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RES IPSA LOQUITUR VINDICATED

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Two of our most distinguished tort skippers, Dean Prosser[1] and Professor Seavey,[2] have recently thrown overboard *res ipsa loquitur*. It is, they say, superfluous timber, *tabula in naufragio* at best; a great many judges fell overboard (or were thrown out) at the same time and are still hopefully clinging to the doctrine. Their thesis is that the concept of *res ipsa loquitur* where it is correctly applied is redundant and where it is not redundant it is wrong. Now, a concept which produces wrong results may indeed be wrong but it cannot at the same time be redundant. I suspect that as the law has stood until very recently *res ipsa* has been neither redundant nor wrong; but that changes now taking place in the burden of proof may render it obsolete. It is not the least important aspect of our thinking about *res ipsa* that we consider what is happening to notions of burden of proof, particularly in the field of negligence. And, in this connection we shall be compelled to re-examine the authority of *Galbraith* v. *Busch*.[3]

The argument starts with *Byrne* v. *Boadle*. A barrel fell out of the defendant's warehouse onto the plaintiff's head. This evidence standing alone was held sufficient to warrant the jury in finding negligence. The thing speaks for itself, said Baron Pollock. This is no more, says Dean Prosser, than an illustration of the general proposition that a case may be proved by adequate circumstantial evidence. Both in the criminal and the civil law a defendant may be found liable though there is no direct proof of the liability-creating act. If the evidence gives rise to a legitimate inference the jury may find the fact without benefit of the magic formula *res ipsa loquitur*, which neither adds nor subtracts from the case. If an inference of negligence is not legitimate then the case should not go to the jury.

Dean Prosser asserts the equivalence of the basic rule of proof and *res ipsa* as follows:

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*Byrne Professor of Administrative Law, Harvard Law School. See *A Note from the Editor, supra* p. ix.

1. *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949). Cited hereafter as Prosser.

2. *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950).

3. 267 N. Y. 230, 196 N. E. 36 (1935).

4. 2 H. & C. 722 (1863).

"In negligence cases he [the plaintiff] 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."[5] But a few lines on this expression is significantly qualified by the conclusion that the judge must leave the question to the jury "where reasonable men may differ as to the balance of probability." Thus the judge is to direct a verdict if the probabilities are evenly balanced but is not to direct a verdict if reasonable men might differ as to whether they are equally balanced. This assumes a judge who is capable of exact calculations of probability. He would distinguish the 50-50 cases from the cases where reasonable men may differ. Such a man will render obsolete the most advanced mechanical brains. There is to my mind an unresolved tension or even contradiction between these two statements which, if more closely examined, may throw light on the historic role of *res ipsa.*

Dean Prosser observes that *res ipsa* is no exception to "these familiar rules." He lists cases where the doctrine has been applied. In most of them one would agree that the result would follow from application of the normal rule of proof. It is easy then to fall into the habit of regarding the rest of them as of the same species. One of them is the kind of case which troubled the Court of Appeals in *Galbraith* v. *Busch.* An automobile driven by the defendant leaves the road for some unexplained reason; the plaintiff, a passenger (not for hire) is injured. Can he recover on no other proof than of the unexplained accident? In a California case which involved such facts plus proof of a broken steering wheel—broken apparently coincident with or after the departure from the road—it was held that he might.[6] Dean Prosser appears to agree: he believes therefore that there is evidence that the driver's negligence is more probable than not. It is in his terms a case of "circumstantial" evidence.

Yet if we give those terms meanings roughly equivalent to their traditional meanings—and it is those which he purports to be using—it is not at all obvious that the evidence in the case satisfies them. At least, six judges of the Court of Appeals, led by Judge Lehman (in *Galbraith* v. *Busch*) thought otherwise. There the defendant drove the plaintiff, a gratuitous passenger, in his automobile on a bright clear day. The automobile left the road. The Court held that the plaintiff must be non-suited. The Court below had permitted a recovery based on *res ipsa.* Judge Lehman started with the premise that the defendant would be liable for negligent operation of the car but not for mechanical failure (unless he had known of the defect). Accepting Dean Prosser's

5. Prosser at 194.

6. *Brown* v. *Davis,* 84 Cal. App. 180, 257 Pac. 877 (1927).

view of *res ipsa* he arrives at the conclusion that its operation adds nothing to an other wise insufficient case.

