

The Doctrine of Res Ipsa Loquitur in New York

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Whether because of Sections 118, 119 and 120, the courts will now adopt the view that the reasons for barring the claim no longer exist, or whether the legislature will deem it advisable to amend Section 130, by striking out therefrom the words " * * * against a * * * person who, or corporation which, would have been liable to an action in favor of the decedent * * *," is conjectural matter. But, though the above limitation exists, it is most desirable that we do not enlarge the scope of dependency of the wrongful death action on the primary personal injury action. The true purpose of the statute is to allow to the next of kin a recovery of money damages where they have suffered inestimable loss by reason of the death of the injured person, and any attempt to defeat this right must be discouraged by the courts. It is therefore submitted that the ruling in the *Kwiatkowski* case, barring the statements of the deceased from being received in evidence, was quite correct.

HERMAN T. PERS.

THE DOCTRINE OF RES IPSA LOQUITUR IN NEW YORK.

In an ordinary negligence action, the plaintiff must convince the jury that the defendant has been negligent, otherwise the latter will win. The onus of convincing the jury on this issue is called the burden of proof and the plaintiff must satisfy this burden by a preponderance of the evidence in his favor.¹ He must show (1) the legal harm done to him, (2) how the accident happened, and (3) that it was proximately caused by the defendant's negligence.² This requires a great deal of positive action on the plaintiff's part and is properly called a burden. But if the plaintiff comes into court with a *res ipsa loquitur* ("The thing speaks for itself") case, and every plaintiff undoubtedly finds this highly desirable, he is spared a great deal of work though the burden of proof on the whole case still rests on him.³ For where the maxim *res ipsa loquitur* applies, there is a

¹ *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901); *Goldstein v. Pullman Co.*, 220 N. Y. 549, 116 N. E. 376 (1917).

² HARPER, *THE LAW OF TORTS* (1933) § 77.

³ *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, 31 N. E. 870 (1892); *Hogan v. Manhattan Ry. Co.*, 149 N. Y. 23, 43 N. E. 403 (1896); *Piehl v. Albany Ry. Co.*, 162 N. Y. 617, 57 N. E. 1122 (1900); *Day v. Metropolitan Street Ry. Co.*, 163 N. Y. 447, 57 N. E. 751 (1900); *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901); *Cunningham v. Dady*, 191 N. Y. 152, 83 N. E. 689 (1908); *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805 (1909); *Plumb v. Richmond Light & Ry. Co.*, 233 N. Y. 285, 135 N. E. 504 (1922); *Sandler v. Garrison*, 249 N. Y. 236, 164 N. E. 36 (1928); *Galbraith v. Busch*, 267 N. Y. 230, 196 N. E. 36 (1935); *Tortora v. State*, 269 N. Y. 167, 199 N. E. 44 (1935); *Bressler v. N. Y. Rapid Transit Corp.*, 270 N. Y. 409, 1 N. E. (2d) 828 (1936); *Lessig v. N. Y. Central R. R. Co.*, 271 N. Y. 250, 2 N. E. (2d) 646 (1936); *Smith v. Brooklyn Heights*, 82 App. Div. 531, 81 N. Y. Supp. 838 (2d Dept. 1903); *Whitcher v. Board of Education*, 236 App. Div. 293, 258 N. Y. Supp. 556 (3d Dept. 1932).

rebuttable presumption⁴ or inference⁵ that the defendant has been negligent and the plaintiff is relieved, to a certain extent, from showing by direct evidence that the negligence of the defendant proximately caused the injury, or to put it positively, all the plaintiff has to do is to prove the injury suffered by him and the circumstances under which the accident occurred.⁶ But when can a plaintiff enjoy the benefits of a *res ipsa loquitur* case? (*i.e.* when do the circumstances of the case unexplained by the plaintiff justify the presumption or inference of the defendant's negligence?).

