NOTES

RES IPSA LOQUITUR: INDIANA ORIGINS, USES AND PROCEDURAL EFFECTS

The heterogeneous matters which have been held to fall within the doctrine of *res ipsa loquitur* illustrate recurrent judicial development[1] of a concept which eased recovery in actions for negligence.

Res ipsa loquitur[2] allowed plaintiff to take his case to the jury[3] if proof was made of an occurrence "such as in the ordinary course of things does not happen, if those who have the management use proper care,"[4] and if defendant failed to make an explanation.

"The nature of the occurrence" and "the demand of explanation" comprise the elements of the rule. The first of these implies that the rule, when properly applied, may be simply a means of circumventing a preference for direct evidence of negligence.[5] The function of the other aspect of the rule is to force information from the defendant.

Res ipsa loquitur expands the role of the court in a negligence case. It is for the judge to determine whether the circumstances support a con-

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1. A parallel exploitation of the inexactitude of a Latin phrase is found in the exceptions to the hearsay rule which have been collected under the term *res gestae.* The result ascribed to *res gestae* by Thayer is equally imputable to *res ipsa loquitur.* "It would seem that it [*res gestate*] was called into use mainly because of its 'convenient obscurity.' . . . To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression." THAYER, LEGAL ESSAYS, 244, 245 (1908).

2. The first definition of the doctrine is found in Scott v. London and St. Katherine Dock Co., 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865): ". . . 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 an explanation by the defendants, that the accident arose from the want of care," *id.* at 601, 159 Eng. Rep. at 667. Prior usage of the term is discussed by Bond in *The Use of the Phrase Res Ipsa Loquitur,* 66 CENT. L. J. 386 (1908).

3. Submission of the case to the jury was the original result of applying *res ipsa loquitur.* See note 25 *infra.* By contemporary explanations of the doctrine, submission of the case to the jury is the minimumal advantage or sanction which the plaintiff may obtain. See note 15 *infra.*

4. Scott v. London, etc., Co., 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865), Terre Haute and Indianapolis R.R. Co. v. Buck, 96 Ind. 346, 359 (1884).

5. Circumstantial evidence, as distinguished from direct evidence (see 2 HARPER AND JAMES, TORTS § 19.2 *et seq.,* (1956), and 1 WIGMORE, EVIDENCE, § 25 (3d ed. 1940) is apparently much more freely accepted in criminal litigation than in civil litigation, even though the plaintiff in the former is confronted by the rule that proof be beyond a reasonable doubt. Prosser, *The Procedural Effect of Res Ipsa Loquitur,* 20 MINN. L. REV. 241, 258 (1936). Also see the dissents in Kestler v. State, 227 Ind. 274, 85 N.E.2d 76 (1949); where the inferential evidence supporting a conviction for second degree murder was viewed as inadequate to support a civil action.

clusion that the accident would not ordinarily occur without the presence of negligence. He also has the prerogative of determining whether justice requires the defendant to explain the occurrence. Application of these broad standards has resulted in apparently irreconcilable case law.[6] However, the varied uses[7] to which *res ipsa loquitur* has been put may be grouped roughly in three categories. It has been used as a vehicle for strict liability; allowing negligence to be a purported basis of re-

6. Treatment of *res ipsa loquitur* as a single doctrine or rule of law fails to recognize that the maxim represents a number of legal concepts, and that the content of this agglomeration varies with both time and place. McBratney, *Res Ipsa Loquitur,* 1952 WASH. U.L.Q. 542.

7. A partial enumeration of these purposes includes:

(1) Relieving the plaintiff of the necessity of producing expert testimony in malpractice actions. Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953); Funk v. Bonham, 204 Ind. 170, 183 N.E. 312 (1932); Bence v. Denbo, 98 Ind. App. 52, 183 N.E. 326 (1932).

(2) Covert application of the doctrine of strict liability for ultrahazardous activity. Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020 (1895). In the Judson case, the powder company factory exploded, leaving no witnesses as to what cause created the explosion. A similar disposition toward the maintenance of dangerous instrumentalities is found in Indiana cases dealing with injuries received by the escape of electricity. *Res ipsa loquitur* has been applied with comments such as ". . . those who generate such currents ought on principle to be made insurers against damage thereby done." Indianapolis Light & Heat Co. v. Dolby, 47 Ind. App. 406, 410, 92 N.E. 739, 740 (1910).

(3) Resurrection of the law of bailments for injuries received by passengers while aboard a common carrier. Indianapolis & St. L. R.R. v. Horst, 93 U.S. 291 (1876), Southern R.R. v. Adams, 52 Ind. App. 322, 100 N.E. 773 (1913); The Jeffersonville R.R. Co. v. Hendricks, 26 Ind. 228 (1866). Also see cases cited at note 49 *infra.*

(4) *Res ipsa loquitur* used as a device to implement statutes abnegating common law defenses absolving employers from liability for injuries sustained by employees. Miller v. Elgin, Joliet & Eastern R.R., 177 F.2d 224 (7th Cir. 1949); Baltimore & Ohio S.W. R.R. v. Hill, 84 Ind. App. 354, 148 N.E. 489 (1925), *cert. denied,* 273 U.S. 738 (1926); Indiana Union Traction Co. v. Abrams, 180 Ind. 54, 101 N.E. 1 (1913).

(5) A judicial assessment of the technological status of an industry or device. As to industries, this specie of *res ipsa loquitur* appears most frequently where plaintiffs are injured by foreign substances in foods or beverages. Coca Cola Bottling Works of Evansville v. Williams, 111 Ind. App. 502, 37 N.E.2d 702 (1941). As to a device, an interesting discussion is found in a recent case which holds a jet airplane may explode without an imputation of negligence. Williams v. United States, 218 F.2d 473 (1955). A majority of *res ipsa* cases may be classified as actions arising from a mechanical misfunction, and the suggestion has been made that the doctrine may be manageable only by restricting the maxim to such cases. Carpenter, *The Doctrine of Res Ipsa Loquitur in California,* 10 So. CAL. L. REV. 166, 187 (1937).

(6) By-passing an unsettled question of law. Use of *res ipsa* in Knoefel v. Atkins, 40 Ind. App. 428, 81 N.E. 600 (1907) allowed a plaintiff to recover when injured by receiving a poisonous drug from a pharmacist when the error apparently could have been that of the manufacturer.

(7) A sub-rosa extension of liability without fault. McBratney, *New Trends Toward Liability Without Fault,* 26 ROCKY MT. L. REV. 140 (1954). For an opinion calling for candor in this process, see that of Traynor, J. in Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944). Also see authorities cited at note 9 *infra.*

(8) Most typically, *res ipsa loquitur* signifies only that the plaintiff has produced sufficient evidence to justify a jury finding in his favor. Wass v. Suter, 119 Ind. App. 655, 663, 84 N.E.2d 734, 738 (1949); Louisville and Southern Indiana Traction Co. v. Worrell, 44 Ind. App. 480, 86 N.E. 78 (1908).

covery where typical proof of negligence does not exist.[8] The result is strict liability.[9] Secondly, *res ipsa loquitur* may be used to express the court's judgment that the plaintiff has produced, in point of logic, circumstantial proof of a cause of negligence sufficient to escape a directed verdict.[10] Finally, even though the circumstantial evidence of negligence is not sufficient to satisfy the second category, the plaintiff is allowed to escape a directed verdict because the court feels the defendant has superior,[11] if not exclusive,[12] knowledge of the cause of the injury. The

8. Given the rule that the verdict in a negligence case may not be supported by mere surmise or conjecture, Sickles v. Graybar Electric Co., 219 F.2d 847, 855 (7th Cir. 1955); Orey v. Mutual Life Insurance Co. of N.Y., 215 Ind. 305, 19 N.E.2d 547 (1938); Wabash, St. L. & P. R.R. v. Locke, 112 Ind. 404, 14 N.E. 391 (1887), use of *res ipsa loquitur* in a case such as Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020 (1895) establishes a jury question in an instance where typical evidentiary standards for proving negligence would preclude recovery.

9. James suggests the growth of *res ipsa loquitur* may be indicative of the demise of a system of liability premised upon fault. James, *Proof of the Breach in Negligence Actions*, 37 VA. L. REV. 179, 198 (1951), and authorities there cited, to which may be added: Ehrenzweig, *Assurance Olige—A comparative Study*, 15 LAW & CONTEMP. PROB., 445 (1950); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 381 (1951); Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 238 (1914); *Seavey, Comment: Res Ipsa Loquitur, Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950); Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 807 (1916).

10. Under Indiana practice, the defendant, if he introduces evidence, waives his right to question the properness of a denial of a request for a directed verdict at the close of the plaintiff's evidence. Trent v. Rodgers, 123 Ind. App. 139, 142, 104 N.E.2d 759, 761 (1952); Talge Mahogany Co. v. Burrows, 191 Ind. 167, 172, 130 N.E. 865, 868 (1921); Baltimore & Ohio S.W. R.R. v. Conoyer, 149 Ind. 524, 527, 48 N.E. 352, 353 (1897). This rule has probably prevented *res ipsa loquitur* from being expressly cited in an Indiana case as justification for allowing the plaintiff to escape a directed verdict at the close of his case in chief The practice at the time of the origin of *res ipsa loquitur* was apparently contra. Early applications of the maxim reversed a directed verdict for the defendant. Briggs v. Oliver, 4 H. & C. 403, 143 Rev. Rep. 680 (Ex. 1866) (nonsuit by court, reversed on appeal); Scott v. London, etc., Co. 3 H. & C. 596, 159 Eng. Rep. 665 (1865) (verdict directed for defendants at close of plaintiff's evidence, reversed on appeal); Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863) (Plaintiff non-suited, reversed on appeal).

