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GENERALLY, IT HAS BEEN HELD that the doctrine of *res ipsa loquitur* is not applicable against multiple defendants where it is not shown that their liability was joint or that they were in joint or exclusive control of the injury-producing factor, or where the specific wrongdoer, among several possible, was not identified.[1] A fundamental principle of *res ipsa loquitur* is that it is available to a plaintiff only when it operates substantially to identify the probable wrongdoer in a given situation.[2] The difficulty in applying the *res ipsa loquitur* doctrine in a joint tortfeasor situation is that:

> (1) the incident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action on the part of the plaintiff.[3]

This second stated element of the doctrine is the one which has generally defeated its application by most jurisdictions in a joint tortfeasor case.[4] It has been recognized that, as a general rule, where there are multiple defendants, any one of whom might have been at fault, it ordinarily is not proper to say that any one had exclusive control of the instrument or that any one had or should have had exclusive knowledge as to how or why the accident occurred.[5] Conversely, the doctrine has been held applicable against multiple defendants where they are properly charged as joint tortfeasors on the theory that the defendants were engaged in a joint enterprise or were in joint control of the instrumentality causing damage to the plaintiff.[6] The courts are therefore confronted with a dual

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1 Huggins v. Morrell & Co., 176 Ohio St. 171, 182, 198 N. E. 2d 448, 455 (1964); Joffre v. Canada Dry Ginger Ale, Inc., 222 Md. 1, 11; 158 A.2d 631, 637 (1960). As to pleading of joint torts, see, Oleck, Negligence Forms of Pleading, 457 et passim (1957 rev. ed.).

2 Huggins v. Morrell & Co., *supra* n. 1; Actiesselskabet Ingrid v. Central R. Co. of New Jersey, 216 F. 72, 79 (2d Cir. 1914), *reh. den.* 216 F. 991, *cert. den.* 238 U. S. 615, 59 L. Ed. 1490, 35 S. Ct. 284.

3 Prosser, Torts, 218 (3rd ed., 1964); Murphy v. City of New York, 19 App. Div. 2d 545, 240 N. Y. S. 2d 883 (1963); Schafer v. Wells, 171 Ohio St. 506, 511, 172 N. E. 2d 708, 711 (1961).

4 Huggins v. Morrell & Co., *supra* n. 1; Sanders v. Nehi Bottling Co., 30 F. Supp. 332 (1939); Gerber v. Faber, 54 Cal. App. 2d 674, 129 P. 2d 485 (1942); Shannon v. Jaller, 6 Ohio App. 2d 206, 217 N. E. 2d 234 (1966).

5 Meyer v. St. Paul-Mercury Indemnity Co., 61 So. 2d 901, 906 (La. App. 1952) (The court, however, felt this case was an exception to the rule); Monroe v. H. G. Hill Stores, 51 So. 2d 645, 648 (La. App. 1951).

6 Koskela v. Albion Lumber Co., 25 Cal. App. 12, 142 P. 851 (1914); Price v. McDonald, 7 Cal. App. 2d 77, 45 P. 2d 425 (1935); Pierce v. Schroeder, 171 Kan. 259, 232 P. 2d 460 (1951); Biondini v. Amship Corp., 81 Cal. App. 2d 751, 185 P. 2d 94 (1947); Woods v. Kansas City, K. V. & W. R. R. Co., 134 Kan. 755, 8 P. 2d 404 (1932).

problem when the doctrine of *res ipsa loquitur* is raised in a joint tortfeasor case. The first problem is whether or not the defendants can properly be considered as joint tortfeasors, hence more readily allowing application of the doctrine.[7] The second problem is whether the requirement of exclusive control interferes with the doctrine's application regardless of the legal relationship between the defendants.[8] In the first instance, if the defendants can be properly labeled as joint tortfeasors, the doctrine is more readily applied since the defendants may be considered as a single defendant.[9] In the second instance, even if the defendants combined in a joint tort against the plaintiff, the question as to which defendant was in "control," causing damage to the plaintiff, may be a serious one which would totally defeat the application of the doctrine.[10]

Besides a smattering of cases in a few jurisdictions which have allowed the application of *res ipsa* where there is present a joint tortfeasor situation,[11] the only two jurisdictions which have shown any consistency in doing so are Kansas and California.[12] The courts of the other jurisdictions have been reluctant to relax the strict requirements of *res ipsa* and generally the application of the doctrine against two or more defendants in a joint tortfeasor situation has not been so recognized, and in most of these cases has been strictly denied. This does not mean that the doctrine will not apply at all if there is present a joint tortfeasor situation. Consequently, the doctrine may be invoked against one of several defendants though it is not and can not be invoked against others.[13] It must be remembered that in applying the doctrine it is a question of a substantial probability that the defendant, or de-

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[7] Prosser, *op. cit. supra* n. 3 at 249, 258, 260.

