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Res Ipsa Loquitur in North Dakota

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RES IPSA LOQUITUR IN NORTH DAKOTA

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I

One of the dearest friends of plaintiffs in negligence is the doctrine[1] called *res ipsa loquitur*. It is not of terribly classic lineage. It is true that it seems to have been used from time to time throughout the centuries when people felt like saying in Latin "the thing speaks for itself," or, if more literal translation is preferred, "the thing itself speaks."[2] And it seems that it was used in the field of contracts before it was in torts.[3]

But it was not until 1863 that the doctrine found a home in the place where it has acquired its greatest renown and pre-eminence. It was imported into the field of negligence in the case of *Byrne v. Boadle*,[4] and since then has flourished increasingly as a fixture of the Anglo-American legal system.

Perhaps the most satisfying single definition of *res ipsa loquitur* is that given in the projected second Restatement of Torts. Its text is as follows:[5]

> "(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when:
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> (a) The event is of a kind which ordinarily does not occur in the absence of negligence;
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> (b) Other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence, and
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> (c) The indicated negligence is within the scope of the defendant's duty to the plaintiff.
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> "(2) It is the function of the court to determine

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1. It is found objectionable by some to refer to **res ipsa loquitur** as a "doctrine". A dissenting judge, in excoriating **res ipsa loquitur,** said, "It does not represent a doctrine, is not a legal maxim, and is not a rule." Potomac Edison C. v. Johnson, 160 Md. 33, 152 Atl. 633 (1930). See also Prosser, **The Procedural Effect of Res Ipsa Loquitur** 20 Minn. L. Rev. 241, at 270-71 (1936).

2. For usages of the phrase running back to Roman times, see Hannigan, **Res Ipsa Loquitur,** 6 Temp. L.Q. 376 (1932).

3. See Roberts v. Trenayne, Cr. Jac. 508 (1614).

4. 2 H. & C. 722. 159 Eng. Rep. 299 (Ex. 1863).

5. RESTATEMENT (SECOND), TORTS § 328D (Tent. Draft No. 5, 1961).

whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

"(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached."

It is to be noted that this involves an intimate intertwining of substance and procedure. It was apparently in the belief that the procedural aspect predominated that the first Restatement of Torts omitted all reference to *res ipsa loquitur*.[6]

It is readily apparent that *res ipsa loquitur* assists the plaintiff by relieving him of the normal stringencies of the burden of proof. Normally, he must prove the facts constituting the alleged negligence by a preponderance of the evidence, as in any other civil case.[7] That is, he must show what the defendant did, and wherein these acts of the defendant fell below the standard of care owing by the defendant. This can become a logical and physical impossibility where harm is suddenly visited upon the plaintiff in such a way that the conduct of the defendant immediately leading up to the incident is wholly beyond possible discovery by the plaintiff. Such would be the case, for example, where the plaintiff is a passenger on a train and asleep in a pullman berth when a wreck occurs. For many cases of this type the rules of circumstantial evidence may bail the plaintiff out of his dilemma.

The idea of circumstantial evidence is that from proof of the existence of one proposition a further proposition may be inferred, because of some kind of propinquity between the two.[8] Thus, by proving what he *does* know—*i.e.*, that certain harm was visited upon him by the defendant—sometimes from this fact some further fact may be permissibly inferred. For example, where a bottle filled under pressure by the defendant with a carbonated drink explodes in the plaintiff's hand and injures him, the plaintiff can prove the fact of the explosion, and from this fact the jury may be permitted to infer the further fact that the defendant filled the bottle with too strong a pressure charge for the strength of the bottle. Such an inference relieves the plaintiff of the impossible burden of proving that when this particular bottle was going

6. See the remarks of Dean Prosser, The American Law Institute, PROCEEDINGS 1960, beginning at p. 209.
7. See generally, WIGMORE, EVIDENCE, § 2498 (3d ed. 1940).
8. **Id.** § 25.

through the defendant's bottling works certain excessive pressures were injected into it.[9]

There are some who consider that *res ipsa loquitur* is not distinguishable from the rules of circumstantial evidence.[10] However, the doctrine does have vigorous supporters who uphold its separate integrity and deny its devouring by circumstantial evidence.[11] Wherever the dividing line may be—and this point will be discussed later—*res ipsa loquitur* is designed as something over and beyond circumstantial evidence. After the plaintiff has obtained all permissible mileage out of circumstantial evidence, *res ipsa loquitur* may still be on hand to go with him that one extra mile that he needs. Even those who deal with *res ipsa loquitur* distastefully out of the necessity born from the fact of the widespread belief in it, consider that it does not differ in principle from circumstantial evidence. At least they seem to concede that it asserts itself on the outer fringes of circumstantial evidence. But for the existence of this doctrine, the circumstantiality in such cases might be deemed stretched too thin to permit an inference.

In the controversy regarding the distinct identity of *res ipsa loquitur,* various distinguishable marks have been urged. Jaffe[12] maintains that *res ipsa loquitur* necessarily involves a presumption as opposed to the inference of circumstantial evidence. But, at least from a standpoint of characterizing it as an aid to the plaintiff, all would seem to agree that it is an additional or more extreme assist than the most orthodox and unquestioned circumstantial evidence would afford.

II

As in the case of any other invention, it took a while for *res ipsa loquitur* to develop and spread beyond its status as an exotic new device to its present near ubiquity in Anglo-American law.[13] Moreover it has only begun to make its ap-

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9. Innumerable cases could be cited to illustrate exploding bottle problems. One such is Zentz v. Coca-Cola Bottling Co. of Fresno, 39 Cal.2d 436, 247 P.2d 344 (1952).