Use of *res ipsa loquitur* as a means of stating a sufficiency of circumstantial evidence after both parties have presented their evidence may be synonomous with use of *res ipsa loquitur* at the close of the plaintiff's case, inasmuch as evidence at the close of the plaintiff's case is subjected to the same test—relative to directing a verdict—as is the evidence at the close of both parties' presentations. Contrast Kandea v. Inland Amusement Co., 220 Ind. 219, 224, 41 N.E.2d 795, 797 (1942); Bell v. Bell, 108 Ind. App. 436, 29 N.E.2d 358 (1940); and Estes v. Anderson Oil Co., 93 Ind. App. 365, 176 N.E. 560 (1931) with Worster v. Caylor, 231 Ind. 625, 628, 110 N.E.2d 337, 341 (1953); Frick v. Bickel, 115 Ind. App. 114, 121, 54 N.E.2d 436, 439 (1944); Robinson v. Ferguson, 107 Ind. App. 107, 109, 22 N.E.2d 901, 902 (1939). With regard to these standards, *res ipsa loquitur* under the federal rule duplicates the judgment that the plaintiff's case—in point of logic—is sufficient circumstantial proof of negligence to escape a directed verdict. Sweeney v. Erving, 228 U.S. 233 (1913); Atkinson, T. & S.F. R.R. v. Simmons, 153 F.2d 206 (10th Cir. 1946).

11. This form to *res ipsa loquitur* stems from Wigmore's interpretation of the maxim. 9 WIGMORE, EVIDENCE, § 2509; Foth, *Res Ipsa Loquitur*, 14 J. KAN. B.A. 239, 240 (1945); Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519, 531 (1934).

objective sought in this third use of *res ipsa loquitur* is the coercing of information from a defendant.[13]

Each application of *res ipsa loquitur* must involve a procedural sanction,[14] and the dissimilarity of the reasons for applying the doctrine suggests a necessity for corresponding flexibility in its procedural results. There is general agreement as to the existence of three possible procedural effects.[15] These are, the creation of a permissible inference—which holds the plaintiff is entitled to submission of the case to the jury, who may infer the defendant's negligence; the creation of a presumption—which requires the defendant answer or suffer a directed verdict; and the shift in the burden of proof—which entitles the defendant to have the case submitted to the jury *only* if he makes a *satisfactory* explanation.

Although frequently defined in the abstract, the procedural meaning of *res ipsa loquitur* seldom becomes the holding of an appellate case.[16] Appellate examination of *res ipsa loquitur* is almost wholly limited[17] to

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12. Indiana's requirement that the defendant be shown to have exclusive control of the instrumentality which caused plaintiff's injury tends to restrict the maxim to instances where the defendant is the only party with knowledge of how the accident occurred. Hamble v. Brandt, 98 Ind. App. 399, 189 N.E. 533 (1934); Prest-O-Lite v. Skeel, 182 Ind. 593, 106 N.E. 365 (1914).

13. This aspect of *res ipsa loquitur* is most apparent in malpractice cases, where the maxim allows the plaintiff the benefit of the defendant's professional learning. When the mechanism allegedly causing the injury is an intricate and technical device, use of *res ipsa loquitur* brings the defendant's knowledge of the apparatus before the tribunal. New York, Chicago & St. L. R.R. v. Henderson, 137 N.E.2d 744 (Ind. App. 1956). (Defendant was forced to explain the failure of a railway crossing flasher).

14. When the central purpose is to place upon the defendant the "burden of coming forward with evidence" the procedural sanction is obvious. In cases where the issue centers on the sufficiency of evidence of negligence, *res ipsa loquitur* is relevant to the procedural devices used in assessing the sufficiency of the evidence, *e.g.*, the directed verdict.

15. PROSSER, TORTS § 43 n. 89 (2d ed. 1955) and authorities cited. Indiana, because of the early decisions, has been listed as a "presumption jurisdiction." Prosser, *op. cit. supra* note 5, at 248.

16. Decision as to the procedural sanction may be obtained only by hazardous means. Plaintiff may force a determination only by requesting a directed verdict at the close of the defendant's evidence. In view of the traditional reluctance to grant a directed verdict to plaintiffs in negligence actions, the request would exchange the relatively small risk in submission of the case to the jury for the creation of an independent cause of reversal on appeal. Sunderland, *Directing a Verdict for the Party Having the Burden of Proof*, 11 MICH. L. REV. 189 (1913). The defendant may raise the question by remaining silent. By doing so he encounters the risk of either having waived his right to introduce evidence or being negligent as a matter of law by having failed to reply to a prima facie case. Ayrshire Coal Co. v. West, 72 Ind. App. 699, 125 N.E. 84 (1919). Significantly, the leading case giving procedural definition to *res ipsa loquitur* arose on the trial court's direction for the plaintiff after the jury had found no evidence of negligence. George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941).

17. City of Decatur v. Eady, 186 Ind. 205, 115 N.E. 577 (1917) can be said to be an Indiana holding as to the procedural character of *res ipsa*. Plaintiff's evidence showed the insulation on defendant's power line was rotten and had fallen from the power wire in the area where decedent was electrocuted. The only evidence before the

the question of the propriety of applying the doctrine in a given case.[18] In determining whether the rule was properly invoked, the court frequently uses broad language to express its conviction that the proper result has been reached. Because of this, *res ipsa loquitur* opinions are studded with language which, although intended only to convey approval of the trial court's use of the doctrine, has procedural connotations.[19]

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court clearly showed the defendant to have negligently maintained the line, and the use of *res ipsa loquitur* injected an unnecessary theory into the case, particularly in view of the fact the plaintiff had shown—by direct evidence—a negligent act on the part of the defendant. The appellate court's conclusion that the defendant was negligent as a matter of law was supported by the usual test for a directed verdict. Ayrshire Coal Co. v. West, 72 Ind. App. 699, 125 N.E. 84 (1919) is the only other holding on the issue. Both cases bottom upon direct evidence. "Where the evidence in the record is all one way, its effect becomes a letter of law, and the court will weigh it, even if in favor of the appellant [plaintiff] to recover." First National Bank v. Farmer's & Merchants Bank, 171 Ind. 323, 345, 86 N.E. 417, 428 (1908).

18. Taylor v. Fitzpatrick, 235 Ind. 238, 132 N.E.2d 919 (1956); Phillips v. Klepfer, 217 Ind. 237, 27 N.E.2d 340 (1940); Indianapolis Power & Light Co. v. Moore, 103 Ind. App. 521, 5 N.E.2d 118 (1936); Artificial Ice Co. v. Waltz, 86 Ind. App. 534, 146 N.E. 826 (1925); Cleveland, C. C., & St. L. R.R. v. Hadley, 170 Ind. 204, 82 N.E. 1025 (1908).

19. "Presumption of negligence," "prima facie case," and "burden of proof" are used in affirming the trial court's result. Each of these terms has more than one meaning. Burden of proof is normally regarded as a dichotomous term. Regarding a particular issue, the party with the "burden of proof" fails if no evidence is presented on that issue. Mayer v. C.P. Lesh Paper Co., 45 Ind. App. 250, 251, 89 N.E. 894, 895 (1909). This is called the "risk of non-production of evidence." Morgan, *Burden of Proof and Presumptions,* 25 ROCKY MT. L. REV. 34, 35 (1952). Failure to meet this burden brings a directed verdict or its equivalent. Kandea v. Inland Amusement Co., 220 Ind. 219, 41 N.E.2d 795, 797 (1942); N.Y. Central R.R. v. Verkins, 125 Ind. App. 320, 122 N.E.2d 141 (1954).

"Burden of Proof" may also indicate that one of the litigants must lose if the trier is unable to make a choice between the probative values supporting the parties' contentions. As to "his case," this burden is on the plaintiff throughout the trial. Fleming v. Pyramid Coal Co., 122 Ind. App. 41, 43, 100 N.E.2d 835, 836 (1951). This principle is called the "risk of non-persuasion." Morgan, *supra.*

Burden of proof has also been used where the plaintiff has met the initial risk of non-production of evidence. Sherlock v. Alling, 44 Ind. 182, 207 (1873). It is now agreed, however, the defendant then assumes the "burden of coming forward with evidence." Meyers v. Emerson, 118 Ind. App. 463, 466, 77 N.E.2d 902, 902 (1948). What effect flows from failing to meet the burden of coming forward with evidence is critical when *res ipsa loquitur* arises in the plaintiff's fulfillment of the risk of non-production of evidence, inasmuch as the defendant's failure to undertake the burden of coming forward with evidence may become a failure on the risk of non-production of evidence. Ayrshire Coal Co. v. West, 72 Ind. App. 699, 704, 125 N.E. 84, 86 (1919).

