

EFFECT OF THE DOCTRINE OF RES IPSA LOQUITUR

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I

It is elementary in the law of torts that the onus of proving negligence lies upon him who alleges it.¹ It is repeatedly declared that negligence will never be presumed.² Even if there be a presumption to aid the plaintiff, he must still prove, by a preponderance of the evidence that defendant has been negligent.³ Some courts, however, regard the doctrine of *res ipsa loquitur* as symbolizing the principle of evidence which excepts certain situations from this general rule.⁴ Courts which deny that this amounts to an exception, regard a *res ipsa* case as merely describing a situation where the fact and nature of the injury itself "speaks," that is, affords proof of negligence,⁵ so as to relieve the plaintiff of the initial obligation to show negligence, or rather, perhaps, to discharge that obligation on his part.⁶

The basis for this principle is generally said to be in the likelihood that negligence caused the injury, in view of the facts of the case.⁷ If there must be evidence of negligence, this, then, is the evidence. Circumstantial evidence is made sufficient, as a matter of law, to sustain a recovery in the absence of explanation

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1. *Memphis St. Ry. Co. v. Cavell* (1916) 135 Tenn. 462, 187 S. W. 179; *Mulligan v. Atlantic Coast Line R. R. Co.* (1916) 104 S. C. 173, 88 N. E. 445; *Southern R. R. Co. v. Derr* (1917) 240 Fed. 73, 153 C. C. A. 109; *Clark v. Lang* (1919) 124 Va. 554, 98 S. E. 673; *Klein v. Beeten* (1919) 169 Wis. 385, 172 N. W. 736.

2. *Kemp v. McNeill Cooperage Co.* (1918) 7 Boyce (Del.) 146, 104 Atl. 639; *Swanson v. Hood* (1918) 99 Wash. 506, 170 Pac. 135; *McCombe v. Public Service Ry. Co.* (1920) 95 N. J. L. 187, 112 Atl. 255; *Johnson v. Mobile & O. R. Co.* (1917) 178 Ky. 108, 198 S. W. 538; *Tower v. Humboldt Transit Co.* (1917) 176 Calif. 602, 169 Pac. 227.

3. *Spinneweber v. Every* (1919) 189 App. Div. 35, 177 N. Y. Supp. 801.

4. See *Hamilton v. Birmingham Ry., Light & Power Co.* (1917) 198 Ala. 630, 73 So. 950. Cf. *Clerk and Lindsell "Torts"* (7th ed.) 496.

5. *Adriane v. Schenck Bros.* (1921) 95 N. J. L. 185, 112 Atl. 408. Cf. *Stull's Adm'x. v. Kentucky Traction, etc., Co.* (1916) 172 Ky. 650, 189 S. W. 721. Cf. especially, *Dunn v. Roper Lumber Co.* (1916) 172 N. C. 129, 90 S. E. 18; *Atlas Powder Co. v. Benson* (1920) 287 Fed. 797.

6. Cf. *Heim v. Roberts* (1920) 135 Md. 600, 109 Atl. 329.

7. Cf. *Cooley "Torts"* (3rd ed.) 1416-1417.

by defendant.⁸ The doctrine may be said to be based on "judicial notice."⁹ The experience of men, generally, is such as readily to lead to the inference of negligence in certain situations, because in the ordinary course of events injury does not occur in the absence of negligence.¹⁰ The mere fact of injury alone is never enough to invoke the doctrine of *res ipsa loquitur*.¹¹ The circumstances must make negligence a reasonable inference,¹² if not, as said by some courts, a necessary one in the absence of explanation.¹³

But there is still another phase to a *res ipsa* case. The circumstances which give rise to the injury must be such as to lie exclusively within the defendant's knowledge. This may be said to be the "reason" for the rule,¹⁴ and usually takes the form of the instrument or appliance causing the injury being under defendant's control and management.¹⁵ Indeed it has been declared that the instrumentality must have been under the defendant's exclusive control, otherwise the question of proximate cause complicates the issue and destroys the presumptions because the injury may have been as easily due to the negligence of a third person.¹⁶

8. *Mayer v. Kansas City Light & Power Co.* (1926) 121 Kan. 648, 249 Pac. 599; *Eaton v. New York Cent. & H. R. R. Co.* (1909) 195 N. Y. 267, 88 N. E. 378. Note the following distinction: "When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of '*res ipsa loquitur*'; when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence": *Griffin v. Manice* (1901) 166 N. Y. 188, 196, 59 N. E. 925. Ordinarily, of course, negligence can be shown by circumstantial evidence: *Mulligan v. Atlantic Coast Line* (1916) 104 S. C. 173, 77 S. E. 445; *Mathews v. Ala. Gt. So. R. R. Co.* (1917) 200 Ala. 251, 76 So. 17; *Weleetka Cotton Oil Co. v. Brookshire* (1917) 65 Okla. 293, 166 Pac. 408; *Loveland v. Nelson* (1926) 235 Mich. 623, 209 N. W. 835; *Dei v. Stratigos* (1926) 287 Pa. 475, 135 Atl. 111; *Lutgen v. Standard Oil Co.* (Mo. 1926) 287 S. W. 474.

9. Cf. *Russell v. St. Louis & S. F. R. R. Co.* (Mo. 1922) 245 S. W. 590.

10. Cf. *Ash v. Childs Dining Hall Co.* (1918) 231 Mass. 86, 120 N. E. 396; *Hoopman v. Seattle* (1922) 122 Wash. 379, 210 Pac. 783.

11. *Mardo v. Valley Smokeless Coal Co.* (1924) 279 Pa. 209, 123 Atl. 779; *New v. Bradshaw* (1922) 89 Okla. 205, 214 Pac. 557.

12. *Carter Oil Co. v. Independent Torpedo Co.* (1924) 107 Okla. 209, 232 Pac. 419; *Lakey v. North McAlester Coal Co.* (1924) 98 Okla. 130, 224 Pac. 309; *Exporters', etc., Warehouse Co. v. Schulze* (Tex. 1924) 265 S. W. 133.

13. *Goldman, etc., Bottling Co. v. Sindell* (1922) 140 Md. 488, 117 Atl. 866.

14. Cf. *Wigmore "Evidence"* (2nd ed.) 2509 p. 498.

15. *Scellers v. Universal Service* (1924) 68 Calif. App. 252, 228 Pac. 879; *Sullivan v. Minneapolis St. Ry. Co.* (1924) 161 Minn. 45, 200 N. W. 922; *Sylvia v. Newport Gaslight Co.* (R. I. 1924) 124 Atl. 289; *Sund v. Wilmington, etc., Traction Co.* (Del. 1920) 114 Atl. 281.

16. *Larrabee v. Des Moines Tent Co.* (1920) 189 Iowa 319, 178 N. W. 373.

Finally, the agency causing the injury must have been under the defendant's control both at the time of the injury¹⁷ and at the time of the negligent acts which it is presumed caused the injury.¹⁸

The application of the doctrine is as varied as the effect of its application, which we shall discuss later. It is said by some courts that it may be invoked only where the facts of the occurrence warrant the inference of negligence, and the pleader, because of the nature of the case, is unable to point out the specific acts which caused the injury.¹⁹ On the other hand, at least one jurisdiction restricts its application to situations wherein there is an absolute duty or obligation amounting to that of an insurer in which case, it is said, a presumption of negligence is raised.²⁰ Ordinarily, of course, a contractual relationship between plaintiff and defendant is not necessary for the application of *res ipsa*,²¹ although there are cases and dicta which indicate otherwise.²² It seems that Michigan has refused to recognize the principle in any form,²³ and the court in that jurisdiction has so committed itself in terms,²⁴ but some of the later cases apparently beg the question.²⁵ Illinois has denied the advantages of *res ipsa loquitur* to a trespasser,²⁶ although it is difficult to see the logic thereof.

Different jurisdictions seem hopelessly in conflict upon the effect of pleading or attempting to prove specific acts of negligence in a case which is properly the subject of the application of *res ipsa loquitur*. In Missouri, it is consistently held that the allegation of specific acts of negligence precludes plaintiff from taking advantage of the doctrine.²⁷ This seems to be the rule in Texas,²⁸

17. *National Biscuit Co. v. Wilson* (Ind. 1906) 78 N. E. 251.

18. *Goldman, etc., Bottling Co. v. Sindell* supra, note 13.

