

# Guiding large language models to write legal treatises

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## Introduction

This paper introduces Restatements (Artificial) of Law, an open-source architecture for guiding large language models to produce legal treatises based upon the language model's understanding of a particular set of legal cases. For this application, a user provides a set of cases and a description of the legal issue to be addressed, and the application manages a sequence of calls to a large language model instructing it to read cases, write notes, and use those notes to construct a legal treatise — all without a human in the loop. (Mialon 2023, Wei 2023, Mamooler 2022, Wu 2022, Dong 2023, Lou 2023).

The process looks like this: The user provides the application with a short description of a legal topic and the raw text files of a set of legal opinions from jurisdictions across the country. For each legal opinion, the application calls upon an LLM to write a casebrief: a set of notes that captures each opinion's relevant facts, legal issues, holding, and reasoning. The application stores these casebriefs so that the application can later retrieve relevant casebriefs for subsequent LLM calls. Next, the application asks the LLM to extract from the casebriefs legal rules related to the topic the restatement is addressing. The LLM then analyzes that list, grouping similar rules together to create an overview of the various — often conflicting — legal rules for that legal topic across the country. Through a sequence of API calls, the LLM uses these notes as source material to write new notes discerning the best legal rule, writing a commentary on that rule, creating illustrative examples of the rule applied to facts, and writing a Reporter's Note documenting the legal cases that support all of these assertions.

Following this multi-step process, the application can produce a Section of a Restatement of Law that is worth analyzing. The legal rules reflect the legal sources provided, the Comments provide background information and colorful hypotheticals, and the Reporter's Note references the caselaw that supports the assertions made. But the application's outputs are far from perfect. The legal rules can drift off topic and often lack the precision of a carefully drafted provision. The Comments and Reporter's Note are repetitious and reflect the generic writing style of large language models.

So what's the point? This project is a prototype and a resource for open-source research into legal reasoning with large language models. Large language models seem like they're poised to take over many legal research and writing tasks, but we're still not sure of their capabilities and limits. We need better insights into legal reasoning with large language models, and the way to better insights is open-source architecture. This application is available as open-source code for researchers to run experiments and remix components. Opportunities for future research include evaluating the

performance of large language models on difficult legal reasoning tasks, exploring ways to improve LLM performance with better architecture and prompt engineering, gaining insight into LLM’s emergent legal reasoning capabilities, and using the outputs of this process to critique human performance with similar legal reasoning and writing tasks.

## Process

This section of the paper walks through the architecture of the application at a conceptual level and has been written for legal and computer-science readers alike. The codebase for the project is available on GitHub under an MIT license.<sup>1</sup> The documentation for the Python codebase provides a more detailed, technical, step-by-step explanation of the classes, methods, and functions.

But first, why choose Restatements of Law? Restatements can be a fertile resource for evaluating LLM performance at legal tasks. Published by the American Law Institute, Restatements of the Law are influential treatises that attempt to clarify the law by articulating black letter rules, providing commentary on those rules, and demonstrating the application of those rules with illustrative examples. (Revesz 2019). Although large language models seem up to the task of summarizing analysis of caselaw that humans have already performed, language models’ competency at independently analyzing and synthesizing caselaw is uncertain. (Shukla 2022, Yang 2023). To create restatement provisions, a large language model must do more than simply summarize cases. Writing restatement provisions requires resolving conflicts across jurisdictions, addressing discrepancies in how legal rules are framed, handling ambiguity and gaps in common law, reflecting trends across case law over time, and choosing the best available legal rule among multiple options. The tension at the heart of the restatement process is between, “the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.” (American Law Institute 2015).

To create this architecture, we start with the human process for writing a Restatement of Law. This process has already been described in detail by the American Law Institute in the official style guide for drafting Restatements. (American Law Institute 2015). The process for Restatements (Artificial) mimics the process a human researcher would go through to compose a restatement. The different steps that a human researcher would take — reading cases, taking notes on particular issues, tracking discrepancies, editing drafts, and so on — are broken up into separate API calls to a large language model. The output of these calls is saved and organized for the application to retrieve — typically to inject as source material within a prompt for a subsequent call to the LLM.

The application follows this sequence:

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<sup>1</sup> Note for reviewers: at the time of submitting this paper, I had not yet made the codebase publicly available on GitHub because I needed to clean up the documentation. The codebase will be made public soon (perhaps it is already at the time that you are reading this) and long before the December decision deadline for this conference.

**User Input** To start the process, the user names the Restatement, describes what legal issue being addressed within this section of the Restatement, and provides a folder of legal opinions and statutes related to this legal issue.

**Brief cases:** For each legal opinion that the user provided, the application calls upon an LLM to create a casebrief, which is a set of notes on the important legal information from the case.

**Group provisions:** As a first pass, an LLM extracts from the casebriefs any legal rules that may be relevant to the legal issue being addressed in this section of the restatement. As a second pass, the LLM organizes those rules into groups that represent the different variations of the legal rule across the country.

**Discern legal rule:** This stage is more analytical and normative: discerning the legal rule that the Restatement should adopt. Following a set of considerations laid out in ALI's style guide, the LLM is asked to use its notes on legal rules to take a new set of notes on the majority rule, trends in the law, which rules fit in best with the body of law as a whole, which rules produce more desirable outcomes, and which rules best align with the purpose of the Restatements. The LLM is then asked to rely on these notes to discern the best rule and draft the black-letter law provision.

**Write Comment:** Following the black-letter law provision in every section of a Restatement is a list of comments explaining the law. An LLM is called upon to create an outline for the Comments that explain the legal rule and then cycles through each part of the outline, writing the relevant commentary.

**Create Illustrations:** The Comment part of a Restatement includes short illustrations which are hypothetical examples of how the legal rule would operate for a particular set of facts. For each part of the comment, the application asks the LLM to write a set of Illustrations.

**Write Reporter's Note:** The last part of a Restatement section is the Reporter's Note, which provides case citations (and sometimes case descriptions) for the cases relied upon by the Comment and Illustrations. For this stage, the application calls upon an LLM to write citations and case descriptions based on the casebriefs that are semantically similar to the comment being addressed.

#### Example: Res Ipsa Loquitur

Let's examine this process in further detail using an example of asking the application to write a Section of the Restatement of Torts on the legal issue of res ipsa loquitur. In tort law, to prove that a defendant was negligent, plaintiffs typically have to establish that the defendant was legally obligated to exercise some standard of care and that the defendant did not exercise that standard of care under the circumstances. Res ipsa loquitur — a Latin phrase meaning “the thing speaks for itself” — is a tort law doctrine that allows plaintiffs to prove that the defendant was negligent by the nature of the accident itself. The justification for the doctrine is that there are some kinds of harms that occur only because of negligence, and in those circumstances the plaintiff should have to prove only that the harm occurred and that the defendant was responsible.

The doctrine of res ipsa loquitur serves as a good example for Artificial Restatements because it challenges the application in particular ways. The rule is not uniform across the country at present and the rule has changed over time. As a general rule of tort

law, it is applicable in a variety of contexts: from tires falling loose from a truck and hitting another car to doctors making a mistake during surgery. Because of all these considerations, *res ipsa loquitur* may also require a technical, precise legal rule — something we might expect an LLM to miss because LLMs are guided by semantic similarity, not legal logic. There is also likely to be a difference between where training data alone would lead LLM and where notes developed from case law would lead the LLM.

### User input

The first step is the only human input within the process. After providing this starting material and information, the application works autonomously through each of the intermediary steps to produce a final draft of a restatement section.

For this example, I provided the application with:

- A title: § 17 Res Ipsa Loquitur
- An area of law: Torts
- A description of the Section: This Section addresses *res ipsa loquitur*, which is a particular method for proving the existence of negligence.
- A folder with 173 cases from across the country that address *res ipsa loquitur*. The cases were selected because they were the cases that the Restatement (Third) of Torts cited as references on a Section defining *res ipsa loquitur*.

### Brief cases

We want the application to write a Section of a Restatement based on its understanding of the cases that the user provided. A necessary first step is to transform dense legal opinions into a set of relevant notes called casebriefs. A casebrief is a set of notes on the important legal information from the case: the legally relevant facts, legal issues addressed, the court's holding, the reasoning behind the holding, and the reasoning of any dissenting opinions. For each legal opinion that the user provided, the application gives the text of the case to the LLM with instructions for producing a set of notes that capture the essential case information. Writing case briefs is a fundamental lawyering task that every first-year law student learns to do. The prompt instructions were largely copied from Orin Kerr's "How to Read a Legal Opinion," a short article often assigned to first-year law students to instruct them on case briefing. (Kerr 2007). Here is one of the 173 casebriefs that the application produced:

Case Name: Doyle v. RST Construction Specialty, Inc.

Citation: 286 Ga.App. 53, 648 S.E.2d 664, 07 FCDR 2029

Jurisdiction: Court of Appeals of Georgia

Year: June 21, 2007

Facts: William Doyle was waiting at a light when a dump truck owned by RST Construction Specialty, Inc. and driven by Derrick Cheek turned right onto the road. The truck was hauling a trailer with an excavator, which fell off the trailer and landed on Doyle's car, causing him serious injuries. Cheek admitted that Doyle was not at fault and that he and his crew were solely responsible for loading the excavator

onto the trailer. Cheek also mentioned that the road's pitch may have contributed to the accident.

