

## Res Ipsa Loquitur in Perspective

Prior to the latter half of the 19th century the latin expression *res ipsa loquitur* had no special legal significance.<sup>1</sup> It was employed whenever appropriate.<sup>2</sup> Baron Parke, for example, used the phrase in *Skinner v. The Longon, Brighton, and South Coast Railway Company*<sup>3</sup> with respect to an argument as to costs:

After the jury are sworn, the defendants and the plaintiff agree that the plaintiff shall be at liberty to withdraw the record, and the agreement is silent as to costs. But *res ipsa loquitur*. It never could have been intended that the defendants were to be prejudiced by granting the plaintiff an indulgence. Therefore although there may have been an assent by the defendants to the order, the plaintiff is bound to pay the costs.<sup>4</sup>

But once adopted by Chief Baron Pollock in *Byrne v. Boadle*<sup>5</sup> it assumed a particular legal connotation although in its elaboration that meaning has often proved to be elusive.

Because it has traditionally been assumed that the meaning of *res ipsa loquitur* is contained within *Byrne v. Boadle* and *Scott v. The London and St. Katherine Docks Company*<sup>6</sup>, discussions of that expression have usually begun with an examination of those two decisions. In fact the principles formulated by the majority of the Court of Exchequer Chamber in the latter case have often been adopted as the classical definition of that revered latin phrase. But inappropriately so for *res ipsa loquitur* is merely a specific instance of a much broader concept. The elucidation of the latter is necessary if the meaning of the former is to be precisely ascertained. Accordingly, only when considered in proper perspective are those cases of assistance in explaining the meaning that *res ipsa loquitur* has acquired.

This article proposes to examine the broader concept in historical perspective to clarify the simplicity of *res ipsa loquitur* and allay the confusion that has, at least until recently, shrouded its interpretation. That necessitates an exploration of the legal interstices of ages long past, an exercise naturally avoided at a time when reform overshadows reflection. But comfort may be sought in the words of that most distinguished American jurist Oliver Wendell Holmes:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy,

1. Translated '*res ipsa loquitur*' simply means "the thing speaks for itself".

2. Marcus Tullius Cicero is purported to have declared in summation that the facts spoke for themselves in his defence of Milo for the murder of Clodius in the year 52 B.C.; S.B. Weston, 'Products Liability and Res Ipsa Loquitur', (1964), 35 Cleveland Bar Journal, 81.

3. (1850) 4 Ex. 885; 154 E. R. 1476.

4. *Ibid.* 888; 1477. The record in that case was withdrawn entirely for the purpose of enabling the plaintiff to avoid a nonsuit.

5. (1863) 2 H & C 722; 159 E. R. 299.

6. (1864) 34 Law J. Rep. (N.S.) Ex. 17; (1865) 34 Law J. Rep. (N.S.) Ex. 220; 3 H & C 596; 159 E. R. 665.

avowed or unconscious, even the prejudices which judges share with their fellow-men, had a good deal more to do with syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become.<sup>7</sup>

## PRESUMPTIONS OF FACT

The term 'presumption' has been traditionally utilized to describe both an assumption of law and an inference of fact.<sup>8</sup> In the former sense it refers to a proposition of law which attaches to proof of particular circumstances and which is not deduced or inferred therefrom.<sup>9</sup> For example, proof of absence for seven years necessitates a conclusion of death in the absence of evidence to the contrary. A prolonged absence might justify an inference of death but the arbitrary stipulation that seven years absence demands such a conclusion properly classifies the rule as a presumption of law. In other words the conclusion is drawn not from the prolonged absence but from the proposition of law which applies when seven years absence is demonstrated. The presumption of legitimacy is similarly a presumption of law. The party relying on legitimacy need only prove that the child was born in wedlock and legitimacy must be presumed unless the contrary is satisfactorily established. Wedlock might justify an inference of legitimacy but the proposition of law which requires that children born in wedlock be assumed to be legitimate is the basis for the conclusion.<sup>10</sup> A presumption of law thus leads to a conclusion of fact not by way of inference but by the application of a rule of law to specific circumstances. It consequently differs from a presumption of fact whereby the existence of one fact is inferred from proof of another by a process of reasoning.<sup>11</sup>

The matter is further complicated in that the term 'presumption of fact' is sometimes used to describe in particular frequently recurring examples of circumstantial evidence.<sup>12</sup> Those logical inferences which from constant reappearance have become familiar include the presumption of continuance, the presumption of guilty knowledge arising from the possession of recently stolen goods, and the presumption of unseaworthiness in the case of vessels which founder

7. Oliver Wendell Holmes, 'The Common Law', 1.

8. 'Presumptions of Law and Presumptive Evidence' 6 Law Mag. (October, 1831), 348, described by Thayer as the best consideration of the subject known to him. Reproduced in part and appended to J. B. Thayer 'Preliminary Treatise on Evidence' (1898), 539.

9. For an excellent discussion of presumptions of law see J. Desmond Morton, 'Presumptions', Special Lectures of the Law Society of Upper Canada, (1955), 137.

10. 'Presumptions of Law and Presumptive Evidence', supra fn. 8.

11. The employment of the term 'presumption' in this sense is criticized by modern legal scholars. It is due, however, to historical usage; see J.H. Wigmore 'A Treatise on the Anglo-American System of Evidence' (3rd ed. 1940) Vol. 9, 288; M. Powell 'Roscoe's Digest of the Law of Evidence (16th ed. 1891) 34; W.B. Odgers 'Principles and Practice of the Law of Evidence' (Canadian ed. 1911) 386.

12. R. Cross 'Evidence' (3rd ed. 1967) 104; J. Desmond Morton 'Presumptions' supra fn. 9.

shortly after leaving port. These are inferences which the tribunal of fact may draw although it is not obliged to do so. Consequently, they are but common examples of 'presumptions of fact'.

Whereas 'presumption of law' describes the legal consequences which attach proof of specific facts, 'presumption of fact' refers to the inference, deducible as a matter of common sense and experience, from facts of which proof is offered.<sup>13</sup> This manner of argument is of ancient origin.<sup>14</sup> Thomas Peake in his *Compendium of the Law of Evidence of 1806*, declared:

... in all cases where positive and direct evidence is not to be obtained, the proof of circumstances and facts, consistent with the claim of one party, and inconsistent with that of the other, is deemed sufficient to enable a Court of Law, or more correctly speaking a jury under its direction, to presume the particular fact which is the subject of controversy; for the mind, comparing the circumstances of the particular case with the ordinary transactions of mankind, judges from those circumstances as to the probability of the story, and for want of better evidence, draws a conclusion from that before it.<sup>15</sup>

In *R. v. Burdett*<sup>16</sup>, a case of criminal libel, Best J., is reported to have said:

We are not to presume guilt, without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases.

Abbott C.J., in that same case made the following remarks:

A presumption of fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could be thus ascertained, by inference in a Court of Law, very few offenders could be brought to punishment.<sup>18</sup>

An inference is justified when facts warranting inference are established. These facts from which the inference is drawn are circumstantial. Circumstantial evidence is not of itself evidence. It is only evidence because, admitting its accuracy, it leads to belief of the fact to be proved by way of reasoning. For example, where a person is

13. J.B. Thayer, 'Preliminary Treatise on Evidence', supra fn. 8, 342, fn. 10; 'Presumptions of Law and Presumptive Evidence', supra fn. 8; Phillips, 'Evidence, (Vol. II), 156.

14. Such are Coke's 'presumption, whereof there be three sorts, viz., violent, probable, and light or temerary'; Co. Litt. 613. But before the days of Coke who was a great inventor of these maxims which embodied "the truisms which elementary reason and elementary experience teaches" the common law had already acquired a considerable number; Sir William Holdsworth, 'A History of English Law', (3rd ed. Reprint 1966) Vol. 9, 133-135, 140; Thayer, 'Preliminary Treatise on Evidence', supra fn. 8, 279-280, 335.

15. Thomas Peake, 'A Compendium of the Law of Evidence', (2nd American Ed. from 2nd London ed. 1806) 21-22.

16. (1820) 4 B. & Ald. 95; 106 E.R. 873.

