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Proof of Negligence in North Carolina Part I -- Res Ipsa Loquitur

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PROOF OF NEGLIGENCE IN NORTH CAROLINA† PART I. RES IPSA LOQUITUR

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INTRODUCTION

The immediate goal of every plaintiff's attorney in a negligence trial ought to be to get his client's case to the jury, for, if he fails in this, the case is lost. The universal assumption is that, with the case in the hands of the jury, the likelihood that plaintiff will recover is great. The number of cases in which this goal is frustrated at the trial level or, if achieved there, is lost in the appellate court suggests that many attorneys who anticipate the jury's benevolence neglect the task of first providing the necessary minimum of proof. In some of these cases, the question naturally arises whether the expense of trial and appeal was necessary before the inadequacy of the evidence could be determined.[1] In others, the suspicion arises that evidence might have been available had proper investigation of the facts been made.[2]

The North Carolina Supreme Court is very demanding in the proof of negligence that it requires to take a case to the jury, especially in cases involving circumstantial evidence.[3] In some of its decisions the court

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[1] Illustrative is the unbelievable number of cases reaching the North Carolina Supreme Court that involve a slip and fall on a slippery surface or on slightly differing levels of floors or walks. For the most part, the cases are indistinguishable on their facts, at least as reported in the appellate opinions, and suffer the same fatal outcome at some stage of their journey through the courts. Their common feature is the complete absence of any evidence of negligence. *See, e.g.*, Hinson v. Cato's, Inc., 271 N.C. 738, 157 S.E.2d 537 (1967) (slip and fall on "slick" spot); Grimes v. Home Credit Co., 271 N.C. 608, 157 S.E.2d 213 (1967) (slip and fall on waxed floor); Smithson v. W. T. Grant Co., 269 N.C. 575, 153 S.E.2d 68 (1967) (slip and fall on screw); Harrison v. Williams, 260 N.C. 392, 132 S.E.2d 869 (1963) (step between floor levels); Bagwell v. Town of Brevard, 256 N.C. 465, 124 S.E.2d 129 (1962) (inch difference in level of sidewalk sections).

[2] *E.g.*, Warren v. Jeffries, 263 N.C. 531, 139 S.E.2d 718 (1965) (car rolled from stationary position; no evidence of condition of brakes or gears); Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962) (bottom fell out of six-pack drink carton; no evidence of condition of carton).

[3] Cases involving exploding bottles, foreign substances in food and beverages, and certain types of automobile accidents are illustrative and are discussed at pp. 461-63 *infra*.

has shown no reluctance to retry a case on the facts and law and, in the process, to assume the role of jury as well as that of judge.[4] Other opinions, though filled with detailed factual recitals, are controlled by vague and inflexible rules that permit little or no evaluation of relevant facts.[5] As a result, reasonable prediction of the probable outcome of a case in advance of trial and appeal is difficult.

The plaintiff in a negligence action, to avoid a directed verdict, must introduce evidence sufficient to convince the judge that the jury would be justified in finding that defendant's negligence caused his injuries;[6] and, to obtain a favorable verdict, he must persuade the the jury of the defendant's liability by a preponderance of the evidence.[7] Either direct or circumstantial evidence may be used to show the defendant's negligence.[8] In addition, in some instances evidence of a fact or group of facts, when accepted, permits an inference[9] or compels a finding of defendant's negligence.[10] Usually, these cases involve nothing more than recognition of the normal probative effect of circumstantial evidence,[11] but occasionally they depend upon a special relationship coupled with defendant's better opportunity to explain how the accident happened.[12]

Plaintiff's evidence must establish a duty owed by the defendant and its breach,[13] and limitations upon defendant's duty may require more

[4] Illustrative cases are: More v. Hales, 266 N.C. 482, 146 S.E.2d 385 (1966); Warren v. Jeffries, 263 N.C. 531, 139 S.E.2d 718 (1965); Smith v. Gulf Oil Corp., 239 N.C. 360, 79 S.E.2d 880 (1954).

[5] Examples are the court's "categorical" approach to *res ipsa loquitur*, discussed pp. 461-63 *infra*; its literal application of the exclusive control doctrine, discussed pp. 469-70 *infra*; and its increasing resort to the doctrine that one inference may not be based on another, discussed in D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 78 (Supp. 1968).

[6] D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 210 (2d ed. 1963), discusses various formulas used in determining whether sufficient evidence has been introduced to warrant submission of the case to the jury.

[7] Stewart v. Carpet Co., 138 N.C. 60, 50 S.E. 562 (1905).

[8] Yates v. Chappell, 263 N.C. 461, 139 S.E.2d 728 (1965).

[9] *Res ipsa loquitur*, the similar instance rule, and other situations that have not achieved "rule" status are examples. Since they are the subject of this article, citations are omitted here.

[10] Negligence per se based upon proof of violation of a safety statute is the principal example. *E.g.*, Reynolds v. Murph, 241 N.C. 60, 84 S.E.2d 273 (1954) (failure to label gasoline as required by statute).

[11] O'Brien v. Parks Cramer Co., 196 N.C. 359, 145 S.E. 684 (1928).

[12] An example is the prima facie case that arises when property in good condition when delivered is in the bailee's possession in damaged condition when claimed. M. B. Haynes Elec. Corp. v. Justice Aero Co., 263 N.C. 437, 139 S.E.2d 682 (1965).

[13] Sowers v. Marley, 235 N.C. 607, 70 S.E.2d 670 (1952) (no showing of where plaintiff was or how he was moving before he was struck in highway by defendant's

substantial evidence to make out a prima facie case.[14] In cases involving young children the burden of proof may be affected not only by the different standard of care applied[15] but also, primarily in relation to contributory negligence, by certain presumptions of incapacity that the law recognizes.[16] A safety statute, ordinance, or regulation; a voluntary industry or trade safety code; or custom or practice may establish the defendant's duty or be some evidence of it; and proof of defendant's failure to conform to the standards established thereby may make out a per se or prima facie case of negligence.[17]

This article undertakes to discuss some of the modes of proof of negligence and their application by the North Carolina Supreme Court. Its concern is with substantive problems rather than evidentiary ones, except as they relate to or overlap the substantive issue. Thus, questions concerning the probative force of evidence are discussed while those involving the initial admissibility of the evidence, for the most part, are not.

Res Ipsa Loquitur

Basic Explanation

Proof of negligence by merely establishing the circumstances of an occurrence that produces injury or damages is called *res ipsa loquitur*.[18] This mode of proof simply recognizes that common experience sometimes permits a reasonable inference of negligence from the occurrence itself.[19]

> [W]hen a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.[20]

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car); Lippard v. Johnson, 215 N.C. 384, 1 S.E.2d 889 (1939) (medical malpractice; no expert testimony).

[14] Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921) (evidence sufficient to establish negligence but not willful or wanton conduct; plaintiff's status as invitee or trespasser for jury).

[15] Phillips v. North Carolina R.R., 257 N.C. 239, 125 S.E.2d 603 (1962). *See also* Hoots v. Beeson, 272 N.C. 644, 159 S.E.2d 16 (1967); Wooten v. Cagle, 268 N.C. 366, 150 S.E.2d 738 (1966).

[16] Walston v. Greene, 247 N.C. 693, 102 S.E.2d 124 (1958).

[17] All of these are discussed later and citations are omitted here.

[18] O'Brien v. Parks Cramer Co., 196 N.C. 359, 145 S.E. 684 (1928).

[19] Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968); Overcash v. Charlotte Elec. Ry. Light & Power Co., 144 N.C. 572, 57 S.E. 377 (1907).

[20] Newton v. Texas Co., 180 N.C. 561, 567, 105 S.E. 433, 436 (1920).

This classic statement of the doctrine reflects its foundation in ordinary human experience; yet, because of the way it has been interpreted by courts, *res ipsa* has evolved into a technical doctrine that, in application, is sometimes totally inconsistent with the principle on which it is founded.[21]

The notion that the evidence is more accessible to the defendant and that he is therefore in a better position to explain what has happened has been persistently tied to the *res ipsa* doctrine. Some early cases[22] relied heavily on this notion to justify the doctrine, and occasionally a more recent case has attached significance to it. For example, in *Hollenbeck v. Ramset Fasteners, Inc.*,[23] the primary reason given by the court for not applying *res ipsa* was the absence of the defendant's superior knowledge. Although the decision is correct on its facts, its reasoning should be rejected. If the facts proved by the plaintiff indicate that the more probable cause of an accident was the defendant's negligence, the inability or lack of opportunity of the defendant to explain what happened does not justify depriving the plaintiff of the benefit of his proof. On the other hand, if plaintiff's evidence does not indicate any negligence of the defendant, it is the plaintiff's inability, not the defendant's, that is fatal to the cause of action.

If the plaintiff's evidence does not make defendant's negligence more probable than not, or its tendency to do so is questionable, the court could as a matter of policy uphold the plaintiff's claim on the basis of the defendant's better opportunity for explanation.[24] There is little evidence in the cases, however, that courts have in fact done this.[25] Where a special relationship, such as a bailment, exists,[26] defendant's opportunity

[21] W. PROSSER, LAW OF TORTS § 39, at 217 (3d ed. 1964) [hereinafter cited as PROSSER].

[22] Perry v. Branning Mfg. Co., 176 N.C. 68, 97 S.E. 162 (1918); Deaton v. Gloucester Lumber Co., 165 N.C. 560, 81 S.E. 774 (1914); Morrisett v. Elizabeth City Cotton Mills, 151 N.C. 31, 65 S.E. 514 (1909); Ross v. Cotton Mills, 140 N.C. 115, 52 S.E. 121 (1905); Stewart v. Carpet Co., 138 N.C. 60, 50 S.E. 562 (1905); Aycock v. Raleigh & A.A.L.R.R., 89 N.C. 321 (1883).

[23] 267 N.C. 401, 148 S.E.2d 287 (1966).

