

January 1952

Res Ipsa Loquitur

Robert Appelgren

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Recommended Citation

Robert Appelgren, *Res Ipsa Loquitur*, 13 Mont. L. Rev. (1952).

Available at: <https://scholarworks.umt.edu/mlr/vol13/iss1/6>

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porations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons. . . ." (Emphasis supplied.) The word "corporation" is not qualified.

Couple all this with the fact that local self government existed in England and the Colonies before there ever was a state constitution, and with the fact that municipal corporations were and are regularly subjected to the burdens and liabilities of private persons engaged in similar proprietary affairs, and it is fairly inferable from the language used that the framers intended to protect municipal corporations in those affairs as private corporations.

In summary, local self government in municipal corporations is socially and economically desirable and is a characteristic mark of English and American democracy. Some states have expressly provided for a right to local self government by amendment to their constitutions, but on sound legal principles there is no room for a theory of a reserved right existing independently of such express constitutional provision. However, another theory of local self government has been adopted by a few jurisdictions which, though more limited, is sound on legal principles. It is that municipalities, when acting in proprietary or private matters, are protected as private corporations by the due process clauses of the state constitutions. Montana has not only given verbal approval to this theory but has actually decided cases on the basis of it. There can be no doubt now but that the Montana Supreme Court will hold invalid any legislative interference in municipal affairs which would be a violation of due process if municipalities were ordinary private corporations acting in a similar activity.

It is submitted that the position of the Montana Supreme Court is socially, economically, and legally sound.

ROBERT L. EHLERS.

RES IPSA LOQUITUR

Substantive Law

Res ipsa loquitur, literally translated, means "the thing speaks for itself." The courts in deciding cases often quote and refer to this literal translation.¹ Shortly, attorneys refer to it

¹Johnson v. Herring, 89 Mont. 420, 300 P. 535 (1931); Maki v. Murray Hospital, 91 Mont. 521, 7 P. (2d) 228 (1932); Standard Oil Co. of New Jersey v. Midgett, 116 F. (2d) 562 (1941); Cunningham v. Dady, 191 N.Y. 152, 83 N.E. 689 (1908); Morner v. Union Pac. R. Co., 196 P. (2d) 744 (1948).

as the *res ipsa* doctrine; more important as one authority puts it is, what does it say? Probably the best statement as to its application is to be found in the case of *San Juan Light and Transit Company v. Belen Requena*,² where the Supreme Court of the United States said:

“ . . . when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care.”³

Montana in the early and often quoted decision of *Hardesty v. Largety Lumber Co.*⁴ gives a somewhat similar definition:

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

Comparing these statements, we note one difference. The United States Supreme Court requires three things before the doctrine is applicable: (1) an injury which does not ordinarily occur in the absence of negligence, (2) exclusive control by the defendant, and (3) that the injured person be without fault. Montana includes the first two requirements above, but leaves out the third. However, the recognition by the court of the fault of a fellow servant as precluding application of the doctrine in *McGowan v. Nelson*,⁵ might well be persuasive that similarly the Montana court would in a proper case find probable fault of the injured person to be an obstacle to its application.

There is, in addition to these three requirements, a fourth held necessary by a few courts, but expressly denied by others. This is the requirement that evidence as to the explanation of the

²224 U. S. 89, 56 L. Ed. 680, 32 S. Ct. 399 (1912).

³Affirmed in *Jesionowski v. Boston and Maine Rr.*, 329 U.S. 452, 91 L. Ed. 416, 67 S. Ct. 401, 169 A.L.R. 947 (1947).

Some other cases giving same definition: *Morner v. Union Pac. R. Co.*, 196 P. (2d) 744 (1948); *Rojas v. Pennsylvania Tunnel and Terminal R. Co.*, 47 N.Y.S. (2d) 82 (1944); *Williamson v. Pacific Greyhound Lines*, 70 Cal. App. (2d) 482, 177 P. (2d) 977 (1947).

