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Res Ipsa Loquitor—An Analysis of Its Application and Procedural Effects in Nebraska

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Comments

RES IPSA LOQUITUR—AN ANALYSIS OF ITS APPLICATION AND PROCEDURAL EFFECTS IN NEBRASKA

I. INTRODUCTION

Of the numerous Latin phrases that have crept into the law, the maxim res ipsa loquitur is perhaps the best known. Yet, this innocuous phrase, which means nothing more than "the thing speaks for itself," has been the source of much confusion and disagreement. This divergence of opinion is centered around the proper application and the procedural effect of the rules which have been promulgated by the courts in giving effect to and in applying this phrase. The purpose here is briefly to summarize the different positions taken with respect to this doctrine, and then to take a critical look at the application of res ipsa loquitur in Nebraska.

The history of the maxim is unique. It was first used in the area of tort liability[1] by Barron Pollock during an argument with counsel in the now famous case of *Byrne v. Broadle.*[2] A barrel of flour had rolled from a warehouse window striking a pedestrian, and Pollock took the position that this was one of those factual situations in which it could be said, "res ipsa loquitur." From this casual reference the doctrine has grown to its present state which, as previously indicated, is one of disagreement and uncertainty. This uncertainty, however, grows not out of the accepted requirements[3] needed to raise the doctrine under a given set of facts, but has developed with respect to the proper application and effect of the rule. Before discussing these problems a brief statement of the theory behind the rule seems proper.

Res ipsa loquitur is a type of circumstantial evidence that may be used by a plaintiff to prove negligence on the part of an

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[1] The phrase res ipsa loquitur has been used where usury was apparent upon the face of an instrument, in connection with the revocation of a license to use a way, and in misrepresentations in the sale of goods. For cases cited to this effect see Prosser, *The Procedural Effect of Res Ispa Loquitur,* 20 MINN. L. REV. 241 (1936).

[2] 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

[3] See text at note 7 *infra.*

alleged tortfeasor.[4] This circumstantial evidence is based upon the peculiarities which may surround a given set of facts, and upon common human knowledge and experience.[5] If the facts of an accident are such as to bring the rule into application, the conclusion is drawn that the resulting injury was probably caused by a breach of duty on the part of the defendant, and the question of negligence is then submitted to the jury.[6] Three requirements are almost universally accepted as necessary prerequisites in order for a plaintiff to avail himself of the doctrine.[7] First, the accident must be of a type that does not usually occur in the absence of negligence; second, the instrumentality causing the injury must be in the exclusive control of the defendant; and third, the plaintiff must not have been in any way responsible for the occurrence of the accident. A fourth requirement often suggested is that the evidence be more readily accessible to the defendant than to the plaintiff.[8] This fourth criterion, however, is not widely accepted as a prerequisite to the doctrine, and has been attacked by some authorities.[9]

Perhaps the most frequently quoted statement of the doctrine of res ipsa loquitur is that of Chief Justice Erle in *Scott v. London and St. Katherine Docks Co.*:[10]

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or

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[4] Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W.2d 224 (1954); Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N.W. 2d 127 (1954); Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. 147 Neb. 880, 25 N.W.2d 396 (1947); Miratsky v. Breseda, 139 Neb. 229, 297 N.W. 94 (1941); PROSSER, TORTS 201 (2d ed. 1955); Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519 (1934).

[5] PROSSER, TORTS 200 (2d ed. 1955).

[6] Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N.W.2d 127 (1954).

[7] 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

[8] 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940). Though the Nebraska court has never expressly stated accessibility of the evidence to the defendant as being a requirement, the following language appearing in Mischnick v. Iowa-Nebraska Light & Power Co., 125 Neb. 598, 602, 251 N.W. 258, 259 (1933) is subject to this interpretation: "The doctrine of res ipsa loquitur *proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury,* but if the petition alleges particular acts of negligence, the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied." (Emphasis added.)

[9] Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 243 (1936).

[10] 3 H. & C. 596, 601, 159 Eng. Rep. 665, 667 (1865).

> 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 defendants, that the accident arose from want of care.

The Nebraska position appears to be substantially the same. In *Miratsky v. Breseda* it was said:[11]

> When the thing which caused the injury complained of 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 its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.

However, the mere occurrence of an accident will not provoke application of the doctrine,[12] and furthermore, the circumstantial evidence derived from res ipsa loquitur must be evidence of the negligence which was the proximate cause of the accident.[13] This former principle is merely a clarification of the generally accepted requirements needed to invoke the doctrine, while the latter is a statement of the law of proximate cause; that is, the negligence of the defendant must be the proximate cause of the complained injury.

II. APPLICATION OF THE DOCTRINE

The purpose here being, for the most part, an examination of the Nebraska law, a proper starting point would seem to be a dis-

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[11] 139 Neb. 229, 231, 297 N.W. 94, 95 (1941).

