lateral source in the cases dealing with the problem is so small in relation to the total amount of damages that the courts and the bar have not bothered to research or to consider the problem thoroughly. It is submitted that a conscious analysis by the courts of the dominant motives beneath the rules would lead to an increase of both the correlation of the rules with announced principles and the social wisdom of the results.

LEWIS R. MILLS

THE PROCEDURAL EFFECT OF RES IPSA LOQUITUR IN MISSOURI

Though the requirements of a res ipsa case may be readily stated,[1] the application of the doctrine to particular fact situations has resulted in a mass of perplexing and baffling decisions. Much of this confusion, which is further complicated by the impingement at certain critical points of various rules of pleading and evidence, arises from conflicting views concerning the procedural consequences of the application of the doctrine.[2] This note is an effort to analyze the problem in Missouri, and so will be concerned with a detailed consideration of the Missouri cases, and in particular with *Mayback v. Falstaff Brewing Co.*,[3] which has caused much consternation.

The basic factual requirements of a res ipsa case in Missouri are: (1) an injury caused by an occurrence which would not ordinarily happen if those in charge are exercising due care, (2) control and management of the instrumentalities involved in the defendant and (3) defendant's possession of superior knowledge or at least superior access to information concerning the cause of the injury.[4]

The necessity for the first requirement is obvious; the facts

1. For an excellent general discussion of the doctrine of res ipsa loquitur, see PROSSER, TORTS 291 (1941).

2. See the discussion comparing the application of this doctrine in the various states in Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

3. 359 Mo. 446, 222 S.W.2d 87 (1949).

4. *E.g.*, Boulos v. Kansas City Public Service Co., 359 Mo. 763, 223 S.W.2d 446 (1949); Welch v. Thompson, 357 Mo. 703, 210 S.W.2d 79 (1948); Palmer v. Brooks, 350 Mo. 1055, 169 S.W.2d 906 (1943); McCloskey v. Koplar, 329 Mo. 527, 46 S.W.2d 557 (1932); Van Houten v. Kansas City Public Service Co., 233 Mo. App. 423, 122 S.W.2d 868 (1938). For a general discussion *compare* PROSSER, TORTS 291 (1941) *with* IX WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

must create a reasonable inference that the accident would not have occurred absent the negligence of *someone*,[5] or it would be patently unfair as well as opposed to all existing principles controlling the placing of the burdens of producing evidence and of persuasion.

The requirement that the defendant be in control of the accident-causing instrumentalities is designed to ensure that the negligence may properly be attributed to the defendant and not to the plaintiff or some stranger. Although the rule as usually stated is that control relates either to physical control or the right to control[6] at the *time of the alleged negligent act*,[7] the Supreme Court of Missouri, in *Mayback v. Falstaff Brewing Corporation*,[8] making no reference to that test, stated that in a res ipsa case the defendant must have at least the right to control at the *time of the injury*.[9] Since res ipsa has been considered

5. Grindstaff v. J. Goldberg & Sons Structural Steel Co., 328 Mo. 72, 80, 40 S.W.2d 702, 705 (1931). "To make out a case for the application of the doctrine of res ipsa loquitur the facts relied on must be such as to reasonably exclude any other hypothesis than that of negligence claimed. . . . [It] is not necessary that they exclude every possible hypothesis except that of the defendant's negligence." Cruce v. Gulf, Mobile & Ohio R.R., 358 Mo. 589, 216 S.W.2d 78 (1949); Charlton v. Lovelace, 351 Mo. 364, 173 S.W.2d 13 (1943) (*mere occurrence* of an injury is not sufficient to invoke the doctrine); Gibbs v. General Motors Corp., 350 Mo. 431, 166 S.W.2d 575 (1942) (facts must exclude contributory negligence of plaintiff); Estes v. Estes, 127 S.W.2d 78 (Mo. App. 1939) (doctrine not to be applied where it is a surmise or a mere possibility only that the defendant's negligence caused the damage); Hart v. Emery-Bird-Thayer Dry Goods Co., 233 Mo. App. 312, 118 S.W.2d 509 (1938).

6. Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S.W.2d 969 (1936); McCloskey v. Koplar, 329 Mo. 527, 46 S.W.2d 557 (1932); Bobbitt v. Salamander, 240 Mo. App. 902, 221 S.W.2d 971 (1949). In quoting an earlier Missouri case Cruce v. Gulf, Mobile & Ohio R.R., 358 Mo. 589, 593, 216 S.W.2d 78, 80 (1949) states: " 'The rule that the exclusive control and management of the appliance or thing causing the injury must be shown to have been in the defendant does not mean physical control, but refers to the right of such control. . . .' "

7. McCloskey v. Koplar, 329 Mo. 527, 535, 46 S.W.2d 557, 560 (1932). Some cases quoting the *McCloskey* case omit the words, "at the time the negligence was committed," but the clear implication is that such is still the test. Cruce v. Gulf, Mobile & Ohio R.R., 358 Mo. 589, 216 S.W.2d 78 (1949) (doctrine applies if instrumentality causing the injury was, at the time, under exclusive control of defendant); Cantley v. Missouri-Kansas-Texas R.R., 353 Mo. 605, 183 S.W.2d 123 (1944).

8. 359 Mo. 446, 222 S.W.2d 87 (1949).

9. In Mayback v. Falstaff Brewing Corp., 359 Mo. 446, 222 S.W.2d 87 (1949), Clark, J. citing Charlton v. Lovelace, 351 Mo. 364, 173 S.W.2d 13 (1943), and Gibbs v. General Motors, 350 Mo. 431, 166 S.W.2d 575 (1943), emphasizes that Missouri does not recognize the control element as being fulfilled by defendant being in control at the time the negligent act was committed.

applicable where there is a possibility of an intermeddler[10] as well as where an instrumentality other than that of the defendant is involved,[11] the *Mayback* case with its requirement of control at the time of the injury may mean that a different criterion is appropriate in bursting bottle cases than is required in other situations.[12]

Because of the underlying theory that one who is in control of the instrumentality causing the injury will generally have access to facts unknown to the other party,[13] the requirement of defendant's superior knowledge would not need to be independently established. In fact a showing by plaintiff that he is ignorant of the facts and that defendant either does[14] or should know them is not enough to establish a res ipsa case unless the other requirements are also present.

Once it has been determined that the basic requirements for the application of the doctrine are present, there arises the question of what procedural effect the doctrine should have.[15] The earlier Missouri cases are characterized by apparent indecision as to which party has the burden of proof (risk of non-

10. Bobbitt v. Salamander, 240 Mo. App. 902, 221 S.W.2d 971 (1949); Hart v. Emery-Bird-Thayer Dry Goods Co., 233 Mo. App. 312, 118 S.W.2d 509 (1938). The basis for this has been that res ipsa is a matter of probability anyway.

11. Belding v. St. Louis Public Service Co., 205 S.W.2d 866 (Mo. App. 1947), *reversed* 358 Mo. 491, 215 S.W.2d 506 (1948); Stephens v. Kansas City Gas Co., 354 Mo. 835, 191 S.W.2d 601 (1946); Zichler v. St. Louis Public Service Co., 332 Mo. 902, 59 S.W.2d 654 (1933).

12. *Compare* Mayback v. Falstaff Brewing Corp., 359 Mo. 446, 222 S.W.2d 87 (1949) (bursting bottle case), *with* McCloskey v. Koplar, 329 Mo. 527, 46 S.W.2d 557 (1932) (falling object case).

13. McClintock v. Terminal R.R. Ass'n. of St. Louis, 257 S.W.2d 180 (Mo. App. 1953). Defendant kept a skilled crew on its elevators and checked them every two hours. A newly hired seventeen-year-old mail clerk was injured on the elevator. The court declared that *under the facts* the defendant must have superior knowledge of the cause of the accident.

14. Venditti v. St. Louis Public Service Co., 380 Mo. 42, 46, 226 S.W.2d 599, 602 (1950). In McClintock v. St. Louis Public Service Co., 257 S.W.2d 180 (Mo. App. 1953) defendant argued that the discovery procedure under the Missouri Code of Civil Procedure had ended the necessity for the res ipsa doctrine because plaintiff's knowledge could, at least, equal defendant's. The court merely declined any serious consideration and summarily dismissed the argument.

