusion that res ipsa loquitur justifies only an inference that the defendant has not exercised ordinary care, and that it does not make out a case of either “gross” or “wilful” misconduct.

This question of duty has arisen frequently in malpractice cases.\(^{163}\) The obligation of a physician, surgeon or dentist is merely one of minimum skill common to the profession and reasonable care in using it; he does not undertake to cure. Consequently the mere fact that his treatment has been unsuccessful,\(^{164}\) or that something has gone wrong with it,\(^{165}\) permits no inference of his negligence. There is not enough in a mistaken diagnosis alone,\(^{166}\) or the unfortunate choice of a wrong method of treatment,\(^{167}\) or the kind of accident that occurs in a substantial percentage of similar cases in spite of all reasonable precautions,\(^{168}\) to show the necessary lack of either skill or care. What this means is that in the ordinary malpractice case laymen are not qualified


\(^{161}\) Druzanich v. Criley, supra note 146. A per curiam opinion.


\(^{163}\) Otherwise where the facts show very excessive speed. Fenstermacher v. Johnson (1934) 138 Cal. App. 691, 32 P. (2d) 1106.


\(^{168}\) Engeling v. Carlson (1939) 13 Cal. (2d) 216, 88 P. (2d) 695.
to say that a good doctor would not go wrong, and that it is only where there is expert testimony that proper skill and care would have done better that the conclusion is open.

In a large number of cases the California courts have held that in the absence of such expert evidence negligence cannot be found. These decisions, together with the notorious unwillingness of the medical profession ever to testify against one another, may impose an insuperable handicap upon the plaintiff in cases where there has been real butchery but he lacks the proof. As medical science approaches a greater degree of perfection and common knowledge of its principles and methods increases, it seems reasonable to expect that the rule will be limited to fewer situations.

Even today, however, there are some medical and surgical errors on which any layman is competent to pass judgment, and common experience tells all of us that such things do not happen unless there is incompetence or want of care. To these cases res ipsa loquitur

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As to the type of case in which non-expert testimony will do as well, see Walter v. England (1933) 133 Cal. App. 676, 24 P. (2d) 930.

171 Thus in McCollum v. Barr (1918) 38 Cal. App. 411, 176 Pac. 463 the court was willing to assume that failure to take X-rays in a case of possible fracture was not enough to permit a finding of negligence. It seems quite unlikely that such a conclusion would be reached today.

172 More than once the California courts have quoted the following passage from Evans v. Roberts (1915) 172 Iowa 653 at 658, 154 N. W. 923 at 925, and Vergeldt v. Hartzell (C. C. A. 8th 1924) 1 F. (2d) 633 at 636: "If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or if he undertakes to stitch a wound on the patient's cheek and by an awkward move thrusts his needle into the patient's eye, or if a dentist in his haste, leaves a decayed tooth in the jaw of his patient and removes one which is perfectly sound and serviceable, the charitable presumptions, which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful are not here available. It is a matter of common knowledge and observation that such things do not ordinarily attend the service of one possessing ordinary skill and experience in the delicate work of surgery. It does not need scientific knowledge or training to understand that, ordinarily speaking, such results are unnecessary and are not to be anticipated if reasonable care be exercised by the operator."
may apply. When a dentist drops a tooth down a patient’s windpipe\textsuperscript{173} or it is knocked out in the course of a tonsillectomy,\textsuperscript{174} when instruments are not sterilized,\textsuperscript{175} when a ligament is torn during treatment\textsuperscript{176} or an operation leaves sponges in the victim’s interior\textsuperscript{177} or removes an inappropriate part of his anatomy,\textsuperscript{178} or when there are serious burns from hot water bottles,\textsuperscript{179} chemicals,\textsuperscript{180} or infra-red\textsuperscript{181} or X-rays\textsuperscript{182} during either diagnosis or treatment, the thing speaks for itself without the aid of any expert’s voice. One may suspect that the courts are not reluctant to use res ipsa loquitur as a deliberate instrument of policy to even the balance against the professional conspiracy of silence; but with two exceptions\textsuperscript{183} the decisions give no hint of anything more than the obvious inference from the circumstantial evidence alone.

Thus far we have considered only the type of case to which res ipsa loquitur may apply. When we come to its effect in terms of procedure when it is applied, we find the decisions of California, like those of many other states, in a quagmire of confusion which, taken in the aggregate, makes no conspicuous amount of sense.

8. PLAINTIFF’S SPECIFIC EVIDENCE

One of the first procedural questions that arises is whether the plaintiff may rely on res ipsa loquitur when he has himself introduced specific evidence of the defendant’s failure to use proper care. There


\textsuperscript{175} Barham v. Widing (1930) 210 Cal. 206, 291 Pac. 173.

\textsuperscript{176} MacKeown v. Baldwin (1922) 59 Cal. App. 674, 211 Pac. 477.

\textsuperscript{177} Ales v. Ryan (1936) 8 Cal. (2d) 82, 64 P. (2d) 409; Armstrong v. Wallace (1935) 8 Cal. App. (2d) 429, 47 P. (2d) 740.


\textsuperscript{179} Timbrell v. Suburban Hospital, Inc. (1935) 4 Cal. (2d) 68, 47 P. (2d) 737; Meyer v. McNutt Hospital (1916) 173 Cal. 156, 159 Pac. 436.

\textsuperscript{180} Hurt v. Sunow (1948) 192 P. (2d) 771 (silver nitrate); Ley v. Bishopp (1928) 88 Cal. App. 713, 263 Pac. 369 (dentist’s mixture).