10. See especially Prosser, **The Procedural Effect of Res Ipsa Loquitur,** 20 Minn. L. Rev. 241 (1936); and **Res Ipsa Loquitur: A Reply to Professor Carpenter,** 10 So. Cal. L. Rev. 458 (1937); and Seavey, **Res Ipsa Loquitur: Tabula in Naufragio,** 63 Harv. L. Rev. 643 (1950). According to Seavey, "There is nothing peculiar in the situations in which the phrase is used except the paucity of evidence."

11. See especially Carpenter, **Res Ipsa Loquitur: A Rejoinder to Professor Prosser** 10 So. Cal. L. Rev. 467 (1937); and Jaffe, **Res Ipsa Loquitur Vindicated,** 1 Buffalo L. Rev. 1 (1951).

12. Jaffe, **supra** note 11.

13. But the gospel still hasn't taken hold everywhere. For example, Michigan and South Carolina expressly reject it. See, **e.g.,** Pattison v. Coca-Cola Bottling Co. of Port Huron, 333 Mich. 253, 52 N.W.2d 688 (1952) and Shepard v. U. S. Fidelity and Guaranty Co., 106 S.E.2d 381 (S.C. 1958).

pearance in North Dakota. This is indicated by the fact that an extensive search through standard sources has revealed only a dozen cases that may be said to have purported to turn on this doctrine. And three of these have occurred since 1959. An indication of how North Dakota has generally ignored the doctrine is the fact that out of approximately 3,500 entries where the bulk of *res ipsa loquitur* cases are presumably collected in the Sixth Decennial Digest of the West Publishing Company, only one North Dakota case is to be found.[14] And quite surprising is the discovery that the only exploding bottle case in North Dakota occurred only a very few years ago, and in it there was not a single citation reported to an exploding bottle case from another jurisdiction.[15] Exploding bottle cases are among the classic or typical examples of *res ipsa loquitur,* and reported cases on them elsewhere are almost myriad. The frequency of exploding bottle litigation is further suggested by the fact that legal literature has developed on this specific point.[16]

The development of *res ipsa loquitur* as the plaintiff's friend forms part of the policy of the law that emerged in the nineteenth century to assist those injured by the relentless progress of industrialization and mechanization. For, although *res ipsa loquitur* is not limited to such factual situations, they are most frequently involved one way or another. Machines or their products are peculiarly liable to cause personal injuries and property damage in ways that the plaintiff may have difficulty in explaining for purposes of fastening fault upon the defendant, and *res ipsa loquitur* is designed to assist plaintiffs thus unfortunately situated. A speculative guess as to why the doctrine has been so slow to thrive in North Dakota is that the rural and agricultural complexion of the state has made the need for such a doctrine less frequent, and that hence the legal profession has not been stimulated to think in terms of it. However, since *res ipsa loquitur* is part of the mainstream of Anglo-American jurisprudence, it seems inevitable that it should become a routine legal issue in North Dakota, and the scanty evidence at hand suggests this development.

14. This covers the period from 1946 to 1956, in Key Number 121 (2 and 3).
15. Kuntz v. McQuade, 95 N.W. 430 (N.D. 1959).
16. E.g., Pound, **The Problem of the Exploding Bottle,** 40 B.U.L. Rev. 167 (1960).

If that is true, it would be well to take a look at the present status of *res ipsa loquitur* in North Dakota for purposes of orientation as to its future development here. The doctrine has tended to develop along jurisdictional lines, and a number of articles have been written explaining its particular application in various jurisdictions.[17]

The North Dakota Court has made the observation that the general rules of *res ipsa loquitur* are easily stated but the difficulty lies in its application to a particular factual situation, so that the conclusions of the courts have been anything but consistent.[18] The conditions necessary for the application of the doctrine that most courts have followed heretofore have generally been those promulgated by Wigmore,[19] and adopted by Prosser,[20] and are usually stated thus: The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; it must be caused by an agency or instrumentality within the exclusive control of the defendant; it must not have been due to any voluntary action or contribution on the part of the plaintiff. An additional condition that the evidence must be more accessible to the defendant has not won much support by the courts or our contemporary writers.[21] No North Dakota case gives a full recital of the doctrine. Where it has recognized *res ipsa loquitur,* the Court has dealt expressly only with such parts of it as it saw to be truly in issue. There has normally been the implication, however, that it recognizes the authority of a generally accepted doctrine of *res ipsa loquitur,* which would presumably approximate the foregoing.

The first case in North Dakota to fall within range of

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17. Carpenter, **The Doctrine of Res Ipsa Loquitur in California,** 10 So. Cal. L. Rev. 166 (1936); Davis, **The California Doctrine of Res Ipsa Loquitur as Affording an Inference of Negligence and not a Presumption of Law,** 5 Air L. Rev. 28 (1934); Prosser, **Res Ipsa Loquitur in California,** 37 Calif. L. Rev. 183 (1949); Malone, **Res Ipsa Loquitur and Proof by Inference: a Discussion of the Louisiana Cases,** La. L. Rev. 70 (1941); Marshall, **Res Ipsa Loquitur in Louisiana,** 12 Tul. L. Rev. 125 (1937); Farinhold, **Res Ipsa Loquitur,** 10 Md. L. Rev. 337 (1949), discussing the doctrine in Maryland; Okin, **Doctrine of Res Ipsa Loquitur in New Jersey,** 59 N.J.L.J. 193 (1936); Katz, **The New Interpretation of Res Ipsa Loquitur,** 17 St. John's L. Rev. 117 (1943), discussing the doctrine in New York; Rosenthal, **The Procedural Effects of Res Ipsa Loquitur in New York,** 22 Cornell L.Q. 39, 57 (1936); note, **Doctrine of Res Ipsa Loquitur in Virginia,** 25 Va. L. Rev. 246 (1938); Kaminoff, **The Doctrine of Res Ipsa Loquitur in Washington,** 13 Wash. L. Rev. 215 (1938).