A presumption may indicate:

(i) the allocation of affirmaitve matters between litigants. The appellate court's "presumption" of a matter not raised below by the party complaining on appeal. "Presumption" here means lack of proof of the matter will not upset the verdict found below. American Cannel Coal v. Huntingburg T.C. & C.R. Co., 130 Ind. 98, 29 N.E. 566 (1891). The rule "insanity will not be presumed" uses "presumption" to make insanity an issue which is an affirmative defense. Graham v. Plotner, 87 Ind. App. 462, 151 N.E. 735 (1928), as to which issue the proponent bears both the burden of coming forward with evidence and the risk of the persuasive quality of the evidence. Fay v. Burditt, 81 Ind. 433 (1882).

(ii) The inference of a second fact from a proven fact. An example of this species of "presumption" is the inference of receipt arising from proof of placing a letter in

The decisions so completely mix the terms it is impossible to decide whether a "permissible inference," "a presumption," or a "shift in the burden of proof" has been the procedural result.[20] Frequently this commingling will occur within a single decision.[21]

The doctrine is applied to diverse circumstances and produces superficially uncertain results. The confusion attending these attributes has prompted some writers to espouse abolition of the phrase,[22] while other writers have sought to clarify *res ipsa loquitur's* status by narrowing the doctrine to a single concept.[23] However, most of the writings

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the mail. Continental Nat. Bank of Indianapolis v. Discount & Deposit State Bank of Kentland, 199 Ind. 290, 157 N.E. 433 (1927).

(iii) A rule of substantive law. Under such a "presumption," evidence which normally would be sufficient to raise a question of fact may be excluded by the presence of the presumption. Early application of the presumption of legitimacy arising from birth in wedlock excluded all evidence which might refute the rule. *In Re* Jones' Estate, 110 Vt. 438, 8 A.2d 631 (1939). To the extent that "direct, clear and convincing evidence" is required by Indiana law, facts of sufficient probative value to raise a jury question may be excluded from the trier's consideration. Pursley v. Hisch, 119 Ind. App. 232, 85 N.E.2d 270 (1949), *e.g.*, where the issue is heirship, the "presumption" of legitimacy arising from knowingly marrying a pregnant woman is conclusive. Bailey v. Boyd, 59 Ind. 292 (1877).

(iv) The assumption of a fact upon the establishing of a basic fact, unless certain conditions are fulfilled. This situation is said to represent the true presumption. 9 WIGMORE, EVIDENCE, § 2490. Early Indiana cases applying *res ipsa loquitur* place the maxim in this context by requiring the presumption be "negatived and overthrown." Louisville, N.A., & C. R.R. v. Thompson, 107 Ind. 442, 8 N.E. 18 (1886).

A prima facie case may mean:

(a) plaintiff has established sufficient proof to escape defendant's request for a directed verdict. 9 WIGMORE, EVIDENCE, § 2494 n. 2; Scott v. London, etc. Co., 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865).

(b) plaintiff has established sufficient proof to not only meet the standard mentioned above, but has entitled himself to a ruling that the opponent should fail if the opponent does nothing more in the way of producing evidence. Indiana applies this construction to the term, and the defendant's silence when faced with a prima facie case entitles plaintiff to a directed verdict. Gamble v. Lewis, 227 Ind. 455, 462, 85 N.E.2d 629, 633 (1949).

20. The language of Indiana opinions contains authority for each alternative. Early cases held the defendant acquired the burden of showing his freedom from negligence. Bedford, S., O., & B. R.R. v. Rainbolt, 99 Ind. 551 (1884). The ambiguity of saying the burden of proof had shifted was partially cured by subsequent recognition that the risk of non-persuasion—as to his case—remained with the plaintiff. Southern R.R. v. Adams, 52 Ind. App. 322, 100 N.E. 773 (1913). "A presumption of negligence" has been the most typical allusion to the procedural effect of *res ipsa loquitur*. Knoefel v. Atkins, 40 Ind. App. 428, 81 N.E. 600 (1907). In several cases, however, the "presumption of negligence" has been said to result in an "inference," from which negligence could have been found. Cleveland, C., C., & St. L. R.R. v. Newell, 104 Ind. 264, 266, 3 N.E. 836, 838 (1885).

21. Louisville and Southern Indiana Traction Co. v. Worrell, 44 Ind. App. 480, 86 N.E. 78 (1908).

22. Prosser, *supra* note 5, at 270; Seavy, *supra* note 9, at 649.

23. Shain claims the doctrine is a form of judicial notice. SHAIN, RES IPSA LOQUITUR, PRESUMPTIONS AND BURDEN OF PROOF, (1945). Wigmore limited the doctrine to malfunctioning vehicles, apparatus, and machines. 9 WIGMORE, EVIDENCE, § 2509. It is more frequently said to be properly applied when used as a synonym for circumstantial evidence. Malone, *Res Ipsa Loquitur and Proof by Inference*, 4 LA. L. REV. 70 (1941);

tacitly acknowledge its lack of precise meaning, and are essentially expositions showing which of the multifarious possible uses of *res ipsa loquitur* have been sanctioned by local courts.[24]

The cases in which *res ipsa loquitur* originated were like those in the second and third categories mentioned above—where plaintiff's evidence logically adduced the conclusion that the defendant either was negligent or was the only party possessing the information which could prove or disprove the allegation of negligence.[25] However, shortly after the origin of *res ipsa loquitur* it became entangled with doctrines regarding common carriers.[26] The union of the two concepts, coupled with an inclination on the part of courts and treatise writers to ascribe to a consistent procedural effect to a doctrine evoked by a diversity of considerations, founded the notion that *res ipsa loquitur* "created a presumption" in Indiana;[27] an uncertainty which has persisted to the present.[28]

I. The Development of Res Ipsa Loquitur in Common Carrier Cases

The status of common carrier has traditionally been subject to unique legal rules.[29] As to goods, fault was not the basis of recovery, and the carrier was liable if the goods were injured while they were in

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Prosser, *Res Ipsa Loquitur in California,* 37 CALIF. L. REV. 183 (1949). Each of these suggested areas of applicability are more narrow than the case law.

24. Carpenter, *The Doctrine of Res Ipsa Loquitur in California,* 10 So. CAL. L. REV. 166 (1937); Gettys, *The Res Ipsa Loquitur Rule as Applied in Pennsylvania,* 11 TEMP. L.Q. 191 (1937); Ghiardi, *Res Ipsa Loquitur in Wisconsin,* 39 MARQ. L. REV. 361 (1956); Hilkey, *The Doctrine of Res Ipsa Loquitur in Georgia,* 9 GA. L. REV. 31, (1946); Morris, *Res Ipsa Loquitur in Texas,* 26 TEX. L. REV. 257, 761 (1948); Prosser, *Res Ipsa Loquitur in Virginia,* 40 VA. L. REV. 951 (1954); *The Doctrine of Res Ipsa Ipsa Loquitur,* 35 IOWA L. REV. 393 (1951); *Res Ipsa Loquitur in the District of Columbia,* 20 J.B.A.D.C. 157, 218 (1953); *The Res Ipsa Loquitur Doctrine in Kentucky,* 37 KY. L. J. 327 (1949); *Res Ipsa Loquitur: Application in Nebraska,* 27 NEB. L. REV. 61 (1947); *The Doctrine of Res Ipsa Loquitur in New York,* 11 ST. JOHN'S L. REV. 280 (1937); *Res Ipsa Loquitur Doctrine in Pennsylvania,* 85 U. PA. L. REV. 212 (1936); *The Doctrine of Res Ipsa Loquitur in Pennsylvania,* 70 U. PA. L. REV. 105 (1921); *Res Ipsa Loquitur in Virginia,* 40 VA. L. REV. 951 (1954); *The Doctrine of Res Ipsa Loquitur in Virginia,* 25 VA. L. REV. 246 (1938); *The Doctrine of Res Ipsa Loquitur in Washington,* 13 WASH. L. REV. 215 (1938).

25. Kearney v. London, Brighton and South Coast Ry. Co., 5 Q.B. 411 (1870); Briggs v. Oliver, 4 H. & C. 403, 143 Rev. Rep. 680 (Ex. 1866); Scott v. London etc. Co., 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865); Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863). Byrne v. Boadle is the only case of the four in which the opinion does not conclude that the state of facts shown raises a question for the jury. The presumption arising from the injury in that case is explained by the right of the defendant to remain silent unless confronted with a prima facie case, the absence of discovery devices (see note 35 *infra*), and the fact that "an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury," *Id.* at 727.