\textsuperscript{181} McCullough v. Langer (1937) 23 Cal. App. (2d) 510, 73 P. (2d) 649.


\textsuperscript{183} Dierman v. Providence Hospital (1947) 31 Cal. (2d) 290, 188 P. (2d) 12, reversing (Cal. App. 1947) 179 P. (2d) 603 (see note 260 infra); Ybarra v. Spangard, supra note 174 (see text at page 223 infra).
are a good many decisions in California holding that he cannot.\textsuperscript{184} Two reasons are commonly given. One is that where the facts in evidence disclose the cause of the accident, nothing is left to inference and there is no room for res ipsa loquitur. The other is that by his specific proof the plaintiff shows that he has definite information as to just what has happened, and so does not qualify for the "particular force and justice of the presumption"\textsuperscript{185} based on the defendant's superior knowledge or access to it. Both reasons are contradicted by an equal number of decisions applying res ipsa loquitur where the plaintiff has offered specific proof.\textsuperscript{186}

There does not appear to be any problem here that will not yield to common sense. When the plaintiff shows that he was on the defendant's train and the train was derailed, there is an inference that the defendant has been negligent, and a res ipsa case. When he goes further and shows that the derailment was caused by an open switch, he destroys any inference that it was due to excessive speed or defective track; but the inference that the defendant has not used due care in looking after its switches is not destroyed, but considerably strengthened. To say that res ipsa loquitur does not apply is to say that the weaker inference may be drawn but the stronger may not. If the plaintiff goes still further and shows that the switchman was drunk and left the switch open, there is nothing left to infer, and the plaintiff must stand or fall on his specific proof.\textsuperscript{187} If he shows that the switch was thrown by an escaped convict with a grudge against the


\textsuperscript{185}Wigmore's formula, text at page 187 supra.


railroad, he has proved himself out of court. It is only in this sense that when the facts are known there is no room for inference, and res ipsa loquitur vanishes from the case. Particularly where the plaintiff introduces only some circumstantial evidence suggesting a definite cause for the accident, it cannot be said that the normal inferences are defeated. Nearly all of the California cases are readily explained on the basis that res ipsa loquitur applies only to the extent that the inference may still be drawn in support of the specific proof. It is only the language of the courts which is confusing.

9. PLAINTIFF'S SPECIFIC PLEADING

Much the same problem arises in connection with the question whether the plaintiff may take advantage of res ipsa loquitur under his complaint. In several cases it has been held that where there are only specific allegations of specific negligence, res ipsa loquitur is not available even though it might otherwise apply. Again the reason has been advanced that by his specific pleading the plaintiff shows that he has definite information as to just what has occurred. On the other hand, when he merely alleges generally that the defendant has negligently driven his car or operated his machinery, he is


assumed to have pleaded all he knows, and is entitled to the benefit of the inference. The distinction has filled the courts with an array of cases in which "general" allegations are separated from "specific" ones, without any very noticeable degree of consistency. Again the entire reasoning is flatly contradicted by a long list of decisions in which res ipsa loquitur has been held to apply where the plaintiff has pleaded specific negligence but has taken the precaution of adding a general allegation.

Here, too, there seems to be nothing that common sense will not solve. When the plaintiff pleads only specific negligence, without adding a general allegation, our theory of pleading is that the defendant


Compare the following:

"The said defendants . . . carelessly and negligently caused and permitted the said Chocolate Malted Milk to then and there contain a foreign, solid substance, resembling a piece of cork about three-quarters of an inch long and one-quarter inch wide. . . ." *Held,* a specific allegation and res ipsa loquitur not applicable. Smith v. McClary, *supra* note 191 at 470, 82 P. (2d) at 713.

"Defendants . . . negligently and carelessly deposited and left an abdominal sponge or gauze pad within the abdomen of the said Maxine Armstrong and . . . negligently and carelessly closed said incision and sutured the same without first removing said abdominal sponge or gauze pad." *Held,* a general allegation permitting the application of res ipsa loquitur. Armstrong v. Wallace, *supra* note 177 at 437, 47 P. (2d) at 744. Almost the same allegation, with the same result, is found in Ales v. Ryan (1936), *supra* note 177.

"The original complaint alleged the employment of defendants, their undertaking of the work of curling plaintiff's hair, and that the defendants negligently failed to fix or adjust the curling devices so as to protect plaintiff's head, but fixed, adjusted and attached the same so as to permit and cause the same to burn the plaintiff; that they negligently performed their services in the manner of their use of the devices employed, and negligently used and manipulated the same and the heating elements thereof, and failed to protect plaintiff's head from the heating devices so that the same were caused to and did burn plaintiff's hair and head." This was said in Chauvin v. Krupin, *supra* note 193 at 324, 40 P. (2d) at 905, to be a general allegation permitting res ipsa loquitur.

There are good discussions of the distinction between general and specific pleading with respect to res ipsa loquitur in Gish v. Los Angeles R. Corp. (1939) 13 Cal. (2d) 570, 90 P. (2d) 792, and Davidson v. American Liquid Gas Corp., *supra* note 184.

is required to meet no other issue. He may come into court prepared to litigate only the question of the open switch; and other possible causes for the derailment, such as excessive speed or defective track or rolling stock, are out of the case. It is clear that the general inference that the cause of the accident was the defendant's negligence in some form or other does not support the specific claim—an open switch is not proved by the fact of derailment alone. When the plaintiff's witnesses fail him and he cannot prove the open switch, he may and should be permitted to amend his complaint to plead negligence generally,\(^{196}\) but until he does he has not made out the case he has pleaded.