18. Bergley v. Mann's, 99 N.W.2d 849, at 853 (N.D. 1959).

19. WIGMORE, EVIDENCE, § 2509 (3d ed. 1940).

20. PROSSER, TORTS 199 (2d ed. 1955).

21. **Id.** at 209; and see, **e.g.,** Nelson v. Zamboni, 164 Minn. 314, 204 N.W. 943 (1925).

res ipsa loquitur was decided in 1903 and involved some stacked hay and straw that was destroyed by the defendant's burning grain elevator.[22] The only evidence of the cause of the fire was an employee's speculation, on the condition of the elevator equipment. The court, however, failed to consider the application of the doctrine probably because the attorneys failed to raise the issue. Significantly, the Court rejected recovery on the theory that a verdict without direct proof would be speculative, resting on pure conjecture; they went on to state that negligence must be proved.

The decision of the *Balding* case may have had its impact for it was slightly more than a decade until the next *res ipsa loquitur* cases were argued before the Court. These two cases, decided in 1915 and 1918, undoubtedly were responsible for the retarded development of *res ipsa loquitur*. Prosser considers the language of the court in both of them to be so uncertain as to make it impossible to say what is the position of North Dakota with respect to the effect of *res ipsa loquitur* as between creating a presumption, permitting an inference, and shifting the burden of proof to the defendant.[23]

One of these cases was *Wyldes v. Patterson*[24] whose facts offer an excellent illustration of the *res ipsa loquitur* situation. The plaintiff, a laborer, was placing a wheelbarrow onto a temporary elevator common to the construction industry. The elevator was lowered while the wheelbarrow was being moved onto the platform causing him to be drawn into the elevator. The fall or sudden stop caused the cable to part, precipitating the plaintiff to the ground, causing injuries. The injury and the circumstances surrounding the occurrence were proved, but the specific act or omission resulting in negligence was unascertained. The jury was allowed to impute negligence to the defendant contractor.

In *Leiferman v. White*,[25] decided three years later, an employee was directed to go to the basement of an ice cream factory to sort potatoes. While there he came in contact with an electric cord suspended from the ceiling. He received electrical burns and other injuries. The court allowed recovery on the theory of *res ipsa loquitur*. This case was clouded by the ad-

22. Balding v. Andrews, 12 N.D. 267, 96 N.W. 305 (1903).
23. Prosser, **The Procedural Effect of Res Ipsa Loquitur**, 20 Minn. L. Rev. 241 (1937), at 251-52.
24. 31 N.D. 282, 153 N.W. 630 (1915).
25. 40 N.D. 150, 168 N.W. 569 (1918).

ditional element of contributory negligence which may have caused the court some difficulty. Apparently from the evidence of the case the plaintiff was forewarned of the existing condition of the electrical appliances. In 1931, the ghost of *Byrne v. Boadle*[26] returned to haunt the North Dakota court in the case of *Bakken v. State*.[27] Here the plaintiff was a laborer inexperienced in work about a warehouse of a flourmill and was temporarily employed to assist with an audit required by law. While engaged in removing tiers of sacks piled in the warehouse he sustained injuries occasioned by heavy sacks falling from an adjoining tier and striking him. The evidence showed that the tiers were constructed according to a standard method so that each tier would be self-sustaining. Although the defendant asserted that due care was exercised in the piling of the tiers, the Court held that the happening of the accident tends to prove negligence in the piling of the sacks. Apparently following earlier North Dakota precedent without citing it, the Court allowed recovery in that the evidence of the occurrence was sufficient to give rise to a presumption of fact.[28]

Ten years later the Court completely rejected *res ipsa loquitur* in *Durick v. Winters*[29] where the plaintiff was injured while a passenger in the defendant's taxicab which was involved in a collision with another vehicle. In failing to recognize the high degree of care required of common carriers as distinguished from private conveyances, the Court ruled that negligence is not imputed to the carrier simply because of the accident. The case apparently turned on the fact that the plaintiff failed to show how the accident happened, and did not sufficiently describe the circumstances surrounding the occurrence.[30] It is submitted that because of the high degree of care required by common carriers, the happening of the accident itself could give rise to an inference to that slight degree of negligence that would entail liability, and thus be sufficient to take the case to the jury.[31]

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26. 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863).
27. 60 N.D. 127, 234 N.W. 513 (1931).
28. See note 52 **infra** for an analysis of this holding.
29. 70 N.D. 592, 296 N.W. 744 (1941).
30. The court relied on Klingman v. Lowe's, Inc., 209 Minn. 449, 296 N.W. 528 (1941) which involved a collision between two automobiles, neither a common carrier.
31. Capital Transit v. Jackson, 149 F.2d 839 (D.C. Cir. 1945).