It is generally accepted that a *res ipsa loquitur* case must be composed of certain peculiar elements or limitations:⁷ (1) the instrumentality or agency which caused the injury must have been within the exclusive and absolute control of the defendant; (2) the injury should be one which would not have occurred, in the *ordinary course of events*, had not the defendant been negligent in his control; and (3) the plaintiff must not have contributed in any voluntary way, whether negligent or not, to his injury.

The first and third limitations that constitute the composition of *res ipsa loquitur*, as outlined above, have not generally caused any doubts in the minds of counsel and judge for the former simply requires the plaintiff to definitely establish that the defendant and the defendant alone must have been negligent⁸ and the latter requires the plaintiff to have been an innocent victim having nothing

⁴ BOHLEN, LAW OF TORTS (1926) 637.

⁵ 2 COOLEY, TORTS (3d ed. 1906) 1425.

⁶ *McKinney v. New York, W. & B. Ry. Co.*, 179 N. Y. Supp. 535 (1919); *Courtney v. Gainsborough Studios*, 186 App. Div. 820, 174 N. Y. Supp. 855 (1st Dept. 1919).

⁷ 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2509, "What is the final shape of the rule can hardly be predicted. But the following consideration ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the person injured." In the language of Lamar, J., in *Chenall v. Palmer B. Co.*, 117 Ga. 106, 43 S. E. 443 (1903): "All that the plaintiff should be required to do in the first instance is to show that the defendant owned, operated, and maintained, or controlled and was responsible for the management and maintenance of, the thing doing the damage; that the accident was of a kind which, in the absence of proof of some external cause, does not ordinarily happen without negligence."

⁸ The question of control is often doubtful and if the plaintiff does not show exclusive and absolute control in the defendant there will be no *res ipsa loquitur* case. See *Sandler v. Garrison*, 249 N. Y. 236, 164 N. E. 36 (1928), wherein a lock dropped on the plaintiff while she was standing underneath defendant's elevated railway. Expert testimony showed that the lock must have been thrown and the cost held that no presumption existed that it was thrown by the defendant's employees even though similar locks were used on the inside of the defendant's cabs for a stranger may have been the wrongdoer; *Slater v. Barnes*, 241 N. Y. 284, 149 N. E. 859 (1925), wherein it was held that a falling ceiling upon a tenant in possession did not create a *res ipsa* case since the landlord had no control of the premises.

at all to do with causing the accident.⁹ But element number two has caused much confusion.¹⁰ This is undoubtedly due to a conclusion that there is a standardized *res ipsa loquitur* case and to a failure to comprehend that whether the circumstances under which the accident occurred, unexplained, justify a presumption or inference of negligence depends upon the specific set of facts of each case or upon the nature of each accident.¹¹ That the accident would not have occurred, *ordinarily*, if the defendant had not been negligent either in his maintenance, supervision, or user of the apparatus causing the injury depends upon the common knowledge of man as to how the apparatus usually behaves. In a recent opinion¹² Judge Lehman says:

"The problem in each case is whether the circumstances unexplained *do* justify an inference of negligence. Ordinarily, circumstantial evidence is insufficient where the circumstances are consistent with freedom from wrong. In the administration of the law arbitrary rules cannot be substituted for logically probative evidence. The doctrine of *res ipsa loquitur* is not an arbitrary rule. It is rather a *common sense* (italics ours) appraisal of the probative value of circumstantial evidence. It requires evidence which shows at least probability that a particular accident could not have occurred without legal wrong by the defendant. To negative every possibility that the accident occurred in some extraordinary manner which would exculpate the defendant is often impossible. Probable certainty is expected and not absolute certainty."¹³

Thus, if under the circumstances of the case, the probability that the accident occurred from a latent defect or sudden strain applied to the apparatus, as where: a cable parts;¹⁴ a flywheel breaks;¹⁵ a boiler bursts;¹⁶ or where an automobile suddenly swerves and leaves the

⁹ *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805 (1909), wherein the decedent was killed by the breaking and falling of the scaffold upon which he was working. The court held that *res ipsa loquitur* was not applicable—the workmen, one of them being the decedent, had put great strain on the scaffold and this strain probably caused the break.

