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Res Ipsa Loquitur

William H. McBratney

RES IPSA LOQUITUR

WILLIAM H. McBRATNEY†

Although res ipsa loquitur is frequently treated as a doctrine or rule of law, it is in fact nothing but a bundle of legal concepts, each of which may be treated separately. Unfortunately, the content of such a bundle varies so extensively from time to time and place to place that the general title "res ipsa loquitur" has little or no significance unless it is used with reference to a particular time and place, and sometimes also with reference to a particular field of law. Aside from the woolly thinking that results from the loose use of a single title to cover a number of concepts, there is also the danger that new rules of law and new ideas will creep into decisions, although such rules and ideas are not only not justified by the individual concepts but would certainly be repudiated by courts or by students of the law were they to consider them on their merits alone. Under those circumstances, it seems to me that res ipsa loquitur is worse than a doctrine incapable of definition; it is a source of ill-considered rules of law. It is the purpose of this article to sort out and to analyze the concepts that have gone into res ipsa loquitur, and to point out some of the consequences that have already resulted from a failure to analyze those concepts separately.[1]

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† Member, Arizona Bar.

1. To prevent an abundance of case citations amounting to a catalogue of decisions, only familiar types of cases have been used, and it is suggested that full citation will be found in the AMERICAN DIGEST SYSTEM and in CORPUS JURIS, CORPUS JURIS SECUNDUM, and AMERICAN JURISPRUDENCE, under Negligence, for general reference, and under specific titles, such as Explosives, Carriers, etc., for types of cases of special interest. Good general discussion may be found in WIGMORE, EVIDENCE and in SHEARMAN AND REDFIELD, NEGLIGENCE. Good discussion and pertinent illustrative material may be found in the following articles: Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519 (1934); Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 SO. CALIF. L. REV. 166 (1907); Carpenter, *Res Ipsa Loquitur: A Rejoinder to Professor Prosser*, 10 S. CALIF. L. REV. 466 (1937); Heckel and Harper, *Res Ipsa Loquitur*, 22 ILL. L. REV. 724 (1928); MacDonald, *The Doctrine of Res Ipsa Loquitur as Applicable to Injuries to Person or Property from Electrical Appliances Not under the Control of the Person or Corporation Furnishing the Electricity*, 3 VA. L. REV. 349 (1916); McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 553 (1951); Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 SO. CALIF. L. REV. 458 (1937); Prosser, *Res Ipsa Loquitur: Collosion of Carriers with Other Vehicles*, 30 ILL. L. REV. 980 (1936); Prosser, *The Procedural Effect of Res Ipsa*

I.

SPECIFIED AND UNSPECIFIED NEGLIGENCE

Res ipsa loquitur cases are sometimes differentiated from other types of cases on the ground that a claimant need not prove specific negligence, but need only prove negligence of an unspecified nature or facts from which it may be inferred that the defendant was negligent in some manner not further specified. In cases of injuries to passengers on a railroad, for example, the mere event of a collision of trains indicates trat the carrier has been negligent. It does not indicate in what particular the carrier has defaulted in its duty, and the plaintiff is not required to prove specifically one act of negligence, such as use of defective equipment, improper employment of operating personnel, failure to observe signals, or any of the many other things that might contribute to a collision of trains, because, as a matter of human experience, the unadorned fact of collision, coupled with the high standard of care due a passenger by a carrier, indicates that the railroad has in some particular defaulted in its duty.

Other courts, however, in attempting to follow the same line of thought, have apparently missed the point. In numerous cases wherein unattended motor vehicles whose brakes have not been set roll away and crash into persons or property, the courts have used the language of res ipsa loquitur as though the situation resembled the situation of a collision of trains.[2] Actually, though, the case of the runaway motor vehicle presents a case of specific negligence, established by way of inference from the proven facts, and the only visible effect of comparing it to the railroad case is to condone the habit of careless thinking on the part of the judges and attorneys concerning the actual nature of negligence.

To urge the proposition that the expression res ipsa loquitur is used only in those cases in which the plaintiff does not know

Loquitur, 20 MINN. L. REV. 241 (1936); Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949); Shain, *Res Ipsa Loquitur*, 17 So. CALIF. L. REV. 187 (1944); Shain, *Presumptions under the Common and the Civil Law*, 18 So. CALIF. L. REV. 91 (1944).

