Rolling the "Barrel" a Little Further: Allowing Res Ipsa Loquitur To Assist in Proving Strict Liability in Tort Manufacturing Defects

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ROLLING THE "BARREL" A LITTLE FURTHER: ALLOWING RES IPSA LOQUITUR TO ASSIST IN PROVING STRICT LIABILITY IN TORT MANUFACTURING DEFECTS*

In England in 1863, a barrel of flour rolled out of the second floor of a barn, struck a passerby walking underneath, and, as William Prosser said, rolled "into the lives of all tort lawyers." Faced with this wayward barrel, the English court crafted the now-famous tort doctrine of res ipsa loquitur. The court held that the peculiar circumstances of the accident generated a presumption of negligence, allowing recovery even though the plaintiff could not prove negligence directly. One hundred years later, Chief Justice Traynor of the California Supreme Court ushered in a new liability scheme, holding a manufacturer of a power tool strictly liable in tort for a defective product without requiring any showing of fault on the part of the manufacturer.

Res ipsa loquitur and strict liability in tort for defective products may appear to be distinct legal constructs, yet both spring from the same doctrinal foundation in that they assist plaintiffs in establishing liability when direct proof 1s beyond their reach. *

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3. See id.

4. See Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (holding that liability for defective products should be governed "by the law of strict liability in tort" and not by contract law).

5. See Restatement (Third) of Torts: Products Liability § 2 cmt. a (Tentative Draft No. 2, 1995) ("Strict liability performs a function similar to the concept of res ipsa loquitur, allowing deserving plaintiffs to succeed notwithstanding what
Res ipsa loquitur, as embraced by modern American courts, allows the court to infer a defendant's negligence absent clear proof of negligent conduct.\textsuperscript{6} Strict liability abandons a conduct-based approach, instead allowing a plaintiff to recover by showing that a product was defective and unreasonably dangerous when it left the manufacturer.\textsuperscript{7} An early products liability case decided by the California Supreme Court highlighted the similarities that exist between these two important tort doctrines.\textsuperscript{8}

In the early 1940s, Gladys Escola, a waitress, was transferring Coca-Cola bottles from a shipping carton into the refrigerator when one of the bottles exploded, cutting her hand severely.\textsuperscript{9} She sued the bottling company for negligence and, relying on the doctrine of res ipsa loquitur, prevailed before the trial court and the California Court of Appeals.\textsuperscript{10}

Chief Justice Gibson, writing for the California Supreme Court, affirmed the lower courts' decisions.\textsuperscript{11} More importantly, the language of his opinion highlighted the similarities that exist between res ipsa loquitur and strict products liability. Chief Justice Gibson engaged in a two-part analysis.\textsuperscript{12} He first determined that because the bottle was not damaged "after delivery to the restaurant by the defendant . . . it follow[ed] . . . that the bottle was in some manner defective at the time defendant relinquished control, because sound and properly prepared bottles of carbonated liquids do not ordinarily explode when carefully handled."\textsuperscript{13} He then noted that the defendant could have been negligent in two different ways: either the defendant overcharged a safe bottle or failed to discover a properly charged but defective-

\textsuperscript{6} See 1 SPEISER, supra note 1, \S 1:1, at 3-4.
\textsuperscript{7} See RESTATEMENT (SECOND) OF TORTS \S 402A (1965); infra note 33 and accompanying text. Not all states have followed the Restatement definition of strict liability. See infra notes 64-65 and accompanying text.
\textsuperscript{8} See Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (affirming a judgment for a plaintiff under res ipsa loquitur).
\textsuperscript{9} See id. at 437-38.
\textsuperscript{10} See id. at 437, 440.
\textsuperscript{11} See id. at 440.
\textsuperscript{12} See id. at 439-40.
\textsuperscript{13} Id. at 439 (emphasis added).
The Chief Justice concluded that sufficient evidence existed for a jury to infer that a defect existed in the bottle and to infer further that the defendant's conduct was negligent. Then-justice Traynor concurred in the judgment. Traynor argued that strict liability, not res ipsa loquitur, should be used to establish negligence for any injury caused by a product defect. He noted that negligence approached strict liability because, procedurally, the jury was left with the ultimate power to determine whether the defendant had refuted the inference of negligence. Traynor's concurrence suggested that both doctrines, res ipsa loquitur and the strict liability system that he envisioned, should be available to aid the plaintiff in establishing the cause of the injury. He favored a strict liability system because some causes of accidents cannot be attributed to negligence "even by the device of res ipsa loquitur," and the ability to determine the cause of the defect should not control whether a plaintiff could recover. Justice Traynor's espousal of a strict liability system, therefore, rested at least in part on the same premise as the English court's decision one hundred years earlier to create the doctrine of res ipsa loquitur; namely, a legal recovery on account of injury should not be barred by lack of proof when the defendant has better knowledge or access to knowledge regarding the cause of the accident.

14. See id. at 439-40.
15. See id.
16. See id. at 440 (Traynor, J., concurring).
18. See Escola, 150 P.2d at 441 (Traynor, J., concurring).
19. See id. (Traynor, J., concurring).
20. Id. (Traynor, J., concurring).
21. See id. (Traynor, J., concurring).
22. In Christie v. Griggs, 170 Eng. Rep. 1088 (K.B. 1809), an English decision pre-dating Byrne v. Boadle, the court justified shifting the burden of persuasion over to the defendant because in many accidents it may be impossible for the plaintiff to produce the required evidence. See id. at 1088. Justice Traynor's concurrence noted that an injured individual is ordinarily unable to identify the cause of a defect because of unfamiliarity with the manufacturing process. See Escola, 150 P.2d at 441 (Traynor, J., concurring).
Despite the similar purposes of the strict liability and res ipsa loquitur doctrines, confusion exists over whether to allow res ipsa loquitur to play a role in proving a product defect in a strict liability claim. Louisiana and several other states have recognized the utility of res ipsa in a strict liability setting.\(^{23}\) Other states, such as California, have rejected the cross-application of the doctrine.\(^{24}\)

This Note outlines the various state approaches to cross-application and proposes that res ipsa loquitur be available to plaintiffs who file manufacturing defect strict liability claims. More specifically, this Note proposes a substantively and procedurally modified res ipsa doctrine tailored to proving manufacturing defects and furthering the social policy goals inherent in the strict products liability system.

The first section of this Note traces the historical evolution of res ipsa loquitur and strict products liability. The res ipsa loquitur discussion focuses on the several variations of the test that courts require plaintiffs to meet in order to qualify for a res ipsa loquitur instruction, as well as the varying procedural effects courts historically have given the doctrine. The strict products liability discussion traces the development of the strict liability tort doctrine and outlines the differing state approaches to strict products liability.

The second section of this Note begins by briefly discussing the existing commentary regarding the applicability of res ipsa loquitur in a strict products liability claim. The section then outlines approaches states have taken regarding whether the doctrine of res ipsa loquitur can be used to prove defect under a strict products liability theory. The section discusses the states that allow the doctrine to be employed, as well as the states that clearly have restricted the use of the doctrine to negligence theory. It also analyzes state court opinions that have embraced or rejected only implicitly the use of res ipsa in strict liability claims.

The third section of this Note briefly outlines the traditional policy rationales for strict products liability. This section then

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23. See infra text accompanying notes 142-58.
24. See infra text accompanying notes 84-141.
critiques the various state approaches to the question, and in so doing briefly touches on some of the policy bases for the proposal outlined in the final section of the Note.

Finally, this Note proposes that res ipsa loquitur be allowed to assist in proving manufacturing defects in a strict liability claim under a new two-tiered presumption analysis tailored for strict products liability settings. This proposal is consistent with the policy goals justifying the imposition of strict liability for manufacturing defects and will further those goals by making strict products liability for manufacturing defects more strict.

THE HISTORICAL DEVELOPMENT OF RES IPSA LOQUITUR AND STRICT PRODUCTS LIABILITY

Res Ipsa Loquitur

Res ipsa loquitur, or "the thing speaks for itself," is a species of circumstantial evidence developed at common law to help a plaintiff prove negligence. The English roots of the doctrine are easily summarized. In Byrne v. Boadle, the court found the defendant negligent under the principle of res ipsa loquitur even though the plaintiff could not prove affirmatively that negligent conduct caused the barrel to fall. The court concluded that, when such an accident occurs, the mere happening of the event presupposes negligence. Two years later, Chief Justice Erle, in Scott v. London & St. Katherine Docks Co., articulated the doctrine of res ipsa loquitur fully by holding:

There must be reasonable evidence of negligence. But where the thing is sh[olwn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

25. See, e.g., Prosser, supra note 1, at 184-85.
27. See id. at 300 ("There are certain cases of which it may be said res ipsa loquitur, and this seems one of them.").
28. See id. at 300-01.
30. Id. at 667; see generally Mark Shain, Res Ipsa Loquitur 85-112 (1945) (dis-
Thus, the doctrine gives the plaintiff the ability to prove negligence when the specific facts necessary to prove negligence are unavailable.

In the United States, almost every state has embraced the doctrine of res ipsa loquitur.\(^3\) The traditional view in the United States has been that for a plaintiff to use the doctrine successfully, the plaintiff must prove that (1) the event is not one that normally occurs absent negligence, (2) the event is attributable to an agency or instrumentality within the defendant's exclusive control, and (3) the plaintiff has not voluntarily contributed to the accident-causing event.\(^3\) The Restatement (Second) of Torts test for res ipsa loquitur is similar to the traditional view but does not require that the defendant have exclusive control over the instrumentality.\(^3\) Court opinions in eight states have indicated some support for the Restatement test,\(^3\)

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\(^3\) Discussing more fully the creation of the doctrine of res ipsa loquitur in England and describing court decisions prior to *Boadle* that invoked the doctrine.


33. The Restatement (Second) of Torts section 328D allows a jury to find the defendant negligent 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.

RESTATEMENT (SECOND) OF TORTS § 328D (1965).

and one other state court has commented favorably on the Restatement test even though the state does not officially recognize the res ipsa doctrine as outlined in the Restatement. Some states have, at times, added a fourth requirement to the Restatement test: that explanatory evidence be more readily accessible to the defendant than to the plaintiff. This element has not been applied uniformly even among states embracing the fourth element.

Courts in the United States have varied the procedural effect of res ipsa loquitor over time. Initially, courts followed the

(R.I. 1984) (stating that Rhode Island has adopted the Restatement test); Provident Life & Accident Ins. Co. v. Professional Cleaning Serv., Inc., 396 S.W.2d 351, 355 (Tenn. 1965) (embracing the Restatement view by deemphasizing exclusive control).

35. See Jones v. Porretta, 405 N.W.2d 863, 872 n.6 (Mich. 1987) (relegating the Restatement factors to a footnote).

36. See Ray v. Ameri-Care Hosp., 400 So. 2d 1127, 1133 (La. Ct. App. 1981) (requiring that the explanation of the accident be more readily available to the defendant); Wilson v. Stilwill, 309 N.W.2d 898, 905 (Mich. 1981) (listing this element as one requirement); Bass v. Nooney Co., 646 S.W.2d 765, 768 (Mo. 1983) (listing this element as part of the test); Otis Elevator Co. v. Reid, 706 P.2d 1378, 1380 & n.1 (Nev. 1985) (upholding a jury instruction stating that the jury must find that the defendant is better able to explain the event than the plaintiff); Goedert v. Newcastle Equip. Co., 802 P.2d 157, 160 (Wyo. 1990) (requiring a showing that the defendant had superior knowledge before allowing the doctrine to be applied); see also Buckelew v. Grossbard, 435 A.2d 1150, 1157 (N.J. 1981) (discussing superior knowledge as a policy but not listing it as a factor); Taylor v. City of Beardstown, 491 N.E.2d 803, 809 (Ill. App. Ct. 1986) (discussing access to explanatory evidence but not listing it as a factor); see generally 1 SPEISER, supra note 1, § 2:27 (discussing states that require this fourth element).

37. Two Wisconsin cases illustrate the inconsistent use of this fourth requirement. Compare Szafranski v. Radetzky, 141 N.W.2d 902, 908 (Wis. 1966) (concluding that the doctrine is only available "when the conduct is peculiarly within the knowledge of the defendant"), with American Family Mut. Ins. Co. v. Dobrzynski, 277 N.W.2d 749, 752-53 (Wis. 1979) (applying the traditional test); see also 1 SPEISER, supra note 1, § 2:27 n.15 (listing state cases rejecting this requirement). Page Keeton has criticized the requirement that the plaintiff demonstrate that the defendant has greater access to information regarding the event. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 254-55 (5th ed. 1984). The Restatement res ipsa test reflects Prosser's view. See RESTATEMENT (SECOND) OF TORTS § 328D cmt. g (1965) (eschewing an exclusive control requirement).

38. This Note refers repeatedly to the procedural effect given to res ipsa loquitor in various states. Three different levels of procedural effect are relevant. First, reference in this Note to shifting the burden of proof, or the full burden, to the defendant means that the defendant has the burden of production as well as the burden of persuasion on the issue. See infra note 39 and accompanying text. Second, reference to the defendant having the burden of going forward with the evidence means
English rule that proving the elements of the doctrine created a legal presumption of negligence, shifting the burden of proof to the defendant to prove himself free of negligence. Currently, state courts are split regarding the procedural effect of res ipsa loquitur. The majority view is that the doctrine permits a jury to find negligence but does not command that the jury do so. Under this view, the doctrine does not shift the burden of proof. The defendant may be deemed to have the burden of going forward with the evidence, but only in the sense that failure to put in evidence to counter the permissible inference of negligence raised by the plaintiff may allow the jury to return an unfavorable verdict. In Sweeney v. Erving, the Supreme Court embraced this view of res ipsa loquitur, noting that the doctrine only allows an inference of negligence and does not force an explanation from the defendant.