¹⁰ See dissenting opinion by Judge Crane in *Galbraith v. Busch*, 267 N. Y. 230, 196 N. E. 36 (1935).

¹¹ *Pinney v. Hall*, 156 Mass. 225, 30 N. E. 1016 (1892); *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61 (1895); *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901).

¹² *Galbraith v. Busch*, 267 N. Y. 230, 196 N. E. 36 (1935).

¹³ *Scott v. London & St. K. Docks Co.*, 3 H. & C. 596 (1865) (injury to passerby from the falling of goods from a crane. Erle, C. S., said: "There must be reasonable evidence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of events does not happen if those who have the management use proper care, in the absence of explanation by the defendant, it affords reasonable evidence that the accident arose from want of care").

¹⁴ *Duhme v. Hamburg-American Packet Co.*, 184 N. Y. 404, 77 N. E. 386 (1906).

¹⁵ *Piehl v. Albany Ry. Co.*, 162 N. Y. 617, 57 N. E. 1122 (1900).

¹⁶ *Losee v. Buchanan*, 51 N. Y. 476 (1872).

road; ¹⁷ is just as great or greater than the probability that the accident resulted from the defendant's want of care, then there is no justification for a presumption or inference of negligence. To do so would be to base it on mere conjecture. In all such cases the balance of probabilities between causes which entail liability and others which do not is equal enough so that an inference of fact which entails liability is the result of mere speculation.¹⁸ For these things frequently happen without anybody's fault. It is not the mere happening of the accident that warrants the presumption or inference of negligence, but the circumstances and character of the occurrence.¹⁹ Thus the doctrine of *res ipsa loquitur* has been applied where the plaintiff was injured by: a brick falling from the structure of a bridge;²⁰ a building falling into the street;²¹ a piece of iron dropping off an elevated structure;²² a falling elevator car;²³ a window falling from a transom;²⁴ a stove exploding because of confined water in pipes that should have been emptied out;²⁵ falling through a sidewalk into a coal chute²⁶ or through a grating in a sidewalk;²⁷ a cracked glass dropping out on a passenger when a train stopped suddenly;²⁸ and by a train that was supposed to be "braked" moving suddenly while goods were being unloaded.²⁹ In these cases it was decided "that the only reasonable conclusion is that the accident was attributable * * * and was due to negligence on the part of the defendant, for the result was predictable and the condition of which could easily be ascertained."³⁰

Thus it is seen that there is no definite criteria for determining when negligence is presumable or inferable for there is no typical *res ipsa loquitur* case. The test is, to reiterate, whether the circumstances, though unexplained, show that *ordinarily* the accident would not have occurred unless the defendant were negligent. The application of this test, the other elements or limitations being present of course, will tend to lessen the confusion and vagueness that attend the "mysterious" maxim *res ipsa loquitur*.

¹⁷ Galbraith v. Busch, 267 N. Y. 230, 196 N. E. 36 (1935).

¹⁸ Tortora v. State, 269 N. Y. 167, 199 N. E. 44 (1935).

¹⁹ Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901).

²⁰ Dearney v. London B. & S. C. R. Co., 6 Q. B. 759 (1870).

²¹ Mullen v. St. John, 57 N. Y. 567 (1874).

²² Hogan v. Manhattan Ry. Co., 149 N. Y. 23, 43 N. E. 403 (1896).

²³ Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901).

²⁴ Whitcher v. Board of Education, 236 App. Div. 293, 258 N. Y. Supp. 556 (3d Dept. 1932).

²⁵ Tortora v. State, 269 N. Y. 167, 199 N. E. 44 (1935).

²⁶ Bender v. Dazian, 180 N. Y. Supp. 461 (1920).

²⁷ Herman v. Josephsohn, 188 App. Div. 163, 176 N. Y. Supp. 561 (1st Dept. 1919).