2. Price v. McDonald, 7 Cal. App. 2d 77, 45 P.2d 425 (1935); Glaser v. Schroeder, 269 Mass. 337, 168 N.E. 809 (1929); Kolbe v. Public Market Delivery & Transfer, 130 Wash. 302, 226 Pac. 1021 (1924); Oberg v. Berg, 90 Wash. 435, 156 Pac. 391 (1916). In each of these cases, the opinions point out that the motor vehicle owner had complete control of the instrumentality involved in the accident, and that, therefore, the fact of the accident presupposes some unknown negligence.

or cannot prove the nature of the defendant's negligence is, therefore, not justified. The matter depends entirely upon the individual court's concept of the matter, especially with reference to particular types of cases, and no purpose is served in any event by the use of the phrase. Dangers certainly lie in the way of its use if it can be made to serve in place of a more complete discussion of specific situations.

II.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Much of the difficulty in connection with res ipsa loquitur arises from the deficiencies and discrepancies of the definitions of circumstantial evidence. If negligence is a fact to be inferred from the specific facts of a particular case, then all evidence is circumstantial because without an admission of a party, the deductive process is necessary—and some definitions tend to go just about that far. On the other hand, there are those definitions which include within the term "circumstantial evidence" only the evidence of facts that would otherwise be absolutely irrelevant to the case, but which are, nevertheless, admissible because relevant deductions may be drawn from them. Writers who favor the latter definition, however, seem to feel that there is a nameless gap in the range of evidence; a gap that consists of evidence of relevant facts from which further relevant deductions of specific fact can be drawn.[3] Realizing, apparently, that

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3. Wigmore classifies evidence in three categories: autoptic proferrence, testimonial evidence going directly to the ultimate issue, and circumstantial evidence which embraces everything else. 1 WIGMORE, EVIDENCE § 25 (3rd ed. 1940); JONES, EVIDENCE § 6 (3rd ed. 1924):

> Other terms which are familiarly used to designate different forms of evidence are direct and circumstantial . . . . Circumstantial evidence is that which relates to a series of *other facts than the fact in issue*, which by experience have been found so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion. . . . These two kinds of evidence are thus defined by the codes in several states: "Direct evidence is that which proves the fact in dispute directly without any inference or presumption and which, in itself if true, conclusively establishes the fact. . . . Indirect evidence is that tends to establish the fact in dispute by proving another, and which though true does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. [Italics ours]

31 C. J. S. 871 defines circumstantial evidence as evidence which without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. The difficulty with reference to res ipsa loquitur is directly pointed out at 38 AM. JUR., Negligence § 297:

such evidence is obviously admissible and that it falls into neither the category of direct evidence nor their concept of circumstantial evidence, they call it res ipsa loquitur in order to identify it.

But writers who lean toward the position that all objective evidence is circumstantial are developing a regrettable tendency to use the words "res ispa loquitur" to cover an increasing number of specific situations without sufficient regard for the nature of proof or the principals of standards of conduct.[4] The unattend automobile case is a situation in point. In fact, a case of that kind is one in which specific negligence is established by way of objective evidence, and there is no need to make it appear that novel principles of law are connected with it.[5] In such circumstances, res ipsa loquitur tends to be synonymous with evidence itself without sufficient attention being directed to the nature of evidence or to the inferences that may be drawn from particular facts.[6]

Still other writers assign res ipsa loquitur a variety of other positions. Some tend to speak of it as a unique form of direct evidence,[7] and others as a unique form of circumstantial evidence.

Another distinction [between res ipsa loquitur and circumstantial evidence] which has been adopted is that where the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, it has been held to be a case of res ipsa loquitur. Where they are not immediately connected with the occurrence, it is an ordinary case of circumstantial evidence.

4. See note 1 *supra*, articles dealing with common carriers, airlines, and electrical appliances, for examples.

5. In both California and Michigan, runaway vehicle cases have been established by principles of circumstantial evidence without resort to res ipsa loquitur, although California uses the doctrine freely and Michigan rejects it entirely. Latky v. Wolfe, 85 Cal. App. 332, 259 Pac. 470 (1927); Bacon v. Snashall, 238 Mich. 457, 213 N.W. 705 (1927). Michigan has taken the position that there is no need of the use of the expression res ipsa loquitur and denies its validity as a doctrine. Mitchell v. Stroh Brewery Co., 309 Mich. 231, 15 N.W.2d 144 (1944); Collar v. Maycroft, 274 Mich. 376, 264 N.W. 407 (1936).