[8] *Id.* at 224, 225; Harrison v. Sutter Street Ry. Co., 134 Cal. 549, 66 P. 787 (1901) (An early case which considered this problem and denied application of *res ipsa*).

[9] Koskela v. Albion Lumber Co., *supra* n. 6; Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183, 199 (1949).

[10] Actiesselskabet Ingrid v. Central R. Co. of N. J., *supra* n. 2; Wolf v. American Tract Soc., 164 N. Y. 30, 58 N. E. 31 (1900); Murphy v. City of New York, *supra* n. 3; Corcoran v. Banner Super Market, Inc., 20 A. D. 2d 552, 245 N. Y. S. 2d 175 (1963).

[11] Smith v. Claude Neon Lights, Inc., 110 N. J. L. 326, 164 A. 423 (1933); Bonner v. Boudreaux, 8 So. 2d 309 (La. App. 1942); Nichols v. Nold, 174 Kan. 613, 258 P. 2d 317 (1953); Loch v. Confair, 372 Pa. 212, 93 A. 2d 451 (1953).

[12] Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P. 2d 740 (1935); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P. 2d 687 (1944) (Held not applicable in situation where "a conscious person receives an injury from a known object in a known way," Gobin v. Avenue Food Mart, 2 Cal. Rptr. 822, 824 [Cal. App. 1960]); Raber v. Tumin, 36 Cal. 2d 654, 226 P. 2d 574 (1951); Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (1948); Nichols v. Nold, *supra* n. 11; Waterbury v. Riss, 169 Kan. 271, 219 P. 2d 673 (1950); Blue Stem Feed Yards, Inc. v. Craft, 191 Kan. 605, 383 P. 2d 540 (1963); Whitby v. One-O-One Trailer Rental Co., 191 Kan. 653, 383 P. 2d 560 (1963).

[13] Armstrong v. Wallace, *supra* n. 12; Godfrey v. Brown, 220 Cal. 57, 29 P. 2d 165 (1934); Shannon v. Jaller, *supra* n. 4; Robinson v. Nightingale, 188 Kan. 377, 362 P. 2d 432 (1961).

fendants, have been negligent, and in those jurisdictions other than Kansas and California where the doctrine has been applied against a defendant when several defendants are before the court, this question of probability has been based on the theory of control.[14] In the jurisdictions of Kansas and California which have not relied on the element of control, the doctrine of *res ipsa loquitur* has been applied against one of several defendants, regardless of their relationship, because it was more probable than not that a specific defendant was the negligent party.[15] This question of probability is resolved by the evidence presented before the court (essentially circumstantial in nature, otherwise the plaintiff would not require, or be allowed the use of the doctrine if he has direct evidence). In California, the doctrine of *res ipsa loquitur* is applied and creates an inference of negligence on the part of the defendant where, in the light of past experience, (1) the accident was probably the result of someone's negligence and (2) the defendant was probably the responsible person.[16]

It is easily seen that the application of *res ipsa* against a single defendant, if the generally recognized elements are present, poses no great problem to the court. The really substantial question is whether, if the plaintiff relies upon *res ipsa* in his case, the court will allow the use of the doctrine against one or more defendants in a joint tortfeasor case, or against them regardless of their legal relationship.[17]

The leading case which applied the doctrine of *res ipsa loquitur* against two or more defendants in a joint tortfeasor situation is *Ybarra v. Spangard,*[18] in which the plaintiff brought an action to recover for an injury which he allegedly received while unconscious and a patient in the hands of several doctors and nurses. If the exact requirements for *res ipsa* to apply had been followed by the court, the use of the doctrine against all the defendants would be highly questionable.[19] The case is a perfect example of the relaxation of the control element of *res ipsa,* thereby allowing its application in a joint tortfeasor situation.[20]

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[14] Shannon v. Jaller, *supra* n. 4; Jensen v. Linner, 260 Minn. 22, 108 N. W. 2d 705 (1961).

[15] Fowler v. Seaton, 39 Cal. Rptr. 881, 394 P. 2d 697 (1964); Armstrong v. Wallace, *supra* n. 12; Robinson v. Nightingale, *supra* n. 4; However, see dissenting opinion of Justice Traynor in Raber v. Tumin, *supra* n. 12, at 579; Also see Berryman v. Bayshore Construction Co., 207 Cal. App. 2d 331, 24 Cal. Rptr. 380 (1962).