But where there is proof that the switch was in fact left open, the obvious inference arises that the defendant did not use due care in keeping it closed; and this inference clearly supports the pleading. In a small group of California cases,\(^ {197}\) which are unhappily very much in the minority, this type of inference has been recognized and permitted; and res ipsa loquitur has been held to apply to the extent that it will support the allegation made.

Where, in addition to his pleading of specific negligence, the plaintiff also alleges negligence in general terms, the reason for excluding the general inference does not apply. The defendant has received notice that he must meet more than the specific issue; and the fact of the derailment alone sufficiently supports the allegation of some kind of negligence unspecified. The particular allegation does not control the general one, and the plaintiff is not to be penalized for being as specific as he can in his claim, so long as it is clear that he is not exclusively committed to the one theory. It seems clear that as to this the California courts have come to the right conclusion.

In all these cases of specific pleading and proof the courts have labored in a sort of hypnotic awe of the Latin words, which still mean no more than “the thing speaks for itself,” but have been treated as a special ritual fraught with mystery and magic. In addition there has been too often the assumption, inherited from the carrier's old burden of proof,\(^ {198}\) that res ipsa loquitur is somehow based primarily on the plaintiff's inability to produce evidence, and that no inference can

\(^{196}\) As in Price v. McDonald and Chauvin v. Krupin, both supra note 193.


\(^{198}\) Text at pages 185-187 supra.
ever be drawn in favor of one who has any specific proof of his own. There is no such principle of evidence, and the assumption is not borne out by the cases. Even if it were granted, it does not follow that a specific pleading, or for that matter an attempt at specific proof, is an assertion of definite knowledge, or anything more than an honest and unsuccessful effort to put in whatever inadequate independent information the plaintiff has.

10. INFEERENCE, PRESUMPTION AND BURDEN OF PROOF

The real cyclone center at the heart of res ipsa loquitur revolves about its procedural effect in terms of a presumption or the burden of proof. It arises when the defendant rests without evidence and the plaintiff moves for a directed verdict; or when the evidence of both parties is in and the plaintiff seeks either a directed verdict or a peremptory instruction. Essentially, the question is whether in a res ipsa case the jury is free to refuse to find negligence and return a verdict for the defendant. Since the jury seldom does that, the practical importance of the question is slight in comparison with its theoretical complications; but over it battle has raged and continues to rage with no sign of abating.

When the plaintiff succeeds in making out a case of res ipsa loquitur, he obtains a procedural advantage over the defendant. This advantage may conceivably take any one of three forms, as follows:

A. Permissible inference. The least effect which may be given to res ipsa loquitur is to permit the jury to infer from the plaintiff's case that the defendant has been negligent. Such an inference is enough to satisfy, in the first instance, the plaintiff's burden of introducing evidence from which reasonable men may find in his favor. It is enough to avoid a nonsuit or a dismissal. It is not enough to entitle the plaintiff to a directed verdict, even though the defendant offers no evidence. It shifts no "burden" to the defendant, except in the sense that unless he produces evidence he runs the risk that the jury may find against him. The jury may accept the inference, but it is not compulsory, and if they see fit to find for the defendant they are free to do so. In other words, the inference makes enough of a case to get to the jury and no more.

B. Presumption. A greater advantage is given to the plaintiff if

199 "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." Cal. Code Civ. Proc. § 1958.
his res ipsa case is treated as creating a presumption. This means that the jury will not merely be permitted to infer the defendant's negligence, but in the absence of sufficient evidence to the contrary will be required to do so. If the defendant rests without evidence, the plaintiff will be entitled to a directed verdict. The "burden of going forward" is placed upon the defendant, in the sense that if he does not offer evidence he will necessarily lose. But when all of the evidence is in, if it is evenly balanced the verdict must be for the defendant.

C. Burden of Proof. The greatest effect which may be given to res ipsa loquitur is to put upon the defendant the ultimate burden of proof. This means that the defendant is required to prove by a preponderance of all the evidence that the accident was not caused by his negligence. He must produce evidence which will have greater weight than that offered by the plaintiff. Upon all the evidence the defendant's case must outweigh that of the plaintiff; and if it does not, the defendant must lose. Since the weight of evidence is normally for the jury, the question usually arises upon an instruction. As few cases, if any, are ever evenly balanced, the burden of proof has more theoretical than practical importance. Trial lawyers have more than a suspicion that the jury either does not understand the instruction or pays no attention to it, and that it is chiefly a device for getting error into the record.

In other states the majority of the decisions are heavily in favor of the first of these procedural results, and the ordinary case of res ipsa loquitur is held to create a permissible inference only. What the law is in California it is extraordinarily difficult to say. In this state, perhaps more than any other, the original confusion arising from the miscegenation of the inference of negligence and the carrier's burden of proof has persisted. It is in no way diminished by the fact, which the courts themselves have noticed on more than one occasion, that the opinions have used "presumption," "inference," "burden of proof"

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200 "A presumption is a deduction which the law expressly directs to be made from particular facts." CAL. CODE CIV. PROC. § 1959.


202 Text at pages 185-189 supra.

proof,” “burden of going forward,” “prima facie case,” and many other terms more or less indiscriminately in any one or more of the above senses, so that what any particular case means is often a matter of individual conjecture.

With due allowance for this, it may be said that, beginning with passenger cases in which the Latin words were not mentioned, a res ipsa case has been held to put the burden of proof upon the defendant;\(^{204}\) not to put the burden of proof on the defendant;\(^{205}\) to give rise to a presumption;\(^{206}\) to set up a case which it is “incumbent” upon the defendant to “meet” or to “rebut”;\(^{207}\) to create a compulsory inference which the jury cannot disregard;\(^{208}\) and to create only a per-


It should be noted that these are all passenger cases.