[12] Sipprell v. Merner Motors, 164 Neb. 447, 82 N.W.2d 648 (1957); Pierce v. Burlington Transp. Co., 139 Neb. 423, 297 N.W. 656 (1941); Thompson v. Young Men's Christian Ass'n, 122 Neb. 843, 241 N.W. 565 (1932); Broadston v. Beddeo Clothing Co., 104 Neb. 604, 178 N.W. 190 (1920).

Though the question has yet to be litigated in Nebraska, it has been held prejudicial error in other jurisdictions to give a "mere happening of an accident" instruction to the jury in a situation where res ipsa loquitur applies as a matter of law. The reasoning behind these decisions is that a "mere happening of an accident" instruction and a res ipsa instruction appear as inconsistent ideas to the jury, and would confuse them. Guerra v. Handlery Hotels, Inc., 53 Cal. 2d 266, 347 P.2d 674, 1 Cal. Rptr. 330 (1959); Brown v. George Pepperdine Foundation, 23 Cal. 2d 256, 143 P.2d 929 (1943); Waller v. Ross, 100 Minn. 7, 110 N.W. 252 (1907); Olson v. Great Northern Ry., 68 Minn. 155, 71 N.W. 5 (1897) (instruction rightly denied that the mere happening of an accident will not raise a presumption of negligence).

[13] Asher v. Coca-Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961) (evidence insufficient to establish intervention of third party); Mischnick v. Iowa-Nebraska Light & Power Co., 125 Neb. 598, 251 N.W. 258 (1933) (no causal connection between fire and negligence charged); PROSSER, TORTS 204 (2d ed. 1955).

cussion of the applicability of res ipsa loquitur in this jurisdiction. The reluctance of the court to apply the doctrine is evidenced by a review of the Nebraska decisions. In one case[14] the court went so far as to state that "the doctrine of res ipsa loquitur is of limited and restricted scope and should ordinarily be applied sparingly." This attitude has resulted in what this writer believes to be, in some instances, unsound and unjustifiable decisions. An examination of the Nebraska case law substantiates this view.

Kries v. Lang, [15] a 1928 decision, is demonstrative of the Nebraska attitude. Defendant was the owner of a three-story brick building containing a bay window on the side adjacent to a public sidewalk. A board which formed part of the window fell and struck the plaintiff. The facts evidenced that the board was put in place during the original construction of the building some thirty-five years prior to the accident, and it was further shown that the board was sound and undecayed. A "high wind," the velocity of which was not stated, tore the board off the building. However, the evidence indicated that the nails holding the board in place had rusted to the extent of uselessness. The Nebraska Supreme Court affirmed a directed verdict for the defendant, holding res ipsa loquitur inapplicable. The basis for the decision is not altogether clear from a reading of the opinion, but apparently the court felt there had been no breach of the defendant's duty of care to persons outside the premises. The court further stated that res ipsa should not apply where evidence is adduced which is as consistent with the absence as with the existence of negligence of the defendant; that the rule is only applicable where the facts proved are more consistent with negligence of the defendant than with the occurrence of a mere accident.

The decision appears unjustifiable. The factual situation is almost identical to that in *Byrne v. Broadle,*[16] the case from which the doctrine of res ipsa loquitur evolved. The court concluded that since the rusted nails were not ascertainable by sight inspection they were latent defects, and therefore, there was no breach of duty of care; the defendant had to go no further than to use reasonable care in keeping the building safe. This holding is difficult to understand. The exercise of reasonable and prudent care in keeping a building safe is unquestionably breached when a board is permitted to be blown from the building to a public walk, and

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[14] Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 929, 62 N.W.2d 127, 131 (1954).

[15] 116 Neb. 387, 217 N.W. 615 (1928).

[16] 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

there is a showing of badly rusted nails. The least that can be said for the situation is that a question of negligence is presented for jury determination, yet a directed verdict for the defendant was affirmed.

Another case somewhat disturbing is *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*[17] The insurance company issued a fire insurance policy containing subrogation rights to the owner and lessee of the building. The action was brought by the subrogee on the ground of the defendant's negligence. A "coke" machine was placed in the building by the defendant who promised to keep it in proper working order. Subsequently the building was damaged by smoke, the apparent cause being a fire in the vending machine. There was no fire in the building itself, but the machine was completely burned as were some adjacent bottle cases. The plaintiff contended that the doctrine had application to the situation, and there was thus a question of negligence to be submitted to the jury. The court took cognizance of the principle that although a mere occurrence of a fire will not raise a "presumption of negligence,"[18] certain circumstances may justify an application of the doctrine to an unexplained fire. The evidence showed that the machine had rumbled and had been extremely noisy for several days preceding the fire, and that the defendant had notice to this effect. Yet, the court concluded that the facts did not establish a case of res ipsa loquitur.

Looking at the requirements needed to establish a res ipsa loquitur case, the factual situation in *Security Ins. Co.*[19] appears clearly to come within the ambit of these rules. Common experience should tell us that vending machines do not ordinarily burn in the absence of negligence. Furthermore, the defendant had notice that the machine had been unusually noisy, but had failed to take any action in regard thereto. Although the defendants did not have exclusive control of the machine, the Nebraska court has held that exclusive control does not necessarily refer to actual physical control at the time of the accident.[20] Finally, the plain-

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[17] 157 Neb. 923, 62 N.W.2d 127 (1954).

