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# RES IPSA LOQUITUR IN WISCONSIN

JAMES D. GHIARDI\*

This article will attempt to review the majority of Wisconsin decisions dealing with the subject known as *res ipsa loquitur*. It is hoped that by doing so some of the difficulties that have presented themselves, in the past will thereby be clarified.

The doctrine of *res ipsa loquitur* developed out of the famous flour case of 1863,<sup>1</sup> where, in the absence of proof of any negligence, the trial judge said "the thing speaks for itself."

The doctrine was more fully declared in 1865 by Chief Justice Erle in *Scott v. London Dock Company*:<sup>2</sup>

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

The Wisconsin court in *Ryan v. Zweck-Wollenberg Co.*,<sup>3</sup> stated the conditions for the doctrine as follows: (1) The accident must be a kind which ordinarily does not occur in the absence of someone's negligence; (2) It must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) It must not have been due to any voluntary action or contribution on the part of the plaintiff.

The first Wisconsin case that used the term was *Kirst v. The Milwaukee Lake Shore & Western Ry. Co.*<sup>4</sup> This was a case involving the delivery by the railroad of three carboys of acid. The cars were broken during the switching. The trial court overruled a motion for nonsuit on the ground that the railroad had failed to give a full and fair account as to how the loss occurred and hence that negligence could be inferred to satisfy the plaintiff's requirement of proof. The Supreme Court quoted with approval the *Scott* case:<sup>5</sup>

"... When the carboys were shown to be in the possession or under the control of the defendant, and a breakage occurred from switching, which, in the ordinary course of things, does not happen if those who have charge of the train use proper

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<sup>1</sup> *Byrne v. Boadle*, 159 Eng. Rep. 299.

<sup>2</sup> 3 H. & C. 596, 159 Eng. Rep. 665.

<sup>3</sup> 266 Wis. 630, 64 N.W.2d 226 (1954); See *Colla v. Mandella* 271 Wis. 145, 72 N.W.2d 755 (1955); *Ziino v. The Milwaukee E. R. & T. Co.*, 272 Wis. 21, 74 N.W.2d 791 (1956).

<sup>4</sup> 46 Wis. 489, 1 N.W. 89 (1879).

<sup>5</sup> See note 2 *supra*.

care, this affords reasonable evidence, in the absence of a full explanation by the carrier, that the loss or breakage did in fact occur through the negligence or default of the agents of the company."

Prior to this case the Wisconsin Court had found negligence on the part of the defendant railroad on the mere happening of the event but had not used the term merely because it had not been popularized by the English decisions.<sup>6</sup>

It is to be noted that the first case to mention the doctrine, and the cases that previously applied the rule of finding negligence from the fact of accident arose out of the obligation of a carrier to a passenger or the the consignor of goods. These cases developed the rule that the mere fact of injury to a passenger or to goods or to adjoining property cast upon the carrier the burden of proving that it was not at fault or of proving a defense such as contributory negligence. This broad rule was later limited to situations where the accident was clearly caused by the carrier's equipment or operation, as distinguished from some outside agency, over which it had no control.<sup>7</sup> Originally the burden of proof was imposed on the carrier because he had contracted to transplant the passenger and goods safely. Hence, in the absence of explanation by the carrier, the fact that it had not done so was on its face a breach of contract, and further, that the carrier had undertaken a special responsibility toward the passenger which required it not only to exercise the highest possible degree of care, but pay for the damage unless it could prove that it was not caused by its negligence. It then became inevitable, since the law of negligence in the late 19th century was to a considerable extent the law of the railroad accidents that the phrase "*res ipsa loquitur*" was to become merged with the carrier's burden of proof. This was extended to include damage to property adjacent to the carrier's right of way.<sup>8</sup> As a result the "presumption" of fault against the carrier became merged, and is now so far identified with *res ipsa loquitur* that the two are no longer distinguished.<sup>9</sup> One outstanding authority<sup>10</sup> points out that this is a fusion of two very different ideas; one concerned only with what the facts in evidence may be taken to prove, and the other with the necessity of any such proof at all. Today, only one court still recognizes the distinction, to-wit:

<sup>6</sup> See *Galpin v. Chicago N.W. Ry. Co.*, 19 Wis. 637 (1865); *Spaulding v. Chicago N.W. Ry. Co.*, 30 Wis. 110 (1872); *Spaulding v. Chicago N.W. Ry. Co.*, 33 Wis. 582 (1873); *Morrison v. Phillips & Colby Construction Co.*, 44 Wis. 405 (1878).

<sup>7</sup> *Sommerfeld v. Chicago, North Shore & M. Ry.*, 173 Wis. 191, 180 N.W. 847 (1921) (breaking glass); *Spencer v. Chicago, Milwaukee & St. Paul Ry. Co.*, 105 Wis. 311, 81 N.W. 407 (1900) (stream of water).

<sup>8</sup> 33 Wis. 582, note 6 *supra*.

<sup>9</sup> See *Ziino v. T.M.E.R. & T. Co.*, note 3 *supra*.

<sup>10</sup> PROSSER—SELECTED ESSAYS ON THE LAW OF TORTS (1953).

Missouri, where *res ipsa loquitur* in passenger cases amounts to a "presumption" but in other cases to a mere permissible inference.<sup>11</sup>

The Wisconsin Court next considered the doctrine in the case of *Cummings v. The National Furnace Co.*<sup>12</sup> and adopted the *Kirst*<sup>13</sup> view. There had been other cases,<sup>14</sup> subsequent to the *Kirst* case, in which the court held carriers liable not only to their passengers but also to adjoining property owners, but the *Cummings* case was the next to allude to it as the doctrine of *res ipsa loquitur* and apply it to a non-carrier case. The Furnace Company was held liable to a seaman when he was injured by the dropping of a bucket of iron ore from a swinging crane, owned and operated by the defendant company, while unloading the vessel on which the seaman was working. The court stated:

"In an action for personal injury when the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of ordinary care."

Our court quickly followed up with *Kaples v. Orth*.<sup>15</sup> The injury resulted when a block of ice fell from the shoulder of the defendant's servant and struck the plaintiff while he was sitting on a stairway. The court found an analogy in the presumption of negligence arising in the carrier cases and rejected the contention that the presumption was limited to a contractual relationship between the parties. It reviewed the earlier *res ipsa loquitur* cases and came to the conclusion that this was a proper case for the application of the doctrine.

"In such case it is hardly accurate to say that negligence is presumed from the mere fact of the injury, but rather that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that it occurred without the fault of the defendant. In such case the facts and circumstances speak for themselves and, in the absence of such explanation or disproof, give rise to the inference of negligence. Such a case comes within the principle of *res ipsa loquitur*." p. 535

This case standardized the doctrine into the form that it is known by today. It mentioned the name of the doctrine and held that an infer-

<sup>11</sup> *Gordon v. Muchling Packing Co.* 40 S.W.2d 693 (1931); *Hartnett v. May Department Stores*, 85 S.W.2d 644 (1935), PROSSER, *SELECTED ESSAYS, supra* p. 307.

<sup>12</sup> 60 Wis. 603, 18 N.W. 742 (1884).

<sup>13</sup> See note 4 *supra*.