A minority of states have given the doctrine a greater procedural effect. In California, the doctrine creates a rebuttable presumption of negligence, and the jury must presume the conduct sued upon to be negligent unless the defendant puts on evidence to counter the presumption. Several other states have
gone even further and held that the doctrine shifts the burden of persuasion over to the defendant.\textsuperscript{46} Any attempt to analyze state court decisions is problematic, however, given the courts' imprecise uses of the terms "presumption" and "inference."\textsuperscript{47} Two court opinions applying Illinois law illustrate the confusion. In a recent federal case, the court concluded that res ipsa loquitur created a presumption of negligence;\textsuperscript{48} an earlier state court opinion, however, had held that the doctrine only created an inference of negligence.\textsuperscript{49} Despite state differences regarding the proper elements of the doctrine and its procedural effect, res ipsa loquitur remains an important inferential doctrine and should be expanded beyond the negligence realm to serve limited duty in the strict liability setting.

\textbf{Strict Products Liability}

In the last several hundred years, manufacturer liability has swung from strict liability to fault-based liability and back to strict liability.\textsuperscript{50} During the eighteenth century, manufacturers were held strictly liable for any defects in their products regardless of fault.\textsuperscript{51} Slowly, an emphasis on fault developed in the


\textsuperscript{47} See George S. Goodspeed, Jr., Comment, \textit{Application of the Doctrine of Res Ipsa Loquitur to Food Cases}, 3 MIAMI L.Q. 613, 621 (1949).

\textsuperscript{48} See Neace v. Laimans, 951 F.2d 139, 141 (7th Cir. 1991). \textit{But see id.} (referring to "a presumption of negligence" and an "inference of negligence" within the same paragraph).

\textsuperscript{49} See Dyback v. Weber, 500 N.E.2d 8, 12 (Ill. 1986) (discussing the inference of negligence created by the doctrine in Illinois).

\textsuperscript{50} See \textit{infra} notes 51-67 and accompanying text.

law, coinciding with the Industrial Revolution. A dramatic shift in products liability law occurred with the now-famous English decision of Winterbottom v. Wright, which insulated product manufacturers from liability unless privity existed between the manufacturer and the buyer of the merchandise. The privity requirement remained inviolate in the United States until 1960.

In 1960, the New Jersey Supreme Court, in Henningsen v. Bloomfield Motors, Inc., abandoned the contractual privity requirement and held that the ultimate buyer of an injury-causing product could sue the manufacturer directly. Just two years later, the California Supreme Court rejected the contractual basis altogether in favor of a strict liability in tort theory of recovery. Chief Justice Traynor argued that manufacturers should be strictly liable for placing products on the market that they know will not be inspected prior to resale.

Chief Justice Traynor's opinion ushered in the current phase of strict products liability. Three years later, the Restatement (Second) of Torts codified Justice Traynor's approach in section 402A. Under the Restatement view:

(1) One who sells any product in a defective condition unreas-

97, at 690-92 (discussing the history of strict liability in warranty).
55. See infra notes 56-58 and accompanying text.
57. See id. at 100-01.
58. See id.
60. See id. at 900.
sonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.62

Most states have adopted some form of strict products liability, and the vast majority of states have expressly endorsed the section 402A test of strict liability.63 Of the states that have not

62. Id. For a discussion of the policy rationales behind the creation of this doctrine, see id. cmt. c and infra notes 226-32 and accompanying text.


Several other states have adopted identical or functionally identical language by
expressly adopted the Restatement doctrine of strict products liability, several states in the group have adopted the Restatement view but omitted the requirement that the product be "unreasonably dangerous." Several other states have adopted strict liability doctrines similar to the doctrine articulated in the Restatement. Only two states, North Carolina and Virginia, have not embraced strict liability in tort. In Virginia, how-


ever, at least one court has noted the similarity between the Virginia approach and the Restatement. Thus, most states have embraced both res ipsa and strict products liability. It is the interrelation between these two legal theories that has generated scholarly and judicial confusion.

THE APPLICABILITY OF RES IPSA LOQUI TUR IN A STRICT LIABILITY SETTING

Current Legal Scholarship

Little scholarly research has been done on the compatibility of res ipsa loquitur and strict liability. William Prosser has written that, "[s]trictly speaking, since proof of negligence is not in issue, res ipsa loquitur has no application to strict liability; but the inferences which are the core of the doctrine remain, and are no less applicable." Several state courts have embraced Prosser's view in grappling with the issue, and it has been followed by Frank Hills in his practice-oriented treatise on strict products liability cases. Two commentators analyzing defective product claims, however, recently came to the exact opposite conclusion: res ipsa loquitur could not be used in a strict liability context.

Another survey of the law of products liability has approached the question differently, focusing on the procedural implications of the doctrine. The authors conclude that if res ipsa generates an inference of negligence it is permissible to use the doc-

67. See Bly v. Otis Elevator Co., 713 F.2d 1040, 1045 n.6 (4th Cir. 1983) (stating that Virginia's imposition of warranty liability for personal injuries resulting from defective products is the "functional equivalent" of strict liability under the Restatement).

68. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103, at 672-73 (4th ed. 1971). This early edition is cited because certain courts have quoted this phrase when discussing the compatibility of res ipsa and strict products liability. See, e.g., Williams v. Smart Chevrolet Co., 730 S.W.2d 479, 482 (Ark. 1987); Mays v. Ciba-Geigy Corp., 661 F.2d 348, 358 (Kan. 1983). The latest edition does not discuss the compatibility of res ipsa and strict liability. See KEETON ET AL., supra note 37, § 103.

69. See infra notes 162 and 164 and accompanying text.

70. FRANK S. HILLS, HANDLING THE STRICT LIABILITY PRODUCTS CASE 220 (1980).


trine in strict liability claims, but if the doctrine generates a
presumption of negligence then res ipsa loquitur cannot be ap-
plied in such a claim.\textsuperscript{73}

Finally, Thomas Cowan, in a law review article published
shortly after the Restatement incarnation of strict products lia-
ibility surfaced, envisioned the future use of res ipsa loquitur to
prove product defects as the strict liability system moved toward
a purely compensation-driven form.\textsuperscript{74} Although he did not ex-
plicitly endorse the doctrine's use, Cowan implicitly favored
allowing res ipsa to prove defectiveness because such use fur-
thered his compensation-based model of strict liability.\textsuperscript{75}

Thus, current commentary has failed to provide a clear an-
swer to the question of res ipsa/strict liability cross-applicability.
The remainder of this section explores various approaches that
states have taken in directly or indirectly discussing the issue.

\textbf{State Approaches}

An analysis of state approaches reveals that they provide no
more definitive answer than do current commentaries. Some
states clearly have allowed res ipsa loquitur in strict liability
claims,\textsuperscript{76} and other states have disallowed the doctrine out-
right.\textsuperscript{77} Between those two extremes, court opinions from still
more states have implicitly favored or disfavored the extension
of res ipsa loquitur beyond negligence claims.\textsuperscript{78} A majority of
states have not decided definitively whether res ipsa loquitur
can be used to prove defect in a strict liability setting.\textsuperscript{79} Only
about one third of the states have issued rulings that at least
suggest whether res ipsa loquitur will be available to plaintiffs

\textsuperscript{73}. See \textit{id}.
\textsuperscript{75}. See \textit{id}.
\textsuperscript{76}. See \textit{infra} notes 142-58 and accompanying text.
\textsuperscript{77}. See \textit{infra} notes 87-141 and accompanying text.
\textsuperscript{78}. See \textit{infra} notes 159-219 and accompanying text.
\textsuperscript{79}. See, e.g., Dutsch v. Sea Ray Boats, Inc., 845 P.2d 187, 190 (Okla. 1992) (not-
ing that the application of res ipsa loquitur to actions in strict liability was undecid-
ed in that state); \textit{cf. infra} notes 80, 87-225 and accompanying text.
in strict liability product defect actions. \textsuperscript{80} Even in those states that have decided, a clear understanding of the approaches remains elusive because courts have focused on procedural issues as well as the role of circumstantial evidence in proving defectiveness. States are divided over whether circumstantial evidence can be used to prove product defects. \textsuperscript{81} To confuse the analysis further, different states give res ipsa loquitur different procedural effects \textsuperscript{82} and use different tests for the doctrine as well. \textsuperscript{83} Regardless of the confusion, given that state courts have focused primarily on those factors mentioned above, the analysis of state court approaches will center around the treatment that state courts have given those issues.

\textit{States Declining to Recognize Res Ipsa Loquitur in Strict Products Liability Claims}

State courts have used various bases for excluding res ipsa loquitur from the strict liability setting. Courts have rejected the doctrine because of procedural concerns, \textsuperscript{84} because of the belief

\textsuperscript{80} See infra notes 87-225 and accompanying text.

\textsuperscript{81} See, e.g., Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 432 (Minn. 1971) (noting that the fact of the accident alone rarely suffices to show the existence of defect at the time the defendant relinquished control); Scanlon v. General Motors Corp., 326 A.2d 673, 677 (N.J. 1974) (stating that the mere occurrence of the accident is not usually sufficient absent additional circumstantial evidence to show defect); Gunstone v. Julius Blum GMbH.a-6873, 825 P.2d 1389, 1393 (Or. Ct. App. 1992) (concluding that the facts of the accident do not prove defect if a plaintiff has pled a specific defect). But see Caprara v. Chrysler Corp., 423 N.Y.S.2d 694, 697 (N.Y. App. Div. 1979) (noting that if a plaintiff can prove that the product did not perform as intended and can exclude all other potential causes not attributable to the defendant then an inference of defect will be allowed).

\textsuperscript{82} Compare Domany v. Otis Elevator Co., 369 F.2d 604, 612 (6th Cir. 1966) (stating that, under Ohio law, the doctrine only creates a permissible inference of negligence), with Newing v. Cheatham, 540 P.2d 33, 42-43 (Cal. 1975) (en banc) (noting that res ipsa loquitur is given a presumptive effect in California).

\textsuperscript{83} Compare Khirieh v. State Farm Mut. Auto. Ins. Co., 594 So. 2d 1220, 1223 (Ala. 1992) (applying the traditional test focusing on exclusive control, the plaintiff's conduct, and an accident that would not normally occur absent negligence), with Wells v. Woman's Hosp. Found., 286 So. 2d 439, 442 (La. Ct. App. 1973) (requiring that the defendant have greater access to the information than the plaintiff to invoke the doctrine).

\textsuperscript{84} See infra notes 88-95 and accompanying text.
that a defect must be shown affirmatively, 85 and because of the belief that res ipsa is nothing more than a negligence doctrine. 86

California, the state that first ushered in the doctrine of strict liability, 87 does not allow res ipsa loquitur to be used in strict liability cases. California courts have indicated consistently their belief that the doctrine has no place in a strict liability claim. 88 The court opinions rejecting the doctrine are conclusory, however, and provide no guidance as to the rationale behind the rejection. 89 A federal court struggling with the same problem under Hawaiian law discussed the California courts' rejection of the doctrine and concluded that the rejection stemmed from the stronger procedural effect given res ipsa loquitur under California law. 90

Under the California Evidence Code, res ipsa loquitur creates a presumption affecting the burden of production. 91 If the plaintiff proves the doctrinal elements of res ipsa loquitur, then the factfinder must assume the existence of the presumed fact until evidence is introduced that would support a finding of its nonexistence. 92 Thus, a res ipsa showing shifts the burden of production over to the defendant to rebut the presumption of negli-

85. See infra notes 96-106 and accompanying text.
86. See infra notes 112-24 and accompanying text.
89. See Barrett, 150 Cal. Rptr. at 342 (stating only that the doctrine is not applicable in any action predicated upon the theory of strict liability) (citation omitted); McCurter, 69 Cal. Rptr. at 496 (stating that an attempt to rely on res ipsa loquitur in a strict liability action "would be futile" because a "showing [of] a defect cannot be satisfied by reliance on the doctrine of res ipsa loquitur").
90. See Jenkins v. Whittaker Corp., 785 F.2d 720, 732-33 (9th Cir. 1986) (concluding that California courts do not allow the doctrine to be invoked in strict liability settings because res ipsa loquitur in California creates a presumption of negligence that is too great a burden for the defendant to overcome).
91. CAL. EVID. CODE § 646 (West 1995); see also Newing v. Cheatham, 540 P.2d 33, 42-43 (Cal. 1975) (noting that the presumptive effect of res ipsa loquitur shifts to the defendant the "obligation to introduce sufficient evidence to sustain a finding" that the defendant was not negligent).
92. See CAL. EVID. CODE § 604.
gence.\(^93\) If the defendant rebuts the presumption, a jury may still infer negligence from the facts that gave rise to the presumption.\(^94\) California gives the doctrine a greater procedural effect but does not require any special showing by the plaintiff to qualify for a res ipsa instruction; the plaintiff needs to establish only the elements of the traditional res ipsa loquitur test.\(^95\) Res ipsa loquitur, as defined in California, is a powerful procedural device for plaintiffs and one that may not dissipate even upon the introduction of contrary evidence by the defendant. The doctrine's procedural implications appear to be behind California's refusal to allow res ipsa to operate in a strict liability setting.

