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Res Ipsa Loquitur in Texas: The Element of Superior Knowledge.

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COMMENTS

RES IPSA LOQUITUR IN TEXAS: THE ELEMENT OF SUPERIOR KNOWLEDGE

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Is *res ipsa loquitur* a concession to the needs of procedural law, a proton in the nucleus of negligence law or an etching in the bark of evidence law? The doctrine infers negligence from the physical cause of an accident and eliminates the necessity of pinpointing the responsible human cause.[1]

Historically, the doctrine has been invoked in those instances where "the thing speaks for itself." However, the *rule* does not speak for itself. In Texas, *res ipsa loquitur* means that the facts of an occurrence warrant an inference of negligence,[2] that they furnish circumstantial evidence in the absence of direct negligence[3] and that the facts call for an explanation or rebuttal.[4] When these elements coexist, a case is made for the jury to decide whether the doctrine may be invoked.[5]

Procedural Effects as a Result of Invoking the Doctrine

To understand a legal definition it is often helpful to think of the definition in terms of cause and effect. Each definition embraces an effect, and often a preliminary understanding of the effect will lead to a comprehension of the entire definition.

Depending upon the jurisdiction in which it is invoked, *res ipsa loquitur* will result in one of the following:

1. *Legal Presumption*—A legal presumption of negligence will arise and the court will direct a verdict in favor of the plaintiff. The legal

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1 Howard v. Texas Co., 169 S.E. 832 (S.C. 1933).

2 Hensley v. Fort Worth & Denver Ry. Co., 408 S.W.2d 761 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.); *cert. denied,* 389 U.S. 823, 88 S. Ct. 51; Simpson v. Dallas Ry. & Terminal Co., 143 S.W.2d 416 (Tex. Civ. App.—Dallas 1940, writ dism'd jdgmt cor.); Alagood v. Coca Cola Bottling Co., 135 S.W.2d 1056 (Tex. Civ. App.—Fort Worth 1940, writ dism'd jdgmt cor.).

3 Rogers v. Coca Cola Bottling Co., 156 S.W.2d 325 (Tex. Civ. App.—Dallas 1941, writ ref'd w.o.m.); Benkendorfer v. Garrett, 143 S.W.2d 1020 (Tex. Civ. App.—San Antonio 1940, writ dism'd jdgmt cor.).

4 Wichita Falls Traction Co. v. Elliott, 125 Tex. 248, 81 S.W.2d 659 (1935); Penrod Drilling Co. v. Silvertooth, 144 S.W.2d 335 (Tex. Civ. App.—Galveston 1940, writ dism'd jdgmt cor.); Alagood v. Coca Cola Bottling Co., 135 S.W.2d 1056 (Tex. Civ. App.—Fort Worth 1940, writ dism'd jdgmt cor.).

5 Alagood v. Coca Cola Bottling Co., 135 S.W.2d 1056 (Tex. Civ. App.—Fort Worth 1940, writ dism'd jdgmt cor.).

presumption effect is followed in California,[6] Colorado,[7] and Kentucky.[8]

2. *Permissible Inference*—The majority view is that, except under extraordinary circumstances, the doctrine does not ordinarily warrant a directed verdict for the plaintiff. The plaintiff presents circumstantial evidence, and because of a lack of direct evidence, the doctrine is invoked. Then it is for the *jury* to decide whether negligence should be inferred from the mere fact that an accident occurred that ordinarily does not occur in the absence of negligence.[9]

The distinction between a *legal presumption* and a *permissible inference* is that in a *legal presumption* the trial court directs a verdict for the plaintiff when the defendant does not present the evidence necessary to rebut the presumption. When the doctrine results in a *permissible inference,* the *jury* decides whether there is an inference of negligence.

The United States Supreme Court, in *Sweeney v. Erving,*[10] applied the doctrine of *res ipsa loquitur* in an action under the Federal Employers' Liability Act and implied that it would prefer the *permissible inference* approach when it stated:

> [*R*]*es ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the *jury* is whether the preponderence is with the plaintiff.[11]

The Texas courts have adopted the doctrine as promulgated by the Supreme Court of the United States in the *Sweeney* case. Texas courts have cited the *Sweeney* case as authority for holding that the effect of invoking the doctrine is to permit the jury to draw a reasonable inference of negligence.[12] "It appears to be established law in this juris-

6 Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 339 (Cal. 1961).

7 Weiss v. Axler, 328 P.2d 88, 89 (Colo. 1958).

8 Knop v. Atcher, 308 S.W.2d 287 (Ky Ct. of App. 1958). *See* WIGMORE ON EVIDENCE, § 2490, at 287 (3d ed. 1940). Carpenter, *Doctrine of Res Ipsa Loquitur,* 1 U. CHI. L. REV. 519, 525 (1934).

9 *See* WIGMORE ON EVIDENCE, § 2491, at 288 (3d ed. 1940); Carpenter, *Doctrine of Res Ipsa Loquitur,* 1 U. CHI. L. REV. 519 (1934); Prosser, *The Procedural Effect of Res Ipsa Loquitur,* 20 MINN. L. REV. 241, 243 (1936).

10 228 U.S. 233, 33 S. Ct. 416, 57 L. Ed. 815 (1913).

11 *Id.* at 240, 33 S. Ct. 416, 418, 57 L. Ed. 815, 819 (1913) (emphasis added.)