After somewhat successfully coping with *res ipsa loquitur* in those situations where it applied the doctrine, the Court in 1952 nullified what progress had been made before in the case of *Farmers Home Mutual Insurance Co. v. Grand Forks Implement Co.*[32] The case arose out of a fire which started in the plaintiff's shops from an unexplained source. One witness testified how the fire started but was unable to pinpoint the cause and merely said that it started on a work bench near some gasoline and electric apparatus. The plaintiff's case had gone to the jury, which had found for the defendant. The plaintiff asked for a judgment *non obstante veredicto,* or, in the alternative, a new trial, on the theory that the verdict was contrary to the evidence. Now, so far as *res ipsa loquitur* is concerned, the plaintiff had gotten all the benefits he could wish when he got the case to the jury. Although the court did not employ the terminology of *res ipsa loquitur* in this connection, it did say that, even in the absence of actual evidence by the plaintiff as to the cause of the fire, "there is no question but that the proof of a negligent act on the part of the defendant is sufficient." Once the matter has gotten to the jury, the plaintiff has overcome his major hurdle, but *res ipsa loquitur* is not going to insure him success with the jury. In affirming the lower court, the Supreme Court could merely have pointed to reasonable possibilities for the jury's having decided for the defendant, and that it was a case upon which reasonable minds could differ. However, the Court then inconsistently went on to say that on the state of the evidence, the plaintiff had failed to make out a prima facie case, because it was at least equally probable that the harm resulted from a cause for which the defendant was not responsible.[33] About the only apparent purpose in such discussion by the Court would be to let the plaintiff know that, not only is he not entitled to complain about the verdict, but he should never have gotten to the jury in the first place, and a verdict should have been directed *against* him. Out of the confusion of this case about the only significance to be drawn for *res ipsa loquitur* is the utterance by the Court of these magic words and reci-

32. 79 N.D. 177, 55 N.W.2d 315 (1952).
33. The court's analysis in terms of "prima facie case" interestingly suggests the law of Michigan, which seems to use this as a substitute for **res ipsa loquitur.** However, the court referred to no Michigan cases. For a statement of Michigan law on the point, see Pattison v. Coca Cola Bottling Co. of Port Huron, 333 Mich. 253, 52 N.W.2d 688 (1952).

tation of parts of the doctrine by way of what can only be properly regarded as dictum.

The latest of North Dakota cases, all decided in 1959, illustrate some of the classic *res ipsa loquitur* situations. An exploding bottle was the basis of applying the doctrine in *Kuntz v. McQuade.*[34] There a tavern keeper's son was injured when a beer bottle which he had placed in a cooler exploded. The evidence did not disclose the cause of the explosion and the plaintiff put forth no theory of causation but relied on *res ipsa loquitur.* Although the case went to the jury, recovery was denied. We have already noted how singular it was that the case failed to cite any other cases of exploding bottles, inasmuch as other jurisdictions have dealt with them repeatedly.[35]

A case where a home was destroyed by fire apparently caused by defendant's negligence in causing a break in the gas line service while excavating for a sewer installation leans toward the doctrine but was properly decided on pure circumstantial evidence without requiring the implementation of *res ipsa loquitur.*[36]

Bergley v. Mann's[37] was the last real *res ipsa loquitur* case to be decided in North Dakota. It was an action for injuries sustained by a pedestrian when struck by a false store front which collapsed while the pedestrian was watching an auto show. Although the trial court accepted *res ipsa loquitur,* the case was remanded for new trial because of erroneous instructions.

Two malpractice cases which are pertinent have appeared in North Dakota. *Dolan v. O'Rourke,*[38] decided in 1928, involved a dental patient who died while under an anesthetic administered by her dentist. The anesthetic was the same type that was administered six months before treatment by the dentist. The Court said that "*res ipsa loquitur* has no application in malpractice cases" and that negligence cannot be inferred from

34. 95 N.W.2d 430 (N.D. 1959).
35. See **supra** at footnote 15.
36. Mischel v. Vogel, 96 N.W.2d 233 (N.D. 1959).
37. 99 N.W.2d 849 (N.D. 1959).
38. 65 N.D. 416, 217 N.W. 666 (1928).
39. Stokes v. Dailey, 85 N.W.2d 745 (N.D 1957); the court said in ruling on the defendant's directed verdict, "We cannot say under the facts of the case that as a matter of law the plaintiff has failed to make out a prima facie case of negligence or that there are not inferences of negligence to be drawn from the evidence presented." For further developments of this case, see Stokes v. Dailey, 97 N.W.2d 676 (N.D. 1959).

the fact that the patient died while under an anesthetic because a bad result was not evidence of negligence.

Apparently the public policy of this period was against holding medical practicioners liable for this type of treatment in that it would discourage the "practice of the healing art, for they would have to assume financial liability for nearly all the ills that flesh is heir to." Nevertheless, the resulting death would appear to be an extraordinary result of anesthesia, particularly if administered by a dentist. An expert medical witness may be necessary to indicate that the result would not ordinarily happen under the same conditions without negligence. One other malpractice case has winked at *res ipsa loquitur* but failed to make any progress due to the more pressing procedural specifications of error.[39]

III

Until recently, the procedural status of *res ipsa loquitur* has been in flux in that the courts were in disagreement whether *res ipsa loquitur* operated to create a presumption or an inference of negligence. The difficulty may be traced back to the formation of the doctrine in England at the time when the evidentiary presumption was itself in infancy. Many early cases of *res ipsa loquitur* apparently failed to grasp the significance of distinguishing between a presumption and an inference partly because the presumption was under development during that period and partly because the presumption conceivably did not have the general judicial force it has today.[40]