17. Ibid. 121-122; 883.

18. Ibid. 161; 898. See also *Loveden v. Loveden* (1810) 2 Hag. Can. 1; 161 E.R. 648.

found standing over a wounded man with a bloody knife in his hand it may be inferred that the one stabbed the other. The fact that the person was discovered with the bloody knife has, of itself and apart from its consequence, no weight; but it tends to establish who stabbed the wounded man.<sup>19</sup> Circumstantial evidence was thus once described as presumptive evidence.<sup>20</sup> As Boyle C.J., noted:

Evidence, whether written or oral, is either positive or presumptive. Positive evidence is direct proof of the fact or point in issue; presumptive evidence consists in the proof of some other fact or facts from which the point in issue may be inferred.<sup>21</sup>

### KNOWLEDGE

It has always been a rule of law that all evidence be weighed according to the proof which it was in the power of one party to have produced, and in the power of the other to have contradicted.<sup>22</sup> This applies equally whether the evidence be direct or circumstantial. So, for example, in *R. v. Burdette*<sup>23</sup>, Holroyd J., referring to inferences of fact, stated:

They (the presumptions arising in the case) stand only as proofs of the facts presumed till the contrary be proved, and these presumptions are either weaker or stronger according as the party (i.e. the accused) has, or is reasonably to be supposed to have, it in his power to produce such other evidence to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence, that in every case the onus probandi lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime of which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, un rebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true.<sup>24</sup>

19 'Presumptions of Law and Presumptive Evidence', supra fn. 8, 547-548.

20 J.H. Wigmore, 'A Treatise on the Anglo-American System of Evidence', supra fn. 11, Vol. 1, 398-399; 'Presumptions of Law and Presumptive Evidence', supra fn. 8, 548.

21 *Davis v. Curry* (1810) 2 Bibb. Ky. 239; also *State v. Carter* (1873) 1 Houst. Cr. C. Del. 402, 411, per Gilpin C.J. The distinction between positive and presumptive evidence was correctly stated by Bentham when he said, "Evidence is direct, positive, immediate, when it is of such a nature, that (admitting its accuracy) it brings with it a belief of the thing to be proved. Evidence is indirect or circumstantial when it is of such a nature that (admitting its accuracy) it leads to a belief of the thing to be proved only by way of induction (i.e. deduction) reasoning, inference." Dumont, 'Treatise on Evidence' 186, rehd. 'Presumptions of Law and Presumptive Evidence', supra fn. 8, 547.

22 *Blatch v Archer* (1774) 1 Cowp. 63, 65, 98 E.R. 969-970; per Lord Mansfield. In *R. v. Kakelo* (1923) 2 K.B. 793, Sankey J., expressed the rule thus: "in considering the amount of evidence necessary to shift the (evidentiary) burden of proof the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively." See also *Windsor Board of Education v. Fort Motor Company of Canada* (1939) 5 C.R. 412, 432, per Davis J.

23 Supra fn. 16.

24 Ibid. 140, 890. See also Holroyd J's statements at 141; 891. These latter statements which correspond to those of Bayley J. at 150, 894, must be read bearing in mind Holroyd J's foregoing opinion. Neither judgment should be interpreted as suggesting that where a matter is peculiarly within the knowledge of the defendant the onus probandi will shift to him despite the absence of sufficient proof on the part of the party alleging, and that his neglect will furnish the ground for the presumption against him.

Abbott C.J., in that same case expressed the proposition more simply:

In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?<sup>25</sup>

Where an inference can justifiably be drawn from circumstantial evidence and it can be assumed that the opposite party has it in his power to rebut that conclusion by contradictory or explanatory evidence, if he offers none then we have something like an admission that the presumption is just.<sup>26</sup>

### BEST EVIDENCE

In *Robinson Brothers (Brewers) Ltd. v. Houghton and Chesterle-Street Assessment Committee*<sup>27</sup>, Scott L.J., declared:

... where the particular hereditament is let at what is plainly a rack rent, or where similar hereditaments in similar economic sites are so let, so that they are truly comparable, that evidence is the best evidence, and for that reason alone admissible: indirect evidence is excluded, not because it is not logically relevant to the economic inquiry, but because it is not the best evidence.<sup>28</sup>

This dictum was rejected by Lord Denning M.R., in *Garton v. Hunter*<sup>29</sup>, wherein he asserted that Lord Justice Scott had in mind an old rule, which had since all but disappeared, requiring a party to produce the best evidence the nature of the case would allow and excluding accordingly evidence of a lesser value.<sup>30</sup> Granted the passage of time has witnessed its gradual erosion nonetheless at the beginning of the 19th century this principle was most important.<sup>31</sup> In its own way it restricted the utilization of ordinary processes of reasoning, for only in cases where direct proof was unobtainable could circumstantial evidence, for want of better evidence, be received.<sup>32</sup>

25. Ibid. 161-162; 898.

26. Ibid. 122; 833; per Best J.

27. (1937) 2 K.B. 445; (1937) 2 All E.R. 298.

28. Ibid. 468-469; 307.

29. (1969) 1 All E.R. 451, 453.

30. The only remaining instance of the rule is to be found in the context of documentary evidence. If an original document is available it must be produced

Today all relevant evidence is admitted. Its nature affects only its weight: *Garton v. Hunter*, supra fn. 29, 453, per Lord Denning M.R.

31. See *Omychund v. Barker* (1744) 1 Atk. 21, 49; 26 E.R. 15, 33; *Cheney v. Watson* (1797) Peake Add. Cas. 123; 170 E.R. 217; *Williams v. The East Indian Company* (1802) 3 East 192, 201; 102 E.R. 571, 574; Earle Bathurst, 'The Theory of Evidence', (1761), 2, 110; H. Smith and G.C. Kennedy, 'Roscoe's Digest of the Law of Evidence in Criminal Cases', (11th ed. 1890), 1; Phipson, 'Law of Evidence', (10th ed.), 70, "Perhaps the most conspicuous feature of the modern law is its persistent recession from this once famous principle".

32. Supra fn. 15.

In *Williams v. The East India Company*<sup>33</sup>, it was held that circumstantial evidence could not be given of a fact when direct evidence with respect thereto was available. But normally when circumstantial evidence was offered direct evidence was not to be obtained. Abbot C.J., when justifying presumptions of fact in *R. v. Burdett*, argued that in a great number of criminal trials no direct proof that the party accused actually committed the crime was or could be given.<sup>34</sup> Rarely were those charged with theft seen to break into the house or take the goods and in few cases of murder was there a witness who saw the fatal blow struck. In instances of homicide direct evidence of the intention necessary to constitute the murder was almost never available. So Best J., in that same case, remarked:

If the rules of evidence prescribe the best course to get at the truth, they must be and are the same in all cases . . . Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished.<sup>35</sup>

#### NEGLIGENCE AND PRESUMPTIONS OF FACT PRIOR TO *BYRNE V. BOADLE*

There is no absolute or intrinsic negligence.<sup>36</sup> Negligence is a relative term. Whether in a specific case the defendant's injuries are a consequence of the plaintiff's negligence depends on an assessment of the evidence in the light of the duty of care demanded by law having regard to the relationship of the parties.<sup>37</sup> Accordingly, one might be tempted to describe negligence as being necessarily a presumption of fact from circumstantial evidence of a more or less cogent nature. But this terminology has not been adopted. The law has traditionally recognized direct evidence of particular acts of negligence.<sup>38</sup> Facts established by direct proof which in the circumstances constitute negligence are deemed to amount to direct evidence of negligence. Consequently, only in cases where no direct evidence of any particular act or negligence is adduced is negligence, if found, properly described as a presumption of fact. In such cases nothing beyond evidence of the mere fact that something unusual has happened is given. What is presumed are acts or omissions which when considered with reference to the duty of care are deemed to amount to negligence.

The best evidence rule once operated to exclude the ordinary processes of reasoning from circumstantial evidence when direct

33. (1802) 3 East 192, 201; 102 E.R. 571, 574.

34. *Supra* fn. 16, 161; 898.

35. *Ibid.* 123; 884.

36. *Degg v. The Midlands Railway Company* (1857) 1 H. & N. 733, 781; 156 E.R. 1413, 1416; *Ruck v. Williams* (1858) 3 H. & N. 308, 317; 157 E.R. 488, 492.

This assertion is subject to this qualification: in jurisdictions where a breach of statutory duty constitutes negligence *per se* negligence is, in this sense, absolute.