[18] The word "presumption" as used by the court does not carry its usual and accepted meaning, but refers to an inference of negligence which is the procedural effect given res ipsa loquitur by the Nebraska court. See note 60 *infra*.

[19] 157 Neb. 923, 62 N.W.2d 127 (1954).

[20] Asher v. Coca-Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961) (Coca-Cola bottle containing a dead mouse was in possession of the retailer immediately before sale to plaintiff); Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W.2d 224 (1954) (court held the defendant

tiff was in no way responsible for the fire, but did all that could be expected of him by notification.

It should be pointed out, however, that as a general rule a plaintiff suffering damages caused by a fire of unknown origin will not be able to avail himself of res ipsa loquitur.[21] Nevertheless, as the Nebraska court noted, certain additional circumstances may justify application of the doctrine.[22] The facts in the case under discussion certainly appear to fall within this category. Yet, the court, giving no apparent reason for its decision, concluded this was not such an instance. The inevitable conclusion drawn from the holding of this case, a review of the cases cited by the court as authority for applying the doctrine,[23] and an examination of other Nebraska cases involving a fire situation,[24] is that res ipsa will not be applied to an unexplained fire unless the situation is analogous to that of an ignition caused by a passing locomotive.

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was in exclusive control of a chair which collapsed even though at the time of the accident the plaintiff had physical control). However, the court has yet to depart from the concept of exclusive control to the extent evidenced by the case of Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). In that case all the doctors and hospital employees connected with an operation on the plaintiff were held liable on a res ipsa theory for an unexplained traumatic shoulder injury.

21 PROSSER, TORTS 203 (2d ed. 1955).

22 Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 929, 62 N.W.2d 127, 131 (1954). See Reurat v. Stevens, 113 Conn. 333, 155 Atl. 219 (1931), where res ipsa loquitur was applied to the unexplained burning of a davenport when it was shown that the defendant was the only person to smoke on the sofa all evening.

23 In Rogers v. Kansas City & O. Ry., 52 Neb. 86, 71 N.W. 977 (1897), and Burlington & Mo. R.R. v. Westover, 4 Neb. 268 (1876), the doctrine was not referred to by name, but a rebuttable presumption of negligence was permitted when a grass fire was started immediately after the passing of a locomotive. Frederich v. Klise, 95 Neb. 244, 145 N.W. 353 (1914), involved fire damage to crops caused by the careless management of a traction engine. The court analogized this case to a situation where a passing locomotive is the cause of a grass fire, and concluded that the same rules were applicable to both situations.

24 Watenpaugh v. L. L. Coryell & Son, 135 Neb. 607, 283 N.W. 204 (1939) (stove kindled with hot fire in room containing oily coats and jackets—though the doctrine is not mentioned by name the court stated no presumption of negligence was raised by the facts); Mischnick v. Iowa-Nebraska Light & Power Co., 125 Neb. 598, 251 N.W. 258 (1933) (fire allegedly caused by gas-pipe leak existing by reason of gas company's negligence—though the court held res ipsa inapplicable because plaintiff pleaded specific acts of negligence, it is evident from a reading of the opinion that the doctrine would not have been applied notwithstanding the pleadings).

Another case of interest is *Buzzello v. Sramek.*[25] Here, defendant left his automobile parked on a slope. He testified that he pulled the emergency brake and set the wheels against the curb. The car stood from ten to twenty minutes and then rolled down the hill striking and killing the plaintiff's small child. It was shown that some children were playing around the car, but there was no evidence indicating they were meddling with the automobile. There was a further showing that the brakes were in good condition. The plaintiff attempted to invoke the doctrine of res ipsa loquitur, but the court held the doctrine inapplicable, feeling the circumstances surrounding the accident were more consistent with the view that it was caused by some unknown person rather than by defendant's negligence. The interesting point about the case is the language used by the court. In quoting from a New York decision,[26] the court stated: "The rule of res ipsa loquitur cannot apply, where *no* negligence of defendant is shown by direct evidence, and it is apparent that there may have been other causes than defendant's negligence which led to the accident."[27] The doctrine of res ipsa loquitur proceeds, in part, on the theory that negligence is inferred from a given set of facts because it may be impossible for the plaintiff to show any negligence by direct evidence, yet by this statement some negligence of the defendant must be shown when it is possible an intervening agency could have caused the accident. Such an attitude defeats the purpose of the doctrine, especially in view of the Nebraska position that res ipsa merely warrants an inference of negligence which the defendant does not have to rebut and which the jury can accept or reject.[28] It does not compel[29] an inference of negligence nor does it raise a presumption to that effect.[30] The conjecture that a few

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[25] 110 Neb. 262, 193 N.W. 743 (1923).

[26] Keber v. Central Brewing Co., 150 N.Y. Supp. 986 (Sup. Ct. 1915) (a truck rolled down hill, but here there was evidence that boys were playing *on* the truck).