"The problem in each case is whether the circumstances unexplained *do* justify an inference of negligence. * * * In the administration of the law arbitrary rules cannot be substituted for logically probative evidence. The doctrine of *res ipsa loquitur* is not an arbitrary rule. It is rather a common sense appraisal of the probative value of circumstantive evidence. It requires evidence which shows at least probability that a particular accident could not have occurred without legal wrong by the defendant."[7]

What, then! Was there not "at least [a] probability" of negligence in this case?

But, adds the Judge:

"The evidence, though unexplained, cannot possibly lead to an inference that the accident was due to lack of care in the operation of the automobile, for the probability that it occurred from a break in its mechanism is at least equally great."

How account for the difference between the California and the New York cases? Is it merely of judgment as to facts? Of a differing appraisal of the "probabilities" within a common concept of the burden of proof? The reader may remember the somewhat contraductory definition of burden of proof given by Dean Prosser. Where the probabilities are balanced the plaintiff, he says, must be non-suited but "where reasonable men may differ as to the balance of probabilities" it must go to the jury. If as Judge Lehman thought the probability of innocence was "at least equally great" as that of negligence, which of Dean Prosser's two ideas is applicable? It depends, he says, on whether a reasonable man could say that one is greater than the other. All right, could he? I maintain that once that question is put and squarely faced it becomes obvious that the formula is an abstraction lacking workable terms. It ignores the key to the traditional concept. All the modern emphasis is coming to be placed on this fashionable word "probability" whereas the key words are "speculation and conjecture." These words which are treated as so much surplusage are in fact of the essence. Keeping them in mind the judgment in *Galbraith* v. *Busch* makes sense at least in terms of traditional notions of proof. Let us assume, as Lehman did, that he somehow knows—though how he could know is a mystery—that the probabilities were 50-50, or let us assume in Prosser's terms that a "reasonable man" could find that the "probabilities" were 55-45 or even 60-40 in favor of negligence. Nevertheless on either hypothesis if the tradition is followed there is no case for the jury. Why? Because it cannot *decide the case* except by "speculation." Liability—in the traditional

7. 267 N. Y. at 234, 196 N. E. at 38.

view—is not based on the "balance of probabilities" but on a finding of the fact. I am perfectly aware that abstract probability may play a role in finding a fact, but what is referred to in the traditional formula is the greater probability in the case at hand. The "probabilities" in the abstract or statistical sense is only a datum. The jury's quest for the fact can only be undertaken if there is evidence in addition to that upon which the mere abstraction is based which will enable the jury to make a reasoned choice between the competing possibilities. The conditions for a finding are not satisfied merely by showing a greater statistical probability. If all that can be said is that there are 55 chances of negligence out of 100, that is not enough. There must be a *rational,* i.e., evidentiary basis on which the jury can choose the competing probabilities. If there is not, the finding will be based (in the words of the formula) on mere speculation and conjecture. And if in these two cases, *Galbraith* v. *Busch* and the California analogue, the result must be worked out in terms of traditional burden of proof rules, I think the New York case is clearly correct and the California case wrong.

On the other hand if there is or ought to be a special rule of proof, called by many courts, as I gather, *res ipsa loquitur,* then the California case could be correct and the New York case wrong. Now I suspect that a good deal of legal criticism is the more or less unconscious substitution of a fashionable form of words for an older form of words; and it is not unusual for a linguistic critic himself to fall into a trap. That appears to me to be happening here in these easy off-the-cuff assertions about probability. What, indeed, do we know in many of these cases of so-called circumstantial evidence—and particularly the one in question—of the degree of probability? How does Judge Lehman know that the probability of mechanical defect is equally as great as that of negligent operation? What, perhaps, the Judge means is that in the absence of specific information we have no more reason for attributing the accident to one cause than to the other. This is surely not the same thing as saying that the probabilities are of equal magnitude. As a matter of fact it is said that studies showed that only 3½% of the cars in accidents have mechanical defects and in only ¼ of 1% do these defects play a part.[8]

This mode of achieving solutions by easy assumptions concerning "probability" is nicely illustrated in Dean Prosser's treatment of collisions. "The whole problem," he says, "of the application of *res ipsa loquitur* is brought to a head in the collision cases."[9] If *A* and *B* each driving vehicles collide, can a passenger of *A* or *B* recover against *A* or *B* without more proof than of the collision itself? Usually it is held that if the defendant is a carrier and the