37. cf. *Christie v. Griggs* (1809) 2 Camp. 79; 170 E.R. 1088; *Sharp v. Grey* (1833) 9 Bing 457; 131 E.R. 684; *Doyle v. Wragg* (1857) 1 F. & F. 7; 175 E.R. 601.

38. e.g. H. Smith 'Treatise on the Law of Negligence' (2nd ed. 1884) 246.

evidence of particular acts of negligence was introduced. It was only the absence of such direct evidence which permitted the fact of negligence to be inferred from circumstantial evidence in *Christie v. Griggs*.<sup>39</sup> The plaintiff in that case proved that as a result of the axle-tree snapping he was precipitated from the top of the coach on which he was travelling and thereby injured. That was the extent of the plaintiff's case and despite the defendant's contention that the plaintiff was bound to give evidence to support the latter's allegations that the accident was a result of either the driver's unskilfulness or the coaches insufficiency, or both, Chief Justice Mansfield concluded:

I think the plaintiff has made a prima facie case by proving his going on the coach, the accident, and the damage he has suffered... What other evidence can the plaintiff give. The passengers were probably all sailors like himself; and how do they know whether the coach was well built or whether the coachman drove skilfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of the coach is proved, negligence on the part of the owner is implied.<sup>40</sup>

Of course today the nature of the evidence should only be relevant to its weight and therefore presumptions of negligence, where justified, ought to be permitted despite direct proof of particular acts of negligence; their utility in such circumstances is another matter.<sup>41</sup>

Liability for negligence is only established if it can be shown that the defendant's negligence was the cause of the accident resulting in injury or damage. As direct evidence in *Christie v. Griggs* only demonstrated that the plaintiff's injuries had resulted from the breaking down of the defendant's coach, a determination that the plaintiff had made a prima facie case consequently implied that it could be inferred from the mere fact of that occurrence that negligence on the part of those for whom the coach owner was at law vicariously liable was the cause of the accident. In other words, in addition to negligence being a reasonable conclusion of fact from the breaking down of the coach, the circumstantial evidence connected the defendant with the cause of the accident. The presumption of negligence embodied a presumption that that negligence was attributable to the defendant or his employees.

Knowledge was an additional factor in *Christie v. Griggs* to which Mansfield C.J., had regard when determining that the plaintiff had made a prima facie case. Whereas it was acknowledged that the plaintiff was unable to give other evidence it was assumed that the coach owner had the means to rebut the presumption of negligence if it was unfounded.<sup>42</sup> Witnesses subsequently called by the defendant confirmed the propriety

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39 (1809) 2 Camp 79; 170 E R 1088

40 Ibid

41 Supra fn 30

42 Supra fn 39

of this assumption by stating that the axle-tree had been examined a few days before it broke without any flaw being discovered in it and that at the time of the breaking down of the coach, the coachman, a very skilful driver, was driving in the usual track at a moderate pace.

Satisfied that this evidence cleared the driver "of everything like negligence" Mansfield C.J., submitted only the question of the sufficiency of the coach to the jury. The skilfulness of the driver having been demonstrated the cause of the breaking down of the coach could only be presumed to be its insufficiency. But was this insufficiency attributable to the defendant's negligence? A verdict for the defendant implied a negative response to this question on the part of the jury. Having assessed the evidence with reference to the duty of care owed by the defendant to the plaintiff, the jury in effect concluded that the breaking down of the coach was unavoidable despite due care on the defendant's part.

The allegations of unskilfulness and insufficiency in *Christie v. Griggs* were thus attacked at different points. Evidence of the driver's skilfulness precluded an inference of unskilfulness from the fact of the occurrence. But there was no evidence to preclude an inference of insufficiency. It was deducible as a matter of common sense and experience from the fact of the occurrence. However, evidence was led to enable the jury to conclude that the insufficiency was not attributable to the defendant's failure to take due and proper care.

An exhaustive examination of the early negligence actions wherein presumptions of fact were discussed would be a futile exercise. But the remaining cases referred to in argument in *Byrne v. Boadle*<sup>43</sup> should be considered prior to an examination of the latter decision.

The plaintiff in *Carpue v. The London and Brighton Railway Company*<sup>44</sup> sought to recover damages for the injuries he sustained as a consequence of the railway carriage in which he was travelling being derailed. The declaration alleged that the Company, which owned and operated both the railway and the train, was responsible for the plaintiff's injuries in that it unskilfully and without due and proper care managed the train thereby causing the derailment. Evidence given for the plaintiff at trial included an assertion that the position of the rails had been deranged at the place where the derailment had occurred and an opinion that the train was proceeding at an excessive speed given the state of the rails. Evidence to meet this was introduced by the defendant Company.

Lord Denman C.J., instructed the jurors that they had to be satisfied that the accident had been occasioned by the negligence<sup>43</sup> of the

43. *Supra* fn. 5.

44. (1844) 5 Q.B. 747; 114 E.R. 1431.



defendant. But it having been shown that the Company had exclusive management, both of the machinery and the railway, it was in his opinion presumable that the accident had occurred because of the Company's negligence unless the latter gave some explanation of the cause by which the derailment was produced. The plaintiff, not having the same means of knowledge, could not reasonably be expected to give such an explanation. He also adverted to the assertion that the speed of the train was excessive considering the condition of the rails as being one hypothesis which might reasonably have accounted for the derailment. The jury returned a verdict for the plaintiff.<sup>45</sup>

Connecting the defendant with the cause of the accident was not a problem in *Carpue*. As the Company had exclusive management of both the machinery and the railway, if negligence was the cause of the derailment resulting in injury to the plaintiff that negligence was necessarily attributable to the Company.

But what of negligence itself? The alleged failure of the Company to maintain the railway in a proper state of repair was direct evidence of negligence upon which the jury verdict might have been based. But assuming negligence was presumed to be the cause of the accident how was this conclusion arrived at? Did the jury infer specific acts or omissions which, when considered with reference to the appropriate duty of care, constituted negligence?<sup>46</sup> Or did the jury simply presume that whatever acts or omissions produced the derailment they probably amounted to negligence bearing in mind the proper standard of care?

An absence of knowledge on the part of the plaintiff in *Carpue* did not relieve him of the necessity of proving his case. But it did provide the icing for the cake for as we have noted all evidence is weighed according to the proof which it was in the power of one party to adduce and in the power of the other to have contradicted.

The ruling of Lord Denman C.J., in *Carpue v. The London and Brighton Railway Company* was referred to with approval by the Court of Exchequer in *Skinner v. The London, Brighton, and South Coast Railway Company*.<sup>47</sup> The plaintiff in the latter case sought to recover damages for the injuries he had received when the night train on which he was travelling collided with a stationary train which had stopped a short distance from a station as a consequence of a goods train before it having broken down. He alleged that the Company, which owned and operated all three trains in addition to the railway, was responsible for his injuries in that the negligence of its employees had caused the

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45. The Company sought, inter alia, a new trial on the ground of misdirection alleging that Lord Denman C.J., had informed the jury that it lay on the Company to disprove negligence rather than on the plaintiff to prove it. However, the point was not pursued.

46. e.g. operating the train at a speed which was, in the circumstances, excessive or failing to keep a proper look out.

47. (1850) 5 Ex. 787; E.R. 345.

collision. Pollock C.B., in his summation, told the jury that the fact of the accident having occurred was of itself prima facie evidence of negligence on the part of the Company. The jury returned a verdict for the plaintiff.

The Company moved for a new trial asserting that the trial judge had misdirected the jury and erroneously cast the burden of disproving negligence upon the Company. It argued, to adopt its own terminology:

The plaintiff complains of negligence, and therefore he is bound to prove it: and for that purpose it is not enough to show that an accident in fact happened, but he ought further to prove, that the accident was the result of the defendant's negligence.<sup>48</sup>

This argument provoked the following responses from Pollock C.B., and Alderson B., respectively:

Surely the fact of a collision between two trains belonging to the same Company is prima facie some evidence of negligence on their part.<sup>49</sup>

This is not the case of a collision between two vehicles belonging to different persons, where no negligence can be inferred against either party, in the absence of evidence as to which of them is to blame. But here all three trains belong to the same Company; and whether the accident arose from the trains running at too short intervals, or from their improper management by the persons in charge of them, or from their servants at the station neglecting to stop the last train in time, the Company are equally liable; and it is not necessary for the plaintiff to trace specifically in what the negligence consists; and if the accident arose from some inevitable fatality, it is for the defendant's to show it.<sup>50</sup>

The motion was accordingly dismissed.

