Volume 59, Issue 4 Page 1065

Stanford Law Review

THE LAW OF FALLING OBJECTS: *BYRNE V. BOADLE* AND THE BIRTH OF RES IPSA LOQUITUR

G. Gregg Webb

THE LAW OF FALLING OBJECTS: *BYRNE V. BOADLE* AND THE BIRTH OF RES IPSA LOQUITUR

G. Gregg Webb*

INTRODUCTION

In Latin, the phrase *res ipsa loquitur* means "the thing speaks for itself." In the law, few concepts have created more confusion among scholars and practitioners than the evidentiary doctrine of res ipsa loquitur. Commentators have attempted to characterize the phrase alternatively as a rule, principle, doctrine, maxim, and for one particularly frustrated scholar, a myth.[1] Likewise, res ipsa loquitur has resisted all attempts by legal authorities to delineate its

* J.D. Candidate, Stanford Law School, 2007; B.A., Princeton University, 2003. Thanks to Professor Amalia D. Kessler for catalyzing this project and guiding me in it long after classroom bells had gone silent and to Professor Robert L. Rabin for providing helpful comments and ever-ready support throughout. Thanks also to the librarians of the Robert Crown Law Library, especially Paul Lomio, Erika V. Wayne, Kathleen M. Wilko, and Sonia Moss, for helping me blow the dust off a lot of aged, but still insightful, common law. Finally, my deepest appreciation to Shelley Marie Johnson, Esq., for life-lasting love and painstaking edits that make both this Note and its author richer.

1. G. H. L. Fridman, *The Myth of Res Ipsa Loquitur*, 10 U. TORONTO L.J. 233 (1954).

scope. In the words of another eminent, but exasperated, scholar, res ipsa loquitur "is used in different senses[;] . . . it means inference, it means presumption, it means no one thing—in short it means nothing."[2] Nonetheless, the maxim has appeared in thousands of cases since its first articulation in the mid-nineteenth century and shows no signs of leaving the legal lexicon. The most widely accepted interpretations of res ipsa loquitur include[3]: (1) that it creates a permissible inference of negligence for a jury in situations where a plaintiff can only show that an injurious event occurred; (2) that it presents a rebuttable presumption requiring a jury to find for a plaintiff in the absence of exculpatory evidence from the defendant; or (3) that it forces an affirmative shift in the burden of proof from plaintiff to defendant.[4]

Abundant scholarship exists debating the nature of res ipsa loquitur, due in large part no doubt to the deep ambiguities that continue to shroud the doctrine. Perhaps the only aspect of res ipsa loquitur which has not spawned heated intellectual and juridical debate has been the doctrine's origin. The minimal historical inquiry into res ipsa's roots may be related to the unambiguous and overt way in which the phrase "res ipsa loquitur" entered the English common law of torts.

---

2. William L. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 270 (1936).

3. Early versions of this three-part categorization of res ipsa loquitur jurisprudence are proposed by William Prosser and C. A. Wright. *See id.* at 243-45 (providing an exhaustive accounting of late-nineteenth and early-twentieth-century res ipsa loquitur cases in the United States); C. A. Wright, *Res Ipsa Loquitur*, *in* STUDIES IN CANADIAN TORT LAW 41, 63-70 (Allen M. Linden ed., 1968) (addressing mainly Canadian and English res ipsa cases). For contemporary discussions of res ipsa jurisprudence, see TORT LAW AND ALTERNATIVES 93-99 (Marc A. Franklin & Robert L. Rabin eds., 7th ed. 2001) (covering American case law), and CHARLESWORTH & PERCY ON NEGLIGENCE 424-36 (R.A. Percy & C. T. Walton eds., 9th ed. 1997) (covering U.K. case law and ultimately adopting the rebuttable presumption approach).

4. The last of these interpretations of res ipsa has generally been either subsumed under the "rebuttable presumption" approach or replaced entirely by the "permissive inference" approach. The current Restatement discussion of res ipsa omits any mention of an affirmative shift in the burden of proof, explaining instead that a majority of jurisdictions adopt the permissive inference interpretation while others follow the rebuttable presumption approach. *See* RESTATEMENT (THIRD) OF TORTS § 17 cmt. j (Proposed Final Draft No. 1, 2005) (approved at ALI 2005 Annual Meeting). Nevertheless, for a fervent defense of the "burden of proof" interpretation of res ipsa's scope, see MARK SHAIN, RES IPSA LOQUITUR: PRESUMPTIONS AND BURDEN OF PROOF (1945). Shain's scholarship is idiosyncratic, and while Prosser describes this third interpretation of res ipsa, he also catalogues its minimal and contested use in the United States during the early twentieth century. By then, most jurisdictions had recognized res ipsa as creating either an inference of negligence or a rebuttable presumption and not a wholesale shift in the standard burden of proof from plaintiff to defendant. *See* Prosser, *supra* note 2, at 244-45, 250-54; *cf.* Russell Denison Niles, *Pleading Res Ipsa Loquitur*, 7 N.Y.U. L.Q. REV. 415, 417 (1929) (observing that "[o]ther courts, perhaps unguardedly, hold that the presumption [of res ipsa] shifts the 'burden of proof' to the defendant").

Nearly all commentators agree that the first use of the colloquial Latin tag in the negligence context came in the 1863 case of *Byrne v. Boadle*, in which a Liverpool flour merchant was sued by a pedestrian who had been struck and seriously injured by a barrel plummeting from the merchant's second-story storeroom.[5] The case came before the common law Court of Exchequer on appeal, and the court's head, Chief Baron Jonathan Frederick Pollock, favoring the plaintiff despite his inability to present affirmative evidence of the defendant's negligence, observed that "[t]here are certain cases of which it may be said res ipsa loquitur, and this seems one of them."[6] In context, Pollock's choice of Latin phraseology was more a gilded bauble of his classical education at Cambridge than a conscious attempt to generate a new legalism; however, subsequent jurisprudence soon minted Pollock's words into legal coinage.[7]

Rarely has the first use of a well-known legal phrase been so clearly traceable to an individual case. Res ipsa loquitur's enticingly straightforward entry into the language of the common law has lulled not a few authors into dashing off cursory accounts of its beginnings and may explain the paucity of historical investigation into the doctrine's roots.[8] It would be ironic indeed if commentators were to presume that the doctrine's past speaks for itself.

Not all res ipsa expositors have ignored the search for historical antecedents. Several have asserted that the presumption of negligence allowed under the res ipsa doctrine can be viewed as an outgrowth of the higher standards of care imposed on common carriers during the first half of the nineteenth century.[9] This line of reasoning merits consideration. Enterprise liability was the main arena for doctrinal expansion in tort law during the

---

5. Byrne v. Boadle, 159 Eng. Rep. 299, 299-300 (Exch. 1863).

6. *Id.* at 300.

7. EDWARD FOSS, BIOGRAPHIA JURIDICA: A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND FROM THE CONQUEST TO THE PRESENT TIME, 1066-1870, at 523-24 (London, John Murray 1870).

8. Pointed examples include Fridman, *supra* note 1, at 233 (declaring "[a]ll that is known of the origin of the phrase, *res ipsa loquitur* is that it was introduced into the courts by Pollock C. B., in the famous 'barrel' case *Byrne* v. *Boadle*"), and Mark Shain, *Res Ipsa Loquitur*, 17 S. CAL. L. REV. 187, 187-88 (1944), though in fairness to Shain his subsequent book on the subject, *supra* note 4, provides a more thorough, albeit still flawed, account of res ipsa's background.

9. *See, e.g.*, William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 185-86 (1949); *see also* John Fenston, *Res Ipsa Loquitur in Aviation*, 1 MCGILL L.J. 209, 211 (1953) (listing stagecoach and railroad cases, several described *infra*, and asserting, without further elaboration, that such cases "[i]n the opinion of the writer [constitute] . . . the origin of the doctrine"); T. Ellis Lewis, *A Ramble with Res Ipsa Loquitur*, 11 CAMBRIDGE L.J. 74, 75 (1951) (citing railroad cases, *see* discussion *infra* notes 55, 59, 60, 164, 172 and accompanying text, as part of background discussion on res ipsa doctrine but providing no explanation or analysis of relationship between common carriers and res ipsa's creation). Other res ipsa discussions that allude to such a connection include J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 469 n.66 (3d ed. 1990); PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997); and Niles, *supra* note 4, at 416.

nineteenth century, and the vast majority of case law cited in *Byrne* and its immediate progeny involved common-carrier liability.

This Note expands on previous scholarship citing a connection between the emergence of an independent doctrine of res ipsa loquitur in the 1860s and earlier developments in enterprise liability. Existing inquiries have not delved deeply enough into the relationship between these two aspects of tort history. No account is dedicated exclusively, or even primarily, to charting the doctrinal developments out of which *Byrne v. Boadle* arose.[10] Most attempts to position res ipsa loquitur in historical context entertain doctrinal agendas.[11] Furthermore, this scholarship suffers from omissions at both the factual level—lacking consideration of the judges, lawyers, and parties involved in individual cases like *Byrne*—and at the most abstract, theoretical levels—omitting linkages to the wider historical context within which tort and evidence law evolved during the nineteenth century.

The main purpose of this Note is to explore the factual and jurisprudential background of *Byrne v. Boadle* and to reexamine the case's founding role in the creation of the doctrine of res ipsa loquitur. Part I reviews the circumstances giving rise to the legal dispute between Mr. Byrne and Mr. Boadle and outlines the procedural history of the litigation as it wound its way from Liverpool's Scotland Road, to the local Court of Passage, and finally to the Court of Exchequer in London where Chief Baron Pollock delivered the fated phrase "res ipsa loquitur." This Part provides a factual foundation for understanding the place of *Byrne v. Boadle*, and res ipsa doctrine generally, in the history of tort law.

Part II of this work examines why the judges hearing *Byrne v. Boadle* in 1863 ruled unanimously in favor of plaintiff Joseph Byrne, finding he had met

---

10. Prosser makes the most substantial effort at explaining the origins of res ipsa doctrine, suggesting that the doctrine took on its modern form by merging with heightened standards of liability for common carriers; however, while possessing some truth, Prosser's account possesses serious flaws. *See infra* note 82. Further, Prosser's explanation for res ipsa's origin constitutes only a short and secondary portion of his article, which is focused on untangling the doctrine's twentieth-century effect under California law. *See* Prosser, *supra* note 9, at 184-89. Likewise, Peter Karsten lists res ipsa loquitur among the legal rules that plaintiffs' counsel "teased from sympathetic benches" during the nineteenth century; however, he does not elaborate on this assertion nor does he discuss the doctrine's historical development. KARSTEN, *supra* note 9, at 100, 367 n.86; *see also* sources cited *supra* note 9 and *infra* note 11.

11. For example, Prosser's larger doctrinal purpose is to show that res ipsa loquitur is merely a misleading way to describe what amounts to a normal weighing of circumstantial evidence. As he puts it, "A res ipsa loquitur case is a circumstantial evidence case which permits the jury to infer negligence from the mere occurrence of the accident itself." Prosser, *supra* note 9, at 191. Shain's account of the case law in his book, *supra* note 4, focuses on proving that res ipsa loquitur effects a shift in the burden of proof from the plaintiff to the defendant. Fenston's goal is to convey the narrowness of the holdings in *Byrne* and *Scott* (i.e., whether the plaintiff should be nonsuited or have leave to put evidence before a jury) in order to advance his underlying position that res ipsa is not a cohesive doctrine and therefore cannot be applied to airplane crashes. Fenston, *supra* note 9, at 213-14, 216, 221.

the proof requirements to sustain his action even though he could present no affirmative evidence of negligence on the part of either the defendant flour dealer or his employees. Even if one accepts the hypothesis that the doctrine of res ipsa loquitur grew out of higher standards of liability for common carriers and others operating under special duties during this period, the fact that *Byrne v. Boadle* is not an enterprise liability case distinguishes it from those cases where presumptions of negligence were imposed. It is further safe to presume (and will be affirmatively shown) that the effects of gravity, in the form of falling objects, had been a danger subject to legal regulation since classical times. The *Byrne* case seemingly lacked a novel legal quandary worthy of a novel legal solution. Consequently, both the Exchequer's heavy reliance on common-carrier cases in its opinion as well as subsequent scholarship identifying a link between res ipsa and enterprise liability appear suspect at first. Why would the Exchequer have extended one of its most current legal doctrines (developed to address emerging transportation technologies) to a case involving an ancient form of personal injury?