\(^{208}\) Druzanich v. Criley (1942) 19 Cal. (2d) 439, 122 P. (2d) 53; Ales v. Ryan, supra note 207; Dieterle v. Yellow Cab Co., supra note 207; Morris v. Morris (1927) 84 Cal. App. 599, 258 Pac. 616.
missible inference which gets the case to the jury but permits a verdict either way.209 One might be tempted to say that the trend of the later cases is toward the permissible inference result, but there are some comparatively recent decisions to the contrary.

Again, is there anything here to which common sense cannot find a solution? Res ipsa loquitur at least gets the plaintiff to the jury; are there good and sufficient reasons why it should do something more?

One reason sometimes advanced is that if the inference is sufficiently strong to persuade the court, and the obvious conclusion is that the defendant has been negligent, no perverse jury should be permitted to refuse to draw it. If the thing speaks for itself, why not accept what it says?

It must be agreed that if all of the essential elements of a res ipsa case are clearly established—that is, if the event is clearly one which could not occur in the absence of negligence, and the responsibility of any other person than the defendant is clearly excluded—then there is no good reason for leaving the issue to the jury.210 There are certainly such cases. One such is forever associated with the supreme example of understatement in all legal literature:

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.211

Another is the case of the vagrant steamroller212 which traveled across

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sidewalk, fences, lawn and shrubbery, and ended by crashing into the plaintiff's house. Collisions of railway trains trying to run on the same track are certainly in that category, and most of us would say the same of the sponge sewn up in the patient's abdomen or the operation which removes the wrong leg. In all these cases any explanation that does not include the negligence of those in charge is in the realm of pure fantasy, and no jury should be permitted to accept it without definite proof.

But if the foregoing discussion leads anywhere, it leads to the conclusion that these are the rare and exceptional instances, and that in the usual case of res ipsa loquitur a choice is to be made between conflicting inferences as to which reasonable men may differ. The fall of plaster from a ceiling or of a light globe from a street fixture, the parked car that starts down a hill, the bursting water main, the exploding bottle, the fire of uncertain origin and the rest of the res ipsa cases all suggest various alternative possibilities which cannot be excluded as a matter of law, and as to which the defendant is entitled to his chance to persuade the jury in his argument. Res ipsa loquitur is applied not only where the inference is compelling, but far more often where it is relatively weak and barely permissible. There is not only room but great need for a distinction on the basis of what the thing says when it speaks. There has been almost no recog-

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213 "The time will probably never come when a collision resulting from an attempt to have two trains going at full speed, in opposite directions, pass each other, on the same track, will not be held to be negligence, in law." Rouse v. Hornsby (C. C. A. 8th 1895) 67 Fed. 219 at 221.

The same conclusion is implicit in the current anecdote: "What a hell of a way to run a railroad."


nition of this in California, and little elsewhere; but it seems none the less entirely obvious.

A second argument is that the defendant's superior knowledge of what has happened or opportunity to obtain it, together with his original control of the causes of the accident, will justify a rule of policy which requires him to produce the evidence or lose. As we have seen, the defendant's superior knowledge or opportunity is not an essential part of a res ipsa case. If it were, it is still certainly not the general rule that a plaintiff may impose any burden upon his adversary merely by showing that he is ignorant of the facts while the defendant knows, or should know, all about them. Otherwise sheer ignorance would become the most powerful weapon in the law. It is the normal thing for any defendant to know far more about what he has done or failed to do than the plaintiff can ever hope to know; yet when the plaintiff introduces specific evidence that the defendant has driven his car at an excessive speed, no presumption arises and the burden of proof is not shifted. Is it logical that a mere inference, based on circumstantial evidence as to a probable cause, can have the effect which such direct and positive proof does not?

Nevertheless there are cases where a relation exists between the parties which may call for this result. One such relation is that of carrier and passenger, where the special responsibility undertaken by the carrier was recognized from the beginning. There is still respectable authority in California, as in other states, that this undertaking justifies the full burden of proof upon the carrier, requiring it to exonerate itself by the greater weight of evidence or pay. The original rule was peculiar to carriers. It had nothing to do with res ipsa loquitur, and applied even where the plaintiff introduced specific proof of negligence. It is in process of being submerged in the sea. It can still be salvaged. It is surely a highly anomalous distinction, and a very strange preference of property values over human safety,

222 The nearest suggestion is in Hilton v. Pacific Gas & Electric Co., supra note 203, on the particular facts.

223 Keithley v. Hettinger (1916) 133 Minn. 36, 157 N.W. 897; Alabama & Vicksburg R. Co. v. Broome (1910) 97 Miss. 201, 52 So. 703; George Follis, Inc. v. City of New York, supra note 201; Angerman Co. v. Edgemon (1930) 76 Utah 394, 290 Pac. 169; Zoccolillo v. Oregon Short Line R. Co. (1918) 53 Utah 39, 177 Pac. 201.

224 Text at pages 202-204 supra.

225 The classic opinion on this question is that of Doe, J., in Lisbon v. Lyman (1870) 49 N.H. 533, 568-582.

226 Text at pages 185-187 supra.

227 Cases cited note 204 supra.
which puts the burden of proof upon the carrier when it damages the passenger’s trunk, but not when it injures the man. No one has ever justified such a distinction, and no one, to the knowledge of the writer, has ever tried.