6. See 38 AM. JUR., Negligence § 298: " . . . it has been said that the doctrine, strictly speaking, merely takes the place of evidence as affecting the burden of proceeding with the case, and is not itself evidence."

7. Maki v. Murray Hospital, 91 Mont. 251, 263, 7 P. 2d 228, 231 (1932): The court said that the doctrine of res ipsa loquitur rests "not upon evidence, . . . but upon a postulate from common experience that accidents of the kind involved do not ordinarily occur in the absence of negligence." See also Tayer v. York Ice Machinery Corporation, 342 Mo. 912, 119 S.W. 2d 240, 117 A.L.R. 1414 (1938); Howard v. Texas Co., 205 N.C. 20, 169 S.E. 832 (1933); Plumb v. Richmond Light & R.R., 233 N.Y. 285, 135 N.E. 504, 25 A.L.R. 685 (1922); Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 200 S.E. 2d 153, 141 A.L.R. 1010 (1942).

In both cases it is assigned great probative value. But again there is no necessity for indulging in any new or original thoughts concerning the matter. It has long been recognized that certain forms of evidence have a higher probative value than others. A written instrument, for example, is considered better evidence of its content than anyone's statement concerning it. All sorts of material objects may be introduced as evidence. And it has long been recognized that some evidence is superior to testimony.[8] Furthermore, very careful consideration has been given by the law to both presumptions and inferences, both of which are outside the general scope of this paper except insofar as the theory underlying the use of inferences has become a part of res ispa loquitur. The law of evidence has proceeded a very long way from trials by ordeal to the present use of scientific techniques, and all along courts of law have been able to determine by themselves, and without the help of Latin slogans, that if one person twice gives another one two dollars, four dollars have changed hands.

Strangely enough, the expression "res ipsa loquitur" in connection with these various types of evidentiary propositions has been confined to the law of negligence, although indeed if it were necessary to use the expression at all, it would long ago have occurred in the criminal law. However, the law of evidence, in dealing with the proof of crimes, has been able to get along without it and still deal adequately with the concepts labeled "direct evidence," "circumstantial evidence," "best evidence," etc. Furthermore, the older cases, even in the field of negligence, were decided without resort to the expression "res ipsa loquitur" even though they dealt with factual situations similar to those that occur today and even though they arose from identical propositions of law.[9]

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8. *E.g.*, real objects such as weapons, clothing, mechanical devices, the scene of crimes and accidents, persons themselves to show age, injury, or color, official documents concerning birth, marriage, and death, judgments, administrative findings and procedures, and all the various matters of which courts will take judicial notice. See 4 WIGMORE, EVIDENCE § 1150 *et seq.*, and § 1177 *et seq.* (3rd ed. 1940).

9. See discussion, *infra*, of Holmes' treatment of the dropping of a brick from a railway bridge and the falling of a barrel from a warehouse window.

III.

CIRCUMSTANCE AND CIRCUMSTANTIAL

A.

Failure to distinguish between the substantive law of liability and the procedural aspects of establishing it has led to confusion and to the loose use of words, and the use of the phrase "res ispa loquitur" makes the matter worse.

Although the words "circumstance" and "circumstantial" are merely the noun and adjective forms of the same word, the difference between the two, for present purposes at least, is quite as great as the difference between substantive and adjective law.[10] We use the words "under the same or similar circumstances" in jury instructions without much thought for the fact that all liability, civil and criminal, is predicated upon circumstances. If, then, the word "circumstantial" is used on the same level as the word "circumstance" (with reference to operative facts) then all negligence cases are circumstantially established —a matter of nomenclature that has been touched upon above. But the word "circumstantial" is not usually given so extreme a meaning. It usually denotes the evidence of facts, one or several stages removed from the operative facts, but from which inferences of fact closer to the operative facts may be drawn. While these distinctions may seem to be nothing more than either hair-splitting or an exercise in semantics, they are nonetheless of serious consequence, for they facilitate the examination of legal concepts of real importance.