Other states have focused on the role of circumstantial evidence in proving defectiveness to exclude res ipsa from strict liability claims. The Alabama Supreme Court, in *Brooks v. Colonial Chevrolet-Buick, Inc.*,\(^96\) held that res ipsa is not available in strict liability claims because a plaintiff must put on some proof of the product's defectiveness.\(^97\) The court later provided the rationale for this ruling, stating that under Alabama's products liability law, "a defect in the product must be affirmatively shown."\(^98\) Procedural concerns did not appear to animate either decision.\(^99\) In Alabama, res ipsa loquitur allows, but does not require, a jury to infer negligence.\(^100\) The doctrine, as fol-

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93. See id. § 646 cmt., at 198; see also id. §§ 660-670 (outlining other presumptions that shift the full burden of proof).
94. See id. § 646(c)(1).
95. A plaintiff in California must establish three elements to use res ipsa loquitur:
First, that it is the kind of [accident or injury] which ordinarily does not occur in the absence of someone's negligence;
Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant [originally, and which was not mishandled or otherwise changed after the defendant relinquished control]; and
Third, that the [accident or injury] was not due to any voluntary action or contribution on the part of the plaintiff which was the responsible cause of his injury.
Id. § 646 cmt., at 198 (alterations in original).
96. 579 So. 2d 1328 (Ala. 1991).
97. See id. at 1333.
99. See id. at 415; Brooks, 579 So. 2d at 1333.
100. See Holmes v. Birmingham Transit Co., 116 So. 2d 912, 919 (Ala. 1959) (using both "presumption" and "inference" but meaning inference because the court conclud-
allowed in Alabama courts, does not shift the burden of proof to the defendant but merely the burden of going forward with the evidence.\textsuperscript{101} The only similarity between Alabama's and California's applications of res ipsa is that both states use the traditional res ipsa loquitur test.\textsuperscript{102}

The Tennessee Supreme Court has followed the Alabama Supreme Court's evidentiary logic in determining that res ipsa loquitur does not apply in strict products liability settings. In \textit{Browder v. Pettigrew},\textsuperscript{103} the court held that "the doctrine of \textit{res ipsa loquitur} is not a substitute for proof of defect."\textsuperscript{104} The court's analysis indicated that the doctrine could be used only in product liability actions brought under a negligence theory.\textsuperscript{105} Tennessee courts have relied on additional theories to limit the use of the doctrine. An appellate court recently held that the doctrine also cannot be applied to warranty-based product liability actions.\textsuperscript{106}

Tennessee's procedural approach also mirrors that of Alabama. Res ipsa loquitur allows a Tennessee jury to infer negligence but does not compel such an inference.\textsuperscript{107} To prevail in the suit, the defendant must rebut the inference, but the defendant is not required to put forth any evidence in order to do so.\textsuperscript{108} Tennessee and Alabama differ only over the appropriate test for res ipsa loquitur. Alabama applies the traditional defini-

\textsuperscript{101} See Greyhound Corp. v. Brown, 113 So. 2d 916, 919 (Ala. 1959); see generally 2 McCORMICK ON EVIDENCE, supra note 38, § 338, at 435-36 (outlining what most courts mean when they say that a party has the burden of going forward with the evidence).

\textsuperscript{102} See, e.g., Khirieh v. State Farm Mut. Auto. Ins. Co., 594 So. 2d 1220, 1223 (Ala. 1992) (applying the traditional test, focusing on an accident that would not occur normally absent negligence, the defendant's exclusive control, and the plaintiff's blameless conduct).

\textsuperscript{103} 541 S.W.2d 402 (Tenn. 1976).

\textsuperscript{104} \textit{Id.} at 404; see also Fulton v. Pfizer Hosp. Prods. Group, Inc., 872 S.W.2d 908, 912 (Tenn. Ct. App. 1993) (following the \textit{Browder} precedent).

\textsuperscript{105} See \textit{Browder}, 541 S.W.2d at 404 (quoting Mosier v. American Motors Corp., 303 F. Supp. 44 (S.D. Tex. 1967), \textit{aff'd}, 414 F.2d 34 (5th Cir. 1969)).

\textsuperscript{106} See \textit{Fulton}, 872 S.W.2d at 912.

\textsuperscript{107} See Sullivan v. Crabtree, 258 S.W.2d 782, 784 (Tenn. Ct. App. 1953).

\textsuperscript{108} See Kidd v. Dunn, 499 S.W.2d 898, 900 (Tenn. Ct. App. 1973) (quoting Sweeney v. Erving, 228 U.S. 233, 240 (1913), for the proposition that the defendant is not compelled to produce rebuttal evidence).
tion,109 but Tennessee courts have applied both the Restatement version and the traditional version.110 Regardless of the definition employed by Tennessee, both states reject the use of res ipsa loquitur on the grounds that evidence of defectiveness must be established affirmatively.111

The procedural effect of res ipsa loquitur and the role of circumstantial evidence in proving defectiveness are not the only grounds upon which states limit res ipsa to negligence claims. In Brothers v. General Motors Corp.,112 the Montana Supreme Court concluded that res ipsa loquitur should be reserved only for human conduct and should not be applied to defective products.113 The court recognized that defects could be proven circumstantially but declined to allow res ipsa loquitur to be used to infer defect.114 Procedural effect did not appear to guide the court's determination.115 Montana follows the procedural approach favored by a majority of states116 and by the other states that have rejected the use of res ipsa in product liability actions, except California.117 In Montana, res ipsa allows a jury to infer negligence,118 but a plaintiff's successful application of the doctrine appears to shift only the burden of going forward with evidence.119

Confusion exists in Montana over which res ipsa loquitur test

110. Compare Provident Life & Accident Ins. Co. v. Professional Cleaning Serv., Inc., 396 S.W.2d 351, 355 (Tenn. 1966) (discussing favorably the Restatement definition of res ipsa loquitur), with Armes v. Hulett, 843 S.W.2d 427, 432-33 (Tenn. Ct. App. 1992) (stating that the object must have been under the management of the defendant and the accident must have been the type that does not occur if proper care is used).
112. 658 P.2d 1108 (Mont. 1983).
113. See id. at 1110; see also Eisenmenger v. Ethicon, 871 P.2d 1313, 1317 (Mont. 1994) (reaffirming the inapplicability of res ipsa loquitur in a strict liability setting).
114. See Brothers, 658 P.2d at 1109.
115. See id. (containing no discussion of the procedural effect).
116. See supra notes 40-41 and accompanying text.
117. See supra text accompanying notes 87-111; infra text accompanying notes 122-36.
118. See Brothers, 658 P.2d at 1110.
119. See Baker v. Rental Serv. Co., 432 P.2d 624, 628 (Mont. 1967) (stating without implying an absolute duty that the defendant has the "burden of rebutting the inference or presumption of negligence").
the state favors. In *Brothers*, the Supreme Court of Montana supported the test outlined in the Restatement.\(^{120}\) A more recent case, however, emphasized the need to prove that the defendant exercised exclusive control, a key element of the traditional test.\(^{121}\) Regardless of the test employed, Montana's decision to disallow the use of res ipsa loquitur does not appear to hinge on which test is used or on the doctrine's procedural significance, but rather on a view that res ipsa loquitur is solely a circumstantial theory of negligence.

The belief that res ipsa is a creature of negligence was implicit in the Ohio Supreme Court's rejection of the use of res ipsa loquitur in strict products liability actions. In *State Auto Mutual Insurance Co. v. Chrysler Corp.*,\(^{122}\) the court held that the doctrine could be used to allow a jury to infer negligence only after the plaintiff had satisfied his burden of proof under strict liability.\(^{123}\) The court refused to expand the scope of the doctrine beyond the negligence realm.\(^{124}\) No unique procedural grounds exist in Ohio to explain the rejection of the doctrine. Res ipsa loquitur receives the same judicial treatment as in Alabama, Tennessee, and Montana in that it creates an inference of negligence\(^{125}\) but does not shift the burden of production to the defendant.\(^{126}\) Ohio uses the traditional test for res ipsa,\(^{127}\) so

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122. 304 N.E.2d 891 (Ohio 1973).
123. *See id.* at 894-95 (concluding that, before a plaintiff can use res ipsa loquitur to establish an inference of negligence, a plaintiff in a strict liability action first must prove that a defect existed in the product, that it existed at the time the product left the defendant, and that the defect was the proximate cause of the plaintiff's injuries).
124. *See id.*
125. *See State Auto*, 304 N.E.2d at 894; *see also* Domany v. Otis Elevator Co., 369 F.2d 604, 612 (6th Cir. 1966) (stating that the doctrine only creates a permissible inference of negligence); Becker v. Lake County Mem'l Hosp. W., 560 N.E.2d 165, 167 (Ohio 1990) (stating that res ipsa loquitur only permits an inference of negligence).
126. *See Domany*, 369 F.2d at 612 (stating that the doctrine does not shift the burden to the defendant and that the plaintiff is not entitled to a directed verdict if the defendant produces no evidence). *But see* Taxicabs of Cincinnati, Inc. v. Kohler, 165 N.E.2d 244, 245 (Ohio Ct. App. 1959) (holding that if the defendant does not put forth any evidence to rebut an inference of negligence, then the plaintiff is en-
the choice of test does not appear to explain the court's decision. The Ohio Supreme Court appears to have rejected the expansion of res ipsa loquitur because the court viewed the doctrine as uniquely negligence-based and also because, at least in State Auto, the court appeared to require more direct proof of defect in a strict liability setting.

Finally, one state appears to have rejected the doctrine's expansion implicitly based on the belief that res ipsa cannot be used except in negligence claims. A federal district court, applying Mississippi law, reached this conclusion in Powe v. Wagner Electric Sales Corp. The court reasoned that, although strict liability eases the plaintiff's burden by not requiring the plaintiff to prove negligence to recover, "[strict liability] is certainly not the equivalent of the doctrine of res ipsa loquitur[,] which is a rule of evidence." The court did not hold that Mississippi law does not recognize the cross applicability of the doctrine, but by drawing a distinction between the two doctrines, the court suggested that res ipsa loquitur should remain a theory of negligence.

Procedurally, Mississippi's handling of res ipsa loquitur is consistent with the majority of states. The doctrine allows the jury to infer negligence but does not compel such an inference. Additionally, the plaintiff's use of the doctrine shifts to the defendant the burden of going forward with the evidence but does not require the defendant to rebut the evidence to avoid a contrary verdict. Mississippi also follows the traditional test of the doctrine. Although far from completely clear, the Powe
opinion suggests that Mississippi would follow California,\textsuperscript{137} Alabama,\textsuperscript{138} Tennessee,\textsuperscript{139} Montana,\textsuperscript{140} and Ohio\textsuperscript{141} in rejecting the application of res ipsa loquitur to strict products liability claims. Thus, courts have rejected the expansion of res ipsa for various reasons: because of procedural concerns, because of the belief that a defect must be specifically shown, and because of the belief that res ipsa is, and should be, no more than a negligence doctrine.

\textbf{States Recognizing the Cross-Applicability of the Doctrine}

Three states have allowed res ipsa to be used in strict products liability claims.\textsuperscript{142} In \textit{State Farm Mutual Auto Insurance Co. v. Wrap-On Co.},\textsuperscript{143} a Louisiana appellate court concluded that, "because [res ipsa loquitur] is an evidentiary doctrine, it may be applied to any theory of recovery for which it is suitable."\textsuperscript{144} The court noted that the Louisiana Supreme Court had previously applied the doctrine in a products liability action without naming the doctrine, and later held that "res ipsa loquitur applies to products liability cases."\textsuperscript{145} Louisiana, unlike California, has recognized the use of the doctrine even though the doctrine is given a greater procedural effect. Some Louisiana opinions speak of the doctrine creating a permissible inference of negligence,\textsuperscript{146} but the clear weight of occurrence not be a result of any voluntary action taken by the plaintiff).

\textsuperscript{137} See supra notes 87-95 and accompanying text.
\textsuperscript{138} See supra notes 96-102 and accompanying text.
\textsuperscript{139} See supra notes 103-11 and accompanying text.
\textsuperscript{140} See supra notes 112-21 and accompanying text.
\textsuperscript{141} See supra notes 122-29 and accompanying text.
\textsuperscript{143} 626 So. 2d 874 (La. Ct. App. 1993).
\textsuperscript{144} Id. at 877.
\textsuperscript{145} Id. (noting the state supreme court's usage-in-fact of res ipsa loquitur to prove defect in Weber v. Fidelity & Casualty Ins. Co., 250 So. 2d 754, 755-56 (La. 1971), superseded by LA. REV. STAT. ANN. §§ 9:2800.51-9:2800.59 (West 1991)). The Louisiana Supreme Court has yet to hold directly that res ipsa loquitur can be used in strict liability actions.
\textsuperscript{146} See id.; see also Ray v. Ameri-Care Hosp., 400 So. 2d 1127, 1133 (La. Ct. App.
authority in Louisiana indicates that the doctrine, if proved, shifts the full burden of proof to the defendant to show an absence of negligence.\textsuperscript{147} Thus, res ipsa loquitur has a greater procedural effect in Louisiana, yet the doctrine is nonetheless allowed in strict liability cases. The only distinction between the California and Louisiana approaches to this issue, other than the outcome, is Louisiana's use of the least-favored res ipsa loquitur test. Louisiana courts have employed the traditional definition but have added an additional requirement to the test: that the information needed to explain the accident be more readily available to the defendant than to the plaintiff.\textsuperscript{148} As will be discussed in greater detail later in this Note, the defendant's superior knowledge, or lack thereof, should play an important role in the use of res ipsa loquitur in manufacturing defect claims.\textsuperscript{149}

Hawaii and Wisconsin have mirrored each other in their respective extensions of res ipsa loquitur to prove product defectiveness. In Jenkins v. Whittaker Corp.,\textsuperscript{150} a federal court applying Hawaii law concluded that "nothing bars application of the res ipsa loquitur theory to strict liability."\textsuperscript{151} Similarly, the Wisconsin Supreme Court, in Rennick v. Fruehauf Corp.,\textsuperscript{152} upheld a trial court's instruction to the jury regarding res ipsa loquitur in a products liability case.\textsuperscript{153} The court concluded that "[t]he existence of the defect may be shown by a res ipsa type of inference."\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{148} See Wells, 286 So. 2d at 441 (stating that "information as to the true cause of the accident [being] more readily available to the defendant than to the plaintiff" is one of the elements of res ipsa loquitur in Louisiana); see also Alexander v. St. Paul Fire & Marine Ins. Co., 312 So. 2d 139, 143 (La. Ct. App. 1975) (noting the superior knowledge requirement for the application of res ipsa loquitur).
\item \textsuperscript{149} See infra notes 286-94 and accompanying text.
\item \textsuperscript{150} 785 F.2d 720 (9th Cir. 1986).
\item \textsuperscript{151} Id. at 733.
\item \textsuperscript{152} 264 N.W.2d 264 (Wis. 1978).
\item \textsuperscript{153} See id. at 268.
\item \textsuperscript{154} Id. at 267.
\end{itemize}
The doctrine has the same procedural effect in both jurisdictions, creating a permissible inference of negligence but not requiring the defendant to come forward with exculpatory evidence to avoid a contrary jury verdict. Both states have also embraced the traditional definition of res ipsa loquitur. Louisiana, Hawaii, and Wisconsin all allow the doctrine to be used in strict products liability actions, but like the states rejecting the doctrine, have embraced the doctrine for different reasons.