Another such relation may quite possibly be that of physician and patient. The special responsibility undertaken for the plaintiff’s safety, the entrusting and the reliance, are at least no less than in the case of a passenger; and if an additional practical reason is needed, there is the refusal of the doctors to testify against one another. When there is an injury which any layman can recognize as inconsistent with due care, is there any reason why the medical defendant should not bear the burden of convincing the jury by the greater weight of proof that it is not his fault?

There is more than a hint of this in Ybarra v. Spangard. In the course of an operation for appendicitis an unconscious patient suffered a traumatic injury to his shoulder, apparently due to some kind of pressure or strain. He brought suit, joining as defendants the diagnostician, the surgeon, the anaesthetist, the owner of the hospital and two nurses, some one or more of whom were clearly responsible. Liability might perhaps have rested on the ground that all were engaged in a joint enterprise; but the court apparently assumed that the act of one was not the act of all. Nevertheless it applied “res ipsa loquitur,” even in the absence of any inference which would point to any one defendant; and the reason given was that under such circumstances each defendant should be required to explain.

The basis of the decision appears quite clearly to be a burden imposed upon such defendants because of their special responsibility toward the plaintiff, which

229 Text at pages 211–212 supra.


231 Cf. Summers v. Tice (1948) 33 A. C. 48, 199 P. (2d) 1; and see Prosser, Joint Torts and Several Liability (1937) 25 CALIF. L. REV. 413.

232 “The control, at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.” Ybarra v. Spangard, supra note 230 at 492, 154 P. (2d) at 690.

233 “The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an
in reality has very little to do with the ordinary notion of res ipsa loquitur at all.

There may be other such relations. There is reason to think that in some instances res ipsa loquitur has been used by the courts, consciously or otherwise, as a deliberate instrument of policy imposing a procedural disadvantage upon the defendant which will require him to establish his freedom from negligence or to pay. Since there will be defendants innocent in fact who cannot prove it, this is a step along the road to liability without fault. It seems obvious that such a policy is justified only where the particular defendant is in a position of some special responsibility toward the plaintiff or the public. It seems no less obvious that the policy calls for the full burden of proof. If the real intent is to hold certain defendants liable wherever possible, it would be far better to take the remaining step, and to hold that liability is not based upon negligence at all.

Explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of someone’s negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anaesthesia. But we think this juncture has not yet been reached, and that the doctrine of res ipsa loquitur is properly applicable to the case before us.” Ybarra v. Spangard, supra note 230 at 490, 154 P. (2d) at 689.

This has been urged, in the case of the manufacturer of food products, by the two concurring opinions of Justice Traynor in Gordon v. Aztec Brewing Co. (1949) 33 A. C. 490, and Escola v. Coca Cola Bottling Co. (1944) 24 Cal. (2d) 453, 150 P. (2d) 476.

The writer understands the present state of the law of California to be as follows:

A. The manufacturer of food products warrants that the food inside of the container is not, at the time it leaves his plant, in such condition that it will poison the consumer. He is liable for breach of this warranty even though it is proved that he has not been negligent. The warranty is given to the dealer to whom the goods are sold, but it “runs with the title” to the consumer, who may sue the manufacturer directly for its breach. Klein v. Duchess Sandwich Co. (1939) 14 Cal. (2d) 272, 93 P. (2d) 799.

B. The manufacturer warrants that the container itself is not, at the time it leaves his plant, in such condition that it will explode in the consumer’s face. This warranty is given to the dealer, and permits him to recover over for his liability to the injured consumer. The warranty does not, however, run with the title to the consumer, who can
What is needed is a recognition that there is, and should be, no uniform procedural effect of a "res ipsa case"; that where the facts bespeak negligence beyond dispute a verdict should be directed in the absence of sufficient evidence to the contrary; that there are special relations which should require the defendant to sustain the burden of proof; and that there are some cases in which the court has moved or is moving in the direction of strict liability.

Unless there are such factors in the case, there is no visible reason why res ipsa loquitur should ever amount to anything more than a permissible inference.

11. THE DEFENDANT'S EVIDENCE

Further complications arise when the defendant in turn offers evidence that the event was not due to his negligence. California is one of the dwindling group of jurisdictions which cling to the idea, long since discredited in most states,\textsuperscript{238} that a presumption is itself evidence, and must be "weighed" against the evidence of the defendant.\textsuperscript{237} This has been said from time to time in cases of res ipsa loquitur.\textsuperscript{238} Apart from begging the question whether res ipsa loquitur gives rise to a presumption at all,\textsuperscript{239} the proposition as stated calls for the impossible. A presumption, as such, is nothing more than a rule of law requiring a directed verdict in the absence of sufficient evidence to the contrary; and it can no more be balanced against evidence "than ten pounds of sugar can be weighed against half-past two in the afternoon."\textsuperscript{240}

Probably what is meant in most instances is that the facts which give rise to the presumption remain in the case when the rule of law recover directly from the manufacturer only on the basis of res ipsa loquitur or some other proof of negligence.

The difference between the container and the contents would appear to be a rather metaphysical matter, which the court has not attempted to explain.

\textsuperscript{238} See for example Langley Bus Co. v. Messer (1931) 222 Ala. 533, 133 So. 287; Lawson v. Mobile Electric Co. (1920) 204 Ala. 318, 85 So. 257; Bollenbach v. Bloomen-thal (1930) 341 Ill. 539, 173 N.E. 670; Scarpell v. Washington Water Power Co. (1911) 63 Wash. 18, 114 Pac. 870; Spaulding v. Chicago & N. W. R. Co. (1873) 33 Wis. 582.


\textsuperscript{239} See part 10 \textit{supra}.