26. Terre Haute and I. R.R. v. Buck, 96 Ind. 346 (1884).

27. This has traditionally been considered the rule in Indiana. See note 15 *supra.*

28. Albin v. F. T. Barett Construction Co., 232 F.2d 501 (7th Cir. 1956).

29. HOLMES, THE COMMON LAW, LECTURE V (bailments), 164 (1881).

his possession.[30] Passengers, possibly because they possessed both an ability to injure themselves by their own fault and the capacity to defend themselves against certain common dangers such as highwaymen,[31] were subject to a different rule. A higher standard—negligence—was required when the passenger sued for personal injuries suffered while aboard the carrier.[32] The incongruity thus developed that a passenger, even though he could show he was passive during the events which led to his injury, was accorded less legal protection than an inert trunk or crate. The first case providing authority for lessening the disparity between these standards of liability is *Christie v. Griggs*.[33]

Plaintiff was seated upon the top of a stagecoach when the axle-tree of the vehicle broke, causing him to be thrown to the ground. The roadway was apparently in good repair. Upon proof of these facts, plaintiff, who had alleged both negligence on the part of the driver and inadequacy of the carriage, rested. The court refused defendant's request for a nonsuit, saying "[I]t now lies on the other side [defendant] to shew, that the coach was as good as a coach could be made, and that the driver was as skillful a driver as could anywhere be found."[34] Defendant upon introducing evidence of the faultless conduct of the driver received a directed verdict as to this issue. He also produced testimony of an examination of the axle-tree. The thoroughness and timeliness of the inspection formed the issue which was submitted to the jury. A verdict was returned for the defendant.

Considering the lack of discovery devices at the time of the suit,[35] plaintiff had shown all the evidence relating to negligence which he could have produced, but the probative value of the circumstantial evidence was only part of the justification for allowing plaintiff to escape a directed verdict. The denial of the request for a directed verdict was also admittedly used to coerce information from the defendant. The facts, in point of logic, supported a conclusion that defendant could produce additional information as to the cause of plaintiff's injury.[36] As to the plaintiff, this conclusion was stated in terms of a "prima facie case" having been established. As to the defendant, it was expressed in terms of

30. 1 HUTCHISON, CARRIERS § 265 (3d ed. 1906).
31. Ashton v. Heaven, 2 Esp. Cas. 533, 170 Eng. Rep. 445, (C.P. 1797).
32. Grand Rapids and Indiana R.R. v. Boyd, 65 Ind. 526, 533 (1879).
33. 2 Camp. 79, 170 Eng. Rep. 1088 (C.P. 1809). The action was in assumpsit.
34. *Ibid.*
35. RAGLAND, DISCOVERY BEFORE TRIAL, 13, (1932); 7 BENTHAM, WORKS, 502 (1837).
36. "The passengers were probably all sailors like himself;—and how do they know whether the coach was well built, or whether the coachman drove skillfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required." Christie v. Griggs, 2 Camp. 79, 170 Eng. Rep. 1088 (C.P. 1809).

a presumption which arose when one party apparently controlled evidence which could prove or disprove the opponent's allegation.

The imposition upon the carrier in the *Christie* case was supported by the factual showing against the defendant in that case. However, later cases distorted the principle of the case and seized upon the notions of "prima facie case" and "presumption" to shift the burden of explaining the personal injury of the passenger to the carrier regardless of the circumstances which had been shown. This subsequent use of the language of the *Christie* case suggested liability for personal injuries might attach to the mere status of carrier, irrespective of negligence on the part of the carrier.

The first Indiana case to give extensive consideration to the procedural ramifications of the relationship between carrier and passenger was *Sherlock v. Alling*.[38] Plaintiff's decedent was a passenger on a steamboat which collided with another steamboat. Both boats were owned by the same company. The boat upon which the decedent was a passenger had departed from the federal navigation regulations. The statute created liability upon proof of injury, causation, and noncompliance with the statute. Plaintiff had introduced sufficient evidence as to each of these points, but the defendant argued that even though the plaintiff had proved the violation of the statute and the injury, there remained a possibility of the jury finding that a cause inconsistent with defendant's negligence had created the collision. There was no evidence suggesting any such unforeseeable cause. The court rejected the defendant's argument, saying if the injury resulted from such a cause, it rested with the defendant to demonstrate such a cause actually did occur.[39]

Although the statutory basis for recovery presented an adequate reason for affirmation of the trial court's result, the court cited an *additional* reason for upholding the plaintiff's verdict. It was said the fact the plaintiff suffered an injury as the result of a collision while a passenger of the carrier created a presumption of negligence, and that this presumption of negligence required the carrier to prove his freedom from negligence.[40] While the procedural imposition in the *Christie* case rested upon the factual probabilities shown in that case, the ruling of *Sherlock v. Alling* established authority for a trial court instructing a jury that the presumption of negligence was available to passengers as a class, re-

37. *Ibid.*

38. 44 Ind. 182 (1873), *aff'd without mention of the presumption of negligence,* 93 U.S. 99 (1876).

39. *Id.* at 204.

40. *Ibid.* Cases emanating from *Christie v. Griggs* were cited in support of this proposition.

gardless of the factual probabilities which arose from the injury being litigated.[41]

In point of theory, negligence remained the basis of recovery, but the language of the *Alling* opinion allowed facts which were not conclusive of a failure to avoid a foreseeable injury to withstand the test of a non-suit motion, as well as thrust upon the carrier a mandate to produce exculpatory testimony. The procedural shift justified by the facts in the *Christie* case was now applied to carriers, regardless of the logical content of plaintiff's proof. The liability of the carrier for injuries to passengers was now essentially the same as the carrier's liability for injury to goods—if the carrier could not find exculpatory proof, he paid.[42] Use of an unnecessary theory established a vehicle for holding the carrier liable when neither the passenger nor the carrier could explain the cause of the injury. Obviously a rule allowing liability because of mere status differs from circumstantial proof of negligence or the attempt to coerce information necessary to the negation or proof of negligence from its sole possessor, but subsequent application of the "presumption of negligence" established the procedural meaning, against both carrier and non-carrier defendants, of *res ipsa loquitur* in Indiana.

The above mentioned cases used neither the formula nor the maxim of *res ipsa loquitur* in facilitating the passenger's proof of negligence against the carrier. The first Indiana case using the language of *res ipsa loquitur* achieved a merger of the "presumption of negligence" against the carrier and the Latin phrase. In *Terre Haute and Indianapolis R.R. v. Buck*,[44] the brakes on defendant company's train failed to operate properly, and the train stopped on a trestle about four hundred feet beyond the passenger's station. Plaintiff's decedent was killed when he stepped from the train and fell into a creek bed below the trestle. The conductor of the train had failed to apprise the decedent of the location

41. "Proof of injury does not raise a presumption of negligence. But where it is shown that the injury is caused by a collision of the vessel, car, or vehicle in which the passenger is being carried, with another, the presumption of negligence immediately arises. Ordinarily, the circumstances attending the injury are shown in proving the injury and its cause, and, of course, it is immaterial who introduces the evidence. But that does not affect the rule of law laid down in the [trial court's] instruction." *Ibid.*

42. The rule did not wholly duplicate the rule as to goods. If the carrier could show the accident was due to the negligence of another or was one which reasonable care could not have prevented, no liability resulted. Grand Rapids & Indiana R.R. v. Boyd, 65 Ind. 526 (1879).

43. As *res ipsa loquitur* was applied to fact situations in which there was no carrier-passenger relationship, the "presumption of negligence" concept was transferred to those areas. Funk v. Bonham, 204 Ind. 170, 183 N.E. 312 (1932) (malpractice); Talge Mahogany Co. v. Hockett, 55 Ind. App. 303, 103 N.E. 815 (1914) (collapsing scaffold); Indianapolis Light Co. v. Dolby, 47 Ind. App. 406, 92 N.E. 739 (1910) (escape of electricity); Knoefel v. Atkins, 40 Ind. App. 428, 81 N.E. 600 (1907) (drugs).

44. 96 Ind. 346 (1884).

at which the train was stopped The carrier owed a duty to warn a passenger of such conditions as well as to stop at the proper place for alighting.[45] Given a breach of the former duty, whether there was a negligent cause of the train overshooting the station becomes immaterial to the plaintiff's case. However, the court apparently did treat it as a material issue and said, in effect, trains do not ordinarily overshoot stations unless there is negligence on the part of the operators of the train.[46] To substantiate this assertion, the Indiana court called upon the principles of the *Christie* rule and one of the two English cases[47] which comprise the genesis of *res ipsa loquitur.*

The holdings in the English cases express the proposition that plaintiff's evidence standing alone demands a response from the defendant.[48] In the present case, plaintiff had alleged negligent conduct in the failure to warn a passenger of dangerous conditions. Testimony has been entered on that specification, and no contradictory matters had been shown by the defendant during his presentations. As in the previous Indiana cases which recited the presumption of negligence, the case bottoms upon direct proof of the breach of a specific duty and did not require the use

45. Jeffersonville, Madison and Indianapolis R.R. v. Parmalee, 51 Ind. 42 (1875).
46. See note 44 *supra* at 359.
47. Scott v. London & etc. Co., 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865).
48. See note 25 *supra.*
49. In the following cases the "presumption of negligence" was supported by the plaintiff's pleading and proof of specific allegations of negligence:

Southern R.R. v. Adams, 52 Ind. App. 322, 100 N.E. 773 (1913); Indiana Union Traction Co. v. Scribner, 47 Ind. App. 621, 93 N.E. 1014 (1910); Louisville & S.I. Traction Co. v. Worrell, 44 Ind. App. 480, 86 N.E. 78 (1908); Cleveland, C., C., and St. L. R.R. v. Hadley, 170 Ind. 204, 82 N.E. 1025 (1907); Pittsburg, C., C., and St. L. R.R. v. Higgs, 165 Ind. 694, 76 N.E 299 (1905); Terre Haute and Indianapolis R.R. v. Sheeks, 155 Ind. 74, 56 N.E. 434 (1900); Louisville, N.A. & C. R.R. v. Miller, 141 Ind. 553, 37 N.E. 343 (1895); Louisville and Jeffersonville Ferry Co. v. Nolan, 135 Ind. 60, 34 N.E. 710 (1893); Louisville, N.A. & C. R.R. v. Hendricks, 128 Ind. 462, 28 N.E. 58 (1891); Kentucky & Indiana Bridge Co. v. Quinkert, 2 Ind. App. 244, 28 N.E. 338 (1891); Louisville, N.A. & C. R.R. v. Faylor, 126 Ind. 126, 25 N.E. 869 (1890); Louisville, N.A. & C. R.R. v. Snider, 117 Ind. 435, 20 N.E. 135 (1889); Grand Rapids & Indiana R.R. v. Ellison, 117 Ind. 234, 20 N.E. 234 (1889); Anderson v. Scholey, 114 Ind. 553, 17 N.E. 125 (1888); Louisville, N.A. & C. R.R. v. Jones, 108 Ind. 551, 9 N.E. 476 (1886); Louisville, N.A. & C. R.R. v. Thompson, 107 Ind. 442, 8 N.E. 18 (1886); Cleveland, C., C., and St. L. R.R. v. Newell, 104 Ind. 264, 3 N.E. 836 (1885); Bedford, Springville, Owensburg, and Bloomfield R.R. v. Rainbolt, 99 Ind. 551 (1884); Pittsburg, Cincinnati, and St. Louis R.R. v. Williams, 74 Ind. 462 (1881); Jeffersonville, Madison, and Indianapolis R.R. v. Hendricks, 41 Ind. 48 (1872).

Louisville, N.A. & C. R.R. v. Pedigo, 108 Ind. 481, 8 N.E. 627 (1886) contains no indication of whether the plaintiff plead and proved any specific act of negligence.

Indianapolis Street R.R. v. Schmidt, 163 Ind. 360, 71 N.E. 201 (1904) is the only case in the "presumption of negligence" cases in which the plaintiff failed to produce sufficient evidence to support a verdict in his favor. The plaintiff in that case showed the defendant's streetcar was driven at an excessive speed when visibility was poor. The train was derailed when it collided with an open switch. The defendant claimed a stone was placed in the switch. The court said the defendant was charged with showing there was a stone in the switch and affirmed the plaintiff's recovery.

of the inferential principles of *res ipsa loquitur* or the presumtion invoked when one party to the litigation has exclusive knowledge of a relevant fact.

From the *Buck* and the *Alling* cases grew a hybrid statement of both the principles of *res ipsa loquitur* and the especial relationship of carrier and passenger. In its classic form, the rule was stated (1) plaintiff was a passenger and remained passive throughout the events which caused his injury (2) the implement of cartage overturned, sank, or otherwise malfunctioned (3) the passenger could show the malfunction was the cause of his injuries.[50] Meeting these requirements invoked *res ipsa loquitur,* created a "prima facie case," and gave rise to a "presumption of negligence."[51] If unanswered, the prima facie case demanded a directed verdict[52] no matter what circumstantial or direct evidence may have supported the plaintiff's case. To be sure, the specifications in the rule demanded facts which demonstrated freedom from contributory negligence, thereby removing that issue from the case. The rule also circumscribed a class of occurrences which might be said to not normally occur without negligence on the part of the carrier. The rule was persistently approved by appellate tribunals,[53] but on the only occasion where a plaintiff did not allege a specific act of negligence and attempted to rely wholly on the inferential basis of negligence which may be deduced from the rule, the upper court reversed because the pleading was so general as to not fairly apprise the defendant of the nature of the allegation of negligence.[54]

Because the passenger was required to plead a negligent act, the requirement that the plaintiff introduce proof of his allegations resulted—with a single exception[55]—in actions against the common carrier being supported by clear proof of negligence. Application of the common-carrier-*res ipsa loquitur* rule to these cases accomplished little more than the introduction of an abstract instruction which reiterated the strength of plaintiff's proof by telling the jury the plaintiff had made a sufficient showing of a negligent act. The *res ipsa loquitur* instruction became a formula which for a period of fifty years was used to impress the jury with the meritorious character of plaintiff's pleading and proof of specific allegations of negligence. The conclusiveness of plaintiffs' show-

50. 3 HUTCHISON, CARRIERS, § 1414 (3d ed. 1906).
51. Terre Haute and I. R.R. v. Sheeks, 155 Ind. 74, 56 N.E. 434 (1900).
52. Ayrshire Coal Co. v. West, 72 Ind. App. 699, 125 N.E. 84 (1919).
53. See cases at note 49 *supra.*
54. The Cincinnati, Hamilton and Dayton R.R. v. Chester, 57 Ind. 297 (1877).
55. The Indianapolis Street R.R. v. Schmidt, 163 Ind. 360, 71 N.E. 201 (1904), noted above at note 49, the negligent act shown by the plaintiff has no causal relationship with the derailment of the coach.

ings, along with the form of the instruction, frequently suggested the *res ipsa loquitur* instruction was being used in lieu of a directed verdict for the plaintiff.[56] While restrained to this usage the presumption of negligence arising out of *res ipsa loquitur* was no more than an innocuous surplusage which illustrated a judicial reluctance to direct a verdict for the plaintiff in a negligence case.[57]

The rule that in a *res ipsa loquitur* case the jury "presumed" the defendant's negligence eventually came to be applied to situations where the character of the evidence was such that reasonable men could arrive at differing conclusions. When *res ipsa loquitur* assumed this guise, it became an interference by the court in an area traditionally reserved for the jury.[58]

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56. "While the plaintiff here has the burden of proving the negligence charged, and all other material facts which constitute the cause of action alleged in her complaint, yet, if she has proven by a fair preponderance of the evidence that she was a passenger, that she had paid her fare and was admitted as a passenger on defendant's train, and that she was jerked or thrown therefrom and injured as charged in her complaint, without any fault on her part, then I instruct you that such facts would raise a presumption of negligence on the part of the defendant railroad company, and would place upon said defendant the burden of proving, in order to rebut the presumption of negligence, that the injury could not have been avoided by the exercise of the highest practical care and diligence, and in the absence of such proof on the part of said defendant, such presumption of negligence would prevail." 2 LOTTICK, INSTRUCTIONS TO JURIES § 5999 (1951). The source quoted for this instruction is Indianapolis Southern R.R. v. Emerson, 52 Ind. App. 403, 98 N.E. 895 (1912). The doors on defendant's train had been opened while the train was losing speed as it approached Trevelac, plaintiff's station. The station had been called, the train was nearly stopped, and plaintiff was standing in the aisle. The speed of the train was quite suddenly increased, and plaintiff was "thrown from the train and into a cattle-pit and against some fencing on the defendant's right of way." The appellate court's view of the proper instructions for the case assumes the only issue for the jury was the question of contributory negligence, and that the instruction as to the presumption of negligence should have been used below to achieve this result.

57. Sunderland, *supra* at note 16. This is further illustrated by the expression found in a recent workmen's compensation case. "It is the law in this state that a prima facie case must always prevail in the absence of countervailing proof, or in other words, where the evidence in the record is all one way; its effect becomes a matter of law, and the court will weight it, *even if in favor of the plaintiff to recover.*" (Emphasis added.) Steele v. Anderson Co., 126 Ind. App. 445, 452, 133 N.E.2d 896, 899 (1956). This reluctance may in part stem from authority which holds a directed verdict is improper where the evidence is other than writings. Stephens v. American Car & Foundry Co., 38 Ind. App. 414, 419, 78 N.E. 335, 337 (1906). Where the defendant is called upon to meet the coercive aspects of *res ipsa loquitur,* a directed verdict based upon his testimony negating negligence is proper. Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953); Robinson v. Ferguson, 107 Ind. App. 107, 22 N.E.2d 901 (1939). Where the testimony sought by a presumption is not expert testimony, the disparity in treatment of plaintiffs and defendants is totally without support. Frick v. Bickel, 115 Ind. App. 114, 54 N.E.2d 436 (1944). In the expert testimony situation, allowing the jury to disregard the expert testimony given in reply to the coercive presumption would question the very premise upon which the requirement of expert testimony rests. Rutledge, *Medical Witnesses in Workmen's Compensation,* 32 IND. L.J. 313 (1957).

58. Where the evidence is such that the finding for a party becomes a matter of law, a misleading or erroneous instruction is not prejudicial. Public Service Co. v. DeArk, 120 Ind. App. 353, 361, 92 N.E.2d 734, 737 (1950). However, when there is a

II. Application of Res Ipsa Loquitur in the Absence of a Contractual Duty

Pittsburgh, C., C., & St. L. R.R. v. Hoffman[59] was the first case which applied the presumption of negligence originating in common carrier cases to an action of negligence which was recognized as being proven by circumstantial evidence alone. Plaintiff, a watchman for a company building a bridge on defendant company's right of way, was struck by a large lump of coal when defendant's train passed over a temporary roadbed. The temporary roadbed was crooked and imperfectly ballasted. Plaintiff alleged the defendant's train crossed it at 40 miles per hour. Plaintiff was standing at a place about seven feet below the level of the track and five to seven feet laterally removed from the track. He saw the descending block of coal an instant before being struck.