²⁸ Bressler v. N. Y. Rapid Transit Corp., 270 N. Y. 409, 1 N. E. (2d) 828 (1936).

²⁹ Lessig v. N. Y. Central R. R. Co., 271 N. Y. 250, 2 N. E. (2d) 646 (1936).

³⁰ Tortora v. State, 269 N. Y. 167, 199 N. E. 44 (1935).

To what extent the plaintiff's burden is lightened by a *res ipsa loquitur* case (*i.e.* what exact procedural advantage is given to the plaintiff) is still the source of much confusion and contradiction in the courts of various jurisdictions³¹ and former decisions of the New York courts were not totally free from inconsistencies.³² It is believed that the difficulty has arisen in part from a confusion of terms and a failure to draw the proper distinction between *presumptions* and *inferences*.³³

What will be the effect of a *res ipsa loquitur* case if it is treated as creating a *presumption* of negligence and what will its effect be if it permits an *inference* of negligence? The plaintiff will receive a much greater advantage if his *res ipsa loquitur* case will create the former effect for in such an instance, upon the close of the plaintiff's case, if the defendant rests without offering evidence, the plaintiff, if his evidence is credible and unsuspecting, will be entitled to a directed verdict.³⁴ This will have the effect of *compelling* the defendant to come forward with the evidence and explain how the accident happened or else lose the case without an opportunity for jury consideration. But if *res ipsa loquitur* merely permits the jury to *infer* negligence then the sole advantage that will accrue to the plaintiff is that he will be able to pass the judge and get to the jury, *i.e.* it will be enough to avoid a non-suit and the jury will be permitted and not compelled to draw an inference that the defendant has been negligent. This "permissible inference" satisfies the plaintiff's usual burden of evidence and creates an opportunity for reasonable men to find in his favor.³⁵ It follows that where *res ipsa loquitur* has such an effect, the judge can never direct a verdict for the plaintiff upon the close of his

³¹ 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2509; Heckel & Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724; Note (1929) 3 ST. JOHN'S L. REV. 248.

³² Heckel & Harper, *op. cit. supra* n. 31, at 726; Note (1929) 3 ST. JOHN'S L. REV. 248-250; compare Hogan v. Manhattan Ry. Co., 149 N. Y. 23, 43 N. E. 403 (1896) with Breen v. N. Y. Ry. Co., 109 N. Y. 297, 16 N. E. 60 (1888) and with Maher v. Manhattan Ry. Co., 53 Hun 506 (N. Y. 1889), and with Stallman v. New York Steam Co., 17 App. Div. 397, 45 N. Y. Supp. 161 (1st Dept. 1897). In the latter cases though defendant rested upon close of the plaintiff's case without evidence, the case was sent to the jury.

³³ WIGMORE, EVIDENCE (2d ed. Supp. 1934) § 2509; Glowacki v. North Western Ohio R. & P. Co., 116 Ohio 541, 157 N. E. 21 (1927); Ensel v. Lumbar Ins. Co., 88 Ohio 269, 102 N. E. 955 (1913), where the court said, "The error of counsel throughout this case, lies in a confusion of terms. They mistake *inference* for *presumption*, a slip too often made by judges as well as lawyers. A *presumption* is a rule which the law makes upon a given set of facts; an *inference* is a conclusion which, by means of data, founded upon common experience, natural reason draws from facts which are proven."

³⁴ Hogan v. Manhattan Ry. Co., 149 N. Y. 23, 43 N. E. 403 (1896); Moelia v. Nassau Elec. Co., 127 App. Div. 243, 111 N. Y. Supp. 70 (2nd Dept. 1908); Levine v. Brooklyn Q. Ry. Co., 134 App. Div. 606, 119 N. Y. Supp. 315 (2d Dept. 1909).