[24] This policy has been adopted by some courts in the area of causation. *E.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (two hunters negligently fired in plaintiff's direction, but only one shot struck; each held liable). The true explanation for this kind of decision is practical fairness. *E.g.*, Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961) (chain automobile collision involving successive impacts in which the damage caused by each defendant was uncertain).

[25] Application of *res ipsa* to multiple defendants is one situation in which the policy has been adopted by some courts. *E.g.*, Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (unexplained injury to healthy part of body during operation that involved several doctors and nurses).

[26] Jordan v. Eastern Transit & Storage Co., 266 N.C. 156, 146 S.E.2d 43 (1966).

for superior knowledge has been an important factor, but in other situations its impact, except in the early development of *res ipsa*, is not apparent. Further, in many cases of unexplained occurrences, defendant's superior knowledge is more apparent than real.

Ironically, plaintiff's, rather than defendant's, apparent opportunity to give a fuller account of the accident than that presented by his evidence may have had a greater impact on the North Carolina decisions. In a number of cases plaintiff's proof, which seemed to permit a reasonable inference of the defendant's negligence, has been held insufficient.[27] Although other factors may have influenced or determined the outcome, the court was obviously disturbed by the plaintiff's failure to offer proof seemingly available to him. For example, in *Boyd v. Kistler*[28] plaintiff sought to recover for a permanent scar that developed from a red streak on her lips and cheek that she first discovered several hours after an extended dental operation performed by the defendant. In rejecting plaintiff's claim, the court said: "By investigation, the plaintiff surely could have obtained evidence as to when and how the injury occurred and who caused it. No doubt the plaintiff's able counsel knew of their right to make inquiry by adverse examination of witnesses. . . ."[29]

If the evidence offered by plaintiff had been sufficient to permit an inference of defendant's negligence, and it probably was not, it is not at all clear that her failure to introduce other evidence should prejudice her case. While the willingness of the jury to accept the inference may be adversely affected by the absence of such evidence, the determination of the sufficiency of the offered evidence for submission to the jury should not be.

Res ipsa does not relax the normal requirements of proof that must be met by plaintiff to establish his cause of action. When the plaintiff relies upon *res ipsa*, his proof must establish a reasonable probability that the defendant has been negligent just as it must when he relies upon direct or other circumstantial evidence of negligence.[30] *Res ipsa* may make

[27] *E.g.*, Warren v. Jeffries, 263 N.C. 531, 139 S.E.2d 718 (1965) (car rolled from stationary position; no evidence of condition of brakes and gears); Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962) (bottom fell out of soft drink carton; no evidence of condition of carton); Harward v. General Motors Corp., 235 N.C. 88, 68 S.E.2d 855 (1952) (car's steering mechanism locked; no evidence of care in car's operation and maintenance).

[28] 270 N.C. 744, 155 S.E.2d 208 (1967).

[29] *Id.* at 747, 155 S.E.2d at 210.

[30] Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954); Modlin v. Simmons, 183 N.C. 63, 110 S.E. 661 (1922).

this burden easier since it eliminates the need for proof of specific acts of negligence. Some cases leave the impression that *res ipsa* entails less stringent proof requirements, but this view seldom benefits a plantiff whose evidence is otherwise insufficient.[31] At other times, the court's reluctance to give the plaintiff the benefit of this supposed liberality seems to underlie its denial of a claim where the evidence is sufficient to permit the jury reasonably to infer that the defendant's negligence was the likely cause of the accident.[32]

Direct evidence of negligence points to a particular act or omission of the defendant that constitutes a failure to use reasonable care. Circumstantial evidence, including *res ipsa loquitur*, may also permit an inference of a particular negligent act or omission of the defendant.[33] When a customer steps into a pile of grapes and slips and falls, evidence that the grapes were covered with dust and lint and were in a pile with other debris permits a finding that an employee of the store's proprietor had swept up the debris and left it there.[34] However, the inference that arises in the typical *res ipsa* case indicates that some negligence of the defendant was the probable cause of the injury but seldom identifies a particular act or omission as its likely cause.[35] The derailment of a train permits an inference that the railroad was negligent in some way. The cause may have been improperly constructed or maintained tracks, defective operating equipment, or neligent operation of the train. That the

[31] Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954) (trial court's instruction permitted verdict for plaintiff, without finding of negligence, upon finding that accident occurred as alleged; held to be erroneous). A liberal view of *res ipsa* may be taken in the products field, especially when a jurisdiction is in transition from negligence to strict liability. *See* Fricke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 1, 7-34 (1960); Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675 (1963). *See also* Wallerman v. Grand Union Stores, 47 N.J. 426, 221 A.2d 513 (1966) (customer who slipped and fell on string bean recovered without evidence of how long bean had been on floor or who put it there; deliberate policy decision to enlarge proprietor's "duty"); Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (*res ipsa* applied to multiple defendants; policy decision).

[32] Courts never give this as a reason for refusing to apply *res ipsa*. Their justification is likely to be that proof of accident or injury does not establish negligence, a recital that *res ipsa* is inapplicable under the facts of the case, or a finding of the absence of defendant's exclusive control.

[33] Lindsey v. Atlantic Coast Line R.R., 173 N.C. 390, 92 S.E. 166 (1917) (that loose bolt on floor of train was left there by railroad's employees); Womble v. Merchants' Grocery Co., 135 N.C. 474, 47 S.E. 493 (1904) (that elevator was negligently constructed) (*semble*).

[34] Long v. National Food Stores, Inc., 262 N.C. 57, 136 S.E.2d 275 (1964).

[35] Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954); Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921).

derailment itself leaves the specific cause totally in doubt does not preclude a reasonable inference that one or more of these acts was the cause.[36]

The recognition of the sufficiency of this inference of general negligence is perhaps the most distinctive feature of *res ipsa loquitur*. Yet, as fundamental as this feature is, it has been troublesome for the North Carolina court. The absence of any evidence of specific acts of negligence has been emphasized by the court in a number of decisions in which *res ipsa* was held to be inapplicable.[37] Of course, when no inference of negligence arises from the nature of the occurrence, the dismissal of plaintiff's claim may make it appropriate to note additionally the absence of other evidence of negligence. Despite the existence of this possibility, a reading of the cases leaves the distinct impression that the absence of such evidence has significantly affected the court's determination that *res ipsa* was inapplicable.

For example, in *Warren v. Jeffries*,[38] plaintiff was injured when defendant's car rolled from a stationary position down an incline on which it was parked. The plaintiff's evidence negated the possibility that anyone had tampered with the car after it was parked. In a per curiam opinion, the court held:

> There is no evidence as to the condition of the brakes, whether the hand brake had been set, or whether the car was in gear. [These omissions were the allegations of negligence contained in the complaint.] Apparently the car was not examined after the accident. What caused it to make a "clicking" sound and begin rolling backwards is pure speculation. The doctrine of *res ipsa loquitur* is not applicable.[39]

To deny the application of *res ipsa* unless an inference of specific negligence arises would substantially curtail the doctrine and eliminate its use in situations in which it is most often applied.

Effect of Defendant's Duty

Res ipsa loquitur is not an independent basis for imposing liability;

[36] Overcash v. Charlotte Elec. Ry. Light & Power Co., 144 N.C. 572, 57 S.E. 377 (1907).

[37] Phillips v. Pepsi-Cola Bottling Co., 256 N.C. 728, 125 S.E.2d 30 (1962); Ivey v. Rollins, 250 N.C. 89, 108 S.E.2d 63 (1959); Harward v. General Motors Corp., 235 N.C. 88, 68 S.E.2d 855 (1952); Watkins v. Taylor Furnishing Co., 224 N.C. 674, 31 S.E.2d 917 (1944); Jennings v. Standard Oil Co., 206 N.C. 261, 173 S.E. 582 (1934).

[38] 263 N.C. 531, 139 S.E.2d 718 (1965).

[39] *Id.* at 533, 139 S.E.2d at 720.

it is merely a mode of proof.[40] It imposes no duty on the defendant, but merely affords a way in which proof of violation of whatever duty the law imposes may be undertaken.[41] Its effectiveness to show a breach of the defendant's duty depends both upon the extent and nature of the duty owed[42] and upon the character of the circumstances shown by the evidence.[43]

The usual application of *res ipsa* is to situations in which defendant owes a duty of reasonable care. A row of seats in defendant's store does not fall over backwards when a customer sits down in one of them if it has been properly installed and maintained, and, when it does, an inference that defendant has failed to use reasonable care arises.[44] When an automobile driven by the defendant suddenly leaves the road and plunges into danger, defendant's negligence in operating the vehicle may be inferred.[45] The defendant's lack of care is the most likely explanation for what has happened. For the same reason, *res ipsa* applies to the derailment of a train,[46] a head-on collision between two of defendant's trains,[47] or the top of a railroad boxcar being blown off by an expectable wind;[48] the fall of an elevator,[49] an open elevator shaft,[50] or a sudden jerking motion of an escalator;[51] the explosion of a boiler,[52] of a soda water tank,[53]

[40] Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954) (charge that permitted verdict for plaintiff without finding negligence held erroneous); Kiger v. Liipfert Scales Co., 162 N.C. 133, 78 S.E. 76 (1913) (same). *See also* Trull v. Carolina-Virginia Well Co., 264 N.C. 687, 693, 142 S.E.2d 622, 626 (1965) ("The rule of absolute and strict liability differs from the doctrine of *res ipsa loquitur* in that the former . . . operates regardless of . . . negligence, while the latter is a rule of evidence which operates as *prima facie* proof of negligence.").

[41] White v. Hines, 182 N.C. 275, 109 S.E. 31 (1921).

[42] Lippard v. Johnson, 215 N.C. 384, 1 S.E.2d 889 (1939); Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921).

[43] Boone v. Matheny, 224 N.C. 250, 29 S.E.2d 687 (1944).

[44] Schueler v. Good Friend North Carolina Corp., 231 N.C. 416, 57 S.E.2d 324 (1950).

[45] Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968); Boone v. Matheny, 224 N.C. 250, 29 S.E.2d 687 (1944); Etheridge v. Etheridge, 222 N.C. 616, 24 S.E.2d 477 (1943).