Part II analyzes this apparent discrepancy and concludes that the Exchequer's decision in *Byrne* is best understood as an effort to create the fairest outcome based on the particular facts of that case. This Part explores how the barons' solution—upholdinga presumption of negligence in favor of the plaintiff—constituted a logical extension of prior rulings involving railroad and other common-carrier liability. Part II rests its conclusions on: (1) the attitudes and experiences of the two most prominent jurists in *Byrne*; (2) English case law preceding *Byrne*; and (3) contemporary treatises and other secondary sources from the mid-nineteenth century.

Part III positions this substantial-justice explanation for the birth of res ipsa loquitur within the larger historical narrative of nineteenth-century tort law. Several competing schools of thought exist to explain how negligence became the dominant theory of tort liability during the nineteenth century. To some scholars, negligence arose in response to the Industrial Revolution because it provided a rigorous, and therefore less costly, standard of liability for powerful but still emerging industries to hide behind in avoiding fault.[12] Other commentators maintain that nineteenth-century developments in torts were driven by intellectual trends, such as expanding notions of causation or efforts to make the legal profession more "scientific" through standardization of principles and education.[13]

A third school takes a more pragmatic approach, viewing growth in tort law as having been driven not by economics or ideas alone but rather by a

12. An early statement of this theory is Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368, 382 (1951); the seminal articulation is MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

13. John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 704-06 (2001) (labeling these positions respectively as "materialist" and "idealist" accounts).

combination of influences. Proponents of this approach recognize an effort by nineteenth-century jurists to hold business interests accountable for injuries caused by their machines, even as industrial accidents proliferated and industrialists came to dominate Anglo-American government and society. This school interprets developments in the law that created heightened-liability obligations for certain parties as a middle ground between competing standards of negligence and strict liability. According to these scholars, nineteenth-century courts adopted hybrid approaches to tort liability as a means of holding industry accountable without creating unmanageable standards of liability.[14]

This Note argues that the introduction of res ipsa loquitur in 1863 supports this third explanation for the progression of tort law. The judges who decided *Byrne v. Boadle* were clearly uninterested in giving quarter to a merchant and his business when doing so would leave an innocent pedestrian uncompensated for his injuries. Given the opportunity to limit the scope of heightened liability to cases involving railroad or stagecoach passengers, the Court of Exchequer declined to do so and instead recognized a presumption of negligence outside the common-carrier context. The decision in *Byrne* is best understood as a practical expansion of existing liability doctrine, and though it provides only a snapshot of jurisprudence during this period, the case persuasively indicates that judges at the height of nineteenth-century industrialization were not so caught up in big business or big ideas that they had abandoned the ageless imperative of the common law system to seek the fairest legal outcome for every set of facts.

I. THE CASE OF *BYRNE V. BOADLE*

This Part describes the facts and litigation in the case of *Byrne v. Boadle*.[15] Beginning with a detailed account of events immediately before and after the underlying injury, this Part constitutes the first effort to compile a comprehensive record of the case using the descriptions provided in contemporary law reporters as well as newspaper articles from the period. The Part goes on to describe the arguments raised by counsel for both sides at trial and during the appeal before the Court of Exchequer. Finally, this Part features

14. Among the leading proponents of this approach is Gary Schwartz. *See* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1724-25 & n.54 (1981) [hereinafter Schwartz, *Tort Law and the Economy*]; Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 655 (1989) [hereinafter Schwartz, *Early American Tort Law*]. Another substantial attack on the economic-centered thesis is made by Peter Karsten. *See* KARSTEN, *supra* note 9. Karsten explains the evolution of nineteenth-century tort law in terms of competing judicial imperatives between honoring English common law precedents ("Jurisprudence of the Head") and generating relief for poorer plaintiffs based on social and religious values ("Jurisprudence of the Heart"). *Id.* at 4. These works and others are discussed more fully in Part III, *infra*.

15. 159 Eng. Rep. 299 (Exch. 1863).

a close examination of the judicial opinions handed down by the four Exchequer barons.

On July 18, 1863, Joseph Byrne, a commission agent and cork manufacturer in Liverpool, England, set out on a walk that would leave him crippled but immortal.[16] Byrne's stroll took him down Liverpool's Scotland Road.[17] Among the tenants on Scotland Road was the flour dealer Abel Boadle, whose combined residence and shop sat along the thoroughfare's east side.[18] Boadle's premises followed a typical design of the period, with a shop open to the public on the street level and a storage room on the floor above. As Byrne came upon Boadle's shop, a horse and cart sat parked along the road in front. Barrels of flour were being lowered into the cart from Boadle's second-story storeroom.[19] Just as Byrne walked underneath the storeroom's loading bay, a barrel of flour plummeted down, landing squarely on his shoulder and casting him to the ground in front of the shop.[20] Bystanders rushed to Byrne's aid and carried him, senseless, into the grocer's store next to Boadle's flour business.[21] After the accident, Boadle directed his surgeon, a Mr. Jones, to treat the victim.[22] Byrne remained in the grocery for several hours until he was sent home in a cab.[23] His injuries proved severe, including extensive trauma to his chest, back, neck, and foot, and he was completely incapacitated for two weeks.[24] The accident also rendered him permanently lame.[25]

Byrne did not lose time in suing Boadle, seeking £700 in damages under a theory of respondeat superior, or vicarious liability, for the alleged negligence

---

16. *Action to Recover Compensation for Injuries: Byrne v. Boadle*, LIVERPOOL MERCURY, Oct. 29, 1863, at 3 [hereinafter *Liverpool Mercury Article*]. This discussion of the facts, procedural history, and arguments surrounding the case of *Byrne v. Boadle* relies heavily on published accounts of the accident and its aftermath in the just cited *Liverpool Mercury* article as well as at *Byrne*, 159 Eng. Rep. at 299, and *Court of Exchequer, Nov. 25: Byrne v. Boadle*, TIMES (London), Nov. 26, 1863, at 11.

17. *Byrne*, 159 Eng. Rep. at 299; *Liverpool Mercury Article*, *supra* note 16.

18. *Byrne*, 159 Eng. Rep. at 299. We can deduce that Boadle's residence and shop was on the east side of Scotland Road because one of the witnesses whom Byrne presented at trial, named Critchley, testified that on July 18th he had been "in Scotland Road, on the right side going north, defendant's shop is on that side." *Id.* The right side of the road when facing north would be to the east.

19. *Id.* Byrne's witness Critchley testified to the existence of the cart. *Id.* Byrne himself testified that he had not seen any cart in front of Boadle's shop before the accident. *Id.*

20. *Id.*; *Liverpool Mercury Article*, *supra* note 16. Critchley testified that "[the barrel] struck [Byrne] on the shoulder and knocked him towards [Boadle's] shop." *Byrne*, 159 Eng. Rep. at 299.

21. *Liverpool Mercury Article*, *supra* note 16.

22. *Id.* It is unclear whether Boadle's surgeon arrived immediately after the accident or began treating Byrne during his recovery in the following weeks. The *Liverpool Mercury* article states only that "Mr. Boadle sent his surgeon, Mr. Jones, to attend to the plaintiff." *Id.*

23. *Id.*

24. *Byrne*, 159 Eng. Rep. at 299; *Liverpool Mercury Article*, *supra* note 16.

25. *Liverpool Mercury Article*, *supra* note 16.

of Boadle's employees.[26] Byrne's suit claimed that Boadle's workmen had "so negligently and unskillfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop" that "one of the said barrels of flour fell upon and struck against the plaintiff."[27] Byrne sought damages not only for the physical injuries he had suffered, but also for being "prevented from attending to his business for a long time," "great expense for medical attendance," and "great pain and anguish."[28]

The case was tried before the Assessor of the Court of Passage at Liverpool probably near the end of October 1863, or roughly three months after the accident.[29] Byrne engaged a Mr. Littler and a Mr. Segar as counsel.[30] Boadle retained a Mr. Charles Russell for his defense.[31]

At trial, Littler and Segar presented testimony on behalf of Byrne from two eyewitnesses (a Mr. Critchley and a second, unidentified individual), the plaintiff, and a surgeon.[32] A contemporary newspaper account of the trial alludes to the limited evidence set forth in the plaintiff's case. The article observed that "[s]everal witnesses were called, who spoke to seeing the plaintiff knocked down by the barrel, but there was no evidence of any negligence on the part of the defendant or his servants."[33] Russell argued on behalf of Boadle that Byrne's suit should not go to the jury, since he had failed

---

26. *Id.*; *see also Byrne*, 159 Eng. Rep. at 299.

27. *Byrne*, 159 Eng. Rep. at 299.

28. *Id.*

29. *See Liverpool Mercury Article*, *supra* note 16. None of the accounts of the case provide an exact date for the trial, but the fact that the *Liverpool Mercury* account appeared in the paper's October 29 edition tips in favor of late October, as newspapers then, as now, tended to publish descriptions of trial proceedings soon after the actual news had occurred. Furthermore, the case was heard by the Court of Exchequer on November 25, 1863. *Byrne*, 159 Eng. Rep. at 299. Therefore, the trial must have fallen sometime between July 18 and November 25, 1863.

30. *Liverpool Mercury Article*, *supra* note 16. Though none of the reports provide the first names of Byrne's lawyers, one contemporary legal directory lists a Ralph Daniel Makinson Littler, Q.C., who may have been the Mr. Littler in question. *See* JOSEPH FOSTER, MEN-AT-THE-BAR: A BIOGRAPHICAL HAND-LIST OF THE MEMBERS OF THE VARIOUS INNS OF COURT, INCLUDING HER MAJESTY'S JUDGES, ETC. (London, Reeves & Turner 1885). Daniel Littler was a member of the North and Northeastern circuits—of which Liverpool was a part. *See id.* at 281. Foster's biographical tome also lists a George Zavier Segar, B.A., who might be the Mr. Segar referenced in the *Liverpool Mercury* account. *Id.* at 418. Circumstantial support for this proposition exists in the fact that Foster's book provides a Liverpool address for Segar's law offices, namely "Law Association Rooms, 13, Harrington Street, Liverpool." *Id.* Segar was both younger and less experienced than Daniel Littler. *See id.* at 281, 418.

31. *Liverpool Mercury Article*, *supra* note 16. Foster's book contains entries for three lawyers by the name of Charles Russell. *See id.* at 406. Of these, only one makes any sense as a candidate for this context: Charles Arthur Russell, Q.C. *See id.*

32. *See Byrne*, 159 Eng. Rep. at 299; *see also supra* notes 19-20, 22 and accompanying text.

33. *Liverpool Mercury Article*, *supra* note 16.

to show sufficient evidence that Boadle or his employees had been negligent to allow a jury reasonably to decide the question.[34]

After hearing each side's arguments, the trial judge ruled in favor of Boadle, finding insufficient evidence of negligence for the case to be heard by a jury.[35] The trial judge nonsuited Byrne but granted him permission to appeal the case to the Court of Exchequer.[36] In order to facilitate the appeal and in accordance with the procedures of the day, the judge also encouraged the parties to agree on a specific amount of damages which Byrne would seek on appeal.[37] The two sides conferred but were unable to reach a consensus, so they asked the Assessor to submit the damages question to the jury.[38] The Assessor complied, and the jury returned a hypothetical verdict in favor of plaintiff Byrne, awarding him £50 in damages for his injuries.[39] The Assessor then dismissed Byrne's suit, leaving him to appeal to the Court of Exchequer in order to recover the jury award.[40]

Byrne's counsel Littler soon filed a rule nisi claiming that the Assessor had been mistaken in dismissing his client's suit for lack of evidence of negligence.[41] The Court of Exchequer granted Littler's motion, and the case was heard before a panel of the Exchequer on November 25, 1863.[42]

Charles Russell again presented the case for defendant Boadle.[43] On appeal, Russell opened his argument with a technical assault on the pleadings. According to Russell, Byrne had failed to introduce any evidence connecting either the defendant or his employees with the accident, despite Byrne's initial declaration averring negligence on the part of "the defendant, by his servants."[44] Russell pointed out that this dearth of evidence made it equally likely that one of Boadle's customers, or even a third-party stranger, had been handling the barrel when it fell and that the defendant could not be held liable under such nebulous facts.[45] At this point, Chief Baron Pollock broke in for the first time, suggesting that the court might presume that it was the defendant's servants who had been manipulating the defendant's flour and that if the facts were otherwise the onus was on the defendant to present them.[46] Russell

34. *Byrne*, 159 Eng. Rep. at 299.