Plaintiff's allegations were the company negligently loaded the coal and then ran the train at an excessive speed across the temporary track, and that the company knew, and he did not know, of the conditions pleaded.

Defendant's only witness was the fireman of the train. He described the dimensions of the tender's coal bin, which had at its top a horizontal surface eighteen inches wide which was bounded by an eight to ten inch high perpendicular flange. The piece of coal might have rested upon this surface prior to being thrown against the plaintiff. The fireman also testified it was not his business to watch the coal, that he did not do so, and that he believed the coal was all in the pit when the temporary roadbed was crossed. There was no evidence of the method by which the coal was transferred from the tender to the locomotive.

Giving credence to the plaintiff's testimony that he saw the coal in the air immediately before being struck, several explanations of the injury as possible—*e.g.*—it fell from the train while being transferred to the locomotive, or was on the track and was thrown against the plaintiff when struck by the train, or an intentional tort by the train crewmen. The plaintiff's allegation was that the coal was improperly loaded, and the possibility that the coal was thrown from the horizontal surface on

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factual determination for the jury, an instruction stating a presumption may be considered an interference with the jury's determination of the factual issue. James, *Functions of Judge and Jury in Negligence Cases,* 58 YALE L. REV. 667 (1949), see cases at note 79 *infra.* The Indiana rule that *res ipsa loquitur* is not applicable to proximate cause suggests that at least one of the elements of negligence would remain a jury question and that an instruction directing the jury's attention to a search for exculpatory matters would prejudicially divert the jury's attention from the question of he defendant's negligence. Pittsburgh C., C., & St. L. R.R. v. Arnott, 189 Ind. 350, 126 N.E. 13 (1920).

59. 57 Ind. App. 431, 107 N.E. 315 (1914).

the tender was the explanation upon which the parties and the court proceeded.[60]

The court noted plaintiff's evidence "tending to show that appellee was struck by a piece of coal, and that it came from said tender, was in part circumstantial,"[61] but added "considered as a matter of mere circumstantial evidence, however, the evidence is not sufficient to prove the negligence charged. . . . It is in such a situation the maxim *res ipsa loquitur* supplements circumstantial evidence, by raising a presumption from such facts unexplained that there was negligence. . . ."[62] The presumption was to be weighed with the evidence.[63] The instructions approved by the appellate court told the jury a presumption of negligence would arise from a finding of basic facts such as the plaintiff's location when the train passed.[64] The presumption of negligence informed the jury, if they believed the basic facts of the presumption, that the defendant's negligence had been sufficiently proved. The jury's attention, upon the finding of the basic facts, was thereafter directed toward a search for execulpatory evidence for the defendant, rather than a weighing of the possible explanations from the proven facts.[65]

The present case parallels the original applications of *res ipsa loquitur,* inasmuch as the injury might possibly occur without negligence on the part of the defendant, yet the balance of probabilities is that negligence was the cause of the accident. In the *Christie* case, as well as the landmark cases in *res ipsa loquitur,*[67] the balance of the probabilities was left to the jury. However, in the *Hoffman* case, because of the previous cominglings with other doctrines, the Latin phrase compels the jury to accept the inferences of negligence established by the plaintiff's circumstantial evidence. Reliance on earlier *res ipsa loquitur* authority achieved a rule suggesting absolute liability in a case where *res ipsa loquitur* would normally be said to only signify a sufficiency of circumstantial evidence. Other Indiana cases recognizing proof of a circumstantial character carry no similarly compelled conclusion.[67]

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60. *Id.* at 437, 107 N.E. at 317.
61. *Id.* at 449, 107 N.E. at 319.
62. *Id.* at 450, 107 N.E. at 319.
63. Cleveland, C.C., & St. L. R.R. v. Hadley, 170 Ind. 204, 210, 82 N.E. 1025, 1028 (1907).
64. Pittsburgh, C., C., & St. L. R.R. v. Hoffman, 57 Ind. App. 431, 441, 107 N.E. 315, 318 (1914). Also see instruction quoted at note 57 *supra.*
65. The *res ipsa loquitur* instruction in this circumstance results in obfuscating the issues of the case by drawing the jury's attention to matters which may not even be aspects of the evidence before them. Malone, *supra* note 23, at 91.
66. See note 25 *supra.*
67. Kempf v. Himsel, 121 Ind. App. 488, 98 N.E.2d 200 (1951); Great Atlantic & Pacific Co. v. McNew, 99 Ind. App. 229, 189 N.E. 641 (1934); Chicago, & E.I. R.R. v.

III. The Over-Ruling of the Common Carrier-Res Ipsa Loquitur Rule

The tenacity of the notion that *res ipsa loquitur* is invariably[68] a presumption in Indiana adds significance to the abandonment of two important principles of the *res ipsa loquitur*-common carrier rule. These now defunct principles are the "high degree" of care imposed upon the carrier and the "presumption of negligence" against the carrier.

The presumption created by *res ipsa loquitur* in its early applications was one which, like a proven fact, remained available to the party in whose favor it arose until disproven or overthrown.[69] The presumption itself was evidence.[70] It was stated to the jury in an instruction which was to be considered along with the rest of the evidence.[71] Liability attached upon the slightest indication of a failure by the carrier to perform the duty arising by law from his contract with the passenger—that of the highest degree of care.[72] Lack of reply to the presumption of negligence convicted the defendant of negligence as a matter of law.[73]

Holding that an instruction charging the carrier with the highest degree of care was reversible error,[74] removed a collateral rule which, at least in an abstract fashion, augmented the propriety of applying *res ipsa loquitur* against the carrier. The common carrier-*res ipsa loquitur* rule received a more thorough disapproval when the Indiana court adopted new principles regarding the use of presumptions.

In approximately the same period when the *res ipsa loquitur* doctrine was being fused with the law regarding carriers, Professor Thayer laid the basis[75] for the abrogation of the "presumption of negligence" which resulted from the union of *res ipsa loquitur* with the earlier rule. Presumptions had previously been divided into presumptions of law and presumptions of fact.[76] Thayer reasoned the latter were not presumptions at all, but were rather common sense evaluations of fact for the

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Vester, 47 Ind. App. 141, 93 N.E. 1039 (1911); Indianapolis, P., & C. R.R. v. Collingwood, 71 Ind. 476 (1880).

68. Albin v. F. T. Barett Const. Co., 232 F.2d 501 (7th Cir. 1956), discussed in text and notes at note 103 *infra*.

69. Cleveland, C., C., & St. L. R.R. v. Newell, 104 Ind. 264, 273, 3 N.E. 836, 841 (1885).

70. "In finally determining the issue as to appellant's [defendant's] negligence, the jury must weigh presumptions, testimony, and proofs of every character. . . ." Cleveland, C., C., & St. L. R.R. v. Hadley, 170 Ind. 204, 210, 82 N.E. 1025, 1028 (1907).

71. 1 LOTTICK, INSTRUCTIONS TO JURIES, § 4657 (1951).

72. Southern R.R. v. Adams, 52 Ind. App. 322, 100 N.E. 773 (1913).

73. City of Decatur v. Eady, 186 Ind. 205, 115 N.E. 577 (1917); Ayrshire Coal Co. v. West, 72 Ind. App. 699, 125 N.E. 84 (1919).

74. Pittsburg, C., C., & St. L. R.R. v. Stephens, 86 Ind. App. 251, 157 N.E. 58 (1927); Union Traction Co. v. Berry, 188 Ind. 514, 124 N.E. 737 (1919).

75. THAYER, PRELIMINARY TREATISE ON EVIDENCE, 337 (1898).

76. LAWSON, PRESUMPTIVE EVIDENCE, 639 (1899).

jury's decision and need not be mentioned to the jury.[77] The presumption of law was a rule of law and solely an administrative device for the court.[78] It, too, was not to be mentioned to the jury.[79] Thayer also maintained that neither form of "presumption" had probative force[80] . . . a direct contradiction to statements made in cases applying the common carrier-*res ipsa loquitur* rule.[81]

The result of the eventual adoption of these views as to presumptions is found in two recent cases which expressly overrule the presumption of negligence previously applied in *res ipsa loquitur* cases against common carriers. The first case was against a property owner whose building had burned, leaving an inadequately supported fourth story wall standing.[82] Failure to promptly remove such a menace had previously justified a presumption of negligence instruction.[83] The second case was an action for injuries to a passenger caused by a streetcar-non-carrier collision.[84] In both cases, upon remanding to the trial court, the appellate court noted that error invariably resulted from instructions allowing the

77. Kilgore v. Gannon, 185 Ind. 682, 687, 114 N.E. 446 (1916); City of Indianapolis v. Keeley, 167 Ind. 516, 79 N.E. 499 (1906).