[16] Inouye v. Black, 47 Cal. Rptr. 313, 315 (Cal. App. 1965); Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 41 Cal. Rptr. 577, 397 P. 2d 161 (1964); Faulk v. Soberanes, 56 Cal. 2d 466, 363 P. 2d 593 (1961).

[17] *Supra* n. 7.

[18] *Supra* n. 12.

[19] Voss v. Bridwell, 188 Kan. 643, 364 P. 2d 955 (1961); Note, Res Ipsa Loquitur Against Multiple Defendants, 52 Columbia L. Rev. 537, 538-539 (1952).

[20] Prosser, *op. cit. supra* n. 3 at 227-228.

This problem of who, among several defendants, was probably the responsible person, as well as the problem of who, among the several defendants, had control of the injury-causing instrumentality, did not deter the court from applying *res ipsa* against all the defendants. This case represents the extreme view of the doctrine's application (applying *res ipsa* against all the defendants) in a joint tortfeasor situation.[21] The court felt the case was representative of a joint tortfeasor situation, that all the defendants owed the plaintiff a duty of a high degree of care, and that the defendants could be considered as involved in a joint enterprise.[22] The application of the doctrine was aided by the fact that the plaintiff was unconscious during the period in which his injury was probably inflicted. The defendants were in a better position than the plaintiff to explain the occurrence leading to the injury.[23] This aspect of superior knowledge on the part of the defendants has been used in California and Kansas to aid the courts in applying the doctrine against several defendants,[24] whereas the aspect of control has been either minimized, avoided or disregarded.[25]

Dean Prosser believes that the element of control by the defendant which the plaintiff must show to apply the doctrine is misleading, since there are a great many situations in which the defendant's responsibility is apparent even though the instrumentality causing injury to the plaintiff is in the control of another.[26] Another problem with the control element of *res ipsa* is that a tort situation rarely arises in which it can be said there is actual joint control of the instrument causing injury by two or more defendants. The control is usually successive,[27] or at the most concurrent[28] in nature, thereby making it even more difficult to say that any one of several defendants had exclusive control,

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21 Res Ipsa Loquitur Against Multiple Defendants, *op. cit. supra* n. 19.

22 Prosser, *op. cit. supra* n. 9 at 223; But see Seavey, Res Ipsa Loquitur: Tabula in Naufragio, 63 Harv. L. Rev. 643, 648 (1950).

23 Ybarra v. Spangard, *supra* n. 12.

24 *Ibid.*; Nichols v. Nold, *supra* n. 11.

25 As stated in Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 247 P. 2d 344, at 348, "The requirement of control is not an absolute one." The test should be one of right of control and not actual control. Also see Metz v. Southern Pac. Co., 51 Cal. App. 2d 260, 124 P. 2d 670 (1942).

26 Prosser, *op. cit. supra* n. 9 at 199-200; Knell v. Morris, 39 Cal. 2d 450, 247 P. 2d 352 (1952) (Landlord-Contractor case); Weddle v. Loges, 52 Cal. App. 2d 77, 125 P. 2d 914 (1942) (Principal-Agent); Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. 2d 969 (1936) (Landlord's Non-delegable Duty).

27 Ybarra v. Spangard, *supra* n. 12; Loch v. Confair, *supra* n. 11; Nichols v. Nold, *supra* n. 11.

28 Armstrong v. Wallace, *supra* n. 12; Smith v. Claude Neon Lights, Inc., *supra* n. 11; Weddle v. Phelan, 177 So. 407 (La. App. 1937), moving car in which plaintiff, a passenger, was hit from behind by a truck. But is this a true *res ipsa* situation? See 48 Harv. L. Rev. 328 (1934).

or that the defendants were in joint control, in order to apply the doctrine against any or all of them.[29]

In Kansas, in the case of *Robinson v. Nightingale, res ipsa* was applied against one of three defendants, though it was argued that there was joint control of the instrument, in this case an overhead hoist which fell on the plaintiff truck driver, and that *res ipsa* be applied against all.[30] The court stated, "in reaching the foregoing conclusion we note that in applying the doctrine in *Nichols v. Nold*,[31] there was no finding that the multiple defendants were joint tortfeasors, or that they were in joint control of the instrumentality."[32] The court seemed to be struggling with the problem of exacting a satisfactory definition for joint tortfeasors and the element of control which is ordinarily required to apply the *res ipsa loquitur* doctrine.[33] It would seem that in Kansas, the requirement of control of *res ipsa loquitur,* which would ordinarily defeat application of the doctrine in a joint tortfeasor situation, is held subordinate to the possibly more demanding theory of strict liability, or liability without fault, of manufacturers, contractors, etc.[34] The federal courts are satisfied by finding "dominant" control, in joint tort cases, rather than "exclusive" control.[35]