12 Gulf, C.&S.F. Ry. Co. v. Dunman, 27 S.W.2d 116, 118 (Tex. Comm'n App. 1930).

diction that in those cases wherein the doctrine of res ipsa loquitur is applicable, because of the proof the plaintiffs offer, it will sustain a finding by the trier of the facts, but does not compel such a finding."[13] Thus, when the doctrine is applied, there is an inference that the defendant was negligent, and the defendant must rebut that inference. When the plaintiff establishes a prima facie case of negligence by applying *res ipsa loquitur,* it is incumbent upon the defendant to introduce evidence to explain, to rebut or to otherwise overcome the presumption or inference that the alleged injury was due to his negligence.[14]

The defendant may choose whether to introduce evidence. He is not compelled to introduce evidence, but by failing to do so, he risks nonpersuasion. Thus, the defendant is left with the option of carrying forward with the evidence or letting the jury decide the issue on the exclusive evidence presented by the plaintiff.

Elements Essential to Invoking the Doctrine

Although the rule of *res ipsa loquitur* is invoked where the "thing speaks for itself,"[15] the courts require varied facts and circumstances before the plantiff may shift the burden of carrying the evidence forward to the defendant. The jurisdictions conflict with each other, and often conflict within themselves when determining the requirements necessary for the plaintiff to utilize this evidentiary assist.

The law surrounding the doctrine is tainted with ambiguities and inconsistencies. South Carolina does not recognize *res ipsa loquitur,* but circumstantial evidence may be used by the plaintiff.[16] Michigan does not recognize the rule, but the court will apply its principles. Although the Michigan courts do not apply the doctrine, they qualify this non-recognition by stating:

What's in a name?

J. Sharp in this decision held that, "We have no better definition of the rule of res ipsa loquitur than that given in the opinion of *Sweeney v. Erving,*" in which Justice Pitney rendered the opinion of the United States Supreme Court; Hensley v. Fort Worth and Denver Ry. Co., 408 S.W.2d 761, 764 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.); *cert. denied,* 88 S. Ct. 51; Alagood v. Coca Cola Bottling Co., 135 S.W.2d 1056, 1061 (Tex. Civ. App.—Fort Worth 1940, writ dism'd jdgmt cor.). *See also* 72 A.L.R. 90 (1931); Houston E. & W.T. Ry. Co. v. Roach, 114 S.W. 418, 422 (Tex. Civ. App.—1908). The court indicates that the inference is to evolve from the jury when stating that the result of invoking the doctrine is "not that negligence is presumed, but that the circumstances amount to evidence from which it may be inferred by the jury."

13 Bitner v. Hines, 293 S.W.2d 540, 541 (Tex. Civ. App.—Galveston 1956, no writ) (emphasis added.)

14 Carothers v. Olshan, 198 S.W.2d 941, 943 (Tex. Civ. App.—Galveston 1947, writ ref'd n.r.e.).

15 Keystone Fleming Transp. v. City of Tahoka, 277 S.W.2d 202 (Tex. Civ. App.—Amarillo 1954, writ dism'd).

16 Boyd v. Marion Coca Cola Bottling Company, 126 S.E.2d 178 (S.C. 1962); Shepherd v. United States Fidelity & Guaranty Company, 106 S.E.2d 381 (S.C. 1958).

That which we call a rose
By any other name would smell as sweet.
(Shakespeare, *Romeo and Juliet,* Act 2 Scene 2).[17]

It seems that in the Michigan courts the plaintiff seeking to invoke the doctrine is more dependent upon judicial discretion than on legal precedent.

Although the other jurisdictions recognize the doctrine, they disagree in providing the legal foundation upon which it rests. Some states require that the following elements coexist before the doctrine may be invoked:[18]

(1) the nature of the occurrence leads to the inference that the accident does not happen in the absence of negligence;

(2) the instrumentality or agent must have been in the control of the defendant;

(3) the plaintiff must not have contributed in causing the accident.

However, other jurisdictions require that *in addition* to these elements, the plaintiff must show that he had no knowledge of how the accident occurred or that the defendant had superior knowledge of the nature of the instrumentality or agency causing the accident.[19] These jurisdictions hold that the doctrine is one of evidence, which was originally based on the theory that "he who has charge of the thing that causes the injury either knows the cause of the accident or has the best opportunity for ascertaining it."[20]

The fact that jurisdictions may differ in setting forth elements which provide a guide in ascertaining whether to invoke the doctrine is a minor problem when compared to the problem that arises when courts within the same state require a different set of elements. It is not surprising that some of the most noted authorities on the subject are in discord.

The purpose of this comment is to illustrate that the element of

17 Daniel v. McNamara, 159 N.W.2d 339, 343 (Mich. Civ. App. 1968). *See* Prosser, *The Procedural Effect of Res Ipsa Loquitur,* 20 MINN. L. REV. 241, 253 (1936). "Both Michigan and South Carolina reject the entire doctrine of res ipsa loquitur in express terms, and say it is not to be given effect, but proceed nevertheless to apply the principle under different names when the situation calls for it."

18 Thompson v. Burke Engineering Sales Co., 106 N.W.2d 351 (Iowa 1960); Kitchen v. Smith, 334 P.2d 413, 414 (Kan. 1959); Shields v. United Gas Pipe Line, 110 So. 2d 881 (La. Civ. App. 1959); Vattilana v. George & Lynch, Inc., 154 A.2d 565 (Del. 1959); Siebrand v. Gossnell, 234 F.2d 81 (9th Cir. 1956).