8. In James & Dickinson, *Accident Proneness and Accident Law,* 63 HARV. L. REV. 769 at 770 (1950).

9. Prosser at 204.

plaintiff is his passenger the doctrine of *res ipsa* applies, but otherwise not.[10] This distinction, as Dean Prosser says, can hardly be explained on the ground that the "probabilities" are different in one case than in the other. And since there is no reason for concluding that *A* or *B* is the more likely to have been negligent, he appears to approve decisions holding that *res ipsa* is inapplicable to such suits, which is to say that on ordinary rules of proof the evidence is inadequate. But then he is confronted with *Godfrey* v. *Brown*[11] in which the California court *did* apply *res ipsa* in a collision case in favor of *A's* guest against *A*. "It left entirely unexplained," says Dean Prosser, "and it appears quite impossible to explain, the distinction between the private host and the driver of the other car."[12]

So far so good, but then in a startling Statue of Liberty play he suggests that the case is wrong only because it does not go far enough. It would be correct if *res ipsa* applied against both *A* and *B*. Why? Because there is a "greater probability that *both* drivers were at fault." "Certainly that is the experience of liability insurance companies and is the reason for much of the recent agitation for vehicle accident compensation laws and comparative negligence statutes." I am not at all sure what Dean Prosser's statement about greater probability means. That it is more probable that both drivers were negligent than that both were not negligent? or more probable that both were negligent than that either one or the other was negligent? His following remarks only make the argument more obscure. "At least there is evidence," he says, "that someone was negligent. It is not a question of whether this negligence is more likely to be that of *A* than *B*, but whether the collision itself is sufficient evidence against each." But of course under the usual rules of burden of proof there must be evidence from which it appears that *A* was more probably negligent than not, and that *B* was more probably negligent than not. When a driver, he says, goes off the highway or collides with a stationary object the *normal experience* is that he has been negligent and *res ipsa* applies (Judge Lehman was unfamiliar with this inference). Why, he continues, any other conclusion when he collides with a moving object, which due care requires him to look out for and avoid? The probability of *A's* negligence when *A* hits a stationary object is thus easily equated to the situation when he collides with another free-moving man-directed object. Where does this convenient datum come from? Is it a normal inference? In the traditional terms of proof—of reasoning on sufficient evidence to a conclusion—is there anything

10. *Plumb* v. *Richmond, Light & R. Co.*, 223 N. Y. 285, 135 N. E. 504 (1922). A recent Kentucky case rather curiously takes the position that *res ipsa loquitur* applies only if the passenger in his suit against the carrier joins the person responsible for the operation of the other vehicle. *Vogt* v. *Cinn. Ry.*, 312 Ky. 668, 229 S. W. 2d 461 (1950).

11. 220 Cal. 57, 29 P. 2d 165 (1934).

12. Prosser at 207.

in the mere fact of a collision that will enable a jury to conclude that the driver of one car was negligent? the driver of the other? It is obvious, I think, that in argument such as this abstract statistical probabilities (and even the statistics are assertions without experimental verification) are taking the place of proof. In short this is the process known to the law as presumption rather than proof and the conclusion seems inescapable that we are in the presence of a special doctrine.

The doctrine of *res ipsa does* rest on probability. It takes a case to the jury where the degree of probability is indeterminate and there is not sufficient evidence to apply it to the case at hand. But what is the argument for putting to a jury a case such as *Galbraith* v. *Busch* or *Gidfrey* v. *Brown*? What justification can there be for putting to a jury a case in which a "rational" finding of liability cannot be made? The reason is two-fold. Our experience and understanding of such situations indicates a substantial, if indeterminate, probability of negligence. In short, there is a substantial probability that the plaintiff may have a cause of action. Now ordinarily that fact alone would not warrant a judgment against the defendant. But typically, if not invariably, in this class of case the defendant has greater access to the facts than the plaintiff. This is the significance of the usual requirement for *res ipsa* that the defendant be in control of the mischief-working instrumentality.[13] *Res ipsa* rests on the notion that it is fair to treat the probability as the fact if the defendant has the power to rebut the inference.