Procedurally, Doyle appealed from the jury's defense verdict in their personal injury case against RST Construction Specialty, Inc. and Derrick Cheek.

Issues: The main issue is whether the trial court erred in refusing to give Doyle's requested charge on *res ipsa loquitur*.

Holding: The trial court erred in refusing to give Doyle's requested charge on *res ipsa loquitur*.

Reasoning: *Res ipsa loquitur* is a rule of evidence that allows the jury to infer negligence from the manner of the occurrence of the injury or the attendant circumstances. The plaintiff must establish three elements for this rule to apply: (1) the injury would not occur in the absence of negligence, (2) the injury was caused by an agent or instrument within the defendant's exclusive control, and (3) the injury was not due to any voluntary action or contribution on the plaintiff's part.

In this case, Doyle established these elements. The accident of a 15.8-ton machine falling off a trailer without explanation and crushing a driver sitting at a stop light is an extraordinary event. Cheek admitted that trailers do not ordinarily roll over in this or any other intersection. Cheek was in exclusive control of the truck and trailer, and Doyle did nothing to cause the accident.

The trial court erred in refusing to give Doyle's requested charge on *res ipsa loquitur*. The failure to give the charge was harmful error, and therefore, the judgment is reversed, and the case is remanded for a new trial.

The application stores the casebriefs as a list and as a vector database. Storing the casebriefs as individual entries in a vector database allows the application to selectively include particular casebriefs in subsequent LLM calls. For later LLM calls, casebriefs will often be included as part of the prompt based upon the casebriefs semantic similarity to the issue that the LLM needs to address.

Depending on the number of cases provided by the user, briefing cases can be very time consuming and costly, as each case requires at least one API call to the large language model. Longer cases that exceed the model's context window are split into smaller, context-sized chunks. The application asks the LLM to summarize each of these chunks, combines the chunks together, and has the LLM write a case brief based on the condensed version of the opinion. If the condensed opinion still exceeds the context window, the condensing process is repeated until the opinion fits within the context window.

### Group provisions

A set of case briefs is more manageable than the raw text of legal opinions, but it's still an unwieldy amount of unorganized information. The next stage in the process tries to assemble a set of notes that represent an organized overview of the law across these

cases. The application instructs the LLM to read through each casebrief to extract any legal rules and reasoning that are relevant to the legal topic of the restatement section. Here's an excerpt of what the application produced for res ipsa loquitur cases:

Provision: Res ipsa loquitur is a rule of evidence that allows the jury to infer negligence from the manner of the occurrence of the injury or the attendant circumstances. The plaintiff must establish three elements for this rule to apply: (1) the injury would not occur in the absence of negligence, (2) the injury was caused by an agent or instrument within the defendant's exclusive control, and (3) the injury was not due to any voluntary action or contribution on the plaintiff's part. Case name: Doyle v. RST Construction Specialty, Inc. Jurisdiction: Court of Appeals of Georgia Year: 2007

Provision: Res ipsa loquitur allows an inference of negligence to be drawn if the accident is of a kind that would not normally occur without negligence. In this case, the escape of the cows was an event that would not normally occur without negligence, and the defendants had exclusive control over the cows. Case name: Watzig v Tobin Jurisdiction: Supreme Court of Oregon Year: 1982

Provision: Res ipsa loquitur is applied in negligence actions as a permissible inference that the thing speaks for itself. However, the plaintiff failed to satisfy all the elements of res ipsa loquitur, including the element of "control," which requires that the injury be traced to a specific instrument for which the defendant was responsible. Case name: Cyr v. Green Mountain Power Corp. Jurisdiction: Supreme Court of Vermont Year: 1984

This list of rules is sent back to the LLM, which is prompted to organize those rules into groups that represent the different variations of the legal rules related to this legal issue from across the country.

### Discern Legal Rule

Now we enter the decidedly normative part of the restatement process. Having condensed the caselaw down to a set of legal rules, the application must decide on the preferred rule for the restatement.

Following the instructions that the ALI style guide provides on writing a restatement of law, the application takes a five step process. In sequence of separate API calls, an LLM is instructed to use its previous notes as reference material to:

- ascertain the majority rule
- ascertain trends in the law
- determine what specific rules fit best with the broader body of law and therefore lead to more coherence in the law
- ascertain the desirability of competing rules
- consider the best rule in light of the purpose of Restatements of Law

The prompt for each of these API calls is derived from the API style guide's instructions on what matters in discerning the appropriate legal rule for a black-letter law provision of a section of a restatement. Because the output of these LLM calls is a set of notes to be used to draft the black-letter law provision, the prompts also

incorporate “chain of thought” prompting to encourage the model to document a thought process and reason more accurately. (Wei 2023).

Using the outputs of these previous steps as notes, the application calls upon an LLM to draft the black-letter law provision through the following steps:

- discern the best legal rule for the black-letter law provision of this section of the restatement
- write the black-letter law provision
- edit the first draft of the black-letter law provision to conform with ALI style guidelines

In this instance, the legal rule that the application arrives at is:

#### § 17 Res Ipsa Loquitur

(a) The doctrine of res ipsa loquitur is applicable when the injury is of such a nature that it ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury was under the exclusive control of the defendant.

(b) The plaintiff is not required to conclusively eliminate all other possible causes, but must provide evidence that makes it more probable than not that the injury was a result of the defendant's negligence.

(c) In medical malpractice cases, expert testimony is generally necessary to establish negligence and causation, unless the absence of reasonable care or the existence of proximate cause is evident to an average layperson based on common knowledge or experience.

(d) The doctrine should not be employed to infer negligence where the plaintiff's evidence points to specific acts, which are in dispute, and where equal evidence exists to support the contention that the defendant was not negligent.

(e) The plaintiff's freedom from contributory negligence should not be a prerequisite to invoke the doctrine. The analysis should focus on whether the defendant's inferred negligence was more likely than not a cause of the injury, even if the plaintiff's own negligence contributed to the injury.

As a point of comparison here is the Restatement (Third) of Torts provision on res ipsa loquitur:

The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.

Restatement (Third) of Torts: Phys. & Emot. Harm § 17 (2010).

And here is the Restatement (Second) of Torts' approach:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

- (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
  - (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
  - (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
- (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.
- (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

Restatement (Second) of Torts § 328D (1965).

There's not enough space in this paper to explore all of the difference between these restatements, but a few points are worth noting. First, the application has not produced gibberish. The black-letter law provision does not seem confused or incorrect about what the state of the law is or the scope of what to include in this provision. Later in the paper, we'll look at outputs of the application that are less than perfect in this regard. Second, the black-letter law provision is wordier than either of the human-written restatements and addresses more tangential topics like medical malpractices, but it belongs to the genre of black-letter law provisions. Third, nothing about its substance or style indicates that it was the product of an algorithm rather than a human thinker.

It's also worth noting that the provision produced by this process differs from what the same LLM would produce absent the preceding steps. The only reason to expend the effort to have the application process legal opinions into casebriefs, process casebriefs into groups of legal rules, and process those groups into normative assessments of the value of legal rules would be because that process has an influence on the ultimate rule that the application settles upon. If the LLM arrives at the same legal rule either way, then the complicated process isn't contributing anything. Here is the text the Chat-GPT4 produced given an identical prompt, but without the notes from the prior steps in the process.

- (a) The doctrine of Res Ipsa Loquitur applies when an accident causing injury occurs, which in the ordinary course of events, would not happen without negligence on the part of the defendant.
- (b) For Res Ipsa Loquitur to apply, the plaintiff must demonstrate that:
  - (1) the event is of a kind which ordinarily does not occur in the absence of negligence;
  - (2) other responsible causes, including the conduct of the plaintiff and third parties, are sufficiently eliminated by the evidence; and
  - (3) the indicated negligence is within the scope of the defendant's duty to the plaintiff.



(c) If these conditions are met, the court may permit the jury to infer the existence of the defendant's negligence, even without specific evidence of an act or omission.

(d) The application of Res Ipsa Loquitur does not shift the burden of proof, but allows for an inference of negligence where direct evidence is lacking. The defendant retains the right to rebut this inference.

(e) The doctrine of Res Ipsa Loquitur applies unless a statute provides otherwise or to the extent permitted by law.

There's room for debate over who has the better rule, the Restatement (Second), the Restatement (Third), the Restatement (Artificial), or the Restatement (Artificial without Notes). But there's no doubt that the antecedent process has influenced the black-letter law provision that the LLM has settled upon.

### Write Comments

Following the black-letter law provision in every section of a Restatement has a list of comments explaining the law. For this stage, the LLM is asked to produce an outline of the comment headings based upon the black-letter law provision and notes from the caselaw. For res ipsa loquitur, the headings were:

- a. General Application of Res Ipsa Loquitur.
- b. Res Ipsa Loquitur in Medical Malpractice Cases.
- c. Res Ipsa Loquitur and Specific Acts of Negligence.
- d. Res Ipsa Loquitur and Other Possible Causes.
- e. Res Ipsa Loquitur and Plaintiff's Contributory Negligence.

The application then loops through the headings, making separate requests for the LLM to draft the contents of each heading based upon the black-letter law provision, the outline of other comments, the heading of this comment, notes on trends in the law and the majority-minority rules, and casebriefs that may be relevant based on the comment heading. An excerpt of the first comment for this Section is:

a. General Application of Res Ipsa Loquitur. The doctrine of res ipsa loquitur is a rule of evidence that allows an inference of negligence to be drawn from the nature of the accident itself. This doctrine is applicable when the injury is of such a nature that it ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury was under the exclusive control of the defendant. The doctrine is based on the principle that certain accidents are of such a nature that they can only happen if someone has been negligent.