[46] White v. Hines, 182 N.C. 275, 109 S.E. 31 (1921); Overcash v. Charlotte Elec. Ry. Light & Power Co., 144 N.C. 572, 57 S.E. 377 (1907).

[47] Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924).

[48] Ridge v. Norfolk S.R.R., 167 N.C. 510, 83 S.E. 762 (1914).

[49] Stewart v. Carpet Co., 138 N.C. 60, 50 S.E. 562 (1905); Womble v. Grocery Co., 135 N.C. 474, 47 S.E. 493 (1904).

[50] Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921).

[51] Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954).

[52] Harris v. Mangum, 183 N.C. 235, 111 S.E. 177 (1922).

[53] Lyles v. Brannon Carbonating Co., 140 N.C. 25, 52 S.E. 233 (1905).

of tanks or gasoline pipes of a filling station;[54] the escape of gasoline from storage tanks;[55] the delivery of excessive electrical current into household outlets[56] or shock transmitted through electrical equipment;[57] machinery suddenly starting without manipulation by its operator,[58] breaking,[59] or operating in an unexpected way;[60] the sagging of power lines to an unreasonably low height;[61] or other occurrences.[62]

On the other hand, a customer may slip and fall on the floor of a business establishment without the proprietor's negligence, and proof of such an occurrence, without more, raises no inference that defendant has failed to use reasonable care.[63] Proof that the floor was slippery because it had been waxed or oiled is not enough since the risk is not great and this method of care is a common one.[64] Defendant's negligence

[54] Howard v. Texas Co., 205 N.C. 20, 169 S.E. 832 (1933). *But see* O'Quinn v. Southard, 269 N.C. 385, 152 S.E.2d 538 (1967) (*res ipsa* inapplicable to establish supplier's negligence as cause of explosion that occurred while gasoline was being delivered; no exclusive control); Hubbard v. Quality Oil Co., 268 N.C. 489, 151 S.E.2d 71 (1966) (same).

[55] Newton v. Texas Co., 180 N.C. 561, 105 S.E. 433 (1920).

[56] McAllister v. Pryor, 187 N.C. 832, 123 S.E. 92 (1924); Turner v. Southern Power Co., 154 N.C. 131, 69 S.E. 767 (1910).

[57] Bryan v. Burns-Hammond Constr. Co., 197 N.C. 639, 150 S.E. 122 (1929); O'Brien v. Parks Cramer Co., 196 N.C. 359, 145 S.E. 684 (1928).

[58] Eaker v. International Shoe Co., 199 N.C. 379, 154 S.E. 667 (1930); Morrisett v. Elizabeth City Cotton Mills, 151 N.C. 31, 65 S.E. 514 (1909); Ross v. Cotton Mills, 140 N.C. 115, 52 S.E. 121 (1905).

[59] Isley v. Bridge Co., 141 N.C. 220, 53 S.E. 841 (1906).

[60] Dunn v. Roper Lumber Co., 172 N.C. 129, 90 S.E. 18 (1916); Kiger v. Liipfert Scales Co., 162 N.C. 133, 78 S.E. 76 (1913); Deaton v. Gloucester Lumber Co., 165 N.C. 560, 81 S.E. 774 (1914). *But see* Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960) (*res ipsa* held inapplicable when front-end loader tilted forward; emphasis on absence of showing of defect in design, materials, or construction and of whether operated on incline or level area).

[61] Murphy v. Carolina Power & Light Co., 196 N.C. 484, 146 S.E. 204 (1929); Haynes v. Raleigh Gas Co., 114 N.C. 204, 19 S.E. 344 (1894).

[62] Star Mfg. Co. v. Atlantic Coast Line R.R., 222 N.C. 330, 23 S.E.2d 32 (1942) (escape of sparks from train engine); Collins v. Virginia Power & Elec. Co., 204 N.C. 320, 168 S.E. 500 (1933) (fire started where electrical wires entered house); Royal v. Dodd, 177 N.C. 206, 98 S.E. 599 (1919) (fire set by sawmill steam engine); Lindsey v. Atlantic Coast Line R.R., 173 N.C. 390, 92 S.E. 166 (1917) (passenger's fall on bolt on floor of train; bolt used to fasten rails of track together and frequently carried by railroad's employees); Fitzgerald v. Southern Ry., 141 N.C. 530, 54 S.E. 391 (1906) (piece of coal fell while being loaded on tender from coal car); Lawton v. Giles, 90 N.C. 374 (1884) (fire set by combustible material from smokestack).

[63] Haynes v. Horton, 261 N.C. 615, 135 S.E.2d 582 (1964); Garner v. Atlantic Greyhound Corp., 250 N.C. 151, 108 S.E.2d 461 (1959); Fanelty v. Rogers Jewelers, Inc., 230 N.C. 694, 55 S.E.2d 493 (1949).

[64] Hinson v. Cato's Inc., 271 N.C. 738, 157 S.E.2d 213 (1967) (slick spot);

may be established by evidence of an accumulation of excessive wax at the place where plaintiff fell[65] or of defendant's failure to take normal precautions to reduce the danger.[66]

That some foreign substance on the floor caused the plaintiff to fall does not establish defendant's failure to use reasonable care.[67] If the object was placed there by the defendant or his employees, he is liable.[68] But in the absence of evidence to this effect, the probability that it was placed there by a third party is as great as that of defendant's responsibility. Under these circumstances, defendant's liability may be established only by showing that he had a reasonable opportunity to remove the substance after he knew or should have known of its presence.[69] Defendant's negligence may be inferred from circumstances that indicate that the substance had been on the floor for a sufficient time to have been discovered by reasonable inspection.[70]

The North Carolina Supreme Court has repeatedly stated that *res ipsa loquitur* does not apply to injuries caused by exploding bottles,[71] foreign or deleterious substances in food and beverage,[72] the operations of auto-

Grimes v. Home Credit Co., 271 N.C. 608, 157 S.E.2d 213 (1967) (waxed floor); Hendrick v. Tigniere, 267 N.C. 62, 147 S.E.2d 550 (1966) (waxed floor in dance studio; decision seems questionable in light of activity involved, greater risk present, and studio's obligation to provide suitable premises); Case v. Cato's Inc., 252 N.C. 224, 113 S.E.2d 320 (1960) (waxed floor); Barnes v. Hotel O'Henry Corp., 229 N.C. 730, 51 S.E.2d 180 (1949) (waxed floor).

[65] Copeland v. Phthisic, 245 N.C. 580, 96 S.E.2d 697 (1957); Lee v. Green & Co., 236 N.C. 83, 72 S.E.2d 33 (1952).

[66] Powell v. Deifells, Inc., 251 N.C. 596, 112 S.E.2d 56 (1960); Harris v. Montgomery Ward & Co., 230 N.C. 485, 53 S.E.2d 536 (1949).

[67] Smithson v. W. T. Grant Co., 269 N.C. 575, 153 S.E.2d 68 (1967) (screw); Fox v. Great Atl. & Pac. Tea Co., 209 N.C. 115, 182 SE. 662 (1935) (beet); Cooke v. Great Atl. & Pac. Tea Co., 204 N.C. 495, 168 S.E. 679 (1933) (banana peel).

[68] Long v. National Food Stores, Inc., 262 N.C. 57, 136 S.E.2d 275 (1964) (fact that grapes were covered with lint and other debris permits inference that they were swept there by defendant's employee); Lindsey v. Atlantic Coast Line R.R., 173 N.C. 390, 92 S.E. 166 (1917) (fact that bolt was used to fasten rails of track together and frequently carried by railroad's employees permits inference that they were responsible for its presence on floor of train).

[69] Raper v. McCrory-McLellan Corp., 259 N.C. 199, 130 S.E.2d 281 (1963).

[70] Long v. National Food Stores, Inc., 262 N.C. 57, 136 S.E.2d 275 (1964) (lint-covered grapes); Morgan v. Great. Atl. & Pac. Tea Co., 266 N.C. 221, 145 S.E.2d 877 (1966) (mashed and bruised cabbage leaves).

[71] Jenkins v. Harvey C. Hines Co., 264 N.C. 83, 141 S.E.2d 1 (1965); Styers v. Winston Coca-Cola Bottling Co., 239 N.C. 504, 80 S.E.2d 253 (1954); Davis v. Coca-Cola Bottling Co., 228 N.C. 32, 44 S.E.2d 337 (1947).

[72] Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 154 S.E.2d 337 (1967) (by implication); Manning v. Harvey C. Hines Co., 218 N.C. 779, 10 S.E.2d 727 (1940); Smith v. Coca-Cola Bottling Co., 213 N.C. 544, 196 S.E. 822 (1938).

mobiles,[73] airplane crashes,[74] and medical malpractice.[75] Although many of these cases are correctly decided on their facts, this categorical approach in rejecting the application of *res ipsa* has introduced an undesirable rigidity that may have caused the court to decide cases by affixing a subject-matter label (for example "foreign substance in food and drink") while ignoring factual distinctions within a particular category that should be determinative.

Reasonable care, or the absence of it, depends upon the total circumstances surrounding an occurrence. No inference of negligence may arise from the presence of a small piece of glass in a barbecued beef sandwich since reasonable inspection may not have disclosed it.[76] However, the presence of a fishhook in a plug of tobacco;[77] a lethal dose of arsenic in a crooked soft drink bottle;[78] or a mouse,[79] a fly covered with fungus,[80] a bug,[81] decomposed animal matter,[82] or the partially decayed body of a spider[83] in a bottle of soft drink is not consistent with reasonable care in production and inspection; and an inference of negligence may reasonably be drawn.[84] Despite the reasonableness of such an approach, the North Carolina decisions flatly reject *res ipsa* in all these instances, and neither the nature nor the size of the substance affects the outcome.[85]

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[73] Warren v. Jeffries, 263 N.C. 531, 139 S.E.2d 718 (1965) (stationary car starting to roll); Yates v. Chappell, 263 N.C. 461, 139 S.E.2d 728 (1965) ("operation of motor vehicles"); Fuller v. Fuller, 253 N.C. 288, 116 S.E.2d 776 (1960), *overruled in* Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968) (car unaccountably left the road); Meegan v. Grubbs, 253 N.C. 63, 116 S.E.2d 151 (1960) (collision with a pedestrian); Williams v. Thomas, 219 N.C. 727, 14 S.E.2d 797 (1941) (skidding).