**States Recognizing the Cross-Applicability of the Inferential Core of the Doctrine**

Two states have recognized that the inferences at the heart of res ipsa should apply in strict liability claims, although they have not held explicitly that the doctrine, as now constructed, should apply. Two other states have crafted inferential doc-

155. See Jenkins, 785 F.2d at 733; Weggeman v. Seven-Up Bottling Co., 93 N.W.2d 467, 472 (Wis. 1958).
156. See Jenkins, 785 F.2d at 733 (stating that “a defendant need not come forward with rebuttal evidence to avoid a directed verdict”); American Family Mut. Ins. Co. v. Dobrzynski, 277 N.W.2d 749, 754 (Wis. 1979) (concluding that the plaintiff is not entitled to a directed verdict if the defendant does not put on any evidence unless the inference is so powerful that it is inescapable). But see Guanzon v. Kalamau, 402 P.2d 289, 291, 293 (Haw. 1965) (treating the doctrine as a presumption that truly shifts the burden of production).
157. See Agee v. Kahului Trucking & Storage, Inc., 688 P.2d 256, 258 (Haw. 1984) (requiring that the defendant have control and management of the instrument); Turner v. Willis, 582 P.2d 710, 714 (Haw. 1978) (requiring that the instrument be under control of the defendant and that the accident be one that does not normally happen if due care is exercised); Dobrzynski, 277 N.W.2d at 752-53 (stating that a plaintiff must show that the accident does not occur normally without negligence, that the accident was caused by an instrument within the “exclusive control” of the defendant, and that the plaintiff did not voluntarily contribute to the accident).
158. The Ninth Circuit Court of Appeals in Jenkins discussed the policy rationale behind California's rejection of the doctrine and concluded that the doctrine would be allowed in Hawaii based on the procedural distinctions between res ipsa loquitur in Hawaii and in California. See Jenkins, 785 F.2d at 732-33. The Louisiana appellate court summarily allowed the use of the doctrine because the court viewed res ipsa as a rule of evidence, see State Farm Mut. Auto. Ins. Co. v. Wrap-On Co., 626 So. 2d 874, 878 (La. Ct. App. 1993), and the Wisconsin Supreme Court allowed the doctrine to be used because the inferential base of the doctrine allowed cross-application. See Rennick v. Fruehauf Corp., 264 N.W.2d 264, 267 (Wis. 1978).
trines for product defect cases that mimic res ipsa loquitur.\textsuperscript{160} Arkansas and Georgia courts have noted the inferential applicability of res ipsa loquitur to strict products liability actions. The Arkansas Supreme Court, in \textit{Williams v. Smart Chevrolet Co.},\textsuperscript{161} relied on Dean Prosser's statement that "[s]trictly speaking, since proof of negligence is not in issue, res ipsa loquitur has no application to strict liability; but the inferences which are the core of the doctrine remain, and are not less applicable."\textsuperscript{162} In \textit{Lang v. Federated Department Stores, Inc.},\textsuperscript{163} a Georgia appellate court used almost identical language in reaching the same conclusion.\textsuperscript{164} Neither court explicitly held that a res ipsa loquitur instruction would be proper in a strict liability setting.\textsuperscript{165} In \textit{Williams}, however, the Arkansas Supreme Court stated that "[t]he plaintiff is not required to prove a specific defect when common experience tells us that the accident would not have occurred in the absence of a defect."\textsuperscript{166} The Georgia appellate court was less sweeping but noted that the injury was of such a nature that the only reasonable explanation was that the product was defective and that "a jury may be permitted to infer that the product was defective."\textsuperscript{167} Although not clearly ruling on the applicability of the doctrine, both courts, in stating that res ipsa—like inferences may be allowed to prove defect, referenced the core elements of res ipsa loquitur. The language of the opinions indicates that courts in both states would allow a

\begin{itemize}
  \item 161. 730 S.W.2d 479 (Ark. 1987).
  \item 162. \textit{Id.} at 482 (quoting Southern Co. v. Graham, 607 S.W.2d 677, 679 (Ark. 1980) (quoting PROSSER, supra note 68, § 103, at 672-73)).
  \item 163. 287 S.E.2d 729 (Ga. Ct. App. 1982).
  \item 164. \textit{See id.} at 731 ("Generally, as proof of negligence is not in issue in a strict liability case, the doctrine of res ipsa loquitur has no application. Yet, the inferences which are the core of the doctrine are more and are no less applicable . . . ."). The Georgia Supreme Court has not yet ruled on this issue.
  \item 165. In both Arkansas and Georgia, the court opinions merely referred to the doctrine's inferential utility. \textit{See Williams}, 730 S.W.2d at 482; \textit{Lang}, 287 S.E.2d at 731. The Wisconsin Supreme Court went one step further, affirming a trial court's use of a res ipsa jury instruction in a strict liability case. \textit{See Rennick v. Fruehauf Corp.}, 264 N.W.2d 264, 267 (Wis. 1978).
  \item 166. \textit{Williams}, 730 S.W.2d at 482 (citing Harrell Motors, Inc. v. Flanery, 612 S.W.2d 727, 729 (Ark. 1981)).
  \item 167. \textit{Lang}, 287 S.E.2d at 731.
\end{itemize}
plaintiff to prove the elements of res ipsa loquitur in order to generate an inference of defect. These rulings stand in stark contrast to the opinions of the Alabama and Tennessee courts regarding the level of proof necessary to show defectiveness.\textsuperscript{168}

Arkansas and Georgia employ the traditional test of res ipsa loquitur.\textsuperscript{169} Procedurally, however, the states differ. Georgia follows the majority view regarding the procedural implications of the doctrine.\textsuperscript{170} The doctrine allows only an inference of negligence,\textsuperscript{171} and only the burden of going forward with the evidence shifts to the defendant.\textsuperscript{172} The procedural effect of the Arkansas doctrine is less clear. Court opinions have used both the terms "inference" and "presumption" inconsistently,\textsuperscript{173} and burden of proof issues remain unsettled as well. Earlier opinions seemed to establish that only the burden of going forward with the evidence shifted to the defendant,\textsuperscript{174} but a recent Arkansas Supreme Court opinion has cast doubt on this conclusion.\textsuperscript{175}

\begin{footnotes}
\footnote{168. See Brooks v. Colonial Chevrolet-Buick, Inc., 579 So. 2d 1328, 1333 (Ala. 1991) (holding that defects must be affirmatively proven); Browder v. Pettigrew, 541 S.W.2d 402, 404 (Tenn. 1976).}
\footnote{169. See Schmidt v. Gibbs, 807 S.W.2d 928, 931 (Ark. 1991) (stating that the plaintiff must show that the defendant owed a duty of care, that the instrument was under the control of the defendant, that the accident was one that would not have occurred normally if proper care had been used, and that no contrary evidence exists); Hall v. Chastain, 273 S.E.2d 12, 14 (Ga. 1980) (stating as the elements of res ipsa that the defendant must own or control the "thing doing the damage [and that] the accident [be] of a kind which, in the absence of proof of some external cause, [would] not ordinarily happen without negligence.") (quoting Chenall v. Palmer Brick Co., 43 S.E. 443 (Ga. 1903)).}
\footnote{170. See supra notes 116-19.}
\footnote{171. See Bowers v. Fred W. Amend Co., 35 S.E.2d 15, 16 (Ga. Ct. App. 1945).}
\footnote{172. See Parker v. Dailey, 177 S.E.2d 44, 46 (Ga. 1970).}
\footnote{173. Compare Heard v. Arkansas Power & Light Co., 147 S.W.2d 362, 364 (Ark. 1941) (stating that the doctrine creates a presumption of negligence), with Coca-Cola Bottling Co. v. Mattice, 243 S.W.2d 15, 18 (Ark. 1951) (using the terms "inference" and "presumption" interchangeably in discussing the procedural effect of the doctrine).}
\footnote{174. See Mattice, 243 S.W.2d at 18.}
\footnote{175. In Schmidt v. Gibbs, 807 S.W.2d 928 (Ark. 1991), the Arkansas Supreme Court stated that the doctrine "shifts to the defendant the burden of proving that it was not caused through any lack of care on its part." \textit{Id.} at 931 (quoting Southwestern Tel. & Tel. Co. v. Bruce, 117 S.W. 564, 567 (Ark. 1909)). The court's reliance on its 1909 opinion is questionable given its extensive discussion of the procedural effect of the doctrine in \textit{Mattice}, 243 S.W.2d at 17-21, and its subsequent conclusion that Arkansas had abandoned the English rule in favor of the rule that the doctrine only shifts the burden of going forward with the evidence. See \textit{id.} at 19-21.}
\end{footnotes}
Regardless of whether Arkansas courts decide to give the doctrine a greater procedural effect, courts in Arkansas and Georgia have recognized that the inferential utility of res ipsa loquitur extends beyond negligence cases.

Florida and Illinois have not allowed the use of res ipsa loquitur in strict products liability cases but have recognized the use of closely analogous doctrines. In *Cassisi v. Maytag Co.*, Florida appellate court approved of and applied the inference of defect rule fashioned in *Greco v. Bucciconi Engineering Co.* The *Greco* doctrine "states that when a product malfunctions during normal operation, a legal inference ... arises, and the injured plaintiff thereby establishes a prima facie case for jury consideration." The court recognized that this inferential rule is "somewhat analogous" to res ipsa loquitur and that both inferential rules were "based upon common sense assumptions that the occurrence of the accident is such that in the ordinary course of events it could not have happened ... without the negligence of the person in control ... and ... without the product's defective condition." The court noted that the two doctrines were guided by the same public policy rationale of aiding a plaintiff when direct proof is unavailable. The Florida court apparently embraced the *Greco* inference instead of the res ipsa doctrine because the court concluded that exclusive control, the central factor of the traditional res ipsa test, is an indispensable element of res ipsa.

An Illinois appellate court recently issued a ruling similar to *Cassisi*, concluding that a cause of action for strict liability could be "premised on the doctrine of res ipsa loquitur." The court noted that, under Illinois law, the doctrine was not technically available in products liability cases but that Illinois courts nevertheless had recognized a "semi-res-ipsa-loquitur theory."

178. *Cassisi*, 396 So. 2d at 1148.
179. *Id.* at 1149.
180. *See id.*
181. *See id.* at 1151-52.
The court justified its determination on the grounds that res ipsa was a rule of evidence and not a doctrine of substantive law.\textsuperscript{184}

Procedurally, Florida and Illinois follow the majority approach regarding res ipsa.\textsuperscript{185} The doctrine makes possible an inference of negligence but does not compel it,\textsuperscript{186} and res ipsa shifts the burden of going forward with the evidence but does not compel the defendant to introduce evidence to avoid a contrary jury verdict.\textsuperscript{187} The Florida court recognized the inferential value of res ipsa loquitur in proving defect but, because the court relied on the traditional test of res ipsa loquitur requiring exclusive control,\textsuperscript{188} the court adhered to a doctrinal cousin of res ipsa instead.\textsuperscript{189} Perhaps if the court had embraced the modern, relaxed view of the control element of res ipsa loquitur, the rationale relied on by the court for the nonapplication of the res ipsa doctrine would disappear and, as a result, nothing would bar the application of res ipsa to prove product defect.\textsuperscript{190} Such a result is not a foregone conclusion, however. The Illinois court embraced a more relaxed version of the test\textsuperscript{191} but still concluded that the doctrine

\textsuperscript{184} See id. at 1027.

\textsuperscript{185} See supra notes 40-41 and accompanying text.

\textsuperscript{186} See Cassisi, 396 So. 2d at 1149; Delvecchio, 625 N.E.2d at 1027; see also Anderson v. Sarasota County Pub. Hosp. Bd., 214 So. 2d 655, 657 (Fla. Dist. Ct. App. 1968) (stating that the doctrine only created an inference).

\textsuperscript{187} See Cassisi, 396 So. 2d at 1151 (quoting PROSSER, supra note 68, § 40, at 229); Imig v. Beck, 503 N.E.2d 324, 329 (Ill. 1986); see also Stanek v. Houston, 165 So. 2d 825, 828 (Fla. Dist. Ct. App. 1964) (implying that the defendant is not required to put forth explanatory evidence to avoid a directed verdict for the plaintiff).

\textsuperscript{188} See Cassisi, 396 So. 2d at 1151-52 (focusing on the control element in res ipsa).

\textsuperscript{189} See id.

\textsuperscript{190} The drafters of the Restatement definition of res ipsa loquitur removed the “exclusive control” requirement, believing that such a rigid control test is not needed as long as the plaintiff can show that it was more likely than not the defendant who caused the problem. See RESTATEMENT (SECOND) OF TORTS § 328D cmt. e (1965); see also KEETON ET AL., supra note 37, § 39 (discussing control as a mere tool for determining whether it was more likely than not the defendant who was negligent); Louis L. Jaffe, Res Ipsa Loquitur Vindicated, 1 BUFF. L. REV. 1, 6 n.13 (1951) (advocating for less focus on control).