<sup>14</sup> *Wood v. The Chicago, Milwaukee & St. Paul Railway Company*, 51 Wis. 196, 8 N.W. 214 (1881); *Briesberg v. The Milwaukee, Lake Shore & Western Railway Company*, 55 Wis. 106, 12 N.W. 416 (1882); *Luebke v. The Chicago, Milwaukee & St. Paul Railway Company*, 59 Wis. 127, 17 N.W. 870 (1883).

<sup>15</sup> 61 Wis. 531, 21 N.W. 633 (1884).

ence of negligence arose unless sufficient proof was forthcoming from the defendant to rebut any inference of negligence.

#### REQUIREMENTS OF THE DOCTRINE

A. Introduction. A study of the Wisconsin law in this field warrants a discussion of the requirements of the doctrine, to see if we can discover exactly what they are so that we may know if they exist in any given case. Unfortunately the proof of facts by facts is not capable of reduction to a set formula.

In this area we are dealing with one kind of circumstantial evidence. In criminal cases the facts often establish the commission of the crime and the fact of negligence can be proven by circumstances. As was indicated in the material on the development of the doctrine, our Wisconsin court was recognizing as sufficient evidence of negligence, the fact that soon after the passage of a train, a fire had started.<sup>16</sup> This was done without calling it *res ipsa loquitur*. Circumstantial evidence means that from facts in evidence other facts may reasonably be inferred. The inference rests upon a process of reasoning, based upon past experience. It may be strong or weak, depending entirely upon the facts. The words *res ipsa loquitur* add nothing and such a case is nothing more than a statement that this is a case where the jury can infer negligence from the mere occurrence of the accident itself.

There are inferences in every negligence case but the principal difference between a *res ipsa* case and a specific negligence case would seem to be as follows:

"The very basis of liability, the existence of some negligence, may be shown by a particular kind of circumstantial evidence, namely an unusual occurrence of a character which ordinarily results only from negligence . . . and from which, therefore, negligence is a reasonable inference; while in a specific negligence case the careless acts or omission which constitute negligence must be stated and proved. In other words, in a *res ipsa* case the ultimate fact, some kind of negligence is inferred without any evidential facts except the unusual occurrence itself; while in a specific negligence case there must be some evidential facts sufficient to show some negligent acts or omissions which were the proximate cause of the occurrence."<sup>17</sup>

This concept is well illustrated in the case of *Arledge v. Scherer Freight Lines*.<sup>18</sup> The court held that there could be no inference of negligence where a fire started in the office of the defendant, near an oil stove and which spread into the part of the building occupied by

<sup>16</sup> See note 8 *supra*.

<sup>17</sup> *Harke v. Haase*, 75 S.W.2d 1001 (Mo. 1934). See PROSSER, SELECTED ESSAYS, p. 314.

<sup>18</sup> 269 Wis. 142, 68 N.W.2d 821 (1954).

the plaintiff. The court went on to say that *res ipsa loquitur* could be applied only in exceptional cases. The fire was not an unusual occurrence and some specific act would have to be proved in order to infer negligent conduct since it could not be inferred merely from the happening of a fire. This case is difficult to reconcile with the early cases involving fires along the railroad right of way where negligence was inferred from the happenings of a fire and adjoining property owners were allowed to recover.

**B. The Inference that Someone Was Negligent.** The first element is, that on the basis of past experience the trier of fact can conclude that such events do not ordinarily happen unless someone has been negligent.<sup>19</sup>

In the usual case the basis of past experience from which the conclusion can be drawn is one common to all of us. The courts take cognizance of it without calling it judicial notice, and the jury recognizes it as common knowledge. However, the basis may be supplied by the evidence of the parties, where there is no such common knowledge.<sup>20</sup>

The doctrine of *res ipsa loquitur* does not change the burden of proving the plaintiff's case by a preponderance of the evidence. This burden is met by satisfying 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, not mere speculation and conjecture, and where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is not sufficient proof. A case to which the doctrine is applicable is no exception to these familiar rules. It is the plaintiff's task to make a case from which, on the basis of experience, the jury may draw the conclusion that negligence is the most likely explanation of the accident. That conclusion is not for the court to draw, or to refuse to draw so long as there is enough to permit the jury to draw it; and even though the court would not itself infer negligence, it must still leave the question to the jury where reasonable men may differ as to the balance of probabilities."<sup>21</sup>

**B(1). Cases Where the Wisconsin Court Refused to Infer Negligence.** Our court in the following cases refused to conclude that the event that occurred would not have happened except for someone's negligence. In *Hyer v. City of Janesville*,<sup>22</sup> the plaintiff fell on an icy

<sup>19</sup> See note 3 *supra*.

<sup>20</sup> *Zarnik v. C. Reiss Coal Co.*, 133 Wis. 290, 113 N.W. 752 (1907). Evidence was given of a specific defect in the lever fastening of the door of a coal car; *Nelson v. Newell*, 195 Wis. 572, 217 N.W. 723 (1928). Expert testimony was introduced to establish malpractice on the part of the defendant in the use of x-ray for treatment purposes.

<sup>21</sup> PROSSER, *SELECTED ESSAYS*, p. 319.

<sup>22</sup> 101 Wis. 371, 77 N.W. 729 (1898).

sidewalk, the only evidence introduced was that the walk was icy and rough and that she fell. The jury verdict for the plaintiff was reversed, because the court was of the opinion that there were two possible inferences from this situation, either that the city was negligent in allowing an obstruction on the sidewalk, or that the plaintiff merely slipped on the icy walk for which the city had no responsibility. There being two possible inferences, one actionable, the other not, the jury could not guess. The court stated:

"... where there is no direct evidence of how an accident occurred, and the circumstances are clearly as consistent with the theory that it may be ascribed to a cause not actionable, it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict." p. 377

This same result was reached where an employee sued his employer for injuries caused by an explosion claiming a leak in the pipes under his machine.<sup>23</sup> Evidence indicated that the flow of gas could have come from the pipes but also from the habit of a co-employee to permit a flow of gas from his burner after it was extinguished. The court held that there were two possible causes of the harm and the plaintiff had to prove which one and that he did not meet the burden of proof merely by showing that one was as probable as the other.

"The existence and probable efficacy of the defect was required to be established by reasonably direct proof, while only the reasonable possibility of causation by the fellow employee's negligence need be proved to prevent presumption of a defect being necessarily drawn from the accident."

Similar results were reached in five other cases.<sup>24</sup>

Two recent cases were controlled by the lack of this first requirement. The court refused to allow the application of the doctrine to infer negligence where the plaintiff was injured when the entire build-

<sup>23</sup> *Musbach v. The Wisconsin Chair Co.*, 108 Wis. 57, 84 N.W. 36 (1900).