[27] 110 Neb. 262, 265, 193 N.W. 743, 744 (1923). (Emphasis added.)

[28] Asher v. Coca-Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961); Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W.2d 224 (1954); Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N.W.2d 127 (1954); Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry., 147 Neb. 880, 25 N.W.2d 396 (1947); Miratsky v. Breseda, 139 Neb. 229, 297 N.W. 94 (1941).

[29] Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N.W.2d 127 (1954).

[30] Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W.2d 224 (1954) (instruction that verdict must be for plaintiff if defendant fails to rebut presumption was held to be erroneous).

boys playing in the vicinity of an automobile which suddenly rolls down a steep incline were the cause of this sudden starting is a speculation that should be left to the jury, the fact-finders in our legal system. The case involved an accident not usually happening without negligence on the part of someone; the defendant was in control of the instrumentality; and the plaintiff was in no wise at fault.

However, the court has not completely abrogated the doctrine. A recent case, *Asher v. Coca-Cola Bottling Co.*,[31] is perhaps indicative of a change in attitude. The plaintiff, while drinking a bottle of Coca-Cola, discovered a dead mouse in the bottle. Suit was commenced against the defendant on two theories—res ipsa loquitur and breach of implied warranty by the manufacturer. The supreme court affirmed a lower court decision for the plaintiff, holding either theory advanced by plaintiff as sufficient to sustain the action. Defendant contended res ipsa could not apply because there was divided control over the instrumentality causing the harm, but this argument was rejected.[32] The court further rejected a claim that the mere possibility of someone tampering with the bottles while they were in the possession of the retailer negatived the theory of res ipsa loquitur. Perhaps this holding somewhat dilutes the strong language found in the *Buzzello* case[33] discussed above, but it is doubtful for the case was not cited and the criticized language appearing therein remains to be impugned.

In other decisions the Nebraska court has applied the doctrine where the plaintiff was sitting on a retaining wall and was struck by the side of a turning streetcar;[34] where a set of temporary bleachers collapsed at a gymnastics exhibition;[35] where the plaintiff's trucks were damaged when two boxcars became disengaged from a switch engine;[36] and where the plaintiff's chair collapsed while she was participating in a bingo game.[37] Also worthy of

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31 172 Neb. 855, 112 N.W.2d 252 (1961).

32 The court felt that in order to satisfy the exclusive control requisite of res ipsa loquitur, it must only be shown there was no tampering in the interim between the physical control by the manufacturer and that of the consumer. The jury found the mouse was in the bottle at the time of delivery, and the court then concluded there was a reasonable basis for this finding.

33 Buzzello v. Sramek, 110 Neb. 262, 193 N.W. 743 (1923).

34 Mercer v. Omaha & C. B. St. R.R., 108 Neb. 532, 188 N.W. 296 (1922).

35 Miratsky v. Breseda, 139 Neb. 229, 297 N.W. 94 (1941).

36 Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry., 147 Neb. 880, 25 N.W.2d 396 (1947).

37 Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N.W.2d 228 (1955).

comment are a group of early Nebraska cases in which the court, without mentioning the doctrine by name, held the facts to be such as to warrant a rebuttable presumption of negligence. The situations involved in these cases include a grass fire started shortly after the passage of a locomotive;[38] a streetcar running off the track;[39] and fire damage to crops after use of a traction engine with a defective spark arrester.[40] These early cases almost invariably involved either common carriers or steam generated engines run by fire, and thus the common law rules respecting the higher duty of care owed seem to be more determinative with respect to these holdings than the accepted requirements of res ipsa loquitur. The language in these carrier cases, however, does show the relationship between the inference of negligence which may be raised against a common carrier and that which arises through the doctrine of res ipsa loquitur.[41] It appears doubtful that the decisions in these early cases are of much importance in determining whether, under a given set of facts, a case of res ipsa loquitur is presented.[42] For example, in *Knight v. Lincoln Traction Co.*,[43] the plaintiff, a passenger of defendant bus company, sustained injuries resulting from a collision between the bus on which she was riding and an automobile, but the court refused to apply the doctrine, stating:[44]

> [W]here a common carrier is operating a bus on a public street, and is struck by an automobile, causing injuries to a passenger on the bus, there is no presumption, from the mere fact of the collision, that the bus company was guilty of negligence.

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38 Rogers v. Kansas City & O. R.R., 52 Neb. 86, 71 N.W. 977 (1897); Burlington & Mo. R.R. v. Westover, 4 Neb. 268 (1876).

39 Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N.W. 270 (1893).

40 Friederich v. Klise, 95 Neb. 244, 145 N.W. 353 (1914). The court analogized this case to a situation where a passing locomotive is the cause of a grass fire, and concluded that the same rules were applicable in both situations.

41 In Chicago B. & Q. R.R. v. Howard, 45 Neb. 570, 63 N.W. 872 (1895), it was stated that the "inference of negligence against a railroad company must be a reasonable one, and where it is impossible to infer negligence from established facts without reasoning irrationally and contrary to common sense and experience of average men, there is no question for the jury, and the court should direct a verdict for the defendant."