\textsuperscript{191} See Delvecchio, 625 N.E.2d at 1026-27 (outlining the traditional test but then noting that the Illinois Supreme Court, in Lynch v. Precision Mach. Shop, Ltd., 443 N.E.2d 569, 572-74 (Ill. 1983), embraced a flexible control requirement more akin to the Restatement test).
was not technically available in strict liability claims. 192

**States Recognizing That Common Experience May Allow the Inference of a Defect**

Two states, Kentucky and Missouri, appear close to allowing the use of res ipsa loquitur in a strict liability setting. Appellate courts in both states have recognized that common experience indicates that certain accidents do not occur absent some defect. Therefore, the courts allowed an inference of defect to arise under those circumstances. 193 In recognizing "common experience" inferences, these courts have recognized the principle behind res ipsa loquitur without invoking the formal doctrine. The purpose of the different res ipsa loquitur tests is to determine whether the accident was the type of accident that ordinarily does not occur absent some negligence. 194 The specific elements of each test strive to tie the cause of the accident to the defendant. 195

Both Kentucky and Missouri follow the majority view of the procedural effect of the doctrine and only differ slightly on the proper test, 196 so court refusal to extend the doctrine would likely not rest on procedural reasons. In both states, res ipsa loquitur generates a permissible inference of negligence 197 and shifts to the defendant the burden of going forward with the evi-

192. See id. at 1026.
193. See Embs v. Pepsi-Cola Bottling Co., 528 S.W.2d 703, 706 (Ky. 1975) (holding that "[t]here are some accidents . . . as to which there is common experience that they do not ordinarily occur without a defect; and this permits the inference of a defect") (citing PROSSER, supra note 68, § 103, at 673); Crump v. McNaught P.T.Y. Ltd., 743 S.W.2d 532, 535 (Mo. Ct. App. 1987) (stating that "if common experience suggests an event would not occur absent a defect, then a defect can be inferred"). Neither the Supreme Court of Kentucky nor the Supreme Court of Missouri has discussed this issue.
194. See supra notes 32-36 and accompanying text.
195. The traditional test requires the plaintiff to demonstrate that the defendant had exclusive control over the accident-causing instrumentality in order to make it more likely that the defendant's conduct caused the harm. See supra note 32 and accompanying text. The Restatement test requires the plaintiff to exclude other possible causes of the injury in order to make it more probable that the defendant's conduct caused the harm. See supra note 33.
196. See Bell & Koch, Inc. v. Stanley, 375 S.W.2d 696, 697 (Ky. 1964); Cunningham v. Hayes, 463 S.W.2d 555, 564 (Mo. Ct. App. 1971).
197. See Bell & Koch, 375 S.W.2d at 697; Cunningham, 463 S.W.2d at 564.
The states differ on the exact version of the res ipsa

test they employ; Kentucky continues to apply the traditional
test of res ipsa loquitur, but Missouri has followed Louisiana

in requiring the defendant to possess superior knowledge as to
the cause of the accident before the doctrine can be invoked.
The knowledge requirement, which places a greater initial bur-
den on the plaintiff, may signal that the Missouri Supreme
Court would be even more likely to allow res ipsa loquitur to be
used to prove defect because the defendant could counter the
inference with superior knowledge. The final section of this Note
examines the ramifications of the superior knowledge require-
ment as it relates to the doctrine's applicability in proving man-
ufacturing defects.

Washington has joined Kentucky and Missouri in recognizing
the “common experience” inference of defect. In Bombardi v.

Pochel's Appliance & TV Co., a Washington appellate court

noted that “there are some accidents as to which there is common

experience dictating that they do not ordinarily occur without a
defect, and as to which the inference that a product is defective
should be permitted.” Washington courts have employed the
traditional test of res ipsa loquitur, following Kentucky, and a majority of the other states in stating that
res ipsa loquitur only allows an inference of negligence.

198. See Dunning v. Kentucky Utils. Co., 109 S.W.2d 6, 9 (Ky. 1937) (noting that
the burden never shifts to the defendant but that if he does not put on evidence he
may lose the case); Turner v. Missouri-Kansas-Texas R.R. Co., 142 S.W.2d 455, 460
(requiring the plaintiff to show that the defendant had full control, that an accident
would not occur normally without negligence, and that the injuries were caused by the
accident).
200. See Bass v. Nooney Co., 646 S.W.2d 765, 768 (Mo. 1983) (en banc) (listing the
elements as an occurrence that does not occur normally if due care is used, defendant's control of the instrumentality, and defendant's possession of superior
knowledge).
202. Id. at 204. The Washington Supreme Court has not ruled on this issue.
203. See Miller v. Kennedy, 588 P.2d 734, 737 (Wash. 1978) (en banc) (listing the
two requirements as control of the instrument by the defendant and a type of injury
that does not occur normally absent negligence by the defendant).
204. See supra notes 193-96 and accompanying text.
205. See supra notes 193-96 and accompanying text.
206. See Miller, 588 P.2d at 737; accord Tuengel v. Stobbs, 367 P.2d 1008, 1009
The further procedural effect of the doctrine appears unsettled in Washington. A recent appellate court decision stated that, once the doctrine applies, "the defendant has the duty to come forward with exculpatory evidence."\(^{207}\) Such language suggests that the defendant may have the burden of production, and thus be required to put forth sufficient evidence or lose. An earlier Washington Supreme Court decision did little to resolve the issue,\(^{208}\) stating that, once the plaintiff has established res ipsa loquitur, "the burden then devolves upon defendant to furnish an explanation or rebuttal of that presumption of negligence."\(^{209}\) Covey did not answer the question of whether the defendant has a legal duty to explain away the inference or just a practical duty to come forward with rebuttal evidence. If Washington courts conclude that res ipsa requires the defendant to either provide exculpatory evidence or lose, similar to the approach in Louisiana and California, then the decision as to whether res ipsa loquitur should be extended into the field of strict liability may rest upon a determination of which state model to follow: Louisiana or California.

Maryland courts have shown a slight recognition of the conceptual framework necessary to allow expansion of res ipsa loquitur into the strict products liability field. In *Harrison v. Bill Cairns Pontiac*,\(^{210}\) the Maryland Court of Special Appeals noted that if circumstantial evidence rules out other causes, "[a]n inference of a defect may be drawn from the happening of an accident."\(^{211}\) The court articulated a five-factor test for when a defect could be inferred, including a requirement that the accident not be of the type that happens without a defect.\(^{212}\)

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\(^{209}\) Id. at 328.


\(^{211}\) Id. at 390. The Maryland Court of Appeals, the court of last resort in Maryland, has not yet ruled on this issue.

\(^{212}\) See Harrison, 549 A.2d at 390 (listing the factors to be considered as "(1) expert testimony as to possible causes; (2) the occurrence of the accident a short time after the sale; (3) same accidents in similar products; (4) the elimination of other causes of the accident; (5) the type of accident that does not happen without a defect") (quoting
is consistent with the rationale behind res ipsa loquitur,\textsuperscript{213} and
the other factors stated by the court all tend, as do the factors in
the res ipsa loquitur tests, to isolate the defendant as the likely
cause of the defect or negligence. Maryland's endorsement of a
product defect test, although not res ipsa loquitur, is similar to
the inferential test adopted in Florida\textsuperscript{214} and thus embraces
the core of the res ipsa doctrine in strict liability actions without
embracing the doctrine as a whole.

Maryland courts have adopted the majority approach to res
ipsa,\textsuperscript{215} allowing an inference of negligence by the jury.\textsuperscript{216} The
burden shifts to the defendant to go forward with the evidence,
but the defendant has no legal duty to come forward with excul-
patatory evidence.\textsuperscript{217} Maryland also follows the majority of states
in recognizing the traditional test for res ipsa loquitur.\textsuperscript{218} No
heightened procedural effect exists to give Maryland courts
pause in extending the doctrine into strict liability settings, and
Maryland courts already allow circumstantial evidence to prove
defect under a similar inferential test.\textsuperscript{219} If the Maryland
courts recognize the similarity between their stated defect doc-
trine and res ipsa loquitur, the courts might recognize the utility
of allowing res ipsa loquitur to act as the single test to infer
negligence and to infer certain types of strict products liability
defects.

No consensus has emerged as to whether res ipsa should be
allowed in strict liability claims, nor has a consistent approach
to the issue arisen in the courts. Courts that have rejected the
discipline have focused on its procedural effect,\textsuperscript{220} the degree of

\begin{itemize}
also PROSSER, supra note 68, § 103, at 671-76 (discussing similar factors).
\item 213. See PROSSER, supra note 68, § 103, at 673-74.
(adopting an inference of defect test from Pennsylvania).
\item 215. See supra notes 40-41.
\item 216. See Meda v. Brown, 569 A.2d 202, 204-05 (Md. 1990).
\item 217. See id. at 205.
\item 218. See id. at 204 (requiring that the defendant have exclusive control, that the
accident be the type that does not occur normally absent negligence, and that the
plaintiff not aid in the causation of the accident).
\end{itemize}
proof of defectiveness necessary in strict liability claims,\textsuperscript{221} and the nature of the doctrine.\textsuperscript{222} States that have embraced the expansion of res ipsa into strict liability have focused on the inferential utility of the doctrine\textsuperscript{223} or the belief that res ipsa is only an evidentiary tool.\textsuperscript{224} Still other states have appeared willing to accept an expanded role for res ipsa based on a judicial view of the utility of circumstantial evidence in proving product defects.\textsuperscript{225}

**CRITICISMS OF STATE APPROACHES TO THE ISSUE**

*Policy Rationales for the Imposition of Strict Products Liability*

This section outlines the basic policy justifications for strict liability and then uses these justifications as a framework to criticize current state approaches to the cross-applicability of res ipsa loquitur.

Many scholars have analyzed the doctrinal justifications of strict products liability. One of the earliest and most adamant advocates of strict liability was Fleming James.\textsuperscript{226} He endorsed strict products liability as the best approach to solving the prob-

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\textsuperscript{221} See, e.g., Brooks v. Colonial Chevrolet-Buick, 579 So. 2d 1328, 1333 (Ala. 1991) (holding that, in the strict liability setting, res ipsa loquitur is not applicable because a plaintiff must put forth some evidence that the product was defective).

\textsuperscript{222} See Brothers v. General Motors Corp., 658 P.2d 1108, 1110 (Mont. 1983) (stating that res ipsa is generally reserved only for human conduct).

\textsuperscript{223} See, e.g., Rennick v. Fruehauf Corp., 264 N.W.2d 264, 267 (Wis. 1978) (holding that defectiveness may be shown through "res ipsa type" inferences).

\textsuperscript{224} See State Farm Mut. Auto. Ins. v. Wrap-On Co., 626 So. 2d 874, 877 (La. Ct. App. 1993) (holding that res ipsa is an evidentiary doctrine and thus can be applied to any theory of recovery for which it is suitable).


lem of accidents.\textsuperscript{227} James and other commentators have set forth several rationales for the imposition of strict liability. First, such commentators espoused a rationale based on the manufacturer's superior access to information and modern consumer reliance on the knowledge and dependability of the manufacturer.\textsuperscript{228} Second, and similarly, plaintiffs have a difficult time proving negligence in most product accident cases.\textsuperscript{229} Third, through insurance and by passing along added costs to consumers in the form of higher prices, manufacturers can spread the risk better than can consumers.\textsuperscript{230} Fourth, strict liability is an economically efficient legal structure that promotes the allocation of losses to the party most able to avoid the costs.\textsuperscript{231} Fifth, the imposition of strict liability is believed to generate safer products by inducing manufacturers to increase investment in quality control and other safety measures.\textsuperscript{232}

\begin{itemize}
  \item \textsuperscript{227} See James, supra note 226, at 227.
  \item \textsuperscript{228} See Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (imposing strict liability on the manufacturer); see also Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring) (outlining the rationale behind the strict liability system that would be adopted 20 years later in Greenman).
  \item \textsuperscript{229} See John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 826 (1973) (providing a survey of the development of strict product liability); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (Tentative Draft No. 2, 1995) (outlining why the common rationales for strict liability are most appropriate in a manufacturing defect situation); John E. Montgomery & David G. Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C. L. REV. 803, 809 (1976) (outlining the development of and rationales behind strict liability).
  \item \textsuperscript{230} See Wade, supra note 229, at 826; see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (noting that manufacturers are better able to insure against product defect losses); Cowan, supra note 74, at 1088 (discussing the policies driving the imposition of strict liability); cf. Montgomery & Owen, supra note 229, at 809 (noting that sellers can absorb and spread costs better than can buyers).
  \item \textsuperscript{231} See Guido Calabresi, Optimal Deterrence and Accidents: To Fleming James, Jr., 84 YALE L.J. 656, 666-68 (1975) (arguing that the appropriate test should be to determine who is in the best position to reduce accident costs); Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts, 81 YALE L.J. 1055, 1060 (1972) (arguing the same cheapest-cost-avoider standard); Priest, supra note 226, at 520; see also Montgomery & Owen, supra note 229, at 809 (noting that sellers can better assess risks and "absorb or spread costs of product accidents" than can consumers).
  \item \textsuperscript{232} See Montgomery & Owen, supra note 229, at 809-10; Wade, supra note 229, at 826. A government report on products liability concluded that the imposition of strict
Criticisms of States Rejecting the Use of the Doctrine in Strict Liability

California ushered in the era of strict products liability, yet its lawmakers have rejected unequivocally the extension of res ipsa loquitur into the field of strict liability. The apparent reason is the heightened procedural effect given res ipsa loquitur in California. Justice Traynor's policy rationale for strict liability in Greenman and Escola, however, favors the use of res ipsa loquitur in strict liability actions. Traynor justified strict liability on the ground that producers who put their products on the market knowing consumers will not inspect them should be held liable for any defects, regardless of fault. The decision by California courts not to allow the extension of res ipsa loquitur to prove defects effectively limits the strictness of strict liability in California. Res ipsa loquitur, like strict liability, aids plaintiffs in establishing their cases. Keeping res ipsa and strict liability separate means that certain plaintiffs will not be able to state a cause of action or get their case heard by a jury due to the nature of the defect.

California classifies res ipsa loquitur as a presumption affecting the burden of production but not the burden of persuasion, yet California also recognizes a variety of presumptions that do
affect the burden of persuasion. Presumptions are established for a variety of reasons. Probability, superior access to information, and social policy are three common rationales for the judicial or statutory creation of a presumption. Some commentators on the law of evidence have argued that the greater the social policy promoting the creation of the presumption, the more procedural weight such a presumption should be given. California recognizes this belief, at least implicitly, through its bifurcated evidence code. The code's drafters, however, declined to give res ipsa loquitur the highest procedural significance. Given the strong social policy goal of accident avoidance inherent in the strict liability system, res ipsa loquitur should be viewed as a presumption that at a minimum shifts the burden of production on the issue to the manufacturer and at times shifts the burden of persuasion as well, at least when the doctrine is applied in manufacturing defect cases.