35. *Liverpool Mercury Article*, *supra* note 16.

36. *Id.*

37. *Id.*

38. *Id.* ("After a consultation, it was decided that the jury should decide the matter.").

39. *Id.* This represented only one-fourteenth of the original £700 sought by Byrne.

40. *Id.*

41. Byrne v. Boadle, 159 Eng. Rep. 299, 299 (Exch. 1863).

42. *Id.* at 299-301; *see also Court of Exchequer, Nov. 25: Byrne v. Boadle*, *supra* note 16.

43. *Byrne*, 159 Eng. Rep. at 299.

44. *Id.* The following account of the arguments before the Court of Exchequer paraphrases and expands on the reported version of the case.

45. *Id.* at 300.

46. *Id.*

responded eloquently that "[s]urmise ought not to be substituted for strict proof" and that the burden was on the plaintiff to support his case with "affirmative evidence."[47]

Russell then embarked on a second argument that, even if the defendant or his employees were found to have been responsible for the barrel when it fell, the plaintiff still had failed to show any affirmative evidence of negligence during the events leading to the accident.[48] According to Russell, there was not a "scintilla" of evidence showing negligence by the defendant.[49] In fact, the plaintiff had even failed to support the neutral claim in his declaration that the offending barrel was being lowered by a "jigger-hoist" when it fell.[50] To Russell the only way a court could find negligence would be if it found that "the occurrence is of itself evidence of negligence."[51] With this remark, the able advocate proved a bit too smart for his own, and his client's, good. The statement became one of the great set-up lines in legal history when Chief Baron Pollock took instant issue with it and declared: "There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them."[52]

Unfazed, and as unaware of the historic significance of the Chief Baron's remark as Pollock himself, Russell seized on a previous analogy Pollock had made with train wrecks in an attempt to limit the applicability of the idea, claiming that the presumed negligence "doctrine would seem to be confined to the case of a collision between two trains upon the same line, and both being the property and under the management of the same Company."[53] Russell, citing such a case, conceded that under those facts "there must have been negligence, or the accident could not have happened."[54] Russell also cited two other cases that he said were widely considered to represent a "doctrine of presumptive negligence" but that, upon closer scrutiny, proved not to do so.[55] In the first case, *Carpue v. London and Brighton Railway Co.*, Russell noted that the plaintiff had been able to present affirmative evidence of negligence against the defendant railroad. In the second case, *Christie v. Griggs*, Russell argued the defendant stagecoach owner had been subject to heightened liability because privity had existed between the owner and the injured passenger who

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* (emphasis added).
53. *Id.*
54. *Id.* (citing Skinner v. London, Brighton & S. Coast Ry. Co., 155 Eng. Rep. 345 (Exch. 1850)).
55. *Id.* (describing Carpue v. London & Brighton Ry. Co., 114 Eng. Rep. 1431 (Q.B. 1844), and Christie v. Griggs, 170 Eng. Rep. 1088 (C.P. 1809)). Both cases receive further consideration below. Notably, Chief Baron Pollock argued the plaintiff's case on appeal in *Carpue* as a government attorney-general before being named to the bench. Concerning Pollock's pre-bench career, see *infra* notes 151-53 and accompanying text.

brought the suit, unlike in the current case.[56] The Chief Baron pressed Russell on the latter point, inquiring, "What difference would it have made, if instead of a passenger a bystander had been injured [in *Christie*]?" Russell sought to distinguish the situations, maintaining that the stagecoach owner "was bound by his contract to provide a safe vehicle" for his passengers and that, in the event of an injury to one of them, the occurrence of a wreck alone might serve as sufficient proof that the owner had failed to fulfill his contractual duty to the plaintiff.[57] Whereas, in the case of an injured bystander, the stagecoach owner would only be liable upon an affirmative showing of negligence on either his or his employees' part and the mere "fact of the accident" would not serve as adequate proof of negligence.[58]

Russell then turned to several cases that he said placed definitive limits on the scope of the so-called "doctrine of presumptive negligence." He began with *Bird v. Great Northern Railway Co.*, perhaps because Pollock himself had presided over that trial, asserting that it showed "the fact of a train running off the line is not prima facie proof where the occurrence is consistent with the absence of negligence on the part of the defendants."[59] Russell relied on a second case, *Cotton v. Wood*, for the proposition that "a Judge is not justified in leaving the case to a jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant."[60]

Following yet another exchange between Russell and Pollock,[61] a second jurist, Baron Bramwell, entered the fray and struck a moderating tone. Bramwell observed that "the presumption of negligence is not raised in every

---

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (citing Bird v. Great N. Ry. Co., 28 L.J. Exch. 3 (1858)).

60. *Id.* (citing Cotton v. Wood, 141 Eng. Rep. 1288 (1860)). *Cotton v. Wood* found no negligence on the part of defendant through his coach driver for running over a woman at night on a busy street because plaintiff had failed to show sufficient negligence on the part of the driver to overcome a lack of privity between parties, and also because the decedent had a corresponding duty to keep out of the path of carriage traffic. Cotton v. Wood, 141 Eng. Rep. 1288 (C.P. 1860). Russell's use of *Cotton v. Wood* here relies on an additional statement made by Justice Williams during the appellate proceedings that "where the evidence is equally consistent with either view,—with the existence or non-existence of negligence,—it is not competent to the judge to leave the matter to the jury." *Id.* at 1290.

61. *Byrne*, 159 Eng. Rep. at 300. The exchange involved an interpretative tussle over the extent of Chief Justice Erle's holding in *Hammack v. White*. *Id.* (citing Hammack v. White, 142 Eng. Rep. 926 (C.P. 1862) (finding no prima facie case of negligence in the running down of the decedent by defendant's horse where plaintiff could show only that the horse appeared unruly to witnesses before accident and defendant was unfamiliar with a new mount)). Russell cited Erle's finding "that the plaintiff in a case of this sort was not entitled to have the case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant." *Id.* (citing *Hammack*, 142 Eng. Rep. 926). Pollock responded that he believed Chief Justice Erle had only meant the remark to address the particular facts of *Hammack* and not to be generally applicable and that, if it were otherwise, Pollock would "entirely differ" from Erle's position. *Id.*

case of injury from accident, but in some it is."[62] Appealing to the logic of judicial discretion, Bramwell continued that "[w]e must judge of the facts in a reasonable way; and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence."[63] But Russell quickly countered that "[t]he law will not presume that a man is guilty of a wrong."[64] He stressed that the paltry facts proved by the plaintiff were still consistent with the notion that Boadle's employees had been "using the utmost care and the best appliances to lower the barrel with safety."[65]

To this Baron Bramwell raised what would become a familiar justification for the doctrine of res ipsa loquitur, namely the informational advantage that defendants in such cases have over plaintiffs. Bramwell reasoned that presumptions of negligence were warranted where "an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury."[66] Russell, dogged in defense of his client, responded that "[t]he plaintiff cannot, by a defective proof of his case, compel the defendant to give evidence in explanation."[67] He concluded his remarks by observing that it would be "dangerous to allow presumption to be substituted for affirmative proof of negligence," given that the sympathy of juries was almost always with the plaintiff in this type of unexpected-injury case.[68]

Byrne's counsel, Mr. Littler, appeared at this proceeding but was not called by the court to present an argument. The Exchequer Court's subsequent unanimity in favor of the plaintiff soon rendered his lack of participation insignificant.[69]

In speaking first for the court, Chief Baron Pollock acknowledged Russell's position that negligence could not be presumed in most types of cases, but Pollock refused to "lay down as a rule that in no case can presumption of negligence arise from the fact of an accident."[70] In an effort to tie the court's somewhat novel holding back into the recognizable language of negligence law, Pollock conjured up a duty that he claimed Boadle had owed Byrne, namely "the duty of persons who keep barrels in a warehouse to take care that they do not roll out."[71] Pollock posited that "[a] barrel could not roll out of a warehouse without some negligence" and prefaced this by declaring

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 300-01.
66. *Id.*
67. *Id.* at 301.
68. *Id.*
69. *See id.*
70. *Id.*
71. *Id.*

"that such a case would, beyond all doubt, afford primâ facie evidence of negligence."[72]

Chief Baron Pollock, like Bramwell, noted the potential information gap that such accidents created as well as the attendant possibility for injustice, deeming it "preposterous" that "a plaintiff who is injured by [a falling barrel] must call witnesses from the warehouse to prove negligence."[73] Pollock made clear that this reasoning applied to other potentially hazardous situations. He stated that "in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be primâ facie evidence of negligence."[74] Pollock ended his opinion by assessing each side's evidentiary burden, finding that "the plaintiff who was injured by [the barrel] is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them."[75]

Both Barons Bramwell and Pigott concurred with Pollock's ruling without further comment.[76] Only Baron Channell chose to supplement Pollock's remarks, but his comments added little substance, being split between a summary of Russell's two main arguments on behalf of Boadle and a regurgitation of Pollock's reasoning in favor of the plaintiff.[77] Baron Channell, however, did provide a second articulation of what defendant Boadle's duty had been to Byrne, stating that "a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it."[78] Channel concurred with Pollock that not every accident would warrant an inference of negligence[79] but that some mishaps would raise a presumption of negligence. Byrne's unlucky stroll placed his case squarely in the realm of presumptive negligence.[80]

II. THE ORIGINS OF *BYRNE V. BOADLE* AND RES IPSA LOQUITUR

Neither the concept of presumptive negligence embodied in res ipsa doctrine nor the phrase itself were new to the law in November 1863 when the Exchequer barons heard *Byrne v. Boadle*. "Res ipsa loquitur" first appeared in the English common law in a 1614 usury case.[81] Likewise, the notion that

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *See id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. Roberts v. Trenayne (1614), *in* SIR GEORGE CROKE, THE SECOND PART OF THE

certain facts might lead a judge or jury to infer a defendant's negligence, even where the plaintiff could not present affirmative evidence showing a lack of care by the defendant, was established in English common law by the middle of the nineteenth century.

Several commentators have pointed to a line of early nineteenth-century cases, in which negligence was presumed on behalf of passengers injured in stagecoach and railroad accidents, as constituting the origin of the res ipsa doctrine.[82] One need only look to the *Byrne* opinion itself to confirm a link between the heightened liability of common carriers and the reasoning of the barons. Four of the six cases cited in the *Byrne* proceedings involved passengers injured while traveling on common carriers. This Part details the bond between *Byrne* and the common law jurisprudence from whence it came.

The Part begins, however, with a brief treatment of ancient Roman efforts to regulate the danger from objects falling out of buildings onto passersby below. The Roman example lends valuable perspective to this discussion by showing the agelessness of the falling-object hazard featured in *Byrne*, which contrasts sharply with the court's progressive use of a negligence presumption to decide the case.

Perhaps the most glaring gap in the literature on res ipsa loquitur is the failure to consider *Byrne* in light of the individual jurists who decided the case.

REPORTS OF SIR GEORGE CROKE 507, 508 (Sir Harebotle Grimston trans., London, T. Newcomb & W. Godbid 1659). Prosser describes this case as the first use of the phrase in the English common law, though an earlier use would not be surprising since even the *Roberts* opinion mentions "one Higgins and Mervins case" as authority for its holding. Authorities disagree on the exact date of *Roberts*. Prosser, *supra* note 2, at 241, puts it at 1614, but Shain, *supra* note 8, at 188 n.1, puts it at 1616 and references "79 Eng. Rep. 433 (1616)" as a parallel citation. Grimston's translation of the original reporter omits a date.

82. The most developed account is Prosser, *supra* note 9, at 185-86. Though I agree with Prosser's general linkage of res ipsa and enterprise liability, I disagree with Prosser's account of the relationship between the two concepts. Prosser asserts that "the 'presumption' against the carrier became merged with res ipsa loquitur" and further finds "a fusion of two very different ideas, one concerned only with what the facts in evidence may be taken to prove [res ipsa loquitur], and the other only with the necessity of any such proof at all [enterprise liability]." *Id.* at 186. I maintain that the linkage between res ipsa and enterprise liability was more causal and linear than Prosser's characterization of a "merging" suggests. The presumptive negligence reasoning underlying res ipsa doctrine had already been firmly incorporated into the common law through common-carrier cases well before *Byrne*, as evidenced by references to several such cases in the *Byrne* opinion itself. The articulation of res ipsa doctrine in *Byrne* and its sister cases should be regarded as an expansion of the contemporary common law's contract-based bias against common carriers. Thus, res ipsa loquitur's rapid adoption into the law was not, as Prosser would have it, the fusing of two parallel but independent principles. SHAIN, *supra* note 4, also acknowledges the res ipsa doctrine as extending from the common-carrier cases, but his account is single mindedly focused on supporting his larger point that the twentieth-century doctrine of res ipsa loquitur should be perceived as affirmatively shifting the burden of proof in res ipsa cases from plaintiff to defendant, a highly suspect interpretation. As a consequence, the historical value of his account is limited. For other references to the res ipsa/common carrier link, see *supra* note 9.