19. *King v. Davis* (1924) 296 Fed. 986.

20. *Fitzpatrick v. Penfield* (1920) 267 Pa. 564, 109 Atl. 653; *Johns v. Pa. R. R. Co.* (1916) 226 Pa. 319, 75 Atl. 408.

21. *Bloom v. Cullman* (1916) 197 Ala. 490, 73 So. 85.

22. *Kirby v. Canal Co.* (1897) 20 App. Div. 473, 46 N. Y. Supp. 777. If such a distinction ever existed in New York, it could scarcely survive such cases as *MacPherson v. Buick Co.* (1916) 217 N. Y. 382, 111 N. E. 1050; and *Glanzer v. Shepard* (1922) 233 N. Y. 236, 135 N. E. 275.

23. *Renders v. Grand Trunk R. R. Co.* (1906) 144 Mich. 387, 108 N. W. 368; *Lincoln v. Detroit & M. Ry. Co.* (1914) 179 Mich. 189, 146 N. W. 405, *semble*.

24. *Burghardt v. Detroit United Ry. Co.* (1919) 206 Mich. 545, 173 N. W. 360.

25. See *Loveland v. Nelson* (1926) 235 Mich. 623, 209 N. W. 835. Cf. also *Fuller v. Magatti* (1925) 231 Mich. 213, 203 N. W. 868.

26. *McClain v. Chicago & N. W. R. R. Co.* (1905) 121 Ill. App. 614.

27. *Kennedy v. Metropolitan St. Ry. Co.* (1907) 128 Mo. App. 297, 107 S. W. 16; *Mullery v. Missouri & Kansas Tel. Co.* (1914) 180 Mo. App. 128, 168 S. W. 213; *Bogress v. Wabash R. R. Co.* (Mo. 1924) 266 S. W. 333.

28. *Davis v. Castile* (Tex. 1924) 257 S. W. 870; *Wichita Valley R. R. Co. v. Helms* (Tex. 1924) 261 S. W. 225.

and in the federal courts,²⁹ but the contrary is the rule in Washington,³⁰ Connecticut,³¹ Virginia,³² Massachusetts,³³ and probably in New York.³⁴ The better reasoning as well as the weight of authority seems to be with the latter result. To have a good complaint, the plaintiff must plead negligence. He cannot plead less than this, and, by alleging the specific acts of negligence, he does not do more, so there is no good reason to deny the application of *res ipsa*, if it is properly applicable, merely because the plaintiff has attempted to show particular acts of negligence.³⁵

Some authorities regard the doctrine as a principle of evidence³⁶ while others insist upon treating it as a rule of the substantive law of tort.³⁷ The results of its application have been varied and the theories upon which it is applied are by no means in harmony. This is largely due to a looseness in language of courts³⁸ and a confusion between the different so-called "presumptions" which are said to be raised. It should be helpful to inquire into the origin of the doctrine and thereafter take up in detail the different results that have followed, and should follow, upon the theories announced by the courts.

II

The leading English case, and one of the first to formulate the specific doctrine of *res ipsa loquitur* is *Byrne v. Boadle*.³⁹ Here it appeared that the plaintiff, while walking along the public street, was struck by a barrel of flour falling from a window above. The

29. *The Great Northern* (1918) 251 Fed. 826.

30. *Walters v. Seattle, etc., Ry. Co.* (1908) 48 Wash. 233, 93 Pac. 419; *Kluska v. Yeomans* (1909) 54 Wash. 463, 103 Pac. 819.

31. *Firszt v. Capitol Park Realty Co.* (1923) 98 Conn. 627, 120 Atl. 300.

32. *Washington-Virginia Ry. Co. v. Bouknight* (1912) 113 Va. 696, 75 S. E. 1032.

33. *McNamara v. Boston & M. R. R. Co.* (1909) 202 Mass. 491, 89 N. E. 131; *Cook v. Newhall* (1913) 213 Mass. 292, 101 N. E. 72; *Hull v. Berkshire St. Ry. Co.* (1914) 217 Mass. 361, 104 N. E. 747; *Vleary v. Cavanaugh* (1914) 219 Mass. 281, 106 N. E. 998.

34. *Clarke v. Nassau Electric Ry. Co.* (1896) 9 App. Div. 51, 41 N. Y. Supp. 78.

35. See *Firszt v. Capitol Park Realty Co.* supra, note 31, 120 Atl. 300, at 306.

36. *Christenson v. Oregon Short Line* (1909) 35 Utah 137, 99 Pac. 676; *St. Louis, S. F. & T. R. R. Co. v. Cason* (1910) 59 Tex. Civ. App. 323, 129 S. W. 394; *Wright v. Elkhorn Consolidation Coal & Coke Co.* (1918) 182 Ky. 423, 206 S. W. 634; *Rost v. Kee, etc., Dairy Co.* (1920) 216 Ill. App. 497.

37. Cf. *Pollock "Torts"* (11th ed.) 524-527. Cf. also the language of Kephart, J., in *Fitzpatrick v. Penfield* (1920) 267 Pa. 564, 109 Atl. 653, 658.

38. Cf. *Wigmore "Evidence"* (2nd ed.) 2509 p. 493.

39. (1863) 2 H. & C. 722, 159 Eng. Repr. 299.

plaintiff could testify nothing as to the accident save that he had suddenly been injured by some falling object. Yet he had averred negligence in his pleading. Two eye witnesses testified that they saw a barrel falling, but could offer no evidence as to the reason for the accident, if "accident" it could be called. Because the plaintiff sought to recover on the grounds of negligence and there was no evidence of negligence, the court non-suited the plaintiff.

But in the Court of Exchequer, it was unanimously held that the non-suit was improper and that the plaintiff had in fact offered evidence, by proof of the injury under the circumstances, to sustain a verdict for damages. He had made out a prima facie case which was sufficient to go to the jury. "If there are any facts inconsistent with negligence," said Pollock, C. B., "it is for the defendant to prove them." It was incumbent upon the defendant to disclose the circumstances of the falling of the barrel, if they indicated that he had exercised due care. If he had not, he could not complain if the jury so found. The court thought that a barrel "could not roll out of a warehouse without some negligence, and to say that the plaintiff who is injured by it must call witnesses from the warehouse to prove negligence" was preposterous.⁴⁰

Seven years after *Byrne v. Boadle* a similar result was obtained in *Kearney v. London, B. & S. C. R. R. Co.*⁴¹ Here it was found that the circumstances of a brick falling from a wall in a bridge upon the plaintiff causing him injury amounted to sufficient evidence of negligence to warrant a jury in finding an affirmative verdict in his favor. While the immediate question to decide in each of these cases was raised as to the propriety of a non-suit, the language used by the judges seems to be responsible for much of the confusion in subsequent cases as to the nature of the presumptions raised by a *res ipsa* case. These confusing dicta will be recalled shortly.

Preliminary to examining the effects of the two English cases and the language which the courts indulged in, it is well to look at the possible situations which might ensue when "presumptions" are raised. At the outset of a case, the plaintiff is said to be under (1) the burden of convincing the jury of the issue upon which he predicates his claim to recover, and (2) the burden of producing evidence for the jury to consider. We sometimes refer to the

40. *Ibid.*, at 728.

41. (1870) L. R. 5 Q. B. 411.

first as the burden of proof and the second as the burden of going forward with the evidence.⁴²

Now the question may be raised whether the plaintiff may satisfy the second burden, that is, the burden of producing evidence for the jury to consider, without satisfying the first burden, the burden of proof. The answer obviously is yes. As soon as the burden of producing evidence is satisfied, the jury is entitled to consider the case and upon its verdict will depend the answer to the first question, the burden of proof.⁴³ If the verdict is for the plaintiff, he has, of course, satisfied the burden of proof, for he has obtained an affirmative verdict.

