

VALLEY PROPERTIES LIMITED PARTNERSHIP v. STEADMAN'S HARDWARE, INC., 251 Mont. 242, 824 P.2d 250 (1992). Defendant rented space in the plaintiff's warehouse. The defendant's space was completely separate and defendant had the only keys. The electrical wiring was quite old. A fire started in the defendant's rented area and eventually consumed the entire warehouse. The plaintiff sued for the destruction of its warehouse. The plaintiff was unable to point to specific acts of negligence by the defendant, but argued *res ipsa loquitur*. *Held*, the trial court correctly refused to give instructions on the doctrine. "This Court has stated the doctrine of *res ipsa loquitur* in the following terms: (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff. Under the facts of the present case, the doctrine is not applicable. A fire in a warehouse, of unknown origin, may occur in the absence of negligence. Further, the evidence did not clearly eliminate causes, such as a malfunction in the electrical system, which were not chargeable to the occupants of the warehouse."

EATON v. EATON, 119 N.J. 628, 575 A.2d 858 (1990). Sandra Eaton and her adult daughter Donna were traveling in a car at night in clear, dry weather. Police found the car overturned, with heavy damage on the passenger side. Sandra was seriously injured and later died; Donna sustained only minor injuries. Donna insisted that her mother had been driving, and that the accident had occurred when she swerved to avoid a head-on collision with a dark-colored Chevrolet Nova. Before her death from injuries, Sandra told the police that Donna was driving

the car at the time of the accident. The investigating police officer concluded that the daughter's story was unbelievable, and cited her for careless driving. Plaintiff Gerald Eaton, Sandra's husband and Donna's father, sued Donna for negligently causing Sandra's death. The jury returned a verdict for Donna, finding that she was driving the car but was not negligent. Plaintiff's lawyer had not requested a *res ipsa loquitur* instruction at trial, but claimed on appeal that the trial court's failure to so instruct was plain error requiring remand for a new trial. The New Jersey Supreme Court agreed, holding that *res ipsa* applied. "Under the rule of *res ipsa loquitur*, a jury may draw a permissible inference of negligence from the circumstances surrounding certain accidents. . . . Application of the rule depends on satisfaction of three conditions: (1) the accident which produced a person's injury was one which ordinarily does not happen unless someone was negligent, (2) the instrumentality or agent which caused the accident was under the exclusive control of the defendant, and (3) the circumstances indicated that the untoward event was not caused or contributed to by any act or neglect on the part of the injured person. When the rule applies, it permits an inference of negligence that can satisfy the plaintiff's burden of proof, thereby enabling the plaintiff to survive a motion to dismiss at the close of his or her case. The inference, however, does not shift the burden of proof. As we said in *Lorenc*, '[t]he facts are said to provide circumstantial evidence of negligence to be weighed, but not necessarily to be accepted as sufficient; they afford a basis for an inference of want of due care which the jury may, but need not, draw. Even in the absence of explanation by the defendant, the jury may properly conclude that the inference should not be drawn or that the facts are not adequate to sustain the plaintiff's ultimate burden of showing, to the degree required, the origin of the accident in the negligence of the defendant."

Notes

1. To invoke *res ipsa loquitur*, the plaintiff must show that negligence is more probable than not, or as commonly expressed, that the event does not ordinarily occur without negligence of someone. But how do we know the probabilities? The answer is that in some cases, judges believe juries lack sufficient knowledge or experience to conclude that negligence is more probable than not. In such instances, judges direct verdicts for the defendant. E.g., *Scott v. James*, 731 A.2d 399 (D.C.App.1999) (stressing jury's lack of knowledge of chemistry). In situations like *Byrne v. Boadle*, however, judges believe that common knowledge and general experience of jurors permit them to think that, more likely than not, the defendant was negligent.

2. *Valley Properties* reflects the elements of *res ipsa* as set forth in RESTATEMENT SECOND OF TORTS § 328D. Are the requirements materially different from those set forth in *Eaton*? Expect variation in local verbalization of the rules, but always consider the possibility that a different verbalization may be intended to express substantially the same rules the Restatement uses. In *Reese v. Board of Directors of Mem. Hospital of Laramie*

County, 955 P.2d 425 (Wyo.1998), the court seemed to say that *res ipsa* could not be applied unless negligence was the only possible inference. Taken literally, would such a rule be rational? If not, maybe we should take the rule as a defective statement of the court's intent.