19 O'Donnel v. Maves, 436 P.2d 577 (Ariz. 1968); Szafranski v. Radetzky, 141 N.W.2d 902, 908 (Wis. 1966); Snow v. Cannelton Sewer Pipe Co., 210 N.E.2d 118, 120 (Ind. Civ. App. 1965). The court held that an inference of negligence may be drawn if certain facts are shown to disclose that defendant had exclusive control over agency which produces accident and *plaintiff has no access to information about its control and operation.* Lachey v. Price, 378 P.2d 1925 (Kan. 1963); The court stated that one of the elements essential to invoking the doctrine is that *the facts be peculiarly within the knowledge of the defendant.* Citrola v. Eastern Airlines, Inc., 264 F.2d 815, 818 (2d Cir. 1959).

20 Edwards v. Des Moines Transit Co., 99 N.W.2d 920 (Iowa 1959).

superior knowledge on the part of the defendant should be established as an independent consideration by the courts in promulgating consistent guidelines to aid in ascertaining those instances in which the doctrine should be applied. Treating the element of superior knowledge as an independent element will compound the utility of the doctrine.

THE CLASH OF AUTHORITIES

Prosser states that the superior knowledge by the defendant "cannot be regarded as an indispensable requirement and there are few cases in which it can be said to have had any real importance."[21] This is in striking contrast to Wigmore's contention that:

> The particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstances that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.[22]

Classifying *res ipsa loquitur* as a rule of evidence or a rule of negligence law and adopting the theories of the respective leading authorities will not lead to an answer.

The cases differ in direct proportion to the discord among the authorities. The Texas cases indicate that there is a schism-stained aura of reconciliation where parties have attempted to lean upon the convenience afforded by the doctrine. There are cases in Texas that hold that the superior knowledge approach is to be used in determining whether the plantiff can shift the burden of going forward with the evidence to the defendant.[23] Other Texas decisions hold that the fact

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21 PROSSER, LAW OF TORTS § 39, at 230 (3d ed. 1964).

22 WIGMORE ON EVIDENCE, § 2509, at 382-384 (3d ed. 1940). *See also* 65a C.J.S., *Negligence,* § 220.8 stating that "The rule is nevertheless one of necessity to be invoked when and *only when* under the circumstances involved *direct evidence is absent* and not readily available. Hence, it has generally been held that the presumption, or inference, arising from the doctrine cannot be availed of, or is overcome, where plaintiff has knowledge and testifies or presents evidence as to the specific act of negligence which is the cause of the injury complained of, or where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant on the occurrences clearly appear." (emphasis added.) *See also* 59 A.L.R. 461 (1929).

23 Smith v. Caplan, 425 S.W.2d 477, 479 (Tex. Civ. App.—Amarillo 1968, no writ); Sloter v. Smith Motor Sales, Inc., 417 S.W.2d 766 (Tex. Civ. App.—San Antonio 1967, no writ); Henry v. American Airlines, Inc., 413 S.W.2d 123, 127 (Tex. Civ. App.—Eastland 1967, no writ); Bond v. Otis Elevator Company, 388 S.W.2d 681, 686 (Tex. Sup. 1965). It seems that in the *Bond* case the Texas Supreme Court tacitly considered the element of superior knowledge when it provided that: "If the doctrine of res ipsa loquitur applies it is not necessary to plead and prove specific acts of negligence in order for the case to go to the jury on the question of negligence generally." Estrada v. Central Power and Light Company, 336 S.W.2d 768 (Tex. Civ. App.—San Antonio 1960, writ ref'd); Weingarten v. Gauthier, 305 S.W.2d 181, 187 (Tex. Civ. App.—Beaumont 1957, no writ); Southland Industries, Inc. v. O. R. Mitchell Motors, 244 S.W.2d 528 (Tex. Civ. App.—San Antonio 1951, writ ref'd n.r.e.). Chief Justice Murray stated that, where the plaintiffs offered in evidence an explanation of how a fire was started, the doctrine would not apply. Where the plaintiff

that the defendant is in a better position to explain the occurrence is not an *independent element* which must be established.[24] In *Estrada v. Central Power and Light Company*,[25] the San Antonio Court of Civil Appeals held that:

> In order to invoke the doctrine of res ipsa loquitur there are *four* elements which must be pleaded and proved: (1) the thing or instrumentality which causes the injury must be under the management of the defendant or his servants; (2) the accident must be such as in ordinary events does not happen if those who have its management and control use proper care; (3) there must be an *absence* or *unavailability* of direct evidence of negligence; (4) there must exist a sufficient duty on the part of the defendant to use due care.[26]

It is important to note that the court in the above decision listed these four independent elements as prerequisites to invoking *res ipsa loquitur*. This is in contrast to the subsequent decision of *Smith v. Koenning*[27] in which the Corpus Christi Court of Civil Appeals held that the element of superior knowledge is embodied in the two following requirements: (1) the injury would not have occurred in the absence of negligence and (2) the defendant had exclusive control of the instrumentality at the time of the accident. When these two elements are present, the matter of superior knowledge may follow. However, this is not an independent element which must be established in order to impose the doctrine.[28] Although the *Smith* case cites the Texas Supreme

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has *knowledge* of how an occurrence evolved then under such circumstances the doctrine does not apply. International Creosoting & Construction Co. v. Daniel, 114 S.W.2d 393, 396 (Tex. Civ. App.—El Paso 1938, writ dism'd). The court held that where "Plaintiff alleged the acts of defendant assigned as negligence in general terms, and alleged that he could not give a detailed statement or set them forth more fully, we have concluded that res ipsa loquitur applies. . . ."