Dean Prosser's treatment of defendant's superior knowledge is charac-

13. But "control" should not be a condition for applying the doctrine. The determining factor should be the defendant's power—if not in the very case, at least in the class of case in question—to rebut the adverse inference. Control is relevant but not necessary. Control is in any case a hopelessly ambiguous concept. An instrumentality once in defendant's control, e.g. as a manufacturer, may have been handled since by many persons including the plaintiff without in any way, however, altering the mechanical situation giving rise to the inference of negligence; and when at the time of harmful contact the defendant is still closely connected with the instrumentality—in "control" if you will—the plaintiff, too, may not have been completely passive with reference to its manipulation. But nevertheless if two conditions are satisfied *res ipsa* should apply in such cases, though there is far from judicial agreement that it does. These two conditions are: (1) a substantial probability that defendant has done a risk-creating act of a described type, (2) a relation by defendant to the instrumentality at the putative time of such act enabling him to rebut the inference of its occurrence. Thus, in injuries arising from defects in manufactured articles where there is a probability that the defect was negligently produced the doctrine will apply though later parties or the plaintiff have handled or used it. Where, however, the very nature of the defect is itself unclear and may be attributable to the negligent or non-negligent acts of a number of persons depending on which defect is assumed, the application of *res ipsa* becomes much more problematical. *Curley* v. *Ruppert*, 188 Misc. 148, 65 N. Y. S. 2d 785, *rev'd* 272 App. Div. 441, 71 N. Y. S. 2d 578. (1st Dept. 1947); and see discussion of exploding bottle cases below. Where the plaintiff has participated in the operation of the injury-working mechanism at the time of impact, courts have recently allowed the application of the doctrine conditioned on a finding that the plaintiff was not negligent. *Jesionowski* v. *Boston & Me. R.*, 329 U. S. 452 (1947); *cf. Marceau* v. *Rutland Ry.*, 211 N. Y. 203, 105 N. E. 206 (1914); *Metropolitan Life Ins. Co.* v. *Rochester Gas*, 271 App. Div. 367, 65 N. Y. 2d 560 (4th Dept. 1946); Annotations 174 A. L. R. 608; 145 A. L. R. 870.

teristic of his whole argument. "It is difficult," he says, "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."[14]

If as is stated in the first hypothesis the plaintiff has already made a case, of course the defendant's ignorance cannot defeat it and no doctrine of *res ipsa* is needed to help the plaintiff. What is objectionable in the quoted statement is the second hypothesis and the assertion based on it: namely that if the inference of negligence is not sufficient the case cannot go to the jury though the defendant has peculiar control of facts which would enable the jury to apply—or reject—a substantial but indefinite probability. There is in my opinion a legitimate place for a doctrine of *res ipsa* which operates in the absence of a less than adequate inference where the defendant is typically in control of the key facts.[15] The doctrine of burden of proof as we have come to know it has never been the uniform basis for proving a case. The constant creation of presumptions attests this. The great object of the rules concerning burdens is to mediate between the plaintiff's problem of proving a presumptively good cause of action and the defendant's problem of proving a presupmptively good defense. The ordinary rule of burden of proof is taken in the general run of cases to be a fair solution but in particular cases the rule maye be unfair and I suggest that in the type of case in question it is unfair. I am willing to accept Judge Lehman's analysis in *Galbraith* v. *Busch* that the plaintiff did not offer sufficient proof of negligence but I question whether the case was rightly decided. Unless the case is to be justified on very special grounds of policy, it is to my mind a proper one for the application of *res ipsa*. If we assume with the Court that the probability of negligence is at least 50%, then it would appear just to impose on the driver a duty to explain the accident. Judge Lehman argued that it might have been the mechanism rather than the driving which was at fault and that the driver was not responsible for the mechanism. But if the mechanism was at fault the owner is in a superior position to demonstrate the fact. *Galbraith* v. *Busch* involved litigation between relatives. It appears from the dissenting opinion that the Court may have feared that in suits between relatives or friends the application of *res ipsa* would promote collusion at the expense of insurers. But a claim for protection

14. Prosser at 203.

15. In *Griffen* v. *Manice*, 166 N. Y. 188 at 193-4, 59 N. E. 925 at 926-7 (1901), the Court emphasizes the power to produce evidence: "where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation."

against negligent injury should not be denied an otherwise rational method of proof just because there is insurance.

A more recent case[16] follows *Galbraith* though there is no factor of collusion. The plaintiff, a tenant of defendant, rented the ground floor of defendant's building. Water dripped from the ceiling of plaintiff's store damaging his personal property. The majority of the Court non-suited the plaintiff because it was as likely that the water came from next door as from the second story plumbing. To my mind, the minority's solution is more just. The landlord was in control of the upper premises and was in a superior position to explain the cause of the accident.