3. As we know, the usual standard of care is the reasonable person standard. However, in some situations, the standard is much less demanding and the defendant breaches his duty to the plaintiff only if the defendant is chargeable with gross negligence or reckless misconduct. These situations are considered in Chapter 10. Suppose that in *Byrne v. Boadle* the plaintiff, without invitation, had walked into the defendant's place of business just for a look around and had been hit by the barrel. If the defendant's duty under those circumstances was only to avoid gross negligence, would *res ipsa loquitur* take the plaintiff to the jury? See *Maiden v. Rozwood*, 461 Mich. 109, 597 N.W.2d 817 (1999). Does the answer turn upon a specific rule of law or upon assessment of the evidence in each case?

NOTE: PROCEDURAL INCIDENTS AND
EFFECTS OF RES IPSA LOQUITUR

1. *Sufficiency of evidence issue.* As *Eaton* notes, the application of *res ipsa loquitur* means that, on the negligence issue, the plaintiff will survive a motion for directed verdict and get to the jury, which can then decide the case either way.

2. *Instructing on res ipsa.* If the plaintiff has adduced evidence from which the jury could conclude that the elements of *res ipsa loquitur* are present, then trial judges commonly give a *res ipsa loquitur* instruction to the jury. The instruction "merely tells the jury that if they do find the existence of these elements then they may draw the inference of negligence," not that they must do so. *K-Mart Corp. v. Gipson*, 563 N.E.2d 667, 670 (Ind.App.1990). Is an instruction necessary or desirable? In *Grajales-Romero v. American Airlines, Inc.*, 194 F.3d 288 (1st Cir. 1999), the court upheld the jury's verdict for the plaintiff because evidence made out a *res ipsa loquitur* case even though the judge had not instructed the jury on that doctrine.

3. *Permissible inference effect.* Most courts hold that *res ipsa* creates a permissible inference that the jury may draw if it sees fit. This is reflected in *Eaton* and in the instruction just quoted. Even if the defendant introduces no evidence at all, the jury may reject the inference and bring in a verdict for the defendant. This may be expressed by saying that the inference of negligence in a *res ipsa* case is merely "permissible" and that it does not shift the burden of persuasion.

4. *Abnormally strong inferences of negligence.* To say that the inference of negligence is merely permitted, not required, is to say that the plaintiff who makes out a permissible inference case would not be entitled to a directed verdict. But could there be cases so strong that the permissible inference becomes a mandatory inference so that the trial

judge would direct a verdict after all? In *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116 (1st Cir.1991), two women gave birth to twins in the University Hospital at Puerto Rico Medical Center. The hospital somehow switched one twin from each set, so that each mother went home with two children, but only with one of her own. The mistake was discovered after a year and a half. The court thought that occasions for directing a verdict for the plaintiff were "hen's-teeth rare," the court nevertheless permitted a directed verdict for the plaintiff in this case.

5. *The presumption effect.* A small number of courts say that *res ipsa loquitur* is *not* merely a common sense assessment of evidence which permits an inference of fault, but that, instead, it creates a "presumption" of negligence. The term "presumption" can be used loosely or can have technical meanings, explored in the course in evidence. Courts usually enforce one of two possible effects when a presumption of negligence applies:

(a) The jury is told that, once the presumption applies, the defendant has the burden of showing he is *not* negligent; OR

(b) The judge will direct a verdict for the plaintiff unless the defendant produces some evidence that he was not negligent. CAL. EVID. CODE § 646(b) is an example; it defines *res ipsa* as "a presumption affecting the burden of producing evidence." (How *much* evidence the defendant must produce is another disputed matter.)

The presumption in (a) is sometimes said to shift the burden of persuasion. The presumption in (b) is sometimes said to shift the burden of production (meaning production of evidence), or the burden of going forward with evidence. See, describing presumptions and their effects, DOBBS ON TORTS § 152 (2000). How would you compare or contrast the permissible inference approach to *res ipsa*?

6. *Rebuttal by defendant.* Suppose the defendant does in fact offer proof about his conduct. What does this do to the *res ipsa loquitur* inference? Can the plaintiff still get to the jury? Suppose in *Byrne* the defendant had proved that a trucker loading the flour had negligently dropped it. Suppose instead that the defendant proved it did everything normally, exercised all precautions about the flour storage and cannot understand why the injury took place? Would the results be different under these two versions of the defendant's proof?