24 Smith v. Koenning, 398 S.W.2d 411, 420 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.). Justice Sharpe speaking for the court held that "[T]here is no rigid requirement that evidence to explain the occurrence must be more readily accessible to the defendant than to the plaintiff."

25 336 S.W.2d 768 (Tex. Civ. App.—San Antonio 1960, writ ref'd).

26 *Id.* (emphasis added.)

27 398 S.W.2d 411 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

28 *Id.* at 421. The court here cited the Texas Supreme Court cases of Bond v. Otis Elevator Co., 388 S.W.2d 681, 684, 686 (Tex. Sup. 1965) and Honea v. Coca Cola Bottling Company, 143 Tex. 272, 183 S.W.2d 968 (1944). However, the *Bond* case and the *Honea* case did not answer the question of whether superior knowledge is an essential element to invoking the doctrine. These are landmark cases which have held that when requiring the instrumentality to be in the management or control of the defendant the courts will interpret this to mean control at the time of the negligence as distinguished from control or management at the time of the occurrence. Thus, these cases clarified the element of management and control and did not affirmatively negate the need for taking cognizance of the superior knowledge element. In *Honea* the plaintiff had been injured by an exploding soda bottle. The court held that although the bottle was not in the management and control of the defendant at the time of the explosion the plaintiff would be permitted to invoke the doctrine when he showed that he was using the bottle with proper care and it had not been changed after it left defendant's possession.

Court case of *Bond v. Otis Elevator Company*[29] as authority for requiring only two elements, it is clear from reading the *Bond* case that this was not what the Texas Supreme Court intended when it rendered the decision. In *Bond*, the court stated:

> It appears from the contract between Adolphus and Otis with reference to the maintenance of the elevators that the mechanism controlling the movement of the elevators is quite complicated and from the very nature of things the facts which would reveal how this "free fall" happened were peculiarly within the knowledge of respondents. If there is any explanation of this unusual occurrence of the elevator going into a "free fall", then the respondents are in a far better position to come forward with it than is the petitioner.[30]

It is evident from this statement that there is a need for an independent consideration of the element of superior knowledge when ascertaining whether the doctrine may be invoked. Although the *Smith v. Koenning* case[31] cited the *Bond* case[32] as authority for requiring only two elements in testing whether to invoke the doctrine, it is clear that the *Estrada*[33] case is in closer compliance with the Texas Supreme Court's holding although it did not cite the supreme court's decision as authority. It is significant to note that the case of *Sloter v. Smith Motor Sales*,[34] decided by the San Antonio Court of Civil Appeals in 1967, lists the four elements promulgated in the *Estrada*[35] case which includes the independent element of superior knowledge.[36] The case then cites the *Bond* decision by the supreme court as authority. The result of the comparison is that in *Smith v. Koenning*[37] the court excluded the element of superior knowledge and in *Sloter v. Smith Motor Sales*[38] the court expressly considered the element of superior knowledge. Despite the apparent disparity between the Corpus Christi Court of Civil Appeals[39] and the San Antonio Court of Civil Appeals,[40] both

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29 388 S.W.2d 681 (Tex. Sup. 1965).
30 *Id.* at 684.
31 398 S.W.2d 411 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).
32 Bond v. Otis Elevator Company, 388 S.W.2d 681 (Tex. Sup. 1965).
33 Estrada v. Central Power and Light Company, 336 S.W.2d 768 (Tex. Civ. App.—San Antonio 1960, writ ref'd).
34 417 S.W.2d 766 (Tex. Civ. App.—San Antonio 1967, no writ).
35 Estrada v. Central Power and Light Company, 336 S.W.2d 768 (Tex. Civ. App.—San Antonio 1960, writ ref'd).
36 Sloter v. Smith Motor Sales, Inc., 417 S.W.2d 766, 768 (Tex. Civ. App.—San Antonio 1967, no writ).
37 398 S.W.2d 411 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).
38 417 S.W.2d 766 (Tex. Civ. App.—San Antonio 1967, no writ).
39 Smith v. Koenning, 398 S.W.2d 411 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).
40 Sloter v. Smith Motor Sales, Inc., 417 S.W.2d 766 (Tex. Civ. App.—San Antonio 1967, no writ).

courts cite the Texas Supreme Court decision in *Bond v. Otis Elevator Company*[41] as authority. This paradox indicates the Texas Supreme Court has never really decided the issue.