The next question is whether the plaintiff may satisfy the second burden, the burden of producing evidence, without that burden's shifting to the defendant. The answer again seems to be yes. The burden is satisfied as soon as plaintiff has produced enough evidence to warrant the jury in finding in his favor, although it is not necessarily required to so find.⁴⁴ This is not a situation to warrant a directed verdict, for the defendant may do as he chooses about producing any evidence to rebut the plaintiff's evidence.⁴⁵ The latter is assured that he will get to the jury but he is not assured of getting a verdict in his favor, for it is not yet ascertained whether he has satisfied the burden of proof. He has merely satisfied the burden of producing evidence. The case is, by hypothesis, a doubtful one, and consequently the jury must pass upon it. The defendant is in no way obliged to produce evidence. The burden has not shifted, for the plaintiff has barely satisfied his burden. If he had not done so, there would have been nothing for the jury to consider, and a verdict would have been directed for the defendant.⁴⁶

With these distinctions in mind, it is seen that there are three different types of what are sometimes called presumptions possible in a negligence case. In the first place, the plaintiff must produce some evidence of negligence. This is elementary. He has a bur-

42. See *Thayer* "Preliminary Treatise on Evidence" (1898) 355. Cf. *Alabama & V. Ry. Co. v. Groome* (1910) 97 Miss. 201, 52 So. 703.

43. Cf. *Colorado Springs, etc., Ry. Co. v. Reese* (1917) 69 Colo. 1, 169 Pac. 572.

44. *Wigmore* 2487 (a). But see *Hughes v. Atlantic City & S. R. R. Co.* (1914) 85 N. J. L. 212, 89 Atl. 769, where the court argues that as soon as one party has made out a prima facie case, the burden to go forward with evidence shifts to the other party. This is clearly wrong, for under such a theory, a verdict would have to be directed against the party to whom the burden shifted if he failed to produce evidence. See note 46, *infra*.

45. *Wigmore* "Evidence" 2487 (b).

46. *Ibid.*, 2494 (2).

den of offering some evidence to the jury that the defendant has not used due care. If he does not satisfy this burden, he has not made a case. As soon as he has satisfied this initial burden, he has made what is sometimes called a prima facie case. For the sake of convenience, we may call this prima facie case presumption number 1. Properly speaking, it is not a presumption,⁴⁷ but the situation is one in which the jury *might* find for the plaintiff, and consequently the court must presume that it will so find, and submit the case to it. If negligence is actually found, the verdict will be sustained.⁴⁸

Then there is the situation where the law declares that something must be taken for granted as true until doubt is cast upon it. This is called a presumption because the burden of going forward with the evidence has definitely shifted to the other party. Unless he produces some evidence to throw doubt upon the proposition, it will be presumed to be true, and he will lose by default. In this case, a failure to go forward with evidence will justify the court in taking the case from the jury and directing a verdict for the party who has the presumption in his favor, because, the proposition being true until doubt is cast upon it, the jury has nothing to consider.⁴⁹ This we shall call presumption number 2.

Finally, there is the situation where the burden of proof rests upon a party and no evidence is offered to satisfy it. Here there can be but one possible result. The jury is not entitled to consider the case on its merits, for there are no merits to it. The court will always direct a verdict against the party totally failing to sustain the burden of proof.⁵⁰ This we shall call presumption number 3, and then examine the two leading cases to determine which of the three is actually invoked thereby.

In discussing *Byrne v. Boadle* Pollock, no mean authority on torts, deduces that the effect of the doctrine of *res ipsa loquitur* is to establish a full presumption, or number 3, in favor of the plaintiff, which results in throwing the burden of proof upon the defendant to show, by the weight of evidence, that the injury was occasioned by no want of due care on his part. "Where damage is

47. This is sometimes designated as an "inference" as distinguished from a presumption. The inference may be disregarded by the jury, whereas a presumption, of course, cannot be disregarded. Cf. the illuminating case of *Cogdell v. R. R. Co.* (1903) 132 N. C. 852, 44 S. E. 618, quoted in *Wigmore "Evidence"* 2490, at p. 450, n. 1.

48. *Feldman v. Chicago Ry. Co.* (1919) 289 Ill. 35, 124 N. E. 334.

49. *Wigmore "Evidence"* 2495 (b).

50. *Webb v. Western Reserve Bond & Share Co.* (1926) 115 Ohio St. 247, 153 N. E. 289.

done by the falling of objects into a highway from a building," it is stated, "the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words, *the burden of proof is on the occupier of the building*. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable."⁵¹ The language employed in this decision is consistent with this deduction. Pollock, C. B., declared, "if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence *they must prove them*."⁵² Thus, while the expression *prima facie* is somewhat misleading, we must understand that if the defendant is required to *rebut* the presumption of negligence, and if he must *prove* such facts as will be necessary to rebut this presumption, the burden of proof rests upon the defendant to prove to the satisfaction of the jury that he has exercised due care.

In *Kearney v. London, etc., R. R.*, however, altogether different language was used, for here the effect of a *res ipsa* situation is unmistakably only to throw the burden of going forward with the evidence upon the defendant. "Anything," said Cockburn, C. J., "which tended to rebut the presumption arising from an accident caused by the defective condition of the brickwork, which it was their duty to keep in repair, even if such evidence were but slight, might have sufficed; but the defendants chose to leave it on the naked state of facts proved by the plaintiff. . . . Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts"⁵³ Apparently the burden which is here thrown upon the defendant is that which we designate as arising from presumption number 2, namely, to go forward with evidence tending to show due care. Slight evidence "might have sufficed"; that is, all that the defendant was obligated to do was to throw doubt upon the matter and his burden would have been satisfied.

Of course, the exact nature of the burden in either of the foregoing cases must be adduced from the dicta. The decision in

51. Pollock "Torts" (11th ed.) 524.

52. *Byrne v. Boadle* supra, 159 Eng. Repr. 299, 301.

53. L. R. 5 Q. B. 411, 413.

each case, however, is authority for a proposition even less than either of the presumptions suggested. It must be remembered that the issue was the narrow one whether a non-suit was proper. The holdings amount to no more than declaring that the plaintiff had satisfied his initial burden of producing enough evidence to get to the jury. He could not be non-suited. It does not follow from this that any burden had shifted to the defendant. It was said that he was obligated to explain. From this, and the other language quoted, the theory of presumptions in these cases has arisen. But the decisions do not hold that the jury *must* find for the plaintiff if there be no explanation; they merely hold that the jury *may* so find. The case is still a doubtful one. So, accurately, here is authority for no more than presumption number 1, namely, that by showing a *res ipsa* case, the plaintiff is assured of getting to the jury, for he has introduced some evidence of negligence, or, in other words, he has shown enough evidence of negligence to warrant an affirmative verdict in his favor if the jury chooses to return such a verdict, but it remains to be seen whether or not such a verdict will be returned.⁵⁴

As might be expected, the extensive industrial and manufacturing activities of America have furnished fertile soil for the growth of the doctrine of *res ipsa loquitur*. The confusion arising out of the leading English cases, however, seems to have increased in the state courts. All three presumptions are found in the decisions, in varying degrees of certainty, some courts favoring presumption number 1, some number 2, some number 3 and still others uncertain as to whether 1, 2, or 3 arises.

North Carolina has consistently clung to the doctrine of presumption number 1,⁵⁵ although the language sometimes used is a bit ambiguous.⁵⁶ Thus, it has been said that the doctrine of *res ipsa* "requires the defendant to go forward with his proof," but the plaintiff must nevertheless submit to the jury's conclusions, whether

54. Salmond concurs in this conclusion. "There is not, indeed, even in these cases any *legal presumption* of negligence, so that the legal burden of disproving it lies on the defendant. But the plaintiff by proving the accident has adduced reasonable evidence, on which the jurors may, if they think fit, find a verdict for him": "Torts" (5th ed.) p. 34.

55. *Ross v. Double Shoals Cotton Mills* (1905) 140 N. C. 115, 52 S. E. 121; *Morrisett v. Elizabeth City Cotton Mills* (1909) 151 N. C. 31, 65 S. E. 514; *Kiger v. Lüpfert Scales Co.* (1913) 162 N. C. 133, 78 S. E. 76; *Page v. Camp Mfg. Co.* (1920) 180 N. C. 330, 104 S. E. 667; *Harris v. Mangum* (1922) 183 N. C. 235, 111 S. E. 177.