By way of selecting a factual situation free from the usual implications of res ipsa loquitur, a situation discussed by Holmes in his treatment of the criminal law will be appropriate:

> . . . if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is, therefore,

10. See 1 WIGMORE, EVIDENCE § 38 *et seq.* (3rd ed. 1940) on circumstantial evidence, and 9 WIGMORE, EVIDENCE § 2499 *et seq.* (3rd ed. 1940) on presumptions; THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313 *et seq.* (1898); JONES, EVIDENCE §§ 1-104 (3rd ed. 1924); Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. OF PA. L. REV. 307 (1920); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933).

> bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not. If a death is caused by the act, he is guilty of murder.[11]

The word "circumstantial" may be used to describe the evidence that "the space below him is a street in a great city" because from that fact it may be inferred that "there were people passing below." On the other hand, the inference is not arrived at in any mysterious manner since anybody with "common understanding" would be able to draw it. So simple a deduction is it that the court draws it in behalf of, or rather against, the defendant. The court has assumed to exercise at least as much deductive power as a man of common understanding and has found that the inference to be drawn is so obvious that anybody ought to draw it. The court therefore charges the defendant with knowledge of the fact that "there were people passing below" without bothering about direct evidence on the point. But once it is established by way of inference that the defendant knew there were people passing below, that fact, along with the fact that he nevertheless threw a heavy beam into the street, are circumstances that constitute murder.

In his discussion of negligence, Holmes uses illustrations of inference that factually bear a strong resemblance to res ipsa loquitur. But his discussion of the matter has only to do with the legitimacy of various sorts of inferences:

> It has often been said, that negligence is pure matter of fact, or that, after the court has declared the evidence to be such that negligence *may* be inferred from it, the jury are always to decide whether the inference shall be drawn. . . .
>
> . . . Take the case where the fact in proof is an event such as the dropping of a brick from a railway bridge over a highway upon the plaintiff, the fact must be inferred that the dropping was due, not to a sudden operation of weather, but to a gradual falling out of repair which it was physically possible for the defendant to have prevented, before there can be any question as to the standard of conduct.
>
> So, in the case of a barrel falling from a warehouse window, it must be found that the defendant or his servants

11. HOLMES, THE COMMON LAW 55-56 (1881).

> were in charge of it, before any question of standard can arise. It will be seen that in each of these well-known cases the court assumed a rule which would make the defendant liable if his conduct was such as the evidence tended to prove. [Footnotes omitted][12]

In some discussions of res ipsa loquitur, it is stated that the defendant must have control of the particular object in question in order for the rule to come into play,[13] as though some novel principle of law were involved, although as Holmes points out, the reason that a defendant must be in charge of the object is that it could not be otherwise inferred as a matter of logic that it was his negligence that caused the plaintiff's injury. It should be noted, too, that the case of the falling brick, as presented by Holmes, makes out a case of specific negligence by way of inference. In both these cases, the fact of negligence is inferred from facts which are in turn inferred from other facts, and the case may be said to be proved by circumstantial evidence.

B.

The words "res ipsa loquitur" have been used to justify inferences of negligence in cases not founded upon negligence, thereby injecting inappropriate concepts into such cases and further clouding the definition of res ipsa loquitur as a doctrine.

It has become so much a custom to infer the operative facts of liability that courts have tended to go through the motions of inference when liability may be imposed without it. In most criminal cases, and in most negligence cases, a standard of conduct is involved, and the facts on which liability is predicated are necessarily arrived at by inference unless the party specifically admits them. Negligence as a fact, for example, must be inferred from the facts constituting the specific circumstances of a particular case. On the other hand, there are fields of law in which it is not necessary to infer the operative facts upon which liability may be based. The actual facts or circumstances of the case are sufficient within themselves.

12. *Id.* at 124-125.

13. 9 WIGMORE, EVIDENCE § 2509 (3rd ed. 1940) and cases cited, especially Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929); Ross v. Double Shoals Cotton Mills, 140 N.C. 115, 52 S.E. 121 (1905); Glowacki v. North Western Ohio R. & P. Co., 116 Ohio St. 151, 157 N.E. 21 (1927); 1 SHEARMAN & REDFIELD, NEGLIGENCE § 56 (Zipp's ed. 1941); 9 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6041 *et seq.* (1941); JONES, EVIDENCE § 15 (3rd ed. 1924).