An excellent treatment of the topic *res ipsa loquitur* by Starling Thomas Morris appeared in the Texas Law Review in 1948.[42] In his article, Morris contended that superior knowledge should not be an independent consideration.[43] He stated that in those instances where the superior knowledge was treated as an independent element:

> It is extremely doubtful that the doctrine could have been applied in any event, since one or more of the first three elements was probably missing, thus failing to raise any acceptable inference of defendant's negligence.[44]

This is a weak argument if we interpret the subsequent supreme court decision of *Bond v. Otis Elevator Company*[45] as holding that the defendant must have more knowledge of the occurrence than the plaintiff did because in *Bond* the court applied the doctrine. In addition, subsequent cases decided by the San Antonio Court of Civil Appeals have stressed that the test is to ascertain whether the facts of the occurrence are within the peculiar knowledge of the defendant.[46]

The Need for a Uniform Test in Deciding Whether to Apply the Doctrine

It is fallacious to reason that in applying the law different tests will be used when the law is applied and when it is not applied, especially where the function of the test is to mold continuity out of otherwise inconsistent decisions. It would be a weak argument if one of the courts held that the test to be applied in cases of negligence differed from the test where there was no negligence. The test for application of any legal doctrine begs for similarity. Similarity of application will result in court decisions marked by continuity and consistency. The test established by the San Antonio Court of Civil Appeals in the *Estrada*[47] case will bring the rule closest to its intended purpose. Before the courts decide whether the plaintiff may invoke the doctrine, they should decide whether: (1) the thing or instrumentality which caused the acci-

41 388 S.W.2d 681 (Tex. Sup. 1965).
42 Morris, *Res Ipsa Loquitur in Texas*, 26 Texas L. Rev. 257 (1948).
43 *Id.* at 271.
44 *Id.*
45 388 S.W.2d 681 (Tex. Sup. 1965).
46 Sloter v. Smith Motor Sales, Inc., 417 S.W.2d 766 (Tex. Civ. App.—San Antonio 1967, no writ); Estrada v. Central Power and Light Company, 336 S.W.2d 768 (Tex. Civ. App.—San Antonio 1960, writ ref'd).
47 Estrada v. Central Power and Light Company, 336 S.W.2d 768 (Tex. Civ. App.—San Antonio 1960, writ ref'd).

dent was under the management or control of the defendants or his servants; (2) the accident was such as ordinarily would not have occurred if those who managed and controlled the instrumentality had used proper care; (3) *there was an absence or unavailability of direct evidence of negligence;* (4) there must have been sufficient duty on the part of the defendant to use due care.[48] Application of the test adopted by the court in *Estrada*[49] will allow the doctrine a rendezvous with its intended purpose. In 1969, a decision by the Texas Supreme Court by Chief Justice Calvert touched on establishing the element of superior knowledge when it stated, "Res ipsa loquitur is a rule of evidence which permits a jury to infer negligence, without proof of specific negligent conduct on the part of the defendant. . . ."[50] It seems that the phrase, "without proof of specific negligent conduct on the part of the defendant," indicates that the doctrine is to be applied where the plaintiff has little or no knowledge of how the accident occurred because peculiar facts may be more readily available to the defendant.

Tracing the history of those cases in which the doctrine has been applied, considering the nature of the instrumentalities involved in the occurrences where the doctrine has been subsequently applied, and observing how the doctrine has been applied in other jurisdictions lend strong support to the contention that the element of superior knowledge should be a prerequisite in deciding whether to invoke the doctrine.

Evolution of the Doctrine

In *Byrne v. Boadle,* one of the first English cases in which the doctrine was applied, the plaintiff had been walking on a public street and was knocked unconscious by a barrel of flour that had rolled out of the window of the building owned by the defendant. The plaintiff testified that he suddenly lost all recollection, that he felt no blow and that he saw nothing to warn him of danger. Pollock, C.B., speaking for the court, stated that although the plaintiff offered no direct evidence, *res ipsa loquitur* (the thing speaks for itself). The facts of the occurrence provided reasonable evidence of negligence.[51] Two years later in *Scott v. London and St. Katherine Docks Co.,* another English case, the same rule was applied where the plaintiff sustained injuries

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48 *Id.*

49 *Id.*

50 Pittsburg Coca-Cola Bottling Works of Pittsburg v. Ponder, 443 S.W.2d 546, 547 (Tex. Sup. 1969).

51 Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863).

when six bags of sugar fell from a crane. The court required that the defendant present evidence to rebut the presumption of negligence.[52]

The two English cases from which the doctrine has evolved indicate that the plaintiff could not specifically allege how the accident occurred and that therefore, since the defendant had superior knowledge of how the accident occurred, it was only proper that the defendant be required to present the evidence. One of the earliest cases in the United States to adopt the rule suggested in *Byrne* and *Scott* was *Mullen v. St. John.*[53] This case was decided in New York in 1874. The plaintiff was injured by a collapsing building and the court held that this established a prima facie case of negligence. The *Mullen* case cited the *Byrne v. Boadle* and the *Scott* case as authority for the proposition that the plaintiff did not have to allege *specific* negligence. It can be seen that the purpose of applying the rule in the *Mullen* case was much the same as the reason for applying it in the early English cases. It seemed only reasonable that the defendant had more of an opportunity to explain why his building collapsed than the plaintiff had.