56. *Stewart v. Van de Vanter Carpet Co.* (1905) 138 N. C. 60, 50 S. E. 562.

the defendant produces any evidence or not.⁵⁷ This is clearly inconsistent because the court is saying that the doctrine creates presumption number 2, but the results are those which attend number 1. In *Dunn v. Roper Lumber Co.*⁵⁸ the court lays down the rule that *res ipsa loquitur* "makes a prima facie case of negligence which requires the defendant to go forward with his proof, or *take the chance* of an adverse verdict."⁵⁹ This indisputably established number 1, only. But, peculiarly enough, the court immediately cites an earlier case⁶⁰ to prove that "the accident, the injury, and the circumstances under which they occurred are, in some cases, sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault." There can be no question but that here is enunciated the theory that *res ipsa* raises presumption number 3, and definitely throws upon the defendant the burden of proving due care.⁶¹

These cases are confusing, but there can be no doubt of the fact that North Carolina has established the first presumption and that the doctrine does no more than furnish some evidence of negligence from which the jury may, or need not, conclude that the defendant has been negligent.⁶² There are cases which suggest that this is the effect accorded the doctrine in the federal courts,⁶³ in Connecticut,⁶⁴ in Iowa,⁶⁵ in Minnesota,⁶⁶ in Oklahoma,⁶⁷ and perhaps in Colorado, although it is doubtful in the latter jurisdiction.⁶⁸

57. *Ibid.*, 50 S. E. 562, at 565.

58. (1916) 172 N. C. 129, 90 S. E. 18.

59. 90 S. E. 18, at 21.

60. *Ellis v. R. R.* (1841) 24 N. C. 138.

61. 90 S. E. 18, at 21.

62. See the concise statement of Adams, J., in *Harris v. Mangum* supra, 111 S. E. 177, at 179; see also Walker, J., in *Page v. Camp* supra; and cf. language in *White v. Hines* (1921) 182 N. C. 275, 109 S. E. 31.

63. *Central R. R. Co. of New Jersey v. Peluso* (1923) 286 Fed. 661; *Atlas Powder Co. v. Benson* (1923) 287 Fed. 797, particularly at p. 798; *Sweeney v. Erving* (1913) 228 U. S. 233, 57 L. Ed. 815, 33 Sup. Ct. Rep. 416.

64. *Stebel v. Connecticut Co.* (1915) 90 Conn. 24, 96 Atl. 171; but see *Elwood v. Ry. Co.* (1904) 77 Conn. 145, 58 Atl. 751, which is apparently enunciating number 3.

65. *Hall v. Chicago, R. I. & P.* (1924) 199 Iowa 607, 199 N. W. 491, *semble*. But in *Nicoll v. Sweet* (1913) 163 Iowa 683, 144 N. W. 615, presumption number 3 is stated in the headnote. It is doubtful, however, if the case verifies it. See *infra*, note 74.

66. *Holt v. Ten Broeck* (1916) 134 Minn. 458, 159 N. W. 1073; *Ryan v. St. Paul Union Depot Co.* (Minn. 1926) 210 N. W. 32; *Kleenman v. Banner Laundry Co.* (1921) 150 Minn. 515, 186 N. W. 123; *Sullivan v. Minneapolis St. Ry. Co.* (1924) 161 Minn. 45, 200 N. W. 922.

67. *Sand Springs Park v. Schrader* (1921) 82 Okla. 244, 198 Pac. 983; *Okmulgee Gas Co. v. Kelly* (1924) 105 Okla. 189, 232 Pac. 428, *semble*.

68. *Colorado Springs, etc., Ry. Co. v. Reese* (1917) 69 Colo. 1, 169 Pac. 572; but cf. *Velotta v. Yampa Valley Coal Co.* (1917) 63 Colo. 489, 167 Pac. 971, in which apparently number 3 is raised.

On the other hand the decisions in many other states indicate either presumption number 2 or number 3, it is not always easy to determine which. Some New York cases look like presumption number 2, casting upon the defendant only the burden of going forward with evidence,⁶⁹ while still others apparently favor presumption number 3 with the burden of proving due care on the defendant.⁷⁰ Arkansas expressly declares that the burden of proof "shifts," thus establishing number 3.⁷¹ Missouri cases seem to favor this result also,⁷² as do cases in Kentucky⁷³ and some of the Iowa cases.⁷⁴ Maryland leans to this rule⁷⁵ with Pennsylvania ap-

69. *Slater v. Barnes* (1925) 241 N. Y. 284, 149 N. E. 859, by language stating the principle, although the decision held the case not properly the subject of the *res ipsa* doctrine; *Adams v. Union Ry. Co. of New York City* (1903) 80 App. Div. 136, 80 N. Y. Supp. 264; *Dean v. Tarrytown, W. P. & M. Ry. Co.* (1906) 113 App. Div. 437, 99 N. Y. Supp. 250; *Sinay v. Chesebro-Whitman Co.* (1913) 140 N. Y. Supp. 1074, doubtful whether 2 or 3; *Loudon v. Eighth Ave. R. R. Co.* (1900) 162 N. Y. 380, 56 N. E. 988; *Curtis v. New York, N. H. & H. R. R. Co.* (1913) 159 App. Div. 757, 144 N. Y. Supp. 1007; *Rice v. Von Der Lieth* (1920) 111 Misc. 418, 181 N. Y. Supp. 767; *McNulty v. Ludwig & Co.* (1908) 125 App. Div. 291, 109 N. Y. Supp. 703; *Spinnweber v. Every* (1919) 189 App. Div. 35, 177 N. Y. Supp. 801; *Ments v. Schieren* (1901) 36 Misc. 813, 74 N. Y. Supp. 889.

70. *Schmidt v. Stern* (1922) 119 Misc. 529, 196 N. Y. Supp. 727; *Lynch v. Ley* (1922) 119 Misc. 681, 197 N. Y. Supp. 360; *Scheider v. American Bridge Co.* (1903) 78 App. Div. 163, 79 N. Y. Supp. 634, but language is garbled; *Travers v. Murray* (1903) 87 App. Div. 552, 84 N. Y. Supp. 558, sensible; *Papazian v. Baumgartner* (1906) 49 Misc. 244, 97 N. Y. Supp. 399. A few of these cases are questionable. There is no doubt but that number 2 is the farthest presumption that can be deduced from the better New York cases. There are good cases to indicate that only presumption number 1 results: *Griffen v. Manice* (1901) 166 N. Y. 188, 59 N. E. 925.

71. *Southwestern Telegraph & Telephone Co. v. Bruce* (1909) 89 Ark. 589, 117 S. W. 565; *Jacks v. Reeves* (1906) 78 Ark. 426, 95 S. W. 781; but in *Arkansas Light & Power Co. v. Jackson* (1924) 166 Ark. 633, 267 S. W. 359, presumption number 3 is repudiated and apparently presumption number 2 is enunciated.

72. *Brown v. Consolidated Light & Power Co.* (1908) 137 Mo. App. 718, 109 S. W. 1032, sensible; *Freeman v. Foreman* (1910) 141 Mo. App. 359, 125 S. W. 524; *De Mun Estate Corp. v. Frankfurt General Ins. Co.* (1916) 196 Mo. App. 1, 187 S. W. 1124; *Warren v. Missouri & Kansas Telephone Co.* (1917) 196 Mo. App. 549, 196 S. W. 1030, an unequivocal case, the court declaring that the theory that *res ipsa loquitur* is only a rule of evidence supplying the plaintiff with proof of negligence, but that the burden of proof remains upon the plaintiff is not the law in Missouri. To the same effect, see *Russell v. St. Louis & S. F. Ry. Co.* (Mo. 1922) 245 S. W. 590. But cf. *Watson v. Chicago Gt. W. R. R.* (Mo. 1926) 287 S. W. 813.

73. *Jones v. Pelly* (Ky. 1910) 128 S. W. 305.

74. *Weber v. Chicago, R. I. & P. R. R. Co.* (Iowa 1915) 151 N. W. 852, an unequivocal authority for the rule that the burden of proof "shifts"; so also *Nicoll v. Sweet* (1913) 163 Iowa 683, 144 N. W. 615. See note 65, *supra*.

75. *Pindell v. Rubenstein* (1921) 139 Md. 567, 115 Atl. 859.

parently in accord.⁷⁶ So also are Louisiana,⁷⁷ Washington,⁷⁸ and Virginia.⁷⁹ At least some Texas cases are unequivocally committed to this view.⁸⁰

But presumption number 2 seems favored in Illinois,⁸¹ Delaware,⁸² Indiana,⁸³ Mississippi,⁸⁴ perhaps South Dakota⁸⁵ and Wisconsin,⁸⁶ although it is by no means certain, especially in the last named jurisdiction.⁸⁷ In Massachusetts,⁸⁸ New Jersey,⁸⁹ Ohio⁹⁰

76. *Johns v. Pennsylvania R. R. Co.* (1910) 226 Pa. 319, 75 Atl. 408, *semble*.