A frequent occasion for the appropriate application of *res ipsa* is a situation which suggests the negligence of one or more of a group of defendants but does not point with sufficient logic to any particular defendant. According to Dean Prosser the suit must be dismissed even though the defendants are in a position to offer an explanation. He cites a number of California cases supporting the proposition but does not at that point refer to a recent California case which is a most dramatic example to the contrary. In *Ybarra* v. *Spangard*[17] the plaintiff was operated on in a private hospital and offered proof that immediately following the operation he had suffered a serious injury which could have been in the opinion of the plaintiff's experts a consequence of improper treatment during the operation. Plaintiff sued the owner of the hospital, the anesthetist, an employee of the anesthetist who adjusted his head on the operating table, a nurse who wheeled him into the operating room, a nurse who was in his room when he awoke, and, to be sure, the doctor who performed the operation. The Court held that on no more evidence than has been stated above there was a case for the jury against each and every one of the defendants! The Court rested its decision primarily on the superior accessibility of the defendants to the evidence. It is highly questionable whether this reason supports a case against any of the nurses; as applied to them it suggests the strange principle that whoever has access to evidence is a proper defendant regardless of any duty to exercise care. Dean Prosser, speaking of the case in another connection, suggests that it reflects the difficulty of proving cases against medical men because of the unwillingness of medical men to

16. *Silver* v. *Dry Dock Savings Institution*, 261 App. Div. 283, 25 N. Y. S. 2d 136 (1st Dept. 1941). See also *Meibohm* v. *Horton Pilsener Brewing Co.*, 259 App. Div. 236, 18 N. Y. S. 2d 878 (1st Dept. 1940), where a defendant, improperly, as the writer believes, was not required to explain an explosion on his premises. "The *mere* occurrence of the event" hardly affords sufficient basis for casting on defendant the burden of explanation. "There should be at least some proof of what exploded." By what standard does the court require that there should be at least some proof of *what* exploded? Possibly, on the ground that otherwise you are not in a position to indulge in speculation about negligence. But it should be enough that, abstractly considered, there is some probability of negligence, where defendant is in control of the avenue to the facts.

17. 25 Cal. 2d 486, 154 P. 2d (1944).

testify against each other. Yet that may be thought of as indeed the very condition was *res ipsa* brings into play, namely, defendant's virtual control of the evidence. It has, he says, little to do with "the ordinary notion of *res ipsa.*" If we accept his notion of *res ipsa* it does indeed have little to do with it, but if we base our conception of *res ipsa* on what use is in fact being made of it then it is a very striking example of the doctrine as we have identified it, at least as applied to the operating doctors.[18]

A recent decision of the Court of Appeals indicates that at least in the case of multiple defendants *res ipsa* will be applied without reference to the balance of probabilities. In so doing it probably overruled *sub silentio* an earlier case in which traditional notions of burdens of proof were applied. Both cases concerned injury in a public street to a person passing a construction job. In *Wolf* v. *American Tract Society,*[19] the plaintiff was hit by a falling brick. There were 19 contractors. The plaintiff was non-suited. The Court admitted that under *res ipsa* there was an inference of negligence but no inference as to who was negligent. "Cases must occasionally happen," said the Court, "where the person really responsible for a personal injury cannot be identified or pointed out by proof, as in this case, and then it is far better and more consistent with reason and law that the injury should go without redress than that innocent persons should be held responsible * * *."[20] In the recent case of *Schroeder* v. *City & County Savings Bank*[21] a scaffolding fell down. There were two contractors, one of whom erected it. The scaffold fell while the other was on the job. It was held that there was a sufficient case against both. "They were the ones who knew the cause of the collapse. It is not necessary for the applicability of *res ispa loquitur* that there be but a single person in control of that which caused the damage. * * * it is for them to explain their action."[22] The *Wolf* case might be justified on the ground that the falling of a brick is so fortuitous an event that no one of nineteen contractors would be in a position to explain it. Indeed one of the most vexed questions in connection with *res ipsa* is the nature of the burden of rebuttal which it places on the defendant, and it is part of my thesis that that problem will be more fairly solved if the distinctions urged in this paper are kept in mind.

I would like then to turn for a moment to the problem of rebuttal. The usually accepted procedural effect of *res ipsa* stops somewhere short of shifting

18. The plaintiff's case should, however, have been dismissed after the rebuttal testimony on the second trial. See *infra.*

19. 164 N. Y. 30, 58 N. E. 31 (1900).

2. *Id.* at 34, 58 N. E. at 32. In these days of awareness of the availability of liability insurance, we would no longer be so concerned about the plight of an "innocent person."

21. 293 N. Y. 370, 57 N. E. 2d 57 (1944).