15. In a res ipsa case some kind of negligence is inferred from the fact of the unusual occurrence itself. In a specific negligence case, some evidentiary facts sufficient to show that some negligent acts were the proximate cause of the accident must be presented. *E.g.*, Mueller v. St. Louis Public Service Co., 358 Mo. 247, 214 S.W.2d 1 (1948); Palmer v. Brooks, 350 Mo. 1055, 169 S.W.2d 906 (1943); Harke v. Haase, 335 Mo. 1104, 75 S.W.2d 1001 (1934).

persuasion) in a res ipsa case.[16] But beginning with *McCloskey v. Koplar*[17] and strengthened by subsequent decisions,[18] the rule as developed is that the doctrine results merely in a permissive inference of negligence. Although the plaintiff was given the benefit of a presumption[19] in certain carrier cases decided after the *McCloskey* case, those decisions have been overruled.[20] It is likely that the fluctuating opinion in the earlier cases is attributable to a failure to recognize that res ipsa loquitur is merely a rule of evidence which changes the method by which plaintiff is permitted to established defendant's negligence,[21]

16. Schaefer v. St. Louis Suburban Ry., 128 Mo. 64, 30 S.W. 331 (1895). Plaintiff was injured when attempting to board defendant's train. Instruction placing the burden of proof upon the defendant was held to have been properly refused. *But cf.* Price v. Metropolitan Street Ry., 220 Mo. 435, 119 S.W. 932 (1909) (burden of proof in a carrier collision case was placed upon the defendant carrier); *accord, e.g.,* Fowlkes v. Fleming, 332 Mo. 718, 17 S.W.2d 511 (1929); Bond v. St. Louis-San Francisco Ry., 315 Mo. 987, 288 S.W. 777 (1926). These decisions and others led competent writers to conclude that in *some cases,* at least, the Missouri courts shifted the risk of non persuasion onto the defendant in a res ipsa case. Prosser, *supra* note 2 at 246; Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur,* 22 ILL. L. REV. 724, 734 (1928).

17. 329 Mo. 527, 46 S.W.2d 557 (1932).

18. Rothweiler v. St. Louis Public Service Co., 224 S.W.2d 569, 575 (Mo. App. 1949).

"It has been pointed out that the rule of res ipsa loquitur merely means that the facts of an occurrence may warrant an inference of negligence, but will not compel it; that while such circumstantial evidence of negligence is to be weighed, it is not necessarily to be accepted as sufficient; and that such evidence merely makes a case to be decided by the jury, and does not in any sense forestall the verdict." *Accord, e.g.,* Charlton v. Lovelace, 351 Mo. 364, 173 S.W.2d 13 (1943); Turner v. Missouri-Kansas-Texas R.R., 346 Mo. 28, 142 S.W.2d 455 (1940); Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S.W.2d 969 (1936); Williams v. St. Louis-San Francisco Ry., 337 Mo. 667, 85 S.W.2d 624 (1935); Tabler v. Perry, 337 Mo. 154, 85 S.W.2d 471 (1935); Harke v. Haase, 335 Mo. 1104, 75 S.W.2d 1001 (1934); Glasco Electric Co. v. Union Electric Light and Power Co., 332 Mo. 1079, 61 S.W.2d 955 (1933); Walsh v. Southwestern Bell Telephone Co., 331 Mo. 118, 52 S.W.2d 839 (1932); Hervies v. Bond Stores, 231 Mo. App. 1053, 84 S.W.2d 153 (1935).

19. Hartnett v. May Department Stores Co., 231 Mo. App. 1116, 85 S.W.2d 644 (1935) (escalator case).

20. Duncan v. St. Louis Public Service Co., 355 Mo. 733, 197 S.W.2d 964 (1946); Duncker v. St. Louis Public Service Co., 241 S.W.2d 64, 67 (Mo. App. 1951).

21. The cases involving negligence in a bailment situation are particularly interesting. The plaintiff makes his case for res ipsa upon showing the facts of the bailment and the failure of return or a return in a damaged condition. At that point the courts say that the defendant has the burden of going forward with the evidence (in an effort to rebut this inference of negligence that will go to the jury), but not the burden of proof. *E.g.,* Bommer v. Stedelin, 237 S.W.2d 225 (Mo. App. 1951); Oliver Cadillac Co. v. Rosenberg, 179 S.W.2d 476 (Mo. App. 1944). *But cf.* Bock v. Eilen, 211 S.W.2d 92, 97 (Mo. App. 1948) in which case defendant had hired a boat

and is not a rule of substantive law.[22] In spite of the fact that the cases continue to speak of shifting the burden of going forward with the evidence to the defendant,[23] the clear indication is that neither party is entitled to a directed verdict once a res ipsa case has been established. It is highly doubtful that the court would direct a verdict for a res ipsa plaintiff even if the defendant fails to introduce evidence,[24] which would be a necessary result if the burden of producing evidence was truly shifted.[25] Perhaps the semantic difficulty involved would be obviated by increased emphasis on the permissive nature of the inference.