77. *Dotson v. Louisiana Central Lumber Co.* (1918) 144 La. 78, 80 So. 205.

78. *Johnson v. Light Co.* (1927) 253 Pac. 819; *Gibson v. Chicago, M. & P. S. Ry. Co.* (1911) 61 Wash. 639, 112 Pac. 919; *Poth v. Dexter Horton Estate* (1926) 140 Wash. 272, 248 Pac. 374.

79. *Washington-Virginia Ry. Co. v. Bouknight* (1912) 113 Va. 696, 75 S. E. 1032. This is a clear case of presumption number 3, with burden of proof on the defendant, but cf. the earlier case of *Richmond Ry. & Electric Co. v. Hudgins* (1902) 100 Va. 409, 41 S. E. 736.

80. *Southwestern Telegraph & Telephone Co. v. Sheppard* (Tex. 1916) 189 S. W. 799.

81. *Everett v. Foley* (1907) 132 Ill. App. 438; *Heimberger v. Frog & Switch Co.* (1911) 165 Ill. App. 317; and probably *Nawrocki v. Chicago City Ry. Co.* (1910) 156 Ill. App. 563; but *Chicago City Ry. Co. v. Eick* (1903) 111 Ill. App. 452, stands for presumption number 3, casting the burden of proof upon the defendant, although, so far as *Libby, etc., v. Banks* (1903) 110 Ill. App. 330, is concerned, no more than presumption number 1 is raised.

82. *Wood v. Wilmington City Ry. Co.* (1906) 5 Pen. (Del.) 369, 64 Atl. 246; *Edmanson v. Traction Co.* (Del. 1923) 120 Atl. 923.

83. *Talge Mahogany Co. v. Hockett* (1914) 55 Ind. App. 303, 103 N. E. 815, *semble*; *Pittsburgh, C. C. & St. L. R. R. Co. v. Hoffman* (1914) 57 Ind. App. 431, 107 N. E. 315; *Pittsburgh, C. C. & St. L. R. R. Co. v. Arnot* (1920) 189 Ind. 350, 126 N. E. 13; *Baltimore & O. R. R. Co. v. Hill* (Ind. 1925) 148 N. E. 489; *Artificial Ice, etc., Co. v. Walz* (Ind. 1925) 146 N. E. 826, *semble*.

84. *Alabama & V. Ry. Co. v. Groome* (1910) 97 Miss. 201, 52 So. 703.

85. *Patterson v. Schlitz Brewing Co.* (1902) 16 S. D. 33, 91 N. W. 336, but the case is not clear.

86. *Carrol v. Chicago, B. & N. R. R. Co.* (1898) 99 Wis. 399, 75 N. W. 176, *semble*; *Klitzke v. Webb* (1904) 120 Wis. 254, 97 N. W. 901, either presumption 2 or 3, but more probably 2; *Rost v. Roberts* (1923) 180 Wis. 207, 192 N. W. 38.

87. *Schmidt v. Johnson Co.* (1911) 145 Wis. 49, 129 N. W. 657, seems uncertain, and *Mulcairns v. Janesville* (1886) 67 Wis. 24, 29 N. W. 565, cited in the former case, enunciates number 3.

88. *Washburn v. Owens* (1925) 252 Mass. 47, 147 N. E. 564, and *Hull v. Berkshire St. Ry. Co.* (1914) 217 Mass. 361, 104 N. E. 747, look like no more than number 1.

89. *Higgins v. Goerke-Krich Co.* (1918) 91 N. J. L. 464, 103 Atl. 37, case doubtful—may be presumption number 2; *Polony v. Brady Sons Co.* (N. J. L. 1924) 126 Atl. 675, undoubtedly this case states number 3; but see the confused case of *Hughes v. Atlantic City & S. R. R. Co.* (1914) 85 N. J. L. 212, 89 Atl. 769. See note 44, *supra*.

90. *Mansfield Public Utility Co. v. Grogg* (1921) 103 Ohio St. 301, 133 N. E. 481; *St. Mary's Gas Co. v. Brodbeck* (1926) 114 Ohio St. 423, 151 N. E. 323.

and California,⁹¹ it is not at all clear whether it is the burden of proof, the burden of producing some evidence to rebut negligence, or yet no burden at all that is cast upon the defendant.⁹²

The application of *res ipsa loquitur* in North Dakota has apparently been rare, and the presumption raised by the doctrine is not clear. In *Wyldes v. Patterson*,⁹³ Bruce, J., treated the principle at some length, but his chief concern was with the type of situation which invoked it. This was also an issue in *Leiferman v. White*.⁹⁴ These two cases represent the totality of North Dakota law on the matter. In the former case the inference to be gathered from the dictum is that presumption number 3 is raised and the burden is on defendant to show no want of due care. The court, in construing instructions given by the trial court to the jury, took occasion to comment:

"We believe that the court would have been justified in instructing the jury that, under the evidence in the case, the breaking of the cable in the manner and under the conditions which it did, raised a presumption that such cable was defective, and that the burden was upon the defendant to rebut such presumption."⁹⁵

As the trial court did not give such instructions, however, the case is not authority for either presumption number 2 or number 3, one of which must have been intended in the language quoted. In the *White* case, *supra*, the narrow question was before the court whether proof of the injury alone was sufficient to support a verdict for the plaintiff. The defendant, after the plaintiff's evidence, had requested a directed verdict which was denied. At the close of the trial, and after the jury's verdict, the defendant requested a new trial, or, in the alternative, a judgment notwithstanding the verdict, which was likewise denied. The court declared that *res ipsa loquitur* applied and that proof of the injury alone was sufficient evidence to support the jury's verdict. This, of course, means

91. *Scellars v. Universal Service* (1924) 68 Calif. App. 252, 228 Pac. 879, looks like number 2, but may be only 1. *Atkinson v. United Railroads of San Francisco* (1925) 71 Calif. App. 82, 234 Pac. 863, cannot be more than number 2. See also *Onell v. Chappell* (1918) 38 Calif. App. 375, 176 Pac. 370.

92. This is true in Utah: *Zoccolillo v. Oregon Short Line R. R.* (1918) 53 Utah 39, 177 Pac. 201. In this case the court states that an inference may arise from one or from a series of facts which if unexplained, may not only justify, but may also require a finding of negligence. But immediately it is stated that "at least most writers refer to the presumption so called merely as an inference of fact, and not as a presumption requiring the court to direct a verdict, even though no explanation is offered." See 177 Pac. 201, at 211.

93. (1915) 31 N. D. 282, 153 N. W. 630.

94. (1918) 40 N. D. 150, 168 N. W. 569.

95. 31 N. D. 282, at 324-325.

presumption number 1. It means that the plaintiff had satisfied his burden to produce evidence of negligence. It means that by proving the injury under the circumstances of the case, he had offered evidence to warrant the jury in finding that the defendant had been negligent. The jury, in fact, found that the plaintiff had also sustained the burden of proof, but that is beside the point of the case, so far as we are concerned.

Under this presumption, number 1, no burden of any kind was cast upon the defendant. All that the plaintiff gained by the doctrine of *res ipsa loquitur* was to insure that he get to the jury. The latter might, or might not, find a verdict in his favor, depending on its judgment as to whether he had satisfied the burden of proof. He had produced *some* evidence of negligence when he proved the injury under the circumstances and established a *res ipsa* case. The defendant could offer evidence to rebut the same, or not, just as he chose. He could assume the risk of non-persuasion without offering any evidence, if he saw fit, trusting that the jury would find that the plaintiff had not satisfied his burden of proof. Most certainly this is presumption number 1, and nothing "shifted" to the defendant.