Thus, this Part also examines the backgrounds of the barons—especially Pollock and Bramwell—and shows that both were intimately familiar with presumptive negligence. Long before Joseph Byrne's case, both jurists had either argued or ruled in several important common-carrier precedents involving presumptions of negligence. With this fresh perspective, the decision in *Byrne* is best understood as an effort by these jurists to stretch existing legal constructions concerning presumptive negligence, which several of them were instrumental in molding, to fit a compelling set of facts outside the doctrine's normal ken.[83]

A. *The Classical Law of Falling Objects*

Res ipsa loquitur, "or the thing speaks for itself," was a recognized turn of phrase in classical Latin and meant that a proposition (i.e., the "thing") was alone (i.e., "itself") sufficient to convey its full meaning and implications, without requiring reference to outside facts.[84] The most frequently cited classical usage of the axiom appears in Cicero's legal defense of the Roman statesman Milo at his trial for murdering a rival.[85] Not only was the phrase "res ipsa loquitur" put to use in the daily speech of ancient Rome, but also both the facts of *Byrne* and the substance of the future doctrine of res ipsa loquitur possess striking parallels in Roman law. The third part of book nine of *The Digest of Justinian* was entitled "Those Who Pour or Throw Things Out of Buildings" and addressed the legal liability of building occupants when falling objects struck individuals on the streets below.[86] One commentator, Ulpian, quotes the praetor as stipulating that an action would lie against the occupant of a building "[i]f anything should be thrown out or poured out from a building onto a place where people commonly pass and repass or stand about."[87] This provision covered the same factual situation as in *Byrne* as well as many subsequent res ipsa cases featuring injurious falling objects. The use of "thrown" and "poured" at first seems to imply a purpose requirement that would make Roman law distinct from the lack of a state-of-mind requirement

83. *Byrne v. Boadle* is distinguishable from the vast majority of earlier cases in which presumptive negligence was found because it did not involve an injury suffered at the hands of a common carrier (railroad/stagecoach), nor did it entail the privity of contract that served as judicial justification during this period for making common-carrier liability more stringent than liability for other types of defendants.

84. SHAIN, *supra* note 4, at 305. This discussion of the phrase's classical roots as well as the Roman law related to falling objects relies heavily on the commendable account of the topic in Appendix B of Shain's book, entitled "Res Ipsa Loquitur in Classical Latin and in Roman Law." *See id.*

85. *Id.* at 305-06; *see also* Prosser, *supra* note 9, at 184 & n.3.

86. 1 THE DIGEST OF JUSTINIAN bk. 9.3.1, at 293 (Theodor Mommsen et al. eds., 1985). Shain also discusses this section of *The Digest*. *See* SHAIN, *supra* note 4, at 320-22. Shain's comments directed my attention to *The Digest* and inform my observations here.

87. 1 THE DIGEST OF JUSTINIAN, *supra* note 86, bk. 9.3.1, at 293.

in *Byrne*. Ulpian's accompanying commentary, however, clarifies the scope of the provision, finding that it applied regardless of a defendant's intent. Thus, "[s]omething which falls while it is being hung up should rather be deemed thrown down."[88] He elaborates, "From this proposition it follows that if something is poured from a suspended vessel, even though no one did the actual pouring, we must still hold that the edict applies."[89] If, as Ulpian maintains, the Roman law of falling objects applied equally to a building's occupier, regardless of whether a plaintiff could show the "throwing down" was intentional or unintentional, then its effect would be functionally the same as the presumption made in *Byrne*, namely that liability can exist where the only evidence is the fact that a vessel (or a barrel) fell on the plaintiff.[90]

Ulpian's commentary contains other tantalizing similarities to the facts and law in *Byrne* and subsequent res ipsa cases. For example, Ulpian observes that the law holds owners responsible for the actions of their employees, as with the modern concept of respondeat superior. Thus, "[i]f a warehouseman or a hirer of a storeroom . . . should throw something down or pour something out an *actio in factum* will lie, even if it was one of his workmen . . . who did the throwing or pouring."[91] In a separate *Digest* section, Ulpian notes that "[i]f a number of people occupy a lodging house and something is thrown down from it, action may be brought against any one of them."[92] The *Digest* cites another author, Gaius, as explaining the rationale behind such dispersed liability, namely "because it is quite impossible to know which one threw or poured out anything."[93] Presuming liability in all actors when a lack of evidence prevents assignment of individual responsibility has become a prominent feature of the res ipsa doctrine, especially when it is applied in medical malpractice cases. Modern courts have imposed liability on entire surgical teams where the plaintiff alleging injury during an operation was anesthetized and thus incapable of identifying the specific medical personnel who caused the harm. The modern rationale for assigning blanket liability in res ipsa cases frequently echoes Gaius's reasoning that a plaintiff's inability to identify a particular defendant should not be sufficient to defeat an action.[94]

---

88. *Id*. at 294.

89. *Id.*

90. This conclusion is qualified somewhat by the fact that Ulpian's subsequent remarks indicated that the edict might have applied regardless of fault, or in modern parlance, under strict liability. *See id.* bk. 9.3.5.11-12, at 296.

91. *Id.* bk. 9.3.5.3, at 295.

92. *Id.* bk. 9.3.1.10, at 294.

93. *Id.* bk. 9.3.2, at 294.

94. As the California Supreme Court stated in *Ybarra v. Spangard*, the archetypal case on this point: "Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants [multiple medical personnel]; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act." Ybarra v. Spangard, 154 P.2d 687, 690 (Cal. 1944); *see also* TORT LAW AND ALTERNATIVES, *supra* note 3, at 101-08 (featuring *Ybarra* as the central case for instruction

The Roman law on falling objects detailed in the *Digest* deserves consideration here because the edict and its commentaries reflect the timelessness of the factual issues in *Byrne*. Admittedly, one must tread cautiously in analogizing between such historically distant and disparate periods as Ancient Rome and mid-nineteenth-century England; nevertheless, the *Digest* passages vividly illustrate how gravity and human activity have interacted for millennia to create dangers for people walking under occupied structures.[95] They further reveal that a past society as sophisticated as the Romans felt a need to create legal responses to cope with such incidents. Indeed, Ulpian cites public policy as justifying this particular area of Roman law, declaring that "[t]here is no one who will deny that the above edict of the praetor is most useful; for it is in the public interest that everyone should move about and gather together without fear or danger."[96] The edict proves that the *Byrne* decision was not the first instance of the law treating victims of unexpected falling objects charitably.

B. *The Roots of Presumptive Negligence*

The development of modern negligence, or fault-based liability, is a subject that far exceeds the scope of this work. However, Pollock and the other Exchequer barons who found a presumption of negligence for the plaintiff in *Byrne* did not arrive at their judgment merely from the judicial labors of a single day. As common law jurists, their ruling rested on a deep appreciation for prior case law and a studied understanding of contemporary legal doctrine. Consequently, exploring *Byrne*, and res ipsa loquitur doctrine in general, requires examination of the channels through which presumptive negligence entered the common law.

The most widely accepted explanation for the origins of the res ipsa doctrine is the heightened standards of care to which courts held common carriers during the early and mid-nineteenth century. Some scholars and judges, however, have suggested that the true roots of res ipsa loquitur rest much farther back in the common law's past, in what are known as the "English fire cases."[97]

---

on the res ipsa doctrine).

95. Notwithstanding the temporal distance between these two eras, Roman law played a foundational role in the establishment of torts as a recognized category of modern substantive law. *See* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1233-36 (2001).

96. 1 THE DIGEST OF JUSTINIAN, *supra* note 86, bk. 9.3.1.1, at 294; *see also* SHAIN, *supra* note 4, at 321.

97. Stephen F. Williams, *Transforming American Law: Doubtful Economics Makes Doubtful History*, 25 UCLA L. REV. 1187, 1193 (1978) (book review); *see also* Schwartz, *Tort Law and the Economy*, *supra* note 14, at 1724-25 & n.54 (noting with approval Williams's interpretation of the English fire cases in a "res ipsa way").

The English fire cases extended from the fifteenth century to the eighteenth century.[98] Their distinguishing feature is a common fact pattern, involving an intentionally set fire that accidentally burns beyond a landowner's control and spreads to damage a neighbor's property.[99]

The manner in which the common law dealt with such cases has long been a bone of academic contention.[100] One camp asserts that the common law maxim associated with these cases—"a man must keep his fire in at his peril"[101]—represented a strict, or fault-free, liability regime.[102] Another set of experts maintains that the common law supported a negligence, or fault-based, theory for fires spread unintentionally. The latter camp points out that courts generally found defendants liable for their fires only so long as they had had physical control over the fire.[103] Evidence that absolved a defendant of liability for fire damage included: (1) showing that the fire had been caused by the acts of a stranger and (2) showing that some force had intervened that would have foiled even the most reasonable attempts to control it (e.g., "a sudden storm").[104] According to this reading, a rebuttable presumption existed for fire liability, with the defendant bearing the burden of proving lack of fault or mitigating circumstances. As one commentator puts it, there was "always a possible loophole of escape for the defendant who could prove that he had not been negligent."[105] Even more interestingly, subsequent commentators have identified a symmetry between the concept of presumed negligence for accidental fire damage and the presumption of negligence embodied in the doctrine of res ipsa loquitur.[106] Fire remained an influential medium for the

98. The most commonly cited "fire" cases include *Beaulieu v. Finglam*, Y.B. 2 Hen. IV, fol. 18, pl. 6 (1401), and *Turbervil v. Stamp*, 91 Eng. Rep. 13 (K.B. 1697). *See, e.g.*, Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 14-15 (1970) (citing *Beaulieu* and *Turbervil* as exemplary fire cases); Schwartz, *Tort Law and the Economy*, *supra* note 14, at 1724 (same).

99. Schwartz, *Tort Law and the Economy*, *supra* note 14, at 1724 & n.50.

100. *Id.* at 1724.

101. Percy H. Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37, 46 (1926).

102. Malone, *supra* note 98, at 14-15, is an example of the strict liability position. *See also* Schwartz, *Tort Law and the Economy*, *supra* note 14, at 1724 (describing scholarly divisions over fire cases and citing Malone as leading source in strict liability camp).

103. *See, e.g.*, Schwartz, *Tort Law and the Economy*, *supra* note 14, at 1724.

104. Winfield, *supra* note 101, at 49 (citing dicta from *Turbervil v. Stamp*, 91 Eng. Rep. 1); *see also* Williams, *supra* note 97, at 1192 (citing and discussing same). Still others acknowledge the aforementioned exceptions to fire liability while also describing the fire case standard as one of strict liability. *See* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 285 (2004).