⁴34 Mont. 151, 86 P. 29 (1906).

⁵36 Mont. 67, 92 P. 40 (1907).

accident must be more readily available to the defendant than to the plaintiff. This requirement often is stated by words requiring the defendant to have a better knowledge of the cause of the injury than the plaintiff.⁸ However, most courts reject this requirement. In a case where defendant was killed in an accident, one court holds that the fact that the cause was not known to defendant makes no difference, as the whole theory of res ipsa loquitur is that "the thing speaks for itself."⁹ Montana has, however, given a slight indication that this requirement is necessary. In one case,⁸ it was said that the theory of res ipsa loquitur is that the plaintiff does not know the cause, whereas the defendant does, and should, therefore, be required to produce evidence. This was mentioned in connection with a procedural ruling and therefor may not be as important a precedent as if the issue had concerned substantive law.

Some explanation is necessary as to the interpretation the courts have given the three main requirements. As to the first, an injury which does not ordinarily occur in the absence of negligence: the courts hold that the mere fact that the plaintiff was injured is not enough,⁹ but the facts and attendant circumstances invoking the existence of the doctrine must be present.¹⁰ Inherent in this is the requirement that the injury itself be one that gives rise to an inference of negligence.

The second requirement, exclusive control by the defendant is somewhat more difficult: it is held that control here means the right of control at the time and not actual physical control.¹¹ Thus it is usually possible to apply the rule to all kinds of agency problems including a fellow servant injury;¹² however, Montana seems to have rejected the fellow servant application. In *McGowan v. Nelson*¹³ where the plaintiff was injured by a falling plank while working for the defendant, the court held res ipsa did not apply as it was not known whether the plank fell from

⁸Hart v. Emery, Bird, Thayer Dry Goods Co., 233 Mo. App. 312, 118 S.W. (2d) 509 (1938); PROSSER, LAW OF TORTS (1941) § 43, pp. 301, 302.

⁹Waller v. Worstall, 50 Ohio App. 11, 197 N.E. 410 (1934).

¹⁰Lyon v. Chicago, M. and St. P. Ry. Co. of Montana, 50 Mont. 532, 148 P. 386 (1915).

¹¹Glover v. Chicago, Milwaukee and St. Paul Ry. Co., 54 Mont. 446, 171 P. 278 (1918); Maki v. Murray Hospital, 91 Mont. 521, 7 P. (2d) 228 (1932); Charlton v. Lovelace, 351 Mo. 364, 173 S.W. (2d) 13 (1943).

¹²Charlton v. Lovelace, 351 Mo. 364, 173 S.W. (2d) 13 (1943).

¹³Hart v. Emery, Bird, Thayer Dry Goods Co., 233 Mo. App. 312, 118 S.W. (2d) 509 (1938).

¹⁴Johnson v. United States, 333 U. S. 46, 92 L. Ed. 68, 68 S. Ct. 391, motion denied 333 U. S. 865, 92 L. Ed. 1143, 68 S. Ct. 788 (1948).

¹⁵36 Mont. 67, 92 P. 40 (1907).

the defendant's negligent piling of planks or because of some fellow servant's negligence. So the plaintiff must show more than the fact that the injury occurred on the defendant's property;¹⁴ he must show that the defendant actually did have some control.¹⁵ Most courts say the plaintiff must show more than a mere possibility that the defendant had control, he must show a probability.¹⁶ Sometimes too, the defendant is held liable where the plaintiff has control at the actual time of the accident: so it was held by one court¹⁷ where a coca-cola bottle exploded in a waitress's hand, the court saying:

“ . . . the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.”

It also points out that all that is necessary is a reasonable inference that nothing happened to the instrumentality after it left the control of the defendant. Along these lines it has also been held that where the thing which caused the injury was within the exclusive control of the defendant, the *possibility* that some third person, who was an inter-meddler and in no way connected with the defendant, tampered with it so as to make it defective or dangerous does not defeat the application of the doctrine.¹⁸

The third major requirement, that the plaintiff be without fault, means merely that there must be no contributory negligence.¹⁹ As has already been pointed out, Montana has not expressly stated this requirement in its definition.