<sup>24</sup> In *Badger v. Janesville Cotton Mills*, 95 Wis. 599, 70 N.W. 687 (1897), the court said that no inference of negligence could be drawn from the fact that a ladder broke 16 inches from the top, while the plaintiff was standing on the 5th rung of a 12 rung ladder. However, the evidence introduced in that case established the fact that the probabilities were all on the side of a nonactionable cause; In *Beyersdorf v. Cream City Sash & Door Co.*, 109 Wis. 456, 84 N.W. 860 (1901), the jury could not infer negligence from the fact that a boy was injured by a sawing machine, for it was possible he was injured because he did not act carefully as well as from the fact that there was no guard; The same result was reached in *Strehlow v. John Schroeder L. Co.*, 142 Wis. 215, 125 N.W. 429 (1910), where the plaintiff was injured when a plank fell, the court said there was a possibility of two causes, negligence of the defendant or negligence of a third party, hence no basis for the inference of one over the other; In *Adams v. Bucyrus Co.*, 155 Wis. 70, 143 N.W. 1027 (1913) where a steel roller that fell could have fallen because of the negligent placing of it or the act of a fellow employee; In *Zurich General Accident & Liability Insurance Co. v. Bowers*, 171 Wis. 116, 176 N.W. 772 (1920) where the fall of a coil could have been caused by the negligence of the plaintiff himself.

ing was demolished,<sup>25</sup> and where the plaintiff was injured by a bowling ball hitting him on the head while he was bending over in the locker room.<sup>26</sup> The idea behind these cases being that everyone knows that such accidents commonly occur without the fault of anyone unless it is the plaintiff himself.

B(2). Cases Where the Wisconsin Court Inferred Negligence. Our court was of the opinion that the probability of negligence was clearly evident and available to the plaintiff in the following cases: In *Lipsky v. C. Reiss Coal Co.*,<sup>27</sup> the plaintiff was injured while working on the defendant's dock by the fall of one of the bracing beams. The court held that they could not conceive of a clearer case for the application of the rule of *res ipsa loquitur*. The same result was reached in *Mulcairn v. City of Janesville*,<sup>28</sup> where a worker was killed by the falling of a wall of a new cistern. The court held that if the wall had been properly constructed it is common observation and within the common course of things that it would not have fallen, hence negligent construction was to be inferred unless the city could explain why it fell. This same result was reached where the plaintiff was injured when a large timber piled in an alley, with two on the bottom and one on top, fell. The court said that the abnormal and unexpected movement of the timber under the defendant's control was the basis of an inference of negligence.<sup>29</sup> This case is difficult to explain since the only direct testimony was that of three disinterested witnesses who indicated that the plaintiff could have bumped the logs with the wagon he was pulling down the alley. It appears to be indistinguishable from the previous cases holding that no such inference was probable.<sup>30</sup> In *Dunham v. Wisconsin Gas & Electric Co.*,<sup>31</sup> the court held that a truck traveling down the road with a wire 30-40 feet trailing behind which hooked around the plaintiff's ankle was clearly a case for the application of the doctrine, since the only inference possible was that the defendants were negligent in allowing the wire to trail.

As can be readily noted, most of these cases are all cases where there is a basis of experience from which a reasonable man may conclude that negligence was a more probable explanation than any other.<sup>32</sup> Of course there are very few *res ipsa loquitur* cases in which all other possible inferences can be excluded. However, it must be reasonable for the jury to exclude these other inferences and say that it was most

<sup>25</sup> *Dahl v. Charles A. Krause Milling Co.* 234 Wis. 231, 289 N.W. 626 (1940).

<sup>26</sup> *DuBois v. DuBouche*, 262 Wis. 32, 53 N.W.2d 628 (1951).

<sup>27</sup> *Lipsky v. C. Reiss Coal Co.*, 136 Wis. 307, 117 N.W. 803 (1908).

<sup>28</sup> 67 Wis. 24, 29 N.W. 565 (1886).

<sup>29</sup> *Peschel v. Klug*, 170 Wis. 519, 175 N.W. 805 (1920).

<sup>30</sup> See note 24 *supra*.

<sup>31</sup> 228 Wis. 250, 280 N.W. 291 (1938).

<sup>32</sup> This appears to be true except for *Arledge v. Scherer Freight Lines* (fire); *DuBois v. DuBouche* (bowling ball); and *Peschel v. Klug* (timber), *supra*.



probable that the defendant was negligent. This inference need not be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it.<sup>33</sup>

A well reasoned case in which the first requirement was found to be present involved a customer of a bank who was injured by the unexpected explosion of the tear gas system.<sup>34</sup> The bank claimed that it could not be a case for *res ipsa loquitur* since it did not manufacture, inspect or manually operate the system. The facts were that the system could be set off only by stepping twice on a foot lever. The defendant claimed that the fault had to be attributed to the company that installed and serviced the system. The court held that it was a proper case for the doctrine since the inference was that negligence in maintenance, inspection or manual control caused the accident. There was clearly an inference of negligence, and the mere uncertainty as to which of the several acts on the part of the defendant bank actually caused it, was insufficient to prevent its application.

**C. Inference that the Defendant was Negligent.** It is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone, it is necessary to bring it home to the defendant. In any case where it is quite clear that it is at least equally probable that the negligence was that of a third person, or non-actionable cause, the court must direct the jury that the plaintiff has not proved his case.<sup>35</sup> The plaintiff is assisted by the application of the doctrine where the facts give rise to a second inference showing some specific cause for the accident within the defendants responsibility,<sup>36</sup> or on a showing that the defendant was responsible for all reasonable probable causes to which the accident could be attributed.<sup>37</sup> Again the plaintiff needs only a preponderance of the evidence, and he need not definitely exclude all other possible conclusions. When a parked car starts down a hill there is always a possibility that some third party may have set it in motion, but it may still be found more likely that the fault was that of the man who parked it.<sup>38</sup> In a case where other causes are in the first instance equally probable there must be some evidence which will permit the jury to eliminate them; and the plaintiff may be required to make some showing that there was no mishandling of the instrumentality. This is illustrated by a case where the decedent was electrocuted while turning on a 110 volt lamp in the basement.<sup>39</sup>

<sup>33</sup> *Mayer v. Boynton Cab. Co.*, 267 Wis. 486, 66 N.W.2d 136 (1954).

<sup>34</sup> *Koehler v. Thiensville State Bank*, 245 Wis. 281, 14 N.W.2d 15 (1944).

<sup>35</sup> PROSSER, *SELECTED ESSAYS*, *supra* p. 322.

<sup>36</sup> *Dunham v. Wis. G. & Elec. Co.*, *supra* note 31.

<sup>37</sup> See *Mulcairn v. City of Janesville*, *supra* note 28.

<sup>38</sup> *Hughes v. Rentschler Floral Co.*, 193 Wis. 49, 213 N.W. 625 (1927); *Colla v. Mandella*, 271 Wis. 145, 72 N.W.2d 755 (1955).

<sup>39</sup> *Stark v. Badger Pub. Service Co.*, 176 Wis. 600, 187 N.W. 651 (1922).

The court applied the doctrine of *res ipsa loquitur* on the showing that the 'inside appliance was in good shape, that the deceased was not grounded in such a way as to be standing where a 110 volt would kill her, and further that there was an opportunity for the 2300 volt primary wire, that the defendant was in control of, to reach the 110 volt line going into the basement. Liability was found though there was no control of the appliance. The court required only enough evidence to permit a finding as to the greater probability of injury from the instrumentality under the defendant's control than from the plaintiff's own acts or any defective appliance.