22. *Id.* at 374, 57 N. E. 2d at 59.

the burden of proof. It must be confessed that the line is a subtle one, perhaps too subtle for all juries and most lawyers. But it is insisted upon by many courts and therefore lawyers must do their best to understand it. It is said that—as in cases of presumption—the defendant must produce a balance rather than a preponderance. If the case reaches the jury it is hardly to be supposed that it will make this distinction. But the distinction may be seen to operate in deciding the question of whether the case shall go to the jury. A good illustration of this concerns the presumption under Section 59 of the Motor Vehicle Act that the driver of an automobile is driving with the permission of the owner. In *St. Andrassey* v. *Mooney*[23] the owner presented the testimony of his discharged chauffeur, the driver, that he had not received permission. It was held in an opinion by Judge Lehman that this rebutted the presumption as a matter of law. The owner had discharged his burden by proudcing *believable* evidence, i.e., evidence which there was no very good reason for disbelieving. Now I think that it is clear that if the owner had the burden of proof he would not have been entitled to a directed verdict. He would have been compelled to take the risk of the jury's non-persuasion. The jury might have reasonable rejected the chauffeur's testimony because of his interest in a good reference or in the future favor of his old employer.

In my opinion, a similar rule should be applied to *res ipsa.* If *res ipsa* is just a species of circumstantial evidence, the contrary evidence offered by the defendant would in the usual case create a mere conflict of evidence for resolution by a jury. I would be prepared to agree that in many instances where *res ipsa* is invoked the case could go to the jury on ordinary principles of proof. If there is evidence that the defendant tried, unsuccessfully, to drive his car over a curve at 60 miles per hour, contrary testimony that his speed was 25 miles would not take the case from the jury. But if as in *Galbraith* v. *Busch* where there was no evidence dealing with the car's operation, the defendant presents a mechanic who testifies that he examined the wreck and found a broken steering wheel, the defendant should be entitled to a directed verdict. This conclusion follows from the correct understanding of the function and justification of *res ipsa.* There is, we have said, in such a case an indeterminate probability of negligent operation, but there is no rational process for making a conclusion one way or the other. The defendant, however, holds a probable key to the solution and fairness demands that what he may know he should produce. If he produces a reasonably satisfactory explanation nothing more in fairness can be demanded of him. And why should he be subjected to the mercy of a jury which, given his explanation, has less than ever reason for conjecturing the facts to be favorable to the plaintiff?

Now, in the example of rebuttal which I have given I have outrageously simplified a very considerable problem. It will be noticed that in this example

23. 262 N. Y. 368, 186 N. E. 867 (1933).

the defendant has been able to bring forward a disinterested witness who can give a circumstantial and satisfying explanation. Many courts in such a case will direct a verdict for defendant[24]—though there are others which will not do so even here. But it is usually said that the defendant can never have a direction based on his own evidence or the evidence of interested witnesses. And in certain type situations this will be the only available evidence. Indeed, that fact may be implicit in the proposition that the defendant is in control of the instrumentality. It is for that reason that he must explain; yet his explanation will not avail to keep from the jury a case which on our hypothesis admits of no conclusion in the plaintiff's favor other than one based on conjecture. We can comfort ourselves by observing once more that in many of these cases *res ipsa* is a redundant description of an otherwise adequate case. There are, for example, those cases where rats, snails, bits of human toes, and old cigar stubs have been pickled in coca-cola bottles. No amount of explanation, short of a catalyptic fit by the only possible employee-bottler, will overcome a valid inference of negligence. But if in *Ybarra* v. *Spangler* each participant in the operation states exactly what he did,[25] or if as in one of the California cases involving a *Galbraith* v. *Busch* situation the driver states that a car coming from the opposite direction without lights crowded him off the road, what more *can* the defendant do? Following our argument it would appear that, if in such cases the defendant's explanation is not to be accepted, the doctrine of *res ipsa* should not be applied at all. It is something of a mockery to require the defendant in the name of fairness to offer an explanation and then let a jury ignore the explanation on no other basis than its choice not to believe. It is no answer to this argument that questions of belief are for the jury. Where a party has the burden of proof, he must take the risk of not convincing. But, by hypothesis, the defendant in these cases does not have the burden of proof. The occasion calls for explanation and he has, as far as it can be judged, given a complete explanation to the limits of his power. Even accepting this line of argument, it would not follow that any explanation suffices which the defendant chooses to give. If it appears that the defendant has not taken the pains to find out what lies in his power, or if he evades explanation at a crucial point, or if his evidence itself suggests mendacity, he has not destroyed the inference or the presumption and must submit to the jury or to a directed verdict.