[74] Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964); Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

[75] Starnes v. Taylor, 272 N.C. 386, 158 S.E.2d 339 (1968); Watson v. Clutts, 262 N.C. 153, 136 S.E.2d 617 (1964); Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955).

[76] Williams v. Elson, 218 N.C. 157, 10 S.E.2d 668 (1940).

[77] *But cf.* Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E.2d 680 (1941); Corum v. R. J. Reynolds Tobacco Co., 205 N.C. 213, 171 S.E. 78 (1933).

[78] *Contra,* Evans v. Charlotte Pepsi-Cola Bottling Co., 216 N.C. 716, 6 S.E.2d 510 (1940).

[79] *Contra,* Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935).

[80] *Contra,* McLeod v. Lexington Coca-Cola Bottling Co., 212 N.C. 671, 194 S.E. 82 (1937).

[81] *Contra,* Elledge v. Pepsi-Cola Bottling Co., 252 N.C. 337, 113 S.E.2d 435 (1960); Blackwell v. Coca-Cola Bottling Co., 208 N.C. 751, 182 S.E. 469 (1935).

[82] *Contra,* Tickle v. Hobgood, 216 N.C. 221, 4 S.E.2d 444 (1939).

[83] *Contra,* Collins v. Lumberton Coca-Cola Bottling Co., 209 N.C. 821, 184 S.E. 834 (1936).

[84] *See* PROSSER § 39, at 221.

[85] Cases cited notes 71-83 *supra.* However, by a showing of two or more

The explosion of a bottle filled with carbonated beverage may result from mishandling by others after it passes beyond the manufacturer's control. If the evidence shows nothing more than the explosion of the bottle, an inference of the manufacturer's negligence may not be justified.[86] However, when the evidence also shows that the bottle was handled carefully by those in possession after it left defendant's control, an inference that the manufacturer's negligence was the probable cause of the bottle's exploding is permissible.[87] A majority of courts accept this view,[88] but the North Carolina decisions reject it.[89]

The same rigid approach has at times been evident in cases involving unexplained automobile accidents and airplane crashes. They have been labeled by the North Carolina court as situations to which *res ipsa* is inapplicable. The airplane-crash cases[90] may be correctly decided on their facts, but the court's categorical denial of the application of *res ipsa* indicates that factual differences, unless they show specific acts of negligence, will not affect the court's position. If this interpretation is correct, North Carolina's view is again the minority one.[91]

For a quarter of a century, despite the existence of early precedent to the contrary,[92] the court's position on unexplained, single-car accidents was just as inflexible.[93] A remarkable recent case overruled this line of cases, reinstated the older precedents, and applied *res ipsa loquitur* to a situation in which defendant's car suddenly and unaccountably left the road and collided with a tree.[94] Cases involving single-car accidents other than those in which the car leaves the road were not overruled, and their present authority is uncertain.[95]

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similar occurrences, a plaintiff may invoke the similar instances rule to establish a prima facie case of negligence. *See* Byrd, *Proof of Negligence in North Carolina —Part II, Similar Occurrences and Violation of Statute*, 48 N.C.L. REV. — (1970).

[86] *E.g.*, Keefer v. Logan Coca-Cola Bottling Co., 141 W. Va. 839, 93 S.E.2d 225 (1956).

[87] *E.g.*, Groves v. Florida Coca-Cola Bottling Co., 40 So. 2d 128 (Fla. 1949).

[88] PROSSER § 39, at 223-24.

[89] Cases cited note 71 *supra*.

[90] Cases cited note 74 *supra*.

[91] PROSSER § 39, at 220-21.

[92] Boone v. Matheny, 224 N.C. 250, 29 S.E.2d 687 (1944); Etheridge v. Etheridge, 222 N.C. 616, 24 S.E.2d 477 (1943).

[93] *E.g.*, Privette v. Clemmons, 265 N.C. 727, 145 S.E.2d 13 (1965); Fuller v. Fuller, 253 N.C. 288, 116 S.E.2d 776 (1960); Ivey v. Rollins, 250 N.C. 89, 108 S.E.2d 63 (1959).

[94] Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968).

[95] *E.g.*, Warren v. Jeffries, 263 N.C. 531, 139 S.E.2d 718 (1965) (stationary car started rolling); Clodfelter v. Wells, 212 N.C. 823, 195 S.E. 11 (1938) (skidding).

In the absence of special circumstances, *res ipsa loquitur* does not apply when two cars collide[96] or a car strikes a pedestrian[97] since, as between the parties, the likelihood of fault is equal. However, if both cars belong to the defendant, his negligence, per se or imputed, may reasonably be inferred.[98] Further, the place and circumstances of the occurrence may permit an inference that defendant's negligence caused it.[99] When a motorist with clear vision, without sounding his horn, strikes a six-year-old child standing in the street, it may be inferred that the driver has failed to keep a proper lookout.[100] The mere fact that a motorist collides with the vehicle ahead of him furnishes some evidence that he was speeding, following too closely, or failing to keep a proper lookout[101] unless some other reason for the rear-end collision appears.[102]

If the duty owed by the defendant is less than reasonable care, proof of the occurrence, even though it permits an inference of defendant's negligence, may not be sufficient to take the case to the jury. If the plaintiff who falls down an open elevator shaft is an invitee, a duty of reasonable care is owed to him, and this proof makes out a case for the jury. However, if the plaintiff is a trespasser, the evidence fails to establish a prima facie breach of defendant's duty not to wilfully or wantonly injure him.[103] If, as in some jurisdictions, a driver is liable to a guest passenger only for gross negligence, proof that the car left the road for unknown reasons does not establish defendant's liability.[104] Additional

[96] Swainey v. Great Atl. & Pac. Tea Co., 202 N.C. 272, 162 S.E. 557 (1932) (truck and bicycle); Burke v. Carolina Coach Co., 198 N.C. 8, 150 S.E. 636 (1929).

[97] Rogers v. Green, 252 N.C. 214, 113 S.E.2d 364 (1960); Meegan v. Grubbs, 253 N.C. 63, 116 S.E.2d 151 (1960); Sowers v. Marley, 235 N.C. 607, 70 S.E.2d 670 (1952). The same is true when a mangled body is found on defendant's railroad tracks: Mercer v. Powell, 218 N.C. 642, 12 S.E.2d 227 (1940); Harrison v. Southern Ry., 204 N.C. 718, 169 S.E. 637 (1933).

[98] *Cf.* Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924) (head-on collision between two of defendant's trains).

[99] Goodson v. Williams, 237 N.C. 291, 74 S.E.2d 762 (1953); Adams v. Beaty Serv. Co., 237 N.C. 136, 74 S.E.2d 332 (1953).

[100] Edwards v. Cross, 233 N.C. 354, 64 S.E.2d 6 (1951).

[101] Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965); Burnett v. Corbett, 264 N.C. 341, 141 S.E.2d 468 (1965); Parker v. Bruce, 258 N.C. 341, 128 S.E.2d 561 (1962).

[102] If plaintiff's evidence discloses how the accident happened, the facts shown may negate any inference of defendant's negligence: Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965); Jones v. C. B. Atkins Co., 259 N.C. 655, 131 S.E.2d 371 (1963).

[103] Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921).

[104] Minkovitz v. Fine, 67 Ga. App. 176, 19 S.E.2d 561 (1942).

facts, however, may permit an inference that the defendant was grossly negligent; and, when they are in evidence, the case should go to the jury despite defendant's limited duty.[105]

The inference in a *res ipsa* case is based upon common experience and, when the matter involved is beyond the competence of the layman, no basis exists for submission of the case to the jury.[106] Although various explanations have been given for the inapplicability of *res ipsa* in medical malpractice suits,[107] this one seems to be the most plausible. Normally, in such actions, both the standard of care and its breach must be established by expert testimony.[108] Proof of specific negligence, however, is not always required, as the testimony of the expert may, without identifying any specific negligence of the doctor, enable the jury to infer that he has somehow been negligent.[109]

Although no inference of the doctor's negligence usually arises upon proof of injury or other adverse consequence from treatment or medication, some results are so far out of the ordinary as to permit the jury, without the aid of experts, to find negligence. The fact that a doctor breaks a large bone of his patient's leg while setting a fracture in the small bone of that leg is so inconsistent with care that expert testimony is not required.[110] In other situations, the judgment of the reasonableness of what the doctor has done is clearly within the competence of the layman and expert evidence is not needed.[111] Such is the case when a surgeon

[105] *Cf.* Drumwright v. Wood, 266 N.C. 198, 146 S.E.2d 1 (1966) (physical facts at scene of accident permitted inference that car was driven in reckless manner).

[106] Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955) (medical malpractice); Hawkins v. McCain, 239 N.C. 160, 79 S.E.2d 493 (1954) (same); Lippard v. Johnson, 215 N.C. 384, 1 S.E.2d 889 (1939) (same).

[107] Some further obstacles to the applications of the doctrine . . . have arisen from two conflicting theories, which we sometimes find advanced in the same case: First, that the practice of medicine and surgery is largely empirical (which means unscientific), therefore the doctrine would have little or no significance; and, second, that these professions are so highly scientific that the doctrine or inference would have no meaning except to men learned in the profession—certainly not to a jury.

Mitchell v. Saunders, 219 N.C. 178, 182, 13 S.E.2d 242, 244-45 (1941).

[108] Cases cited note 106 *supra.*

[109] Siverson v. Weber, 57 Cal. 2d 834, 372 P.2d 97 (1962); Collins v. Virginia Power & Elec. Co., 204 N.C. 320, 168 S.E. 500 (1933); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963). *See also* Jackson v. Mountain Sanitarium & Asheville Agric. School, 234 N.C. 222, 67 S.E.2d 57 (1951) (medical standard established by experts; lay testimony sufficient to show noncompliance).