The application of the doctrine is not automatic and depends on the circumstances of each case. The plaintiff must provide evidence that makes it more probable than not that the injury was a result of the defendant's negligence. This does not mean that the plaintiff must conclusively eliminate all other possible causes, but rather that the evidence presented must tilt the balance of probabilities in favor of negligence.

### Create Illustrations

The Comment part of sections of Restatements of Law always include illustrations: hypothetical examples of how the black-letter rule or principle under discussion applies to specific factual situations. For each component of the comment, the application asks an LLM to create illustrations and provides instructions along with relevant casebriefs to use as inspiration for the fact patterns. These are the first three of a set of Illustrations the application created for this Section under “\*a\*. \*General Application of Res Ipsa Loquitur.\*”:

1. Arthur is walking on a public sidewalk when a car suddenly jumps the curb and hits him. The car is driven by Betty, who claims that a tire blowout caused her to lose control of the vehicle. Arthur sues Betty for negligence and invokes the doctrine of *res ipsa loquitur*. The court finds that the doctrine applies because cars do not ordinarily jump curbs and hit pedestrians in the absence of negligence, and the car was under Betty's exclusive control. The court also finds that Arthur's evidence makes it more probable than not that the accident was a result of Betty's negligence, even though he cannot conclusively eliminate the possibility of a tire blowout.
2. Same facts as Illustration 1, except that Arthur also sues the manufacturer of the car's tires, alleging that a defect in the tire caused the blowout. The court finds that the doctrine of *res ipsa loquitur* does not apply against the tire manufacturer because the car, not the tire, was the instrumentality causing the injury, and the car was not under the manufacturer's control.
3. Pauline undergoes a surgical procedure performed by Dr. Smith. After the surgery, Pauline develops complications that are not ordinarily associated with the procedure. Pauline sues Dr. Smith for medical malpractice and invokes the doctrine of *res ipsa loquitur*. The court finds that the doctrine applies because the complications do not ordinarily occur in the absence of negligence, and Dr. Smith had exclusive control over the surgical procedure. The court also finds that Pauline's evidence makes it more probable than not that the complications were a result of Dr. Smith's negligence, even though she cannot conclusively eliminate all other possible causes.

Some of these illustrations are better than others at demonstrating the application of a particular legal rule. Although all of the illustrations have the elements in place of a law school hypothetical in a superficial way, many don't actually deliver by providing a full context.

### Write Reporter's Note

The last part of a Restatement section is the Reporter's Note, which provides case citations (and sometimes case descriptions) for the cases relied upon by the Comment and Illustrations. For this stage, the application splits the current draft into smaller chunks, and then loops through the draft. For each chunk, the application retrieves

relevant casebriefs, and then provides the draft text and casebriefs to the LLM along with instructions for writing a Reporter's Note.

The following is an excerpt of the Reporter's Note on the illustrations above:

Illustration 1 is based on the facts of *Merriman v Kraft*, 253 Ind. 58, 249 N.E.2d 485 (Supreme Court of Indiana 1969). Illustration 3 is derived from the facts of *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (Supreme Court of Illinois 1980). Illustration 5 is suggested by the case of *Bell v May Dept Stores Co*, 866 F.2d 452 (United States Court of Appeals, District of Columbia Circuit 1989). Illustration 6 is adapted from the case of *Brewster v. United States*, 542 N.W.2d 524 (Supreme Court of Iowa 1996).

In this excerpt, the Reporter's Note successfully identifies cases that present facts that are similar to the Illustrations.

## Results

The output of the process includes the final draft and result of every intermediary stage and step along the way. The final draft may be only a few pages long, but the total work product will be much longer. For this *res ipsa loquitur* Section, the total output — from briefing cases to assembling the final draft — was over 100,000 words. The final draft is included as an appendix to this paper.

Following this multi-step process, the application can produce a Section of a Restatement of Law that is worth analyzing. The outputs reflect the particular legal rules and facts of the cases provided, illustrate the application of the rules with colorful hypotheticals, and accurately reference the caselaw that supports the assertions made. The outputs also have serious shortcomings. The legal rules can drift off topic and often lack the precision of a carefully drafted legal rule. The Comments and Reporter's Note are repetitious and reflect the generic writing style of large language models.

Preliminary results indicate that, when there is a general consensus in the caselaw over a legal issue, LLMs can produce restatement provisions that are virtually identical to human-written provisions on the same issue. With longer cases, more complicated legal rules, and less consensus among jurisdictions, LLMs are more prone to error. The legal rules that they produce appear more like a creative collage of legal terms than a consistent rule to apply in practice.

The application struggles with managing the appropriate level of detail and staying on topic within specific legal rules. The nature of law and legal practice requires lawyers to be very precise and careful with language. The rules the application settles upon often lack this precision. Large language models are terrific at recognizing and generating semantic connections between words. What separates law from general language is precision. A tremendous risk with using general-purpose LLMs for legal work is that semantic similarity can lead to incorrect legal conclusions. For more complicated issues, the Artificial Restatements struggle, primarily because the quantity of relevant information becomes overwhelming. The task requires the model to retain more of a context than it can handle. Even with a lot of prompting, it's hard to avoid ChatGPT's writing style. Particularly since different parts of the restatement section are written by separate LLM calls and later stitched together, the Comments and Reporter's Note can

feel formulaic and repetitious with phrases like “It is important to note that,” “In sum,” and “In conclusion,” littered about every few paragraphs.

LLMs also seem to have trouble navigating between the particular and the general. At the time of discerning the legal rule to adopt, the application frequently includes provisions that are strangely specific to a subset of cases and would not belong in a general rule about the law.

For example, the application produced this legal rule for the definition of intent in tort law:

- (a) Intent in tort law is determined when the actor engages in an act with a purposeful or specific intent to cause harm, or when the actor is aware that the harm is substantially certain to result from their conduct, irrespective of whether the actor wishes to cause harm.
- (b) Reckless conduct does not equate to intentional conduct.
- (c) In the context of employer liability, the Workers' Compensation Act serves as the exclusive remedy for all injuries within the Act's scope, unless the employer commits an intentional tort resulting in the injury or death of the employee.
- (d) The exception to the workers' compensation statute necessitates a "conscious and deliberate" intent to inflict injury.

Before analyzing the application’s output, let’s compare it to the official restatements. The Restatement (Third) of Torts offers the following definition for intent:

A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.

Restatement (Third) of Torts: Phys. & Emot. Harm § 1 (2010).

And the Restatement (Second) offers this definition:

The word “intent” is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

Restatement (Second) of Torts § 8A (1965).

All three restatements provide that intent can be satisfied either by the actor desiring the harm/consequence or by the actor having knowledge with substantial certainty that harm/consequence will follow. The artificial restatement provision is a little wordier and relies on terms like “purposeful or specific intent” that may require further definition.

The most notable difference is that the application brings in specific rules about Workers’ Compensation. Within the human-authored restatements, these issues are also addressed but only in the Comment, not the black-letter law provision. This approach is clearly preferable, as Workers’ Compensation is a statutory regime separate

from tort law, and the definition of “intent” in tort law does not depend upon those statutes.

Another distinction is that the human versions use the term “consequence” instead of “harm.” This reflects careful deliberation, as explained in a comment to the Third Restatement. “In general, the intent required in order to show that the defendant's conduct is an intentional tort is the intent to bring about harm. . . . At times, however, rules of tort liability attach significance to the fact that the actor has engaged in conduct that is intended to produce some consequence other than harm itself.” Restatement (Third) of Torts: Phys. & Emot. Harm § 1 (2010). The Restatement (Artificial)’s definition would therefore suffice in the vast majority of cases, but the human restatement’s more precise terminology captures some cases where consequences were intended but the harm was not.

## Opportunities

Artificial Restatements can be a method for evaluating the performance of large language models at difficult legal tasks. Large language models seem poised to take over many legal research and writing tasks. (Garwal 2022). But there are serious concerns about the reliability of legal software that relies upon generative A.I. Large language models are prone to hallucinate information, cannot accurately gauge the uncertainty of their own answers, have short context windows that inhibit their ability to work with larger documents, and can struggle to perform well in niche domains — among other issues. (Yang 2023). Evaluating the performance of large language models is also difficult. (Li 2023). Because large language models are terrific few-shot and zero shot-learners, they can accomplish tasks without a large dataset of examples. (Wei 2022). This allows language large models to function in a variety of contexts, but it presents a challenge for evaluating their performance. With traditional machine learning methods, some data is withheld during training and used as test data to evaluate the model’s performance. But when a large language model is deployed in a new context, there’s often no test data available to evaluate how well the model has performed.

As the technology progresses, LLM-powered applications should progress to the point of being able to address many of the errors identified in this paper. We are only at the beginning of exploring how fine-tuning, prompt engineering, and retrieval augmented generation might improve LLMs baseline legal reasoning and writing capabilities. But if the fundamental architecture behind LLMs remains the same for the foreseeable future — as seems likely to be the case — then some errors may be more persistent. Insights from open source experimentation can enrich our understanding of how these errors arise and what can be done to address them.