³⁵ Prosser, *Procedural Effect of Res Ipsa Loquitur* (1935-36) 20 MINN. L. REV. 244.

case, though the defendant says nothing, for whether the inference can be drawn is a question of fact for the jury and not a conclusion of law.³⁶

A casual reading of the cases on *res ipsa loquitur* in New York seems to indicate that the courts have avoided treating the doctrine as creating a presumption and have decided that its proper effect should be a permissible inference, but the true answer is to the contrary. Much confusion would be avoided if the courts would refrain from using the words "inference" and "presumption" indiscriminately. In *Hogan v. Manhattan Railway Company*,³⁷ a Court of Appeals case which has never been overruled and must therefore be regarded as the law today, the plaintiff while driving along beneath the defendant's elevated railway was injured when an iron bar fell upon him from the tracks. After proving his case, the plaintiff moved for a directed verdict when the defendant failed to offer any evidence. The motion was granted. Since this case, there has never been another directly on this point in the Court of Appeals although two similar cases³⁸ (*i.e.* where plaintiff obtained a directed verdict upon the close of his case when the defendant offered no evidence at all) were decided in like manner in the second department of the Appellate Division. These are the only cases in New York on this point and there are several logical reasons why there have been no later confirming cases. Perhaps the defendants in subsequent actions realized that if they did not offer any rebuttal the plaintiff would move for a directed verdict. In other cases the plaintiff may not have moved for a directed verdict, or the credibility of the plaintiff's witnesses may have been doubtful enough to create suspicion as to the truth of their testimony in the mind of the judge so that he would refuse the plaintiff's motion. In *Hull v. Littauer*,³⁹ the court said on the latter point:

"Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness."

But the fact that there are so few directed verdicts for the plaintiff in *res ipsa loquitur* cases does not alter the fact that the *Hogan*

³⁶ See note 33, *supra*. See Carpenter, *Doctrine of Res Ipsa Loquitur* (1933-34) 1 CH. L. REV. 523. Professor Carpenter says that where *res ipsa* case merely lays down a foundation for a permissible inference of negligence on the part of the defendant, the plaintiff will be entitled to go to the jury and a motion for a non-suit of the plaintiff or a direct verdict for the defendant will be denied.

³⁷ 149 N. Y. 23, 43 N. E. 403 (1896).

³⁸ *Moglia v. Nassau Elec. Co.*, 127 App. Div. 243, 111 N. Y. Supp. 70 (2d Dept. 1908); *Levine v. Brooklyn Q. Ry. Co.*, 134 App. Div. 606, 119 N. Y. Supp. 315 (2d Dept. 1909).

³⁹ 162 N. Y. 567, 572, 57 N. E. 102 (1900).

case⁴⁰ is still the law in New York on this point and is therefore authority that *res ipsa loquitur* creates a *presumption* of the defendant's negligence in New York. But in spite of this early case, the New York Court of Appeals in innumerable subsequent decisions⁴¹ has continually used the word "inference" instead of "presumption" and at different times⁴² has used them interchangeably as though they were synonymous. But, to reiterate, no matter which word was used the *Hogan* case⁴³ has never been overruled and must still be regarded as the law in New York.⁴⁴ It would seem that this apparent inconsistency or confusion in the use of the words "presumption" and "inference" can be explained by the following: since there has never been a directed verdict case after 1909, the case always went to the jury, who decided in favor of either the plaintiff or defendant. But how did these average, reasonable men decide in favor of either party? They knew the facts of the case and from the evidence introduced by both parties arrived at a conclusion, deductively obtained, as to whether the plaintiff had proved the defendant negligent by a preponderance of the evidence in his favor. That is, the jury drew an inference (a question of fact)⁴⁵ from the *whole* case. Thus the use by the court of the words "inference" and "presumption" in the same case was not incorrect for when the plaintiff proved his *res ipsa loquitur* case, a presumption of the defendant's negligence arose. But once the case was submitted to the jury, they were permitted to draw an inference of fact, from the evidence presented on the *whole* case, as

⁴⁰ 149 N. Y. 23, 43 N. E. 403 (1896).