Some early United States cases reveal that *res ipsa loquitur* ran the gamit of interpretation.[41] New York was particularly convinced that a presumption was raised by the doctrine[42] while other eastern courts preferred the inference theory.[43] One court went so far as to proclaim that negligence is never

40. See SIR W. S. HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. IX, p. 139 (1926); specific statutory presumptions were effected long before **res ipsa loquitur, e.g.,** a baby's cry was a presumption of life and seven years of an absence was a presumption of death. And see Prosser, **Res Ipsa Loquitur in California,** 37 Calif. L. Rev. 183 (1949) for a historical review of **res ipsa loquitur.**

41. Mentser v. Armour, 18 Fed. 373 (8th Cir. 1883) (apparently not recognizing the doctrine); Peer v. Ryan, 54 Mich. 215, 19 N.W. 961 (1884) (circumstantial evidence); Graham v. Bauland Co., 89 N.Y. Supp. 595 (1904) (specific negligence); Morris v. Strobel & Wilken Co., 30 N.Y. Supp. 571 (1894) (prima facie negligence).

42. Rintoul v. N.Y. Cent. R. R., 17 Fed. 905 (2d Cir. 1883); Dahn v. Dawson, 32 N.Y. Supp. 59 (1895); Adams v. Union Ry. 80 N.Y. Supp 264 (1903); Connor v. Koch, 85 N.Y. Supp. 93 (1903); Papazian v. Baumgartner, 97 N.Y. Supp. 399 (1906).

43. Strasburger v. Vogel, 103 Md. 85, 63 Atl. 202 (1906); Ross v. Double Shoals Cotton Mills, 140 N.C. 115, 52 S.E. 121 (1905).

presumed but that *res ipsa loquitur* is one mode of showing negligence and that the negligence must be controverted or the plaintiffs are entitled to recover.[44]

Two previously mentioned North Dakota cases experienced this same difficulty in distinguishing between a presumption and an inference. In *Wyldes v. Patterson*[45] where the injury resulted from an elevator accident, no evidence was offered by the defendant to show sufficient strength of the cable or any inspection of the cable. The court, implying an inference, that "the occurrence of the injury, in the manner and under the circumstances shown to exist, is of itself sufficient evidence of the defect of the cable and the negligence of the defendant." But further on in the opinion, the court said, "The breaking of the cable under these circumstances was of itself sufficient to raise a presumption of negligence." The court offers the puzzled reader no clue as to how one is to choose between inference and presumption in interpreting the case.

Leiferman v. White[46] where the plaintiff received an electrical injury in the defendant's basement, apparently considered that only an inference was available to carry the case to the jury. The court said ". . . (The) appliance in question was shown to have been under the control of the defendants, and the accident was such as would not have happened in the ordinary course of events had proper care been used. It is in just such circumstances that the law allows the jury to draw the inference of fact that the defendant was negligent. . . . *Res ipsa loquitur* merely permits the jury to draw upon their experience in determining whether or not a given set of circumstances is consistent with the exercise of reasonable care on the part of the defendant."

The later cases in North Dakota dealing with *res ipsa loquitur* have taken the position that the doctrine operates to create an inference. Although in *Bakken v. State*[47] the court may have erroneously applied *res ipsa loquitur* they did conclude that negligence could reasonably be inferred from the facts of the case. Our most recent decision unequivically per-

44. Wood v. Wilmington City Ry., 21 Del. 369, 64 Atl. 246 (1905).
45. 31 N.D. 282, 153 N.W. 630 (1915).
46. 40 N.D. 150, 168 N.W. 569 (1918).
47. 60 N.D. 127, 234 N.W. 513 (1931); in Farmers Home Mut. I. Co. v. Grand Forks Implement Co., 79 N.D. 177, 55 N.W.2d 315 (1952) the court said that, " . . . if the evidence of circumstances will permit a reasonable inference of the alleged cause of injury and exclude other equally reasonable inferences of other causes, the proof is sufficient to take the case to the jury . . . ."

mits an inference and should make North Dakota's position clear. An excellent opinion by Judge Morris in *Bergley v. Mann's*,[48] quoted that much cited U. S. Supreme Court case of *Sweeney v. Erving*[49] thus: "*Res ipsa loquitur* means that the facts of the occurrence warrant an inference of negligence . . ." Therefore, an inference of negligence was created which the jury might accept or reject even after any explanation offered by the defendant.

An interesting point in applying an inference or presumption was raised in *Kuntz v. McQuade*.[50] The court allowed the parties to stipulate that *res ipsa loquitur* should create an inference, not a presumption. The court allowed this stipulation although it is difficult to understand how the parties may stipulate with regard to rules of evidence.[51] However, the court reached the conclusion that inference is the proper theory. If presumptions were to be the theory, the plaintiff should be allowed a directed verdict if the defendant has done nothing to rebut the evidentiary presumption.