An Artificial Restatement’s performance at crafting restatements can be evaluated by comparing the machine-written restatements with existing, human-written restatements. For this paper, the Second and Third Restatements of Torts serve as a kind of test data for evaluating the Artificial Restatement of Torts. Inversely, machine-written restatements can function as test data for evaluating the human-written restatements. Lawyers and judges often rely on Restatements of the Law, but these treatises have their own reliability concerns. (Balganesh 2022). Critics have argued that certain restatement provisions do not accurately reflect the caselaw or trends in the caselaw. (Levitin 2019). This criticism is often coupled with an additional criticism that

a restatement provision has captured the authors' preferences for what the law should be rather than what the law actually is.<sup>2</sup> (Merrill 2014).

By tracking the discrepancies between machine-written restatements and human-written restatements, we can gain insights into both the machine and human processes for understanding the law. Where the two restatements converge would tend to indicate the reliability of both sources on a particular subject. Where the restatements diverge may reflect the limitations of a language model or human author, meaningful differences in how humans and machines process information, or different underlying values that would lead an author to choose one legal rule over another.

Each of these research avenues can help us to develop a more informed perspective on the potential and proper role for generative A.I. in legal work: the opportunities, the limits, the risks, the persistent challenges. This process was entirely automated — largely in order to test and better understand LLM's capabilities. As we get a better picture of what LLMs are better and worse at accomplishing in this space, we should be better able to craft collaborative processes that leverage the comparative strengths of LLMs and humans. Analysis of this kind can shape the future of A.I. tools for legal research and writing, accountability mechanisms for computer and human authorship, the function and authority of Restatements of Law, the future of human-machine collaboration in legal practice, and the potential for machine learning to reshape the law itself.

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<sup>2</sup> *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part) (“I write separately to note that modern Restatements . . . are of questionable value, and must be used with caution.”).

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## Appendix

This is the unedited final output of the Restatement (Artificial) of Torts on the topic of Res Ipsa Loquitur from October 5, 2023.

### **Restatement of Torts § 17 Res Ipsa Loquitur**

(a) The doctrine of res ipsa loquitur is applicable when the injury is of such a nature that it ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury was under the exclusive control of the defendant.

(b) The plaintiff is not required to conclusively eliminate all other possible causes, but must provide evidence that makes it more probable than not that the injury was a result of the defendant's negligence.

(c) In medical malpractice cases, expert testimony is generally necessary to establish negligence and causation, unless the absence of reasonable care or the existence of proximate cause is evident to an average layperson based on common knowledge or experience.

(d) The doctrine should not be employed to infer negligence where the plaintiff's evidence points to specific acts, which are in dispute, and where equal evidence exists to support the contention that the defendant was not negligent.

(e) The plaintiff's freedom from contributory negligence should not be a prerequisite to invoke the doctrine. The analysis should focus on whether the defendant's inferred negligence was more likely than not a cause of the injury, even if the plaintiff's own negligence contributed to the injury.

\*a\*. \*General Application of Res Ipsa Loquitur.\* The doctrine of res ipsa loquitur is a rule of evidence that allows an inference of negligence to be drawn from the nature of the accident itself. This doctrine is applicable when the injury is of such a nature that it ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury was under the exclusive control of the defendant. The doctrine is based on the principle that certain accidents are of such a nature that they can only happen if someone has been negligent.

The application of the doctrine is not automatic and depends on the circumstances of each case. The plaintiff must provide evidence that makes it more probable than not that the injury was a result of the defendant's negligence. This does not mean that the plaintiff must conclusively eliminate all other possible causes, but rather that the evidence presented must tilt the balance of probabilities in favor of negligence.

The doctrine of res ipsa loquitur is particularly useful in cases where the specific act of negligence is unknown or cannot be proven directly. It allows the plaintiff to rely on the circumstantial evidence of the accident itself to establish the defendant's negligence. However, the doctrine should not be employed to infer negligence where the plaintiff's evidence points to specific acts, which are in dispute, and where equal evidence exists to support the contention that the defendant was not negligent.

The application of the doctrine of res ipsa loquitur is becoming more nuanced over time. While the general application of the doctrine remains a prevalent rule, there is a growing trend against using the doctrine to create an inference of negligence where the plaintiff's evidence points to specific acts, which are in dispute, and where equal

evidence exists to support the contention that the defendant was not negligent. This trend suggests a move towards a more precise application of the doctrine, where it is not used to infer negligence in cases where the evidence is evenly balanced.

The requirement for the defendant to have exclusive control of the instrumentality causing the injury is becoming more prevalent. This trend suggests a move towards a stricter application of the doctrine, where it does not apply if there are other reasonable theories that could explain the cause of the accident.

The trend towards removing the requirement for the plaintiff's freedom from contributory negligence to invoke the *res ipsa loquitur* doctrine is becoming more prevalent. This trend suggests a move towards a more liberal application of the doctrine, where it can be invoked even if the plaintiff may have contributed to their own injury.

In conclusion, the trends suggest a move towards a more nuanced and precise application of the doctrine of *res ipsa loquitur*. The doctrine is being applied more strictly in some cases, while being applied more liberally in others. This suggests that the black-letter law provision for this section of the restatement should reflect these nuances.

### **Illustrations:**

1. Arthur is walking on a public sidewalk when a car suddenly jumps the curb and hits him. The car is driven by Betty, who claims that a tire blowout caused her to lose control of the vehicle. Arthur sues Betty for negligence and invokes the doctrine of *res ipsa loquitur*. The court finds that the doctrine applies because cars do not ordinarily jump curbs and hit pedestrians in the absence of negligence, and the car was under Betty's exclusive control. The court also finds that Arthur's evidence makes it more probable than not that the accident was a result of Betty's negligence, even though he cannot conclusively eliminate the possibility of a tire blowout.
2. Same facts as Illustration 1, except that Arthur also sues the manufacturer of the car's tires, alleging that a defect in the tire caused the blowout. The court finds that the doctrine of *res ipsa loquitur* does not apply against the tire manufacturer because the car, not the tire, was the instrumentality causing the injury, and the car was not under the manufacturer's control.
3. Pauline undergoes a surgical procedure performed by Dr. Smith. After the surgery, Pauline develops complications that are not ordinarily associated with the procedure. Pauline sues Dr. Smith for medical malpractice and invokes the doctrine of *res ipsa loquitur*. The court finds that the doctrine applies because the complications do not ordinarily occur in the absence of negligence, and Dr. Smith had exclusive control over the surgical procedure. The court also finds that Pauline's evidence makes it more probable than not that the complications were a result of Dr. Smith's negligence, even though she cannot conclusively eliminate all other possible causes.
4. Same facts as Illustration 3, except that Pauline also presents evidence of specific acts of negligence by Dr. Smith. The court finds that the doctrine of *res ipsa loquitur* does not apply because Pauline's evidence points to specific

acts, which are in dispute, and equal evidence exists to support the contention that Dr. Smith was not negligent.

5. George is injured when an elevator he is entering suddenly closes on him. The elevator is owned and operated by XYZ Corporation. George sues XYZ Corporation for negligence and invokes the doctrine of *res ipsa loquitur*. The court finds that the doctrine does not apply because George's evidence does not make it more probable than not that the accident was a result of XYZ Corporation's negligence. The evidence presented shows that there were several possible causes for the malfunction of the elevator doors, some of which did not involve XYZ Corporation's alleged negligence.
6. Same facts as Illustration 5, except that George also presents evidence that he was not negligent in entering the elevator. The court finds that the doctrine of *res ipsa loquitur* applies because the accident does not ordinarily occur in the absence of negligence, the elevator was under XYZ Corporation's exclusive control, and George's evidence makes it more probable than not that the accident was a result of XYZ Corporation's negligence, even though he cannot conclusively eliminate all other possible causes. The court also finds that George's freedom from contributory negligence is not a prerequisite to invoke the doctrine.

\*b\*. \*Res Ipsa Loquitur in Medical Malpractice Cases.\* The doctrine of *res ipsa loquitur* has a significant role in medical malpractice cases. Generally, expert testimony is necessary to establish negligence and causation in these cases. This is because the complexities of medical procedures and the standard of care required are often beyond the common knowledge of laypersons. However, there are exceptions to this rule. If the absence of reasonable care or the existence of proximate cause is evident to an average layperson based on common knowledge or experience, expert testimony may not be necessary.

For instance, in the case of *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980), the court held that the doctrine of *res ipsa loquitur* is applicable in medical malpractice cases if the plaintiff demonstrates that the injury occurred in an occurrence that ordinarily does not happen in the absence of negligence, by an agency or instrumentality within the defendant's exclusive control, and under circumstances indicating that the injury was not due to any voluntary act or neglect on the part of the plaintiff. The court emphasized that the trial court must determine, as a matter of law, whether the *res ipsa loquitur* doctrine applies and whether the plaintiff has introduced enough evidence that the injury would not have happened ordinarily without negligence.

However, the application of *res ipsa loquitur* in medical malpractice cases is not universal. In *Haddock v. Arnspiger*, 793 S.W.2d 948 (1990), the Supreme Court of Texas held that *res ipsa loquitur* is not applicable in medical malpractice cases involving the use of mechanical instruments. The court reasoned that the use of a flexible colonoscope for a proctological examination is not a matter within the common knowledge of laymen, and therefore, *res ipsa loquitur* is not applicable in this case.