\textsuperscript{240} This simile has been attributed to an unidentified English judge. I have been unable to trace it.
itself is no longer applicable. The circumstantial evidence is still there and continues to speak for itself; and the inference may still be drawn, and has weight so long as reasonable men may still be permitted to draw it.\textsuperscript{241} This is obviously true whether res ipsa loquitur is treated as an inference, a presumption, or as shifting the burden of proof. When it is said that the inference cannot be disregarded,\textsuperscript{242} it may be that no more is meant than that the jury must be told to take it into account along with all the other evidence; and that its relative weight still depends on the strength of the facts which give rise to it as compared with the strength of the rebutting evidence. So stated, the California decisions make a considerable amount of sense.

It follows that when the defendant seeks a directed verdict in a res ipsa case, he must prove enough to overcome the inference from the original facts. What is required will depend upon what these facts are and what the evidence is, and cannot be made a matter of rule. It takes more of an explanation to account for a hundred defective bottles than for one, more to justify a falling elephant than a falling brick. A carrier, held to the highest obligation of care, must show more in the way of care than an ordinary defendant.\textsuperscript{243} It is clear that no defendant can prevail as a matter of law upon a mere showing that he does not know what has happened,\textsuperscript{244} or upon circumstantial evidence which merely suggests another possible cause, as in the case where a break in a power line might have been due to a rifle bullet.\textsuperscript{245} It is equally clear that no verdict is to be directed on the basis of testi-


\textsuperscript{242} As in Druzanich v. Criley, \textit{supra} note 208; Ales v. Ryan, \textit{supra} note 207; Dieterle v. Yellow Cab Co., \textit{supra} note 207; Lejeune v. General Petroleum Corp., \textit{supra} note 206; Morris v. Morris, \textit{supra} note 208.


\textsuperscript{244} Williams v. Field Transportation Co. (1946) 166 P. (2d) 884; Ireland v. Marsden, \textit{supra} note 241.

\textsuperscript{245} Manuel v. Pacific Gas & Electric Co. (1933) 134 Cal. App. 512, 25 P. (2d) 509. \textit{Cf.} Peters v. McKay (1902) 136 Cal. 73, 68 Pac. 478 (evidence “tending to show” derailment due to stick of wood placed on track by third person); Roselip v. Raisch, \textit{supra} note 220 (“No person in charge of a dangerous instrumentality can avoid his liability for an injury resulting from its mismanagement because out of a number of probable causes of the injury he may have concluded, and procured witnesses to testify, that the injury was due to cause A and not to cause B.”).
mony as to the defendant's own conduct, or any other possible cause for the accident, which still leaves fairly open the possibility of the negligence originally to be inferred.

This is not to say that the defendant can never rebut the inference of res ipsa loquitur. When he testifies definitely and completely as to his own due care, or as to another cause, the jury may find in his favor and their verdict will not be disturbed. It is even possible that the rebutting evidence will be so convincing and overwhelming as to call for a directed verdict. In the ordinary case, however, the inference based on common experience remains in the case, and still has enough strength to get the plaintiff to the jury.

The defendant testifies that he operated his bakeshop with all possible care; but the fact remains that glass does not get into bread in carefully operated bakeries. He testifies that there was no negli-


247 St. Clair v. McAllister (1932) 216 Cal. 95, 13 P. (2d) 924 (negligence of other driver in collision); Linberg v. Stanto (1931) 211 Cal. 771, 297 Pac. 9 (turning to avoid other car); House v. Pacific Electric R. Co., supra note 238 (emergency action in collision); Karsey v. City and County of San Francisco (1933) 130 Cal. App. 655, 20 P. (2d) 751 (sudden stop to avoid collision); Smith v. Hollander, supra note 205 (skidding on wet pavement); Morris v. Morris, supra note 208 (turning to avoid other car); Seney v. Pickwick Stages (1927) 82 Cal. App. 226, 255 Pac. 279 (turn to avoid plank in road).


gence in running his train; but still it went off the track. He testifies that he inspected his elevator; but properly inspected elevators do not fall. He says that he parked his car safely; but there is the car, coming down the hill. He says that he examined his gas pipes after the explosion and found no leak; but gas pipes which do not leak do not explode. He says that he put a weight in such a position that it could not possibly have fallen; nevertheless it fell. He says that his permanent wave machine was handled with such extraordinary care and foresight that no one could possibly have been burned by it; but here is the plaintiff who was burned. In all such cases there is common experience which permits the jury to conclude that the defendant's witnesses are not to be believed, that something went wrong with the precautions described, that the full truth has not been told. As the defendant's evidence approaches conclusive proof that such precautions were taken that this accident could not possibly have occurred, it is all the more obviously contradicted by the fact that it did occur.

It has been said that in a res ipsa case the defendant may have a directed verdict only when he shows a definite cause for the accident in which his negligence played no part, or else conclusive proof of his own due care. This seems much too narrow. The defendant may certainly rebut the plaintiff's case by showing that the accident is of a kind which commonly occurs without the fault of anyone, or that
responsibility for the apparent cause was in another—or in other words, that the case is not one of res ipsa loquitur at all. At best, however, his task is a difficult one. In all the California cases there are only a handful of directed verdicts for the defendant; and even a jury verdict in his favor must run the gauntlet on appeal. This at least suggests that the plaintiff is in no great need of the aid of any presumption or shifted burden of proof.