As Dean Prosser points out, if on the slightest of evidence from plaintiff and the fullest of explanations from the defendant, the case is nevertheless put to the jury, the result is in effect a change in the burden of proof and, it

24. E.g. *Melia* v. *Ry.*, 159 Misc. 293, 286 N. Y. Supp. 501 (City Ct. N. Y. 1936).

25. Professor Seavey points out that on the retrial there was evidence not even mentioned by the reviewing court—after the retrial—that plaintiff's teeth were diseased and that there was expert testimony to the effect that such disease may have caused the harm to the arm. SEAVEY, KEETON, THURSTON, CASES ON TORTS (1950) 216.

may be, even in the basis of liability. The cases dealing with exploding bottles illustrate the puzzling and dynamic ambiguities in this field. Again we can compare a California and a New York case. Both were suits against the bottler of a carbonated beverage (in the New York case coupled with a suit against the manufacturer of the bottle). In the New York case[26] there was no reference to the doctrine of *res ipsa,* but the case against the bottler was handled on that basis and disposed of as I have suggested it should be. The bottler put in testimony of his methods of inspection. Upon receipt of the bottles he put one or two out of each gross under the pressure guaranteed by the manufacturer. He tested every filled bottle by a test which would catch undue pressure and some defects in the bottle but not all defects. These were the tests customary in the bottling trade. Tests customary in the manufacturing trade would reveal certain defects in the bottle not revealed by the bottler's tests, but again not all defects. It was held that the bottler's testimony entitled it to a directed verdict. What did this holding involve? First, it would seem, a ruling that as a matter of law the bottler's tests were sufficient. He might in other words rely on the manufacturer for certain tests normally performed at that stage (division of labor on testing) and second (and very pertinent to our concern here), the defendant's own testimony (through its employees etc.) as to what its tests were and that it did test is taken at its face value as a conclusive rebuttal.

The California case[27] comes to the opposite conclusion. It talks the language of *res ipsa* and liability rather indiscriminately. "Where defects are discoverable, it may be assumed that they will not ordinarily escape detection" which implies that the bottler must apply every known test. But what of undiscoverable ones? Well, the manufacturers have a test which is "pretty near" infallible and so it will be assumed that when the bottles reached the bottler they had no defects, at least none not discoverable by visual inspection! Thus, no doubt depending on who is the defendant, bottler or manufacturer, it can be demonstrated that one is negligent by assuming that the other is not and should have taken all of the precautions that either might have taken.[28] Finally, the evidence of the defendant as to his methods is " a question of fact for the

26. *Smith* v. *Peerless Glass Co.,* 259 N. Y. 292, 181 N. E. 576 (1932).

27. *Escola* v. *Coca Cola Bottling Co.,* 24 Cal. 2d 453, 150 P. 2d 436 (1944).

28. This form of reasoning was explicitly repudiated in *Curley* v. *Ruppert, supra* n. 13. In this case the plaintiff did not introduce the broken pieces of the bottle so that nothing was known of the character of the defect. If it were assumed that the manufacturer had done his duty, then it might be argued according to the *Escola* case in the preceding footnote that either there was a discoverable defect or improper bottling. This, of course, ignores the possibility suggested in the *Peerless* case of a non-discoverable defect—at least of such as might be discovered by methods commonly in use among bottlers. In *Saglimberi* v. *West End Brewing Co.,* 274 App. Div. 201, 80 N. Y. S. 2d 635, *aff'd* 298 N. Y. 875, 84 N. E. 2d 638 (1949), recoveries against *Ballantine,* 273 App. Div. 217, 76 N. Y. S. 2d 383 (1st Dept. 1948), recoveries against the bottler were based on the continued use of old bottles in one case and the explosion of a number of bottles in the other.

jury." Mr. Justice Traynor concurred specially on the ground that the bottler should be absolutely liable on an extension of the notions of warranty.

"In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly."

We professors prefer Judge Traynor's clear, analytic approach. Indeed, this paper's prime purpose is to analyze as clearly as possible the function of *res ipsa*, to exhibit it as a species of inference or presumption operating — and justifiably so in a given case — somewhere between a rational circumstantial case on the one hand and a shift of the burden of proof or change in liability on the other. But I do not insist that the way of Judge Traynor—who having been a professor before he was a judge, can probably never shake the professorial passion for neat classification—is the only way. The law has traditionally moved from one doctrinal peak to another through the misty vales of fiction. For this it has its reasons, some good and some not so good. An outright rejection of an old doctrine in favor of a new may seem a gross assertion of naked power. A slow approach allows an opportunity for discussion, for testing the implication of an emerging doctrine. It allows time or acclimatization, for acceptance or rejection—by the bar and its clientele. It allows the court to beat a strategic or merely tactical retreat in the rare case where the application of the new doctrine is shocking. These considerations may appear to weaken my claim that *res ipsa* fulfils its function when the defendant has offered a complete explanation in terms of negligence. And to some degree they do. It depends, I would say, on what the court sees as the function of *res ipsa* in the case at hand. If it is a stage in the evolution of a new basis of liability, if it is being used as a fiction, it will take the case to the jury irrespective of the evidence as it did in the *Escola* case. If it is a device to assist the plaintiff to succeed on the presently stated basis of liability, then as in *Peerless Glass* case, the defendant's explanation may entitle him to a directed verdict. If, as some think, the concept of negligence is irrelevant in the context of most modern cases (at least in those involving automobiles, trains, machinery, etc.), *res ipsa* will be used wherever possible as a fiction. Evidence from whatever source will be irrelevant except in cases so inexorably clear that a refusal to direct a verdict would require the explicit rejection of the assumed rule of liability.