Given the essentials of a res ipsa situation, plaintiff must still surmount certain pleading problems before he is entitled to the application of the doctrine. Because an underlying policy for allowing res ipsa is defendant's superior knowledge, the Missouri courts have denied the use of the doctrine in a case where it would otherwise apply, when specific acts of negligence are also alleged.[26] Earlier cases, however, that overlooked, disregarded, or criticized this rule[27] have not been effectively harmonized with the present view.[28]

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from plaintiff. The court said, "This is not a case where an article is taken into possession by a bailee and lost, or a case where the burden would have been on the bailee to show freedom from negligence, or to show that his failure to return the boat was not due to negligence on his part. Such may be the general rule in bailments; but, in this case, plaintiff had alleged carelessness and negligence on the part of the bailee."

22. Dodson v. Maddox, 359 Mo. 742, 223 S.W.2d 434 (1949); Belding v. St. Louis Public Service Co., 358 Mo. 491, 215 S.W.2d 506 (1948).

23. Turner v. Missouri-Kansas-Texas R.R., 346 Mo. 28, 142 S.W.2d 455 (1940); Carroll v. May Department Stores, 237 Mo. App. 983, 180 S.W.2d 793 (1944); Glossip v. Kelly, 228 Mo. App. 392, 67 S.W.2d 513 (1934).

24. Rothweiler v. St. Louis Public Service Co., 224 S.W.2d 569 (Mo. App. 1949); Charlton v. Lovelace, 351 Mo. 364, 173 S.W.2d 13 (1943); Turner v. Missouri-Kansas-Texas R.R., *supra*, note 23; Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S.W.2d 969 (1936); Glasco Electric Co. v. Union Electric Light and Power Co., 332 Mo. 1079, 61 S.W.2d 955 (1933).

25. IX WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

26. Maxie v. Gulf, Mobile & Ohio R.R., 356 Mo. 633, 202 S.W.2d 904 (1947); Crupe v. Spicuzza, 86 S.W.2d 347 (Mo. App. 1935). *But cf.* Dodson v. Maddox, 359 Mo. 722, 223 S.W.2d 434 (1949). For a collection of Missouri cases, and the views of other jurisdictions, see note, 40 U. of Mo. BULL. L. REV. 41 (1928). Plaintiff must recover, if at all, by proving the specific acts alleged.

27. Gannon v. Laclede Gas Light Co., 145 Mo. 502, 47 S.W. 907 (1898); Gallagher v. Edison Illuminating Co., 72 Mo. App. 576 (1897) (the court held that plaintiff was not restricted to recovery upon specific negligence alleged where plaintiff first alleged negligence generally and then alleged certain particular defects that existed).

28. Sanders v. Carthage, 330 Mo. 844, 51 S.W.2d 529 (1931).

Having ruled that res ipsa is available only under a charge of "general negligence,"[29] the Missouri courts have found it difficult to distinguish between specific and general allegations with any real consistency, although the distinction may be verbalized quite simply:

> . . . To constitute a specific allegation of negligence as contra distinguished from a general allegation, an enumeration and averment of the specific act or acts relied upon as a ground of recovery must be made.[30]

The usual difficulties that arise from applying a general rule to particular facts are present in this area.[31] An examination of the manner in which two petitions were construed will best illustrate the problem.

In *Price v. Metropolitan Street Ry.*[32] a petition which alleged that defendant carelessly and negligently caused and permitted its train to collide with another of defendant's trains was held to charge general negligence only, on the ground that plaintiff made no attempt to specify any particular act of negligence by defendant's engineer. Seven years later, the same court held that a petition which charged defendant with owning a faulty and defective "racer dip" and maintaining and operating it in a careless and negligent manner charged specific negligence.[33] Since the first of these cases concerns a common carrier, perhaps the indication is that there is a tendency to construe the allegations in carrier cases as alleging general negligence only.[34]

Furthermore, an interesting statement was made by the court in *Williams v. St. Louis Public Service Co.*[35] where a complaint similar to that in the *Price* case was also held to contain only general allegations of negligence. The court said:

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29. These are the words used by the courts, but, in reality, both an allegation of the existence of the res ipsa requirements and a charge of general negligence are required. *See e.g.*, Maxie v. Gulf, Mobile & Ohio R.R., 356 Mo. 633, 202 S.W.2d 904 (1947).

30. Porter v. St. Joseph Ry., Light, Heat & Power Co., 311 Mo. 66, 74, 277 S.W. 913, 915 (1925).

31. May Department Stores Co. v. Bell, 61 F.2d 830, 836 (8th Cir. 1932). The court collects the Missouri cases construing allegations as specific or negligent at 836, 837.