78. Kaiser v. Happel, 219 Ind. 28, 32, 36 N.E.2d 784, 786 (1941); Breadheft v. Cleveland, 184 Ind. 130, 139, 108 N.E. 5, 110 N.E. 662, 664 (1915).

79. Earlier use of presumptions of law was designed to suggest to the jury what the court felt to be a proper result. This is illustrated by an instruction given the jury regarding the presumption of malice arising from an unexplained killing by means of a deadly weapon. Welty v. State, 180 Ind. 411, 416, 100 N.E. 73, 76 (1912). In answering the defendant's argument that the jury should have found malice without the aid of a presumption, the court said the presumption could be used by the judge to suggest to the jury the proper result. The presumption was so used because of "public safety and policy," *id.* at 423, 100 N.E. at 78. Instructing the jury of the presumed negligence of the defendant common carrier was also premised on the basis of public safety and policy. Cleveland, C., C., and St. L. R.R. v. Newell, 104 Ind. 264, 267, 3 N.E. 836, 837 (1885). The use of the presumption instruction is more easily defended in a criminal case where the court may not withdraw an issue clearly proven against the defendant from the jury's consideration. *Contra:* New York, C., & St. L. R.R. v. Callahan, 40 Ind. App. 223, 81 N.E. 670 (1907) (Withdrawing all issues but the question of damages in a presumption of negligence case denied the defendant his right under the "jury trial" provisions of the Indiana constitution, even though plaintiff's testimony was uncontradicted.) The case has not been over-ruled, but subsequent cases suggest it may no longer be valid. First National Bank v. Farmer's & Merchants Bank, 171 Ind. 323, 345, 86 N.E. 417, 428. See note 57 *supra.*

Advisory statements by use of presumption instructions in negligence cases have been criticized as an infringement upon the jury's area of discretion. Talge Mahogany Co. v. Hockett, 55 Ind. App. 303, 103 N.E. 815 (1913). In other civil cases, it has been the basis of reversible error. Kaiser v. Happel, 219 Ind. 28, 32, 36 N.E.2d 784, 786 (1941); Breadheft v. Cleveland, 184 Ind. 130, 108 N.E. 5, 110 N.E. 662 (1915). This view protects the power of the jury in an area where the court may intervene and withdraw matter so patent as to be one of law.

80. Kilgore v. Gannon, 185 Ind. 682, 686, 114 N.E. 446, 447 (1916).

81. See note 70 *supra.*

82. Wass v. Suter, 119 Ind. App. 655, 84 N.E.2d 734 (1949).

83. 1 SHEARMAN AND REDFIELD, NEGLIGENCE, § 159 (5th ed. 1898); City of Anderson v. East, 117 Ind. 126, 19 N.E. 726 (1889); Sessengut v. Posey, 67 Ind. 408 (1879).

84. Gary R.R. v. Williams, 120 Ind. App. 21, 89 N.E.2d 560 (1950).

jury to presume a fact upon which no evidence had been entered. The opinions categorically say there is never a presumption of negligence.[85] Key cases in the common carrier-*res ipsa loquitur* authority were overruled.[86] The presumption of negligence and its misleading notion that negligence—upon a finding of the basic facts—had been proved is no longer a proper instruction to the jury.[87] The jury is to now make its finding without being influenced by the result previously suggested in the presumption of negligence instruction.

IV. The Current Status of Res Ipsa Loquitur

The cases mentioned in the preceding section have changed the form of *res ipsa loquitur* in Indiana. These new views have been applied in a small number of cases;[88] thereby making enumeration of the effects of

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85. *Id.* at 24, 89 N.E.2d at 561.

86. The cases overruled are cases which have been considered representative of Indiana's view of *res ipsa loquitur, e.g.,* Terre Haute & I. R.R. v. Sheeks, 155 Ind. 74, 56 N.E. 434 (1900); Cleveland, C., C., & St. L. R.R. v. Newell, 104 Ind. 264, 3 N.E. 836 (1885).

87. Morgan suggests this may be a result of the difficulty of correctly stating such an instruction. Morgan, *op. cit. supra* note 19, at 48. Kaiser v. Happel suggests the error in instructing the jury about the "rule of law" may be that it misleads them by disclosing something which is none of their business. "The presumption [rule of law] has no place in the instructions because all matters in connection with the order of proof, including failure to discharge the duty of going forward, have been decided by the judge before the trial has reached the stage when the jury is to be instructed." Kaiser v. Happel, 219 Ind. 28, 32, 36 N.E.2d 784, 786 (1941). That failure to discharge the burden of going forward would itself bring a directed verdict is dispelled by the language of Wass v. Suter. The court, after holding the case presented a proper basis for the application of *res ipsa loquitur,* said: "When the appellant [plaintiff] had established her prima facie case the appellees had the duty of going forward with evidence or of taking the chance the jury would accept the prima facie case and return a verdict against them." Wass v. Suter, 119 Ind. App. 655, 669, 84 N.E.2d 734, 741 (1949).

88. Of the seven cases decided since 1950, only Henderson v. N.Y., C., & St. L. R.R., 137 N.E.2d 744 (Ind. App. 1956) adds clarity to the effect of the doctrine. It upholds the suggestion in previous cases that *res ipsa loquitur* has no place in the instructions when the issue of negligence is a matter of jury determination. The plaintiff in that case testified that the defendant's crossing flasher signal failed to operate. The defendant came forward and explained its procedures in maintaining the signals. The trial court judge gave the following *res ipsa loquitur* instruction:

"In all cases of this character there must be reasonable evidence of the negligence of the defendant, but where the thing responsible for the accident is shown to be under the management of the defendant or its servants, and the accident itself is such as in the ordinary course of things, does not happen if those who have the management used proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care on its part." *Id.,* 746.

While the instruction almost exactly duplicates the original statement of the formula for applying *res ipsa loquitur* (note 2 *supra*), it is erroneous in this state of facts because of its reference to an "absence of explanation." The court, however, said the error was more fundamental. Because the defendant came forward and described the device's operation, ". . . [all] questions concerning the appellant's negligence should have been determined from the evidence unaided by the doctrine of *res ipsa loquitur.*" Henderson v. N.Y., C., & St. L. R.R. *supra* at 746.

Two other recent cases use *res ipsa loquitur* as a coercive device. Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953) applies the doctrine against a doctor and says

res ipsa loquitur in its varying contexts still uncertain. Inasmuch as the use of the doctrine has almost invariably been confined to situations where the law places an exceptional obligation upon the defendant,[89] it seems unlikely that the maxim will be expanded into new areas.[90] Within the recognized areas of applicability, the phrase is now apparently given more refined application, and the earlier idea that *res ipsa loquitur* has a constant procedural effect—as illustrated by the *Hoffman* case—has been discarded. Apparently the three objectives of *res ipsa loquitur* are still with us, and the following analysis as to the result of the doctrine in each deserves modification to the extent that a given case may contain a combination, or all, of the categories during any, or possibly all, stages of the trial.

Res Ipsa Loquitur as a vehicle for strict liability:[91] application of *res ipsa loquitur* in this type of case affixes liability to an activity. As in the famous Giant Powder Co. case,[92] where a powder plant exploded, neither the plaintiff nor the defendant can explain the cause of the injury and the jury is left to draw its own conclusion as to whether an in-

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the "presumption, inference, or doctrine" ceased to exist when the practitioner came forward and detailed the transaction, *id.* at 632, 110 N.E.2d at 340. Albin v. F. T. Barett Const. Co., 232 F.2d 501 (7th Cir. 1956) adheres to the earlier view of the presumption arising from *res ipsa loquitur*. See note 104 *infra*.

The remainder of the recent cases are situations in which the controversy is confined to the applicability of the doctrine. Sickles v. Graybar Electric Co., 219 F.2d 847 (7th Cir. 1955), (refused in fall of scaffold where either the plaintiff or the defendant could have caused the injury); Taylor v. Fitzpatrick, 235 Ind. 238, 132 N.E.2d 919 (1956) (Not requested by plaintiff, but apparently not considered applicable by the court when defendant struck plaintiff's parked car from behind, throwing it forward into plaintiff's second parked car, and damaging both cars. The accident occurred on a city street.); F. W. Woolworth Co. v. Jones, 126 Ind. App. 118, 130 N.E.2d 672 (1955) (refusal of attempt to prove storekeepers knowledge of dangerous condition by *res ipsa loquitur*); Dimmick v. Follis, 123 Ind. App. 701, 111 N.E.2d 486 (1953) (held inapplicable when defendant's auto strikes plaintiff's auto from the rear).

89. *Res ipsa loquitur* was at one time thought to be applicable only to common carrier-passenger relationships. Indiana rejected this notion, stating the doctrine arose from the nature of the occurrence, rather than the relationship of the parties. Union Traction Co. v. Mann, 72 Ind. App. 50, 56, 129 N.E. 510, 512 (1919); Pittsburg, C., C., & St. L. R.R. v. Hoffman, 57 Ind. App. 431, 443, 107 N.E. 315, 319 (1914). Restriction of the doctrine to situations where either a statutory duty (employer liability cases) or common law duty (landowner's liability, contractual undertakings) of a strict character is available to the plaintiff suggests such an extraordinary obligation is a prerequisite. "We do not think the doctrine or presumption of *res ipsa loquitur* applies to the situation before us for two reasons: First, the appellee [defendant] was not an insurer. . . ." Worster v. Caylor, 231 Ind. 625, 631, 110 N.E.2d 337, 340 (1953). (The second reason cited was the absence of any evidence tending to show negligence.)