[110] Covington v. James, 214 N.C. 71, 197 S.E. 701 (1938).

[111] Groce v. Myers, 224 N.C. 165, 29 S.E.2d 553 (1944) (doctor broke patient's arm when he "jerked" it to pull her from under bed).

sews up in his patient a lap pack,[112] a sponge,[113] or jagged pieces of glass from a broken test tube.[114] The North Carolina court has also permitted a finding of the doctor's negligence without expert testimony in cases involving neglect of the patient by the doctor.[115] In some instances, an inference of negligence that would otherwise be permissible is negated by plaintiff's expert testimony.[116]

Inference Must Be of Defendant's Negligence—Exclusive Control

Plaintiff's evidence must permit an inference that his injuries were caused by the *defendant's* negligence. Proof that establishes that the accident was caused by negligence but that fails to show that defendant was responsible is inadequate.[117] The traditional statement of the *res ipsa* rule requires that the instrumentality causing the injury be in the exclusive management and control of the defendant and, in this way, identifies the defendant as the culpable party.[118]

Exclusive control has developed into a separate doctrine that is sometimes strictly applied to require actual and sole possession of the instrumentality by the defendant at the time of the injury.[119] Applied in this

[112] Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

[113] Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941).

[114] Pendergraft v. Royster, 203 N.C. 384, 166 S.E. 285 (1932).

[115] Wilson v. Martin Memorial Hosp., 232 N.C. 362, 61 S.E.2d 102 (1950) (failure to treat lacerations caused by child delivery "from below" and failure to examine patient to discover torn stitches and decomposed tissue before discharging her); Gray v. Weinstein, 227 N.C. 463, 42 S.E.2d 616 (1947) (eleven-hour delay in attending infant who had eaten twelve aspirin tablets); Groce v. Myers, 224 N.C. 165, 29 S.E.2d 553 (1944) (doctor told father of patient with broken arm to "just tie something around it and let it hang down"); Gower v. Davidian, 212 N.C. 172, 193 S.E. 28 (1937) (fracture and dislocated vertebrae; failure to make X-ray or clinical examination before releasing patient without treatment).

[116] Nance v. Hitch, 238 N.C. 1, 76 S.E.2d 461 (1953) (X-ray burns; expert testimony that burns result without negligence negates application of *res ipsa loquitur*); Bryan v. Otis Elevator Co., 2 N.C. App. 593 (1968) (elevator fell; plaintiff's own expert testified that equipment was operating properly at time of accident and immediately thereafter).

[117] Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968); Wilson v. Perkins, 211 N.C. 110, 189 S.E. 179 (1937).

[118] O'Quinn v. Southard, 269 N.C. 385, 152 S.E.2d 538 (1967) (defendant's exclusive control absent); Trull v. Carolina-Virginia Well Co., 264 N.C. 687, 142 S.E.2d 622 (1965) (same); Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960) (same).

[119] *E.g.*, Wilcox v. Glover Motors, Inc., 269 N.C. 473, 482, 153 S.E.2d 76, 83 (1967) ("The doctrine of *res ipsa loquitur* does not apply to a brake failure several hours and many miles after delivery of the car" by the dealer to the prospective purchaser); Smith v. Gulf Oil Corp., 239 N.C. 360, 79 S.E.2d 880 (1954), discussed p. 470 *infra*.

way, it becomes an obstacle to examination of the question whether a reasonable inference of defendant's negligence can be drawn from the facts.[120] While, in a given case, the absence of defendant's exclusive control may preclude the inference that his negligence caused the accident, it does not necessarily do so in all cases.

Plaintiff's possession, operation or other use of the machinery or equipment that injured him does not foreclose the inference that the accident was caused by the defendant's negligence.[121] If the accident is one that could have been caused by negligent operation or use, then the plaintiff must account for its reasonable use by him. In the absence of evidence of proper use, it is no more probable that defendant's negligence caused the accident than that the plaintiff's own conduct was its cause.[122] Once reasonable use has been shown, however, plaintiff's possession of the instrumentality becomes insignificant and no longer prevents a finding of the defendant's negligence.[123] The way in which the accident occurred may indicate that possession and control of the instrumentality that caused it played no material part, and thus the inference of defendant's negligence is not weakened.[124]

Res ipsa loquitur may apply although the instrumentality has passed entirely out of the defendant's control. An explosion of gasoline that had escaped from defendant's premises may be attributed to the defendant's negligence even though the gasoline ran into the street and was accidentally

[120] *E.g.*, Trull v. Carolina-Virginia Well Co., 264 N.C. 687, 142 S.E.2d 622 (1965), discussed p. 469 *infra*; Jackson v. Neill McKay Gin Co., 255 N.C. 194, 120 S.E.2d 540 (1961); Weaver v. Wayne Hardwood Co., 171 N.C. 766, 88 S.E. 425 (1916).

[121] Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968); Bryant v. Burns-Hammond Constr. Co., 197 N.C. 639, 150 S.E. 122 (1929); Kiger v. Liipfert Scales Co., 162 N.C. 133, 78 S.E. 76 (1913).

[122] Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960) (front-end loader tilted forward; no showing whether operated on incline or level area).

[123] Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968); Stewart v. Carpet Co., 138 N.C. 60, 50 S.E. 562 (1905).

[124] Schueler v. Good Friend North Carolina Corp., 231 N.C. 416, 57 S.E.2d 324 (1950) (row of chairs tilted over when plaintiff sat down in one of them); Eaker v. International Shoe Co., 199 N.C. 379, 154 S.E. 667 (1930) (machine started operating by itself); Ross v. Cotton Mills, 140 N.C. 115, 52 S.E. 121 (1905) (machine resumed operation after being disconnected from motive power). *But see* Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967) (car brakes failed a few hours after plaintiff took possession from defendant; no exclusive control); Harward v. General Motors Corp., 235 N.C. 88, 68 S.E.2d 855 (1952) (steering mechanism of new car locked; no exclusive control, decision rendered seemingly without regard to duration of plaintiff's possession).

ignited by a match dropped by a stranger or in some other way.[125] However, passage of time after the instrumentality leaves defendant's control may weaken or destroy the inference of defendant's negligence.[126] When the steering mechanism on a new car locks two days after it is purchased, defendant-manufacturer's negligence may be inferred.[127] However, normal wear and tear, improper care, or mishandling may account for an occurrence twelve months after purchase, and it is no longer probable that defendant's negligence caused it.[128] Lapse of time is important only because other possible causes of the accident arise; thus, if the defect that caused the injury was present when the defendant had control of the instrumentality, a reasonable inference of his negligence may be permissible despite his subsequent lack of control.[129]

If the instrumentality, in reaching the plaintiff, passes through intermediaries, proof of careful handling by them must be presented.[130] Only a reasonable account of the third party's possession is required, and the evidence need not detail every moment of his possession.[131] The proof should tend to eliminate, or make remote, possible causes of the accident other than defendant's negligence.[132] Testimony that the instrumentality was handled with care while in the third party's possession may be all that is required. However, a failure to account in any way for the

[125] Newton v. Texas Co., 180 N.C. 561, 105 S.E. 433 (1920).

[126] Wilson v. Perkins, 211 N.C. 110, 189 S.E. 179 (1937) (dress delivered to dry cleaners in good condition, brown spots discovered one week after its return and after it had been worn to a party; no inference of defendant's negligence permissible).

[127] Alexander v. Nash-Kelvinator Corp., 261 F.2d 187 (2d Cir. 1958). *But see* Harward v. General Motors Corp., 235 N.C. 88, 68 S.E.2d 855 (1952) (no exclusive control; decision rendered seemingly without regard to duration of plaintiff's possession).

[128] Harward v. General Motors Corp., 235 N.C. 88, 68 S.E.2d 855 (1952).

[129] *E.g.*, Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). *But see* Smith v. Gulf Oil Corp., 239 N.C. 360, 79 S.E.2d 880 (1954), discussed p. 470 *infra*.

[130] Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968) (*res ipsa* inapplicable because of failure to account for intermediary's careful handling of machine).

[131] PROSSER § 39, at 223-24.

[132] Intermeddling by others, though the opportunity exists, may be so unlikely in many instances as to require no proof of its absence. Lindsey v. Atlantic Coast Line R.R., 173 N.C. 390, 92 S.E. 166 (1917) (when bolt on floor of train of type used to fasten rails and frequently carried by railroad employees, unlikely that third person placed it there); Marcom v. Raleigh & A.A.L.R.R., 126 N.C. 200, 35 S.E. 423 (1900) (malicious conduct of others unlikely cause of defect in railroad track). The same concept would seem to be applicable when a mouse is found in a soft drink, but, of course, the North Carolina Court rejects *res ipsa* in this type of case. See p. 462 *supra*.

instrumentality between the time it passes from defendant's control and the time of the injury may be fatal to the plaintiff's case[133] even though the other person's possession is brief or is unlikely, in the normal course of things, to have supplied an intervening cause.[134] The improbability of other causes is sometimes overlooked because defendant's exclusive control is deemed essential to the application of *res ipsa* rather than being regarded as merely an aid in determining whether defendant's negligence was the more likely cause.

The North Carolina Supreme Court has overworked the absence of defendant's exclusive control as a reason for denying the application of *res ipsa.* The court has substituted a literal application of the exclusive-control doctrine for analysis and, in so doing, may have bypassed legal questions vital to a proper resolution of the case or has, in some instances, assumed a role that is more appropriately left to the jury. To reject the inference that defendant's negligence caused damages in the amount of twenty-thousand dollars to plaintiff's house—when the operation of defendant's well-drilling machine caused the earth to tremble, the house to vibrate, and its walls and ceilings to crack—because the earth and house were not in defendant's exclusive control[135] ignores the basic question of the extent of defendant's duty. Structural weakness in the house or the condition of the earth may have caused the damage, and, if the defendant owed no duty, or only a limited one, to investigate the possibility of such defects before undertaking the drilling operation, the inference that the damage was probably caused by defendant's negligence may no longer be reasonable. If, on the other hand, defendant was required to make reasonable inspection of the premises, the possibility that such extensive damage could have been caused by undiscovered defects seems slight, and the inference of the defendant's negligence becomes the more likely one.