One other difficulty beyond the element that the application of *res ipsa loquitur* is dependent upon the factual situation of each case[52] is distinguishing a *res ipsa loquitur* case from a purely circumstantial case. Although the problem may be largely academic, it will have its practical ramifications. Actually the distinction is a very subtle one. In most instances, circumstantial evidentiary facts must lead to and establish a proposition which of itself has a relative probative value. The proposition can be supported by an infinite synthesis of testimonial assertions and circumstances.[53] A more positive approach is employed by the use of circumstantial evidence to support a preconceived proposition or propositions with facts other than the principal fact. Another distinction may be made on the relative predictability of conceivable propositions and inferences. The use of circumstantial evidence is limited by the predictability of possibilities and requires that the proponent take a more affirmative stand in the proof of his case; where

48. 99 N.W.2d 849 (N.D. 1959).
49. 228 U.S. 233 (1913). The case further quoted PROSSER, THE LAW OF TORTS, § 43 (2d ed. 1955) on the weight of authority regarding **res ipsa loquitur** as nothing more than a form of circumstantial evidence creating an inference.
50. 95 N.W. 430 (N.D. 1959).
51. The court relied on Casey v. First Nat'l Bank, 20 N.D. 211, 126 N.W. 1011 (1910) where a stipulation was allowed on a theory of equitable title to grain. This case has absolutely no application to rules of evidence.
52. Bakken v. State, 60 N.D. 127, 234 N.W. 513 at 516 (1931).
53. See generally, WIGMORE, EVIDENCE, § 25 (3d ed. 1940).

in the *res ipsa loquitur* case the plaintiff is allowed an infinite number of avenues to reach the jury by virtue of a negative or lacuna in proof; *i. e.,* he shows that the event happened, therefore the defendant must have been negligent, thereby circumventing the normal chain of proof. Yet there are many conceivable factual situations where either *res ipsa loquitur* and circumstantial evidence may be utilized to obtain the desired result, and by the same token some courts have adopted the wrong procedural device.[54]

Two North Dakota cases illustrate the difficulty in this area and also illuminate the distinction that should be made. In *Mischel v. Vogel*[55] the plaintiff's home was destroyed by fire allegedly caused by the defendant's negligence in causing a break in the gas service line while excavating for a sewer installation. The court said, "While negligence must be proved and will never be presumed merely from proof of the accident, . . . negligence proximately causing the plaintiff's damage like any other fact, may be proved by circumstantial evidence."

In this case the Court speaks in terms of circumstantial evidence and not *res ipsa loquitur*. There is only one proposition, that the defendants caused the break in the gas line, shown by the facts that the pipe was bent, a large indentation was discovered, and the ground was saturated with natural gas from the point where the gas line was bent to the foundation of the house. From these asserted facts and the circumstances that the house caught fire, we may propose that the defendant negligently caused the break in the gas line and was therefore responsible for the plaintiff's damage.

An older case, *Bakken v. State,*[56] involved a warehouse laborer who was injured by flour sacks falling from a nearby tier of sacks. The Court held that *res ipsa loquitur* applied; the evidence of the occurrence was sufficient to raise a presumption of fact (or inference) for the consideration of the jury. This is true, but the inference was undoubtedly reached by the use of circumstantial evidence rather than *res ipsa loquitur*. There are really only two preconceived inferences. Although the Court only suggested one possible inference of

54. Shaw v. Calgon, Inc., 35 N.J. Super 319, 114 A.2d 278 (1955); Peer v. Ryan, 54 Mich. 215, 19 N.W. 961 (1884).

55. 96 N.W.2d 233 (N.D 1959); the court also gave credence to an old saying, "There is no man who would not accept dog tracks in the mud against the sworn testimony of a hundred eyewitnesses that no dog passed that way."

56. 60 N.D 127, 234 N.W. 513 (1931).

negligence, that the sacks were improperly stacked, there is another, that the sacks were improperly filled, then stacked, so as to cause the tier to tilt dangerously and collapse at the slightest jar. This additional supposition is inserted not as a technical triviality, but to illustrate the narrowness of possible inferences arising out of such a situation. We contend that a *res ipsa loquitur* situation must produce a variety of inferences possible, each one suggesting negligence on the part of the defendant.

The only significant effect this distinction would have is in the actual trial of the case. It would certainly affect the plaintiff for it would be necessary for him in a circumstantial case to establish the propositions by testimentary assertions and circumstances. By employing *res ipsa loquitur,* it is only necessary for the plaintiff to prove the occurrence and the circumstances surrounding the occurrence and allow the jury to infer how the defendant was negligent. Technically, the burden of proof never shifts from the plaintiff.[57] And though the defendant is rarely going to be exposed to an adverse directed verdict for failure to submit evidence controverting the plaintiff's evidence, normally he does offer such evidence. This task of the defendant's is apt to be more onerous when *res ipsa loquitur* applied to the plaintiff's case; for unless the defendant is able to point to some cause extraneous to him as being responsible for the happening, he will probably feel obligated to undertake the difficult and boundless task of proving the negative proposition that he was *not* negligent or failing in the standard of care required of him. This can be particularly frustrating because no amount of such evidence, regardless of its quality, can ever conclusively convince the jury that the defendant was not somehow at fault, because the actual happening itself remains unexplained. But in a circumstantial evidence case the issue is narrowed down to about one or two specific propositions. This gives the defendant an easier time of it, because he must only resist those specific propositions put forth by the plaintiff.

The summation and the instructions would also vary significantly in the type of method used in proving negligence. In a circumstantial case, the plaintiff would submit that if the jury

57. Bergley v. Mann's, 99 N.W.2d 849 (N.D. 1959).

does infer either proposition A or proposition B they are bound to find that the defendant was negligent. However, in a *res ipsa loquitur* case, he would only have to argue that if the occurrence is one which in the ordinary course of things does not happen without negligence, the jury may infer negligence of the defendant. Conceding that there are many other factors which must be dealt with,[58] the above serves as an illustration of some practical distinctions between pure circumstantial evidence and *res ipsa loquitur.*

IV

In view of North Dakota's limited experience with *res ipsa loquitur* to date, many of the refinements of the doctrine have not yet been developed. On the substantive side, of example, there are necessarily only a few types of factual situations that the court has been called upon to characterize as being or not being within the coverage of *res ipsa loquitur.* While there is no one thing or circumstance which is automatically either within or without the scope of *res ipsa loquitur,* nevertheless some things by their nature tend to raise at least the issue of the doctrine.