90. See cases at note 88 *supra*, to which may be added: Hoesel v. Cain, 222 Ind. 330, 53 N.E.2d 165 (1944); Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942); Phillips v. Klepfer, 217 Ind. 237, 27 N.E.2d 340 (1940); Hamble v. Brandt, 98 Ind. App. 399, 189 N.E. 533 (1934). The requirement of exclusive control has also limited the extent of the doctrine. Hook v. National Brick Co., 150 F.2d 184 (7th Cir. 1945).

91. See note 8 *supra* and accompanying text.

92. Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020 (1895).

jury resulting from this activity should create liability. Defendant's failure to enter evidence in this type of case obviously has no probative value.[93] *Res ipsa loquitur* here simply means the plaintiff by showing the defendant's activity injured him can escape a directed verdict at the close of his case in chief. The maximum advantage the plaintiff could now obtain in the instructions would be a statement detailing *res ipsa loquitur* saying that the injury and the attendant circumstances allow a conclusion that the defendant was negligent.[94] The more logical result would be no mention of *res ipsa loquitur* in the instructions.

Res Ipsa Loquitur are a coercive "rule of law": When the plaintiff shows the defendant possesses information material to the proof or disproof of the allegation of negligence, the defendant's failure to answer does have probative value. Instances where the defendant was either a witness to the injury or personally caused the injury are examples of this use of the maxim. In *Bence v. Denbo*[96] the defendant dentist was present at the time an X-ray machine fell into the plaintiff's face and the defendant failed to produce the apparatus, claiming he had given it to his insurance carrier. In this situation the court would make two judgments, first, a decision as to the relevancy of the failure to reply, and second, as to whether the whole of the evidence, including defendant's silence, attains the conclusive character necessary to support a directed verdict for the plaintiff. It may be that the lack of reply in the previously mentioned illustration is so damning as to justify a directed verdict for plaintiff.[97] The directed verdict is granted on the basis of the usual standard, how-

93. In B. & O. R.R. v. Hill, 84 Ind. App. 354, 148 N.E. 489 (1925), *Cert. denied* 273 U.S. 738 (1926), an FELA action, the plaintiff's decedent was a trainman on a locomotive which left the tracks, killing all the crew members. The only evidence was the testmony of a witness who saw the light of the locomotive "go down and roll over," and the fact the train left the tracks near a switch, which was jammed with debris after the accident. The plaintiff had examined the scene of the accident, while the defendant had not. The defendant assailed the plaintiff's admission of a lack of knowledge of the cause of the injury, but the court said *res ipsa loquitur* applied and federal law created an inference for the jury. The defendant here could not have answered the coercive mandate of *res ipsa loquitur*, and the application of the then-existing Indiana view would have raised the most miniminal proof of negligence to negligence as a matter of law.

94. A jury may be instructed as to *res ipsa loquitur* even when the doctrine is said to do no more than create an inference from which the jury may find negligence. George Foltis Co. v. City of New York, 287 N.Y. 108, 124, 38 N.E.2d 455, 464 (1941). Instructing a jury about a "rule of law" is examined in light of whether the error was harmful. Kaiser v. Happel, 219 Ind. 28, 34, 36 N.E.2d 784, 786 (1941). If the instruction allowed an inference to flow from the jury's finding the doctrine applicable, the recognition that an inference constitutes an acceptable instruction might be sufficiently compatible with preservation of the jury's power (see note 79 *supra*). The implications are otherwise. Henderson v. N.Y., C., & St. L. R.R., 137 N.E.2d 744 (Ind. App. 1956).

95. See note 11 *supra* and accompanying text.

96. 98 Ind. App. 52, 183 N.E. 326 (1932).

97. Plaintiff received a presumption of negligence instruction. *Id.* at 57, 183 N.E. 328.

ever, and not merely because of the "failure of the defendant to answer a prima facie case."[98]

Where the significance of the lack of reply or the lack of effective rebuttal in the reply does not meet the standard for a directed verdict, the jury is left to evaluate the probative force of those factors. In so doing, the jury may be enlightened by instructions, first, as to the propriety of circumstantial evidence in proving the breach of duty,[99] and second, that silence under the circumstances may have probative value,[100] and third, possibly by an instruction detailing the requirements of *res ipsa loquitur* and allowing the jury to find negligence if they adopt the inference permitted by the instruction.[101] Recent Indiana cases[102] clearly say the last mentioned instruction may not be framed in the language of a presumption. The implications of recent cases go further, suggesting the judge should remain silent and not give any of the foregoing rules to the jury.

Res Ipsa Loquitur as a recognition of acceptable circumstantial evidence:[103] When the implication of *res ipsa loquitur* is that, irrespective of defendant's silence, the facts might support an acceptable inference of negligence, a jury question arises. The *Hoffman* case is of this type, as is a recent case where a construction barricade fell upon a pedestrian.[104] No showing of unusual weather conditions was made, and the barricade fell because the screws anchoring the wire which held the barricade upright became loose. No showing as to the size of the screws or the nature of the material in which they were set was made. Here the evidence—standing alone—is deemed sufficient by the court to allow the plaintiff to escape a directed verdict. It would appear from the Indiana opinions that when the jury's determination involves accepting one of conflicting possible inferences, the parties may insist the determination be made wthout any *res ipsa loquitur* instruction which suggests a result to the trier of fact.[105]

The current status of *res ipsa loquitur* in cases involving carriers is unsettled. The present use of the doctrine coordinates the procedural

98. City of Decatur v. Eady, 186 Ind. 205, 115 N.E. 577 (1917).
99. Talge Mahogany Co. v. Hockett, 55 Ind. App. 303, 306, 103 N.E. 815, 816 (1913).
100. I LOTTICK, INSTRUCTIONS TO JURIES, § 318, § 2477 (1951).
101. See note 94 *supra*.
102. See notes 87 and 88 *supra*.
103. See note 10 *supra* and accompanying text.
104. Albin v. F. T. Barett Const. Co., 232 F.2d 501 (7th Cir. 1956).
105. The court felt otherwise. The fact the barricade fell, given no additional information as to the type of material into which the screws were set, or the sufficiency of the screws and their installation, is as equally suggestive of due care as it is of negligence. The court said *res ipsa loquitur* was a presumption which was not effectively rebutted by the defendant. It is not stated whether a *res ipsa loquitur* instruction was given the jury.

sanction with the reason for applying the maxim. The nature of *res ipsa loquitur* would therefore be controlled by the facts of each case. In most instances, as in the earlier cases, the defendant carrier would have superior knowledge of the operations causing the injury, and hence would probably fall under the second category mentioned above, where the facts logically attach legal significance to silence.

If this were not the case, *res ipsa loquitur* would be limited to a category three type application. This is the better view. However, an action by a passenger for injuries suffered while seated upon a carrier would not be a case of first impression. The mere tradition of the numerous early decisions which applied the coercive form of *res ipsa loquitur* is a factor not to be ignored, and the possibility remains that a rule approaching strict liability might persist.

Whatever results may be reached in each of the above mentioned situations, the recent case law suggests that Indiana has joined the jurisdictions which allow *res ipsa loquitur* to be viewed as an inference. A more accurate statement of the altered viewpoint would be to say a rule of law will not be allowed to interfere with natural force of evidence, thereby emphasizing the fact that *res ipsa loquitur* is not a substitute for provable facts, and, assuming the phrase deserves continued tenure, restricting the rule so as to give it concordance with more fundamental doctrines concerning standards for directing a verdict and the burdens placed on parties to litigation.[106]

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106. The Indiana Supreme Court reversed the decision of the Appellate Court [137 N.E.2d 744 (Ind. App. 1956)] in Henderson v. N.Y., C., & St. L. R.R. on December 12, 1957. Printing commitments precluded integrating the rationale of the case at the pertinent points in the preceeding text and notes. These aspects, however, deserve comment:

(1) While the court was divided (with both a concurrence with the majority and a dissent), all opinions treat *res ipsa loquitur* under this set of facts (see note 88, *supra*) as creating a permissible inference. This is the most emphatic departure from the earlier "presumption" view to date.

(2) The majority opinion overrules the aspect of Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953) mentioned at note 57. Chief Justice Emmert's concurring opinion rejects this overruling of the *Caylor* case. Justice Bobbitt's dissent also maintains the *Caylor* case was properly decided. The basic policies in the *Caylor* case—particularly the relationship of *res ipsa loquitur* to the rule that a plaintiff may not recover for injuries suffered while undergoing treatment unless he produces expert testimony—are not used to distinguish the two cases. (See note 57.)

(3) All opinions concede that if *res ipsa loquitur* is applicable to the case an instruction on the doctrine is proper. This ignores the suggested error in the instructions noted at note 88. The instruction might also be challenged in that, by advising the jury of this inference, it gives impact beyond that normally accorded inferences. (See note 79.)