In the opinion of the Court the circumstantial evidence in *Skinner* justified a probable conclusion that negligence on the part of the Company's employees had caused the collision resulting in injury to the plaintiff. As in *Carpue* the Company had exclusive management of the trains and the railway and in view of the plaintiff's knowledge the best evidence was circumstantial. It was therefore unnecessary for the plaintiff to show specifically in what that negligence consisted. It was sufficient that the accident could on probabilities be attributed to one or more of a number of acts or omissions, any one of which, when assessed with reference to the appropriate duty of care, amounted to negligence.<sup>51</sup> Moreover the defendant Company was able to adduce contrary evidence if the fact or facts presumptively proved were not true.

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48. Ibid. 789; 345-346.

49. Ibid. 789; 346.

50. Ibid.

51. *Supra* fn. 50, per Alderson B.

It was this latter fact which induced Baron Alderson to assert that "if the accident arose from some inevitable fatality, it is for the defendants to show it".<sup>52</sup> If the collision was unavoidable despite due and proper care on the part of the Company's employees, the Company had the means to prove it. He was not by this remark purporting to define the nature of the onus cast upon a defendant in cases where negligence was presumed as a fact from circumstantial evidence.

A number of important principles concerning the burden of proof and the respective functions of judge and jury emerge from the cases which remain to be considered under this subheading. These principles provide the framework with reference to which the obligations of plaintiff and defendant in any presumptive negligence action may be defined. They must be stated as follows:

1. Just as a fact will not be inferred without premises which warrant the inference so acts or omissions amounting to negligence will not be presumed from circumstantial evidence unless the nature of the occurrence warrants the presumption.<sup>53</sup>

2. Further a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendant will not justify the submission of the case to the jury. For the judge to leave the case to the jury there must be evidence upon which the jury might reasonably and properly conclude that there was negligence.<sup>54</sup>

3. Consequently where on the evidence it is equally probably that there was not as that there was negligence on the part of the defendant it is not competent to the judge to leave the matter to the jury.<sup>55</sup>

4. But although the accident may be prima facie evidence of negligence the jury may still properly find a verdict for the defendant for whereas it is for the judge to say whether any facts may reasonably be inferred from the circumstantial evidence and whether negligence may be a reasonable conclusion from those facts, it is for the jurors to say whether those inferences ought to be drawn.<sup>56</sup>

52. *Ibid.*

53. *Bird v. The Great Northern Railway Company* (1858) 28 L.J. Ex. 3; 118 R.R. 893; *Toomey v. The London, Brighton, and South Coast Railway Company* (1857) 3 C.B. (N.S.) 146; 140 E.R. 694; *Cotton v. Wood* (1860) 8 C.B. (N.S.) 568; 141 E.R. 1288; *Hammack v. White* (1862) 11 C.B. (N.S.) 588; 142 E.R. 926.

54. *Toomey v. The London, Brighton and South Coast Railway Company*, supra fn. 53; *Cotton v. Wood*, supra fn. 53.

55. *Bird v. The Great Northern Railway Company*, supra fn. 53; *Hammack v. White*, supra fn. 53; *Cotton v. Wood*, supra fn. 53.

56. *Bird v. The Great Northern Railway Company*, supra fn. 53; *Bridges v. The Directors of the North London Railway Company* (1874) Law Rep. 7 H.L. 213; *The Directors of the Metropolitan Railway Company v. Jackson* (1877) Law Rep. 3 H.L. 193.

This function of the jury is subject to the powers of the judge to determine whether the verdict is such as reasonable and fair men might not unfairly arrive at, or, in other words, whether the decision is such as would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men: *Bridges v. The Directors of the North London Railway Company*, supra fn. 56, per Brett J.

## TORTIOUS AND CONTRACTUAL DUTIES

*Hammack v. White*<sup>57</sup> was an action by the widow and administratrix of William Hammack to recover damages pursuant to the provisions of Lord Campbell's Act.<sup>58</sup> She alleged that the defendant had by his negligence cause the death of the intestate. Presumptive negligence was argued on her behalf despite the circumstantial evidence not warranting an inference of negligence. Chief Justice Erle, assuming incorrectly that the utilization of presumptive reasoning in negligence actions obliged a defendant to prove the actual cause of the plaintiff's injuries and thereby disprove negligence, in responding to the argument endeavoured to circumscribe the utility of that reasoning process:

The railways cases do not serve you. I do not assent to the doctrine that mere proof of the accident throws upon the defendants the burden of showing the real cause of the injury. All cases where the happening of an accident has been held to be prima facie evidence of negligence, have been cases of contract.<sup>59</sup>

But in addition to the premise upon which he proceeded being erroneous contemporary case law expressly declined to confine negligence within an arbitrary legal category.

In *Pippin v. Sheppard*<sup>60</sup> for example, it was held not to be a ground of demurrer to a declaration in an action by a man and his wife against a surgeon for injury to the wife by reason of the defendant's improper and unskilful treatment that it was not stated therein by whom the defendant was retained or by whom he was paid; it was enough to aver that the defendant was retained as a surgeon and entered upon a cure. Irrespective of whom employed the surgeon the wife was entitled to sustain an action for damages for injuries suffered by her as a result of the surgeon's neglect and want of skill. A similar conclusion was reached in *Marshall v. The York, Newcastle, and Berwick Railway Company*<sup>61</sup>, an action against a railway company for the loss of a passenger's luggage. The declaration in that case alleged that the defendant had received the plaintiff, together with his luggage, to be carried safely for reward and that in breach of that duty the luggage was lost. The Court held that the action being founded upon the breach of duty, and not on the contract, it was unnecessary for the plaintiff to allege or prove that the reward was to be paid by him.<sup>62</sup> Williams J., during the course of his judgment in that case said, this:

It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge* and ending with *Pozzi v. Shipton*, establishes that an action of this sort

57. *Supra* fn. 53.

58. 9 & 10 Vict. c. 93.

59. *Supra* fn. 53, 594; 929.

60. (1822) 11 Price 40; 147 E.R. 512.

61. (1851) 11 C.B. 655; 138 E.R. 632.

62. The Court held that the plaintiff was entitled to recover even though it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time.

is, in substance, not an action of contract, but an action of tort against the company, as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort, is in Fritzerherbert's *Natura Brevium*, "Writ de Trespass sur le Case", where it is said (page 94D): "If a smith prick my horse with a nail, etc., I shall have my action upon the case against him without any warranty by the smith to do it well; for, it is the duty of every artificer to exercise his art rightly and truly as he ought". There is no allusion to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary.<sup>63</sup>

Chief Justice Erle's unjustifiable attempt to restrictively distinguish the presumptive negligence cases and to illogically confine resumptive reasoning to negligence in a contractual context was aborted by the Court of Exchequer in *Byrne v. Boadle*.<sup>64</sup> The following portion of his judgment was cited in the latter case to support an argument that the presumptive negligence "doctrine" be limited to cases involving a collision between two trains upon the same line both being the property and under the management of the same company:

I am of the opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant.<sup>65</sup>

That provoked the following response from Pollock C.B.:

If he meant that to apply to all cases, I must say, with great respect, that I entirely differ from him. He must refer to the mere nature of the accident in that particular case.<sup>66</sup>

But quite apart from any expression reference to Chief Justice Erle's opinion, *Byrne v. Boadle* was a tort action wherein a lack of due and proper care on the part of the defendant was inferred from the circumstantial evidence. Only in this respect was it dissimilar to prior presumptive negligence actions.

### BYRNE V. VOADLE

When Boadle's barrel rolled out of the window of his warehouse it fell into the lives of all tort lawyers and the expression 'res ipsa loquitur' which fell with it became a thing of fearful and wonderful complexities

63. Supra fn. 60. Also *Austin v. Great Western Railway Company* (1867) Law Rep. 2 Q.B. 442; *Foulkes v. Metropolitan Railway Company* (1880) 5 C.P.D. 157.