42 Other than in a few of the early common carrier cases which mentioned res ipsa by name, such as Lincoln Traction Co. v. Webb, 73 Neb. 136, 102 N.W. 258 (1905), this group of decisions has yet to be cited as authority for applying res ipsa loquitur.

43 127 Neb. 447, 255 N.W. 774 (1934).

44 Knight v. Lincoln Traction Co., 127 Neb. 447, 449, 255 N.W. 774, 775 (1934).

This holding is contrary to the generally accepted rules applicable to a collision involving a common carrier which causes injury to a passenger.[45] Furthermore, the holding cannot be reconciled with language appearing in *Lincoln Traction Co. v. Shepard.*[46] In that case the court refused to allow the plaintiff the benefit of the doctrine when she was injured while alighting from defendant's streetcar. The court pointed out the difference between this situation and the case of a derailment or collision, and then concluded that res ipsa loquitur would apply in the latter.

From the above it is apparent that application of the doctrine has been very restricted. The only situations where the doctrine is applied are those factual situations warranting almost a presumption of negligence, or where the direct evidence of negligence is nearly sufficient in itself to establish liability.[47] The court appears reluctant to give the plaintiff the benefit of any doubt by submitting the case to the jury, thus enabling the fact-finders to determine whether the inference raised by the doctrine is sufficient to constitute a preponderance of the evidence when weighed against any evidence the defendant might offer. In some cases, as indicated, this amounts to a gross injustice.

III. THE PROCEDURAL EFFECT OF THE DOCTRINE

The greatest area of confusion surrounding the application of res ipsa loquitur pertains to the procedural effect to be given the rule after the plaintiff has convinced the court of its applicability.[48] No less than three positions have been taken. The first, and that followed by a majority of the courts,[49] is that once the plaintiff has made out a case of res ipsa loquitur a permissible

[45] See Capital Transit Co. v. Jackson, 149 F.2d 839 (D.C. Cir. 1945).

[46] 74 Neb. 369, 104 N.W. 882 (1905), *aff'd on rehearing,* 74 Neb. 374, 107 N.W. 764 (1906).

[47] Asher v. Coca-Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961) (dead mouse in a bottle of Coca-Cola); Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N.W.2d 228 (1955) (folding chair collapsed, and it was shown that braces on the sides had become loose); Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry., 147 Neb. 880, 25 N.W.2d 396 (1947) (railroad cars broke loose from coupling because of a bent pin-rod and pin-rod casting); Miratsky v. Breseda, 139 Neb. 229, 297 N.W. 94 (1941) (temporary bleachers collapsed).

[48] For an interesting series of articles on this subject, see Carpenter, *The Doctrine of Res Ipsa Loquitur in California,* 10 So. Cal. L. Rev. 166 (1937); Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter,* 10 So. Cal. L. Rev. 459 (1937); Carpenter, *Res Ipsa Loquitur: A Rejoinder to Professor Prosser,* 10 So. Cal. L. Rev. 467 (1937).

[49] Prosser, Torts 211 (2d ed. 1955).

inference of negligence arises.[50] The question of negligence is then submitted to the jury and it is allowed to determine whether the circumstantial evidence adduced is sufficient to bring home negligence to the defendant. The jury is permitted, but not compelled,[51] to accept this circumstantial evidence. In this regard the Nebraska court has said that res ipsa loquitur takes the place of direct evidence as affecting the burden of proceeding with the case.[52] However, the burden of proof is not shifted,[53] and the defendant is not compelled to introduce evidence on his behalf. Of course, failure to do so is likely to result in a verdict for the plaintiff.

The second position adopted raises a rebuttable presumption of negligence in favor of the plaintiff.[54] Under this theory the defendant is required to introduce evidence on his own behalf, the absence of which will result in a directed verdict for the plaintiff. However, the burden of proof still lies with the plaintiff and will not be shifted.[55]

Under a third theory the establishment of a res ipsa case will shift the burden of proof from the plaintiff to the defendant.[56] This theory, in effect, requires the defendant to establish that he was not negligent by a preponderance of the evidence, and is by far the minority view.[57]

Nebraska appears to have adopted the position that res ipsa loquitur warrants an inference of negligence, despite the fact that

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[50] Asher v. Coca-Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961); Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W.2d 224 (1954); Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N.W.2d 127 (1954); Miratsky v. Breseda, 139 Neb. 229, 297 N.W. 94 (1941). For cases in other jurisdictions see PROSSER, TORTS 211 n.90 (2d ed. 1955).

[51] Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N.W.2d 127 (1954).

[52] Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N.W.2d 228 (1955).

[53] Mercer v. Omaha & C. B. St. R.R., 108 Neb. 532, 188 N.W. 296 (1922); Lincoln Traction Co. v. Webb, 73 Neb. 136, 102 N.W. 258 (1905).

[54] PROSSER, TORTS 212 (2d ed. 1955).