⁴¹ *Day v. Metropolitan Street Ry. Co.*, 163 N. Y. 447, 57 N. E. 751 (1900); *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901); *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805 (1909); *Galbraith v. Busch*, 267 N. Y. 230, 196 N. E. 36 (1935); *Tortora v. State*, 269 N. Y. 167, 199 N. E. 44 (1935); *Lessig v. N. Y. Central R. R. Co.*, 271 N. Y. 250, 2 N. E. (2d) 646 (1936); *Smith v. Brooklyn Heights*, 82 App. Div. 531, 81 N. Y. Supp. 838 (2d Dept. 1903).

⁴² *Solarz v. Manhattan Ry. Co.*, 8 Misc. 656, 29 N. Y. Supp. 1123 (1894), *aff'd without opinion*, 155 N. Y. 645, 49 N. E. 1104 (1898); *Piehl v. Albany Ry. Co.*, 162 N. Y. 617, 57 N. E. 1122 (1900); *Plumb v. Richmond Light Ry. Co.*, 233 N. Y. 285, 135 N. E. 504 (1922); *Dumes v. Sizer*, 3 App. Div. 11, 37 N. Y. Supp. 929 (4th Dept. 1896).

⁴³ 149 N. Y. 23, 43 N. E. 403 (1896).

⁴⁴ Prosser, *Procedural Effect of Res Ipsa Loquitur* (1935-36) 20 MINN. L. REV. 249, n. 47, where the writer says that most of the New York cases support the presumption view and he cites many New York decisions. Carpenter, *Doctrine of Res Ipsa Loquitur* (1933-34) 1 CHI. L. REV. 525, agrees with Professor Prosser on this point.

⁴⁵ WIGMORE, EVIDENCE (2d ed. Supp. 1934) § 2509; *Enser v. Lumbar Ins. Co.*, 88 Ohio 269, 102 N. E. 955 (1913), where the court said, " * * * an inference is a conclusion which, by means of data, founded upon common experience, natural reason draws from facts which are proven." In *Glowacki v. North Western Ohio R. & P. Co.*, 116 Ohio 451, 157 N. E. 21 (1927) the court said, "Under certain facts a jury would be warranted in inferring negligence, which inference if drawn by the jury, would become a conclusion founded upon common experience." Ohio, incidentally, favors the permissible inference view.

to whether the plaintiff's presumption had been rebutted. It is also highly probable, that because of the rarity of a *res ipsa* case calling for a directed verdict, the courts have become accustomed to the word "inference" and make no attempt (it not being necessary to arrive at the correct decision) to distinguish it from a "presumption".

Some courts of other jurisdictions⁴⁶ have given *res ipsa loquitur* the permissible inference effect and defend it vigorously against any suggestion that it be given the New York effect, *i.e.* that of a presumption. This is a long way from concluding negligence as a matter of law. Thus the defendant may still win if the jury does not draw an inference of negligence though he did not attempt to rebut the plaintiff's case. The courts sponsoring this viewpoint argue that the circumstantial evidence that is substituted for direct evidence is evidence to be weighed and not necessarily to be accepted as conclusive.⁴⁷

Other jurisdictions⁴⁸ have applied *res ipsa loquitur* in a manner that requires the defendant upon the close of the plaintiff's case to affirmatively disprove his negligence by a preponderance of the evidence or else lose the case, a method which the New York courts⁴⁹