In conclusion, the application of *res ipsa loquitur* in medical malpractice cases depends on the specific circumstances of the case, including the nature of the injury, the

medical procedure involved, and the common knowledge or experience of an average layperson.

### **Illustrations:**

1. Dr. Smith performs a routine appendectomy on Patient A. Post-surgery, Patient A experiences severe abdominal pain and is diagnosed with a surgical sponge left inside his abdomen. Patient A sues Dr. Smith for negligence. Here, the doctrine of *res ipsa loquitur* applies as the injury (a surgical sponge left inside the patient) is such that it ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury (the surgical sponge) was under the exclusive control of Dr. Smith.
2. Patient B undergoes a complex heart surgery performed by Dr. Jones. Post-surgery, Patient B suffers from complications and sues Dr. Jones for negligence. Patient B does not have any specific evidence of negligence but argues that the complications would not have occurred in the absence of negligence. In this case, the doctrine of *res ipsa loquitur* may not apply as the complexities of the heart surgery are beyond the common knowledge of laypersons, necessitating expert testimony to establish negligence and causation.
3. Patient C undergoes a knee replacement surgery performed by Dr. Williams. Post-surgery, Patient C experiences severe pain and is diagnosed with a broken surgical instrument left inside his knee. Patient C sues Dr. Williams for negligence. Here, the doctrine of *res ipsa loquitur* applies as the injury (a broken surgical instrument left inside the patient) is such that it ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury (the surgical instrument) was under the exclusive control of Dr. Williams.
4. Patient D undergoes a colonoscopy performed by Dr. Taylor. Post-procedure, Patient D suffers from a perforated colon and sues Dr. Taylor for negligence. Patient D does not have any specific evidence of negligence but argues that the injury would not have occurred in the absence of negligence. In this case, the doctrine of *res ipsa loquitur* may not apply as the use of a flexible colonoscope for a proctological examination is not a matter within the common knowledge of laypersons, necessitating expert testimony to establish negligence and causation.
5. Patient E undergoes a dental procedure performed by Dr. Brown. Post-procedure, Patient E suffers from a broken tooth and sues Dr. Brown for negligence. Here, the doctrine of *res ipsa loquitur* may not apply as there is an inherent risk of damage to a patient's teeth during dental procedures, even when the appropriate standard of care is met. Therefore, the injury (a broken tooth) is not such that it ordinarily does not occur in the absence of negligence.
6. Patient F undergoes a gallbladder removal surgery performed by Dr. Green. Post-surgery, Patient F experiences severe abdominal pain and is diagnosed with a surgical instrument left inside his abdomen. Patient F sues Dr. Green for negligence. Here, the doctrine of *res ipsa loquitur* applies as the injury (a surgical instrument left inside the patient) is such that it ordinarily does not

occur in the absence of negligence, and the instrumentality causing the injury (the surgical instrument) was under the exclusive control of Dr. Green.

\*c\*. \*Res Ipsa Loquitur and Specific Acts of Negligence.\* The doctrine of *res ipsa loquitur* is not typically employed to infer negligence where the plaintiff's evidence points to specific acts of negligence that are in dispute, and where equal evidence exists to support the contention that the defendant was not negligent. This is because the doctrine is primarily used to infer negligence when direct evidence of the defendant's negligence is lacking or difficult to obtain. It allows the plaintiff to establish a *prima facie* case of negligence based on the circumstances of the accident, without having to prove the specific negligent act that caused the injury.

However, when the plaintiff's evidence points to specific acts of negligence, the plaintiff typically has direct evidence of the defendant's negligence and does not need to rely on the doctrine of *res ipsa loquitur*. In such cases, the plaintiff's evidence and the defendant's evidence are often weighed against each other to determine whether the defendant was negligent. If there is equal evidence to support the contention that the defendant was not negligent, the doctrine of *res ipsa loquitur* should not be used to tip the balance in favor of the plaintiff. Instead, the trier of fact should weigh the evidence and determine whether the plaintiff has proven the defendant's negligence by a preponderance of the evidence.

For example, in the case of *Konicki v. Lawrence*, 475 A.2d 208 (R.I. 1984), the court held that the plaintiffs failed to establish the defendant's negligence under the theory of *res ipsa loquitur* because they did not sufficiently eliminate other responsible causes for the accident. The court found that the plaintiffs did not sufficiently eliminate other responsible causes of negligence, such as a negligent third party who attached the wheel to the vehicle or the manufacturer of the wheel. Therefore, the plaintiffs failed to meet their burden of proving that the negligence was more probably than not, that of the defendant.

In contrast, in the case of *Krebs v. Corrigan*, 321 A.2d 558 (D.C. 1974), the court held that the plaintiff did present a *prima facie* case of negligence under the doctrine of *res ipsa loquitur*. The court reasoned that the doctrine allows an inference of negligence when the cause of the accident is known, the accident-producing instrumentality is under the exclusive control of the defendant, and the instrumentality is unlikely to do harm without negligence on the part of the person in control. In this case, the cause of the accident was known (Corrigan's body falling onto the sculptures), Corrigan had exclusive control over his body, and it is unlikely that a person's body would do harm without some negligence.

These cases illustrate the nuanced application of the doctrine of *res ipsa loquitur* in cases where specific acts of negligence are in dispute. The doctrine should not be used to infer negligence in such cases, but should instead be used as a tool to help the plaintiff establish a *prima facie* case of negligence when direct evidence of the defendant's negligence is lacking or difficult to obtain.

#### **Illustrations:**

1. Arthur, a construction worker, is injured when a steel beam falls from a building under construction and lands on him. The beam was being hoisted by a crane operated by Betty, an employee of the construction company. Arthur sues the construction company, alleging negligence. The construction

company argues that the beam could have fallen due to a number of reasons, including a sudden gust of wind or a defect in the crane. Arthur does not have to conclusively eliminate all other possible causes. He only needs to provide evidence that makes it more probable than not that the injury was a result of Betty's negligence. In this case, the doctrine of *res ipsa loquitur* is applicable because the injury is of such a nature that it ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury (the crane) was under the exclusive control of the defendant (the construction company).

2. Same facts as Illustration 1, except that Arthur also alleges that Betty was negligent in operating the crane because she failed to properly secure the beam before hoisting it. In this case, Arthur has direct evidence of Betty's negligence and does not need to rely on the doctrine of *res ipsa loquitur*. If there is equal evidence to support the contention that Betty was not negligent (for example, if Betty testifies that she properly secured the beam and the construction company presents evidence that the crane was in good working condition), the doctrine of *res ipsa loquitur* should not be used to tip the balance in favor of Arthur. Instead, the trier of fact should weigh the evidence and determine whether Arthur has proven Betty's negligence by a preponderance of the evidence.
3. Carol, a patient, undergoes a surgical procedure performed by Dr. David. After the surgery, Carol develops severe complications that are not typically associated with the procedure. Carol sues Dr. David for medical malpractice, alleging negligence. Dr. David argues that the complications could have resulted from a number of factors unrelated to his performance of the surgery, such as Carol's underlying health conditions or an adverse reaction to the anesthesia. In this case, expert testimony is generally necessary to establish negligence and causation, unless the absence of reasonable care or the existence of proximate cause is evident to an average layperson based on common knowledge or experience. The doctrine of *res ipsa loquitur* may be applicable if Carol can demonstrate that the injury is of such a nature that it ordinarily does not occur in the absence of negligence, and that the instrumentality causing the injury (the surgical procedure) was under the exclusive control of Dr. David.
4. Same facts as Illustration 3, except that Carol also alleges that Dr. David was negligent in performing the surgery because he failed to properly sterilize his surgical instruments. In this case, Carol has direct evidence of Dr. David's negligence and does not need to rely on the doctrine of *res ipsa loquitur*. If there is equal evidence to support the contention that Dr. David was not negligent (for example, if Dr. David testifies that he properly sterilized his instruments and the hospital presents evidence that it follows strict sterilization protocols), the doctrine of *res ipsa loquitur* should not be used to tip the balance in favor of Carol. Instead, the trier of fact should weigh the evidence and determine whether Carol has proven Dr. David's negligence by a preponderance of the evidence.

\*d\*. \*Res Ipsa Loquitur and Other Possible Causes.\* The doctrine of *res ipsa loquitur* is not intended to be a catch-all for every incident where the specific cause of an injury is unknown. It is a tool for situations where the injury is of such a nature that it ordinarily does not occur in the absence of negligence, and the instrumentality causing

the injury was under the exclusive control of the defendant. This requirement of exclusive control is crucial, as it helps to establish a direct link between the defendant's actions (or lack thereof) and the injury that occurred.

However, it is important to note that the plaintiff is not required to conclusively eliminate all other possible causes of the injury. The standard is not one of absolute certainty, but rather of probability. The plaintiff must provide evidence that makes it more probable than not that the injury was a result of the defendant's negligence. This is a reflection of the balance that the law seeks to strike between the need for a plaintiff to have a means of redress for injuries caused by another's negligence, and the need to ensure that defendants are not held liable for injuries that they did not cause.