[55] Schecter v. Hann, 305 Ky. 794, 205 S.W.2d 690 (1947); Kerner v. Charles C. Tanner Co., 31 R.I. 203, 76 Atl. 833 (1910). Although Nebraska does not follow the rebuttable presumption rule, this was the view taken in Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N.W. 270 (1893).

[56] Coca-Cola Bottling Co. v. Mattice, 219 Ark. 428, 243 S.W.2d 15 (1951); Jacks v. Reeves, 78 Ark. 426, 95 S.W. 781 (1906).

[57] PROSSER, TORTS 212 (2d ed. 1955); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 244, 250 (1936).

an examination of the case law reveals the use of language which could be interpreted as meaning that, in a given fact situation, a rebuttable presumption might be raised by the doctrine. For example, the following statement found in *Sipprell v. Merner Motors*[58] might indicate that a presumption of negligence would be raised if the doctrine was applicable: "The fact that an invitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any *presumption* of negligence on the part of its owner, and the doctrine of res ipsa loquitur does not apply." In *Asher v. Coca-Cola Bottling Co.*[59] the court, while discussing the rule, stated: "The rule of res ipsa loquitur is a rule of evidence. It is not conclusive and the inference or *presumption* existing under the rule *may be overcome by evidence.*" These statements, when analyzed in a vacuum, are of little assistance in determining the actual effect the court may give to the doctrine.[60] Consequently, there appears to be no real uncertainty as to the position taken by the Nebraska court.[61] In *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*[62] it was stated that the "doctrine of res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel it." Furthermore, in *Benedict v. Eppley Hotel Co.*[63] the court held erroneous an instruction that if the defendant "fails to rebut the presumption or destroy the inference, then your verdict will be in favor of the plaintiff." The court felt the jury was permitted to understand that the defendant was obligated to explain how the accident happened and to overcome by evidence any inference of negligence. The attitude thus taken by the court strongly negates any argument that res ipsa loquitur establishes a presumption of negligence.

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[58] 164 Neb. 447, 455, 82 N.W.2d 648, 654 (1957). (Emphasis added.)

[59] 172 Neb. 855, 859, 112 N.W.2d 252, 255 (1961). (Emphasis added.)

[60] The Nebraska court, like many others, has made casual use of the words "presumption" and "inference," failing to distinguish between the two terms. See, *e.g.*, 25 IOWA L. REV. 816 (1940). Therefore, an examination of the specific language used will be useless in many instances in determining the procedural effect of the doctrine. What is necessary is an analysis of the cases themselves, rather than an analysis of the court's phraseology.

[61] This conclusion is contrary to the position taken in 33 NEB. L. REV. 620. The author there suggests the procedural effect given depends upon the evidentiary situations involved. However, except for the early cases involving common carriers, the Nebraska court has consistently adhered to the position that res ipsa loquitur means that the facts warrant an inference of negligence.

[62] 157 Neb. 923, 925, 62 N.W.2d 127, 129 (1954).

[63] 159 Neb. 23, 33, 65 N.W.2d 224, 231 (1954).

In connection with the Nebraska rule on the procedural effect of the doctrine, a group of cases concerning common carriers is worthy of comment. In *Lincoln Traction Co. v. Webb*[64] and *Lincoln Traction Co. v. Shepard*,[65] each involving injury to a passenger alighting from a streetcar, the court discussed the doctrine as if it raised a presumption of negligence which must be rebutted by the defendant.[66] The reason for the inconsistent positions can be largely attributed to the involvement of a common carrier. Because of the high duty of care owed to passengers, the happening of an accident may justify a presumption of negligence.[67] As pointed out by one authority,[68] res ipsa loquitur became involved with the rules applicable to common carriers, and as a consequence the procedural effects differ depending upon the defendant involved.

It has been suggested that the procedural effect to be attached to a given set of facts which establish a case of res ipsa loquitur should depend, not upon any set rule, but upon the circumstances of each case.[69] That is, one set of facts may justify an inference of negligence, while another situation may be such as to allow a rebuttable presumption. This position is well illustrated by the following example:[70]

> If a piece of mortar falls on the plaintiff from defendant's building it may be that negligence cannot be inferred; if a brick falls from the same building, an inference may be permitted; but sup-

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[64] 73 Neb. 136, 102 N.W. 258 (1905).

[65] 74 Neb. 369, 104 N.W. 882 (1905), *aff'd on rehearing*, 74 Neb. 374, 107 N.W. 764 (1906).

[66] In Lincoln Traction Co. v. Webb, 73 Neb. 136, 102 N.W. 258 (1905), the court held erroneous an instruction which would have shifted the burden of proof to the defendant. The court distinguished between the burden of proof being shifted and a presumption being raised, and concluded that res ipsa loquitur, when applicable, raised a presumption of negligence. In Lincoln Traction Co. v. Shepard, 74 Neb. 369, 373, 104 N.W. 882, 883 (1905), *aff'd on rehearing*, 74 Neb. 374, 107 N.W. 764 (1906) the court stated: "Where negligence is proved, or where from the nature of the accident which was the proximate cause of the injury negligence is presumed, the carrier is then required to show it was no wise at fault."