Those courts which have disregarded the control element believe that in applying the doctrine the fact that evidence as to the true explanation of the injury-causing event is more readily accessible to the defendant than to the plaintiff should be recognized.[36] There is much to be said for this condition, especially in the medical malpractice cases where the plaintiff is unconscious[37] or under anesthesia during an operation.[38] Also, when there are two or more defendants who may have been negligent, the plaintiff may have difficulty in showing which de-

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[29] McCoid, Negligence Actions Against Multiple Defendants, 7 Stan. L. Rev. 480, 491 (1955); Richter, Note, The Application of Res Ipsa Loquitur in Suits Against Multiple Defendants, 1954 Wash. U. L. Q. 215, 227; Seavey, *supra* n. 23 at 646.

[30] *Supra* n. 13.

[31] *Supra* n. 11 (A leading Kansas case in which *res ipsa* was applied against bottler, manufacturer, and retailer joined by a plaintiff injured by an exploding bottle).

[32] *Supra* n. 13, 362 P. 2d at 437.

[33] *Id.* at 436.

[34] Annot., Contractor-Liability to Third Person, 58 A. L. R. 2d 865, 870 (1958).

[35] Taylor v. Reading Co., 83 F. Supp. 804 (D. C. Penna. 1949).

[36] This phase of the doctrine is supported by several distinguished legal writers. Prosser, *op. cit. supra* n. 3; Jaffe, Res Ipsa Loquitur Vindicated, 1 Buff. L. Rev. 1 (1951); Carpenter, The Doctrine of Res Ipsa Loquitur in California, 10 So. Cal. L. Rev. 166 (1937).

[37] Huffman v. Lindquist, 37 Cal. 2d 465, 234 P. 2d 34 (1951).

[38] Meyer v. St. Paul-Mercury Indemnity Co., *supra* n. 5; Ybarra v. Spangard, *supra* n. 12; Dierman v. Providence Hosp., 31 Cal. 2d 290, 188 P. 2d 12 (1947); Cavero v. Franklin General Benev. Soc., 36 Cal. 2d 301, 223 P. 2d 471 (1950); Seneris v. Haas, 45 Cal. 2d 811, 291 P. 2d 915 (1955); Leonard v. Watsonville Community Hosp., 47 Cal. 2d 509, 305 P. 2d 36 (1957).

fendant was negligent without the defendants giving testimony.[39] Dean Prosser has stated that such an element would make "sheer ignorance . . . the most powerful weapon in the law." [40]

Laying aside the problems heretofore discussed for a moment, let us take a look at another phase of *res ipsa* which must be discussed in order to appreciate and understand fully the problem of its application in a joint tortfeasor situation. This phase involves the doctrine's procedural effect once it is applied.[41]

It is generally recognized that *res ipsa loquitur* is not a rule of law but a type of circumstantial evidence which may permit an inference of negligence to be drawn by the jury.[42] A few courts have given the doctrine the effect of a presumption, *i.e.*, a directed verdict for the plaintiff will be given unless the defendant comes forward with sufficient evidence to meet it.[43] In a 1954 California case, the court stated that the doctrine of *res ipsa* raises not a presumption, but an inference of a "special kind" which the defendant must rebut.[44] Recently, this "inferential presumption" was extended further in California by a decision which allowed its use in a non-jury case.[45] It is conceded, though, that most jurisdictions merely treat the doctrine as a type of circumstantial evidence which permits an inference of negligence to be drawn by the jury.[46] In the case of *Waterbury v. Riss,* the court stated:

> The doctrine of *res ipsa loquitur* is not one of substantive law, but is one pertaining to evidence. Where it is relied upon alone it simply means that certain facts and circumstances raise an inference or presumption of liability.[47]

Similarly, as recognized in Ohio, *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

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[39] Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (1948), plaintiff was simultaneously shot at by two hunting companions.