In the case of *Provident Life & Accident Insurance Company and Arthur Andersen & Company v. Professional Cleaning Service, Inc.*, 21 McCanless 199, 217 Tenn. 199, 396 S.W.2d 351 (1965), the Supreme Court of Tennessee held that the doctrine of *res ipsa loquitur* applies if the instrument that produces an injury is under the exclusive control of the defendant and the injury would not ordinarily result if proper care were exercised. The court also noted that the doctrine of *res ipsa loquitur* is a way of presenting substantive evidence of negligence and rescues a plaintiff from the predicament of having no evidence of negligence to support their case. The court concluded that the plaintiffs did not have to eliminate all other possible causes or inferences than that of the defendant's negligence; it was enough if the evidence for them made such negligence more probable than any other cause.

In contrast, in the case of *Bell v May Dept Stores Co*, 866 F.2d 452 (1989), the United States Court of Appeals, District of Columbia Circuit held that the plaintiffs failed to establish the essential elements of *res ipsa loquitur* and therefore, the principle is inapplicable in this case. The court explained that for *res ipsa loquitur* to apply, the event must be of the kind that does not ordinarily occur in the absence of someone's negligence, it must be caused by an instrumentality within the exclusive control of the defendant, and it must not have been due to any voluntary action or contribution on the part of the plaintiff. The court found that the plaintiffs failed to establish that the accident most probably occurred due to the defendant's negligence. The evidence presented showed that there were several possible causes for the malfunction of the elevator doors, some of which did not involve the defendant's alleged negligence. The court emphasized that *res ipsa loquitur* requires more than mere speculation and that the plaintiffs must exclude other probable causes of the accident by a preponderance of the evidence. Since the plaintiffs failed to meet this burden, the court held that *res ipsa loquitur* was inapplicable in this case.

These cases illustrate the nuanced application of the doctrine of *res ipsa loquitur* and the importance of the requirement of exclusive control and the need for the plaintiff to make it more probable than not that the injury was a result of the defendant's negligence.

#### **Illustrations:**

1. A construction company is tasked with building a bridge. After completion, the bridge collapses, causing injuries to several individuals. The construction company had exclusive control over the bridge during its construction, and bridges do not ordinarily collapse without negligence. The injured parties sue the construction company for negligence. The doctrine of *res ipsa loquitur*

applies, as the injury is of such a nature that it ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury was under the exclusive control of the defendant.

2. Same facts as Illustration 1, except that the bridge collapses during a severe earthquake. The construction company provides evidence that the bridge was built according to all relevant safety standards and that the earthquake was the most probable cause of the collapse. In this case, the doctrine of *res ipsa loquitur* may not apply, as the plaintiff cannot show that it is more probable than not that the injury was a result of the defendant's negligence.
3. A patient undergoes surgery in a hospital. Post-surgery, the patient experiences severe pain and a surgical instrument is discovered inside the patient's body. The patient sues the hospital for negligence. The doctrine of *res ipsa loquitur* applies, as surgical instruments do not ordinarily get left inside a patient's body in the absence of negligence, and the instrumentality causing the injury was under the exclusive control of the defendant.
4. Same facts as Illustration 3, except that the patient had multiple surgeries in different hospitals before the surgical instrument was discovered. In this case, the doctrine of *res ipsa loquitur* may not apply, as the plaintiff cannot show that the instrumentality causing the injury was under the exclusive control of the defendant.
5. A customer in a supermarket slips on a wet floor and injures herself. The supermarket had no warning signs posted. The customer sues the supermarket for negligence. The doctrine of *res ipsa loquitur* applies, as customers do not ordinarily slip and fall in supermarkets in the absence of negligence, and the instrumentality causing the injury was under the exclusive control of the defendant.
6. Same facts as Illustration 5, except that the customer was running in the supermarket and not paying attention to her surroundings. In this case, the doctrine of *res ipsa loquitur* may still apply, as the plaintiff's freedom from contributory negligence is not a prerequisite to invoke the doctrine. The analysis should focus on whether the defendant's inferred negligence was more likely than not a cause of the injury, even if the plaintiff's own negligence contributed to the injury.

\*e\*. \*Res Ipsa Loquitur and Plaintiff's Contributory Negligence.\* The traditional requirement that the plaintiff be free from contributory negligence to invoke the doctrine of *res ipsa loquitur* has been largely abandoned. The modern trend, as reflected in the majority rule, is to focus on whether the defendant's inferred negligence was more likely than not a cause of the injury, even if the plaintiff's own negligence contributed to the injury. This shift aligns with the principles of comparative negligence, which aim to distribute liability in proportion to each party's degree of fault.

In *Montgomery Elevator Co v Gordon*, 619 P.2d 66 (Supreme Court of Colorado, En Banc, 1980), the court held that the doctrine of *res ipsa loquitur* applies even though plaintiff's negligent acts or omissions may also have contributed to the injury. The court reasoned that the purpose of comparative negligence is to ameliorate the harshness of the complete bar resulting from common law contributory negligence.



This was accomplished by mandating a comparison of the relative degrees of negligence of the plaintiff and the defendant by the jury. If the court insisted upon retaining the requirement that plaintiff be free from contributory negligence or other responsibilities as an element of the *res ipsa loquitur* doctrine, it would effectively erect a complete bar to recovery in cases where a plaintiff must rely on *res ipsa loquitur* to establish a *prima facie* case of negligence.

This approach is consistent with the principle that the focus of the analysis should be on the defendant's conduct and whether it was more likely than not a cause of the injury. The plaintiff's contributory negligence, if any, is a separate issue that should be considered in determining the extent of the defendant's liability, rather than a bar to the application of the doctrine of *res ipsa loquitur*. This approach allows for a more nuanced and fair assessment of liability, reflecting the realities of complex factual scenarios where both parties may have contributed to the injury.

#### **Illustrations:**

1. Brenda, a hotel employee, enters an elevator in the hotel where she works. The elevator door closes but does not ascend or descend. Instead, the door reopens slightly, but not wide enough for Brenda to exit. As Brenda attempts to exit, the door begins to close, trapping her between the door and the elevator wall. In attempting to free herself, Brenda is injured. Brenda sues the elevator maintenance company, alleging that the elevator's malfunctioning door would not have occurred in the absence of negligence. The court finds that the doctrine of *res ipsa loquitur* applies, even though Brenda's actions in attempting to exit the partially opened elevator may have contributed to her injury. The court reasons that the focus should be on whether the maintenance company's inferred negligence was more likely than not a cause of the injury.
2. Same facts as Illustration 1, except that Brenda is found to have ignored a posted sign warning that the elevator is out of service. Despite Brenda's contributory negligence, the court still applies the doctrine of *res ipsa loquitur*, focusing on whether the maintenance company's inferred negligence was more likely than not a cause of the injury.
3. Gwendolyn is caught between two elevator doors while attempting to enter an automatic elevator in a department store. She sues the store, alleging that the elevator's malfunctioning doors would not ordinarily occur in the absence of negligence. However, the evidence presented shows that there were several possible causes for the malfunction of the elevator doors, some of which did not involve the store's alleged negligence. The court finds that Gwendolyn has failed to establish that the accident most probably occurred due to the store's negligence, and therefore, the doctrine of *res ipsa loquitur* does not apply.
4. Marion, a pedestrian, is injured when a car driven by Carita jumps the curb and hits him on the sidewalk. Marion sues Carita, alleging that cars do not ordinarily jump curbs and hit pedestrians in the absence of negligence. The court finds that the doctrine of *res ipsa loquitur* applies, even though Marion was walking close to the curb, which may have contributed to his injury. The court reasons that the focus should be on whether Carita's inferred negligence was more likely than not a cause of the injury.

5. Same facts as Illustration 4, except that Marion is found to have been texting while walking, which may have contributed to his injury. Despite Marion's contributory negligence, the court still applies the doctrine of *res ipsa loquitur*, focusing on whether Carita's inferred negligence was more likely than not a cause of the injury.
6. Claudette, an elevator operator, is injured when an elevator compensation chain becomes hooked on a rail bracket, causing the chain to tighten and break free. Claudette sues the elevator maintenance company, alleging that the chain's malfunction would not ordinarily occur in the absence of negligence. The court finds that the doctrine of *res ipsa loquitur* applies, even though Claudette's operation of the elevator may have contributed to the chain's malfunction. The court reasons that the focus should be on whether the maintenance company's inferred negligence was more likely than not a cause of the injury.

**Reporter's Note: a. General Application of Res Ipsa Loquitur.**

The Comment's assertion that the doctrine of *res ipsa loquitur* allows an inference of negligence to be drawn from the nature of the accident itself is supported by the case of *Merriman v Kraft*, 253 Ind. 58, 249 N.E.2d 485 (Supreme Court of Indiana 1969). In this case, the court held that the doctrine applies when the plaintiff shows that the instrumentality causing the injury was under the exclusive control of the defendant and that the accident was the result of the defendant's lack of reasonable care. The court further clarified that the doctrine does not require the plaintiff to exclude every other possible cause of the accident, but rather, it allows the plaintiff to rely on the inference of negligence based on the unusual occurrence of the accident.

The Comment's point that the doctrine of *res ipsa loquitur* is particularly useful in cases where the specific act of negligence is unknown or cannot be proven directly is illustrated by the case of *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (Supreme Court of Illinois 1980). In this medical malpractice case, the court held that the doctrine is applicable and can be established through expert testimony. The court also held that the trial court must determine, as a matter of law, whether the doctrine applies and whether the plaintiff has introduced enough evidence to support a *res ipsa loquitur* theory.