After looking at the requirements it must also be pointed out that there are places in which the doctrine is not applicable, even if these requirements are all present. Thus it has been held that the doctrine does not apply where the defendant's only duty is to avoid affirmative or active negligence as to a trespasser²⁰ or

¹⁴Other cases also holding this: *Engdal v. Owl Drug Co.*, 183 Wash. 100, 48 P. (2d) 232 (1935); *Foster v. A. P. Jacobs and Associates*, 85 Cal. App. (2d) 746, 193 P. (2d) 971 (1948).

¹⁵See also: *Scheytt v. Gallatin Valley Milling Co.*, 54 Mont. 565, 172 P. 321 (1918).

¹⁶*Supra*, note 11.

¹⁷*Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. (2d) 453, 150 P. (2d) 436 (1944).

¹⁸*Supra*, note 11.

¹⁹*Supra*, note 17.

²⁰*Brust v. C. J. Kubach Co.*, 130 Cal. App. 152, 19 P. (2d) 845 (1933).

a gratuitous licensee,²¹ but it does apply to an invitee.²² Also the doctrine does not apply where the injury was beyond doubt the voluntary or intentional act of some person.²³ In the past the tendency of the courts was to refuse application of the doctrine where complicated machinery was involved on the theory that too many things could happen to the machinery too fast,²⁴ but the tendency today is away from this view. One court has held that the very fact that the instrumentality doing damage is peculiar and inherently dangerous is a common and proper consideration for the application of the maxim.²⁵

The doctrine arose in connection with a carrier case and is still very often invoked in this connection. In this field the doctrine has become what is sometimes referred to as a "monster child." The courts here seem to impose liability much more freely than in a case not involving the presence of a carrier.²⁶ Many courts though, as Prosser in his work on the subject points out, refuse the application of the doctrine by a passenger against the other driver in case of a collision on the theory that there is no exclusive control by the defendant.²⁷

As pointed out in one leading law encyclopedia,²⁸ the doctrine has also been both applied and denied application to injuries from falling objects, collapsing structures or similar occurrences, escaping water or chemicals, defective machinery or appliances negligently operated, defective or dangerous condition of premises or particular parts thereof, and exploding bottles and fires. The doctrine is usually denied in malpractice cases although sometimes invoked where the charge is not for improper treatment of the illness for which it is sought, but for an incidental injury as where the patient received a large blister on her chest during an operation for appendicitis.²⁹ The doctrine has also been much invoked in electrical cases.³⁰

²¹Biondini v. Amship Corporation, 81 Cal. App. (2d) 751, 185 P. (2d) 94 (1947); Brust v. C. J. Kubach Co., 130 Cal. App. 152, 19 P. (2d) 845 (1933).

²²Biondini v. Amship Corporation, 81 Cal. App. (2d) 751, 185 P. (2d) 94 (1947).

²³*Supra*, note 10.

²⁴Beebe v. St. Louis Transit Co., 206 Mo. 419, 103 S.W. 1019, 12 L.R.A. (N.S.) 760 (1907).

²⁵Gould v. Winona Gas Co., 100 Minn. 258, 111 N.W. 254, 10 L.R.A. (N.S.) 889 (1907).

²⁶Gleason v. Virginia Midland R. Co., 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859 (1891).

²⁷PROSSER, LAW OF TORTS § 43, p. 299 (1941).

²⁸65 C.J.S. *Negligence* § 220 (12).

²⁹Vonault v. O'Rourke, 97 Mont. 92, 33 P. (2d) 535 (1934).

³⁰Haule v. Helena Gas and Electric Co. (C.C.A. 9th, 1929), 31 F. (2d) 671.

In seeking to apply the doctrine, the facts and circumstances of each case should be closely inspected instead of trying to form a rigid formula for it to work in.