Another case that is at least questionable on similar grounds is *Hopkins v. Comer.*[136] In it, *res ipsa* was held inapplicable to the explosion of defendant's gasoline tanker because of the presence of small boys playing with cap pistols in the yard where it was parked. The ages of the boys

[133] Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968).

[134] Bryan v. Otis Elevator Co., 2 N.C. App. 593, 163 S.E.2d 534 (1968) (fall of elevator defendant had contracted to maintain; no exclusive control because contract provided that owner was to have possession and management). *See also* Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968).

[135] Trull v. Carolina-Virginia Well Co., 264 N.C. 687, 142 S.E.2d 622 (1965).

[136] 240 N.C. 143, 81 S.E.2d 368 (1954).

were three, seven and thirteen. If it can be assumed, as defendant's evidence tended to show, that the boys climbed on the tanker, lifted a lid that permitted gasoline vapors to escape, and inadvertently ignited them by firing a cap, do these facts absolve the defendant of liability? Since, as in the classic "turntable" case,[137] a twenty-five-cent lock would have prevented the disaster, a basis for holding the defendant liable may still exist. On the other hand, if the gasoline vapor was ignited by the firing of a cap pistol somewhere else in the yard, the extreme danger is obvious and submission of the case to the jury is clearly warranted.

In *Smith v. Gulf Oil Corp.*,[138] the plaintiff attempted to recover for loss of gasoline that had leaked from pipes connecting gasoline pumps and an underground storage tank. All of the equipment had been installed by the defendant, but the plaintiff by contract had assumed the obligation to repair and maintain it. Immediately after installation, plaintiff discovered that the pumps had to be operated five or six minutes before they would pump gasoline. Shortly thereafter, plaintiff discovered that the amount of gasoline he sold was less than the amount he bought from the defendant. Two years later, after repeated complaints by the plaintiff and efforts by the defendant to repair the pumps, the underground pipes were dug up and found to have leaks in them. After the pipes were repaired, the pumps operated properly. The court denied plaintiff's claim. Its opinion, stripped of factual recitations, consists of the pronouncement that "[t]he doctrine [of *res ipsa loquitur*] does not apply when the instrumentality causing the injury is not under the exclusive control or management of the defendant."[139]

The inference that defendant's negligent installation of the equipment caused the leakage seems sufficiently great to have warranted submission of the case to the jury. By focusing its attention on the absence of defendant's exclusive control at the time of the leakage, the court completely ignored this possibility and failed to give to plaintiff's evidence the probative force that it deserved. Some courts have avoided this mistake by restating the exclusive control rule to require defendant's control of the instrumentality at the time of the negligence that eventually caused the injury.[140] Whether such a restatement is helpful is debatable since a common-sense analysis of the facts will achieve the same end.

[137] Sioux City & P.R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873).
[138] 239 N.C. 360, 79 S.E.2d 880 (1954).
[139] *Id.* at 367, 79 S.E.2d at 884.
[140] *E.g.*, Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

When All the Facts Are Known

When enough facts are known to disclose the specific cause of an accident, nothing is left to inference and *res ipsa loquitur* does not apply.[141] This principle, which is followed in all jurisdictions, simply recognizes that when a specific cause of the occurrence is established by known facts, common sense precludes any inference that defendant's negligence caused it in some other way. Application of the principle, however, is not without difficulty. Inherent in it is the notion that the plaintiff is bound by his own uncontradicted evidence, and out of this notion has grown the problem of the extent to which introduction of evidence of specific acts of negligence will preclude plaintiff's reliance upon *res ipsa loquitur*.

When plaintiff's evidence presents a reasonably complete and satisfactory account of the event, resort to *res ipsa loquitur* should not be allowed even though the occurrence, without such explanation, would permit an inference that it was caused by defendant's negligence.[142] Thus, proof that defendant's advertising sign fell onto the public sidewalk may permit an inference of defendant's negligence; but, if plaintiff's evidence also shows that the sign fell because it was struck by a car driven by an unknown person, nothing is left to infer.[143] Any inference of negligence that may arise from the derailment of defendant's train is destroyed when plaintiff's evidence shows that the derailment was caused by collision of the train with a bull that suddenly came onto the tracks.[144] Upon proof of defendant's delivery of excessive electrical current into household outlets, it may be inferred that the defendant has in some way been negligent;[145] however, the inference disappears when plaintiff's evidence further shows that the excessive electrical current was caused by a stranger felling a tree across defendant's wires.[146]

Plaintiff's evidence need not completely exonerate the defendant to justify rejection of *res ipsa*. If the proof satisfactorily establishes the cause of the injury, it necessarily excludes other possible causes and eliminates any inference that they brought about the occurrence. When the

[141] Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924); Baldwin v. Smitherman, 171 N.C. 772, 88 S.E. 854 (1916).

[142] Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965) (rear-end collision; plaintiff's evidence showed that defendant's car, after coming to a complete stop, was propelled into his car by impact of car that ran into defendant); Jones v. C. B. Atkins Co., 259 N.C. 655, 131 S.E.2d 371 (1963) (same).

[143] Johnson v. Meyer's Co., 246 N.C. 310, 98 S.E.2d 315 (1957).

[144] Enloe v. Southern Ry., 179 N.C. 83, 101 S.E. 556 (1919).

[145] Cases cited note 56 *supra*.

[146] Lea v. Carolina Power & Light Co., 246 N.C. 287, 98 S.E.2d 9 (1957).

facts establish that defendant's car began to swerve after a tire had blown out, without defendant's fault, and in the excitement defendant put his foot on the accelerator rather than the brake, the only question for the jury is whether defendant's misstep was, under the circumstances, negligent.[147] The accident was caused because the defendant mistakenly depressed the accelerator. If this act was negligent, he is liable; otherwise, he is not. Similarly, no inference that defendant's negligence caused an explosion is permissible if the facts establish that the explosion occurred when gasoline, which defendant knew had leaked from a welding machine, mixed with chemicals that were to be welded.[148] Under these circumstances, defendant's liability depends upon whether he should have realized the danger created; if it is found that he had no reason to know that the gasoline-chemical mixture would explode, he should not be liable.

Direct evidence of negligence may make fruitless plaintiff's efforts to rely on *res ipsa* to bolster his case because the facts it established by such evidence leave little or nothing to be inferred. If plaintiff's undisputed evidence shows that he was injured when he came into contact with defendant's uninsulated electrical wires[149] or that he fell down defendant's unlighted stairway,[150] and that the defendant had knowledge of the defective condition for a long period of time prior to the accident, the application of *res ipsa* seems both unwarranted and unnecessary. These facts clearly show the cause of the accident and defendant's responsibility for it.

While in some of the above cases plaintiff may have proved himself out of court, or at least hastened his departure, it should not be concluded that proof of anything beyond the bare occurrence will always be fatal when the success of plaintiff's action depends upon *res ipsa loquitur*. The reasons for those decisions should be clearly understood. In some of them, any inference of the defendant's negligence was so totally inconsistent with the facts shown by the plaintiff as to be unacceptable. In others, the plaintiff's evidence had identified the acts of the defendant that caused the injuries and the question for determination was whether those acts constituted negligence. Inference had no legitimate role in making that determination. Finally, in all of these cases a reasonably

[147] Ingle v. Cassady, 208 N.C. 497, 181 S.E. 562 (1935).
[148] Orr v. Rumbough, 172 N.C. 754, 90 S.E. 911 (1916).
[149] Benton v. North Carolina Pub.-Serv. Corp., 165 N.C. 354, 81 S.E. 448 (1914).
[150] Payne v. Carolina Power & Light Co., 205 N.C. 32, 169 S.E. 831 (1933).

full account of what had happened was given and nothing was left to be inferred.

There are instances when evidence that indicates specific acts of negligence or that identifies a particular cause of an accident does not preclude reasonable inferences about the event to which they relate. The application of *res ipsa loquitur* to a single-car accident should not be denied because the plaintiff has introduced evidence that the defendant was speeding at the time of the accident.[151] The evidence of speed strengthens rather than weakens the inference that the cause of the accident was the defendant's negligence. While the probability that the mishap was caused by speed is greater because of this evidence, the jury's consideration of the case should not be limited to the evidence of speed. The jury should be instructed that the defendant is liable if it finds that the accident was caused by defendant's speed or by any negligence of the defendant, and that the happening itself permits an inference that the defendant was negligent in some way.

Plaintiff's evidence that tends to limit the possible causes of the accident may facilitate rather than bar the application of *res ipsa.* By eliminating weather, road, and traffic conditions as possible causes of defendant's car leaving the road, plaintiff's evidence makes more probable that the cause was the driver's negligence.[152] If defendant's health and the mechanical condition of the car are accounted for, the probability of defendant's negligence becomes even greater.[153]

To show that the derailment of a train was caused by a defective roadbed increases the likelihood that the derailment occurred because of the defendant's negligence.[154] The defective roadbed may be due to factors over which defendant had no control, such as intermeddling by a stranger, but the inference that it resulted from defendant's negligence is

[151] Brown v. Kinston Mfg. Co., 175 N.C. 201, 203, 95 S.E. 168, 169 (1918):

> [*Res ipsa loquitur*] must not be supposed to require that plaintiff . . . must rely altogether upon this prima facie showing by him of negligence, for he may resort to other proof for the purpose of particularizing the negligent act and informing the jury as to the special cause of his injury. This has frequently been done, and the right to make such proof cannot now be questioned.

See Drumwright v. Wood, 266 N.C. 198, 146 S.E.2d 1 (1966) (inference of a variety of negligent acts permitted from circumstances; court had not yet adopted *res ipsa* in single-car accidents); Yates v. Chappell, 263 N.C. 461, 139 S.E.2d 728 (1965) (same).

[152] Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968).