64. Supra fn. 5.

65. Supra fn. 53, 594, 929.

66. Supra fn. 5, 726; 300. Baron Bramwell obviously assumed Erle C.J., was speaking of the nature of the accident in the particular case for he said, "No doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence".

and ramifications.<sup>67</sup> But unnecessarily so for many of the seeds of later difficulties lay in the language adopted by the Barons of the Exchequer Court in *Byrne v. Boadle*<sup>68</sup> and those difficulties could have been avoided had that decision been interpreted bearing in mind contemporary usage and the perspectives of legal history.<sup>69</sup>

The plaintiff in *Byrne v. Boadle* sought damages in the Court of Passage for injuries he sustained as a result of being struck by a barrel of flour which fell from a first storey window of a warehouse occupied by the defendant. He was at the time of the accident walking along a public highway adjacent to the warehouse and he alleged that the barrel had fallen as a result of negligence on the part of the defendant or his employees. At trial no evidence was adduced to demonstrate the cause of the barrel's falling. The Assessor being of the opinion that there was no evidence of negligence acceded to the defendant's submission that there was no case to answer. Nonetheless the plaintiff was given leave to move the Court of Exchequer to enter a verdict in his favour in the sum of fifty pounds, that being the amount assessed by the jury.<sup>70</sup> The plaintiff subsequently obtained a rule nisi in those terms upon the ground that the Assessor had been incorrect in ruling that there was no evidence of negligence, whereupon he moved to have the rule nisi made absolute.

Charles Russell, appearing before the Court of Exchequer, which consisted of Chief Baron Pollock and Barons Bramwell, Channell, and Pigott, on behalf of the defendant to oppose the motion, argued that the plaintiff had failed to prove negligence on the part of the defendant as required in that there was not a scintilla of evidence of such negligence; unless, he added, proof of the occurrence was of itself sufficient. Pollock C.B., interjected:

There are certain cases of which it may be said *res ipsa loquitur*, and this seems to be one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions.<sup>71</sup>

Russell thereupon submitted that his "doctrine" of presumptive negligence was restricted to collisions between two trains under the same line both being the property and under the management of the same company. But how did he support his submission?

In *Skinner v. The London, Brighton, and South Coast Railway Company*, he admitted, there must have been negligence or the accident

67. Cecil A. Wright, 'Res Ipsa Loquitur', Special Lectures of The Law Society of Upper Canada, (1955), 103, 106, referring to the words of Dean Prosser.

68. *Supra* fn. 5.

69. *Supra* fn. 67.

70. The defendant offered no evidence.

71. *Supra* fn. 5, 725; 300.

could not have happened. But *Carpue v. The London and Brighton Railway Company*, he asserted, was not authority for the application of presumptive reasoning in the context of negligence. The plaintiff in that case had, in addition to proving the occurrence, purported to demonstrate that the rails had been deranged at the place where the accident occurred and had thereby confirmed that the train was proceeding at a speed which was in the circumstances hazardous. The conclusion that the accident was attributable to the defendant's negligence was not therefore solely a consequence of the mere fact of the accident having occurred.

*Christie v. Griggs*, he endeavoured to distinguish upon the basis that the action in that case was upon a contract to carry safely. Of it he said:

But that was an action on the contract to carry safely, and one of the counts imputed the accident to the insufficiency of the coach, of which its breaking down would be evidence for the jury.<sup>72</sup>

When Pollock C.B., inquired of Russell what difference it would have made if in *Christie v. Griggs*, instead of a passenger, a bystander had been injured, he replied:

In the one case the coach proprietor was bound by its contract to provide a safe vehicle, in the other he would only be liable in case of negligence. The fact of the accident might be evidence of negligence in the one case, though not in the other.<sup>73</sup>

In questioning the extension of the presumptive negligence "doctrine" to negligence in a tortious context Russell also referred to the remarks of Erle C.J., in *Hammack v. White* which we have already had occasion to consider.

In the alternative Russell argued that the "doctrine" had been qualified by subsequent cases which confirmed that where the evidence was equally consistent with the existence and non-existence of negligence on the part of the defendant the judge was not competent to leave the case to the jury. But of course it had not for presumptive reasoning had never been utilized to modify the necessity for the plaintiff to establish negligence on the balance of probabilities. Although proper, Russell's assertion that the fact of the occurrence in *Byrne v. Boadle* was equally as consistent with no negligence as with negligence on the part of the defendant, and his warning that,

In a case of this nature, in which the sympathies of the jury are with the plaintiff, it would be dangerous to allow presumption to be substituted for affirmative proof of negligence.<sup>74</sup>

72. Ibid. 725-726; 300.

73. Ibid. 726; 300.

74. Ibid. Negligence was of course the basis of the action in *Christie v. Griggs* even though the coach proprietor was bound by his contract to provide a safe vehicle. His undertaking to his passengers went no further than this "that, as for as human care and foresight could go, he would provide for their safe conveyance"; supra fn. 39, 81, 1088-1089, per Sir James Mansfield C.J.

were both to no avail.

Russell's arguments were unanimously rejected. The entire Court was of the opinion that the circumstantial evidence justified a presumption of negligence. The rule nisi was accordingly made absolute.

Two questions were in issue in *Byrne v. Boadle*. Did the circumstantial evidence connect the defendant with the cause of the accident and was negligence a reasonable inference of fact from the circumstantial evidence? With respect to the former Russell argued that there was no evidence to link the defendant or his employees with the occurrence:

... there was no evidence that the defendant, or any person for whose acts he would be responsible, was engaged in lowering the barrel of flour. It is consistent with the evidence that the purchaser of the flour was superintending the lowering of it by his employees, or may be that a stranger was engaged to do it without the knowledge or authority of the defendant.<sup>75</sup>

But again to no avail for Pollock C.B., was of the opinion that the circumstantial evidence adduced, in the absence of better evidence, justified a probable presumption that the defendant's employees were engaged in removing the defendant's flour from the warehouse when the mishap occurred; were they not the defendant had the means to rebut the presumption. He arrived at this conclusion after noting that the barrel was in the custody of the defendant who occupied the warehouse and under the control of his employees for whose negligent acts and omissions he was responsible at law. But however the accident occurred its probable cause was the acts or omissions of the defendant's employees for as Baron Bramwell observed:

The barrel of flour fell from a warehouse over a shop which the defendant occupied and therefore prima facie he is responsible.<sup>76</sup>

Negligence was not lightly inferred. Prefacing his remarks thus:

... there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident.<sup>77</sup>

Pollock C.B., declared:

...the fact of its (the barrel's) falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show it could not fall without negligence...<sup>78</sup>

75. Supra fn 5, 724; 300.

76. Ibid. 728; 301.

77. Ibid. 727; 301. Baron Channell put it thus: "I agree that it is not every accident which will warrant an inference of negligence. On the other hand, I dissent from the doctrine that there is no accident which will in itself raise a presumption of negligence". See also the remarks of Baron Bramwell at 726; 300.

78. Supra fn. 5, 727; 301. Barons Bramwell, Channell, and Pigott concurred.



After all,

Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and so say that a person who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous.<sup>79</sup>

*Byrne v. Boadle* did not challenge the right of a defendant to remain silent until a prima facie case had been established against him. The question for the Court was whether there was any evidence of negligence, not a mere scintilla or surmise, but such as in the absence of any evidence in answer would entitle the plaintiff to a verdict.<sup>80</sup> The circumstantial evidence constituted such prima facie evidence of negligence and the defendant's silence bearing in mind the knowledge which he could be assumed to possess amounted to something like an admission that the inference of negligence was just.<sup>81</sup> Were there any facts inconsistent with negligence it was thereafter for the defendant to prove them.<sup>82</sup> But this by no means implied that the defendant was obliged to prove the actual cause of the accident or to disprove negligence.

A convenient Latin phrase *res ipsa loquitur* was coined in *Byrne v. Boadle* because evidence of the accident warranted an inference of negligence on the part of the defendant. The phrase concisely and explicitly described the process of reasoning by which acts or omissions amounting to negligence on the part of the defendant were deduced from circumstantial evidence of the accident. It described neither a pre-existent, nor a novel, rule of law.

#### SCOTT V. THE LONDON AND ST. KATHERINE DOCKS COMPANY

*Res ipsa loquitur* has assumed in law the particular meaning which it was ascribed in *Byrne v. Boadle*. Unfortunately interpretations of that meaning have been by no means uniform. A remarkably simple concept, its exposition nonetheless has proved to be a source of confusion and a centre of controversy. But inevitably those explanations have referred initially to the opinion of the majority of the Court of Exchequer Chamber in *Scott v. The London and St. Katherine Docks Company*.<sup>83</sup>

79. *Supra* fn 5, 727-728; 301. Baron Bramwell described the duty of care thus: "I think that a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it".