Finally, I advert to two developments which might be thought to render *res ipsa* obsolete. One is the increasingly broadened scope of discovery; the other a change in the basic conception of proof at least in the negligence field.

It has been possible for some time to examine the defendant both before and at the trial. It can be argued that if this is so the defendant is never in "control" of the evidence.[29] But there have been courts which have held that the proponent of a witness even when the witness is his opponent is "bound" by his evidence. In enlightened jurisdictions this incredible rule is abrogated by decision, rule of court, or statute. But even so, being able to ask an opponent questions, albeit without risk, is inferior to the right to compel him to make on his own initiative a full accounting.

But more basic to the present status of *res ipsa* is the fact that the concept of proof or perhaps the concept of negligence itself is undergoing a change. So far we have examined the question in the light of the traditional notion that the conclusion that the defendant was negligent can not be based on "speculation and conjecture." This I have argued means, as Judge Lehman held in *Galbraith* v. *Busch,* that it is not enough that there is a substantial "probability" of negligence. The jury must have evidence by which it can convert the probability into a finding. But in recent cases the Supreme Court has come close to challenging this concept. In *Lavender* v. *Kurn,*[30] a case arising under the Federal Employers Liability Act, Mr. Justice Murphy, reversing and answering the Missouri Supreme Court which had dismissed an employee's suit, said:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems the most reasonable inference."[31]

Read closely, this announces no new doctrine since it implies that the evidence provided a basis for making "the most reasonable inference." But a study of the evidence in that case would lead me at least to the conclusion that there was no more reason for attributing the accident to the defendant railroad's negligence, than to the deceased man's negligence, or the vicious act of a third person, or a combination of circumstances involving no fault on anyone's part. We must not go too fast in drawing conclusions from

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29. In *Johnson* v. *United States,* 333 U. S. 46 (1947), plaintiff and a fellow seaman, Dudder, were rounding in two blocks. One block was attached to a boom, the other was held by Dudder, and plaintiff was taking in the slack. The block in Dudder's hand fell on plaintiff knocking him unconscious. Plaintiff testified that at the time he was coiling the rope. Dudder was available as a witness, as was his disposition taken by the defendant, the United States. Neither side used Dudder or his deposition. The Supreme Court reversing the Court of Appeals held that *res ipsa* applied. Justices Frankfurter, Jackson and Burton dissenting argued that *res ipsa* was not applicable because evidence concerning Dudder's conduct was available. At the least the trial judge should have called Dudder as the court's witness.

30. 327 U. S. 645 (1946).

31. *Id.* at 653. But see *Moore* v. *Chesapeake & O. R. Co.,* — U. S. —, 71 S. Ct. 428, at 430 (1951).

Lavender v. *Kurn*. The FELA serves as a glorified workmen's compensation, and the Supreme Court has gone very far in dispensing with meaningful notions of both negligence and actual causation. But everyone is aware that there are similar trends in the automobile and railroad crossing cases. What we are coming to is not necessarily the adoption of a rule of absolute liability but of liability not limited to the reasoned probability in the particular case; liability based rather on a substantial probability of negligence and/or causation in the *type* of case. In so far as this is so, it then becomes true that *res ipsa* serves no function. But it is, I think, grossly unhistorical to say that this has always been so. Quite to the contrary I would argue that *res ipsa* has been one of a group of devices which have been and are still being used to revise the concepts of liability and proof. On this view *res ipsa* has not been an anomalous monster. Its form and function through the years may have been ambiguous and confused, in considerable measure redundant, but it is in this groping way that the law realizes its destiny of change. And there may still be areas where given an accepted basis of liability the device of *res ipsa* will serve fairly to apportion among the parties the burden of proof.