[153] *Id.* (by implication).

[154] Marcom v. Raleigh & A.A.L.R.R., 126 N.C. 200, 35 S.E. 423 (1900).

the more probable one. Of course, if in the last example plaintiff's proof had shown that a flood had washed out the roadbed, no basis for reasonable inference of negligence would remain. Defendant's fault would then depend upon whether the time that had elapsed since the flood established that defendant knew or should have known of the defect. These examples illustrate the distinctions that were suggested earlier. In the modified example all the essential facts are truly known, whereas in the original one the ultimate cause of the accident remains uncertain.

The North Carolina Supreme Court in its decisions has basically adhered to the distinctions discussed above. On occasion, the court has stated in a decision based primarily on other grounds that *res ipsa loquitur* was inapplicable because all the "facts were known" when this principle was not properly invoked.[155] However, in cases in which it was the basis for the decision, the court has applied the principle correctly. The only caution to be noted is that the court has frequently listed "when all the facts are known" as one of the situations to which *res ipsa* does not apply.[156] For other situations that have made the court's list, there has been some tendency to categorize the principle into a rigid rule to be applied without inquiry into the facts. Unfortunate decisions could result from this approach when known facts establish a particular cause, such as faulty brakes or leaking pipes, but fail to disclose the reason for the existence of such defects. The vital fact of what caused the defect remains unknown, and a reasonable inference that defendant's negligence was its cause may still be permissible.

The relationship between *res ipsa loquitur* and specific negligence has proved troublesome at the pleading as well as the proof stage of trial. Some jurisdictions hold that *res ipsa* is unavailable if specific negligence is pleaded;[157] others restrict its use to proof of the specific negligence

[155] Payne v. Carolina Power & Light Co., 205 N.C. 32, 169 S.E. 831 (1933) (recovery denied to plaintiff for injuries from fall down stairway known by plaintiff to be unlighted; cause of light failure unknown but alleged to be negligence of supplier of electricity); Byrd v. Marion Gen. Hosp., 202 N.C. 337, 162 S.E. 738 (1932) (cause of serious burns in "sweat cabinet" treatment unknown; since doctor prescribed and supervised treatment, nurse is not liable); Baldwin v. Smitherman, 171 N.C. 772, 88 S.E. 854 (1916) (collision between a mule and a car).

[156] Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929), seems to be the major source relied on for this as well as other North Carolina "rules for not applying *res ipsa loquitur*."

[157] *E.g.*, Lund v. Mangelson, 183 Neb. 99, 158 N.W.2d 223 (1968). *See* PROSSER, § 39, at 236-37.

alleged.[158] If the facts alleged in the complaint justify the application of *res ipsa*,[159] no reason exists to restrict or or preclude reliance on it, and some jurisdictions so hold.[160] Earlier discussion indicates that proof of specific negligence does not always destroy other inferences about what happened, and, when other inferences are permissible, plaintiff should not be prevented from going forward with his proof or denied full consideration of it by the jury.

Surprisingly, no North Carolina cases have dealt with the problem.[161] The apparent practice in North Carolina has been to allege specific and general negligence, and the court has upheld submission of the case to the jury under *res ipsa* instructions that did not restrict the jury's consideration of the case to the specific negligence alleged.[162] Further, the North Carolina decisions leave the impression that *res ipsa* may be relied upon without any allegation of general negligence or specific pleading of the *res ipsa* doctrine.[163] This position is sound. When the complaint alleges facts that justify the application of *res ipsa*, defendant can hardly claim to be surprised or misled when plaintiff seeks to rely on it to take his case to the jury even though numerous allegations of specific negligence are also made. Hopefully, if these questions are expressly presented to the court for decision, it will adhere to the views that it seems to have adopted in the above decisions.

When More Than One Inference Arises from the Facts

When the nature of the occurrence and the inferences to be drawn from it establish a reasonable probability that the defendant has been negli-

[158] *E.g.*, Vogreg v. Shepard Ambulance Co., 47 Wash. 2d 659, 289 P.2d 350 (1955).

[159] *But see* Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960) (allegation that front-end loader improperly balanced was a "mere conclusion").

[160] Oberlin v. Friedman, 5 Ohio St. 2d 1, 213 N.E.2d 168 (1965). *See generally* Annot., 2 A.L.R.3d 1335 (1965).

[161] In McNeil v. Durham & C.R.R., 130 N.C. 256, 41 S.E. 383 (1902), involving a train derailment, the court held that plaintiff's allegations of specific neligence became immaterial upon defendant's admission of the derailment because such admission "put the burden of proof on the defendant to show that the derailment . . . was not caused by defendant's negligence." *Id.* at 258, 41 S.E. at 384. This reasoning substantially limits the authority of the case.

[162] White v. Hines, 182 N.C. 275, 109 S.E. 31 (1921); Kilpatrick v. Kinston Mfg. Co., 175 N.C. 201, 95 S.E. 168 (1918); Dunn v. John L. Roper Lumber Co., 172 N.C. 129, 90 S.E. 18 (1916); Stewart v. Carpet Co., 138 N.C. 60, 50 S.E. 562 (1905); Womble v. Grocery Co., 135 N.C. 474, 47 S.E. 493 (1904).

[163] *Id.*

gent, the case should be submitted to the jury even though the possibility of unavoidable accident may also arise from the evidence.[164] Proof in a case need not preclude every inference other than that of the defendant's negligence before the doctrine of *res ipsa* can apply. If the inference that defendant's negligence caused the accident is more likely than other permissible inferences, the doctrine should apply.[165] That several possible inferences as to the cause of an occurrence may be drawn from the evidence does not necessarily leave the matter too much in the realm of conjecture, as the normal course of human experience may indicate that one is a more likely inference than the others.

Yet, when inferences other than that of defendant's negligence may be drawn, an almost instinctive reaction of the North Carolina court, without any inquiry into the more probable cause of the accident, seems to be that the cause of the accident is conjectural.[166] This response may in part stem from a rule enunciated in an early case that *res ipsa* is inapplicable "when more than one inference can be drawn from the evidence as to the cause of the injury."[167]

The court's reluctance to apply *res ipsa loquitur* when several inferences may be drawn has been so persistent that an examination of some of the cases seems warranted.[168] In many of these cases, the decisions may be sound for other reasons, and the "no other inference" reasoning may be little more than an empty recital. In other cases, however, the decisions seem wrong or questionable.

In *Lane v. Dorney*,[169] a car driven by the defendant's intestate left the road, and passengers riding in it were injured. On the initial appeal of the case, nonsuit of the plaintiff by the trial court was affirmed on the ground that *res ipsa* did not apply. On rehearing, the court held that the evidence was sufficient to go to the jury but reaffirmed its position on *res ipsa*.[170] The plaintiff's success on rehearing resulted from his convincing the court that his evidence had eliminated all possible causes

[164] Boone v. Matheny, 224 N.C. 250, 29 S.E.2d 687 (1944); Etheridge v. Etheridge, 222 N.C. 616, 24 S.E.2d 477 (1943).

[165] Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968); Collins v. Virginia Power & Elec. Co., 204 N.C. 320, 168 S.E. 500 (1933).

[166] Crisp v. Medlin, 264 N.C. 314, 141 S.E.2d 609 (1965); Monk v. Flanagan, 263 N.C. 797, 140 S.E.2d 414 (1965); Warren v. Jeffries, 263 N.C. 531, 139 S.E.2d 718 (1965).

[167] Springs v. Doll, 197 N.C. 240, 242, 148 S.E. 251, 253 (1929).

[168] Cases cited notes 166 *supra* through 174 *infra*.

[169] 250 N.C. 15, 108 S.E.2d 55 (1959).

[170] Lane v. Dorney, 252 N.C. 90, 113 S.E.2d 33 (1960).

of the accident other than the defendant's negligence.[171] Although the court found that there was no evidence from which an affirmative inference of the defendant's negligence could be drawn, it held that the evidence, by excluding all other possible causes, identified the defendant's negligence as the likely cause of the accident.[172] Even this persuasive posture of the case left three dissenting justices unconvinced that the cause had been removed from the realm of conjecture.[173]

In similar cases that involved unexplained, single-car accidents, the failure of plaintiff's evidence to eliminate all other possible causes than defendant's negligence has been fatal. The court has, without analysis, disposed of such cases in very brief per curiam opinions.[174] Although it has overruled this line of cases and now applies *res ipsa* to the unexplained, single-car accident,[175] the court's difficulty with the multi-inference fact situation has been pervasive, and whether that difficulty has been overcome remains to be seen.[176]

Another line of decisions that reflects this difficulty is illustrated by *Warren v. Jeffries*.[177] The plaintiff was injured when the defendant's car rolled from a stationary position down an incline on which it was parked. In a per curiam opinion the court held that *res ipsa loquitur* did not apply. The court made no attempt to evaluate the various factors that might have caused the accident. Yet, since the plaintiff's evidence negated any tampering with the car after it was parked by the defendant, it is difficult to find more than two plausible inferences as to the cause of the car rolling down the incline. One possible cause was mechanical defect. As there was no evidence that the defendant had knowledge of any such defect and since plaintiff should probably be considered a

[171] "[The] evidence, though somewhat negative, nevertheless tends to remove everything . . . except the hands of the man at the wheel." *Id.* at 94, 113 S.E.2d at 36.

[172] Later cases have followed this reasoning when plaintiff's evidence negated the mechanical condition of the car, the condition of the road, possible interference from within the car, traffic, and other external factors as possible causes of the accident. Peoples Bank & Trust Co. v. Snowden, 267 N.C. 749, 148 S.E.2d 833 (1966); Randall v. Rogers, 262 N.C. 544, 138 S.E.2d 248 (1964).

[173] Lane v. Dorney, 252 N.C. 90, 95, 113 S.E.2d 33, 37 (1960) (Denny, J., dissenting): "[T]he evidence leads only into the field of conjecture, speculation and surmise as to how and why the accident occurred."