The language used by Birdzell, J., in the opinion in *Leiferman v. White* emphasizes this as the extent of the application of the doctrine:

"As we understand the doctrine of *res ipsa loquitur*, it 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. It takes the circumstances themselves as evidence of negligence, because it is reasonable to do so. Surely there can be nothing unreasonable in allowing the facts surrounding the accident in question to be weighed by the jury as circumstantial evidence of negligence on the part of the defendant. This is all that is accomplished by the doctrine of *res ipsa loquitur*. . . . There can be no doubt that, from the evidence descriptive of the accident itself, a jury would be warranted in finding that the accident was occasioned by an electric shock received by the plaintiff while handling an appliance which, in ordinary circumstances, would not have been sufficiently dangerous to occasion any injury. . . ."98

But there was a dissenting opinion in this case. While the ground for differing from the majority opinion was that the case was not properly one for the application of the doctrine of *res ipsa*, Mr. Justice Christianson suggested that his notion of the effect of the application of the doctrine was not consistent with

that enunciated by the court. While he declares that the doctrine must be regarded as a rule of evidence rather than one of substantive law, he expressed himself that "the particular force and justice of the doctrine, regarded as a rule throwing upon the party charged with negligence the duty of producing evidence, consists in the circumstances that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him, but inaccessible to the injured person."⁹⁷ Just what is here meant by "duty" is not clear. If it means that the burden of going forward with evidence of due care is cast upon the defendant, it is presumption number 2, and a vastly different doctrine from that which merely permits proof of the injury to be sufficient evidence of negligence to get to the jury. If it is the former that is intended by "duty," the penalty for a failure to fulfill it is a directed verdict for the plaintiff;⁹⁸ if it is the latter, the case being doubtful, the jury must pass upon it.⁹⁹ On the whole, however, it seems safest to conclude that probably presumption number 1 is the law in North Dakota in *res ipsa* cases.

III

The practical questions that arise under these various doctrines may be answered separately under four general types of situations. (1) What is the effect when the defendant offers no evidence at all to overcome whatever presumption arises for the plaintiff? (2) What result follows when the defendant offers but a "scintilla" of evidence? (3) What effect when he produces a substantial amount of evidence which we may designate as a "whole lot"? (4) What, finally, must follow when the defendant completely rebuts the inference of negligence by proving beyond doubt that he has exercised due care? We shall discuss the effect of the three presumptions under each of the four situations.

(1) Under presumption number 3, whereby the burden of proof is said to be upon the defendant by virtue of the doctrine of *res ipsa loquitur*, it must be obvious that if he offers nothing whatever in evidence, the defendant is not entitled to a directed verdict in his favor. This is the invariable rule, and is, in part, the situation out of which the doctrine arose. In *Byrne v. Boadle* the defendant thought that he was entitled to a non-suit of the plaintiff.

97. *Ibid.*, at 158.

98. See *infra*, note 111.

99. See *supra*, note 45.

But there was evidence of negligence, and, of course, there could be no directed verdict for the defendant, or, under the old practice, no non-suit.¹⁰⁰

But what if the plaintiff asks for a directed verdict in his favor when the defendant has offered no evidence. Here we have the ordinary situation of a party, upon whom the initial burden of proof to establish his case rested, asking for a directed verdict because his evidence is uncontradicted, that is, nothing offered in rebuttal. Some courts, and respectable ones, have held that such cannot be granted.¹⁰¹ The reason, it is said, is that the jury may refuse to believe the plaintiff's witnesses, and thus the plaintiff loses because he has not satisfied his initial burden of proof.¹⁰² On the other hand, it is held by some courts that if the defendant fails to question the credibility of the plaintiff's witnesses, he thereby admits all that the plaintiff has purported to prove, with the result that a directed verdict may be made,¹⁰³ if, in the judgment of the court the totality of evidence is strong enough that, if believed, the jury

100. In some respects, of course, a non-suit differs from a motion for a directed verdict (See *Wigmore* "Evidence" 2495), and the latter differs from a demurrer to the evidence (Ibid., 2495, 3; see *Sunderland* "Directing a Verdict for the Party Having the Burden of Proof" (1913) 11 Mich. Law Rev. 198). These differences have largely resulted in the modern substitute of a directed verdict for each of the older forms. It is obvious that the non-suit can be employed here only by the defendant. It was useful in the type of situation which, as shown above, gave rise to the doctrine of *res ipsa loquitur*. But, when the plaintiff wished to take advantage of his favorable position under the theory of *res ipsa loquitur*, or any other presumption, he must employ something other than a motion for a non-suit. Further, a demurrer to the evidence was unsatisfactory in that it necessitated an immediate judgment on the merits, by admitting all the facts which the evidence purported to prove. Thus, if the defendant had a good defense, such as contributory negligence, he might well hesitate to employ a demurrer to the evidence, lest the ruling thereon be against him. Furthermore, a demurrer to the evidence was available only to the party not having the burden of proof. (See *Pickel v. Osgrigg* (1881) 6 Fed. 676.)

101. See *Sunderland* supra, 198, 202, and cases cited; see *Wigmore* "Evidence" 2495 (b).

102. See *Woodin v. Durfee* (1881) 46 Mich. 424, 9 N. W. 457; *Charleston Insurance & Trust Co. v. Corner* (1844) 2 Gill (Md.) 410; see *Sunderland* supra, 202. But cf. inference to be drawn from *Michigan Pipe Co. v. Michigan Fire, etc., Insurance Co.* (1892) 92 Mich. 482, 52 N. W. 1070, and see cases cited in note 103, infra.

103. See *Sunderland* supra, 200-201. It is the duty of the court to direct a verdict where evidence is undisputed: *Wheelock v. Clay* (1926) 13 Fed. (2nd) 972; *Traffic Motor Truck Corp. v. Claywell* (1926) 12 Fed. (2nd) 419; *Sedita v. Steinberg* (1926) 105 Conn. 1, 134 Atl. 243. And this is true even if the verdict is directed for the plaintiff, who has burden of proof: *Moore v. Morris* (1926) 116 Okla. 224, 243 Pac. 933. But in Missouri the weight of testimony is for the jury even when uncontradicted: *State v. Cox* (1925) 310 Mo. 367, 276 S. W. 869.

would be warranted in finding but one way, namely, for the plaintiff.¹⁰⁴

What effect, then, does *res ipsa loquitur* have under the rule that it raises presumption number 3? It must be noticed that the argument of courts which insist that a failure by the defendant to produce any evidence authorizes a directed verdict for the plaintiff does not contend that such a verdict *must* be directed, but only that the court is authorized to so do when it deems the plaintiff's evidence strong enough to warrant such a direction. It is strong enough to warrant the directed verdict if, under the circumstances, no reasonable jury could come to a different conclusion. But under presumption number 3 it would seem that the court is obliged to direct a verdict for the plaintiff, in the absence of testimony by the defendant, for since the burden of proving due care is now on the latter, a failure to sustain this burden by any evidence whatever leaves no issue for the jury to consider. The evidence is all one way; the jury cannot refuse to believe the plaintiff's uncontradicted witnesses that the injury occurred under such circumstances as to make it a *res ipsa* case because such is a question of law for the court alone to decide¹⁰⁵ and uncontradicted testimony cannot be disregarded;¹⁰⁶ by hypothesis, the doctrine of *res ipsa* not only furnishes some evidence of negligence, but it furnishes so much evidence of negligence that the defendant has the burden of exculpating himself. This he has not attempted to do, and a verdict must be directed against him, logically.¹⁰⁷ Some *res ipsa* cases look as if they supported this result.¹⁰⁸

104. It has been held error to assume a conflict in the evidence where, though slight, the evidence was uncontradicted: *Modern Woodmen v. Lemonds* (1925) 212 Ky. 83, 278 S. W. 532.

105. Cf. *Hughes v. Atlantic City & S. R. R. Co.* (1914) 85 N. J. L. 212, 89 Atl. 769, and *Ewing v. Foley, Inc.*, (1925) 115 Tex. 222, 280 S. W. 499, and the rule stated in the text is confirmed. It is always for the court, not for the jury, to say whether facts have been proved from which negligence may be reasonably inferred: *Spain v. Burch* (1913) 169 Mo. App. 94, 154 S. W. 172. There is no exclusive province for the jury unless *there is an issue* as to the existence of such an act of omission or commission as in law would constitute negligence: *Smith v. Acme Milling Co.* (1913) 34 Okla. 439, 126 Pac. 190. But when evidence is uncontradicted, there is no issue as to the existence of such facts, hence the matter is for the judge. The question whether there is evidence tending to show negligence is always one of law, to be determined from the testimony only: *Palmer v. Harrison* (1885) 57 Mich. 182, 23 N. W. 624. Cf. the misleading language in syllabus 8, *Firszt v. Capitol Park Realty Co.* (1923) 98 Conn. 627, 120 Atl. 300.