To say the issue is raised, of course, does not necessarily means that *res ipsa loquitur* is decisive of the case, and perhaps closer scrutiny will reveal the case to properly turn on circumstantial evidence. But among those things commonly suggesting *res ipsa loquitur,* the North Dakota Court has had occasion to deal with an elevator,[59] a defective electric cord,[60] an exploding bottle,[61] a broken gas line,[62] the collapse of a building,[63] a taxicab collision,[64] and, at least to a degree, malpractice.[65] And, in the best classical tradition of *res ipsa loquitur,* even if not among the most commonly invoked situations, the Court has also welcomed the falling sack of flour into the club.[66] Fires as such are probably not a "thing" characteristically raising an issue of *res ipsa loquitur,* but nevertheless the court flirted with the doctrine in two cases. In one[67] the

58. See i.e., notes 5 and 37 **supra.**
59. Wyldes v. Patterson, 31 N.D. 282, 153 N.W. 630 (1915).
60. Leiferman v. White, 40 N.D. 150, 168 N.W. 569 (1918).
61. Kuntz v. McQuade, 95 N.W.2d (N.D. 1959).
62. Mischel v. Vogel, 96 N.W.2d 233 (N.D. 1959).
63. Bergley v. Mann's, 99 N.W.2d 849 (N.D. 1959).
64. Durick v. Winters, 70 N.D. 592, 296 N.W. 744 (1941).
65. Stokes v. Dailey, 85 N.W.2d (N.D. 1957); Dolan v. O'Rourke, 56 N.D. 416, 217 N.W. 666 (1928).
66. Bakken v. State, 60 N.D. 127, 234 N.W. 513 (1931).
67. Balding v. Andrews, 12 N.D. 267, 96 N.W. 305 (1903).

court denied recovery in a manner seemingly oblivious to the whole concept of *res ipsa loquitur;* in the other[68] the Court went in so many ways at once on *res ipsa loquitur,* that it scarcely made much impact as to its relation to fires, or anything else.

Still untouched are a number of typical situations, such as airplane crashes, certain types of automobile accidents, railroads and other common carriers, and industrial machinery. As we indicated above, the Court has never undertaken a full statement of the doctrine, but apparently agrees with its generally accepted substantive content, as formulated by leading writers.[69] The Court has not always been at pains to distinguish pure *res ipsa loquitur* from circumstantial evidence cases. The court applied *res ipsa loquitur* in *Bakken v. State.* However, circumstantial evidence would have done the job quite adequately. From the fact of the flour sack having fallen on the plaintiff, about the only two possible inferences of fact, which would create liability on the defendant, were that the sacks had been improperly filled or improperly stacked. There is no necessity to ask the jury to make a leap to a general inference of negligence, without specification as to inferred facts upon which negligence would be predicated.

But in *Mischel v. Vogel* the Court gave an excellent exposition of the theory of circumstantial evidence, and showed a fine sense of discrimination in refraining from any mention of *res ipsa loquitur.* From the fact that the defendant's employees were working and digging near the gas pipe, the jury was allowed to infer the fact that they broke it, and on this fact the defendant's liability could be founded. There was no need to call upon a generalized inference of negligence in order to permit recovery, as the only significant fact in issue not proven by direct testimony was whether the defendant's employees broke the pipe.

On the procedural side, the main problem of *res ipsa loquitur* has been whether it is to give rise to an inference as opposed to a presumption of negligence. We have noted how in ealier years the Court seemed to be in distressing, if not hopeless, confusion between these two alternatives.[70] But the

68. Farmers Home Mut. I. Co. v. Grand Forks Implement Co., 79 N.D. 177, 55 N.W.2d 315 (1952).
69. **Supra** notes 19 and 20.
70. **Supra** notes 41 and 42.

Court has recently spoken clearly on this particular point in the case of *Bergley v. Mann's,* and stated unequivocally that the procedural effect of *res ipsa loquitur* is to create a permissible inference of negligence. The defendant's store front had collapsed on the plaintiff, and the Court said: "The application of the rule of *res ipsa loquitur* under the circumstances presented in this case created an inference of negligence which the jury might accept or reject. . . ." It may seem somewhat unfortunate that the Court did not cite any earlier *res ipsa loquitur* cases in North Dakota in order to dispel explicitly the confusion their unrepudiated authority may continue to cause. However, at least the Court made a deliberate choice of an inference over a presumption, because in its quotations from Prosser's works the Court showed it was aware of the possibility of applying a presumption theory like a few jurisdictions do.

It may be supposed that the new Restatement of Torts will have considerable influence in determining the future shape and direction of *res ipsa loquitur,* and give it additional consistency and cohesiveness from one jurisdiction to the next. If that is true, it would seem desirable for North Dakota to accept the new Restatement's version of it.[71] The new Restatement's position represents the considered opinion of leading authorities on the subject after a thorough study of its development and application.[72] If the holding in the *Bergley* case be accepted as establishing inference as the procedural rule in North Dakota for *res ipsa loquitur,* there would appear to be nothing in North Dakota's jurisprudence thus far that would impede its following in the future the guide lines provided by the new Restatement.

V

Other jurisdictions may reveal what lies in store for North Dakota and what direction the Court will take in deciding future *res ipsa loquitur* cases.