It is a familiar proposition of law that a dealer in food, and particularly canned food, who sells his product to a person to the latter's injury is liable by way of implied warranty.[14] The mere fact of sale, along with the fact of injury, and a demonstration of the relationship between the two, is sufficient for a judgment to be rendered against such a dealer. There is no need for courts to indulge in deduction, nor is it necessary that they refer to the law of negligence. But courts have nevertheless applied the words "res ipsa loquitur" to such implied warranty cases and have inferred negligence from the other facts of the case despite the irrelevance of such an inference. I suppose no harm would be done by so using res ipsa loquitur if it were understood that the words applied to situations in which inferences were not necessary and were used only for the purpose of distinguishing such cases from cases in which the operative facts had to be inferred from other facts. Unfortunately, however, the expression is used indiscriminately as though there were some resemblance between the unwholesome food case and the falling brick case. As a matter of fact, the two cases are not at all similar; they proceed upon entirely different principles of law and should not be lumped together. The imposition of liability in the implied warranty case rests upon a proposition of substantive law based upon public policy, whereas, on the other hand, the inference of negligence in the falling brick case is nothing more than a simple deduction of fact based on human experience and, therefore, cognizable by the law of evidence.

C.

Questions of public policy and the standards of conduct are often concealed behind the expression "res ipsa loquitur" when they should be dealt with consciously and openly.

Although the question of standard of conduct is a question of substantive law, it is so intimately related with the law of procedure that it could very well be described as a mixed question. So far as this discussion is concerned, cases in which standards of conduct are discussed or determined do not go to the extreme of evidentiary cases on the one hand, nor purely substantive ones on the other. But, unfortunately, many opinions in which res ipsa loquitur is applied tend to shuffle the cases about indiscrimi-

14. See 1 WILLISTON, SALES § 242 *et seq.* (rev. ed. 1948).

nately and, therefore, to confuse substantive law with procedure, although nothing is required but decisions concerning the applicable standard of conduct.

The tendency apparent in most appellate negligence cases is to standardize the various types of conduct from which inferences of negligence may be drawn and to define the situations in which negligence will be inferred as a matter of law. And it is a well known proposition of law that standards are established both by decisions and by statute:

> The rule of the road and the sailing rules adopted by Congress from England are modern examples of such statutes. By the former rule, the question has been narrowed from the vague one, Was the party negligent? to the precise one, Was he on the right or the left of the road?[15]

It should be noted that, as Holmes observes, the question is no longer one of negligence but one of precise fact. The law has already inferred negligence from certain types of conduct, and the jury need not do it when such facts are proved. Many courts have used the description negligence *per se* to describe negligence so established. I suppose no harm results from the use of such an expression if it is understood that it refers to those cases in which negligence will be inferred as a matter of law from certain types of facts, and that there is no necessity for anyone at the trial to infer anything from them.

Many cases in which the expression "res ipsa loquitur" is used are very little more than a declaration by the courts that certain types of conduct will be considered negligence without its being inferred by the jury. But the use of the words "res ispa loquitur" obscures the real nature of the process and drags in a comparatively new name to designate a type of development that is quite as old as the law itself and might even be considered an indispensable element of the very essence of law. I see no real reason why a court should not declare that leaving a motor vehicle unattended and without provision for its security constitutes negligence without requiring the jury to infer it. Furthermore, it is desirable that such declarations of law on the part of the appellate courts be thoroughly considered by the judges and by counsel. They should not be hidden behind an expression that tends to ignore the fundamental problem involved.

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15. HOLMES, *op. cit. supra* note 11, at 113.

IV.

RYLANDS V. FLETCHER

In the English case of *Rylands v. Fletcher*,[16] wherein water escaped from a reservoir and damaged a neighbor's property, the court held the owner of the reservoir liable even though no negligence could be shown.