106. See *supra*, note 103.

107. *Webb v. Western Reserve Bond & Share Co.* (1926) 115 Ohio St. 247, 153 N. E. 289; *Franklin Park v. Franklin* (1907) 231 Ill. 380, 83 N. E. 214.

108. "The plaintiffs, however, in this case claim the benefit of the doctrine of '*res ipsa loquitur*'; that is, that the accident itself, with all its sur-

Suppose, however, that the doctrine of *res ipsa loquitur* raises only presumption number 2, that is, it casts on the defendant only the burden or duty of producing evidence of his freedom from negligence. Again, obviously, the defendant cannot have a verdict directed in his favor for reasons similar to those which prevail under presumption number 3. *Byrne v. Boadle* is again authority for this. But when the plaintiff asks for a directed verdict because the defendant has produced no evidence, he is apparently entitled to get it. The defendant has a burden. Not the burden of convincing the jury that he was not negligent, but the burden of offering at least some evidence to show that the cause of the accident was one which was consistent with due care on his part. "Anything," as said by Cockburn, C. J., in *Kearney v. London, etc., R. R. Co.*,¹⁰⁹ "which tended to rebut the presumption . . . even if such evidence were but slight, might have sufficed." But the defendant has failed to sustain the burden of producing anything. The presumption, then, is that he was negligent, since he has failed to throw doubt upon it.¹¹⁰ It is a situation where something is presumed to be true until it is questioned or evidence is brought forward to disprove it. This the defendant has not done, and the general theory of presumptions must result in the court directing a verdict for the plaintiff.¹¹¹

roundings, speaks in such way and is of such character as to show negligence on the part of the defendant company. And that imposes upon it the burden of rebutting such negligence by proof. This may be one mode of showing that there is proof of negligence, and if negligence is shown, then that negligence must be met, or the plaintiffs are entitled to recover": *Wood v. Wilmington City Ry. Co.* (1905) 5 Pen. (Del.) 369, 64 Atl. 246. In *Poth v. Dexter Horton Estate* (1926) 140 Wash. 272, 248 Pac. 374, the defendant corporation's evidence, in an action for injuries to one in street struck by a curtain roller falling from a window of its building was held insufficient, as a matter of law, to overcome the effect of the plaintiff's *res ipsa* case. Cf. *Schmidt v. Stern* (1922) 119 Misc. 529, 196 N. Y. Supp. 727; cf. also *Elwood v. Connecticut Ry., etc., Co.* (1904) 77 Conn. 145, 58 Atl. 751.

109. (1870) L. R. 5 Q. B. 411.

110. It has been held that although the plaintiff has the burden of proof of negligence, still in a *res ipsa* case, if the defendant offers no evidence whatever, the plaintiff has successfully met that burden: *Levine v. Brooklyn, Q. C. & S. R. R. Co.* (1909) 134 App. Div. 606, 119 N. Y. Supp. 315. This is presumption number 2, of course, and it follows logically that the plaintiff should be entitled to a directed verdict.

111. *Wigmore* "Evidence" 2487 (b); *ibid.*, 2495 (b). For *res ipsa* cases which look as if they supported this result, see *Pittsburgh, C. C. & St. L. R. R. Co. v. Arnott* (1920) 189 Ind. 350, 126 N. E. 13; *Brown v. Consolidated Light, Power & Ice Co.* (1908) 137 Mo. App. 718, 109 S. W. 1032, although this confusing case had best be classed as raising presumption number 3, in view of the other Missouri cases. It seems both to affirm and deny presumption number 3. Cf. also language in *Adams v. Union Ry. Co.* (1903) 80 N. Y. Supp. 264, 266.

Under presumption number 1, the problem is simplified. All the *res ipsa* cases again support the proposition that the defendant can have no directed verdict. The least that *res ipsa* can do is to furnish sufficient evidence of negligence to take the case to the jury on behalf of the plaintiff. If this were not true, the doctrine would be a nullity. It seems equally clear, under this theory, that the plaintiff can have no directed verdict. He has furnished some evidence of negligence. By refusing to offer any in rebuttal, the defendant merely says that he is willing to go to the jury as the case stands,¹¹² but he by no means concedes that the plaintiff has satisfied his initial burden of proof. The jury may yet find for him, so he is entitled to have the case submitted to it.

(2) Under this hypothetical situation, the defendant has offered but a scintilla of evidence to prove that he has not been negligent. What effect does this have under the three variations of *res ipsa loquitur*? Under presumption number 3, the burden of proof was upon the defendant to show that he exercised due care and he has only offered the slightest bit of evidence to sustain that burden. The result is clear. In jurisdictions in which the scintilla rule is still enforced, the case must go to the jury, so that the plaintiff could not secure a directed verdict.¹¹³ It is patent, of course, that the defendant could not have a directed verdict in his favor because he has not met the burden cast upon him. A scintilla of evidence could not satisfy the burden of proof. But where the scintilla rule is not good law, the plaintiff is clearly entitled to a directed verdict on the ground that no reasonable jury would be warranted in finding that a scintilla of evidence was sufficient to prove, by a preponderance of evidence, that the defendant had exercised due care.¹¹⁴ The court will not permit the jury to return an unreasonable verdict and where, as here, the judge would be obliged to grant a new trial because the verdict was contrary to the weight of evidence, in case the jury found for the defendant, he should direct a verdict for the plaintiff if he asks for it.¹¹⁵ Consequently we conclude that if the scintilla rule is enforced the case

112. See Conner, J., in *Ross v. Cotton Mills* (1905) 140 N. C. 115, 52 S. E. 121, quoted in *Wigmore "Evidence"* 2509, at p. 498.

113. Cf. *American Ry. Express Co. v. Henderson* (1926) 214 Ala. 263, 107 So. 746; *Bray-Robinson Co. v. Higgins* (1925) 210 Ky. 432, 276 S. W. 129.

114. Cf. *Atlantic National Bank v. More* (Ariz. 1925) 241 Pac. 601. Cf. also *Poevey v. International Sugar Feed, etc., Co.* (1926) 191 N. C. 722, 133 S. E. 12, and *Garrett v. Hunt* (Tex. 1926) 283 S. W. 489.

115. *Jack v. Reeves* (1906) 78 Ark. 426, 95 S. W. 781; *People v. Hutchinson* (1926) 9 Fed. (2nd) 275; *Lavry v. Brigance* (Okla. 1926) 242 Pac. 239; *Froling v. Howard* (1926) 125 Me. 507, 131 Atl. 308.

must go to the jury, but if not the plaintiff is entitled to a directed verdict.

Under presumption number 2, however, the result will be different. If the defendant only has the burden of producing evidence or "going forward with evidence," a scintilla, however slight its weight, is enough to make a jury case. The defendant has thrown doubt upon his negligence, and, by the burden which he was required to sustain, that was all that he was required to do.¹¹⁶ The jury may not believe his witnesses, or it may not be impressed with what they testify, but nevertheless he is entitled to have them pass upon the evidence, as a whole, for the burden of proof is still, and always has been, upon the plaintiff to show negligence.¹¹⁷ Here, it seems, is a clear case of a situation which must be submitted to the jury. The presumption itself, together with the fact that the defendant has satisfied the only burden that he was under, insures to both parties the privilege of going to the jury with the risk of non-persuasion.

Under presumption number 1 certainly the plaintiff is not entitled to a directed verdict. He could not have this when the defendant produced no evidence; a fortiori he cannot have it when some evidence of due care has been offered. As for the defendant's being entitled to a directed verdict, it is hardly conceivable that so slight a degree of evidence would be sufficient. It is possible that the plaintiff's case, even under a *res ipsa* situation, would be so weak, that is, there would be such a slight degree of evidence of negligence, that the defendant's slight proof of due care would leave the mind in equipoise, in which case the defendant would be entitled to win because the plaintiff has failed to satisfy his burden of proof.¹¹⁸ But here the two *quanta* of evidence are evaluated so finely that, while the judge might be justified in granting a new trial, it is not likely that a verdict would be directed for the defendant, and probably the case would be one for the jury.¹¹⁹

(3) When the defendant, in attempting to overcome the effects

116. *Wigmore* "Evidence" 2487 (d); *Thayer* "Preliminary Treatise on Evidence" 346.