32. 220 Mo. 435, 119 S.W. 913 (1909).

33. Pointer v. Mountain Ry. Construction Co., 269 Mo. 104, 189 S.W. 805 (1916).

34. *E.g.*, Williams v. St. Louis Public Service Co., 253 S.W.2d 97 (Mo. 1952); Boulos v. Kansas City Public Service Co., 359 Mo. 763, 223 S.W.2d 446 (1949).

35. 253 S.W.2d 97 (Mo. 1952).

> The pleadings and evidence may be such that a cause may be submitted on either general or specific negligence at plaintiff's election.[36]

The court apparently was referring to a situation in which the specific cause of the accident might be inferred from the available facts. The plaintiff's "election" was to base his case on res ipsa or attempt to recover by proving the specific cause of the accident by circumstantial evidence. In any event, plaintiff was not to be deprived of the res ipsa benefit merely because the specific cause might be *inferred* from the facts. This ruling and cases such as *Maxie v. Gulf, Mobile & Ohio R.R.*,[37] wherein the court advised the plaintiff to amend his petition by deleting the specific allegations of negligence in order to take advantage of res ipsa at the new trial, shows a trend toward construction of the complaint to favor plaintiff.

At this point notice should be taken of a general rule of pleading which may aid the plaintiff who has plead generally ,but has failed to establish the requisites for res ipsa. The rule is succinctly stated in a fairly recent case as follows:

> . . . [I]n most cases where the res ipsa loquitur rule is not applicable and general negligence only is pleaded such is sufficient, absent a motion to make more definite and certain. . . .[38] [defendant raised the issue of pleading generally for the first time on the appeal].

Of course a petition which wholly fails to state a cause of action may be attacked at any time,[39] but in order to state a cause of action plaintiff is only required to describe the act complained of with such reasonable certainty necessary to inform defendant of the charge.[40] Actually, however, the problem here is whether or not defendant has placed the plaintiff's petition in

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36. *Id.* at 102.

37. 356 Mo. 633, 202 S.W.2d 904 (1947). See also, 13 Mo. L. REV. 110, 113 (1948).

38. Barrickman v. National Utilities Co., 191 S.W.2d 265, 268 (Mo. App. 1945); *Accord, e.g.*, Welch v. Thompson, 357 Mo. 703, 210 S.W.2d 79 (1948); Stephens v. Kansas City Gas Co., 354 Mo. 835, 191 S.W.2d 601 (1946); Palmer v. Brooks, 350 Mo. 1055, 169 S.W.2d 906 (1943); Zichler v. St. Louis Public Service Co., 332 Mo. 902, 59 S.W.2d 654 (1933). These cases would be supported by the present Missouri statutes concerning this question. MO. REV. STAT. §§ 509.310, 509.330 (1949).

39. MO. REV. STAT. § 509.340 (1949).

40. Cushulas v. Schroeder & Tremayne, 225 Mo. 567, 22 S.W.2d 872 (1930). The problem as to just what particularity is required to state a cause of action must be recognized, but is without the scope of this article.

issue in a timely manner rather than whether a cause of action has been stated.

A similar situation formerly obtained if plaintiff *did* move to make the complaint more definite and certain, and after his motion was overruled went to trial on the merits. In that case the defendant was held to have waived his right to have the complaint made more specific by going to trial on the merits.[41] A recent Missouri statute,[42] however, has abolished the waiver theory by providing that pleading over or going to trial on the merits constitutes no waiver of any objection raised by motion at the proper time.[43] It is clear, however, that failure to move to make more definite and certain a complaint containing only general allegations of negligence may have precisely the same effect as though the case were truly a res ipsa or other case entitling plaintiff to go to the jury without pleading and proving specific negligence. It must be emphasized that this is not an enlargement of the res ipsa area, but is rather in the nature of a penalty on defendants whose attorneys plead improperly, imposed not out of a desire for revenge but in order to further the timely and orderly administration of justice.