It is also evident from reviewing the first Texas case in which the doctrine was applied that the element of superior knowledge was a motivating force in adopting the rule of law. In *Texas and St. Louis Railway Co. v. Suggs,*[54] the court held that when a plaintiff was injured by the derailment of a passenger car owned by the defendant railway,

> The fact that the car within a short distance was twice derailed showed a prima facie case of negligence on the part of the carrier in permitting the car to be used for passengers and in case such evidence was not in the opinion of the jury rebutted a verdict for damages in favor of a person injured should thereby stand.[55]

In this case, it could only have been the unavailability of specific evidence owing to the mechanical nature of the train that prompted the court to require the defendant to be burdened with explaining away the occurrence. This is also noticed in the early Texas case, *McCray v. Galveston, H. & S. A. Ry. Co.,*[56] in which the action was for the death of a brakeman who was killed by a steel rail that fell from the railway car on which it was loaded. The court held that the rule would not be applied in those instances where the plaintiff had illustrated that he was capable of showing how the accident actually occurred.[57] The court stated that when the facts do not lend themselves to a specific

52 Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865).
53 57 N.Y. 567 (N.Y. Comm. App. 1874).
54 Texas and St. Louis Railway Co. v. Suggs, 62 Tex. 323 (1884).
55 *Id.*
56 89 Tex. 168, 34 S.W. 95 (1896).
57 *Id.*

pleading of negligence, the fact of the occurrence and the surrounding *circumstances* may themselves furnish all the proof of negligence that the injured person is able to offer.[58] Since the court held that when the plaintiff can explain the occurrence, the doctrine should not be invoked, is it not equally true that where the nature of the occurrence is not explainable, the rule should be applied? It was only from this latter corollary that the former was born. In *Gulf, C. & S. F. Railway Co. v. Wood,*[59] the plaintiff had been injured by a piece of coal that flew off the tender of a passing train. In discussing whether the doctrine would be applied, the court held:

> There are instances in which the circumstances surrounding an occurrence and giving a character to it are held, *if unexplained,* to indicate the antecedent or coincident existence of negligence as the efficient cause of the injury complained of. These are the instances where the doctrine *res ipsa loquitur* is applied.[60]

Is not the requirement that the defendant explain that he was not negligent based on the premise that he has superior knowledge of the nature of the occurrence? Does this not indicate that one of the major considerations in which the court engaged, in deciding whether the doctrine would apply to a specific case, was to what extent the plaintiff was ignorant of how the occurrence evolved? Is it not this preponderance of ignorance on the part of the plaintiff that gave rise to the rule? Does it not shock the spirit of the rule in those cases where the courts do not give this ramification independent consideration?

Agencies and Instrumentalities Where the Doctrine Has Been Applied

Examining the agencies or instrumentalities where the doctrine has been repeatedly considered adds further support to the contention that the element of superior knowledge is tacitly considered by the courts. These situations illustrate the need for an *express* consideration of whether the defendant has or should have superior knowledge of the agency or instrumentality that is responsible for the occurrence. Examining the types of instrumentalities and agencies involved when the doctrine has been invoked traditionally, will indicate that the purpose of invoking the doctrine is to evoke from the defendant all the facts and circumstances surrounding the occurrence.

In *Witchita Falls and Traction Co. v. Elliott,*[61] the plaintiff was

58 *Id.*
59 63 S.W. 164 (Tex. Civ. App., 1901, no writ).
60 *Id.*
61 125 Tex. 248, 81 S.W.2d 659 (1935).

a passenger on the street car of the defendant and a trolley wire broke, snapped through the window and caused an injury to the plaintiff by electric shock. In his petition the plaintiff alleged that the wire was old and worn out "or defective in some manner unknown to plaintiff."[62] The commission of appeals, in an opinion adopted by the supreme court, held that the pleadings were sufficient to invoke the doctrine. In permitting application of the doctrine the commission stated that:

> An essential allegation necessary to warrant its application in a case in which defectiveness in equipment is alleged is that the management and control of the equipment which produced the injury shall be with the defendant exclusively. The theory is that plaintiff is not in a position to show the particular circumstances which caused the equipment to operate to his injury, and that *defendant possesses superior knowledge* or means of information as to the cause of the defect if any; and should therefore be required to produce the evidence in explanation.[63]

In *Simpson v. Dallas Ry. & Terminal Co.*,[64] the plaintiff was injured by a closing door while alighting from a street car. In applying the doctrine the court held that there was evidence that the controls of the door were out of order and "that the closing of the door under the circumstances, unexplained, would warrant the inference of negligence."[65]

In *Coastal Coaches Inc. v. Ball*,[66] the plaintiff recovered for injuries sustained as a result of inhaling exhaust fumes while he was a passenger on the bus operated by the defendant. The court allowed *res ipsa loquitur* to be applied although there were specific acts of negligence pleaded in the alternative. In invoking the doctrine the court alluded to the fact that the plaintiff, "did not know much about cars."[67]

In the cases discussed above, it is apparent that there was more knowledge available to the defendant to enable him to explain the occurrence than there was available to the plaintiff. The technical nature of trolley wires, the mechanical nature of bus doors, and the displaced carbon monoxide fumes warranted an inference of negligence. The doctrine is invoked in response to the complex character of the instrumentality involved and not in response to the relationship of the parties. This is apparent by reviewing the case of *Sims v. Dallas Ry. and Terminal Co.*[68] in which the plaintiff, a passenger as in the

62 *Id.* at 661 (emphasis added.)
63 *Id.* at 667 (emphasis added.)
64 143 S.W.2d 416 (Tex. Civ. App.—Dallas 1940, writ dism'd jdgmt cor.).
65 *Id.* at 418.
66 234 S.W.2d 474 (Tex. Civ. App.—Beaumont 1950, writ ref'd n.r.e.).
67 *Id.* at 477. It is also significant to note that the court held that specific acts of negligence pleaded in the alternative will not prevent application of the doctrine.
68 135 S.W.2d 142 (Tex. Civ. App.—Dallas 1939, no writ).

cases above, was thrown from the seat of a bus when the bus came to a sudden stop. The court held that when specific acts of negligence are solely relied on, the plaintiff cannot invoke the doctrine. Thus, the doctrine is not invoked as a result of the carrier-passenger relationship, but rather in response to an unavailability of knowledge. When the plaintiff alleges only specific negligence, indicating an availability of knowledge, the doctrine may not be invoked,[69] even if there is a carrier-passenger relationship.