105. Winfield, *supra* note 101, at 46.

106. *See* Williams, *supra* note 97, at 1193; *see also* Schwartz, *supra* note 14. Williams, in his review of Horwitz's *Transformation of American Law*, characterizes the opinion of Pennsylvania Chief Justice Gibson in *Lehigh Bridge Co. v. Lehigh Coal & Navigation Co.*, 4 Rawle 9 (Pa. 1833), as exemplifying a link between the traditional common law fire cases and emerging notions of presumptive fault during the nineteenth century, including by extension res ipsa doctrine. *See* Williams, *supra* note 97, at 1192-93. In *Lehigh Bridge Co.*,

development of negligence liability during the nineteenth century in the form of railroad "spark" cases. These suits generally involved property damage near railroad tracks caused by sparks escaping from locomotives and starting vagrant blazes in the wake of trains. Presumptions of negligence were often applied in this type of suit, given the great volume of sparks flying from railroad engines and the fact that eyewitnesses rarely existed. In at least one 1846 case, an English judge used the "fire" precedents just described as analogous authority in a "spark" case, finding the defendant railroad liable unless it could show extenuating circumstances.[107]

Contemporary articles and treatises provide another source of rich insight into evidentiary presumptions during the period immediately preceding *Byrne*. Commentators at the time recognized two broad categories of legal presumptions: presumptions of "law" and "fact." Presumptions of law were assumptions made by courts or juries based on proof of certain legally required facts. These presumptions applied automatically, becoming rules of law as soon as the necessary proof was established. Examples of pure presumptions of law included the rule that a child born to a married woman was deemed legitimate under the law until conclusive proof of illegitimacy could be shown or the rule that receipts under seal served as absolute bars against claims of prior, unsatisfied debt.[108]

By contrast, presumptions of fact were not arbitrary constructions to which a judge or jury were automatically bound. Presumptions of fact allowed the fact-finder to *infer* a particular conclusion from a collection of relevant, but not decisive, facts. One contemporary treatise writer, in distinguishing between the two types of presumptions, characterized presumptions of law as "depend[ing] upon . . . a branch of the particular system of jurisprudence to which they belong" and as consisting of "artificial legal relations and connections."[109]

---

the court reversed in favor of a defendant dam owner whose dam had failed and damaged plaintiff's bridge. In remanding the case for a new trial, Chief Justice Gibson cited the fire-case chestnut *Tubervil v. Stamp* and others to support the notion that a damage-producing act itself may constitute partial evidence of negligence in the absence of mitigating circumstances. Williams describes Chief Justice Gibson's opinion as "a suggestive one" and notes that "[t]he magic words *res ipsa loquitur* had not yet been formulated in any judicial opinion, but the maxim provides an analytical tool for reconciling the broad language of strict liability with the realities of a fault concept." Williams, *supra* note 97, at 1193. Though Chief Justice Gibson's opinion does not explicitly unite the fire cases with res ipsa doctrine, it does highlight that the English fire cases—with their implied logic of presumptive negligence—were still shaping tort principles in Anglo-American common law in the period immediately before *Byrne v. Boadle*.

107. This description tracks Schwartz's account of *Pigott v. Eastern Counties Railway*, 54 Eng. C.L.R. 228, 240 (1846). Schwartz, *Early American Tort Law*, *supra* note 14, at 655, nn.80-81. This account of English and American "spark" cases relies on Schwartz's discussions in *Early American Tort Law*, *supra* note 14, and in *Tort Law and the Economy*, *supra* note 14.

108. *Presumptions of Law and Presumptive Evidence*, 6 LAW MAG. 348 (1831).

109. 3 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS 1245 (Boston, Wells & Lilly

Presumptions of fact, or "natural presumptions" as he called them, "*derived wholly by means of the common experience of mankind, from the course of nature, and the ordinary habits of society*. Such presumptions are therefore wholly independent of the system of laws to be applied to the facts," bringing the fact-finder to the same conclusion whether the laws of England or the Code of Justinian is the governing body of rules.[110] Examples of presumptions of fact included the conclusion that a knife-wielding person standing over another individual with a knife wound must have stabbed the latter, or where a person's birthdate is unknown, evidence of his date of death and age at death can be used to prove his birthdate.[111] In both cases, the individual pieces of factual evidence are not sufficient by themselves to presume an outcome, but taken as a whole, common experience allows one to infer a specific conclusion from them.

The presumption made by the court in *Byrne*—allowing the twin facts of the accident's occurrence and the plaintiff's injury to constitute a prima facie case of negligence by the defendant—amounted to a presumption of fact. The presumption in *Byrne* was clearly a presumption of fact, as opposed to one of law, because the case did not lead to an automatic legal presumption, such as a finding of paternity or freedom from debt, and because presumptions of law could not contain circumstantial inferences, as required by necessity in a case like *Byrne*. The scarcity of the plaintiff's evidence meant that the court, in order to find for the plaintiff, had to infer from the facts presented that, as Chief Baron Pollock put it, "A barrel could not roll out of a warehouse without some negligence . . . ."[112] The judges in *Byrne* did not distinguish between presumptions of "fact" and "law" in discussing their holding, though Pollock did describe the case as creating a "presumption of negligence" against the defendant. Nonetheless, the sophisticated distinction between these different presumptions in early-nineteenth-century evidence provides further proof that the logic behind *Byrne* was created decades before the Exchequer unintentionally coined a new term for the tort context—res ipsa loquitur—to describe what had long been recognized by the common law as "presumptions of fact."

Both the "fire" and "spark" cases along with contemporary literature on presumptions show that the underpinnings of presumptive negligence were well established, if not fully articulated, before the *Byrne* decision in 1863. However, the reasoning in *Byrne* and its res ipsa progeny extends most directly from a body of cases during the first half of the nineteenth century involving injuries to passengers on common carriers, such as stagecoaches and trains.

1826).

110. *Id.* (emphasis added).

111. *Presumptions of Law and Presumptive Evidence*, *supra* note 108, at 359.

112. Byrne v. Boadle, 159 Eng. Rep. 299, 301 (Exch. 1863).

Passengers began suing common carriers for harm sustained in transit during the 1790s.[113] Out of these cases a legal distinction emerged between liability incurred by common carriers for transporting freight and liability for transporting human passengers.[114] In the freight context, carriers were already being held to a strict liability standard that made them responsible for damage or loss of property regardless of fault.[115] With human passengers, courts in the early nineteenth century began holding common carriers to a standard of liability below strict liability but above the emerging negligence benchmark of reasonable care.[116] The rationale for a heightened—but not strict—standard of common-carrier liability in transporting human passengers was that people could both watch out for their own safety and precipitate their own injuries.[117] Strict liability was considered unfair, but a lower standard of care was viewed as insufficient incentive to deter carriers from compromising passenger safety.[118]

The first case in which this heightened liability for common carriers was expressed as a presumption of negligence was *Christie v. Griggs* in 1809.[119] The suit featured a sailor suing a stagecoach owner for injuries received when the axle on the defendant's stagecoach broke, pitching the sailor, who had been sitting on the roof of the coach (a common practice in that day), onto the ground.[120] The plaintiff's evidence in support of his claim was limited, amounting to the break in the stagecoach's axle, proof that he had been thrown

113. One commentator identifies *White v. Boulton*, 170 Eng. Rep. 98 (K.B. 1791), as the first case in England in which a passenger sued a common carrier for injuries. Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1158 n.199 (1990). Kaczorowski also points to *Aston v. Heaven*, 170 Eng. Rep. 445 (K.B. 1797), as making negligence the bedrock principle for common-carrier liability in passenger cases, as opposed to the strict liability to which common carriers had recently begun to be held in cases involving the transportation of goods. Kaczorowski, *supra*, at 1158. Though the *Aston* court held that a carrier's liability rested "entirely in negligence," the court also initiated the trend toward heightened standards of care for common carriers by finding that the carrier "is answerable for the smallest negligence." *Id.* at 1158-59 (discussing *Aston*, 170 Eng. Rep. at 446).

114. Kaczorowski, *supra* note 113, at 1134-38, 1158-59.

115. *See id*. at 1129-57 (providing a detailed narration of the development of common-carrier liability for goods).

116. The concept of "reasonable care" as the basis for negligence liability was just coming into widespread use in the common law during this period. *See* BAKER, *supra* note 9, at 469. The meaning of "negligence" was thus in flux and not always pegged to a reasonable care standard. For example, some courts adopted a raised standard of "gross negligence." *See id.*

117. Kaczorowski, *supra* note 113, at 1157.

118. *Id.* at 1158.

119. Christie v. Griggs, 170 Eng. Rep. 1088 (C.P. 1809). Many commentators identify this case as the starting point for the presumptive-negligence thread running through the cases establishing common-carrier liability for passenger injuries. *See, e.g.*, SHAIN, *supra* note 4, at 86; Kaczorowski, *supra* note 113, at 1163; Prosser, *supra* note 9, at 185.

120. *Christie*, 170 Eng. Rep. 1088.

to the ground, and substantiation of the injuries he suffered.[121] At trial, defendant argued that this was insufficient evidence to establish either negligence on the part of the stagecoach driver or a latent defect in the coach itself.[122] However, the Chief Justice of the Common Pleas, Sir James Mansfield, was persuaded, declaring that "the plaintiff has made a prima facie case by proving his going on the coach, the accident, and the damage he has suffered."[123] Mansfield then placed the burden of rebutting the plaintiff's case on the defendant, continuing that "[i]t now lies on the other side to shew, that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found."[124]

Ruling fifty-four years before *Byrne*, Mansfield laid the cornerstone in the res ipsa foundation, declaring that "when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied."[125] Thus, the passenger only needed to show proof that an accident had occurred, and presumably that he was injured by it, to take his case before a jury. Mansfield did acknowledge the need for limits on such a broad evidentiary concession in favor of plaintiffs. However, the boundary he drew still placed the onus of avoiding liability on defendants, namely they "ha[d] always the means to rebut this presumption, if it be unfounded."[126]

Mansfield's first crack at articulating a rule of presumptive negligence in the common-carrier context also highlighted the risk of injustice where a negligent defendant, knowing how an accident came about, blocks an innocent plaintiff from obtaining evidence to support his claim. This potential "information gap" has become a prominent rationale for allowing evidentiary presumptions under res ipsa loquitur. Mansfield sagely recognized the plaintiff's disadvantage in unexpected accident cases, asking rhetorically, "What other evidence can the plaintiff give?"[127] He pointed out how the sailor had had no ability to judge either the soundness of a coach or the skills of its driver and consequently had been dependent on the expertise of the defendant and his employees.[128] Mansfield reasoned—just as the early res ipsa courts would almost sixty years later—that a rebuttable presumption of negligence should fall on the better informed defendant, since "[i]n many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* One contemporary treatise summarized the holding in *Christie v. Griggs* as follows: "In an action against a coach-owner for negligence, proof that the coach broke down, and that the plaintiff was greatly bruised, is *prima facie* evidence that the injury arose from the unskilfulness of the driver, or the insufficiency of the coach." 2 STARKIE, *supra* note 109, at 974.

125. *Christie*, 170 Eng. Rep. at 1088.

126. *Id.*

127. *Id.*

128. *Id.*

required."[129] In the end, Mansfield allowed the case to go to a jury.[130] Though the jury found in favor of the defendant stagecoach owner, *Christie* established presumptive negligence as a tool to help injured passengers reach juries, thereby introducing the theoretical groundwork for the res ipsa doctrine.

Another influential case in the rise of presumptive negligence was *Sharp v. Grey* in 1833.[131] *Sharp*, like *Christie*, involved a passenger suing a stagecoach owner in assumpsit for injuries after the passenger was hurled out of the coach.[132] As in *Christie*, the cause of the accident appeared to be a broken axle, though the *Christie* axle had snapped after passing over a rough spot in the road and in *Sharp* the failure was due to a latent defect in the axle itself.[133] The defendant in *Sharp* proved that his employee had conducted a visual check of the axle and seen no obvious damage.[134] The defect that caused the failure had been concealed under pieces of wood screwed down with iron clamps such that the employee would have had to conduct a major disassembly of the vehicle in order to discover the danger before the accident.[135] The defendant maintained that the nonobvious nature of the defect should absolve him of liability and prevent the case from reaching a jury.[136] The trial judge disagreed and sent the case to a jury, which found in favor of the plaintiff.[137]

On appeal, the Court of Common Pleas upheld the jury verdict, finding that a common carrier was "liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation."[138] Central to this discussion on presumptions of negligence was the statement by Justice Gaselee, who in affirming the trial verdict placed the burden of disproving negligence on the defendant, maintaining that "[t]he burthen lay on the Defendant to shew there had been no defect in the construction of the coach."[139]

---

129. *Id.* Chief Baron Pollock echoed the same plaintiff-friendly logic in *Byrne v. Boadle*, reasoning that where "an article calculated to cause damage is put in the wrong place and does mischief," then "if there is any state of facts to rebut the presumption of negligence, [the defendant] must prove them." 159 Eng. Rep. 299, 301 (Exch. 1863).

130. *See Christie*, 170 Eng. Rep. at 1089.

131. Sharp v. Grey, 131 Eng. Rep. 684 (C.P. 1833); *see* Kaczorowski, *supra* note 113, at 1163 (discussing creation of common carriers' heightened liability).

132. *Compare Sharp*, 131 Eng. Rep. at 684, *with Christie*, 170 Eng. Rep. at 1088.