⁴⁶ *Stebel v. Connecticut Co.*, 90 Conn. 24, 96 Atl. 171 (1920); *Schiesel v. S. Z. Poli Realty Co.*, 108 Conn. 115, 142 Atl. 812 (1928); *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443 (1903); *Candler v. Automatic Heating*, 40 Ga. 280, 149 S. E. 287 (1929); *Anderson v. Fort Dodge, D. M. & S. Ry.*, 208 Iowa 369, 226 N. W. 151 (1929); *Harvey v. Borg*, 218 Iowa 1128, 257 N. W. 190 (1934); *Chaisson v. Williams*, 130 Me. 341, 156 Atl. 154 (1931); *Jones v. Tri-State Tel. & Tel. Co.*, 118 Minn. 217, 136 N. W. 741 (1912); *Johnson v. Herring*, 89 Mont. 420, 300 Pac. 535 (1931); *Vonault v. O'Rourke*, 97 Mont. 92, 33 P. (2d) 535 (1934); *Howard v. Texas Co.*, 205 N. C. 20, 169 S. E. 832 (1933); *Glowacki v. North Western Ohio Ry. & Power Co.*, 116 Ohio St. 451, 157 N. E. 21 (1927); *Carter Oil Co. v. Independent Torpedo Co.*, 107 Okla. 140, 187 Pac. 233 (1924).

⁴⁷ *McSweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416 (1912), where the court said, " * * * *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they *compel* such an inference." (Italics ours.) Rosenthal, *Procedural Effects of Res Ipsa Loquitur in New York* (1936) 22 CORN. L. Q. 61. Mr. Rosenthal in his scholarly discussion of *res ipsa loquitur* in New York says that the permissible inference effect will not put enough pressure on the defendant to explain how the accident occurred for he will still, though he offers no evidence, have an opportunity for the jury to find in his favor.

⁴⁸ *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781 (1906); *Brown v. Consolidated Light, Power Co.*, 137 Mo. 718, 109 S. W. 1032 (1908); *Warren v. Missouri Tel. Co.*, 196 Mo. 549, 196 S. W. 1030 (1917); *Weber v. Chicago, R. I. & P. R. Co.*, 175 Iowa 358, 151 N. W. 852 (1915); *Pindell v. Rubenstein*, 139 Md. 567, 115 Atl. 859 (1921); *Johns v. Penn. R. Co.*, 226 Pa. 319, 75 Atl. 408 (1910); *Johnson v. Grays Harbor R. & Light Co.*, 142 Wash. 520, 253 Pac. 819 (1927).

⁴⁹ *Loudoun v. Eighth Ave. Ry. Co.*, 162 N. Y. 380, 56 N. E. 988 (1900); *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751 (1900); *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901); *Cunningham v. Dady*, 191 N. Y. 152, 83 N. E. 689 (1908); *Galbraith v. Busch*, 267 N. Y. 230, 196 N. E. 36 (1935); *Bressler v. N. Y. Rapid Transit Corp.*, 270 N. Y. 409, 1 N. E. (2d) 828 (1936); *Hollahan v. Metropolitan St. Ry. Co.*, 73 App. Div. 164, 76 N. Y. Supp. 751 (1st Dept. 1902); *Spinneweber v. Every*, 189 App. Div. 35, 177 N. Y. Supp. 801 (3d Dept. 1919).

have unanimously rejected. These courts evidently feel that *res ipsa loquitur* shifts the burden of proof on the entire case to the defendant. But to give the plaintiff such a great advantage would be in effect creating a definite hypothesis of fault. In contrast the advantage given to the plaintiff in New York will be short-lived, if the defendant offers a satisfactory explanation as to how the accident happened—which explanation is consistent with due care on his part.⁵⁰ The failure to distinguish properly between a presumption and an inference and to use them interchangeably as synonyms and the failure to recognize the basic justification for giving the plaintiff the benefit of a *res ipsa loquitur* case have probably caused confusion as to what constitutes a satisfactory explanation. The reason and common sense of the rule requiring the defendant to explain the surrounding circumstances under which the accident occurred (*i.e.* to adduce evidence explaining away the apparent negligence) is predicated upon the facts that the defendant or his employees are the only ones who have or should have superior knowledge as to the cause of the injury under the peculiar conditions of a *res ipsa loquitur* case.⁵¹ But because the defendant knows or should know how the accident happened is no reason why he should be compelled at the peril of losing the case to affirmatively disprove his negligence. In *Huscher v. N. Y. & Queens Ry. Co.*,⁵² the court wrote:

"If at the close of the entire case the presumption arising from the happening of the accident and the attendant circumstances does not fairly preponderate over that introduced by defendant respecting his freedom from culpability, plaintiff has failed to make out a case, and defendant should be absolved."