Even though a plaintiff has established by proper pleadings a res ipsa case, he may yet lose the procedural advantages attaching to the application of that doctrine by introducing unsuitable evidence. Thus if the plaintiff's own evidence shows *clearly* the cause of the accident and leaves nothing in doubt, the res ipsa inference is lost to plaintiff,[44] although evidence which merely *tends* to show the specific cause will not defeat the application of the doctrine.[45] Again the rule is one which is very difficult of applica-

41. *E.g.*, Hanson v. City Light and Traction Co., 238 Mo. App. 182, 178 S.W.2d 804 (1944); Kitchen v. Schlueter Mfg. Co., 323 Mo. 1179, 20 S.W.2d 676 (1929); State *ex rel.* Brancato v. Trimble, 322 Mo. 318, 18 S.W.2d 4 (1929); Sperry v. Hurd, 267 Mo. 628, 185 S.W. 170 (1916).

42. MO. REV. STAT. §509.340 (1949). "[N]or shall pleading over or entering into the trial of the merits be deemed to waive any objection properly raised by motion. . . ."

43. Under MO. REV. STAT. § 512.020 (1949) denial of a motion to make more definite and certain is not appealable at the instance of denial, but the indication is, however, that an appeal could be taken on such motion after the trial. Hartvedt v. Harpst, 173 S.W.2d 65, 67 (Mo. 1949). "A motion to make more definite and certain is addressed to the sound discretion of the court . . . and its discretion, when *soundly* exercised, will not be disturbed by this court." (Italics added.)

44. Williams v. St. Louis Public Service Co., 253 S.W.2d 97 (Mo. 1952).

45. *Ibid.* The analysis of the court seems inadequate in this area. See PROSSER, TORTS 306 (1941).

tion and seems to lead to contradictory results. Representative illustration seems appropriate here to show the impossibility of synthesis at a more particularized level. The first four of the following cases represent situations in which the evidence was held not to show such an exact cause as to preclude application of the res ipsa doctrine:

(1) Plaintiff's witness testified that defendant's streetcar suddenly checked its speed thereby causing an extraordinary and unusual lurch.[46] (2) Evidence was introduced by plaintiff that defendant's operators were negligent in starting the car while the plaintiff had one foot upon the step as he was attempting to take passage on defendant's streetcar.[47] (3) Plaintiff tendered proof that defendant was negligent in failure to have cross bells in operation, failure to keep a proper lookout, untimely application of the brakes, and traveling at excessive speed; the court said that this evidence failed to show a *single* cause.[48] (4) Plaintiff, who was a fare collector on defendant's train,[49] introduced evidence tending to show that the rails were in a defective condition.[50]

Plaintiff is of course bound by his own evidence; but proof of specific facts does not necessarily exclude inferences. When the plaintiff shows that the railway car in which he was a passenger was derailed, there is an inference that the defendant has been negligent. When he goes further and shows that the derailment was caused by an open switch, he destroys any inference of other causes, but the inference that the defendant has not used proper care in looking after its switches is not destroyed, but strengthened. If he goes further still and shows that the switch was left open by a drunken switchman on duty, there is nothing left to infer; and if he shows that the switch was thrown by an escaped convict with a grudge against the railroad, he has proved himself out of court. It is only in this sense that when the facts are known there is no inference, and res ispa loquitur vanishes from the case. It is quite generally agreed that the introduction of evidence which does not purport to furnish a complete explanation of the occurrence does not deprive the plaintiff of res ipsa loquitur.

46. *Ibid.*

47. Boulos v. Kansas City Public Service Co., 359 Mo. 763, 223 S.W.2d 446 (1949).

48. Timmons v. St. Louis-San Francisco Ry., 231 Mo. App. 421, 100 S.W.2d 624 (1936).

49. Williams v. St. Louis-San Francisco R.R. 337 Mo. 667, 686, 85 S.W.2d 624, 635 (1935). If res ipsa would ordinarily apply, the fact that the action is brought under the *Federal Employer's Liability Act* will not preclude the application of the doctrine. Gordon v. Muehling Packing Co., 328 Mo. 123, 40 S.W.2d 693 (1931), is cited as resolving the question of the application of res ipsa in a master-servant case in favor of the plaintiff-servant.

50. Williams v. St. Louis-San Francisco R.R., 337 Mo. 667, 85 S.W.2d 624 (1935).

In the following cases the res ipsa inference was lost to plaintiff because the court felt that his evidence proved the exact cause of the accident: (1) Plaintiff's evidence brought out that defendant's driver was tardy in applying the brakes because he was distracted in a conversation with some third person.[51] (2) Evidence introduced by plaintiff showed that defendant's motorbus *skidded* before hitting the curb.[52] (3) Plaintiff proved the good condition of the wiring in her house, the falling of a tree upon defendant's outside wires, and the improper grounding of defendant's wires.[53] (4) Plaintiff offered evidence showing that the board which fell from defendant's building and struck plaintiff was old and was held in position with old rusty nails.[54]

Though the rules in this area defy definite formulation, one observation seems appropriate. Plaintiff may introduce evidence tending to show many negligent acts so long as the *sole* cause is left unexplained. The benefit of the doctrine is lost only when a particular court in interpreting the pleadings in light of the facts feels that plaintiff's evidence has shown the *only possible* explanation for the accident.