80. The question was so framed by Baron Channell.

81. *Supra* fn. 26

82. *Supra* fn 5, 728; 301, per Pollock C B

83. *Supra* fn 6

The circumstances which gave rise to the dispute between Scott and the London and St. Katherine Docks Company were similar to those which were the subject of proceedings in *Byrne v. Boadle*. The plaintiff, a customs officer, sought damages from the defendant for injuries he sustained, whilst walking on the defendant's dock, as a consequence of being struck by certain bags of sugar which fell from a warehouse occupied by the defendant. His declaration alleged that the bags of sugar fell upon him due to the negligence of the defendant's employees whom he asserted were at the time lowering the bags of sugar from the warehouse to the dock.

At trial the plaintiff proved only the accident. Accordingly, at the conclusion of the plaintiff's examination in chief, Baron Martin is reported to have expressed the following opinion:

... even assuming the bags of sugar were being dealt with by the servants of the defendants in the course of their employment, and that the plaintiff was lawfully passing through the Docks, there was not sufficient evidence of negligence on the part of the defendants to entitle him to leave the case to the jury...<sup>84</sup>

Rather than non-suit the plaintiff, however, he directed a verdict for the defendant.<sup>85</sup>

Thereafter the plaintiff moved the Court of Exchequer to set aside the verdict and order a new trial upon the ground that there was evidence of negligence for the jury. A rule nisi in those terms was granted and subsequently made absolute, whereupon and against which decision the defendant appealed to the Court of Exchequer Chamber. Before considering the judgment of that Court let us review the opinions expressed in the Court of Exchequer.

The rule nisi having been obtained on the authority of *Byrne v. Boadle*, Murphy, for the defendant endeavoured to distinguish that case upon the basis that therein the accident took place on a public highway whereas in the case before the Court, the plaintiff, a licensee, was injured whilst on the defendant's dock. *Byrne v. Boadle*, he declared:

... goes to this only, that there may be circumstances under which the mere happening of an accident is evidence of negligence, whereas *Hammack v. White* shows that a mere accident is not necessarily evidence of negligence; and in *Cotton v. Wood, Erle C.J.*, said that, "to warrant a case being left to the jury, a mere scintilla of evidence is not sufficient: there must be proof of well-defined negligence."<sup>86</sup>

Acts or omissions amounting to negligence could not be inferred, he argued, because the degrees of negligence for which a defendant was liable differed as between public and private property.

84. (1865) 3H. & C. 596, 597, 159 E.R. 665, 666.

85. The defendant gave no evidence.

86. (1864) 34 Law J. Rep. (N.S.) Ex. 17, 18.

In reply the Solicitor General denied that the plaintiff was a mere licensee or passer-by. The plaintiff, he asserted, was on the docks in pursuance of his duty and there was a corresponding duty of care upon the defendant. *Byrne v. Boadle*, he argued, was not therefore distinguishable. Accordingly he submitted:

This is a case where *res ipsa loquitur*, and negligence may be presumed.<sup>87</sup>

For, he concluded:

Proof of negligence need not necessarily be positive or affirmative, but may, by inference from facts, be as clear as if it were direct.<sup>88</sup>

Baron Martin, dissenting, was of the opinion that the rule should be discharged. The plaintiff's evidence amounting to nothing more than that the plaintiff suffered injuries when bags of sugar fell upon him there was, to Baron Martin's mind, no evidence of negligence for the jury.<sup>89</sup> Barons Bramwell and Pigott, however, were of the opinion that the rule should be made absolute. Both prefaced their remarks with the assumption that the plaintiff was rightfully and lawfully on the docks not as a mere licensee but having a right to be there and having a duty to discharge. Neither were accordingly able to distinguish the case substantially from *Byrne v. Boadle*. In the words of Pigott B.:

The sugar fell on him either out of a window or from a crane; how it came to fall is left in doubt. Then the question is, was there any evidence of negligence on the part of those who were dealing with the sugar? That is the way I view the case. To use the words of the Lord Chief Baron in *Byrne v. Boadle*, this is a case where *res ipsa loquitur*, so as to call on the defendants to explain how the thing happened. It may have been the result of inevitable accident, but, as it stands, there is evidence calling upon them for an explanation. As I understand the case of *Hammack vs. White*, it only lays down the same principle: Williams J. says there, that he thinks that "where the evidence is equally balanced, the benefit of the doubt must in such a case as this be given to the defendant." So here, if the facts were such as to leave the evidence evenly balanced, whether the injury was the result of mere accident or of negligence, I should say that it was not a case where the defendants should be called on for an answer. Looking at the case as it stands, however, and understanding the ordinary transactions of life, the event here is not one which does, in the ordinary course of business, usually and ordinarily happen. It is *prima facie* the result of some negligence; and for these reasons I think that it was a question for the jury, and that the defendants should be called upon to explain how the injury happened to be inflicted. In the absence of that explanation, the rule should be made absolute.<sup>90</sup>

The submissions that were made on behalf of the Company before the Court of Exchequer were repeated before the Court of Exchequer Chamber. In addition counsel for the appellant referred to the

87. *Ibid.*

88. *Ibid.*

89. Pollock C.B. intimated that he was inclined to the conclusion of Martin B., given the facts of the case but in order to avoid any obstacle to an appeal he delivered no opinion.

90. *Supra* fn. 86, 17, 18.

judgment of Erle C.J., in *Hammack v. White* as authority for the proposition that mere proof of an accident was not sufficient to establish a prima facie case. Blackburn J., responded thus:

The question depends on the nature and character of the accident. If a ship goes down in the sea that is equally as consistent with care as with negligence; but if a ship goes down in a dock, is not the fact of the accident prima facie evidence of negligence?<sup>91</sup>

Capitalizing on this reasoning counsel for the appellant argued that direct evidence of negligence was essential the accident being equally as consistent with due care as with an absence of it. It was to no avail however, as his submissions were rejected by a majority of the Court of Exchequer Chamber.

During the course of the appellant's address Blackburn J., is reported to have recalled an old rule of pleading that less particularity was required when the facts lay more within the knowledge of the opposite party than the party pleading, and concluded:

Applying that here, is not the fact of the accident sufficient to call upon the defendant to prove that there was no negligence.<sup>92</sup>

But the knowledge rule did not enable a plaintiff to avoid the necessity of establishing a prima facie case and the comment of Blackburn J., should not be interpreted as having that effect.<sup>93</sup>

The Solicitor General argued that the test was whether the case was more consistent with negligence than care. Applying that test to the case before the Court he declared:

Looking at the simple fact that the bags of sugar fell violently upon the plaintiff, this case is more consistent with negligence than care.<sup>94</sup>

After all what further evidence could the plaintiff have given,

... unless he called adverse witnesses to prove facts peculiarly within the knowledge of the defendants?

As in *Byrne v. Boadle* two questions were in issue in *Scott v. The London and St. Katherine Docks Company*. Was the circumstantial evidence sufficient to support an inference of negligence and connect the defendant with the cause of the collision? With reference to the latter neither the test of custody or control formulated by Pollock C.B., in

91. *Supra* fn. 84, 599, 667. The precise wording of the Hurlstone and Coltman Report differs substantially from that of the Law Journal Report.

92. *Supra* fn. 84, 600, 667.

93. *R. v. Burdett*, *supra* fn. 16.

94. *Supra* fn. 84, 601; 667.

95. *Ibid.* 600; 667, per The Solicitor General.

*Byrne v. Boadle*, nor the test of exclusive management employed by Lord Denman C.J., in *Carpue v. The London and Brighton Railway Company*, was specifically referred to but a comparable test was adopted:

... where the thing is solely under the management of the defendant or his servants...<sup>96</sup>

In other words, the bags of sugar fell from a warehouse occupied by the Company and therefore the Company could be presumed on probabilities to be responsible for any negligence.

With respect to the question of negligence the majority concluded:

There must be a reasonable evidence of negligence. But where... the accident is such as the ordinary course of things does not happen if ... proper care (is used), it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.<sup>97</sup>

As the judgment of the Court of Exchequer was affirmed the majority were of the opinion that the accident was prima facie evidence of negligence, and as the Company had offered no evidence there was necessarily evidence of negligence for the jury.