117. *Adams v. Union Ry. Co.* (1903) 80 N. Y. Supp. 264; *Sweeney v. Erving* (1913) 228 U. S. 233, 57 L. Ed. 815, 33 Sup. Ct. Rep. 416. In *Mentz v. Schieren* (1901) 74 N. Y. Supp. 889, the defendant offered some evidence, but the case was submitted to the jury which found for the plaintiff.

118. If the material issues are established, it is the court's duty to direct a verdict against the party failing of proof: *Webb v. Western Reserve Bond & Share Co.* (1925) 115 Ohio St. 247, 153 N. E. 289.

119. Cf. *Scellers v. Universal Service* (1924) 68 Calif. App. 252, 228 Pac. 879, a new trial granted for other reasons; cf. also *White v. Hines* (1921) 182 N. C. 275, 109 S. E. 31.

of the proof of the accident under the *res ipsa loquitur* doctrine introduces evidence in substantial quantities, that is, in an amount and to a degree which we designate as a "whole lot" of evidence that he has used due care, he at once creates at least a doubtful proposition out of the issue of negligence so that the case must go to the jury. The plaintiff is not entitled to a directed verdict either under presumption number 3, number 2 or number 1. Even the strongest case for the plaintiff, number 3, only throws the burden of proof upon the defendant, and he has met that duty by offering for the jury's consideration a goodly quantity of evidence. The accident, even under presumption, number 3, is not *per se* proof of negligence.¹²⁰ The defendant is entitled to disprove it, and consequently he is certain to get to the jury for they would be warranted in finding that he has used due care.¹²¹ Obviously, then, presumptions number 2 and number 1 would present no different situation, so far as the plaintiff is concerned, and he must be content to take the risk of non-persuasion unless he can present evidence to counter-rebut the defendant's proof.

But the plaintiff is not called upon to present further proof. There is no duty cast upon him to rebut the defendant's evidence of due care, so the defendant is therefore not entitled to a directed verdict unless his evidence has been so strong as to establish completely his freedom from fault, which is contrary to the hypothesis in this situation.

(4) But suppose that the defendant has replied by offering evidence which is so persuasive that, if believed, there could be no doubt whatever that he is innocent of negligence. Under these circumstances is the defendant entitled to a directed verdict? Under presumption number 3 we have the identical situation that is encountered when the plaintiff proves the accident and the attendant circumstances, and the defendant has the burden of proving that he has not been negligent. In other words, the situation is just reversed. The defendant has completely sustained his burden, and it is up to the plaintiff to come forward with proof and sustain his initial burden to make out a case for the jury. If he fails to do so, the only objection to directing a verdict for the defendant is that the jury

120. Under many statutes, however, particular situations are made, *per se*, proof of negligence. None of the questions involved in the application of *res ipsa loquitur* arises here.

121. But if the defendant only offers evidence of equal weight he must lose, under presumption number 3, which casts upon him the burden of proving due care: *Weber v. Chicago, R. I. & Pac. R. R.* (Iowa 1915) 151 N. W. 852.

might not believe his witnesses.¹²² If, however, the plaintiff does not attack the credibility of the defendant's witnesses and permits their testimony to go unchallenged, the jury should not be permitted to discount their uncontradicted testimony, as such would be unreasonable and would indicate that the jury had considered evidence not properly before it.¹²³ Under such circumstances the defendant is entitled to a directed verdict and should have it if he asks for it. If the plaintiff does not counterbalance his proof, the jury would be warranted in finding but one verdict, so the trial court must direct it.¹²⁴ If the case goes to the jury and it should return a verdict for the plaintiff the court would have to grant a new trial on the ground that the verdict was contrary to the weight of evidence, and this is uniformly held to be a situation compelling the judge to direct the verdict.¹²⁵

This being the situation under presumption number 3, it follows that a still stronger case is made out for the defendant under presumptions number 2 and number 1. In the one case the defendant is only required to produce some evidence and in the other he is under no duty whatever to produce anything. But he has been able to produce such evidence as, if believed, will completely rebut any inference that has arisen against him, and therefore, unless the plaintiff produces further evidence to establish his case, the defendant

122. It has been held that the question of whether a telephone company discharged its burden of proving lack of negligence (presumption number 3, it will be noticed) which caused a telephone user's injury from electric shock was for the jury, although the company introduced uncontradicted evidence that its appliances were properly constructed and operated, on the ground that the credibility and sufficiency of the defendant's explanation were for the jury: *Warren v. Missouri & Kansas Tel. Co.* (1917) 196 Mo. App. 549, 196 S. W. 1030.

123. Cf. *Sunderland* supra, note 100, at 206.

124. In *Moon v. Fink* (1897) 102 Ga. 520, 28 S. E. 980, the presumption raised by the accident was rebutted by the plaintiff's own witnesses. A nonsuit was ordered. This has always been the law, and the proposition contended for now is but the logical consequence of that rule. This has been practically stated in Wisconsin where the court, in reversing a judgment for the plaintiff, commented on the defendant's rebutting evidence as follows: "Hence, when this proof came in, and was undisputed, the presumption of negligence from the mere happening of the accident was entirely overthrown, and nothing was left for the consideration of the jury," citing two Wisconsin cases: *Klitzke v. Webb* (1904) 120 Wis. 254, 97 N. W. 901. In Washington, where presumption number 3 seems to be favored (see *infra*, note 78) it has been held that the plaintiff who makes no attempt to show the negligence of the defendant, but relies solely upon the doctrine of *res ipsa loquitur*, must controvert the defendant's explanation of the cause of the act and show its insufficiency, or the court will hold, as a matter of law, that the presumption has been overcome: *Scarpelli v. Washington Water Power Co.* (1911) 63 Wash. 18, 114 Pac. 870.

125. See cases cited in *supra*, note 115.

must win.¹²⁶ The plaintiff is now in the same position that he occupied at the beginning of the trial,¹²⁷ and obviously if he now fails to show any evidence supporting his issues and sustaining his burden, which he has been under all the time, no jury would be entitled to find in his favor. This, it seems, presents a situation in which the judge is compelled to grant the defendant's motion for a verdict directed in his favor, and if the latter is made, the direction will certainly be given. To summarize the results of the foregoing analysis, the following tables may be useful:

PRESUMPTION NUMBER 3
(Casting Burden of Proof on Defendant)

	1	2	3	4
Plaintiff's proof	Res ipsa case	Same	Same	Same
Defendant's proof	No evidence	Mere scintilla	"Whole lot"	Rebuts completely
Result	Directed verdict for plaintiff	Same, except where scintilla rule prevails	Goes to jury, ordinarily	Directed verdict for defendant, if plaintiff does not counter-rebut

PRESUMPTION NUMBER 2
(Casting on Defendant Burden of Going Forward with Evidence)

	1	2	3	4
Plaintiff's proof	Res ipsa case	Same	Same	Same
Defendant's proof	No evidence	Mere scintilla	Whole lot	Rebuts completely
Result	Directed verdict for plaintiff	Goes to jury	Goes to jury	Directed verdict for defendant, if plaintiff does not counter-rebut

126. *Curtis v. New York, N. H. & H. R. R. Co.* (1913) 159 App. Div. 757, 144 N. Y. Supp. 1007; *Christenson v. Oregon Short Line* (1909) 35 Utah 137, 99 Pac. 676, seem to be in point. See also *Stott v. Southern, etc., Power Co.* (1920) 47 Calif. App. 242, 190 Pac. 478. Even if the defendant, under presumption number 2, merely meets the plaintiff's proof with evidence of equal weight, he is entitled to win because the plaintiff has never been relieved of his burden of proof: *Scellars v. Universal Service* (1924) 68 Calif. App. 252, 228 Pac. 879. With this compare the opposite result in the case cited in note 121, because there the situation was worked out under presumption number 3. The cases are entirely consistent, according to the two theories of the doctrine of *res ipsa loquitur*.

127. See *Wigmore "Evidence"* 2487 (e), and cases cited in note 8, p. 446.

PRESUMPTION NUMBER 1

(Casting No Burden on Defendant but Making Proof of Accident, etc., Some Evidence of Negligence)

	1	2	3	4
Plaintiff's proof	Res ipsa case	Same	Same	Same
Defendant's proof	No evidence	Mere scintilla	Whole lot	Rebuts completely
Result	Goes to jury	Goes to jury	Goes to jury in most cases	Directed verdict for defendant