Alabama and Tennessee have both rejected the extension of res ipsa loquitur into the strict products liability field based on the belief that, in order to impose liability, defects must be shown affirmatively or specifically. These decisions make strict products liability in Alabama and Tennessee less strict than it is in other states. The requirement of affirmative or specific proof of defectiveness necessarily will bar certain plain-

238. See Cal. Evid. Code §§ 600-669 (splitting presumptions into types that shift only the burden of production and those that also shift the ultimate burden of proof).
239. See Michael M. Martin, Basic Problems of Evidence § 3.02 (6th ed. 1988) (discussing the bases for the creation of evidentiary presumptions); 2 McCormick on Evidence, supra note 38, § 343, at 580.
240. See Edmund M. Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 81-82 (1933) (arguing that presumptions created for social policy reasons should receive greater procedural effect); see also Francis H. Bohlen, The Effect of Rebuttable Presumptions of Law upon the Burden of Proof, 68 U. Pa. L. Rev. 307, 313 (1920) (arguing that the effect to be given each presumption should depend upon the purpose underlying the presumption).
242. See supra notes 91 and 93 and accompanying text.
243. This proposal is discussed fully in the final section of this Note. See infra note 332 and accompanying text.
245. See, e.g., infra notes 265-69 and accompanying text (discussing Louisiana's stricter products liability doctrine).
tiffs from establishing their cases. In any case involving a product that is destroyed or seriously damaged, in these two states a plaintiff may be barred from suing under a strict liability theory because of an inability to prove the existence of a defect at the time the product left the manufacturer.246

The Alabama-Tennessee approach limits the effectiveness of strict liability as a safety-inducing legal framework because more defective products can be made and marketed by the manufacturer with less risk of adverse judgments than under a system allowing inferential proof of defect.247 Manufacturers will take even greater advantage of this relaxation when a defect is likely to destroy the product. At the margins, manufacturers may actually have a disincentive to create safer products under such a system, because if they can build products that are destroyed easily, then they can erase some risk of manufacturing defect liability.

Other states have rejected the extension of res ipsa loquitur on different grounds. In Montana, the doctrine can be used only for human conduct;248 in Mississippi, the doctrine is viewed as an evidence doctrine only;249 in Ohio, the doctrine can be used only after a plaintiff has established his prima facie strict liability case.250 These decisions reflect a cramped view of the utility of the doctrine of res ipsa loquitur. Res ipsa is a tool of circumstantial evidence251 and as such should not be limited to negligence cases necessarily. Res ipsa is also based in part on probability and in part on the plaintiff's relative lack of information vis à vis the defendant as to the nature of the accident.252 It was developed so that, when direct proof of the cause of an injury was lacking, the plaintiff could make his prima facie case circumstantially and then compel the defendant to provide an

246. A plaintiff will not be as hampered by these decisions if the claim is a design defect claim or defective warning claim because the plaintiff can examine the design or warning of a product not involved in the accident.
247. See Montgomery & Owen, supra note 229, at 809-10.
251. See supra notes 25-30 and accompanying text.
252. See supra notes 25-36 and accompanying text.
Plaintiffs in products liability actions are often at a similar disadvantage regarding proof of defectiveness and access to information. The drafters of the proposed Restatement (Third) of Torts have noted that both res ipsa loquitur and strict liability were created to aid plaintiffs in cases involving difficult proof issues. Practically speaking, the court decisions in these states mean that these states, like California, have a comparatively less strict form of strict liability than states recognizing the doctrine's applicability, because one potential vehicle of circumstantial proof of defectiveness has been rejected.

**Criticisms of States Viewing the Cross-Applicability of Res Ipsa Loquitur More Favorably**

Court opinions in Kentucky, Maryland, Missouri, and Washington have all hinted at the potential availability of res ipsa loquitur in strict products liability claims. The opinions are similar in that they all recognize that common experience can be used to infer defect; none of the opinions, however, has held that res ipsa loquitur is available outside the realm of negligence. The recognition that common experience may be used to infer defect suggests that courts in these states are closer to recognizing the utility of res ipsa loquitur in a strict liability claim than are the Alabama and Tennessee courts; yet none of the courts has been willing to recognize that res ipsa loquitur would provide a very effective inferential tool to help determine the likelihood of certain types of product defects. Both the tradition-

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253. *See* Shain, *supra* note 30, at 85-112 (tracing the historical development of res ipsa loquitur in England and concluding that the doctrine shifted the burden of proof to the defendant when it was invoked).


256. *See* Embs, 528 S.W.2d at 706; Harrison, 549 A.2d at 390; Crump, 743 S.W.2d at 535; Bombardi, 518 P.2d at 204.
al and the Second Restatement versions of the res ipsa loquitur test are merely attempts to determine judicially and with more precision when to allow a plaintiff to invoke the "common experience" argument. 257

Arkansas, Georgia, and Florida courts have shown a greater degree of doctrinal flexibility, yet these courts also have refrained from holding that res ipsa loquitur may be applied in strict liability claims. Instead, courts in all three states allow similar inferences, with Arkansas and Georgia courts noting that the inferences at the heart of the doctrine can be applied in a strict liability claim. 258 Rather than creating new inferential schemes, these courts should recognize that the res ipsa doctrine can be transplanted to serve within the contours of strict liability equally as well as it can in negligence. 259 The Restatement test of res ipsa loquitur, reconfigured for a defect analysis, could demonstrate that the probability of certain defects existing at the time the product left the manufacturer was sufficiently high to warrant allowing an inference or even a presumption of defect. 260

Hawaii and Wisconsin both have recognized that res ipsa loquitur may be used to prove product defectiveness in a strict liability setting. 261 Neither state, however, grants the doctrine the proper procedural effect when a manufacturing defect is alleged. 262 Due to the manufacturer's superior knowledge regarding the manufacturing process, the maxim that manufacturers are better able to spread the risk of loss, and the safety incentives that are implicit in a strict liability system, res ipsa loqui-

257. See supra notes 32-33 and accompanying text.


259. The proposal section of this Note explains this viewpoint fully.

260. See infra notes 327-37 and accompanying text for a modified Restatement test of res ipsa loquitur for proving defects.


262. The proposal section of this Note explains this viewpoint fully.
tur should receive a presumptive effect when plaintiffs invoke it in manufacturing defect cases.263 Such a presumption would make it easier for plaintiffs to establish their cases and force the defendants, at a minimum, to produce exculpatory evidence. This approach would, in a narrow class of defect cases, return to the doctrine the procedural weight that it originally had in early English and American cases.264

A PROPOSAL FOR THE APPLICABILITY OF RES IPSA LOQUITUR IN MANUFACTURING DEFECT CASES

Of all the states, Louisiana comes closest to the approach advocated in this Note regarding the proper use of res ipsa loquitur in certain strict products liability claims. In Louisiana, res ipsa loquitur can establish that a product was defective.265 In the field of negligence, the doctrine shifts the ultimate burden of persuasion to the defendant to show an absence of negligence.266 This approach aids plaintiffs and makes strict liability in Louisiana relatively more strict than strict liability in the other states discussed throughout this Note. This strictness coincides with the goals that support strict liability and should produce added safety incentives for manufacturers.267 Although Louisiana courts have allowed the doctrine to be used in strict liability settings, the courts have articulated a test for res ipsa loquitur in Louisiana that mimics the traditional test but requires an additional showing that the defendant had superior access to the knowledge needed to explain the accident.268

263. See supra notes 226-32 and accompanying text; infra notes 269-92 and accompanying text (discussing the differences among design, warning, and manufacturing defect cases).
264. See SHAIN, supra note 30, at 85-149 (outlining the procedural effect given res ipsa loquitur by early English and American courts).
267. See supra notes 226-32 and accompanying text.
268. See Wells v. Woman's Hosp. Found., 286 So. 2d 439, 441 (La. Ct. App. 1973) (requiring that information regarding the cause of the accident be more readily available to the defendant before the doctrine will apply).
cedurally, the knowledge requirement of the Louisiana test should be separated from the actual test for res ipsa loquitur so that it controls not whether the doctrine may be used, but rather, what procedural effect should be bestowed upon the doctrine, consistent with social policy and fairness. Substantively, this Note proposes two improvements upon the current Louisiana scheme with regard to res ipsa loquitur’s entry into strict liability. First, res ipsa should be limited to manufacturing defect cases. Second, the doctrine should include a two-tiered system of presumptions hinging on the defendant’s access to information regarding the defect.

The Distinction Between Manufacturing Defect Cases and Design and Warning Defect Cases

This Note’s proposal is confined to situations involving allegations of manufacturing defects. Manufacturing defects occur when an individual product varies to too great a degree from the specified design of the product. Examples include physically flawed products or incorrectly assembled products. The proposal is confined to manufacturing defects based on the rationale outlined by the American Law Institute’s Product Liability Section in their recently proposed revisions to the Restatement (Second) of Torts. The American Law Institute separated the three strict liability claims (manufacturing defect, design defect, and warning defect) and gave each claim its own test. This

269. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. b (Tentative Draft No. 2, 1995); id. § 2 cmt. b (Tentative Draft No. 1, 1994).
271. Both drafts of the Restatement (Third) indicate that a different form of responsibility is implicated when design defects or warning defects are alleged. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (Tentative Draft No. 2, 1995); id. § 2 cmt. a (Tentative Draft No. 1, 1994).
272. The drafters have attempted to clarify the scope and nature of the liability imposed on product manufacturers depending on the type of defect alleged. They propose:

§ 2. Categories of Product Defect
For purposes of determining liability under § 1:
(a) a product contains a manufacturing defect when the product de-
separation results in a producer or distributor of a product being held strictly liable for manufacturing defects regardless of the degree of care used, although a producer could avoid liability in design and warning defect claims if the harm was not foreseeable or if reasonable alterations or warnings could not avoid the harm.\textsuperscript{273} The drafters made this decision because manufacturing defects involve many fewer, if any, risk-versus-utility calculations than do the other types of defects.\textsuperscript{274} If a product is manufactured defectively, then the risk that comes with it has no concomitant benefit, whereas a product may be designed in such a manner that it is dangerous but the utility of the product is, in society's collective view, worth the risk.\textsuperscript{275} Similarly, a consumer may be aware of the design risk of the product and decide to use the product anyway, but a manufacturing defect provides the consumer with no notice of the risk unless it is patently obvious.

Increased safety is another important rationale for the separation of manufacturing defects from the other two forms of defects.\textsuperscript{276} Holding a manufacturer very strictly liable for defects that could be lessened or averted through increased inspections or quality control is much fairer than imposing very strict liability on a manufacturer for a defect in a design that may be as safe

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\textsuperscript{273} See id.
\textsuperscript{274} See id. \S 2 cmt. a.
\textsuperscript{275} See generally id. (discussing the policy rationales behind imposing stricter liability for manufacturing defects than for design and warning defects).
\textsuperscript{276} See id.
as technically possible, yet is still dangerous. The belief that product producers consciously choose the appropriate level of quality control such that, in some sense, they are at "fault" for any resulting injuries underlies this rationale. If this conception is correct, a very strict liability framework for manufacturing defects should create an incentive for producers to increase their efforts at quality control and thereby create safer products.

Finally, very strict liability for manufacturing defects can be viewed as a direct outgrowth of the contractual theory of implied warranty of merchantability. This doctrine holds a commercial seller strictly liable if the product sold is not of merchantable quality. Strict liability in tort for product defects is really a restatement of this doctrine applied to a more expansive setting. One of the fundamental premises of strict liability in tort is that a manufacturer has promised implicitly that the product will be manufactured correctly and should be held liable if the product is found to be otherwise.

Even absent the American Law Institute's proposal to create distinct tests for each type of defect claim, res ipsa loquitur does not provide the same benefit or the same degree of probability in a design or warning situation as it does in a manufacturing de-

277. See id.; Klein, supra note 63 (discussing the state of the art defense to strict liability). The term "very strictly liable" refers to the proposed ALI manufacturing defect test. See supra note 272.

278. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (Tentative Draft No. 2, 1995).

279. A government report on products liability litigation indicated that the imposition of strict liability under Restatement section 402A generated increased quality control efforts by many manufacturers. See COMMERCE REPORT, supra note 232, at IV-6 to 7.

280. Under the Uniform Commercial Code, if a seller is a merchant of the good he is selling, a warranty of merchantability is implied in every sales contract. See U.C.C. § 2-314 (1978). Merchantability requires a good to be "fit for the ordinary purposes for which such goods are used." Id. § 2-314(c).

281. The concept of strict liability in tort does not include the requirement of privi-

282. See id. cmt. c (stating that the imposition of strict liability is based on the "special responsibility" a manufacturer has to the public); see also Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (stating that "[i]mplicit in the machine's presence on the market, however, [is] a representation that it [will] safely do the jobs for which it was built").
fect situation. Design defect claims focus on the nature of the correctly manufactured product, yet assert that the product is unacceptably dangerous even when perfectly constructed. Res ipsa loquitur, with its focus on the specific incident, is poorly suited to provide proof of a systemic defect. Furthermore, if the plaintiff alleges a design or warning defect, then the informational advantage of the defendant is less compelling because the plaintiff can inspect other products and the design specifications and/or warnings for the product. Res ipsa loquitur is also poorly suited for invocation in a failure to warn case. It is too great a logical leap to attempt to infer from an accident that a product's warning was defective. Like design defect cases, failure to warn cases implicate other factors, such as the foreseeability of the harm and the likelihood that a warning would prevent the harm.

In addition to being better suited to manufacturing defects, res ipsa loquitur is arguably more needed in such cases. To prove a manufacturing defect, the plaintiff must prove that a defect existed in the actual product that caused the injury. Comparison to other products might help, but the crux of the needed proof requires that the specific product in question be proven defective. Such proof may be difficult to obtain when the product is highly technical in nature or is destroyed in the injury-producing event. Design and failure to warn cases have

283. Under the consumer expectation test, a product is designed defectively if the product is more dangerous than a reasonable consumer would expect it to be when using it in a foreseeable manner. See Restatement (Third) of Torts: Products Liability § 2 cmt. g (Tentative Draft No. 2, 1995); id. (Tentative Draft No. 1, 1994). The risk-utility test of design defectiveness exposes a manufacturer to liability if the utility of the design does not outweigh the risk. See Barker v. Lull Eng’g Co., 573 P.2d 443, 455-56 (Cal. 1978).