133. *Sharp*, 131 Eng. Rep. at 684. Justice Gaselee of the Court of Common Pleas distinguished *Christie v. Griggs* from *Sharp v. Grey* on these grounds in his opinion. *Id.* at 685.

134. *Id.* at 684.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 685 (Alderson, J.).

139. *Id.* This reasoning paralleled Mansfield's recognition of presumptive negligence in *Christie v. Griggs*.

Stagecoach cases generated the formative disputes in the early development of common-carrier liability for passengers, no doubt because railroads were still an emerging form of transportation during the first part of the nineteenth century.[140] However, as the English railroad network burgeoned and more passengers began using the rails to travel, suits involving railroad companies and their passengers came to dominate. Interestingly, the same Exchequer barons who extended the doctrine of presumptive negligence outside the common-carrier context in *Byrne* also had been instrumental in several of the pioneering cases applying the doctrine to railroad accidents. The next section advances this narrative on presumptive negligence into the railroad arena and explores the relationship between these cases and the barons in *Byrne*.

C. *The Barons: Linking* Byrne *and Presumptive Negligence*

Torts scholars have intimated a connection between common-carrier cases and the emergence of the res ipsa doctrine for some time. In a 1949 article, the celebrated author and law professor William L. Prosser described the bond thus:

> The law of negligence of the late nineteenth century was to a considerable extent the law of railway accidents. It was perhaps inevitable that Baron Pollock's Latin phrase should become involved in passenger cases, and that it should there cross-breed with the carrier's burden of proof and produce a monster child.[141]

Of course, Prosser's "monster child" was the doctrine of res ipsa loquitur. That Prosser would characterize res ipsa's "birth" in such unflattering terms is not surprising. He devoted much intellectual effort to untangling the knot of doctrinal inconsistency into which Anglo-American courts had wound themselves in trying to follow *Byrne*.[142]

Though Prosser and others acknowledge a lineage from heightened common-carrier liability to res ipsa loquitur, the path of this descent has received little scrutiny. A complete picture of the res ipsa doctrine demands analysis of the means by which the concept of presumptive negligence crossed the doctrinal chasm from common carriers to innocent pedestrians via the

---

140. Kaczorowski identifies *Bremner v. Williams*, 171 Eng. Rep. 1254 (C.P. 1824), as another noteworthy stagecoach case: the stagecoach owner there was found negligent for failure to inspect the coach before a trip, though the coach had been inspected before the previous journey and had been in the repair shop only three or four days earlier. *See* Kaczorowski, *supra* note 113, at 1161-62.

141. Prosser, *supra* note 9, at 186. Though still useful today, Prosser's description of res ipsa doctrine's historical development contains significant flaws. For a critique of Prosser's position and comparison of it with my own interpretation of res ipsa history, see *supra* note 82.

142. *See* Prosser, *supra* note 2, at 243-45. For a discussion of *Byrne*'s "sister" cases, see *infra* notes 252-58 and accompanying text.

holding in *Byrne v. Boadle*. Mere recognition of the connection between these two abstract legalisms provides little insight into the origins of res ipsa loquitur. Such a gloss ignores the personal experiences that undoubtedly influenced individual judges in these cases to rule as they did. Why, for example, would Baron Bramwell, one of the judges hearing *Byrne* and described by a recent commentator as "one of the more conservative English jurists of the nineteenth century,"[143] have supported the creation of a plaintiff-friendly presumption of negligence with the res ipsa loquitur rule? The answers to such questions do not lie in sweeping evaluations of the liberal social trends of the day or in abstract critiques of the *laissez faire* economic theories that were then current. Though contemporary social and economic forces may have influenced the outcome in *Byrne*, imposing them directly onto the case ignores the fact that the individual jurists on the Court of Exchequer served as the necessary and unique human filters through which these broader forces passed in guiding the development of res ipsa doctrine. Thus, obtaining an accurate picture of res ipsa loquitur's introduction into the common law requires scrutinizing both the personal and jurisprudential backgrounds of the judges who decided *Byrne* in order to better understand the context in which they made their enduring decision.[144]

With these considerations in mind, this Part examines the backgrounds of the two most prominent barons presiding over the suit in *Byrne v. Boadle*—Pollock and Bramwell—and explores their relationship with the established law on presumptive negligence for common carriers that had arisen by the time *Byrne* was decided in 1863. This Part also investigates how the particular economic, political, and juridical attitudes of these two jurists may have influenced the unique holding in *Byrne*. The picture produced lends much-needed perspective to both the historical context of the case and to the doctrine of res ipsa loquitur generally.

---

143. KARSTEN, *supra* note 9, at 460 n.122.

144. In this Note, I adopt judicial biography as a tool of historical inquiry and analysis. To my knowledge, such an approach has not been applied before in the res ipsa loquitur context. Judicial biography has been used only sparingly to analyze doctrinal developments in the history of torts generally. However, numerous biographers have found the personal and professional experiences of eminent jurists to be fertile ground for mining insights into the historic opinions and legal doctrines for which they are best remembered. For example, a voluminous literature exists interpreting the jurisprudence and legacies of judicial heavyweights such as Chief Justice John Marshall and Justice Oliver Wendell Holmes. For example, a lively biographical interpretation of Holmes's torts scholarship and views is Grey, *supra* note 95. In recent years, even lesser known jurists such as Supreme Court Justice Benjamin R. Curtis, the *Dred Scott* dissenter who resigned from the Court on principle and later represented President Johnson at his impeachment trial, have garnered scholarly biographies interpreting their impact on the law of their day. *See* STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM (2005); *see also* KARSTEN, *supra* note 9, at 2 ("[A] large body of scholarship produced in the fields of law and history treats [American] jurists of the first sixty years of the nineteenth century as major players in the development of law, the polity, and the economy.").

The scene features two diligent jurists, each possessing a deep knowledge of the English common law, with its cardinal virtues of common-sense reasoning and substantial justice. Chief Baron Pollock was instrumental in creating a heightened standard of common-carrier liability for passengers during the nineteenth century. He represents a directly traceable link between early notions of presumptive negligence and the doctrine of res ipsa loquitur. Unlike Pollock, Baron Bramwell was clearly ambivalent about the type of evidentiary burden that plaintiffs should carry in establishing a prima facie case of negligence. Bramwell first gravitated toward a high threshold for proving negligence in *Cornman v. Eastern Counties Railway Co.*, but he retreated from this position in *Byrne*, adopting a tone of reasonableness and accommodation in favor of the plaintiff. By scrutinizing Pollock and Bramwell's participation in the major cases of the mid-nineteenth century involving presumptions of negligence, one can trace in lively detail the evolution of their thinking about heightened liability. Furthermore, an explanation emerges for their extension in *Byrne* of presumptive negligence beyond the common-carrier context.

1. *Pollock, C.B.*

Sir Jonathan Frederick Pollock served as Chief Baron on the Court of Exchequer from 1844 until 1866.[145] The third son of the saddler to King George III, Pollock attended Trinity College, Cambridge, where he excelled, mastering the Latin that he would later use to such unexpected effect in *Byrne*.[146] Pollock began his legal studies in the Middle Temple in 1802 and was called to bar in 1807.[147] With his business acumen, he developed an extensive bankruptcy practice.[148] He joined the Northern Circuit (including Liverpool), where he became a leading advocate, known for a sharp memory and a steady courtroom demeanor.[149] Pollock initiated a political career in 1831, winning election as a Tory member of parliament for Huntingdon and running unopposed in four subsequent elections.[150] In 1834, he became attorney-general for the government of Sir Robert Peel, but Peel's government fell just four months later.[151] Pollock was reappointed to the job when Peel

145. FOSS, *supra* note 7, at 525.

146. *Id.* at 523-24.

147. *Id.* at 524.

148. J. M. Rigg & Patrick Polden, *Pollock, Sir (Jonathan) Frederick*, *in* 44 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 773 (H.C.G. Matthew & Brian Harrison eds., 2004) [hereinafter *Pollock Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY], *available at* http://www.oxforddnb.com/view/printable/22479; FOSS, *supra* note 7, at 524.

149. *Pollock Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 148; FOSS, *supra* note 7, at 524.

150. *Pollock Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 148; FOSS, *supra* note 7, at 525.

151. LORD HANWORTH, LORD CHIEF BARON POLLOCK 64-65 (1929); *see also* FOSS, *supra* note 7, at 525.

returned to power in 1841.[152] During Pollock's second term as attorney-general, he spearheaded through Parliament several important procedural reforms in the common law.[153] In April 1844, Pollock was named Lord Chief Baron of the Exchequer.[154] As Chief Baron, Pollock inherited an institutionally weak court. The Exchequer had lost its equity jurisdiction not long before his arrival.[155] Pollock, with his deep knowledge of the common law and efficient administrative style, set out to enhance the court's status relative to the other two high courts of law—the Court of King's Bench and the Court of Common Pleas.[156] Pollock's twenty-two years on the Exchequer bench witnessed the rise of his own and his court's station in the English legal community.[157]

Pollock's reputation as a jurist was characterized by devotion to the common law's common-sense underpinnings and by a willingness to depart from legal orthodoxy in order to ensure justice and fairness in individual cases. As one authority has described, Pollock was "not a great original judge, being more concerned to achieve substantive justice in the instant case than to knit the strands of common law into a coherent pattern."[158] Pollock himself expressed reverence for the common law's pragmatic roots in a letter to his grandson Frederick.[159] The elder Pollock, recently retired from the bench, reflected that "[t]he common law of England is really nothing more than 'summa Ratio'—*the highest good sense*."[160] Another grandchild, Lord Hanworth, discussed his grandfather's judicial style in a memoir written several decades after the Chief Baron's death. Hanworth wrote that "[h]is judgments were never long, but they were concentrated; and in his administration of the law there dominated a strong common-sense leaning to substantial justice rather than to technicalities."[161] Pollock's name has never ranked among the most influential in guiding the growth of the common law over its full history,

---

152. HANWORTH, *supra* note 151, at 65, 75; *see also* FOSS, *supra* note 7, at 525.

153. Pollock's Act targeted reforms in the areas of litigation costs, pleadings, notice requirements, and statutes of limitation. *See* Pollock's Act, 1842, 5 & 6 Vict. c. 97 (Eng.); *Pollock Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 148; *see also* HANWORTH, *supra* note 151, at 78-79.

154. *Pollock Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 148.

155. *Id.*

156. *See id.* For background on the three common law courts, see generally BAKER, *supra* note 9, at 34-48.

157. *See Pollock Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 148. The court's stature did decline somewhat during Pollock's final years due to personal conflicts on the court. *Id.*

158. *Id.*

159. HANWORTH, *supra* note 151, at 197-98. Pollock's grandson Sir Frederick Pollock became an esteemed legal academic and treatise author. Among his most famous and enduring works was his treatise *Law of Torts*, which remained a cornerstone of legal literature for generations. *See* FREDERICK POLLOCK, LAW OF TORTS (Philadelphia, Blackstone Publishing Co. 1887).

160. HANWORTH, *supra* note 151, at 198.

161. *Id.* at 149.

but he did serve as a dominant force in its development during the middle of the nineteenth century, while the English legal system was struggling to respond to burgeoning industrial and commercial mechanization.[162]

Railroad-passenger cases represent the most direct antecedent for the res ipsa reasoning applied by Pollock and his colleagues in *Byrne v. Boadle*. In these cases, courts held railroad companies liable for injuries sustained by their passengers in wrecks and other accidents, though the plaintiffs could show little or no affirmative evidence of negligence by the railroads and could only point to a specific accident and their injuries for evidence of fault. Pollock himself linked Mr. Byrne's case with those involving railroads during arguments in *Byrne v. Boadle*, stating that:

> There are certain cases of which it may be said res ipsa loquitur, and this [Byrne's] seems one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions.[163]

Pollock's observation strongly supports the notion that railroad-passenger cases constitute the immediate origin of res ipsa doctrine. The fact that Pollock had been instrumental in several railroad-passenger cases, as both an advocate and a judge, provides additional evidence bolstering this conclusion. Examination of these cases illustrates Pollock's intimate familiarity with the related concepts of a heightened duty for common carriers and presumptive negligence by the time he heard *Byrne* in 1863.