The Comment's observation that the doctrine should not be employed to infer negligence where the plaintiff's evidence points to specific acts, which are in dispute, and where equal evidence exists to support the contention that the defendant was not negligent is reflected in the case of *Bell v May Dept Stores Co*, 866 F.2d 452 (United States Court of Appeals, District of Columbia Circuit 1989). The court held that the plaintiffs failed to establish the essential elements of *res ipsa loquitur* and therefore, the principle is inapplicable in this case. The court explained that for *res ipsa loquitur* to apply, the event must be of the kind that does not ordinarily occur in the absence of someone's negligence, it must be caused by an instrumentality within the exclusive control of the defendant, and it must not have been due to any voluntary action or contribution on the part of the plaintiff.

The Comment's discussion of the evolving application of the doctrine of *res ipsa loquitur* is supported by the case of *Mobil Chemical Co v Bell*, 517 S.W.2d 245 (Supreme Court of Texas 1974). The court held that the submission of subissues to

the jury in *res ipsa loquitur* cases is only proper when necessary to focus the jury's attention on the matter. The court also held that the plaintiffs made out a *Res ipsa loquitur* case and that Mobil's rebutting evidence did not completely negate the plaintiffs' case. Therefore, the court affirmed the judgment of remand for a new trial.

Illustration 1 is based on the facts of *Merriman v Kraft*, 253 Ind. 58, 249 N.E.2d 485 (Supreme Court of Indiana 1969). Illustration 3 is derived from the facts of *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (Supreme Court of Illinois 1980). Illustration 5 is suggested by the case of *Bell v May Dept Stores Co*, 866 F.2d 452 (United States Court of Appeals, District of Columbia Circuit 1989). Illustration 6 is adapted from the case of *Brewster v. United States*, 542 N.W.2d 524 (Supreme Court of Iowa 1996).

#### **b. Res Ipsa Loquitur in Medical Malpractice Cases.**

The Comment's assertion that *res ipsa loquitur* plays a significant role in medical malpractice cases, particularly when the absence of reasonable care or the existence of proximate cause is evident to an average layperson, is supported by several cases. In *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980), the Supreme Court of Illinois held that *res ipsa loquitur* is applicable in medical malpractice cases if the plaintiff demonstrates that the injury occurred in an occurrence that ordinarily does not happen in the absence of negligence, by an agency or instrumentality within the defendant's exclusive control, and under circumstances indicating that the injury was not due to any voluntary act or neglect on the part of the plaintiff. This case supports the Comment's assertion that *res ipsa loquitur* can be applied in medical malpractice cases and that the trial court must determine, as a matter of law, whether the doctrine applies and whether the plaintiff has introduced enough evidence that the injury would not have happened ordinarily without negligence.

However, the Comment also acknowledges that the application of *res ipsa loquitur* in medical malpractice cases is not universal. This is illustrated by *Haddock v Arnspiger*, 793 S.W.2d 948 (1990), where the Supreme Court of Texas held that *res ipsa loquitur* is not applicable in medical malpractice cases involving the use of mechanical instruments. The court reasoned that the use of a flexible colonoscope for a proctological examination is not a matter within the common knowledge of laymen, and therefore, *res ipsa loquitur* is not applicable in this case.

Illustration 1 is based on the facts of *Seavers v. Methodist Medical Center of Oak Ridge*, 9 S.W.3d 86 (1999), where the Supreme Court of Tennessee held that the doctrine of *res ipsa loquitur* can be applied in medical malpractice cases where expert testimony is required. The court reversed the summary judgment and remanded the case for further proceedings, holding that the appellant had satisfied the requirements of *res ipsa loquitur* and raised a genuine issue of material fact.

Illustration 5 is derived from the facts of *Chism v. Campbell*, 250 Neb. 921 (1996), where the Supreme Court of Nebraska held that the doctrine of *res ipsa loquitur* is not applicable in a case where there was an inherent risk of damage to a patient's teeth during surgery under general anesthesia, even when the appropriate standard of care is met.

Illustration 6 is suggested by the facts of *Jones v Harrisburg Polyclinic Hospital*, 496 Pa. 465, 437 A.2d 1134 (1981), where the Supreme Court of Pennsylvania held that *res ipsa loquitur* could be applied in a medical malpractice suit. The court concluded

that expert testimony is not always necessary in medical malpractice cases and that the inference of negligence can be drawn from common lay knowledge or medical evidence.

### **c. Res Ipsa Loquitur and Specific Acts of Negligence.**

The Comment's discussion of the doctrine of res ipsa loquitur and its application in cases where specific acts of negligence are in dispute is supported by several cases.

In *Konicki v. Lawrence*, 475 A.2d 208 (R.I. 1984), the court held that the plaintiffs failed to establish the defendant's negligence under the theory of res ipsa loquitur because they did not sufficiently eliminate other responsible causes for the accident. This case supports the Comment's assertion that the doctrine of res ipsa loquitur is not typically employed to infer negligence where the plaintiff's evidence points to specific acts of negligence that are in dispute, and where equal evidence exists to support the contention that the defendant was not negligent.

On the other hand, *Krebs v. Corrigan*, 321 A.2d 558 (D.C. 1974) illustrates the application of the doctrine when direct evidence of the defendant's negligence is lacking or difficult to obtain. The court held that the plaintiff did present a prima facie case of negligence under the doctrine of res ipsa loquitur, supporting the Comment's assertion that the doctrine allows the plaintiff to establish a prima facie case of negligence based on the circumstances of the accident, without having to prove the specific negligent act that caused the injury.

Illustration 1 is suggested by the case of *Merriman v Kraft*, 253 Ind. 58, 249 N.E.2d 485 (Supreme Court of Indiana 1969), where the court held that the doctrine of res ipsa loquitur applies because the plaintiff showed that the instrumentality that caused his injury was under the exclusive control of the defendant and that the accident was the result of the defendant's lack of reasonable care.

Illustration 3 is derived from the facts of *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (Supreme Court of Illinois 1980). The court held that the res ipsa loquitur doctrine is applicable in medical malpractice cases if the plaintiff demonstrates that the injury occurred in an occurrence that ordinarily does not happen in the absence of negligence, by an agency or instrumentality within the defendant's exclusive control, and under circumstances indicating that the injury was not due to any voluntary act or neglect on the part of the plaintiff.

Illustration 4 is based on *Clark v. Gibbons*, 66 Cal.2d 399 (California 1967), where the court held that the plaintiff could still avail himself of the doctrine of res ipsa loquitur even though he pled and introduced evidence of a specific act of negligence.

The case of *Mobil Chemical Co v Bell*, 517 S.W.2d 245 (Supreme Court of Texas 1974) supports the Comment's assertion that the doctrine of res ipsa loquitur should not be used to tip the balance in favor of the plaintiff when there is equal evidence to support the contention that the defendant was not negligent. The court held that the plaintiffs failed to establish the essential elements of res ipsa loquitur and therefore, the principle is inapplicable in this case.

Finally, the case of *Myrlak v Port Authority of New York and New Jersey*, 157 N.J. 84 (Supreme Court of New Jersey 1999) provides a nuanced view of the doctrine's application in strict products liability cases, which may be relevant for further research. The court held that the traditional negligence doctrine of res ipsa loquitur generally is

not applicable in a strict products liability case, adopting instead the "indeterminate product defect test" established in Section 3 of the Restatement (Third) of Torts: Products Liability.

#### **d. Res Ipsa Loquitur and Other Possible Causes.**

The Comment's discussion of the doctrine of res ipsa loquitur and its application in cases where the specific cause of an injury is unknown is supported by several cases. The Supreme Court of Tennessee's decision in *Provident Life & Accident Insurance Company and Arthur Andersen & Company v. Professional Cleaning Service, Inc.*, 21 McCanless 199, 217 Tenn. 199, 396 S.W.2d 351 (1965) is particularly illustrative. The court held that the doctrine applies if the instrument that produces an injury is under the exclusive control of the defendant and the injury would not ordinarily result if proper care were exercised. The court also noted that the doctrine of res ipsa loquitur is a way of presenting substantive evidence of negligence and rescues a plaintiff from the predicament of having no evidence of negligence to support their case. The court concluded that the plaintiffs did not have to eliminate all other possible causes or inferences than that of the defendant's negligence; it was enough if the evidence for them made such negligence more probable than any other cause.

The Comment's point that the plaintiff is not required to conclusively eliminate all other possible causes of the injury is further supported by the United States Court of Appeals, District of Columbia Circuit's decision in *Bell v May Dept Stores Co*, 866 F.2d 452 (1989). The court held that the plaintiffs failed to establish the essential elements of res ipsa loquitur and therefore, the principle is inapplicable in this case. The court explained that for res ipsa loquitur to apply, the event must be of the kind that does not ordinarily occur in the absence of someone's negligence, it must be caused by an instrumentality within the exclusive control of the defendant, and it must not have been due to any voluntary action or contribution on the part of the plaintiff. The court found that the plaintiffs failed to establish that the accident most probably occurred due to the defendant's negligence. The evidence presented showed that there were several possible causes for the malfunction of the elevator doors, some of which did not involve the defendant's alleged negligence. The court emphasized that res ipsa loquitur requires more than mere speculation and that the plaintiffs must exclude other probable causes of the accident by a preponderance of the evidence. Since the plaintiffs failed to meet this burden, the court held that res ipsa loquitur was inapplicable in this case.