Adjective Law

As has been pointed out, *res ipsa loquitur*, when applicable, furnishes evidence of the negligence of the defendant. Probably the most confused part of this doctrine is the weight to be given to this evidence. Thus, some courts have said that this evidence is to be treated as an inference of negligence, others that it should be treated as a presumption of negligence, and still others that it should be treated as *prima facie* negligence. In addition to the confusion that these rulings bring, is the fact that while one court may seem to adopt one of these methods of treatment in so far as words are concerned, it is in reality adopting a different rule.⁸¹ What would seem to be the better view and also said to be the majority view⁸² is the view taken by the United States Supreme Court in the case of *Sweeney v. Erving*:⁸³

“In our opinion, *res 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 an 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.”

Under this rule it seems clear that the evidence that arises from the doctrine is merely a permissible inference that the jury can either accept or reject *whether the defendant makes a rebuttal or not*,⁸⁴ the theory being that in the ordinary case, men differ as to the reasonable conclusion to be drawn; that what one man might think negligent the other might not. Contrasted to this view, however, is the same Court's view in regards to passengers

⁸¹*White v. Pinney*, 99 Utah 484, 108 P. (2d) 249 (1940).

⁸²PROSSER, *LAW OF TORTS* § 44 pp. 302, 303 (1941).

⁸³223 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416, Ann. Cas. 1914 D. 905 (1913); Affirmed in *Jesionowski v. Boston and Maine Rr.*, 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401, 169 A.L.R. 947 (1947); also affirmed in *Johnson v. United States*, 333 U. S. 46, 92 L. Ed. 68, 68 S. Ct. 391, motion denied 333 U. S. 865, 92 L. Ed. 1143, 68 S. Ct. 788 (1948).

⁸⁴Other cases holding an inference: *Atchison, T. and S. F. Ry. Co. v. Simmons* (C.C.A.N.M., 1946) 153 F. (2d) 206; *Charlton v. Lovelace*, 351 Mo. 364, 173 S.W. (2d) 13 (1943); *Weller v. Worstall*, 50 Ohio App. 11, 197 N.E. 410 (1934).

in carrier cases; thus in *Gleason v. Virginia Midland R. Co.*⁸⁵ it was said:

“. . . the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier . . .” (Italics the Court’s).

This is explained by the general unfavorable attitude toward carriers that the doctrine has developed, which has been mentioned before. This view, as regards the United States Supreme Court, should be considered an exception to the general rule first quoted.

The second and a minority view is that *res ipsa loquitur* creates a presumption or *prima facie* case which if not rebutted may result in a directed verdict for the plaintiff. An illustration of this rule is to be found in *Druzanich v. Criley*,⁸⁶ where the California court said:

“The rule is well settled by . . . the appellate courts of this state to the effect that the inference of negligence which is created by the rule *res ipsa loquitur* is in itself evidence which may not be disregarded by the jury and in the absence of any other evidence as to negligence, necessitates a verdict in favor of a plaintiff. It is incumbent on the defendant to rebut the *prima facie* case so created”

Here it seems that the word “presumption” would have been more accurate than “inference.” Under this minority view, the presumption created is rebuttable, and generally all that it is necessary for the defendant to show to rebut it is an exercise of ordinary care. The ultimate burden of proof still rests on the plaintiff. The majority view also allows a directed verdict at times, but only where the minds of reasonable men could not differ as to the conclusions to be drawn from the evidence.⁸⁷

A third, but very much in the minority, view is that the evidence under *res ipsa loquitur* raises a presumption of negligence and shifts to the defendant the *ultimate* burden of proof, requiring him to introduce evidence of greater weight than that of the plaintiff.⁸⁸ Nothing can be said in support of this rule, and it is very seldom used.

Now, where does Montana stand in the foregoing decisions? Probably in the second group, that a presumption or *prima facie* case is created which must be rebutted.

⁸⁵140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859 (1891).