The first of the landmark railroad-passenger cases in which Pollock took part was *Carpue v. London and Brighton Railway Co.*[164] Pollock argued the case on appeal on behalf of the plaintiff and in his capacity as attorney-general. *Carpue* arose during Pollock's second stint as attorney-general in the Peel Administration and less than a year before he was named to the Exchequer bench. The case was one of two that Charles Russell, counsel for the defendant in *Byrne*, attempted to distinguish from his client's situation when responding to the above remark from Chief Baron Pollock.[165]

In *Carpue*, the plaintiff had been injured when the train in which he had been riding derailed. He sued the railroad company, alleging negligence. At trial, the plaintiff submitted evidence supporting his contention that the tracks at the point of derailment had been "deranged" and that the train had been going dangerously fast when it had hit the defect in the rails.[166] The jury

---

162. In a back-handed, but entertaining tribute to Pollock in the contemporary *Oxford Dictionary of National Biography*, the authors characterized the Chief Baron thus: "Though place cannot be claimed for him among the most illustrious sages of the law, he yields to none in the second rank." *See* HANWORTH, *supra* note 151, at 149-50.

163. Byrne v. Boadle, 159 Eng. Rep. 299, 300 (Exch. 1863); *see also supra* note 52 and accompanying text.

164. 114 Eng. Rep. 1431 (Q.B. 1844).

165. *Byrne*, 159 Eng. Rep. at 300; *see also* text accompanying *supra* note 55.

166. *Carpue*, 114 Eng. Rep. at 1432.

returned a verdict in favor of the plaintiff after the trial judge instructed them that they could presume negligence by the railroad company, since the train and rails had been under the railroad's "exclusive management" when the accident had occurred and the plaintiff, as a passenger, had had no way of knowing that danger lurked ahead.[167] Thus, the trial judge in *Carpue* invoked the same information gap between the unsuspecting plaintiff and the defendant railroad that would later underlay Pollock's presumption of negligence in *Byrne*.[168] The railroad company appealed the unfavorable decision, claiming in part that the judge's instruction allowing for a presumption of negligence had been improper.[169]

On appeal, Pollock and two others represented the plaintiff. In addressing the appellate court, they made an important distinction, discussed above,[170] between the heightened liability for common carriers transporting passengers and the strict liability to which those carriers were held when moving freight.[171] Early in his tenure as Chief Baron, Pollock presided over another landmark railroad-passenger case: *Skinner v. London, Brighton, and South Coast Railway Co*.[172] Charles Russell, Boadle's counsel, considered the case so dangerously analogous to the negligence issue in *Byrne* that he sought to

---

167. *Id.* at 1433.

168. Making a similar point in favor of presumptive negligence in *Byrne*, Pollock posed the following rhetorical question: "Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred?" *Byrne*, 159 Eng. Rep. at 301. Kaczorowski also identifies a parallel between the trial judge's instruction in *Carpue* and res ipsa doctrine generally, noting that the trial judge "explained the rule in terms we would today describe as a theory of *res ipsa loquitur*." Kaczorowski, *supra* note 113, at 1164. However, Kaczorowski goes no further in considering a link between common-carrier liability and res ipsa loquitur.

169. *Carpue*, 114 Eng. Rep. at 1433.

170. *See supra* notes 113-18 and accompanying text.

171. The record is unclear as to whether Pollock or one of his co-counsel actually delivered the remarks, but Pollock was likely present to hear his side observe that the "only difference" between carriers of freight and people was "that the negligence in the one case [freight] is presumed, [and] in the other [passengers] must be proved." *Carpue*, 114 Eng. Rep. at 1434. Thus, long before *Byrne*, Pollock was almost certainly familiar with the distinction between "heightened" standards of negligence for passenger carriers and "strict" liability for freight carriers, and while the word choice here of "proving" negligence does not hint at any elevated liability standard for passenger carriers, both the jury instructions from the trial judge as well as the scholarly evidence presented at *supra* notes 113-18 and accompanying text indicate that a series of similar cases already existed by this time in which negligence had been presumed or inferred. Consequently, the statement does not detract from the point that *Carpue* illustrates Pollock's early awareness of the heightened liability concept. Further proof that Pollock must have known as early as the 1840s that presumptions of negligence existed in the common law appears elsewhere in *Carpue*. Pollock, in making the plaintiff's rebuttal arguments on appeal, cited explicitly to the observations of the trial judge, thereby expressing his familiarity with the lower court's decision, which included the instruction described above authorizing the jury to presume the defendant's negligence. *Carpue*, 114 Eng. Rep. at 1435.

172. 155 Eng. Rep. 345 (Exch. 1850).

distinguish it during his arguments there as being the only factual situation in which a presumption of negligence against a defendant should be made.[173] *Skinner* involved a collision between two trains owned by the same company that had been operating on the same track.[174] *Skinner* is significant to this discussion because at trial Pollock ordered the jury to consider that, as the case reporter relates, "the fact of the accident having occurred was of itself primâ facie evidence of negligence on the part of the defendants."[175] In making this finding, Pollock cited *Carpue* as relevant authority.[176] The jury ruled in favor of the plaintiff. The defendant appealed, alleging that Pollock had erred in placing the "onus probandi," or burden of proof, "on the wrong party."[177] The defendant argued that Pollock should not have allowed the plaintiff to take his case to a jury on the sole basis of the accident's occurrence and without affirmative evidence of defendant's negligence.[178] In rehearing the case on appeal, Pollock responded to the defendant's argument by asserting that "[s]urely the fact of a collision between two trains belonging to the same Company is primâ facie some evidence of negligence on their part."[179] In the end, the full court agreed with Pollock that the plaintiff in the case had presented sufficient evidence of negligence such that he was entitled to take his case to the jury.[180]

In 1858, eight years after *Skinner*, Pollock presided over yet another railroad-passenger suit cited later by defendant's counsel Charles Russell in *Byrne*. The plaintiff in *Bird v. Great Northern Railway Co.* was injured when the train in which he was riding unexpectedly jumped the tracks and crashed.[181] As in *Skinner*, Pollock allowed the question of negligence to be put to the jury.[182] The reported version of the case relates how "[t]here was a great deal of evidence on both sides as to negligence" but that, in the end, the jury "found 'for the defendants, because there was not sufficient evidence as to the cause of the accident.'"[183]

Nonetheless, Edwin James, counsel for plaintiff, sought leave for a new trial.[184] James cited *Carpue v. The London and Brighton Railroad* for the proposition that "[t]he occurrence of the injury itself is *primâ facie* proof of

173. *See Byrne*, 159 Eng. Rep. at 300.
174. 155 Eng. Rep. at 345.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 345-46.
179. *Id.* at 346.
180. *Id.*
181. 28 L.J. Exch. 3 (1858) (Eng.).
182. *Id.*
183. *Id.*
184. *Id.*

negligence."[185] James claimed that Pollock had erred by not instructing the jury that the plaintiff had made a "*primâ facie* case of negligence."[186] He asserted that the plaintiff should receive a verdict in his favor "if [the plaintiff's case] was not satisfactorily answered by the defendants."[187] In response, Pollock articulated for the first time what he considered the principle criterion for presuming negligence—that establishing a prima facie case of negligence based solely on an accident's occurrence "depends on the nature of the accident."[188] Pollock reasoned that the plaintiff in *Bird* had failed to demonstrate a prima facie case of negligence because "the accident was of a nature consistent with the absence of negligence."[189]

James countered by attempting to fit his client's situation into the still-nebulous requirements for presumptions of negligence hinted at by the trial court in *Carpue*.[190] James insisted that the plaintiff was entitled to a new trial because he had fulfilled his burden in light of the information gap between ignorant passengers and their common carrier by providing "as much evidence of negligence as a passenger possibly could, who necessarily must be unable to ascertain the exact cause of an accident."[191] Likewise, James argued that the burden of proof should lie with the defendant railroad because "the railway [had been] entirely under the controul of the company's servants."[192]

Pollock stood firm in his earlier position that any doctrine of presumptive negligence must be limited. Pollock declared that "[i]t was for the plaintiff to prove negligence; the defendants' undertaking was not to carry safely, but to carry with reasonable care. They are not, as carriers of goods, insurers. Therefore, the burthen of proof was on the plaintiff."[193] Here, Pollock was attempting to distinguish the standard of negligence that might be applied to railroads in passenger cases from the strict liability to which common carriers, including railroads, were held when conveying freight. His point was that the heightened standard of negligence liability for passenger carriers, though allowing in specific situations for a finding of undue care with less evidence than normal, did not rise to the level of strict liability, where fault was irrelevant. In the end, the court affirmed the verdict in favor of the defendant with a short per curiam opinion in which it distinguished between the "primâ

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 4; *see also supra* note 168.
191. *Bird*, 28 L.J. Exch. at 4.
192. *Id.* This is a foreshadowing of the "exclusive control" requirement that long remained a condition for res ipsa cases, though defendants' control over the injury-causing device is no longer universally recognized as essential for making a res ipsa case. *See* RESTATEMENT (THIRD) OF TORTS § 17 cmt. b.
193. *Bird*, 28 L.J. Exch. at 4.

facie" proof that allowed a plaintiff to take his case to a jury (including presumptions of negligence) and the higher evidentiary burden of "conclusive" proof required for a jury to rule in favor of a plaintiff.[194]

Chief Baron Pollock was a key architect in England of the so-called "doctrine of presumptive negligence," which was the term used by Charles Russell, counsel for the defendant in *Byrne*, to describe the cumulative effect of *Carpue*, *Skinner*, *Bird*, and *Christie*. In tracing a link between the heightened negligence liability of common carriers and the creation of res ipsa doctrine, one need look no farther than Chief Baron Pollock. He serves as a common denominator between these concepts. Recognizing Pollock's intimate association with the major jurisprudential developments leading to *Byrne* is a first step towards understanding why the Court of Exchequer chose to extend the scope of presumptive negligence reasoning beyond the railroad context in *Byrne*.

2. *Bramwell, B.*

Chief Baron Pollock was instrumental in the rise of presumptive negligence and the birth of res ipsa loquitur, but he did not act alone. Three other barons sat with him on the Court of Exchequer, and all three ruled in favor of the plaintiff in *Byrne*. None, including the Chief Baron himself, held a higher public profile than Sir George William Wilshere Bramwell. Baron Bramwell was the son of a London banker.[195] He began his legal studies in Lincoln's Inn in 1830 and was called to the bar in 1838.[196] Bramwell developed a lucrative practice on the Home Circuit and, like Pollock on the Northern Circuit, became a prominent member of the bar.[197] He was also a political activist and pamphleteer.[198] Bramwell was appointed to the Court of Exchequer in 1856.[199]

As both a judge and a private citizen, Bramwell was known for his devotion to *laissez faire* principles of economics.[200] He believed fervently that the state, including the legal system, should not interfere with individual rights and responsibilities.[201] In contract law, he opposed quasi-contract doctrine and workers' compensation systems, viewing the former as an unfair restriction on

194. *Id.*

195. M. W. Taylor, *Bramwell, George William Wilshere, Baron Bramwell*, 7 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 327 (H.C.G. Matthew & Brian Harrison eds., 2004) [hereinafter *Bramwell Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY], *available at* http://www.oxforddnb.com/view/printable/3245; *see also* FOSS, *supra* note 7, at 118.

196. *Bramwell Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 195.

197. *Id.*; *see also* FOSS, *supra* note 7, at 118.

198. *Bramwell Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 195.

199. *Id.*; *see also* FOSS, *supra* note 7, at 118.

200. *Bramwell Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 195.

201. *Id.*

an individual's right to avoid commitments to which he had not expressly consented and the latter as overcompensation for workers.[202] In tort law, Bramwell supported defenses like contributory negligence, assumption of risk, and the fellow-servant rule on the grounds that they encouraged personal responsibility and fidelity to agreements.[203]

Regarding his judicial style, one commentator has described Bramwell as "'domineering, entertaining, and consciously concerned to mould the law to ends which he favoured.'"[204] Bramwell's individualistic tendencies and distaste for state intervention in economic exchange caused his jurisprudence to follow distinct, and sometimes paradoxical, paths. For example, he often ruled in favor of industry internalizing its own costs.[205] However, he felt juries, as a popular institution, endangered individual decision-making and left businesses vulnerable to extra-contractual penalties. Frederick Pollock, the Chief Baron's grandson and a renowned legal scholar, observed that Bramwell "notoriously thought railway companies needed protection against juries."[206] The younger Pollock described Bramwell as "an individualist . . . constantly insist[ing] on the importance of every man being expected to look out for himself."[207]

A final intriguing and relevant fact about Bramwell was his close friendship with Chief Baron Pollock. The two men relied on each other for emotional support and entertainment throughout their professional lives.[208] When Pollock's stamina faded near the end of his long tenure on the bench, Bramwell came to his aid by serving as his substitute in cases involving special juries, which under the law of the period had to be tried under the auspices of the chief baron.[209]

Bramwell's position on presumptive negligence is not as clearly defined in the reporters as Pollock's. Though their tenures on the Exchequer overlapped considerably, Bramwell did not share in Pollock's extensive exposure to presumptive-negligence cases in the common-carrier context. However, Bramwell's slate was not blank. Bramwell expressed his view on the plaintiff's burden of proving negligence in *Cornman v. Eastern Counties Railway Co.*[210]

---

202. *See id.*

203. *See* A. W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 215 (1995).