The doctrine has been applied when plaintiffs have been injured by exploding soda bottles,[70] falling elevators,[71] faulty escalators,[72] and electricity.[73] In these situations the nature of the occurrence is more readily available to the defendant than to the injured person.

SOME JURISDICTIONS EXPRESSLY CONSIDER THE ELEMENT OF SUPERIOR KNOWLEDGE

The most effective application of the rule occurs in those jurisdictions where the element of superior knowledge is *expressly* considered. Uniformity in decisions and continuity in applications prevails in these jurisdictions. It is important to note that in these jurisdictions the paramount consideration is whether the plaintiff is able to produce the evidence necessary to prove negligence. These jurisdictions have recognized the need to adopt the element of superior knowledge in deciding whether to permit the plaintiff to recover for a negligent occurrence in the absence of alleging specific negligence.

In *Frost v. Des Moines Still College of Osteopathy and Surgery*, an Iowa case, the plaintiff sought recovery for injuries sustained while anesthetized in a hospital operated by the defendant while undergoing surgery by the codefendant.[74] The Iowa Supreme Court justified appli-

69 *Id.*

70 Pitttsburg Coca-Cola Bottling Works of Pittsburg v. Ponder, 443 S.W.2d 546 (Tex. Sup. 1969); Honea v. Coca Cola Bottling Company, 143 Tex. 272, 183 S.W.2d 968 (1944).

71 Bond v. Otis Elevator Company, 388 S.W.2d 681 (Tex. Sup. 1966).

72 Mattox v. Anthony Company, 326 S.W.2d 740 (Tex. Civ. App.—Beaumont 1959, writ ref'd n.r.e.).

73 Simmons v. Terrel Electric Light Co., 12 S.W.2d 1011, 1013 (Texas Comm'n of Appeals 1935, holding approved). The petition alleged the wire fell against his eye because it was an old wire or not properly supported or from *some other reason to plaintiff unknown*. The decision indicates that the doctrine was invoked in respect to the partial consideration that the plaintiff had no knowledge of what caused the electric wire to fall into his eye. Texas Utilities Co. v. Dear, 64 S.W.2d 807, 811, 812 (Tex. Civ. App.—Amarillo 1933, writ dism'd). In the *Dear* case the court stated that, "Unless the rule of res ipsa loquitur is applied it is evident in a large number of cases liability for the resulting injury will be escaped. It is within the power of the companies at all times to show whether they have exercised due care in the erection, and subsequent supervision and maintenance of their wires and appliances, *while to prove an actionable lack in these things would be in many cases practically beyond the reach of the person.*" (emphasis added.)

74 Frost v. Des Moines Still College of Osteopathy and Surgery, 79 N.W.2d 306 (Iowa 1956).

cation of the doctrine by stating that the doctrine is applied where the facts of the occurrence are inaccessible to the plaintiff.[75]

The Montana Supreme Court succinctly stated in *Maki v. Murray Hospital*[76] that there is a need for the element of superior knowledge. The plaintiff had jumped from a hospital window while suffering from a disease usually occasioned by mental derangement. The court held that since the plaintiff was delirious at the time of the occurrence he could not come forward with any specific evidence other than the fact that the hospital knew he was delirious and should have observed him more carefully.[77] In explaining the need for invoking the doctrine the court stated:

> While it is necessary in every personal injury case, to prove negligence, courts, generally, recognize the fact that persons are often injured in such manner, or through such instrumentalities, that it would be impossible to prove the facts showing negligence, and yet, by common knowledge and experience, it is clear that such injury would not have been sustained, ordinarily, had the responsible party not been negligent. Under such circumstances the application of the ordinary rules of evidence would work manifest injustice and render the maxim "for every wrong there is a remedy" nugatory by denying one, patently entitled to damages, satisfaction *merely because he is ignorant of facts peculiarly within the knowledge* of the party who should, in all justice, pay them. Consequently, in order that justice may prevail, in such cases the courts, generally, apply the doctrine of res ipsa loquitur. . . .[78]

In a New York case, *Sawyer v. Jewish Chronic Disease Hospital*,[79] an action was brought for the death of an infant that occurred when an anesthetic was being administered. The New York Supreme Court held that the doctrine of *res ipsa loquitur* would be applied because "otherwise it would be impossible for a plaintiff ever to recover in such a case, since the facts are *entirely within the knowledge* of the person attending the patient."[80]

In an Oklahoma case, *St. John's Hospital & School of Nursing v. Chapman*,[81] the patient's leg was fractured in a hospital when she was turned over in bed by a nurse's aid. The Supreme Court of Oklahoma held that the doctrine could be invoked by the plaintiff's guardian