⁸⁶19 Cal. (2d) 439, 122 P. (2d) 53 (1942).

⁸⁷*Atchison, T. and S. F. Ry. Co. v. Simmons* (C.C.A.N.M., 1946) 153 F. (2) 206.

⁸⁸PROSSER, LAW OF TORTS § 44, pp. 304 (1941).

A perusal of some of Montana's pertinent decisions in chronological order would seem to bring out this viewpoint:

In *Pierce v. Great Falls and Canada Railway Co.*,³² the plaintiff was injured by a derailment of a car while traveling on the defendant's line. Plaintiff alleged specific acts of negligence; defective roadbeds, rails, ties, tracks, cars, locomotives, and failure properly to inspect. Defendant, for whom the jury found, replied that the derailment was caused by a high wind, an act of God. On appeal the court said that although proof of a derailment and injury was made which is ordinarily *prima facie* evidence of negligence on the part of the carrier, the plaintiff had alleged only specific acts of negligence and must stand on the cause of action stated; and that even if a *prima facie* inference would arise from the derailment and injury it had been met, rebutted, and overcome by the proof of the defendant.

In *Hardesty v. Largey Lumber Co.*³³ lumber was piled negligently on the defendant's property, and the plaintiff, an employee of the defendant, was injured when it fell on him. After the plaintiff showed that the defendant was in charge of the piling and had been seemingly indifferent in his orders to workmen about the care to be taken in piling, the defendant moved for a non-suit on the ground that the evidence was insufficient to show negligence, but was overruled. Defendant then introduced evidence tending to show reasonable care on its part. The jury, however, found for the plaintiff. On appeal the court affirmed the decision saying:

"We think the doctrine of the maxim of 'res ipsa loquitur' is applicable to the facts of this case, and that the evidence offered by the plaintiff aided with the presumption which this doctrine raises makes out a *prima facie* case to go to the jury . . ."

In *John v. Northern Pacific Railway Co.*,³⁴ the plaintiff, a gratuitous passenger on the defendant's railroad, was injured when the sleeping car in which he was riding was derailed. Plaintiff proved the derailment and the injury, and the jury found in his favor. The judgment was affirmed on appeal, the court saying:

"But when the plaintiff has sustained and discharged this burden of proof by showing that the injury arose in consequence of the failure . . . of the carrier's means of transportation . . . then, in conformity

³²22 Mont. 445, 56 P. 867 (1899).

³³34 Mont. 151, 86 P. 29 (1906).

³⁴42 Mont. 18, 111 P. 632, 32 L.R.A. (N.S.) 85 (1910).

with the maxim, *res ipsa loquitur*, a presumption arises of negligence on the part of the carrier or his servants which unless rebutted by him *to the satisfaction of the jury* will authorize a verdict and judgment against him for the resulting damages." (Italics the court's).

Later in the same case it is said:

"If there is no countervailing evidence . . . the plaintiff is plainly, by force of this presumption, entitled to a verdict, and no sound reason is perceived why the judge should not be allowed to so instruct the jury."

In *Lyon v. Chicago, M. and St. P. Ry. Co. of Montana*,⁴⁸ the defendant railroad had excavated earth from the right of way to build up grades which were constructed near a river. The excavation left a barrow pit deeper than the river channel with only a small strip of land between the pit and the river serving as an embankment. In high water the embankment was washed away and debris was deposited on the plaintiff's land, the river also cutting a new channel through the plaintiff's land. Plaintiff alleged specific acts of negligence on the part of the defendant in the excavation. Plaintiff made out a prima facie case on the specific allegations, the jury, however, finding for the defendant. The judgment was affirmed on appeal, the court holding the plaintiff could not invoke *res ipsa* where she already had made out a prima facie case under specific allegations. The court said of *res ipsa*:

"The rule *res ipsa loquitur* invoked by appellant, when properly applied, operates to make out a prima facie case, but goes no further. It has the force and effect of a disputable presumption of law and supplies the place of proof necessarily wanting."