Successful disposition of the above problems will entitle plaintiff to a res ipsa instruction. An approved plaintiff's instruction is set forth in *Harke v. Haase*:

> Then you are instructed that such facts (if you believe them to be true) are sufficient circumstantial evidence to warrant a finding by you that defendant was negligent, and you may so find, unless you find and believe from other facts and circumstances in evidence that the occurrence was not due to the defendant's negligence. . . .[55]

In addition to plaintiff's instruction, however, two other types of instructions need consideration. The first of these is called defendant's "burden of proof" instruction. One form of this instruction which has been approved at least under the circumstances of the particular case is as follows:

> The Court instructs the jury that negligence is not in law presumed, but must be established by proof as explained in other instructions.

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51. Lochmoeller v. Kiel, 137 S.W.2d 625 (Mo. App. 1940).
52. Heidt v. People's Motorbus Co. of St. Louis, 219 Mo. App. 683, 284 S.W. 840 (1926).
53. Conduitt v. Trenton Gas and Electric Co., 326 Mo. 133, 31 S.W.2d 21 (1930).
54. McAnny v. Shipley, 189 Mo. App. 396, 176 S.W.2d 1079 (1915).
55. 335 Mo. 1104, 1111, 75 S.W.2d 1001, 1004 (1934).

> . . . [Y]ou are not able to make a finding that defendant was liable without resorting to surmise, guesswork and speculation outside of and beyond the scope of the evidence, and the reasonable inference deductible therefrom, then it is your duty to, and you must, return a verdict for defendant.[56]

The other is plaintiff's "counter burden of proof instruction," of which the following is an example:

> To meet and carry her burden of proof in this case, . . . [the plaintiff] was not required to prove some certain and specific act of negligence or more specific omission of care by the defendant.[57]

Both instructions are regarded as cautionary and so within the discretion of the trial judge.[58] Although not favored by the appellate courts,[59] the giving of these instructions will be approved so long as the clarity (required from a reading) of the instructions as a whole is not thereby destroyed.[60] Consideration of the instruction problem continues in an effort to instruct the jury in as clear a fashion as possible.[61]

THE MAYBACK CASE

In 1949 the Missouri Supreme Court denied the applicability of res ipsa because defendant did not have exclusive control at the time of the injury, but permitted a petition alleging only general negligence to stand because, the court said, plaintiff had stated her cause with as much particularity as could be required under the circumstances.[62]

> The petition states a claim upon which relief may be granted. It is undoubtedly good as against the attack which

56. West v. St. Louis Public Service Co., 361 Mo. 740, 747, 236 S.W.2d 308, 312 (1951).

57. Schwinegruber v. St. Louis Public Service Co., 241 S.W.2d 782, 785 (Mo. App. 1951).

58. West v. St. Louis Public Service Co., 361 Mo. 740, 236 S.W.2d 308 (1951), and cases cited therein. There will be no interference with this discretion unless there is a patently clear abuse.

59. *Ibid.*

60. West v. St. Louis Public Service Co., 361 Mo. 740, 236 S.W.2d 308 (1951), and cases cited therein.

61. See Comment, 3 J. MO. BAR 21 (1947), for a more detailed discussion of the *Harke* case and suggestions for further improvement of res ipsa instructions.

62. Mayback v. Falstaff Brewing Corp., 359 Mo. 446, 222 S.W.2d 87 (1949). Plaintiff was suing the manufacturer of beer bottles which had exploded and which had been out of defendant's control for seven or eight days. Plaintiff offered evidence to disprove negligence of any intervening parties and of explosion of other bottles from the same shipment handled in the same manner.

appellant made after verdict, and *we think it is sufficient even had the attack been more timely.*[63] [Italics added.]