In cases following that rule, as Holmes points out:

> ". . . it is no excuse that the defendant did not know, and could not have found out, the weak point from which the dangerous object escaped. . . . Although he was not to blame, he was bound at his peril to know that the object was a continual threat to his neighbors, and that is enough to throw the risk of the business on him."[17]

Whether such rule is desirable or not is outside the scope of this paper, but it is quite pertinent to observe that American courts repudiate *Rylands v. Fletcher* whenever they consciously deal with it,[18] but nevertheless apply it by way of res ipsa loquitur.

In like manner, the courts have declared in a wide variety of circumstances that the defendant acted at his peril even though the same courts would certainly hesitate to lay down such a declaration of law in those cases were the matter presented to them squarely.

There are three general methods available for the application of *Rylands v. Fletcher* and other severe rules of law under the guise of res ispa loquitur: (1) by inferring negligence when the facts do not warrant it; (2) by inferring negligence when misadventure is indicated; (3) by imposing procedural difficulties upon the defendant. Although the first two situations are quite similar and overlap very extensively, some clarity will be achieved by treating examples separately.

(1). After the courts held that the unexplained fact of a railroad collision was sufficient to raise an inference of negligence, the rule was extended to other carriers as though the proposition were somehow peculiar to carriers rather than to the processes of logic and human experience. As a consequence, courts have held that negligence may be inferred against a motor carrier of

16. L.R. 3 H.L. 330, 159 Eng. Rep. 737 (1868).
17. HOLMES, *op. cit. supra* note 11, at 157.
18. 1 SHEARMAN AND REDFIELD, NEGLIGENCE § 160 (Zipp's ed. 1941); See note 1 *supra* and especially MacDonald, *supra* note 1, at 349.

passengers whenever his vehicle collides with another vehicle in no way under his control.[19] But such use of res ipsa loquitur is not justified by the original rule concerning railroad collisions, nor does it represent a sound declaration of public policy, in addition to its weakness as a declaration of the law regarding inferences. Even if such opinions are supposedly based upon undisclosed public policy, the proper development of the law could be better served if the courts were to specifically so state and let the matter be threshed out in the regular way rather than have it hidden in meaningless jargon. In addition, it is certainly hard to believe that any court would infer negligence as a matter of rational deduction in the examples cited when there is so obvious a possibility that the driver of the other vehicle might be the sole cause of the collision. Inconsistently, though, the courts that permit an inference of negligence in those cases do not hold that motor vehicle operators have the same responsibility for injury to passengers that common carriers have for damage to freight.[20] In fact, were the question put to them directly, they would probably deny it.

Of course, it might be argued that res ipsa loquitur does not have the effect of imposing that liability; it is certainly true that it does not do so in specific terms. It does, however, give rise to an inference of negligence where none is justified, and, depending upon the interpretation of res ipsa loquitur for procedural purposes, leaves the matter to the jury. The court has thus surrendered its proper function and lets cases go to the jury when a non-suit should be directed, and the jury in turn is free to impose any rule it likes. The substantive law of the matter has therefore been changed and the defendant burdened with a more severe test of liability than any that has been actually prescribed for him.

(2). Many, but not all, of the res ipsa loquitur cases concern-

19. Pickwick Stages Corp. v. Messinger, 44 Ariz. 174, 36 P.2d 168 (1934); Kilgore v. Brown, 90 Cal. App. 555, 266 Pac. 297 (1928); Crozier v. Hawkeye Stages, 209 Iowa 313, 318, 228 N.W. 320, 323 (1929), in which the court stated, "The fact of a bus turning over or colliding with another car, like a railroad train leaving the track or striking another train, is so contrary to the usual method of operation as to require the defendant, upon proof of such fact, to establish its freedom from negligence which caused the result"; Stauffer v. Metropolitan St. Ry., 243 Mo. 305, 147 S.W. 1032 (1912).

20. Crozier v. Hawkeye Stages, 209 Iowa 313, 228 N.W. 320 (1929); Stauffer v. Metropolitan St. Ry., 243 Mo. 305, 147 S.W. 1032 (1912).

ing explosives, acids, high powered electrical equipment, and bottles and tanks under pressure, proceed upon the assumption that the mere event of injury presupposes negligence. Sometimes the facts point quite as strongly to misadventure as they do to negligence and all too often do not point to negligence at all. It is by way of res ipsa loquitur and not by way of a well considered declaration of public policy that liability is imposed where "the defendant did not know, and could not have found out, the weak point. . . ."[21]

Courts are particularly prone to disregard the possibility of misadventure and to raise an unwarranted inference of negligence whenever the case involves an instrumentality that is a continual threat to the community. In *Rylands v. Fletcher*, the court held, drawing an analogy to the wild animal cases, that anyone who maintained an object that was a continual threat to his neighbors acted at his peril, and it did not bother to invoke an inference of negligence. The modern tendency is to arrive at the same result, but without saying as much, by way of the roundabout inference of negligence and the use of the words "res ipsa loquitur" which, like the indefinite article, may be applied to anything or to nothing at all.