12. INSTRUCTIONS TO THE JURY

It might be expected that the tangle over the procedural effect of res ipsa loquitur would be at its worst when we come to instructions to the jury; and this has certainly been the case. All of the varying views as to presumptions, inferences and burden of proof have been reflected in instructions given and approved, or given and found in error, and it is unnecessary to repeat what has been said. In addition, however, the instructions have displayed a few peculiarities of their own.

Thus it has been held in a good many cases that it is error to instruct that res ipsa loquitur creates a presumption of negligence, but the error is not prejudicial because the jury could not have been

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261. Engelking v. Carlson (1939) 13 Cal. (2d) 216, 88 P. (2d) 695 (severed nerve during operation). In all of these cases there was additional evidence of the defendant's own due care.


263. The difficulties confronting the defendant are illustrated by the recent case of Dierman v. Providence Hospital, supra note 205. The plaintiff was injured by the explosion of an anaesthetic in the course of a surgical operation. The defendants introduced testimony convincing to the jury, which tended to eliminate all possible causes except impure nitrous oxide supplied by the manufacturer. A verdict for the defendants, once affirmed, was reversed, chiefly because the defendants did not produce the tank of gas or any evidence of testing its contents or of how it had been handled. The original inference of negligence from the fact of the explosion is treated as compelling in the absence of sufficient rebutting evidence—which is certainly right. In effect, however, the inference remaining after the defendants' testimony, and arising from their failure to introduce more evidence, is treated as equally compelling, and not one on which reasonable men may differ. The case looks as if the defendants were required to prove their case beyond a reasonable doubt. No one should attempt to pass judgment without reading the record; but on the opinions alone the writer is inclined to agree with the dissent.

misled— which amounts to saying that the jury could not have understood what the court meant. The value of such an instruction is at least open to question. Equally questionable is the type of charge found in a number of cases, which runs about as follows:

I instruct you that in this case the burden of proof is on the plaintiff to show by a preponderance of the evidence that his injury was caused by the negligence of the defendant.

But from the occurrence of the accident in this case a presumption of negligence arises which throws upon the defendant the burden of proving that the injury was not due to his negligence.

In several instances it has been said that the second part of this instruction is error, but that it is not prejudicial because it is "cured" by the first part. The effect has been to perpetuate the error and lead to its repetition in later cases, as the series of decisions fully demonstrates.

What a jury makes of such instructions is anyone's guess. It must be agreed that the average juryman is no intellectual giant, and that he is not likely to be misled by what he cannot understand; but that is a poor reason for approving an instruction which even a lawyer must find contradictory and confusing. There is room for considerable skepticism as to how far instructions are ever understood by the ordinary jury, or have any weight with them; but they represent the attempt, so far as it is reasonably possible, to enlighten the layman's ignorance of the law, and their entire purpose is defeated when they are legally wrong, or equally when they are not clear.

The judges of the Superior Court of Los Angeles County have approved the following instruction in cases of res ipsa loquitur:

266 The language in the text is a condensation to bring out the point, and is not found in any case. Instructions of this type, however, were given with the indicated result in Bonneau v. North Shore R. Co., supra note 206; Hellman v. Los Angeles R. Corp. (1933) 135 Cal. App. 627, 27 P. (2d) 946, 28 P. (2d) 384; Irwin v. Pickwick Stages System (1933) 134 Cal. App. 443, 25 P. (2d) 998; Holt v. Yellow Cab Co., supra note 205; Bezera v. Associated Oil Co., supra note 207; Learned v. Peninsula Rapid Transit Co. (1920) 49 Cal. App. 436, 193 Pac. 591; Bourguignon v. Peninsular R. Co., supra note 259.

267 Farley, Instructions to Juries—Their Role in the Judicial Process (1932) 42 Yale L. J. 194.
From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on his part.

This is certainly a far better instruction than most of those set out in the California cases. Only two objections to it can be suggested. One is that "there arises an inference" is open to the construction that the inference is compulsory and the jury has no choice but to accept it. While there is California authority both ways on this, it seems clear that in most res ipsa cases, as in other cases of circumstantial evidence, there is a choice of alternative probabilities which counsel are free to argue to the jury and which the jury must decide, and that the inference is not required to be drawn. The other is that "it is incumbent upon the defendant to rebut the inference," with what follows, is a phrase of very uncertain meaning, vaguely reminiscent of burden of proof and at least suggesting a presumption; it is calculated to leave any lawyer, to say nothing of the jury, in considerable doubt as to just what the defendant is expected to do and what happens if he does not do it.

With this instruction one should compare the following, which was approved in Juchert v. California Water Service Co. It is relatively simple and comprehensible to the ordinary citizen; it appears to say everything that is needed and avoids baffling the jury with the procedural complications:

I instruct you that when a thing which causes injury is under control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the

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268 In Dempsey v. Market Street R. Co. (1947) 79 Cal. App. (2d) 216, 179 P. (2d) 34, it was held error to instruct in terms of "if you find from the evidence," since the jury may infer negligence from the mere fact of the accident without other evidence. It is error to instruct that the mere fact of injury permits the inference. Steele v. Pacific Electric R. Co. (1914) 168 Cal. 375, 143 Pac. 718.


270 See notes 208 and 209 supra.

271 Text at pages 195-196, 221-234 supra.
management use ordinary care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from want of ordinary care. Therefore if you find that the defendant water company had exclusive control and management of its water pipe, and that water was permitted to escape therefrom, then I instruct you that the escaping of said water from said pipe affords evidence in the absence of explanations, that it arose from a want of ordinary care on the part of said water company in the control and management of said pipe.272

13. CONCLUSION

All this is rather marvelous. When one considers that the entire "doctrine" of res ipsa loquitur is the child of three words casually let fall in an English case in 1863, amazement grows at the magic of a long dead tongue and the inevitable tendency of the law to seek a formula. It is only too obvious that the words have been no blessing; and there are those who have urged273 that they be consigned forever to oblivion and never mentioned again.