The italicized statement above is readily recognized as dicta, but the analysis which follows seems justified in light of the emphasis attached by the court. It will be remembered that under the earlier cases, whether a motion to make more definite and certain should be sustained or overruled depended solely upon whether the case was one to which the res ipsa was applicable.[64] Under the *Mayback* pronouncement, on the other hand, the propriety of sustaining or overruling such a motion does not depend solely on whether the facts present a case for the application of res ipsa; seemingly there is a third and new category. The *Mayback* case would seem to say, then, that the motion to make more definite and certain should be sustained only if the plaintiff fails to bring himself within the scope of the res ipsa doctrine or if he fails to otherwise bring himself within some as yet undefined classification which would likewise permit him to state a cause of action without alleging specific acts of negligence.

Although this new ruling has been applied only in bursting bottle cases,[65] and the older policy is still otherwise prevailing, *Mayback* indicates that such a petition would be acceptable in any situation where the nature of the case demands.[66] Extension to other situations would relieve the plaintiff of the burden of proving specific acts of negligence though denying him res ipsa; however, some evidence negating negligence of an intervener would be required of the plaintiff. The type and quantum of evidence required apparently must be determined by the facts of the particular case.

Though it is difficult to determine the effect of the *Mayback* case[67] at this juncture, a new fringe or middle ground may have

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63. Mayback v. Falstaff Brewing Corp., 359 Mo. 446, 455, 222 SW.2d 87, 92 (1949).

64. Zichler v. St. Louis Public Service Co., 332 Mo. 902, 59 S.W.2d 654 (1933).

65. Stephens v. Coca-Cola Bottling Co. of St. Louis, 232 S.W.2d 181 (Mo. App. 1950).

66. See note 63, *supra.*

Where from the nature of the case, the plaintiff in an action for negligence could not be expected to know the exact cause of the precise negligent act which became the cause of the injury, and the facts were peculiarly within the knowledge of the defendant, the plaintiff is not required to allege the particular cause.

67. See note 63, *supra.* A superficial glance might convince one that an attempt to check the spread of res ipsa is in evidence; the better view,

been opened. At either extreme is the true res ipsa and the true specific negligence case, but as the facts shift away from both extremes we reach a shaded area where one of the elements (usually the exclusive control requirement) is lacking, but where the facts do not justify forcing plaintiff to plead and prove specific negligence. Under such a rule the plaintiff, after submitting facts sufficient to relieve him of the burden of pleading and proving specific negligence, would apparently gain every procedural advantage to which he would have been entitled had the doctrine been applicable. Perhaps nothing more has been done than to recognize that res ipsa is merely a kind of circumstantial evidence in which the force of the inference should depend upon the strength of plaintiff's case.

CONCLUSION

Certain general statements may be ventured concerning the doctrine of res ipsa loquitur in Missouri.

1. Procedural Effect:
   The courts treat the doctrine as nothing more than a permissive inference in those cases in which it applies. Actually, since plaintiff could not obtain a directed verdict, the burden of going forward with the evidence never really shifts.
2. Allegation of Negligence:
   If the plaintiff is to be afforded the advantage of res ipsa, he must first allege *general* negligence. An allegation of specific negligence will preclude plaintiff from any possibility of the doctrine being applied, even if the plaintiff also pleads general negligence. There is a conflict in Missouri concerning which are specific and which are general allegations of negligence, and this conflict cannot be resolved by any generalizations.
3. Introduction of Specific Evidence:
   A plaintiff who has brought himself within the res ipsa situation may introduce evidence of defendant's negligence so long as that evidence does not show the exact cause of the accident. Again, it is difficult to foretell just what evidence will so clearly prove the precise cause.

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however, appears to this writer to be to recognize an extension of res ipsa under a different name in order to encompass fact situations similar to the principal case and allow plaintiff certain procedural benefits. For an excellent discussion with a similar approach, see Note, *The Applicability of the Doctrine of Res Ipsa Loquitur to Cases Involving Bursting Bottles*, 1951 WASH. U.L.Q. 216, 233 (1951).

4. Effect of Verdict:

(a) If the plaintiff alleges negligence generally and the defendant does not move to make more definite and certain until after the verdict, any defects in plaintiff's petition are considered waived. This waiver occurs even though plaintiff does not have a res ipsa case.

(b) If the defendant does move for a more definite and certain statement and is overruled, he may proceed to the trial on the merits without waiving any defects raised by the motion. The motion, however, is not appealable at the time of the ruling, but may be assigned as error on the appeal from the judgment.

5. General Negligence:

There are a few cases that have held that general allegations of negligence are sufficient as against a motion to make more definite and certain even though res ipsa does not apply. These cases have thus far been limited to bursting bottles, but from the language used there is no reason why it may not later be extended to other cases in which the only res ipsa requirement lacking is the exclusive control in the defendant at the time of the injury.

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