[40] Prosser, Res Ipsa Loquitur: A Reply to Professor Carpenter, 10 So. Cal. L. Rev. 459, 464 (1937). But see Ireland v. Marsden, 108 Cal. App. 632, 644, 291 P. 912, 917 (1930), where the court stated, "'I do not know,' does not explain anything." Also, see, Ybarra v. Spangard, *supra* n. 12, where the court was not satisfied with the defendants' explanations.

[41] Prosser, *op. cit. supra* n. 3 at 232-239.

[42] Renneckar v. Canton Terminal Restaurant, Inc., 148 Ohio St. 119, 73 N. E. 2d 498 (1947); Prosser, *op. cit. supra* n. 3 at 233; Marzotto v. Gay Garment Co., 11 N. J. Super. 368, 78 A. 2d 394, aff'd., 7 N. J. 116, 80 A. 2d 554 (1951); George Foltis, Inc. v. City of New York, 287 N. Y. 108, 38 N. E. 2d 455 (1941).

[43] Weiss v. Axler, 137 Colo. 544, 328 P. 2d 88 (1958); Florence Coca Cola Bottling Co. v. Sullivan, 259 Ala. 56, 65 So. 2d 169 (1953); Prosser, *op. cit. supra* n. 3 at 234; See also Simpson v. Gray Line Co., 226 Ore. 71, 358 P. 2d 516 (1960), which overruled four prior cases which had given the doctrine the effect of a presumption.

[44] Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041 (1954).

[45] Seely v. Combs, 52 Cal. Rptr. 578, 416 P. 2d 810 (Cal. App. 1966).

[46] Prosser, *supra* n. 42.

[47] *Supra* n. 12, 219 P. 2d at 685-686.

negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as conclusive.[48]

When it is seen that the application of the doctrine is a procedural one involving the laws of evidence and of proof, then perhaps there should be no real controversy as to its application at all. Ultimately, the problem is really one involving fact situations which differ widely and the evidence and facts presented must be resolved by the trier of fact. In the cases studied, there seem to be few instances in which the eventual outcome was unjustified. It must be understood that although the application of the doctrine was the main issue in these cases, in many instances their eventual outcome was or may have been decided on other factors or issues.[49] Also, the problems of proof and the legal procedures in negligence cases vary from jurisdiction to jurisdiction. Thus, irrespective of the moot question of the doctrine's application, the case should be eventually justly resolved, under the facts, by the triers of fact.

It is obvious that *res ipsa* is a plaintiff's doctrine and that the courts through the years have relaxed its requirements in order to avoid the injustice of non-suiting plaintiffs where it was clear that these plaintiffs should recover for their injuries.

In these cases of a *res ipsa* nature, more often than not it is quite difficult for a plaintiff to come forward with any direct evidence. Thus, if there are several defendants, to sue, even if they are joint tortfeasors, the plaintiff is often stymied because he cannot prove which one is negligent. According to Dean Prosser,

> It is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where it is clear that it is at least equally probable that the negligence was that of another, the court must direct the jury that the plaintiff has not proved his case.[50]

Thus the courts have resorted to other explanations to allow plaintiffs' recoveries where it was possible the plaintiffs might be non-suited and a gross injustice be effected. We see this situation in the California medical malpractice cases as explained in a recent California case by Justice Friedman:

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[48] Renneckar v. Canton Terminal Restaurant, Inc., *supra* n. 42, 73 N. E. 2d at 500; Shafer v. Wells, *supra* n. 3, 172 N. E. 2d at 711-712.

[49] Loch v. Confair, *supra* n. 11; Nichols v. Nold, *supra* n. 11; Annot., Contractor—Liability to Third Person, *supra* n. 35. See also the effect of the rule of Rylands v. Fletcher as expressed in the Actiesselskabet case, *supra* n. 2, but compare Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020 (1895).

[50] Prosser, *supra* n. 3 at 222.

> A group of persons and instrumentalities may combine in the performance of a medical procedure culminating in an unexpected, mysterious and disastrous result. With the sources of disaster personified in a group of defendants, the demand for evidence pointing the finger of probability at any one of them is relaxed; all may be called upon to give the jury evidence of care.[51]

Although it is seen that California has relaxed the requirements of *res ipsa* in joint tortfeasor cases, an exception is present in the exploding bottle cases where the plaintiff joins the manufacturer, bottler, shipper, and even the retailer as defendants.[52] The courts in these cases have held that in order to apply *res ipsa* the plaintiff must show that the bottle causing the injury was not mishandled or tampered with by others.[53] The only rationale behind the application of the doctrine against several defendants in these cases is based on the theory of strict liability.[54]