(3). The procedural effects of res ipsa loquitur, according to Professor Prosser, are three: It makes "(1) a case sufficient to get the plaintiff to the jury and avoid a nonsuit, and no more; (2) a case sufficient to direct a verdict for the plaintiff unless the defendant introduces evidence; or (3) a case which requires defendant to introduce more in the way of evidence than the plaintiff."[22]

Although that analysis is sound, it does not elaborate upon the nature of the evidence the defendant must introduce. In some instances, evidence of careful inspection, proper use and timely repair will satisfy the defendant's duty under any three of the requirements. But in others, the defendant must introduce evidence that will show how and why the accident occurred or, under (3) above, prove that the plaintiff's injury was the result of an act of God, the public enemy or a third person. Without stopping now to examine those defenses and their relation to the

21. HOLMES, *op. cit. supra* note 11, at 157.
22. Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 So. CALIF. L. REV. 458, 460 (1937).

usual concept of misadventure, it can be safely stated that the rule in *Rylands v. Fletcher*, or the insurer's liability of a freight carrier, or some other as yet unnamed rules approaching them in severity, are being very generally applied by way of res ipsa loquitur.

To add to the confusion, the words "res ispa loquitur" have been applied to all three procedural variations and to all the other variations brought about by different standards of duty that arise as a matter of substantive law. But by using the magic words, the courts are imposing duties upon parties who would otherwise not have to bear them, and are laying down rules of law that the judges themselves would repudiate.

V.

CONCLUSION

Although only extreme definitions, simplified situations, and common examples have been used in this discussion, the varieties of res ispa loquitur indicated here nevertheless become numerous. In actuality, the words are applied to all shades of definition between the extremes and to a great variety of factual situations. There is, therefore, no common factor appearing in all the cases and certainly nothing even approaching a uniform boundary for the area in which the words are used.

The dissatisfaction with the present state of affairs has been well expressed in the following dissenting opinion in *Potomac Edison Co. v. Johnson:*

> In this case . . . the expression res ipsa loquitur has been the basis of much of the argument, and I venture to urge upon the attention of the profession in the state an objection to the continued use of it. 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.[23]

Even though res ipsa loquitur does not mean anything, the words are used in most jurisdictions and are probably here to stay. There is, however, a tendency toward definition in terms of various concepts or combinations of concepts. Courts are constantly clarifying and limiting the use of the words in their own

23. 160 Md. 33, 40, 152 Atl. 633, 636 (1930).

jurisdictions, and in the future, res ipsa loquitur will probably achieve the dignity of a doctrine, but it will have a different content from one court to the next. Periodical literature already reveals a tendency to treat the matter with reference to particular jurisdictions and not generally. And once it takes on definite limitations, even though on a local basis only, lawyers and courts can deal with it relative to the subtantive law and to the consequent procedures.

As a matter of personal preference, however, I would rather see the above quoted dissent win the recognition it deserves, and then hear no more of res ipsa loquitur.

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CONTRIBUTORS TO THIS ISSUE

HOMER CLARK, Assistant Professor of Law, Montana State University School of Law. A.B. 1939, Amherst College; LL.B. 1942, Harvard Law School. Law clerk to Honorable Peter Woodbury, U. S. Circuit Judge, 1946-1947. Associated with firm of Gumbart, Corbing, Tyler & Cooper, New Haven, Connecticut, 1947-1949.

WILLIAM H. MCBRATNEY, Member, Arizona Bar. A.B. 1934, Illinois College; LL.B. 1936, A.M. 1937, Washington University. Practiced in St. Louis, Missouri, 1936-41, with Fordyce, White, Mayne, Williams & Hartman. Presently practicing in Tucson, Arizona.