**C(1). Cases Where Control Was Present.** It is commonly said that the plaintiff must establish this second element of *res ipsa loquitur* by a showing that the instrumentality which caused the accident was under the defendant's exclusive control. Our court has put it this way:

"It is fundamental in cases where the doctrine is to be applied that the defendant be vested with the control and management or be responsible for the control of the instrumentality or thing causing the injury."<sup>40</sup>

The second element was found to be present in cases previously cited: The cistern case,<sup>41</sup> the electrocution case,<sup>42</sup> the trailing wire case,<sup>43</sup> and the Bank case.<sup>44</sup> The court in the latter case stated that where the ownership, possession and control of the instrumentality was in the bank the doctrine could be applied even though they had contracted with a third party to inspect and maintain the system for the inspection was in their control. Even in the fire case,<sup>45</sup> the court found control of the stove and premises but found no basis for an inference of any negligence because of the fire.

**C(2). Cases Where Control Was Not Present.** The court refused to find the necessary control in a case where the plaintiff was injured while standing on the defendant's siding alongside a car load of lumber that belonged to the plaintiff.<sup>46</sup> The car was moved when other cars standing on the same track pushed into it. There was no showing as to what caused these others to move but the court said that there was no control in the defendants for there was no evidence that its employees were managing and using the track. A similar result was reached where the plaintiff fell, while walking down the aisle of defendant's train, when she tripped over two suitcases in the

<sup>40</sup> *Dubois v. DuBouche*, note 26 *supra*.

<sup>41</sup> See note 28 *supra*.

<sup>42</sup> See note 39 *supra*.

<sup>43</sup> See note 31 *supra*.

<sup>44</sup> See note 34 *supra*.

<sup>45</sup> See note 18 *supra*.

<sup>46</sup> *Miller v. Chicago, Milwaukee & St. Paul R. Co.*, 68 Wis. 184, 31 N.W. 479 (1887).

aisle.<sup>47</sup> The court said that the personal baggage of the passengers was not under the control of the defendant. In *Quass v. Milwaukee G. L. Co.*,<sup>48</sup> an explosion in the basement from leaking gas was not attributed to the defendants where they had control of 5 feet of pipe and another 180 feet of house piping was under the control of the plaintiff. A more difficult case to explain is *Ashton v. Chicago N. W. RR. Co.*<sup>49</sup> where a fire was alleged to have been started by a charcoal heater in one of the defendant's refrigerator cars, which was coupled to a car of lumber owned by the plaintiff. The court found no specific acts of negligence, and refused to infer any negligence since the car was not under the control and management of the railroad while merely parked on the track. (The Bill of Lading in the instant case placed all risk of loss on the consignor in the absence of proof of negligence.) How this differs from the recent *Scherer* case<sup>50</sup> is difficult to explain unless the Bill of Lading involved was controlling.

The Wisconsin court has been fairly stringent in its interpretation of this requirement. The court refused to apply the doctrine where plumbers were searching for a gas leak, and fire flashed from a hole in a wall through which the plumbers had chiseled to check the joints, on the theory that the plumbers were not in exclusive control of the building.<sup>51</sup> A recent Louisiana case held just the opposite.<sup>52</sup> In an interesting, recent case, a car load of sand was spotted on the employer's trestle to be unloaded by his employees. While unloading it the car tipped over killing the plaintiff's decedent. The court held that there could be no inference of negligence on the part of the railroad since the car was in the control of the decedent's employer and not the defendant.<sup>53</sup> (There was evidence to the effect that the springs were defective but the jury found the car could have lost its balance because of the unloading and regardless of any mechanical defect.)

It is apparent that in all of the foregoing cases the concept of possession appears to be an element of the control necessary for the application of the doctrine, i.e., possession of the instrumentality that

<sup>47</sup> *Stimson v. Milwaukee Lake Shore and West Ry. Co.*, 75 Wis. 381, 44 N.W. 748 (1890).

<sup>48</sup> 168 Wis. 575, 170 N.W. 942 (1919).

<sup>49</sup> 198 Wis. 618, 225 N.W. 328 (1928).

<sup>50</sup> See note 18 *supra*.

<sup>51</sup> *Implement Dealers Mutual Fire Insurance Co. v. Golden*, 257 Wis. 532, 44 N.W.2d 264 (1950).

<sup>52</sup> *Talley et al v. Brock Furniture Co. et al*, 81 So.2d 443 (La. 1955). This was an action for damages caused to plaintiff's building as a result of water which escaped from the pipes or a valve of an air conditioning unit being installed in the office of a tenant. Evidence was to the effect that on the night of the accident (10 days after installation) the temperature dropped to 23 degrees, and that similar valves had on other occasions froze and burst. The court applied *res ipsa loquitur* stating that the fact of possession and control by defendant is not always an essential element.

<sup>53</sup> *Rucktenwald v. Chicago, Milwaukee, St. Paul & Pacific RR. Co.*, 261 Wis. 611, 53 N.W.2d 714 (1952).

caused the accident. The courts do not mean that there must be an actual physical possession of the particular thing that is involved but merely a right of control as in the *Koehler* case.<sup>54</sup> This right of control had to exist at the time of the accident.

This limitation on control appeared to be the law in Wisconsin until the *Ryan* case.<sup>55</sup> The court there adopted a liberal view with reference to control. By analogy to the exploding bottle cases, namely that the control required for the doctrine to apply, is not control of the physical cause of the injury at the time of the injury, but control at the time of the alleged negligent act, the court eliminated the requirement of control at the time of the accident.

"Some courts have said that it is enough that the defendant was in exclusive control at the time of the indicated negligence. It would be far better, and much confusion would be avoided, if the idea of 'control' were discarded altogether, and if we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."<sup>56</sup>

The rule of the exploding bottle cases would now appear to be the law in Wisconsin. These are primarily decided on the ground of public policy, for in almost every case the bottle had passed out of the possession of the defendant. The courts reason that without the application of the doctrine there would be no recovery and recovery should be allowed.<sup>57</sup> The manufacturer or bottler is to be subject to liability based upon control at the time of the alleged negligent act, that is the time of manufacture or bottling, with no requirement as to control of the use of the bottle or appliance, that is control at the time of the alleged accident. The attack on the applicability of the doctrine will have to be on the theory that no negligence can be inferred merely from the happening of the event but the *Ryan* case will prove to be a stumbling block. It was equally probable, in the *Ryan* case, to infer that there were other causes like a latent defect, an unavoidable accident, or an unknown force, but the court held that the probabilities were in favor of negligence on the part of the defendant.

The exploding bottle cases and the *Ryan* case have clearly widened the area of application of the doctrine by expanding the concept of control. A manufacturer should manufacture his product in such a way that it will operate efficiently and properly under normal circumstances. However, in the absence of proof of negligence in the manufacture or in the absence of proof of what caused the accident, the doctrine of *res ipsa loquitur* should not be applied unless there is addi-

<sup>54</sup> See note 34 *supra*.

<sup>55</sup> See note 3 *supra*.

<sup>56</sup> PROSSER, LAW OF TORTS, (2d ed. 1955) p. 206.