Chief Justice Erle was careful to note that the Court unanimously affirmed the principles laid down in cases cited on behalf of the Company. They included *Toomey v. The London, Brighton and South Coast Railway Company*<sup>98</sup>, *Cotton v. Wood*<sup>99</sup>, and *Hammack v. White*. The Court thereby confirmed the principles with respect to the burden of proof described earlier and their consistency with presumptive negligence. That the necessity of explanation in cases where circumstantial evidence warranted an inference of negligence was not a requirement of disproof of negligence was accordingly re-affirmed.

Res ipsa loquitur should not be equated with the principles formulated by the majority in *Scott v. The London and St. Katherine Docks Company*. It is a descriptive phrase which must be interpreted in perspective; bearing in mind the decision of the Court of Exchequer Chamber but against the background of cases which preceded it and with reference to that broader concept of which it was merely a specific instance. In this respect the caution sounded by Henry J., in *Watson v. Davidson*<sup>100</sup> is particularly appropriate:

<sup>96</sup> Ibid.

<sup>97</sup> Ibid. Erle C.J., who as Erle J., in *Hammack v. White* had endeavoured to circumscribe the presumptive negligence "doctrine", delivered the opinion of the Court. He noted that both he and Mellor J., were unable to find that reasonable evidence of negligence which had been apparent to the rest of the Court.

<sup>98</sup> Supra fn 53

<sup>99</sup> Ibid.

<sup>100</sup> (1966) N.Z.L.R. 853

Before discussing any further cases, I wish to advert to two matters of a general nature. Lord MacDermott, in referring to the formulation by Willes J. of the duty owed to invitees said in the case of *London Graving Dock Co. Ltd. v. Horton* "The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge; but the inquiry is to ascertain the applicable rule of the common law and cannot, as I regard the position, be confined to a problem of construction." These observations apply to the formulation of the principles laid down in *Scott v. London and St. Katherine Docks Co.* The second matter is that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found; per the Earl of Halsbury L.C. in *Quinn v. Leatham*.<sup>101</sup>

## EPILOGUE

An examination of *res ipsa loquitur* actions to the present day is beyond the scope of this article. In any event they have been discussed on numerous occasions in the past.<sup>102</sup> Nevertheless something like a synopsis should be attempted.

In Canada in recent years a more or less accurate explanation of the descriptive expression *res ipsa loquitur* has been consistently adopted.<sup>103</sup> This explanation has in a number of cases been supported by reference to the obiter remarks of Duff C.J., in *United Motors Services Incorporated v. Hutson*.<sup>104</sup> But both before and after that decision confusion shrouded the latin tag as a consequence of misunderstanding and misinterpretation.<sup>105</sup> A tendency to equate it with the principles formulated by the majority of the Court of Exchequer Chamber in *Scott v. The London and St. Katherine Docks Company* still persists.<sup>106</sup> The trend, however, is perhaps best reflected in the judgment of Addy, J., in *MacDonald v. York County Hospital Corporation*<sup>107</sup>:

101. *Ibid.* 854-855.

102. For an excellent discussion of *res ipsa loquitur* from 1863 see Cecil A. Wright, 'Res Ipsa Loquitur' *supra* fn. 67.

103. e.g. *Temple v. Terrace Transfer Limited* (1966) 57 D.L.R. (2d) 631; *McDonald v. Little* (1970) 14 D.L.R. (3d) 114; *McDonald v. York County Hospital Corporation* (1972) 3 O.R. 469.

104. (1937) S.C.R. 294; (1937) 1 D.L.R. 737. e.g. *Interlake Tissue Mills Company Limited v. Salmon and Beckett* (1949) 1 D.L.R. 207; (1948) O.R. 950; *Crits and Crits v. Sylvestre* (1956) O.R. 132; *Temple v. Terrace Transfer Limited*, *supra* fn. 103; *Phillips v. Ford Motor Company of Canada* (1971) 18 D.L.R. (3d) 641.

105. e.g. *Curry v. Sandwich, Windsor and Amherstburg Railway Company* (1914) 18 D.L.R. 685; 7 O.W.N. 140; 19 C.R.C. 210; *Penman v. Winnipeg Electric Railway Company* (1925) 1 D.L.R. 497; *Canivet v. Brown's Bread Limited* (1929) 64 O.L.R. 58; *Willis v. Coca Cola Company of Canada Limited* (1934) 2 D.L.R. 173, per McPhillips J.A.; *Winnipeg Electric Company v. Geel* (1932) A.C. 690. (cf. *Grant v. Australian Knitting Mills Limited* (1936) A.C. 85); *Arendale v. Canadian Bread Company* (1941) 2 D.L.R. 41; (1941) O.R. 69; per Riddell J.A.: *Malone v. Trans-Canada Airlines* (1942) 3 D.L.R. 369; (1942) O.R. 453; per MacKay J., whose interpretation of *res ipsa loquitur* was corrected on appeal; and *Scrimgeour v. Board of Management of the Canadian District of the American Lutheran Church* (1947) 1 D.L.R. 677; (1947) 1 W.W.R. 120. In *Holt v. Nesbitt* (1951) O.R. 601; *Zeppa v. Coca Cola Limited* (1955) 5 D.L.R. 187; (1955) O.R. 855; and *Cudney v. Clements Motor Sales Limited* (1966) 57 D.L.R. (2d) 631; the effect of *res ipsa loquitur* was not precisely described although in the latter case it was clarified on appeal.

106. e.g. *Holt v. Nesbitt*, *supra* fn. 105; *Phillips v. Ford Motor Company of Canada Limited*, *supra* fn. 104; *MacDonald v. York County Hospital Corporation*, *supra* fn. 103.

107. *Supra* fn. 103.

Res ipsa loquitur is a circumstantial rule of evidence based on the concept that, when an accident occurs under circumstances where it is so improbable that it could have happened without the negligence of the defendant, the mere happening of the accident gives rise to an inference that the defendant was negligent. . . . but in any action where it is pleaded, whether malpractice or not, the happening of the accident must satisfy two conditions precedent: The happening of the accident must (a) speak of negligence on the part of someone, and, (b) point to the defendant as the negligent person. . . . If the happening of the accident satisfied these two conditions precedent, all the plaintiff needs to do to make out a prima facie case of negligence against the defendant is prove the simple facts of the occurrence of the accident.<sup>108</sup>

With respect to the necessity to connect the defendant with the cause of the accident he declared:

This requirement is often stated in many of the cases in the form that it must be shown that the control over the happening of the accident rested solely with the defendant, or with persons for whose acts the defendant was vicariously responsible.<sup>109</sup>

The effect of the inference he described in this manner:

The evidentiary obligation on the defendant, therefore, is to put forward an explanation of the accident that is consistent with the facts and no negligence on his part. . . . Many of the cases inadequately distinguish between an "evidential burden of proof" and the legal burden of proof. In an action for negligence the plaintiff has the legal burden of proving that the accident was caused by the defendant's negligence. This legal burden of proof does not shift. At the conclusion of the evidence the Court must be satisfied that, on a balance of probabilities, the accident was caused by the negligence of the defendant; if not, the plaintiff's action fails. However, in the course of the trial the application of the doctrine of res ipsa loquitur may raise a prima facie inference against the defendant and unless he introduces some evidence to rebut this inference he will lose. This is the sense in which there can be said to be an "evidential burden of proof" on the defendant. As stated previously, the defendant can satisfy this evidential burden by introducing a reasonable explanation of the happening of the accident, that is consistent with the proven facts, and is as consistent with there being no negligence on his part as with the inference that there is negligence. Res ipsa loquitur does not have the effect of shifting the legal burden of proof to the defendant so that he must disprove negligence on his part.<sup>110</sup>

Despite the valiant endeavours of Lord Dunedin and Lord Shaw in *Ballard v. North British Railway Company*<sup>111</sup> the confusion and uncertainty which had beset the interpretation of res ipsa loquitur in the United Kingdom persisted. It culminated with the judgment of Asquith L.J., in *Barkway v. South Wales Transport Company*<sup>112</sup> and that of Lord Evershed M.R., in *Moore v. R. Fox and Sons*.<sup>113</sup> Those opinions have been expressly criticized and remarks in several recent cases are in-

108. Ibid 486-487

109. Ibid. 488.

110. Ibid 489-490

111. (1923) S.C. (H.L.) 43; 40 Scottish L. Reporter 441

112. (1949) 1 K.B. 54; 64 T.L.R. 462; (1948) 2 All E.R. 460; reversed on appeal (1950) 1 All E.R. 392.