[174] Privette v. Clemmons, 265 N.C. 727, 145 S.E.2d 13 (1965); Fuller v. Fuller, 253 N.C. 288, 116 S.E.2d 776 (1960). *See also* Ivey v. Rollins, 250 N.C. 89, 108 S.E.2d 63 (1959).

[175] Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968).

[176] See pp. 477-78 *infra*.

[177] 263 N.C. 531, 139 S.E.2d 718 (1965).

licensee, the defendant would have no responsibility to him for the condition of the car. The other possible cause was the negligence of the defendant in failing to take proper precautions in parking. Of the two, the negligence of the defendant would seem to have been by far the more probable. The possibility of the brakes or gears, or both, being defective, unknown to the defendant, or failing at the same time seems slight.

Drumwright v. Wood[178] illustrates a third line of decisions that deserves examination. The plaintiff was injured when the defendant's car left the road on a curve. Physical facts at the scene of the accident supported a finding that the defendant negligently drove too fast and, since the accident was of a type likely to be caused by excessive speed, the court held that the defendant's motion for nonsuit had been properly overruled. Although under these circumstances the more probable inference is that the defendant's negligence caused the accident, the court still thought it necessary to negate other factors as possible causes of the accident: "[*T*]*here is no evidence* that he [defendant] was not well and in the full possession of his mental and physical faculties. . . . *There is no evidence* of any other traffic on the road at the time. *There is no evidence* of any mechanical failure of the station wagon."[179]

Evidence that indicates causes of an accident other than defendant's negligence or that tends to eliminate such other causes is properly considered in determining if the case should be submitted to the jury. Perhaps even the absence of evidence may be relevant if the facts about which evidence is lacking are so basic to the happening that proof of the occurrence would likely have revealed them if they had been present. However, neither of the above principles seems applicable to the facts in *Drumwright*, and the apparent purpose of the court's roll call of missing evidence was to eliminate everything other than the defendant's negligence as a cause of the accident.[180]

A recent and truly laudable decision,[181] in light of the above background, holds promise that the North Carolina Supreme Court may in

[178] 266 N.C. 198, 146 S.E.2d 1 (1966).

[179] *Id.* at 204, 146 S.E.2d at 5-6 (emphasis added). For a discussion of the effect of plaintiff's failure to introduce evidence apparently obtainable by him, see p. 456 *supra*.

[180] In Crisp v. Medlin, 264 N.C. 314, 141 S.E.2d 609 (1965), from the absence of evidence about other possible causes of the accident, the court concocted visions of the defendant's car being sideswiped or forced off the road by an unidentified vehicle to support the conclusion that the cause of the accident was left in the realm of conjecture.

[181] Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968).

the future more realistically evaluate the various factors that might have caused an accident in determining if a reasonable inference of its probable cause can be made. The importance of the case hopefully extends beyond its specific holding that *res ipsa loquitur* applies to the unexplained, single-car accident since Justice Sharp's opinion seems to reject completely the attitudes that have been discussed above.

> It is generally accepted that an automobile which has been traveling on the highway, following "the tread of the road," does not suddenly leave it if the driver uses proper care. Such an occurrence is an unusual event when the one in control is keeping a proper lookout and is driving at a speed which is reasonable under existing highway and weather conditions. An automobile being operated with due care and circumspection "in the absence of some explainable cause, will remain upright and on the traveled portion of the highway." . . . The inference of driver-negligence from such a departure is not based upon mere speculation or conjecture; it is based upon collective experience, which has shown it to be the "more reasonable probability." Highway defects or the negligence of another could cause a car to leave the road. The presence of either of these causes, however, would ordinarily be apparent. Mechanical defects in the vehicle or driver-illness could cause an automobile to leave the road, but these possible causes occur comparatively infrequently and their probability can ordinarily be negated. . . .
>
> When a motor vehicle leaves the highway for no apparent cause, it is not for the court to imagine possible explanations.[182]

This eminently sound reasoning raises serious questions about the continuing authority of other cases that were not considered by the court.[183] Its failure to consider them is not necessarily a cause for concern that the significance of the case will be restricted to the fact situation involved. However, until other cases arise, doubt will exist whether this latest

[182] *Id.* at 26, 161 S.E.2d at 526-27.

[183] Crisp v. Medlin, 264 N.C. 314, 319, 141 S.E.2d 609, 612 (1965) ("In our opinion, and we so hold, the mere fact that it can be reasonably inferred from the evidence that the Chevrolet automobile was traveling at a very rapid speed when it wrecked is not sufficient to permit a jury to find that such speed caused its wreck."); Warren v. Jeffries, 263 N.C. 531, 139 S.E.2d 718 (1965) (stationary car started to roll); Williams v. Thomas, 219 N.C. 727, 14 S.E.2d 797 (1941) (defendant's car for unexplained reasons skidded across center line of highway into oncoming car; *res ipsa loquitur* inapplicable to skidding but evidence "showed more than skidding"); Clodfelter v. Wells, 212 N.C. 823, 195 S.E. 11 (1938) (defendant's car "zig-zagging first to the right and then to the left" and "seemed to be skidding;" *res ipsa loquitur* inapplicable to skidding).

expression of basic philosophy will prevail over well-entrenched earlier attitudes.[184]

Procedural Effect of Res Ipsa Loquitur

Some confusion and inconsistency existed in early North Carolina cases concerning the procedural effect of *res ipsa loquitur*. Part of the confusion resulted from the supreme court's indiscriminate use of "prima facie evidence," "prima facie case," and "presumption of negligence" to describe the effect of *res ipsa*.[185] Much of the inconsistency in these early cases may be characterized as "railroad law" since in cases involving fires caused by sparks emitted from railroad engines, the court often held that the plaintiff's proof of such an occurrence shifted to the railroad the burden of showing that it had not been negligent. [186] In other cases the court left the burden of proof on the plaintiff and held that proof of the occurrence created a permissible inference of negligence sufficient to take the case to the jury.[187] The railroad cases have been overruled[188] and, consequently, most of the confusion and inconsistency has disappeared.

Res ipsa loquitur does not eliminate the necessity for proof of defendant's negligence, but only provides a way in which it may be undertaken. The doctrine neither imposes a different standard for determining liability nor modifies concepts of duty inherent in traditional standards.[189] Use of the doctrine may, however, eliminate the need for proof of specific negligent acts or omissions of the defendant. Proof establishing a *res ipsa* fact situation is sufficient to take the case to the jury.[190]

[184] The North Carolina Court of Appeals has logically extended *Greene* by holding *res ipsa* applicable when defendant's car crossed the center line of the road and collided with a parked car. Allen v. Schiller, 6 N.C. App. 392, 169 S.E.2d 924 (1969).

[185] Bryan v. Burns-Hammond Constr. Co., 197 N.C. 639, 643, 150 S.E. 122, 124 (1929); White v. Hines, 182 N.C. 275, 289, 109 S.E. 31, 38 (1921).

[186] Perry v. Branning Mfg. Co., 176 N.C. 68, 97 S.E. 162 (1918); Aycock v. Raleigh & A.A.L.R.R., 89 N.C. 321 (1883); Ellis v. Portsmouth & R.R.R., 24 N.C. 138 (1841). *Contra*, Cox v. Aberdeen & A.R.R., 149 N.C. 117, 62 S.E. 884 (1908).

[187] Morrisett v. Elizabeth City Cotton Mills, 151 N.C. 31, 65 S.E. 514 (1909); Lyles v. Brannon Carbonating Co., 140 N.C. 25, 52 S.E. 233 (1905); Stewart v. Carpet Co., 138 N.C. 60, 50 S.E. 562 (1905).

[188] Fleming v. Atlantic Coast Line R.R., 236 N.C. 568, 73 S.E.2d 544 (1952); Page v. Camp Mfg. Co., 180 N.C. 330, 104 S.E. 667 (1920).

[189] Cases cited notes 40 and 41 *supra*.

[190] Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954); Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924); White v. Hines, 182 N.C. 275, 109 S.E. 31 (1921).

Such proof creates a permissible inference of negligence that the jury is free to accept or reject,[191] and an instruction that leaves the impression that the jury may find for plaintiff upon such proof without finding defendant was negligent is erroneous.[192] The plaintiff is entitled to recover only if he convinces the jury by a preponderance of the evidence that his injuries were caused by defendant's negligence.[193]

Res ipsa loquitur neither shifts the burden of proof[194] to defendant nor requires him to come forward with evidence to explain what happened.[195] Defendant may or may not introduce evidence. By failing to do so he admits nothing, but merely assumes the risk of an adverse verdict.[196] If defendant does introduce evidence, it does not displace the inference permitted from the plaintiff's proof so as to preclude submission of the case to the jury.[197] Evidence that defendant exercised reasonable care or that identifies possible causes of the accident other than defendant's negligence is submitted to the jury along with plaintiff's proof.[198] The jury determines, under all the evidence, whether any inference of defendant's negligence is to be drawn, what weight it is to be given, what weight any proof inconsistent with the inference is to be given, and, finally, whether plaintiff has established by a preponderance of the evidence that he was injured by the negligence of the defendant.

[191] Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921); Ridge v. Norfolk & S.R.R., 167 N.C. 510, 83 S.E. 762 (1914).

[192] Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954); Kiger v. Liipfert Scales Co., 162 N.C. 133, 78 S.E. 76 (1913).

[193] *Id.*

[194] Etheridge v. Etheridge, 222 N.C. 616, 24 S.E.2d 477 (1943); Modlin v. Simmons, 183 N.C. 63, 110 S.E. 661 (1922); Overcash v. Charlotte Elec. Ry. Light & Power Co., 144 N.C. 572, 57 S.E. 377 (1907).

[195] Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924); Harris v. Mangum, 183 N.C. 235, 111 S.E. 177 (1922).

[196] Etheridge v. Etheridge, 222 N.C. 616, 24 S.E.2d 477 (1943); White v. Hines, 182 N.C. 275, 109 S.E. 31 (1921).

[197] Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941); Turner v. Southern Power Co., 154 N.C. 131, 69 S.E. 767 (1910).

[198] *Id.*