In *Johnson v. Herring*,⁴⁹ the plaintiff's six year old son was run over and killed by an ice truck driven by the defendant Herring who was an employee of the Great Falls Ice and Fuel Co., also a defendant. The facts showed a bright clear day and the accident occurred in an alley, 20 feet wide with no obstructions to view or passage. The truck entered the alley from the west and delivered some ice. Plaintiff's son and a friend tried to secure some ice while the driver was absent but left and walked east in the alley on the driver's return. The friend testified he didn't see the truck until it was almost upon him, and had to jump to get out of the way, and that the driver sounded no warning. When he looked around he saw plaintiff's son lying

⁴⁸50 Mont. 532, 148 P. 386 (1915).

⁴⁹89 Mont. 420, 300 P. 535 (1931).

in the middle of the alley. The driver testified he didn't see the boys and only stopped on hearing a "thump." He then picked up the boy, and took him to the hospital where he died thirty minutes later. The bruises on the body of the plaintiff's son were suspicious, being multiple while the attending physician testified that only one foot could have been passed over by the truck. A motion for non-suit by defendant was granted on this evidence and plaintiff appealed. The court reversed, holding the evidence showed plaintiff had made out a prima facie case, which, in the absence of any explanation would sustain a verdict in the favor of the plaintiff.

In *Maki v. Murray Hospital*⁴⁴ the doctrine was invoked by a patient in the defendant hospital, who, when out of his mind with erysipelas, jumped out of a third story window; the court, after calling it a prima facie case, said:

"In this state a presumption, which is 'a deduction which the law expressly directs to be made from particular facts' (Sec. 10602 Rev. Codes 1921), is 'indirect evidence,' (Sec. 10600 Id.), which can only be overcome by *other* evidence, and the explanation given by defendant must be satisfactory to overcome the prima facie case made" (Italics the court's).

The court said the only time this is not true is where defendant so satisfactorily explains the cause as to point to freedom from negligence with such certainty as to preclude any other reasonable hypothesis.

This latter quotation would seem definitely to put the case under the minority view. Also assuming our court is speaking of prima facie cases under its usual definition,⁴⁵ we would follow the minority view. It then seems very probable to this writer that the evidence arising from the doctrine in Montana creates a presumption or prima facie case which, if not rebutted, can be the subject of a directed verdict.

Some of the other characteristics of this prima facie case in this state should be noted. As usual the doctrine does not cast upon the defendant the burden of disproving negligence in the sense of making it incumbent upon him to establish freedom

⁴⁴91 Mont. 251, 7 P. (2d) 228 (1932).

⁴⁵A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called upon to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side. BLACK'S LAW DICTIONARY (Third Edition, 1933) p. 1414.

from negligence by a preponderance of the evidence.⁴⁶ All he has to do is present enough evidence to satisfy the jury that he was not negligent.⁴⁷ The jury is to weigh the defendant's rebuttal against the plaintiff's presumption from *res ipsa loquitur*.⁴⁸

Another procedural problem in *res ipsa loquitur* which is very important to the plaintiff's attorney is the matter of pleadings. Usually *res ipsa loquitur* is pleaded by a general allegation of negligence, on the theory that "the thing speaks for itself." Sometimes, however, specific pleadings are sought to be used. In this case there are four views that have been taken: (1) that the plaintiff by his specific allegations has waived or lost his right to rely on the doctrine; (2) that he may take advantage of it if the inference of negligence to be drawn supports the specific allegation; (3) that it may be applied only if the specific pleading is accompanied by a general allegation of negligence; (4) that it is available without regard to the pleading.⁴⁹

Montana is said to adopt the first view above. Prosser in his treatise on the subject cites Montana as falling within the first group,⁵⁰ on the strength of *Lyon v. Chicago M. and St. P. Ry. Co. of Montana*,⁵¹ where the court says:

"If the plaintiff is in position to allege the specific negligent acts which caused the injury, and can produce evidence in support of the charge sufficient to make out a *prima facie* case, the doctrine *res ipsa loquitur* cannot be invoked; for to apply it under such circumstances would permit the jury to give double weight to the evidence, first to the facts themselves; and also to the inference or presumption which the law deduces from the existence of those facts, or some of them."