Since this is not likely to happen, and we must all live with res ipsa loquitur, we can at least shift the emphasis from "the thing speaks for itself," which is after all not very important, and ask instead the real question: what does it say?274 On this basis, this long discussion leads to the following conclusions:

1. A res ipsa loquitur case is merely one kind of circumstantial evidence case.275 The Latin tag adds nothing to the proof which would exist without it. Such proof cannot be reduced to a formula or a rule, and its strength, weight and force will depend always on the inference reasonable men may draw from the particular facts. A res ipsa loquitur case may be strong, or it may be weak. There is no typical case, and there is no more reason to expect that two cases will be alike than in other cases of circumstantial evidence.

272 (1940) 16 Cal. (2d) 500, 513, 106 P. (2d) 886, 893. Such an instruction might have to be modified in cases where the defendant is not in exclusive control.

273 "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule." Bond, C. J., dissenting in Potomac Edison Co. v. Johnson (1930) 160 Md. 33, 40, 152 Atl. 633, 636.

See also Bond, The Use of the Phrase Res Ipsa Loquitur (1908) 66 CENT. L. J. 386; Prosser, supra note 201.

"If that phrase had not been in Latin, nobody would have called it a principle." Lord Shaw, in Ballard v. North British R. Co. (1923) Sess. Cas. H. L. 43, 56.

274 If we must have Latin, a law professor of my acquaintance has suggested a substitute phrase: "Loquitur, vere; sed quid in inferno vult dicere?"

275 See text at pages 189-192 supra.
2. A res ipsa case arises under the following conditions:

(a) There is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not ordinarily occur unless someone has been negligent.²⁷⁶

(b) The apparent cause of the accident is such that the defendant will be responsible for negligence associated with it. His exclusive control of the instrumentality involved is one factor clearly indicating such responsibility; but it is not the only one, and responsibility may be found without exclusive control.²⁷⁷ The plaintiff's own responsibility must be eliminated, either by testimony or by the circumstances of the accident.²⁷⁸

(c) The indicated negligence lies within the scope of the defendant's duty. If the defendant will be liable only for wilful misconduct, failure to disclose what he knows or lack of professional skill, any res ipsa loquitur case is not sufficient unless the apparent cause points to a breach of that obligation.²⁷⁹

3. It is not essential to a res ipsa case that the defendant have any superior knowledge or opportunity to obtain knowledge of what has occurred. This is at most a makeweight reason occasionally given when res ipsa loquitur is applied or not applied. It is never controlling and never has any effect. It would be better if it were completely forgotten.²⁸⁰

4. The plaintiff's specific evidence of negligence does not necessarily prevent the application of res ipsa loquitur. It does limit it to the inferences which may be drawn in support of the specific proof, just as it limits inferences to be drawn from other circumstantial evidence.²⁸¹

5. Specific allegations of negligence in the complaint do not necessarily prevent the application of res ipsa loquitur. They limit it to the inferences to be drawn in support of the specific pleading, just as they limit inferences to be drawn from other circumstantial evidence. If the specific allegations are accompanied by a general allega-

²⁷⁶ See text part 2 supra.
²⁷⁷ See text part 3 supra.
²⁷⁸ See text part 4 supra.
²⁷⁹ See text part 7 supra.
²⁸⁰ See text part 5 supra.
²⁸¹ See text part 8 supra.
tion of negligence, res ipsa loquitur may be applied without limitation in support of the general pleading.\(^{282}\)

6. In the ordinary case res ipsa loquitur merely permits the jury to choose the inference of the defendant’s negligence in preference to other permissible inferences. It avoids a nonsuit and gets the plaintiff to the jury; but a verdict for the defendant will be affirmed even though he offers no evidence.\(^{283}\)

7. There are exceptional cases, such as the human toe in the plug of chewing tobacco, where the inference is so strong as to be compulsory, and a verdict should be directed for the plaintiff in the absence of sufficient explanation.\(^{284}\)

8. There are cases where a special relation between the parties should impose upon the defendant the burden of proof. One such relation may be that of carrier and passenger, where this burden of proof was the original rule. The law has had no great benefit from the marriage between this burden and the inference from circumstantial evidence, and a divorce would at least clear the air. The rule has nothing to do with res ipsa loquitur as it is commonly understood and applied, and it should be recognized as a distinct and separate rule of policy.\(^{285}\)

9. There are no rules as to the effect of rebutting evidence. It will always depend upon the strength of the original inference and the weight of the evidence itself. The inference remains in the case for what it is worth until the facts conclusively eliminate it.\(^{286}\)

10. In the ordinary case the best instruction is the simplest one, which merely informs the jury that it is permitted to infer the defendant’s negligence from the occurrence of the accident.\(^{287}\)

11. The Latin catchword is an obstacle to all clear thinking. It is the illegitimate offspring of a chance remark of an English judge eighty-six years ago, hybridized with the carrier’s burden of proof. There is no case in which it has been anything but a hindrance.

12. The present state of affairs, in California as elsewhere, is a reproach to the law. This, at least, speaks for itself.

\(^{282}\) See text part 9 supra.
\(^{283}\) See text part 10 supra.
\(^{284}\) See text at pages 220-221 supra.
\(^{285}\) See text at pages 186-189, 222-223, supra.
\(^{286}\) See text part 11 supra.
\(^{287}\) See text part 12 supra.