<sup>57</sup> *Stolle v. Anheuser-Busch, Inc.* 271 S.W. 497 (Mo. 1925).

tional evidence to take the inference of negligence on the part of the manufacturer out of the field of mere surmise and conjecture. In most of the exploding bottle cases the plaintiff had to, by additional evidence, negate the possible inference that some third party had meddled or that there had been a change in the condition of the bottle.<sup>58</sup> If this proof is forthcoming, although it is circumstantial in nature, there is a basis for the application of the doctrine. Few courts would refuse to apply the doctrine where there is evidence of many bottles exploding or of many defective appliances being produced, for this type of evidence would then establish the cause of the accident. Once the cause is established the fault can be readily assessed, and the elements necessary for the inference would be established as a matter of fact. The manufacturer then would not be held liable as an insurer for any harm that might result.<sup>59</sup>

C(3). *Question of Superior Knowledge.* One common misconception arises in this area, viz, that the doctrine is to be applied only where the plaintiff is without information as how the accident occurred, while the defendant has such information or access to it. This idea is derived from the reasoning in the cases dealing with carrier's burden of proof where injury to a passenger occurred and was included in Wigmore's formula as the basis for the doctrine.<sup>60</sup> This is often given as an additional reason for applying the doctrine where it was otherwise applicable. In only one case has our Wisconsin Court made this reasoning a controlling factor.<sup>61</sup> It would appear that this factor can never be controlling and the doctrine will not be defeated, where applicable, merely by showing that the defendant did not know the facts. This is illustrated in several of the foregoing cases.<sup>62</sup> Further, *res ipsa loquitur* is permitted where the plaintiff has pleaded specific acts of negligence or has introduced definite evidence of his own, and so has indicated that he is not without information.<sup>63</sup> This problem has recently been put to rest by the Wisconsin court.<sup>64</sup>

The court stated:

"In cases where *res ipsa loquitur* is applicable, the exact cause of the accident is something of a mystery. Some courts have held that the doctrine is applied in part because the true explanation of the accident is more accessible to the defendant

<sup>58</sup> *Johnson v. Coca Cola Bottling Company of Willmar, Inc.*, 20 Negligence Cases 266, 51 N.W.2d 573 (Minn. 1952).

<sup>59</sup> See 1954 INS. L. JOURNAL 616.

<sup>60</sup> WIGMORE ON EVIDENCE, (Third Edition, 1945) §2509.

<sup>61</sup> *Mulcairn v. The City of Janesville*, note 28 *supra*.

<sup>62</sup> *Koehler v. Thiensville Bank*, note 34 *supra*; *Peschel v. Klug*, note 29 *supra*.

<sup>63</sup> *Dunham v. Wisconsin G. & Elec. Co.*, note 31 *supra*; *Stark v. Badger Public Service Co.*, note 39 *supra*.

<sup>64</sup> *Ziino v. The Milwaukee Electric Railway and Transport Co.*, 272 Wis. 21, 74 N.W.2d 791 (1956).

than to the plaintiff. In Wisconsin that is not one of the controlling conditions . . .”

**D. The Defendant Was Not Contributorily Negligent.** The third requirement found in the standard formula is that the plaintiff was not a cause. As early as 1865 the court considered the question of the plaintiff's negligence in a case which would be called today a *res ipsa loquitur* case.<sup>65</sup> An action was brought to recover for the killing of the plaintiff's cow at a railroad crossing by the defendant's train. The court said that the plaintiff had to show how the cow got on the crossing and that it got there through no fault of the plaintiff, otherwise it would balance out the inference of negligence on the part of the defendant arising from the fact of injury alone. In a case involving a 15 year old girl who caught her hand in a mangle that she was operating, it was claimed that the accident was due to the unsteady operation of the machine. The evidence showed no such unsteady operation before or after the accident, and the court held that there was no reasonable probability of an inference that the machine was defective in any way.<sup>66</sup> In the *Zurich* case,<sup>67</sup> the court refused to infer any negligence on the part of the defendant because the falling of the coils could have been caused by the negligence of the plaintiff. It would appear that the Supreme Court of Wisconsin considered this as an ingredient of the first requirement, i.e., if there was contributory negligence on the part of the plaintiff there could be no inference of negligence in the first instance, and not as a separate element. In *Matson v. Wisconsin Tel. Co.*<sup>68</sup> the court applied the doctrine of *res ipsa loquitur* to a case where a truck struck a pole belonging to the Telephone Company. The court found the first two requirements present but sent the case back for a new trial because the trial court refused to submit a question on whether the plaintiff was guilty of contributory negligence by having its pole too close to the road. In the *Ryan* case,<sup>69</sup> the jury found that the plaintiff was not contributorily negligent. It is interesting to note that the reporter after citing the elements in headnote 6 of the decision added the following phrase in parenthesis:

“In Wisconsin under our comparative negligence statute, section 331.045 such contributory negligence would not bar recovery unless it amounted to 50 per cent or more of the whole.”

In the recent *Scherer* case,<sup>70</sup> the reporter added the following language, after reciting the requirements and stating that it must not have been due to the contributory negligence of the plaintiff.

<sup>65</sup> Galpin v. The Chicago & N.W. Ry. Co., note 6 *supra*.

<sup>66</sup> Groth v. Thomann, 110 Wis. 488, 86 N.W. 178 (1901).

<sup>67</sup> 171 Wis. 116, note 24 *supra*.

<sup>68</sup> 256 Wis. 304 41 N.W.2d 268 (1950).

<sup>69</sup> See note 3 *supra*.

<sup>70</sup> See note 18 *supra*.

"But the latter condition is subject to the application of the comparative negligence statute, section 331.045."

From the inference to be drawn in the *Matson* case and the headnotes of the *Ryan* and *Scherer* decisions, it can be said that contributory negligence will not bar the use of the doctrine of *res ipsa loquitur* but the case will be submitted to the jury with the question, was the plaintiff guilty of contributory negligence and if so, what was the percentage. If less than that of the defendant, he can recover. Hence, unlike the earlier cases where it was indicated that evidence of contributory negligence on the part of the plaintiff, or the probability of it, would prevent an inference of negligence on the part of the defendant, merely because of the happening of the accident since one of the elements was missing, the rule now appears to be that *res ipsa loquitur* is still available even though there is contributory negligence on the part of the plaintiff as long as that negligence did not exceed the inferred negligence of the defendant.

In Wisconsin there are then but two elements in the doctrine: (1) An accident that would not occur in the absence of negligence; (2) The cause of the accident was an agency or instrumentality within the exclusive control of the defendant. The recent cases indicate that contributory negligence will not bar application of the doctrine unless the percentage is as great as the defendants. This is a correct result if treated solely as a question of defense and not as an element of the doctrine.<sup>71</sup>

#### AUTOMOBILE CASES

Cases involving automobile accidents have created some doubts as to the application of the doctrine to such a situation. It has been assumed that the doctrine would not apply to the ordinary automobile collision case.