[67] Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N.W. 270 (1893). *But cf.* Knight v. Lincoln Traction Co., 127 Neb. 447, 255 N.W. 774 (1934).

[68] PROSSER, TORTS 213 (2d ed. 1955); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 260 (1936).

[69] Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 261 (1936).

[70] *Ibid.*

> pose the falling object is an elephant? Could any reasonable jury infer that those in charge had used due care?

This position is well taken, for res ipsa loquitur is a type of circumstantial evidence used to bring home negligence to the defendant. Circumstantial evidence, like any other evidence, can be strong or it can be weak, and when the evidence is so strong that, in the absence of an explanation, no reasonable conclusion is possible but that the defendant was negligent, a rebuttable presumption to that effect seems entirely justifiable. On the other hand where this circumstantial evidence could lead to reasonable opposing conclusions as to the cause of the accident, only an inference of negligence should be drawn. This position, however, has been adopted by only a few courts.[71]

IV. THE EFFECT OF PLEADING SPECIFIC NEGLIGENCE

The courts have adopted four theories in considering the effect of pleading specific allegations of negligence, while at the same time relying on res ipsa loquitur to establish the negligence of the defendant. Basically, these positions are: (1) the plaintiff has waived the right to rely on the doctrine;[72] (2) the plaintiff may take advantage of the doctrine if the inference of negligence supports the specific allegations;[73] (3) res ipsa loquitur is available to the plaintiff provided the specific allegation is accompanied by a general allegation of negligence;[74] and (4) the doctrine is available without regard to the form of the pleading.[75]

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[71] Kleinman v. Banner Laundry Co., 150 Minn. 515, 186 N.W. 123 (1921); Keithley v. Hettinger, 133 Minn. 36, 157 N.W. 897 (1916); Angerman Co. v. Edge, 76 Utah 394, 290 Pac. 169 (1930).

[72] Roos v. Consumers Pub. Power Dist., 171 Neb. 563, 106 N.W.2d 871 (1961); Weston v. Gold & Co., 167 Neb. 692, 94 N.W.2d 380 (1959); Mischnick v. Iowa-Nebraska Light & Power Co., 125 Neb. 598, 251 N.W. 258 (1933).

[73] Pickwick Stages Corp. v. Messinger, 44 Ariz. 174, 36 P.2d 168 (1934); Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S.E. 329 (1904); Short v. D. R. B. Logging Co., 192 Ore. 383, 235 P.2d 340 (1951).

[74] Leet v. Union Pac. R.R., 25 Cal. 2d 605, 155 P.2d 42 (1944); Colorado Spring & Interurban Ry. v. Reese, 69 Colo. 1, 169 Pac. 572 (1917); Krueger v. Richardson, 326 Ill. App. 205, 61 N.E.2d 399 (1945); Independent E. Torpedo Co. v. Gage, 206 Okla. 108, 240 P.2d 1119 (1951); Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 P.2d 254 (1940); D'Amico v. Conguista, 24 Wash. 2d 674, 167 P.2d 157 (1946); Weggeman v. Seven-Up Bottling Co., 5 Wis. 2d 503, 93 N.W.2d 467(1958), *rehearing denied, mandate amended,* 5 Wis. 2d 503, 94 N.W.2d 645 (1959).

[75] Briganti v. Connecticut Co., 119 Conn. 316, 175 Atl. 679 (1934); Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 193 S.W. 1053 (1917).

The Nebraska court has chosen to adhere to the first view,[76] namely, that by pleading specific acts of negligence as a cause of action the plaintiff may not at the same time rely on res ipsa loquitur. This view, as will be shown by an examination of the cases, lends itself to unjust results in many situations. In *Weston v. Gold & Co.*,[77] for example, a five year-old boy lost his toe when it became lodged between a step and the side panel of an escalator. The plaintiff alleged specific acts of negligence on the part of the defendant and at the same time relied on the doctrine. The trial court was held to be in error in submitting the case to the jury under a res ipsa theory. It was said:[78]

> The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied.

In other words, the court held that when the plaintiff indicates apparent knowledge as to the cause of the accident, he cannot use the inference of negligence arising from the doctrine to help establish these facts. The basic fallacy in this position is an assumption that res ipsa loquitur is an alternative method of establishing negligence rather than *what it actually is*, a type of circumstantial evidence.[79]

However, the court has announced that a plaintiff's right to rely on the doctrine will not be prejudiced by the introduction of negligent acts on the part of the defendant which do not clearly establish the facts or which leave the matter doubtful.[80] The language used is very unclear, and it is extremely doubtful the court meant to imply that a plaintiff may allege negligence generally and rely on the doctrine, while at the same time introducing into evidence the specific acts of negligence which caused the injury.[81]

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[76] See cases cited note 73 *supra*.

[77] 167 Neb. 692, 94 N.W.2d 380 (1959).

[78] Weston v. Gold & Co., 167 Neb. 692, 699, 94 N.W.2d 380, 385 (1959).

[79] See authorities cited note 4 *supra*.

[80] Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N.W.2d 127 (1954).