There seems to be no reason why the doctrine should not apply if there is vicarious liability between the defendants, or if there is present a true joint tortfeasor situation, that is, if the defendants acted jointly or in concert or if they were in joint control of the instrumentality causing injury. The defendants should then have the burden of showing that they acted with due care.[55] The effect, then, of applying the doctrine would be that of a presumption and not an inference, thereby requiring the defendants to come forward with evidence sufficient to show they were not negligent. The issue would thus be joined, and the jury could weigh the evidence.[56] This rule has been suggested because it would accomplish two things: first, it would allow recovery from injuries for plaintiffs as against those defendants who fail to produce exculpating evidence,[57] and second, those defendants who are clearly not negligent are given the chance to avoid any liability.[58] Disallowing the fact of

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[51] Inouye v. Black, *supra* n. 16 at 316.

[52] Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 203 P. 2d 522 (1949); Zentz v. Coca Cola Bottling Co., *supra* n. 26; McClelland v. Acme Brewing Co., 92 Cal. App. 2d 698, 207 P. 2d 591 (1949).

[53] Huggins v. Morrell & Co., *supra* n. 1 (Ohio follows a similar rule in not holding *res ipsa* applicable in exploding-bottle cases involving multiple defendants). Most interesting is the case of Koktavy v. United Fireworks Mfg. Co., Inc., 160 Ohio St. 461, 52 Ohio Op. 351 (1954), where Justice Zimmerman, in a dissenting opinion, felt the plaintiff had overcome this seemingly impossible burden. See also Hadley v. Hillcrest Dairy, Inc., 341 Mass. 624, 171 N. E. 2d 293 (1961), and Pound, The Problem of the Exploding Bottle, 40 B. U. L. Rev. 167 (1960).

[54] Nichols v. Nold and Loch v. Confair, *supra* n. 11; Dissenting and concurring, in part, opinion of Justice Traynor in Gordon v. Aztec Brewing Co., *supra* n. 52, 203 P. 2d at 532. ". . . a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."

[55] Richter, *op. cit. supra* n. 30.

[56] *Id.* at 231.

[57] *Id.* at 232.

[58] *Id.*

vicarious liability or of actual joint liability, this rule would allow the courts to apply *res ipsa* against two or more defendants in those joint tortfeasor cases where it would be unjust to deny plaintiff recovery, or where it is evident that the plaintiff is at a disadvantage in producing adequate evidence to prove his case.[59] Of course, it is material that the plaintiff must fully show that *res ipsa* applies, in order to avoid attempts on the part of plaintiffs to shift the burden of proof in negligence cases merely by invoking the doctrine.[60]

It is quite clear that the problem of applicability of the doctrine in joint tortfeasor cases is based upon the fact that the doctrine was evolved when the courts were confronted with tort cases involving one plaintiff and one defendant. It is to the credit of our courts that in most cases they have not allowed the doctrine to be totally defeated when two or more defendants are before it, basing this distinction on the aspect of probability of negligence in some cases and on the element of control in others. It may not be to their credit that a few of them have allowed the doctrine to be applied against all defendants irrespective of their defendants' legal relations, although this alleged injustice is open to question. Have the courts in these cases really placed that much of an unjust burden upon the defendants? Depending on the procedural effect and the legal weight given to the doctrine, the problems of proof and the rules of evidence in negligence cases in these jurisdictions, perhaps the courts were justified in their decisions.

As suggested by one writer, it would appear that a just rule in applying the doctrine would be to give it the effect of requiring some explanation from the defendants.[61] The problem of whether or not this explanation is confronted by a presumption or an inference of negligence is a highly controversial one[62] and could be resolved only by the policy or procedure of each independent jurisdiction.

No definite solutions or answers to the problems are presented since the legal complexities involved have already been thoroughly reviewed by other writers, including legal academicians of great learning and reputation.[63] It is hoped that the reader has been enlightened as to the problems which will be confronted, and their possible solutions, when the *res ipsa loquitur* doctrine is raised in a joint tortfeasor case.

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[59] *Id.*

[60] Voss v. Bridwell, *supra* n. 20.

[61] McCoid, *op. cit. supra* n. 30 at 505.

[62] Carpenter, *op. cit. supra* n. 36; Jaffe, *op. cit. supra* n. 36; Prosser, *op. cit. supra* n. 9; Seavey, *op. cit. supra* n. 23.

[63] Seavey, Law of Torts, 171 (2d ed., 1964). For an extensive list see McCoid, *op. cit. supra* n. 30, footnote 1 at 480.