In a 1919 case,<sup>72</sup> the plaintiff's son was killed when the automobile in which he was riding, driven by the defendant, left the road and turned over. The facts indicated that the automobile was running along at 15 miles an hour on a smooth road when it suddenly swerved and ran into a ditch. After the car was righted a blow-out in the front

<sup>71</sup> CAMPBELL—*Recent Developments of the Law of Negligence in Wisconsin*, 1955 WIS. L. REV. 1. "A third requirement for *res ipsa loquitur* is stated by some courts. They say that the possibility of contributory negligence by the plaintiff must be eliminated. Insofar as this bears on the exclusive control by the defendant, it is mere duplication. If it implies that the doctrine is never available when the plaintiff is guilty of some collateral contributory negligence it is hard to justify." See *Clemon v. Chicago, St. Paul, M. & O. Ry. Co.*, 137 Wis. 387, 119 N.W. 102 (1909). In a suit for the death of a 14 year old boy who had been killed by the defendants train at a crossing, the court indicated that an inference of negligence could be established on the part of the deceased person from the facts, so that the doctrine of *res ipsa loquitur* was in effect used to establish contributory negligence.

<sup>72</sup> *Klein v. Beeten*, 169 Wis. 385, 172 N.W. 736 (1919).

tire was found. The court said that it was a reasonable inference that the accident could have happened as a result of the blow out, as well as the negligent operation of the automobile, hence the doctrine could not be applied since there were two possible causes. The next case involved a car that was being driven from 10-15 miles per hour when it suddenly swerved over to the left and struck the automobile in which the plaintiff was riding.<sup>73</sup> There was evidence that there were icy spots on the road. The court stated that in automobile collisions, the direct cause of the accident and the controlling circumstances attendant thereon are usually not so within the control of a driver as to raise an inference of negligence on his part. It is to be noted that the *Klein* case was decided on the theory that the first element, inference of negligence, was missing, the *Linden* case was on the theory that the defendant was not in exclusive control of the agency.

The next case that specifically discussed the doctrine as to automobiles was *Baars v. Benda*.<sup>74</sup> The automobile involved left the road and the only evidence as to cause was that while proceeding at a moderate rate of speed it suddenly went into a ditch on the right side of the road and that after the accident the steering apparatus was found broken. The rule of the *Linden* case,<sup>75</sup> was applied but the court said that the doctrine was not available because two inferences were possible, one negligence on the part of the defendant and the other defective steering for which the driver was not responsible, hence the first element was missing. In *Storlie v. Hartford Acc. & Ind. Co.*,<sup>76</sup> the doctrine was not mentioned by name but the facts were similar to the *Baars* case except that there was a curve which the driver failed to negotiate and there was no evidence of any defect such as a blow-out or steering. The court said that there were several possible reasons for the accident, to-wit, exhaustion of the driver, as to which the plaintiff had assumed the risk, negligence of the driver, or a defect in the car not attributed to the driver. There was no evidence of any such defect, but the court held that no inference of negligence was possible under the authority of *Baars v. Benda*.<sup>77</sup> This appeared to be the Wisconsin rule until the *Matson* case<sup>78</sup> was decided. There the court held for the first time that *res ipsa loquitur* could apply to an automobile collision case, saying that ordinarily it will not apply but this was a case where it should be applied since this was an unusual case. It explained all previous cases on the theory that there were two

<sup>73</sup> *Linden v. Miller*, 172 Wis. 20, 177 N.W. 909 (1920).

<sup>74</sup> 249 Wis. 65, 23 N.W.2d 477 (1946).

<sup>75</sup> See note 73 *supra*.

<sup>76</sup> 251 Wis. 340, 28 N.W.2d 920 (1947).

<sup>77</sup> See note 74 *supra*.

<sup>78</sup> See note 68 *supra*.



actionable causes and indicated that the result in the *Storlie* case<sup>79</sup> was wrong as far as the defendant's negligence was concerned and that it should have been inferred but that the outcome would not be any different since the plaintiff had assumed the risk. This was finally held to be the law in a case where the driver left the road while negotiating a curve and lost control.<sup>80</sup> The court said that an inference of negligence as to management and control was allowable since the prior automobile cases were to be distinguished for in the present case there was no showing of a non-actionable cause, hence no speculation as to such other cause was to be indulged in. In a prior case the doctrine was held inapplicable to a situation where the defendant while trying to get back into his lane of traffic, when a traffic officer refused to let him make a left turn, skidded to his left on the street car track, across a safety island and up on the sidewalk injuring the plaintiff.<sup>81</sup> The court said the doctrine was not applicable for skidding is not an unusual occurrence and hence no basis for an inference since skidding could result from causes other than negligence on the part of the plaintiff and as in the *Linden* case from causes not within his control.

From the foregoing it would appear that the doctrine is applicable in automobile collision cases, where the driver leaves the road and there is no apparent explanation for it at the time of the accident, or where the automobile strikes a stationary object, but not where the automobile skids, whatever the cause.

In the *Churchill* case, there was a strong dissent by three judges, saying that a prima facie case of negligence was established by being on the wrong side of the road. The court quoted from *Kempfer v. Bois*:<sup>82</sup>

"The undisputed fact that the defendant's car was on the wrong side of the road established a prima facie case of negligence on the part of the defendant. The defendant then had the burden of producing evidence which would overcome the inference of negligence arising from the fact that defendant's car was on the wrong side of the highway."

The *Kempfer* case was based on a similar result arrived at in a prior decision.<sup>83</sup> It is difficult to see a distinction between this type of case and a *res ipsa* case, unless the court is extending the application of the doctrine that the violation of a statute is negligence as a matter of law. These cases and the dissent mentioned above would lead us to believe that being on the wrong side of the road in an automobile gives rise

<sup>79</sup> See note 76 *supra*.

<sup>80</sup> *Schimke v. Mutual Auto Ins. Co.*, 266 Wis. 517, 64 N.W.2d 195 (1954).

<sup>81</sup> *Churchill v. Brock*, 264 Wis. 23, 58 N.W.2d 290 (1953).

<sup>82</sup> 255 Wis. 312, 38 N.W.2d 483 (1949).

<sup>83</sup> *Hamilton v. Reinemann*, 233 Wis. 572, 290 N.W. 194 (1940).

to an inference of negligence upon which the jury may base a verdict. Some day the Wisconsin court may call this *res ipsa loquitur*.

Another case worth noting is that of *Mayer v. Boynton Cab Co.*<sup>84</sup> The trial court held that the doctrine of *res ipsa loquitur* was to be applied in a case where the plaintiff was injured when she was suddenly jolted while riding in a taxicab. The majority of the court did not decide whether this was a proper case of *res ipsa loquitur* or not, but J. Currie in his dissent indicated that it was. I would hesitate to take this case as authority in an ordinary automobile case where the guest is suddenly jolted for no apparent reason, since this involved a passenger-carrier relationship. Its basis could be the early cases where there was a breach of the contract of carriage and negligence was presumed unless the defendant came forward with evidence refuting the presumption. Perhaps the trial court had this view in mind.<sup>85</sup>

The foregoing cases, except *Linden v. Miller*<sup>86</sup> involve one vehicle only. None of them deal with the question of the application of the doctrine in the case of the collision of two vehicles. The writer has not discovered another case in Wisconsin that has dealt with this other than the cases where the defendant's car was on the wrong side of the road and the court talks about a *prima facie* case of negligence.<sup>87</sup> Ordinarily the doctrine is not applied in such a situation other than in cases involving carriers.<sup>88</sup>

Another facet of the problem in automobile cases deals with the condition of the vehicle. The Wisconsin Court has stated that the doctrine is not to be applied in cases involving blow-outs since other inferences were also probable.<sup>89</sup>

#### EFFECT OF THE DOCTRINE

The Wisconsin cases have not been entirely consistent or clear on exactly what happens when the doctrine of *res ipsa loquitur* is applied. The tendency has been to refer to it as a "presumption or inference." It was originally intended to be used only as an inference.<sup>90</sup> The effect was well stated in the case of *Rost v. Roberts*:<sup>91</sup>

<sup>84</sup> 267 Wis. 486, 66 N.W.2d 136 (1954).