[81] This conclusion is drawn from the reasoning given by the court for not allowing specific allegations of negligence. The theory is that the plaintiff should be unable to specify particular acts of negligence if the doctrine is applicable. See note 8 *supra*. Applying this same reasoning to an attempt to introduce into evidence the specific acts causing the injury, the logical result is that the doctrine cannot be invoked.

Apparently the court is merely stating that a plaintiff may rely on the doctrine to prove up the specific negligent acts causing the injury, and at the same time show collateral acts of negligence on the part of the defendant. That is, negligence of the defendant can be introduced into evidence, but it cannot be such as to show the exact cause of the injury to the plaintiff. Consequently, a plaintiff wishing to rely on res ipsa loquitur can neither allege specific acts of negligence nor can he introduce into evidence any fact tending to establish the exact cause of the accident.

The undesirability of applying this waiver theory is demonstrated by the resulting dilemma in which the plaintiff's attorney finds himself when confronted with an election of alternatives by which to establish the defendant's negligence. On the one hand he has knowledge of the Nebraska court's reluctance to hold res ipsa loquitur applicable under a given set of facts, while on the other hand he may not believe his knowledge of the facts sufficient to establish negligence by direct evidence. This dilemma is not only perplexing to the attorney, but it is unjust to his injured client. A party has been injured; the circumstances are indicative of negligence; the facts may show some direct evidence of defendant's negligence; yet recovery may be disallowed because of the pleadings used.

A further point which merits discussion is the incongruity between the Nebraska rule of pleading specific acts of negligence and the procedural effect of the doctrine in this state. As previously indicated, Nebraska follows the rule that res ipsa loquitur warrants an inference of negligence rather than that it raises a rebuttable presumption. The defendant is not required to introduce the slightest bit of evidence in order to succeed, for the jury can accept or reject this inference as satisfying the necessary quantum of proof. It will be remembered, on the other hand, that the presumption theory requires the defendant to produce sufficient evidence to rebut the plaintiff's case. Thus under this latter theory the establishment of a res ipsa case gives the plaintiff a definite procedural advantage, while under the inference theory such an advantage is not given. The point is then, why give the defendant an added advantage by putting the plaintiff to what amounts to an almost impossible election? When a court adopts the presumption theory, the waiver rule of specific pleadings might possibly be justified. However, to this writer, a sound analysis of res ipsa indicates that the Nebraska position of waiver has no merit regardless of the procedural effect given to the doctrine. Res ipsa loquitur is a rule of circumstantial evidence used to bring home negligence to an individual defendant when the

three requirements of the rule are met. Allegations of specific acts of negligence, provided those acts are consistent with the negligence to be inferred, are in no manner inconsistent with the doctrine. If anything, the allegation and establishment of specific acts would tend to strengthen the inference of negligence that may be drawn from the facts.

One final point should be mentioned. In *Asher v. Coca-Cola Bottling Co.*[82] the Nebraska court held that an action based on two theories, res ipsa loquitur and breach of warranty, could be maintained, and that the principle of election was not applicable. The court stated that neither remedy was inconsistent with the other because only one wrong was alleged. If this is the case, why is a plaintiff denied the right to plead both res ipsa loquitur and specific acts of negligence? Neither theory is inconsistent with the other, but they are, in reality, one and the same. Each is used to bring home the negligence of the defendant—one by circumstantial evidence, the other by direct evidence. It is recognized that the holding in the *Asher* case and the position now advocated have basic differences,[83] the point now made being the unreasonableness and unsound basis of the Nebraska rule which precludes reliance on res ipsa if specific acts of negligence are alleged.

V. CONCLUSION

The purpose here has been to present a critical analysis of the positions adopted by the Nebraska court with respect to the doctrine of res ipsa loquitur. Basically, there appears to be a two-fold problem. First, the court has been reluctant to apply the rule, thus causing much uncertainty as to what factual situations will bring the doctrine into effect. In view of the fact that res ipsa loquitur is merely evidence of negligence to be weighed by the jury, this restrictive view seems to be unsound and unjust. A strict application may be perfectly justifiable if res ipsa loquitur is held to a rebuttable presumption of negligence, but this is not the Nebraska rule. Therefore what is now advocated is a more liberal application of the rule in conformity with the three generally accepted requirements necessary to bring the doctrine into operation.

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[82] 172 Neb. 855, 112 N.W.2d 252 (1961).

[83] In the *Asher* case, the theories advanced by the plaintiff were two different causes—breach of warranty and negligence. Allowing a plaintiff to plead specific acts of negligence and rely on res ipsa loquitur is merely allowing two methods of establishing the same cause of action—negligence.

A further change is also suggested. The Nebraska position with regard to pleading specific acts of negligence is inconsistent with a conventional analysis of the doctrine. Res ipsa loquitur is not an alternative method by which tort liability is imposed upon a defendant. It is a type of circumstantial evidence used to show the negligence that was the proximate cause of injury to the plaintiff. Consequently there appears to be no sound reason for denying a plaintiff the use of the doctrine when specific acts of negligence are pleaded.

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