113. (1956) 1 Q.B. 596. See also *Woods v. Duncan* (1946) A.C. 401.

consistent with the erroneous explanation of *res ipsa loquitur* they adopt.<sup>114</sup> As one writer pointed out:<sup>115</sup>

It really is time that English courts made up their minds what the doctrine of *res ipsa loquitur* is all about.

Early New Zealand experience of *res ipsa loquitur* reflected English confusion. This uncertainty culminated with the decision of the Court of Appeal in *Voice v. Union Steamship Company of New Zealand*.<sup>116</sup> Fair J., and Gresson J., in that case adopted totally inconsistent interpretations of the expression. Gresson J., based his opinion on the decision of the English House of Lords in *Woods v. Duncan*.<sup>117</sup> However, the judgment of Fair J., has properly been preferred.<sup>118</sup> In the latter's words:

... the weight of authority from Scott's case (i.e. *Scott v. London and St. Katherine Docks Company*) onwards clearly established that the principle applied under this brocard is a rule of evidence and not a rule of law. ... It would consequently appear that the correct direction in applying the maxim is that the jury is entitled to infer negligence on the facts which the Judge rules are sufficient to justify such an inference if the jury thinks fit to draw it. ... If upon the evidence there is a reasonable explanation which is equally consistent with the accident happening without the defendant's negligence as with its happening without the defendant's negligence that shifts the burden to the plaintiff.<sup>119</sup>

Not since its decision in *Fitzpatrick v. Walter E. Cooper Pty. Limited*<sup>120</sup> has the High Court of Australia experienced difficulty with the description *res ipsa loquitur*.<sup>121</sup> Evatt J., in a superb judgment in *Davies v. Bunn*<sup>122</sup> recognized the simplicity of that expression.<sup>123</sup> His accurate explanation of *res ipsa loquitur* was reiterated by the High Court in a series of subsequent decisions.<sup>124</sup> In *Government Insurance Office of New South Wales v. Fredrichberg*<sup>125</sup>, Chief Justice Barwick endeavoured to summarize their effect thus:

114. *Walsh v. Holst and Company Limited* (1958) 1 W.L.R. 800; *Colvilles Limited v. Devine* (1969) 2 All E.R. 53; (1969) 1 W.L.R. 475; esp. Lord Donovan; *Lloyde v. West Midlands Gas Board* (1971) 1 All E.R. 1240; *Henderson v. Henry E. Jenkins and Sons* (1970) A.C. 282; *Pearce v. Round Oak Steel Works Limited* (1969) 3 All E.R. 680.

115. P.S. Atiyah, 'Res Ipsa Loquitur in England and Australia', (1972) 35 M.L.R. 337.

But note the words of Megaw L.J., in *Lloyde v. West Midlands Gas Board*, supra fn. 114, 1246, "I doubt whether it is right to describe *res ipsa loquitur* as a 'doctrine'. I think it is no more than an exotic, though convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances."

116. (1953) N.Z.L.R. 176.

117. Supra fn. 113.

118. *MacDonald v. Pottinger* (1953) N.Z.L.R. 196; *Auckland Transport Board v. Coombes* (1954) N.Z.L.R. 901; *Attorney General v. J.M. Heywood and Company Limited* (1955) N.Z.L.R. 1055 (on appeal *J.M. Heywood and Company Limited v. Attorney General* (1956) N.Z.L.R. 668, Gresson J., adopted his earlier opinion; *Shortland J.*, agreed with Fair J., and *Barrowclough C.J.*, found it unnecessary to consider *res ipsa loquitur*; *Watson v. Davidson* (1966) N.Z.L.R. 853.

119. Supra fn. 116, 184, per Fair J.

120. (1935) 54 C.L.R. 200.

121. cf. The opinions of Latham C.J., and McTiernan J., in *Fitzpatrick v. Walter E. Cooper Pty. Limited*, supra fn. 120, with that of Dixon J., in that same case.

122. (1936) 56 C.L.R. 246.

123. The opinion of Evatt J., was referred to by Cecil A. Wright, 'Res Ipsa Loquitur', supra fn. 67, and cited with approval in *MacDonald v. Little*, supra fn. 103.

124. *Mummery v. Irvings Pty. Limited* (1956) 96 C.L.R. 99; *Anchor Products Limited v. Hedges* (1966) 115 C.L.R. 493; *Nominal Defendant v. Haslbauer* (1967) 117 C.L.R. 448; *Prening v. Wanless* (1967) 117 C.L.R. 498; *Government Insurance Office of N.S.W. v. Fredrichberg* (1968) 118 C.L.R. 403.

125. (1968) 118 C.L.R. 403.



Out of these cases emerge, it seems to me, as decisions of the Court, the following relevant propositions binding upon the Courts in Australia. First, that the so-called "doctrine" (*res ipsa loquitur*) is no more than a process of logic by which an inference of negligence may be drawn from the circumstance of the occurrence itself where in the ordinary affairs of mankind such an occurrence is not likely to occur without lack of care towards the plaintiff on the part of a person in the position of the defendant; or perhaps, as it might more accurately, in my opinion, be expressed, where, in the opinion of the judge, the jury would be entitled to think that such an occurrence was not likely to occur in the ordinary experience of mankind without such a want of due care on the part of such a person. Second, that a case in which this can properly be said should be allowed to go to the jury whether or not there is evidence of specific acts or occurrences which could be found to be negligent but that no presumption (i.e. presumption of law) of any kind in favour of the plaintiff thereby arises.<sup>126</sup> That the occurrence affords evidence of negligence does not merely not alter the onus which rests on the plaintiff to establish his case on the probabilities to the satisfaction of the jury, but does not give the plaintiff any entrenched or preferred position in relation to the decision by the jury of that question. I quite realize that it may be attractive to the mind to conclude that, because the jury is allowed to draw an inference of negligence from the occurrence for the reason that they are at liberty to think that it was not likely to occur without a want of care on the part of the defendant, the inference of negligence must be drawn by them if the ground upon which it may be drawn is not displayed by other evidence explaining the occurrence. That line of thought seems to me to have found favour with English Courts and to have resulted in the creation by the decisions of those Courts of a presumption of fact in favour of a plaintiff in such circumstances. But this Court has been unable to accept such reasoning and the law is otherwise in Australia. In my opinion, the jury are not bound either to conclude that such an occurrence was unlikely to occur without negligence on the part of a person in the defendant's position or to draw the inference that it did in fact occur in the case before them because of the negligence of the defendant. All that has happened, in my opinion, at the point in the hearing of a case at which the judge rules that there is evidence of negligence on the part of the defendant furnished by the occurrence itself is that the judge is satisfied that a jury would be entitled to conclude that such an occurrence in the ordinary affairs of mankind is not likely to occur without negligence on the part of a person in the situation of the defendant. For the rest, it is a question for the jury whether they think the occurrence unlikely in this sense and, if so, whether in the particular case they will be satisfied that there was in fact relevant negligence.<sup>127</sup>

The remarks of Atkin L.J., in *McGowan v. Scott*<sup>128</sup> provide a most appropriate conclusion:

I am not sure that the simple issue is not sometimes obscured by referring to a particular formula such as *res ipsa loquitur*.<sup>129</sup>

NEIL R. CAMERON\*

126 This illustrates the language problem referred to earlier. 'Presumption' in *Byrne v. Boadle* must be construed in the context of contemporary usage as meaning 'inference'. It did not impose any special onus upon the defendant.

127. *Supra* fn 125, 413-414

128. Friday, Nov. 23, 1923; Reported (1930) 143 L.T. 217.

129. *Ibid.* 219-220. In *Nominal Defendant v. Haslbauer*, *supra* fn. 124, Barwick C.J. said, "My quotation - with adjustments to express myself without resort to the Latin tag which has, I think, been at least in part the cause of elevating a reason for logical inference, grounded on the common experience of mankind, into a principle or doctrine ..."

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