It is clear from this, that if the plaintiff makes out a *prima facie* case on his specific allegations he has no right to invoke the doctrine in Montana; however, this is only reasonable and does not decide the main question as the plaintiff here has no real need of the doctrine in that case. If there is doubt whether he has proved the specific allegations, he may want to fall back on *res ipsa*, and what would happen if plaintiff pleaded specific allega-

⁴⁶*Maki v. Murray Hospital*, 91 Mont. 251, 7 P. (2d) 228 (1932); *Reynolds v. Jones*, 53 Mont. 251, 163 P. 469 (1917); *Vonault v. O'Rourke*, 97 Mont. 92, 33 P. (2d) 535 (1934).

⁴⁷*John v. Northern Pacific Railway Co.*, 42 Mont. 18, 111 P. 632, 32 L.R.A. (N.S.) 85 (1910).

⁴⁸*Vonault v. O'Rourke*, 97 Mont. 92, 33 P. (2d) 535 (1934).

⁴⁹PROSSER, *LAW OF TORTS*, § 44, p. 307 (1941).

⁵⁰PROSSER, *LAW OF TORTS*, § 44, p. 307, *ftnt.* 56 (1941).

⁵¹50 Mont. 532, 148 P. 386 (1915).

tions of negligence and also used a general allegation, and then could not make out a prima facie case under the specific allegations? Could he then invoke the res ipsa doctrine on the general allegations? This would seem to be the heart of the question, and it appears that it is undecided in this jurisdiction. In a doubtful case, the plaintiff cannot, when he draws the complaint, forecast with assurance that the court will find his case to be one within the doctrine. If he relies on the doctrine and alleges generally, the court may find the case not to be res ipsa with the result that he goes out on demurrer. If he alleges specifically, he may not be able to fall back on the doctrine even though the court finds it to be a res ipsa case. It would seem, therefore, that if the court finds the case to be within the doctrine, the pleader should be enabled to fall back on res ipsa even though he has alleged specifically, and especially if he has coupled the specific with a general allegation.⁵²

ROBERT APPELGREN

SUBSTITUTED SERVICE ON A NON-RESIDENT VENDOR OF MONTANA LAND

The equity maxim, "aequitas agit in personam," though shorn of its once pervasive vitality which was fostered by an attempt to promote rapport with the common law courts,¹ is still a living, moving force in the United States in the absence of statutory modification. However, even from very early times

⁵²Under date of March 15, 1952, the case of *Whitney v. Northland Greyhound Lines, Inc.*, 7 State Reporter 101, P. (2d) was decided by the Montana Supreme Court. In this case, the plaintiff, a bus passenger, sued to recover damage for personal injury due to the overturning of the bus. Verdict and judgment for the defendant below was reversed. One notes with satisfaction the majority opinion citing and relying on cases to the effect that where res ipsa is otherwise applicable, the plaintiff does not lose the benefit of the doctrine by alleging specific acts of negligence which his evidence fails to prove or only tends to prove. It is not, however, believed that the burden of proof shifts to the defendant in a res ipsa case. The dissenting opinion properly points out that the burden is on the plaintiff by a preponderance of the evidence to establish his case, and if, at the close of the evidence the minds of jurors are in equipoise, the plaintiff has failed; further, that the doctrine where applicable furnishes merely a permissible evidential inference which is not controlling on the jury, and that where the plaintiff elects to try his case on "evidence of a higher grade and degree" than that of permissible inferences without request for an instruction on res ipsa, there can be no reviewable error on which to postulate a reversal.

¹POMEROY'S EQUITY JURISPRUDENCE §§ 134, 135, pp. 183-186 (5th ed. 1941).