The defendant is simply required to show only "mere neutral circumstances of control and management which may, when explained, appear to be entirely consistent with due care."⁵³ To require him to do more would be to distort and misconstrue the intention and purpose of the rule which is to *equalize* the position of the parties so that they will be on the same footing that they ordinarily would occupy in

⁵⁰ *Plumb v. Richmond Light & Ry. Co.*, 233 N. Y. 285, 135 N. E. 504 (1922); *Smith v. Brooklyn Heights*, 82 App. Div. 531, 81 N. Y. Supp. 838 (2d Dept. 1903); *Melia v. Southern Boulevard Ry. Co.*, 159 Misc. 293, 286 N. Y. Supp. 501 (1936).

⁵¹ 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2509, "It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured party."

HARPER, THE LAW OF TORTS (1933) § 77, "Since the only person who knows the manner and circumstances under which the accident occurred is the defendant or some person or persons in his employ, it is necessary and proper that the defendant be required at his peril to explain the nature and circumstances of the accident."

⁵² 158 App. Div. 422, 425, 143 N. Y. Supp. 639 (2d Dept. 1913).

⁵³ *Plumb v. Richmond Light & Ry. Co.*, 233 N. Y. 285, 288, 135 N. E. 504, 505 (1922).

any negligence case in which the facts are equally known or capable of being known by both parties.⁵⁴ Upon the defendant's satisfactory rebuttal, the burden of producing evidence to show how the accident occurred and that it proximately resulted from the defendant's negligence then shifts to the plaintiff and he must prove the defendant's negligence by a preponderance of the evidence⁵⁵ as in an ordinary negligence case.

It is thus seen that it is not the burden of *proof* that shifts but the burden of *explaining* how the accident occurred. This is the New York courts' procedural application of the doctrine of *res ipsa loquitur* and it seems to be the most logical method⁵⁶ of the three heretofore discussed. The courts of other jurisdictions which give *res ipsa loquitur* a different procedural effect appear to be confused by the mysterious and impressive-sounding Latin words. If such is the case, it is suggested that English words with a clearer meaning be substituted for "*res ipsa loquitur*".

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IS DOWER ABOLISHED?

The protective attitude of the courts toward dower probably needs no elaboration. Through the years dower has been viewed as a thing apart—something to be religiously protected. In recent times, however, the institution has tended to become a cumbersome affair. Changing times and attitudes demanded some relief from its burden. Finally, by an amendment to Section 190 of the Real Property Law, dower in real property acquired by a husband subsequent to August 31, 1930 was abolished.

However, the Legislature did not stop here. Other rights were created in lieu of dower by enactments in the New York Decedent Estate Law, Sections 18 and 83. Briefly, Section 18 provides that where a husband or wife dies after August, 1930 and leaves a will

⁵⁴ BOHLEN, LAW OF TORTS (1926) 646: "If the defendant's witnesses are believed to have told the truth and his records are accepted as full and accurate, the facts are known and the plaintiff is in no worse position than if such facts had been proved by his own witnesses or books. What advantage he originally labored under has disappeared, and the presumption based on the desire to remove the advantage is satisfied."

⁵⁵ Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Goldstein v. Pullman Co., 220 N. Y. 549, 116 N. E. 376 (1917); Plumb v. Richmond Light & Ry. Co., 233 N. Y. 285, 135 N. E. 504 (1922), where the court said, "If a satisfactory explanation is offered by the defendant, the plaintiff may rebut it by evidence of negligence or lose his case. On the *whole case* there must be a preponderance of evidence in favor of the plaintiff's contention." (Italics ours.)

⁵⁶ See note 54, *supra*.