<sup>85</sup> See 32 MARQ. L. REV. 278.

<sup>86</sup> See note 73 *supra*.

<sup>87</sup> In addition to the previous cases cited see: *Seligman v. Hammond*, 205 Wis. 199, 236 N.W. 115 (1931). *Zeinemann v. Gasser*, 251 Wis. 238, 29 N.W.2d 49 (1947).

<sup>88</sup> For an interesting discussion of the problem and a novel suggestion for the extension of the doctrine in such cases see, PROSSER, SELECTED TOPICS ON THE LAW OF TORTS, p. 334-339 (1953).

<sup>89</sup> *Pawlowski v. Eskofski*, 209 Wis. 189, 244 N.W. 611 (1932); *Ormond v. Wisconsin P. & L. Co.*, 194 Wis. 305, 216 N.W. 489 (1927).

<sup>90</sup> *Kaples v. Orth*, note 15 *supra*. The court stated that the doctrine enabled the jury to infer negligence on the part of the defendant.

<sup>91</sup> 180 Wis. 207, 192 N.W. 38 (1923). This case involved the use of x-ray but the doctrine was not relied on.

"Res ipsa loquitur is a doctrine which permits an inference of negligence from the mere proof of an injury or accident where it appears that the injury or accident would not or could not have happened except for the negligent conduct of the defendant. In such cases it is held that the plaintiff makes a case for the jury by proof of the accident or injury, it being permissible for the jury to infer negligence from the fact that the injury or accident occurred. Manifestly he is in no better position, so far as the burden of proof devolving upon him is concerned, than if he had made out a case for the jury by affirmative evidence of negligence . . . . It (the burden of proof) is with him at the close as well as at the beginning, and in order for him to recover the jury must find that the facts entitling him to recover are established by a preponderance of the evidence."

In the *Koehler* case<sup>92</sup> it was said that the doctrine gives rise to a natural inference of negligence. Of necessity, the inference of negligence arising in cases of this sort are of varying strengths and so are the proofs adduced to meet these inferences. In a great many cases involving the existence of defective construction or maintenance in machines, it is possible to meet the inference of negligence with refutation so conclusive as to leave not a scintilla of the inference, and in such a case there is no issue for the jury. On the other hand, if the counterproof is of a character that need not be treated as a verity, the inference persists and a jury may still be permitted to weigh the inference against the so-called rebutting testimony and arrive at its own conclusion.<sup>93</sup> All doubts in this area were laid to rest by the *Ryan* case,<sup>94</sup> where the court adopted the view expressed in the above mentioned cases, to-wit: The application of the doctrine gives rise to a permissible inference, which inference of course continues in the case until not a scintilla remains because of the positive proof introduced by the defendant, but until that time the jury may still base a verdict on the inference. This case is particularly interesting because the manufacturer did introduce positive evidence that there was no defect in the machine immediately after the alleged accident.

The case of *Mayer v. Boynton Cab Co.*<sup>95</sup> raised the issue when the trial court ruled that plaintiff's motion for a new trial was to be granted where the jury found that the cab driver was not negligent since in the opinion of the trial court the defendant had failed to prove that it was not negligent. The Supreme Court reversed on the theory that the doctrine created an inference which the jury could adopt or reject and unless adopted was rejected and this verdict could not be changed merely because the trial court would have inferred negligence.

<sup>92</sup> See note 34 *supra*.

<sup>93</sup> *Lipsky v. C. Reiss Coal Co.*, see note 27 *supra*.

<sup>94</sup> See note 3 *supra*.

<sup>95</sup> See note 84 *supra*.

The dissenting opinion indicated that the trial court had the right to grant a new trial if in its opinion the jury's conclusion was against the weight of evidence. It carefully distinguished between changing the jury answers and granting a new trial, the latter being allowed but not the former. In the *Ziino* case,<sup>96</sup> it was held reversible error to instruct the jury that the defendant had the burden of proving it was free from negligence. This is of particular importance since this was a carrier case.

EFFECT—WHERE THE PLAINTIFF PLEADS SPECIFIC NEGLIGENCE  
IN HIS COMPLAINT

This problem has arisen in a recent case.<sup>97</sup> An action was brought to recover for the death of plaintiff's husband as a result of the defendant's vehicle colliding with the decedent's house, 422 feet from where the defendant had parked it. Death resulted not from the collision but 10 days later as a result of the shock on his heart from the accident. The plaintiff requested an instruction on *res ipsa loquitur* but the trial court refused and the jury returned a verdict for the defendant. Upon motions after verdict the trial court concluded that the instruction should have been given and granted a new trial. The trial court held that the pleading of specific acts of negligence and general negligence based upon the doctrine of *res ipsa loquitur* in the alternative, did not remove the doctrine from the case, for this did not destroy conclusively any inference that the jury might draw from the presence of the doctrine of *res ipsa loquitur*. The Supreme Court upheld this by saying that it is permissible to plead the doctrine and also allegations setting forth specific or general acts of negligence. They overruled the contention of the defendant that the complaint pleaded an intervening nonactionable cause which thus destroyed the application of the doctrine.

Unhappily, the above decision does not put the problem to rest. As the trial court in the *Colla* case pointed out, there are at least four views on this subject: (1) That pleading a particular cause of injury does not waive the right to rely on the doctrine; (2) That the right to rely on the doctrine is waived by pleading a particular cause of injury; (3) That the doctrine is applicable to prove a particular cause of injury alleged; (4) That pleading a particular cause of injury does not waive the right to rely on the doctrine if general negligence is also alleged.<sup>98</sup> It can readily be seen that only the later view has been considered in Wisconsin. The question of what happens where only specific acts are pleaded and no general negligence is pleaded has not been

<sup>96</sup> See note 64 *supra*.

<sup>97</sup> *Colla v. Mandella*, see note 3 *supra*.

<sup>98</sup> See PROSSER, *THE LAW OF TORTS*, (2nd ed. 1955) p. 214; also 6 WEST. RESERVE L. REV. 164.

answered. Can the doctrine be applied? If not, can the complaint be amended to apply it? The court had an opportunity in the above decision to render a decisive decision but limited itself to the consideration of the narrow point in issue.

EFFECT—WHERE PLAINTIFF INTRODUCES EVIDENCE OF  
SPECIFIC ACTS

What happens when the plaintiff during the trial has himself introduced specific evidence of the defendant's failure to use proper care? Some courts have held that where the facts are disclosed by evidence there is no room for inference, or that by attempting specific proof the plaintiff has waived the benefit of the doctrine.