75 *Id.* at 310. The court cited WIGMORE ON EVIDENCE, § 2509 at 382-384 (3d ed. 1940).
76 7 P.2d 228 (Montana 1932).
77 *Id.*
78 *Id.* at 231 (emphasis added.). The court cited WIGMORE ON EVIDENCE, § 2509 at 382-384 (3d ed. 1940); wherein the doctrine of *res ipsa loquitur* is said to be invoked where "direct evidence is absent and not readily available."
79 234 N.Y.S.2d 372 (N.Y. Sup. 1962).
80 *Id.* at 374 (emphasis added.)
81 434 P.2d 160 (Okla. 1967).

because "direct proof of why the accident happened (as distinguished from what caused the accident) is beyond the power of the plaintiff but should be in the power of the defendant."[82] In response to the *Chapman* case, L. Michael Hager in an article in the Oklahoma Law Review stated:

> If the court meant what it said, it has added a fourth prerequisite to res ipsa loquitur in Oklahoma. A plaintiff who wishes to invoke the doctrine in future cases will have to prove:
> (1) that the defendant has exclusive control of the agency, instrumentality or situation;
> (2) that the accident would not have ordinarily occurred without negligence;
> (3) that the plaintiff did not contribute to his injury and
> (4) that the material facts surrounding the injury are *solely* accessible to the defendant.[83]

It is my opinion that the *Chapman* case did not add a prerequisite; it merely converted what had been the unexpressed spirit of the rule into an express consideration as an aid in deciding whether the rule would be applied to a certain set of facts and circumstances.

THE INCONSISTENCY IN TEXAS DECISIONS IS DUE TO NON-RECOGNITION OF SUPERIOR KNOWLEDGE ELEMENT

A plaintiff in Texas is denied the evidentiary assistance that *res ipsa loquitur* will afford him if he can pinpoint the negligent act that caused the accident.[84] The converse of this rule should have equal force. When the plaintiff has no knowledge of how the accident occurred and when there is a foundation for an *inference* of negligence, the plaintiff should be permitted to invoke the doctrine. However, this does not hold true when the Texas courts apply the doctrine.

The remedy of *res ipsa loquitur* is not applied to all situations with the clarity which would indicate that it is supported by sound legal theory. This may be best illustrated by the Texas decisions which have held that the doctrine of *res ipsa loquitur* cannot be invoked in medical malpractice cases,[85] despite the anomalous fact that expert medical

[82] *Id.* at 166-167. The court states that, "Res ipsa loquitur is a rule of justice. It is a rule of necessity, in that it proceeds upon the theory that . . . there was no negligence on his part, and direct proof of the defendant's negligence is beyond the power of the plaintiff."

[83] Hager, *Res Ipsa Loquitur in Oklahoma: The Impact of Chapman,* 21 OKLAHOMA L. REV. 280, 304 (1968) (emphasis added.)

[84] Robertson v. Southwestern Bell Tel. Co., 403 S.W.2d 459 (Tex. Civ. App.—Tyler 1966, no writ).

[85] Harle v. Krchnak, 422 S.W.2d 810 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.); Goodnight v. Phillips, 418 S.W.2d 862 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); Bell v. Umstadd, 401 S.W.2d 306 (Tex. Civ. App.—Austin 1966, writ dism'd); Shockley v. Payne, 348 S.W.2d 775 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.).

testimony is essential in medical malpractice suits, because the injury is usually not so plain as to be within the common knowledge of the layman.[86] If the knowledge of the physician is superior to that of the layman, so much so as to preclude the layman from testifying, on what sound legal theory can the doctrine be excluded from these cases? The inconsistency of application, as illustrated by denial in malpractice cases of the tool of evidence called *res ipsa loquitur,* indicates the need for *expressly* considering the element of superior knowledge before deciding whether the doctrine should be applied to a particular set of facts and circumstances. What more can necessitate application of the doctrine of *res ipsa loquitur* than malpractice cases "when a case concerns the highly specialized art of treating (disease), with respect to which a layman can have no knowledge at all. . . ."[87] It is only because some of the courts have persistently refused to recognize the element of superior knowledge that this inconsistency in malpractice cases exists. Certainly a consideration of the element of superior knowledge in deciding whether the doctrine should be applied in malpractice cases would indicate that it would be more appropriately applied here than in many cases where it has been applied.

CONCLUSION

Law should march in the parade of scientific progress. Finding ourselves in a "technostructure" where the building blocks are highly mechanized, intensely specialized, and exremely diversified, our new "scientific" state requires nothing less than a uniform application of the rule of *res ipsa loquitur.* Housed in a framework of mechanical technicalities, a plaintiff often finds himself enveloped in a preponderance of ignorance. A doctrine of preponderating ignorance should be tailored to meet the needs of a "technocratic" society.

In an effort to embrace consistency and uniformity, the courts should apply the following test in *all* negligence cases before deciding whether to apply the doctrine:

(1) Was the agency or instrumentality in the control of the defendant or his agent at the time of the negligent occurrence?
(2) Was the accident or occurrence one which would not evolve if those in management and control of the instrumentality had used proper care?
(3) *Did the defendant or should the defendant have superior knowledge of how the occurrence evolved?*
(4) Did the person injured contribute to his own injury?

[86] Jeffcoat v. Phillips, 417 S.W.2d 903, 907 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.).
[87] Amerine v. Hunter, 335 S.W.2d 643, 647 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.).

When the test of whether to apply the doctrine consists of the four elements described above, and the dormant element of superior knowledge is consequently animated, the rule of *res ipsa loquitur* will ripen in the rays of its intended purpose.