The Illustrations provided in the Comment are also supported by case law. For instance, Illustration 1, which involves a construction company's negligence resulting in a bridge collapse, is similar to the facts in *Merriman v. Kraft*, 253 Ind. 58, 249 N.E.2d 485 (Supreme Court of Indiana 1969). In that case, the court held that the doctrine of res ipsa loquitur applies when the plaintiff shows that the instrumentality that caused his injury was under the exclusive control of the defendant and that the accident was the result of the defendant's lack of reasonable care. Similarly, Illustration 3, which involves a surgical instrument left inside a patient's body, is reminiscent of the facts in *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (Supreme Court of Illinois 1980). The court in that case held that the res ipsa loquitur doctrine is applicable in medical malpractice cases if the plaintiff demonstrates that the injury occurred in an occurrence that ordinarily does not happen in the absence of negligence, by an agency or instrumentality within the defendant's exclusive control,

and under circumstances indicating that the injury was not due to any voluntary act or neglect on the part of the plaintiff.

Finally, Illustration 5, which involves a customer slipping on a wet floor in a supermarket, is supported by the Supreme Court of New Jersey's decision in *Brown v Racquet Club of Bricktown*, 95 N.J. 280 (1984). The court held that the doctrine of *res ipsa loquitur* applied in the case, where the plaintiff was injured when a staircase in the defendant's premises collapsed. The court reasoned that *res ipsa loquitur* allows for an inference of negligence when the occurrence itself bespeaks negligence, the instrumentality causing the injury was within the defendant's exclusive control, and there is no indication that the injury was the result of the plaintiff's own voluntary act or neglect. In this case, the collapse of the stairs raised an inference of negligence on the part of the defendant. The defendant, as the owner and occupier of the premises, had control over the stairs and a duty to provide a reasonably safe place for its invitees. The court also noted that the defendant's failure to conduct a reasonable inspection of the stairs contributed to the collapse and further supported the inference of negligence.

#### **e. Res Ipsa Loquitur and Plaintiff's Contributory Negligence.**

The Comment's discussion of the shift in the application of *res ipsa loquitur* in cases involving plaintiff's contributory negligence is supported by a number of cases. The Supreme Court of Colorado's decision in *Montgomery Elevator Co v Gordon*, 619 P.2d 66 (1980), is particularly illustrative. In that case, the court held that the doctrine of *res ipsa loquitur* applies even when the plaintiff's negligent acts or omissions may have contributed to the injury. The court reasoned that the purpose of comparative negligence is to ameliorate the harshness of the complete bar resulting from common law contributory negligence. This was accomplished by mandating a comparison of the relative degrees of negligence of the plaintiff and the defendant by the jury. If the court insisted upon retaining the requirement that plaintiff be free from contributory negligence or other responsibilities as an element of the *res ipsa loquitur* doctrine, it would effectively erect a complete bar to recovery in cases where a plaintiff must rely on *res ipsa loquitur* to establish a *prima facie* case of negligence.

This approach is consistent with the principle that the focus of the analysis should be on the defendant's conduct and whether it was more likely than not a cause of the injury. The plaintiff's contributory negligence, if any, is a separate issue that should be considered in determining the extent of the defendant's liability, rather than a bar to the application of the doctrine of *res ipsa loquitur*. This approach allows for a more nuanced and fair assessment of liability, reflecting the realities of complex factual scenarios where both parties may have contributed to the injury.

The illustrations provided in the Comment further demonstrate the application of this principle. For example, in Illustration 1, Brenda's actions in attempting to exit the partially opened elevator may have contributed to her injury, but the court still applies the doctrine of *res ipsa loquitur*, focusing on whether the maintenance company's inferred negligence was more likely than not a cause of the injury. Similarly, in Illustration 4, even though Marion was walking close to the curb, which may have contributed to his injury, the court applies the doctrine of *res ipsa loquitur*, focusing on whether Carita's inferred negligence was more likely than not a cause of the injury.

The cases cited in the Comment also support the shift in the application of *res ipsa loquitur* in cases involving plaintiff's contributory negligence. For example, in *Bell v. May Dept Stores Co*, 866 F.2d 452 (1989), the court held that the plaintiffs failed to establish the essential elements of *res ipsa loquitur* and therefore, the principle is inapplicable in this case. However, the dissenting opinion disagreed with the majority's interpretation of *res ipsa loquitur* and argued that the plaintiffs had met the threshold requirements for the application of the doctrine. The dissent emphasized that the purpose of *res ipsa loquitur* is to allow fact-finders to make appropriate assignments of the risks of accidents in cases where the exact causes are unknown or unknowable. The dissent criticized the majority for conflating the elements of *res ipsa loquitur* into a single requirement of proving negligence and for disregarding the jury's role in drawing inferences from the evidence presented.

In *Giles v. City of New Haven*, 228 Conn. 441 (1994), the court applied the doctrine of *res ipsa loquitur*, which allows the jury to infer negligence based on the circumstances of the incident, even without direct evidence of negligence. The court clarified that the plaintiff did not need to completely eliminate other possible causes of the accident, but only needed to establish enough evidence that the defendant's negligence was the most plausible explanation. The court also rejected the defendant's argument that the plaintiff's use of the elevator and control over its movement and chain's sway precluded the application of *res ipsa loquitur*. The court held that the defendant's control and responsibility for the elevator and its parts, including the compensation chain, were sufficient to warrant the inference of negligence. Additionally, the court adopted the rule that under comparative negligence, the plaintiff's negligence should not bar liability but should only reduce damages.

In *Barretta v. Otis Elevator Co.*, 242 Conn. 169, 698 A.2d 810 (1997), the court held that the plaintiff was not entitled to a jury instruction on the doctrine of *res ipsa loquitur*. The court explained that the doctrine of *res ipsa loquitur* allows a jury to infer negligence when no direct evidence of negligence has been introduced. However, for the doctrine to apply, two prerequisites must be satisfied: (1) the situation, condition, or apparatus causing the injury must be such that in the ordinary course of events no injury would have occurred unless someone had been negligent, and (2) at the time of the injury, both inspection and operation must have been in the control of the party charged with neglect. In this case, the court found that the evidence presented by the plaintiff did not satisfy the first prerequisite. The plaintiff's expert testified that the escalator had been designed and installed correctly and that he had no evidence or reason to believe that the defendant had been negligent in inspecting or maintaining the escalator. The expert also testified that the escalator could have stopped due to a loose wire or a minor malfunction known as a "gremlin," but he did not testify that these causes could or should have been discovered by the defendant during a safety inspection or reasonable maintenance. Therefore, the court concluded that the evidence did not support a charge on the doctrine of *res ipsa loquitur*.

In *Brown v Racquet Club of Bricktown*, 95 N.J. 280 (1984), the court held that the doctrine of *res ipsa loquitur* applied in this case. The collapse of the stairs created an inference of negligence on the part of the defendant. The defendant, as the proprietor of the premises, had a duty to exercise reasonable care to provide a safe place for its invitees. The court also noted that the defendant's failure to conduct a reasonable inspection of the stairs contributed to the collapse and further supported the inference of negligence.

In *Merriman v Kraft*, 253 Ind. 58, 249 N.E.2d 485 (1969), the court held that the doctrine of *res ipsa loquitur* applies in this case because the plaintiff showed that the instrumentality that caused his injury (the defendant's car) was under the exclusive control of the defendant and that the accident was the result of the defendant's lack of reasonable care. The court explained that the doctrine of *res ipsa loquitur* does not require the plaintiff to exclude every other possible cause of the accident, but rather, it allows the plaintiff to rely on the inference of negligence based on the unusual occurrence of the accident. The court also held that the plaintiff could still avail himself of the doctrine of *res ipsa loquitur* even though he pled and introduced evidence of a tire blowout, as the blowout did not necessarily exclude the possibility of the defendant's negligence.

In *Dover Elevator Co v Swann*, 334 Md. 231 (1994), the court rejected the confusion and formalistic distinctions between the doctrines of *res ipsa loquitur* and exclusive control. The court adopted the evidentiary rule articulated in section 328D of the Restatement (Second) of Torts, which allows for the inference of negligence when the event is of a kind that ordinarily does not occur in the absence of negligence, other responsible causes are eliminated, and the indicated negligence is within the scope of the defendant's duty to the plaintiff. The court concluded that Otis Elevator Co. did not owe a duty of the highest degree of care and therefore the doctrine of *res ipsa loquitur* was improperly applied to them. The court affirmed the award of a new trial to Otis Elevator Co.

In *Gilbert v. Korvette Inc*, 457 Pa. 602 (1974), the court rejected the distinction between *res ipsa loquitur* and exclusive control and adopted a single doctrine based on appropriate evidentiary concerns. The court emphasized that the doctrine of *res ipsa loquitur* is a rule of evidence, not substantive tort law. The court also clarified that exclusive control is not a prerequisite for the application of *res ipsa loquitur* and that responsibility can be shared by multiple defendants.

These cases demonstrate the shift in the application of *res ipsa loquitur* in cases involving plaintiff's contributory negligence. They reflect the modern trend, as reflected in the majority rule, to focus on whether the defendant's inferred negligence was more likely than not a cause of the injury, even if the plaintiff's own negligence contributed to the injury. This shift aligns with the principles of comparative negligence, which aim to distribute liability in proportion to each party's degree of fault.