"Plaintiff is of course bound by his own evidence but proof of specific facts does not necessarily exclude inferences. When the plaintiff shows that the railway car in which he was a passenger was derailed, there is an inference that the defendant has been negligent. When he goes further and shows that the derailment was caused by an open switch, he destroys any inference of other causes, but the inference that the defendant has not used proper care in looking after its switches is not destroyed, but strengthened. If he goes further still and shows that the switch was left open by a drunken switchman on duty, there is nothing left to infer; and if he shows that the switch was thrown by an escaped convict with a grudge against the railroad, he has proved himself out of court."<sup>99</sup>

It would appear to be the better rule that only when the facts leave no room for inferences is *res ipsa loquitur* out of the case. Evidence which does not purport to furnish a complete explanation of the occurrence should not deprive the plaintiff of the doctrine. The Wisconsin Court in the case of *Lipsky v. C. Reiss Coal Co.*<sup>100</sup> arrived at this result. The plaintiff was injured by the fall of a supporting beam. There was evidence by the plaintiff of the inadequate original fastening of the beam. The court treated this as an additional fact to be considered, but it did not prevent the application of the doctrine. This was confirmed in the case of *Waskow v. Robert L. Reisinger & Co.*<sup>101</sup> which was an action to recover for injuries sustained when a door handle came off causing the plaintiff to lose his balance and fall down an elevator shaft. The plaintiff gave evidence as to the improper affixation of the handle and how it could have been made safer if the short part of the handle had been fastened on the outside rather than in the inside. The court stated as follows:

"It will be seen that the case of plaintiff does not . . . rest alone on the doctrine of *res ipsa loquitur*. It is by no means clear,

<sup>99</sup> PROSSER, note 98 *supra*.

<sup>100</sup> See note 27 *supra*.

<sup>101</sup> 180 Wis. 537, 193 N.W. 357 (1923).

however, that under the circumstances negligence might not have been inferred from the mere fact that the handle became loose."

#### EFFECT OF DEFENDANT'S EVIDENCE

We have seen from the previous cases that the doctrine creates an inference to be considered by the jury. The jury may or may not render a verdict in favor of the plaintiff based upon the doctrine. It is clear that if the defendant offers no rebuttal testimony the verdict can go for the plaintiff but it need not, on the other hand, it can go for the defendant as well.<sup>102</sup> On the other hand the defendant may introduce evidence and still fail to overcome the inference so that the jury can return a verdict for the plaintiff.

"If the inference of negligence arising in a case of *res ipsa loquitur* is met with refutation so conclusive as not to leave a scintilla of the inference, there is no issue for the jury; but if the counterproof is of a character that need not be treated as a verity, the inference still persists and a jury may still be permitted to weigh the inference against the so called rebutting testimony."<sup>103</sup>

The court in *Ryan v. Zweck-Wollenberg Co.*<sup>104</sup> stated the rule as follows:

"The testimony in behalf of Philco, that it was guilty of no negligence in the manufacturing, testing, and inspection process employed by it, is not such undisputed proof as would remove the question of Philco's negligence from the jury."

The same result was reached in the early case of *Cummings v. The National Furnace Co.*<sup>105</sup> Testimony by the defendant as to the good repair of the machinery in question, with no direct evidence of any negligence on the part of the defendant's servants was not enough to prevent the jury from inferring negligence.

There are quite a few cases where it has been held that the defendant's evidence was sufficient to refute the inference so as to leave nothing for the jury. In the case of *Senft v. Ed. Schuster & Co.*,<sup>106</sup> the plaintiff was seeking recovery for injuries sustained as a result of a severe jolt or jerk while going up in one of the defendant's elevators. The court held that the evidence of the defendant that the elevator was free from all discoverable defects and that it was physically impossible to jerk or jolt the elevator in the manner testified to by the plaintiff overcame the inference so as to leave no question for the jury.

<sup>102</sup> See *Arledge v. Scherer Freight Lines, Inc.*, note 18 *supra*. (The defendant introduced no testimony but moved for a directed verdict at the close of the plaintiff's evidence.)

<sup>103</sup> *Koehler v. Theinsville State Bank*, note 34 *supra*.

<sup>104</sup> See note 3 *supra*.

<sup>105</sup> See note 12 *supra*.

<sup>106</sup> 250 Wis. 406, 27 N.W.2d 464 (1946).

This same result was reached where the plaintiff sued to recover for the death of an employee caused by leaking gas.<sup>107</sup> Evidence that there were no other methods available than those that were used to control the gas, that little or no gas was in the boiler after the accident, was held to be sufficient to overcome any inferences. Other cases have arrived at the same result.<sup>108</sup>

This result was also achieved in a carrier case that arose prior to the introduction of the term *res ipsa loquitur* in the jurisprudence of Wisconsin.<sup>109</sup> An injury was caused by the breaking of a wheel under a freight car of the train. The evidence proved that the track was in good order, the wheel was fairly new, and had no discoverable flaw in it. The court directed a verdict for the defendant.

The foregoing cases support the view that the defendant may rebut the plaintiff's case by showing that the accident is of a kind which commonly occurs without the fault of anyone, or that the responsibility for the apparent cause was in another, or that the accident could not have physically happened as the plaintiff alleged. At best, his task is a difficult one once that a case of *res ipsa loquitur* has been alleged.

#### CONCLUSION

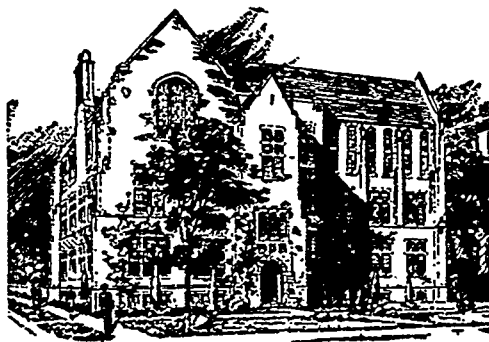
The development of the doctrine in Wisconsin has followed the traditional pattern and the present state of the law has been achieved without serious dislocation of our traditional legal concepts. Some of the inconsistencies in the application of the doctrine are readily apparent and as a result may be avoided in the future. The main problem will always be present, i.e. when do we have a *res ipsa* case? Our court has not always been consistent in applying the doctrine to particular cases but it is hoped that by having the cases classified in this article that the lawyer will be better able to exercise his best judgment in a particular case.

<sup>107</sup> *Maryland Casualty Co. v. Thomas Furnace Co.*, 185 Wis. 98, 201 N.W. 263 (1924).

<sup>108</sup> See *Gay v. Milwaukee E. R. & L. Co.*, 138 Wis. 348, 120 N.W. 283 (1909). The controller on an electric car exploded and there was evidence to show that it could have exploded without anyone's negligence; *Klitzke v. Webb*, 120 Wis. 254, 97 N.W. 901 (1904), where it was shown that it was physically impossible for the door to have fallen; *Vorbrich v. Geuder & Paeschke Manf. Co.*, 96 Wis. 277, 71 N.W. 434 (1897). It was proven that the machine was free from all discoverable defects.

<sup>109</sup> *Morrison v. The Phillips & Colby Construction Co.*, 44 Wis. 405 (1878).

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