284. See Restatement (Third) of Torts: Products Liability § 3 cmt. b (Tentative Draft No. 1, 1994) (noting the difference in the availability of proof in manufacturing defect claims versus design or warning defect claims).


286. See Restatement (Second) of Torts § 402A cmt. g (1965).

287. See Restatement (Third) of Torts: Products Liability § 3 cmt. b (Tentative Draft No. 1, 1994) (noting that plaintiffs asserting manufacturing defect claims may be disadvantaged because the individual product “may be destroyed, lost, or otherwise unavailable to the plaintiff after the product-related accident”).
no temporal element in their proof structures; if the product design or warning is defective, it was always defective. 288 Manufacturing defects, on the other hand, have a critical temporal proof requirement: the defect had to exist when the product left the manufacturer's control. 289 This temporal element can be very difficult to prove, given the nature of the claim and the plaintiff's relative lack of information regarding the production processes at the plant. 290 Helping plaintiffs overcome this "time of defect" hurdle would advance a crucial goal of the strict products liability system: increasing manufacturer incentives to make safer products. 291 Res ipsa loquitur, a test of probability, 292 can provide this assistance.

A PROPOSAL FOR INTEGRATING RES IPSA LOQUITUR INTO THE PROOF STRUCTURE FOR STRICT LIABILITY MANUFACTURING DEFECT CLAIMS

The doctrine of res ipsa loquitur should be allowed in strict liability settings to prove manufacturing defects. This extension is justified based upon the rationales for distinguishing manufacturing defects from design and warning defects, the social policy goal of increasing incentives for manufacturers to market safer products, and the need to assist plaintiffs because proof of the defect may be difficult to obtain. 293 Allowing res ipsa loquitur to assist plaintiffs in proving manufacturing defects is also consistent with the policy rationale behind the imposition of a stricter standard of liability for manufacturing defects 294 because the doctrine will help ensure that the strictness of the test is not weakened by proof problems. Because of the policy goals

288. To avoid liability, however, a manufacturer can always claim buyer misuse or alteration. See FRUMER & FRIEDMAN, supra note 270, § 8:04[1] (discussing available defenses to strict liability claims).
291. See RESTATEMENT (SECOND) OF TORTS § 402A cmts. c, h (1965).
292. See 1 SPEISER, supra note 1, § 1:1.
293. See supra notes 269-92 and accompanying text.
of the strict liability system, the doctrine should be granted a
greater procedural effect than it is afforded in a traditional neg-
ligence setting.

**Historical and Policy Justifications for Granting Res Ipsa Loquitur Presumptive Force in Manufacturing Defect Cases**

Res ipsa loquitur, if established by the plaintiff, should have a
presumptive effect when it is applied in a manufacturing defect
scenario. The procedural effect of the presumption would be de-
termined by whether the plaintiff could make an initial showing
that the defendant had greater knowledge or access to informa-
tion regarding the nature of the accident and potential de-
fect. If the plaintiff could satisfy this procedural hurdle, then
res ipsa loquitur would create a presumption of defect and shift
to the defendant the burden of persuasion on the issue of prod-
uct defectiveness. If the plaintiff could not make this initial
showing of knowledge by the defendant, then the doctrine, if
established, would create a presumption of defect but only shift
to the defendant the burden of production.

Historical precedent supports giving res ipsa loquitur a pre-
sumptive effect. Res ipsa loquitur had presumptive force as origi-
nally formulated and applied in England. If the doctrine was
invoked properly, it shifted the burden of persuasion on the issue
of negligence to the defendant. One commentator has noted
that, "[i]n the pre-Thayer-Wigmore period, the settled law in

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295. See Fed. R. Evid. 104 (discussing the standard of proof necessary under the
federal system for establishing certain preliminary factual issues). Under the propos-
al outlined in this Note, a plaintiff would have to demonstrate to the court "evidence
sufficient to support a finding" that the defendant had superior knowledge regarding
the nature of the product and event. See id.

296. See infra notes 310-18 and accompanying text (discussing different views re-
garding the appropriate procedural effect of presumptions).

297. See infra note 332 and accompanying text. The production shift would be a
true shift. Under the proposal, a defendant having the burden of production would
suffer a directed verdict if that defendant offered no rebuttal evidence. But see 1
Speiser, supra note 1, § 3:14 (discussing the majority view that res ipsa loquitur
may shift the burden of production but does not compel the defendant to come for-
ward with evidence).

298. See Shain, supra note 30, at 92-93 (noting that British opinions suggested
that negligence was presumed).

299. See id.
America was in accord with British decisions." Most states and the United States Supreme Court embraced this presumptive view of res ipsa. Not until Sweeney v. Erving did the Supreme Court declare that the doctrine did not shift the burden of persuasion or the burden of production.

In addition to the historical justification for granting res ipsa loquitur a presumptive effect in manufacturing defect cases, the factors that judges and legislators use in determining whether to recognize a presumption support granting the doctrine this heightened procedural effect in products liability cases. Presumptions are created for a variety of reasons: probability, efficiency, fairness, imbalanced access to information, social policy, and assistance in difficult proof situations. A presumption of a manufacturing defect upon establishment of res ipsa loquitur is consistent with these goals.

In terms of probability, it is more probable than not that if the elements of res ipsa loquitur are established in a given situation, the product was defective when it left the manufacturer. This probability exists because the basis of res ipsa loquitur is the exclusion of as many other potential causes of the injury to the extent possible. Strict liability is premised in part on the social policy of encouraging safer products. Allowing res ipsa loquitur a presumptive effect would make liability for manufacturing defects stricter and increase the incentives for companies to reduce manufacturing defects to avoid liability.

Fairness and informational advantages are also impli-
cated because manufacturers are generally in a better position to determine whether a defect in a product existed, and certainly in a better position to develop evidence to refute such an accusation.

The factors that support the creation of a presumption also support the recognition of a procedural effect beyond that recognized under the Federal Rules of Evidence. Under the Federal Rules of Evidence, presumptions only shift the burden of production and do not shift the ultimate burden of persuasion. This view of presumptions is not universal and not without criticism. Most states employ a variety of presumptions with differing procedural effects depending on the nature of the presumption. In California and Hawaii, the state evidence codes set out different lists of presumptions, some of which affect the burden of persuasion and others of which affect the burden of production. When the Federal Rules of Evidence were drafted, the Supreme Court supported the version of Rule 301 whereby the burden of persuasion on the fact in issue would be shifted. Congress rejected this approach and instead embraced the current version of the rule.

The Supreme Court, in its Advisory Committee Note to its proposed presumption rule, rejected the "bursting bubble" theory of presumptions as not according presumptions a sufficient effect. Other scholars have commented that social policy and

310. See Fed. R. Evid. 301.
311. See supra note 240 and accompanying text.
312. See Jack B. Weinstein et al., Weinstein's Evidence ¶ 301[05] (1996) (noting that states have taken many different approaches to the procedural effect given to presumptions).
314. See Rules of Evidence for United States Courts and Magistrates, supra note 304, at 208 (noting that the policy behind presumptions supports an increased procedural effect).
315. See Martin, supra note 239, § 3.04.
316. See Rules of Evidence for United States Courts and Magistrates, supra note
fairness should determine which party will bear the burden of persuasion.\textsuperscript{317} Professor Bohlen outlined a system of presumptions premised on the belief that presumptions grounded in social policy and probability should shift the burden of persuasion, whereas presumptions not based on those rationales should only shift the burden of production.\textsuperscript{318} The comments to the Restatement (Second) of Torts section 328D note that some courts historically have granted the doctrine a greater procedural effect if the defendant "ha[s] undertaken a special responsibility toward the plaintiff."\textsuperscript{319} Manufacturers have a "special relationship" with buyers because buyers place their trust in manufacturers to produce safe products.\textsuperscript{320} Therefore, precedent exists to infuse the doctrine with a heightened procedural effect.

Courts already shift the burden of persuasion over to the defendant in certain strict liability situations.\textsuperscript{321} For example, the California Supreme Court outlined a two-part strict liability test for design defects that shifts the burden over to the defendant to justify the product design.\textsuperscript{322} Furthermore, courts and legisla-

\textsuperscript{304}, at 208 (citing Edmund M. Morgan & John MacArthur Maguire, \textit{Looking Backward and Forward at Evidence}, 50 HARV. L. REV. 909, 913 (1937)). The "bursting bubble" view of presumptions, adopted by Congress, was championed by Professor Thayer. \textit{See James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law} ch. 9 (Rothman Reprints 1969) (1898) (discussing burden of proof issues). Under Thayer's framework, presumptions should only affect the burden of production; once the defendant has come forward with sufficient evidence to call into question a presumed fact, the presumption drops out of sight entirely and the evidence is weighed as if no presumption had ever been in place. \textit{See id.} at 376-84.


\textsuperscript{318}. \textit{See Bohlen, supra} note 240. California and Hawaii have embraced this approach. \textit{See supra} note 313.

\textsuperscript{319}. \textit{Restatement (Second) of Torts} § 328D cmt. b (1965).

\textsuperscript{320}. \textit{See supra} note 232 and accompanying text.

\textsuperscript{321}. \textit{See, e.g., Barker v. Lull Eng'g Co.}, 573 P.2d 443, 455 (Cal. 1978) (shifting the burden over to the defendant in design defect cases to show that the product's utility outweighed the risk that it posed to the plaintiff).

\textsuperscript{322}. Under the \textit{Barker} test for design defects, a plaintiff can prevail in two different ways. \textit{See id.} The plaintiff can win either by establishing that the product failed to satisfy the consumer expectation test, \textit{see id.} at 455-56, or by establishing that the design defect proximately caused the injury with the defense failing to prove that the utility of the product outweighed the product's risk. \textit{See id.} at 456. In \textit{Soule v. General Motors Corp.}, 882 P.2d 298, 311 n.8 (Cal. 1994), the California Supreme Court appeared to reaffirm the use of the \textit{Barker} test. Other states also have adopt-
tors have shifted the burden of persuasion to the defendant in other situations in which social policy and fairness dictated the shift. In Title VII employment discrimination suits, the Supreme Court shifted the burden of persuasion to the defendant in mixed motive cases to prove the action was based on a nondiscriminatory motive. The Court defended the shift on the basis of fairness. In California, the legislature created a presumption of a failure to exercise due care that shifts the full burden to the defendant when the defendant's conduct violated a rule or regulation and the conduct proximately caused death or injury to an individual or property. At common law, courts created a presumption to shift the burden of persuasion to the defendant in actions by passengers against common carriers. Both from a historical basis and a policy basis, therefore, granting res ipsa a presumptive effect is not a major doctrinal revolution in the law, but rather a recognition of the compatibility of the policy rationales behind res ipsa loquitur, strict liability, and evidentiary presumptions.

Reconfiguring Res Ipsi Loquitur To Prove Defectiveness

The final requirement needed to allow res ipsa loquitur to serve duty in strict liability manufacturing defect cases is the creation of a test that will establish that a product was manufactured defectively with a sufficient degree of certainty. Most states have used one of three different tests of res ipsa: the traditional test, the modified traditional test, and the Rebroden the Barker burden-shifting approach. See Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885 (Alaska 1979); Ontai v. Straub Clinic & Hosp. Inc., 659 P.2d 734, 740 (Haw. 1983).

323. See Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that a "defendant may avoid . . . liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account").

324. See id. at 248 (noting that it is fair to place the burden on the defendant when it has been shown that the defendant relied upon an impermissible motive); see also id. at 263 (analogizing to the law of torts, which sometimes shifts the burden to the defendant for fairness reasons, especially in multiple causation situations) (O'Connor, J., concurring).

325. See CAL. EVID. CODE § 669 (West 1995).

326. See RESTATEMENT (SECOND) TORTS § 328D cmt. b (1965).

327. See supra note 32 and accompanying text.
statement (Second) of Torts test. This Note embraces the Restatement test because that test does not require the plaintiff to show that the defendant had exclusive control; it more perceptively requires the plaintiff to establish that the probable cause of the accident was "one which the defendant was under a duty to the plaintiff to anticipate or guard against." As noted in the Restatement comments, the plaintiff's ultimate burden is to produce evidence that it is more probable than not that the defendant's conduct caused the accident.

Using the Restatement test for res ipsa as a baseline, this Note fashions an appropriate res ipsa test for manufacturing defect cases. Following is an outline of the proposed test for res ipsa in manufacturing defect cases:

(1) It may be presumed that harm suffered by the plaintiff is caused by a manufacturing defect in a product manufactured by the Defendant when
   (a) the event is of a kind which ordinarily does not occur in the absence of a manufacturing defect in the product;
   (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
   (c) it is more likely than not given a totality of the circumstances surrounding the event that the defect existed at the time the product left the manufacturer's control.

(2) It is the function of the court to determine whether the presumption may reasonably be drawn by the jury, and to determine the procedural effect to be given the presumption.
   (a) if the plaintiff puts forward evidence sufficient to support a finding that the defendant had superior knowledge regarding the product or the accident then the judge shall instruct the jury that the doctrine, if established, will create a presumption of defectiveness and shift to the defendant the burden of production and the burden of persuasion on the

328. See supra note 36 and accompanying text.
329. See supra note 33 and accompanying text.
330. RESTATEMENT (SECOND) OF TORTS § 328D cmt. g.
331. See id. cmt. e.
332. The italicized portions of the test indicate my own suggested changes to the Restatement test for res ipsa loquitur in a negligence setting. See supra note 33 to compare the test's manufacturing defect version with its negligence version.
issue of defectiveness.
(b) if the plaintiff fails to make the showing required in
(2)(a) then the judge shall instruct the jury that the presump-
tion shifts to the defendant only the burden of production.
(3) It is the function of the jury to determine liability con-
sistent with the judge’s instructions at the end of the case re-
garding the effect of the presumption.