While North Dakota has not yet come to terms with the application of *res ipsa loquitur* to malpractice cases, more and more of these cases have felt the touch of *res ipsa loquitur,* particularly in California.[73] The question of the defendant's

71. RESTATEMENT, **supra** note 5.
72. See The American Law Institute, PROCEEDINGS 1960, at 209.
73. Prosser, **Res Ipsa Loquitur in California,** 37 Calif. L. Rev. 183, 204 (1949).

duty has become exceedingly important and in order to establish what duty was owed, expert testimony generally must be used to establish negligence. As an example, the result reached in *Dolan v. O'Rourke*,[74] would be quite different if decided today.

Yet, in another medico-legal area, the trend is away from the use of *res ipsa loquitur* in cases dealing with X-ray burns.[75] Prosser suggests that this might be due to idiosyncracy of the patient or that the burn was unavoidable. We suggest as still another factor that in radium and X-ray treatment, the patient assumes the risk of burn and is generally fully cognizant of the dangers of radiation.

Airplane accidents offer an excellent illustration how a particular fact situation may support *res ipsa loquitur*. When air travel was still an infant, the courts thought of it as an ultra-hazardous activity, applying the doctrine of strict liability. *Res ipsa loquitur* had little application to early air travel as common experience would not indicate that the occurrence would not happen in the absence of negligence and the element of assumed risk was present.[76] However, as air travel became more reliable, the airplane was not regarded as an inherently dangerous mode of transportation. Therefore airplane crashes do not ordinarily happen in the absence of negligence.[77]

Automobile accidents which are not witnessed are particularly susceptible to *res ipsa loquitur*. The most frequently recurring situations in which the doctrine is applied to automobile accidents are a single vehicle leaving the road by itself,[78] or a head-on crash between two oncoming vehicles.[79]

Applicable in other automobile situations as well,[80] these two situations fall into the category that in the ordinary course of operation an accident would not happen had the person in control exercised proper care, and in the absence of any explana-

74. 56 N.D. 416, 217 N.W. 666 (1928).
75. PROSSER, TORTS § 43 (2d ed. 1955) and see comment, 40 Colum. L. Rev. 161 (1940).
76. Davis, **The California Doctrine of Res Ipsa Loquitur as Affording an Inference of Negligence and Not a Presumption of Law,** 5 Air L. Rev. 28 (1934).
77. See Goldin, **Res Ipsa Loquitur in Aviation Law,** 18 So. Cal. L. Rev. 15-40; 124-53 (1944).
78. Worsham v. Duke, 220 F.2d 506 (6th Cir. 1954); Wisconsin Telephone Co. v. Matson, 256 Wis. 304, 41 N.W.2d 268 (1949).
79. Kempfer v. Bois, 255 Wis. 312, 38 N.W.2d 483 (1948).
80. Comparative negligence and a presumption of due care raised for the benefit of one killed in an accident are additional considerations in automobile cases. Callahan v. Van Galder, 3 Wis.2d 654, 89 N.W.2d 210 (1958). And see James and Dickson, **Accident Proneness and Accident Law,** 63 Harv. L. Rev. 769 (1950).

tion, an inference arises that the injury was caused by want of care. Proof of negligence in these situations may be established by two possible means. One is circumstantial evidence in the rare instance where the physical facts found following the accident may support an inference of some specific negligent act or omission.[81] The second and more frequent situation is one where the facts will allow the application of the docrine of *res ipsa loquitur*.[82]

Probably the most significant development is the increasing use of expert testimony which will permit the courts to make a finer and more just adjudication of *res ipsa loquitur* situations.[83] It is extremely useful where a layman cannot from his limited practical experience say that a thing would not happen in the ordinary course of events. Due to a more specialized and complex technological society, the use of expert testimony will be of aid to plaintiffs and defendants alike where a properly qualified expert can say what is an ordinary happening in the not so usual course of events. The plaintiff would be quick to recognize the advantages, but an expert may also indicate non-negligence in a particular case although ordinarily there would be negligence.

The doctrine of *res ipsa loquitur* is by no means static and like all other areas of the law is subject to change and development. Although reared in mystery and confusion, the doctrine serves a very necessary function to insure justice.

"Let us think of jurisprudence for a moment as a science of social engineering, having to do with that part of the whole field which may be achieved by the ordering of human relations through the action of politically organized society."

ROSCOE POUND, Interpretation of Legal History 152 (1923).

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81. This may be accomplished by the employment of an automotive crash expert who is able to reconstruct the accident by scientific methods. By observing the twisted wreckage, the expert may suggest excessive speed, or one driver was on the wrong side of the road, or the accident was due to a specific mechanical failure found to have existed before the accident. These elements involve but one proposition to be accepted or rejected by the jury.

82. Haw v. Liberty Mut. Ins. Co., 180 F.2d 18 (D.C. Cir. 1950) (bulldozer operation); Budd v. Crimm, 110 N.W.2d 321 (Ia. 1961) (rear-end collision); McLaughlin v. Lasater, 129 Cal. App. 2d 432, 277 P.2d 41 (1954) (mechanical defect), **Contra,** Faulk v. Soberanes, 14 Cal. Rptr. 545, 363 P.2d 293 (1961) (collision with a tree to avoid oncoming automobile); Cohen v. Hirsch, 230 Minn. 512, 42 N.W.2d 51 (1950) (skidding automobile).

83. See **The Use of Expert Evidence in Res Ipsa Loquitur,** 106 U. Pa. L. Rev. 731 (1958).