Both proposed revisions of the Restatement (Second) of Torts
contain sections recognizing that product defectiveness can be
inferred from the circumstances surrounding the accident.\footnote{See Restatement (Third) of Torts: Products Liability § 3 (Tentative Draft
No. 1, 1994).} In each draft, the authors recognized that the inference of defect is
most likely to apply in manufacturing defect cases because of
the unit-specific nature of manufacturing defect claims and be-
cause of the chance that the product may not be available to the
plaintiff for analysis.\footnote{See id.} Thus, the drafters of the Restatement

\footnote{333. See Restatement (Third) of Torts: Products Liability § 3 (Tentative Draft
No. 1, 1994). Section 3 states:
When a product fails to function as a reasonable person would ex-
pect it to function and causes harm under circumstances where it is
more probable than not that the malfunction was caused by a manufac-
turing defect, the trier of fact may infer that such a defect caused the
malfunction and plaintiff need not specify the nature of the defect.
Id. (emphasis added); see also id. (Tentative Draft No. 2, 1995) (taking an approach
quite similar to the Restatement definition of res ipsa loquitur, see Restatement
(Second) of Torts § 328D (1965), and the approach outlined by this Note). Section
3 of the second draft states:
It may be inferred that the harm sustained by the plaintiff was caused
by a product defect, without proof of the specific nature of the defect,
when:
(a) the incident resulting in the harm was of a kind that ordinarily
would occur only as a result of product defect; and
(b) evidence in the particular case supports the conclusion that more
probably than not:
(1) the cause of the harm was a product defect rather than other
possible causes, including the conduct of the plaintiff and third persons;
and
(2) the product defect existed at the time of sale or distribution.
Restatement (Third) of Torts: Products Liability § 3 (Tentative Draft No. 2, 1995).
334. See Restatement (Third) of Torts: Products Liability § 3 cmt. b (Tentative
Draft No. 1, 1994). The first proposal limited the inference of defect to manufactur-
ing claims. See id. The second proposal did not limit the use of the inference to
manufacturing defect claims but noted that the inference will most often apply in
manufacturing defect scenarios. See id. § 3 cmt. b (Tentative Draft No. 2, 1995).}
recognized the heightened probative value and utility of circum-
stantial evidence of defect when a manufacturing defect claim is
alleged as compared to when another product liability claim is
alleged. The language of the second proposal mirrors closely the
test outlined above. The drafters, however, limited the procedur-
al weight of the test to an inference. This Note's proposal
embraces the American Law Institute's view that circumstantial
evidence of defectiveness arising from the context of the accident
should be limited to the manufacturing defect context. Addition-
ally, this proposal contends that, instead of crafting an entirely
new inferential doctrine for defectiveness, states should use the
aforementioned modified res ipsa loquitur test, with its greater
procedural weight, in manufacturing defect cases.

The modified res ipsa test, coupled with the initial determina-
tion of whether the defendant had greater knowledge regarding
the product or the accident, will advance the social policy goals
inherent in the strict products liability system without exposing
manufacturers to unjustified liability. Under this proposal, a
manufacturer will not be held absolutely liable for manufacturing
defects, nor will a manufacturer be required to insure for all
manufacturing defects. To recover, and before being allowed to
use res ipsa loquitur to create a presumption of defectiveness,
the plaintiff will have to provide sufficient evidence. Even then,
if the plaintiff fails to convince the judge that the defendant had
superior knowledge, the presumption places only the burden of
production on the defendant and the burden of persuasion as to
product defectiveness remains with the plaintiff. Finally,
even if the plaintiff takes full advantage of the new, heightened
procedural effect of res ipsa loquitur in manufacturing defect
cases, the defendant can still escape liability by convincing a
jury that the product was not defective. This burden is justi-
fied, given the superior knowledge the defendant possesses re-
garding the manufacturing of the product and the quality con-
tral processes implicated.

335. See Restatement (Third) of Torts: Products Liability § 3 (Tentative Draft
No. 2, 1995); id. (Tentative Draft No. 1, 1994).
336. The presumption disappears once the burden of production is met. See 2
McCormick on Evidence, supra note 38, § 344(A), at 582-86.
337. See supra note 62.
State Products Liability Reform Legislation Does Not Clash with This Proposal

State legislatures have been active in this area since the judiciary began recognizing strict products liability, defining the contours of strict liability in their respective states. Several state codes now establish umbrella “products liability actions” that encompass all of the separate theories of liability for product injury, including strict tort liability, negligence, and warranty-based claims. The state code provisions can be grouped into four major categories: limitations on who can be held liable for defective products, limitations on the admissibility of certain types of evidence, statute of limitations standards, and defenses to strict products liability actions. An analysis of current state code provisions reveals no legislative barriers to the presumptive use of res ipsa in manufacturing defect cases.

The most prevalent statutory limitation on strict products liability actions has been to limit who can be held liable for a defective product. A number of states either ban the imposition of liability on a nonmanufacturer seller of the product outright, or hold a seller liable only if the manufacturer is jurisdictionally unavailable. Other states limit seller liability by mandating

338. See, e.g., CONN. GEN. STAT. ANN. § 52-572n (West 1991 & Supp. 1996) (establishing a products liability claim “in lieu of all other claims”); KAN. STAT. ANN. § 60-3301 (1983) (establishing a products liability claim that includes all previously existing theories of recovery); MICH. COMP. LAWS ANN. § 600.2945 (West Supp. 1996) (defining a products liability action to include equitable and legal recovery theories).


340. See, e.g., IDAHO CODE § 6-1306 (1990) (declaring as inadmissible subsequent remedial measures).

341. See, e.g., N.H. REV. STAT. ANN. § 507-D:2 (1983) (limiting the availability of claims to 12 years after the manufacturer sells the final product).

342. See, e.g., KAN. STAT. ANN. § 60-3303 (establishing a presumption that a product that is 10 years old or older is not defective).

343. See COLO. REV. STAT. § 13-21-402 (insulating the seller from liability unless jurisdiction over the manufacturer cannot be obtained); IDAHO CODE § 6-1307 (insulating the seller from liability if the seller had no reasonable opportunity to inspect the product even if such an inspection should have revealed the defect); KY. REV. STAT. ANN. § 411.340 (Michie 1992) (insulating the seller from liability if the seller can show that the product was sold by him in its original condition); MINN. STAT. ANN. § 544.41 (West 1988) (insulating the seller from liability unless the plaintiff can prove any of the factors outlined in the code to extend liability to the seller);
that the manufacturer defend the action or indemnify the seller.\textsuperscript{344} This Note's proposal is consistent with the legislative intent of these code restrictions. The broad aim of such state code provisions is to protect from liability sellers who were not responsible for the defective product.\textsuperscript{345} Res ipsa loquitur, when applied in manufacturing defect cases, would focus on the manufacturer of the product because one of the elements of the test involves proving that it was more probable than not that the product was defective when it left the manufacturer's control.\textsuperscript{346} Therefore, a plaintiff could use res ipsa loquitur against a seller only if the seller altered the product in some way. Code provisions that limit seller liability usually exempt seller alteration of the product.\textsuperscript{347}

The other major legislative incursion into strict products liability has involved outlining defenses to strict products liability actions. Several states have recognized a "state of the art" defense.\textsuperscript{348} Still other states have developed the "useful life" concept to limit liability for product injuries if the product is beyond a certain age.\textsuperscript{349} Finally, two states have recognized a pre-


\textsuperscript{345} See supra note 332 and accompanying text (outlining this Note's proposed res ipsa defect test).

\textsuperscript{346} See supra note 311-12 and accompanying text.


\textsuperscript{348} See Idaho Code § 6-1303 (1990) (limiting liability if the product is 10 years old or older); Kan. Stat. Ann. § 60-3303 (1983) (establishing a presumption that a product 10 years old or older is not defective); Ky. Rev. Stat. Ann. § 411.310 (Michie 1992) (establishing a presumption that the product was not defective if the
sumption that the product was not defective if the product conformed to all the proper regulations governing the product.\textsuperscript{350}

These defense measures do not bar res ipsa from strict liability. State of the art defenses focus on the design of the product and not its manufacture, because the goal of the restrictions is to avoid design challenges to products that have been used for a long period of time.\textsuperscript{351} Useful life limitations are consistent with res ipsa loquitur. When useful life limitations are imposed a legislature has determined that the probability is too remote that the proximate cause of the injury was product defectiveness. Therefore, the legislature has voted to disallow the extension of liability in circumstances covered by the statute.\textsuperscript{352} Finally, governmental standards often proffered as potential defenses in design defect claims are less applicable to manufacturing defect cases. In manufacturing defect claims, the plaintiff is not trying to establish that the product did not conform to an outside design standard; the plaintiff is trying to establish that an individual product varied in a significant way from the product norms established by the manufacturer.\textsuperscript{353}

The final two types of legislative reform of products liability law involve statute of limitations requirements and the admissibility of evidence. Four states have outlined statute of limitation requirements similar to the “useful life” defense that range from six to twelve years.\textsuperscript{354} Three other states have enacted legisla-

\begin{footnotesize}
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\item \textsuperscript{350} See KAN. STAT. ANN. § 60-3304(a) (deeming a product not defective if it complied with all relevant standards “relating to design or performance”); TENN. CODE ANN. § 29-28-104 (1980) (establishing a rebuttable presumption that the product was not unreasonably dangerous if it complied with government standards).
\item \textsuperscript{351} Cf. IOWA CODE ANN. § 668.12 (denying liability if “the product conformed to the state of the art in existence at the time the product was designed, tested, manufactured, . . . provided with a warning, or labeled”) (emphasis added).
\item \textsuperscript{352} Cf. KY. REV. STAT. ANN. § 411.310 (establishing a presumption that a product was not defective if the injury occurred five years or more after its purchase or eight years or more after its manufacture).
\item \textsuperscript{353} See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. b (Tentative Draft No. 2, 1995); id. (Tentative Draft No. 1, 1994).
\item \textsuperscript{354} See ARK. CODE ANN. § 16-116-103 (Michie 1987) (requiring that the action be brought within three years of the injury); 735 ILL. COMP. STAT. ANN. § 5/13-213(b)
\end{itemize}
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tion limiting the admissibility of certain types of evidence to prove product defectiveness.355

Again, the foregoing measures do not restrict the utility of res ipsa in strict products liability actions. First, time limitations are procedural in nature, not substantive. Second, after-acquired evidence focuses more on design changes and applies less to manufacturing defect claims. The res ipsa test focuses on the nature of the specific product at the time of production, so the inadmissibility of evidence regarding product changes or quality control changes would not be highly probative of whether the actual product in question was defective.

This Proposal Is Consistent with the Policy Goals of the Strict Products Liability System

The presumptive use of res ipsa loquitur in manufacturing defect cases is consistent with the American Law Institute’s proposed revisions of strict products liability and the policy goals supporting the initial creation of the strict products liability legal construct. The American Law Institute’s revisions would hold manufacturers strictly liable for manufacturing defects but inject other qualifiers into the tests for design and warning defect cases.356 Allowing res ipsa loquitur to assist in proving defectiveness will ensure that the strictness of the liability will hinge more on whether the product was actually defective and less on whether the plaintiff could prove that the product was

355. See COLO. REV. STAT. § 13-21-404 (1987) (declaring inadmissible any evidence regarding design theory, manufacturing technique, testing ability, or warning information acquired after the product was sold); IDAHO CODE § 6-1306 (1990) (declaring as inadmissible subsequent remedial measures); MICH. COMP. LAWS ANN. § 600.2946(3) (West Supp. 1996) (admitting evidence of changes installed after the injury “only for the purpose of proving the feasibility of precautions, if controverted or for impeachment”).

defective.

The use of res ipsa loquitur in strict liability claims will also increase product safety. With stricter liability, manufacturers will have increased incentives to spend more money on quality control and to produce safer products because their risk of liability will increase. For the same reason, res ipsa loquitur will further the enterprise liability theory of strict liability. If a manufacturer's ability to avoid liability for defective products decreases, the manufacturer will bear the costs of putting defective products on the market more completely. By forcing the manufacturer to bear more of the costs, res ipsa loquitur shifts more accident costs to the manufacturer. This means that the manufacturer, who can spread risk and insure against risk better than consumers, will shoulder a greater portion of the accident costs. Finally, res ipsa loquitur will assist plaintiffs when proof is difficult to obtain. Just as strict liability was created to aid plaintiffs when negligence was hard to prove, res ipsa loquitur will act as a proof aid in strict liability manufacturing defect cases. It will allow a plaintiff to make a prima facie case of a manufacturing defect through the use of a "common human experience" argument of defectiveness. Res ipsa will allow the probability of defect to be sufficient to impose liability instead of requiring an affirmative showing of a defect.

CONCLUSION

Res ipsa loquitur may have predated current strict liability laws by 100 years, but the doctrine's inferential premise is equally well-suited to the negligence and strict liability fields.

357. Cf. supra note 232 and accompanying text (noting that strict liability will lead to increased safety).
358. See COMMERCE REPORT, supra note 232, at VI-47.
359. See Montgomery & Owen, supra note 229, at 809-10 (discussing the enterprise liability theory generally).
360. See id.
361. See supra note 230 and accompanying text.
362. See RESTATEMENT (SECOND) OF TORTS § 328D cmt. c (1965) (noting that common experience holds that certain accidents do not occur absent negligence); see also supra notes 193-225 and accompanying text (discussing states that have allowed the use of common experience to infer defects in some manner).
363. See 1 SPEISER, supra note 1, § 1:2.
Allowing the doctrine to assist plaintiffs in proving manufacturing defect claims would be consistent with the American Law Institute's recently proposed modifications to strict liability law. More importantly, allowing the use of the doctrine would ensure a level of strictness in strict liability manufacturing claims that would further the policy goals of safety and enterprise liability at the core of strict liability for products that fail to perform as intended.

Merely allowing the use of the doctrine to provide an inference of defect, however, does not sufficiently advance these goals. Res ipsa loquitur, when used in manufacturing defect cases, should be allotted a two-tiered presumptive effect determined by the degree of the disparity of access to product information between the plaintiff and the manufacturer. This proposal properly balances consumer, seller, and societal interests. It would advance the interests of product safety and manufacturer responsibility for defectively manufactured products without imposing absolute liability on manufacturers and without requiring manufacturers to be insurers of their products. Thus, it is time for the res ipsa "barrel" to be rolled further out of the barn.

Matthew R. Johnson

364. See supra notes 272-75 and accompanying text.
365. See supra notes 228 and 232 and accompanying text.