204. *Bramwell Entry*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 195 (quoting an unnamed source).

205. *See* SIMPSON, *supra* note 203, at 215.

206. SIR FREDERICK POLLOCK, FOR MY GRANDSON: REMEMBRANCES OF AN ANCIENT VICTORIAN 177 (1933).

207. *Id.* For a corroborating description, see SIMPSON, *supra* note 203, at 215.

208. For an entertaining anecdote, see POLLOCK, *supra* note 206, at 176, and for descriptions of lively correspondences between the two, see HANWORTH, *supra* note 151, at 146, 148-49. For snapshots from Pollock's correspondence to Bramwell, see CHARLES FAIRFIELD, SOME ACCOUNT OF GEORGE WILLIAM WILSHERE, BARON BRAMWELL OF HEVER, AND HIS OPINIONS 33-38, 96, 169-70 (London, Macmillan & Co. 1898).

209. HANWORTH, *supra* note 151, at 147.

210. 157 Eng. Rep. 1050 (Exch. 1859).

There, the plaintiff was injured while standing in a train station on a busy Christmas Day.[211] He claimed that the crush of people moving through the station had caused him to trip on the raised platform of an unfenced weight scale lying on the station floor.[212] The Court of Exchequer, on appeal, reversed the jury's verdict in favor of the plaintiff, finding that he had failed to show sufficient evidence to have reached the jury.[213]

In explaining the court's reversal, Bramwell made several revealing observations. First, he expressed "considerable doubt" as to whether the court should deny the plaintiff his verdict.[214] But true to the pro-railroad, anti-jury picture painted by Pollock's grandson, Bramwell qualified his hesitancy to reverse by noting that this sentiment was "not from any want of inclination to take care that railway Companies are fairly treated."[215] Bramwell stated that "all the ingredients to make out a case of negligence against the Company exist, except that proof is wanting that the mischief . . . was one which could have been foreseen."[216] Citing this lack of evidence as to whether the railroad had known that the protruding scale represented a hazard, Bramwell ruled against the plaintiff, heeding the principle from another case that:

> It is not enough to say that there was some evidence; a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants[;] . . . there must be evidence on which [the jury] might reasonably and properly conclude that there was negligence.[217]

Bramwell's reasoning in *Cornman* conveys a reluctance to interpret the plaintiff's evidentiary burden in common-carrier cases as flexibly as Pollock. Indeed, the identical passage was cited approvingly by defendant's counsel in the early and important res ipsa case of *Scott v. London and St. Katherine*

---

211. *Id.* at 1050-51.

212. *Id.*

213. *Id.* Interestingly, the trial judge in *Cornman* was Baron Channell, who subsequently voted in favor of reversing the jury's verdict on appeal and who later concurred with Pollock and Bramwell in affirming negligence by the defendant in *Byrne v. Boadle*. At the trial in *Cornman*, Channell had allowed the case to go before the jury, which ruled for the plaintiff. On appeal, Channell explained the apparent contradiction in his decision to reverse for lack of sufficient evidence of negligence after having refused to dismiss the case before it went to the jury, observing that at trial he had agreed with defendant's counsel that evidence of negligence was lacking but that "as it is often a most difficult question whether there is not a scintilla of evidence which ought to go to the jury, I refused to withdraw it from their consideration." *Id.* at 1053. This candid admission from one of the *Byrne* barons highlights the challenge judges faced in delineating the amount of evidence necessary to put an individual's case before a jury as opposed to the amount of evidence necessary for a jury to pass judgment in favor of a plaintiff. For a description of the nineteenth-century common law rule that plaintiffs first establish a "prima facie" case in order to reach a jury or face dismissal by the court, see Fenston, *supra* note 9, at 212-13.

214. *Cornman*, 157 Eng. Rep. at 1052.

215. *Id.*

216. *Id.*

217. *Id.* at 1052-53 (quoting Toomey v. London, Brighton & S. Coast Ry. Co., 140 Eng. Rep. 694 (C.P. 1857)).

Docks Co.[218] The facts in *Scott* were analogous to those in *Byrne* in that six bags of sugar had fallen on an unsuspecting customs agent as he lawfully walked through the defendant's dockyard.[219] Counsel for the defendant invoked the same passage that Baron Bramwell had in *Cornman* in an unsuccessful attempt to turn the powerful tide of presumptive negligence, maintaining that the statement encapsulated the proper evidentiary burden for plaintiffs to establish a prima facie case of negligence.[220]

Bramwell's comments in *Byrne v. Boadle*, however, reflect a different image of his feelings about the proper evidentiary burden for proving negligence. In *Byrne*, Bramwell joined his Exchequer colleagues to uphold a presumption of negligence in favor of the plaintiff pedestrian. Bramwell's comments in the case are striking both for what he said and for what he chose not to say. First, Bramwell clearly felt that plaintiff Joseph Byrne was entitled to a presumption of negligence in his favor. Bramwell conceded that "[n]o doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is."[221] Bramwell asserted that "[w]e must judge of the facts in a reasonable way; and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence."[222] The unifying theme of Bramwell's two major statements during the arguments in *Byrne* is the concept of judicial reasonableness. Bramwell followed up these initial comments by referencing the familiar "information gap" justification for presuming negligence. As Bramwell put it, "Looking at the matter in a reasonable way it comes to this—an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury."[223] When faced with a clear discrepancy in the relative control of plaintiff and defendant over a dangerous situation, Bramwell presumed that the defendant must have been negligent and sustained Byrne's right to go before a jury with what limited evidence of such negligence he could produce.

Bramwell's opposite positions in *Cornman* and *Byrne* are reconcilable. Indeed, the relationship between these opinions clarifies the basis for the Exchequer's res ipsa loquitur ruling in *Byrne*. Both cases exemplify the theoretical ideal of common law adjudication. The judges in each case adopted common-sense reasoning in order to create the fairest outcome, at least to their minds, based on the distinct facts presented. Thus, in *Cornman*, Bramwell focused on the foreseeability of the danger from the injurious scales having

218. 3 H. & C. 596 (Exch. Chamber 1865); *see infra* notes 252-53 and accompanying text.

219. *Scott*, 3 H. & C. at 596-97.

220. *Id.* at 599.

221. Byrne v. Boadle, 159 Eng. Rep. 299, 300 (Exch. 1863).

222. *Id.*

223. *Id.* at 301.

been placed in the middle of a train station.[224] Since no one had tripped over them before, despite the scales having been in the same location for years, Bramwell reasoned that the danger posed must not have been obvious to railroad employees, and therefore, the danger was not sufficiently foreseeable to justify the plaintiff taking his case before a jury.[225] This logic may seem a bit contrived to the modern mind, but nineteenth-century negligence was a much hazier concept. Bramwell's reliance on a lack of past injuries to deny subsequent injury claims would have sounded significantly fairer in 1859 than it does today, and in any case, his reason-based approach is clear.

Likewise, in *Byrne*, Bramwell repeatedly described his decision as being grounded in a "reasonable" analysis of the facts.[226] His reliance on the information gap that Pollock and others had long been using to justify presumptions of negligence in the common-carrier context supports the notion that Bramwell applied a practical standard in the case, as opposed to the political and economic agendas that defined much of his jurisprudence. Indeed, the fact that such a recognized imposer of personal ideas and biases as Bramwell excluded any reference to authorities other than "reasonableness" speaks persuasively in support of *Byrne*'s having been decided on grounds of common-sense logic and fundamental fairness alone.

Bramwell could easily have ridden one of his regular hobbyhorses. For example, he could have argued that the defendant flour dealer should have absorbed the costs of the accident based on Bramwell's commitment to making industry internalize the harms it caused.[227] Alternatively, Bramwell might have advocated in favor of making the plaintiff suffer the costs of his own conduct in walking down a busy street and failing to see the wagon being loaded in front of defendant's shop (if there really had been one, which was never proved).[228] Bramwell refrained from this type of commentary and, instead, latched onto the judicious logic of his friend Chief Baron Pollock. Bramwell ruled the way he considered the facts of the case and relevant precedent pointing, not according to his personal ideologies.

III. PLACING *BYRNE* AND RES IPSA LOQUITUR IN THE HISTORICAL NARRATIVE OF TORTS

To return to a question posed in the introduction of this piece, why would the Exchequer in *Byrne* have extended a strictly contained legal doctrine—presumptive negligence for common carriers—to a case involving an ancient form of personal injury—objects falling from buildings? The answer is

224. Cornman v. E. Counties Ry. Co., 157 Eng. Rep. 1050, 1052 (Exch. 1859).
225. *Id.*
226. Byrne v. Boadle, 159 Eng. Rep. 299, 300 (Exch. 1863).
227. *See* SIMPSON, *supra* note 203, at 215.
228. *Id.*

straightforward: justice demanded such a reach. The judges on the Court of Exchequer, and especially Chief Baron Pollock, recognized that recent presumptive-negligence jurisprudence could be applied in *Byrne* because he and the other barons had been instrumental in creating that jurisprudence. They acted to expand the previously limited doctrine of presumptive negligence in order to bend the common law to accommodate the facts of Byrne's case, and thereby achieve what they considered to be the fairest outcome. This link between presumptive negligence and fundamental fairness is the connection Pollock intended to make with his unintentionally famous line: "There are certain cases of which it may be said res ipsa loquitur, and this seems one of them."[229]

Understanding the Exchequer's purpose in *Byrne* is no minor point of historical minutiae. The origins of *Byrne* shine meaning not only onto the doctrine of res ipsa loquitur, but also onto the larger historical narrative of tort law. The jurisprudence and personalities behind the birth of res ipsa loquitur reveal the doctrine's pragmatic nature. *Byrne* exemplifies the sort of moderate, functional solution to a mundane dispute for which the English common law was famous. Furthermore, the holding in *Byrne* challenges traditional accounts of developments in nineteenth-century tort doctrine, many of which attribute the rise of the negligence standard to pro-business, anti-plaintiff biases in the law.

The orthodox version of nineteenth-century accident law centers on a "subsidy thesis" of torts to explain the rise of negligence during the Industrial Revolution.[230] The most extreme version of this theory holds that the tort

---

229. *Byrne*, 159 Eng. Rep. at 300.

230. *See* HORWITZ, *supra* note 12. Legal historian Gary T. Schwartz identifies this theory as the "subsidy thesis." *See* Schwartz, *Early American Tort Law*, *supra* note 14, at 641. John Fabian Witt uses "materialist" to describe the same school of thought. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 8 (2004); Witt, *supra* note 13, at 704. In this Part, I frame the rise of res ipsa loquitur in terms of the historical debate over the subsidy thesis and its alternatives. The debate between subsidy-thesis scholars like Gregory, Horwitz, and to some extent Friedman and revisionists like Schwartz, Karsten, and Rabin has played out principally over developments in the American common law of the nineteenth century, given the nationality and expertise of these scholars. Nevertheless, English common law before and during that country's industrialization can be analyzed in similar terms. Indeed, many of the supposedly enterprise-friendly legal doctrines cited by subsidy theorists in support of their varying shades of economic-based approaches existed first, or at least contemporaneously, in the English common law. Furthermore, at least one English legal historian, writing two decades before Horwitz's epochal book, identified the commercial and manufacturing innovations of the Industrial Revolution in that country as the driving force in the direction of English common law during the eighteenth century. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 68-69 (5th ed. 1956) (stating that "[t]he task which faced the law was to meet these new requirements [of the Industrial Revolution]" and concluding that "[t]he legal consequences of the industrial revolution were effected . . . largely through the development of case law."). Moreover, Schwartz, Kaczorowski, and other critics of the subsidy thesis rely heavily on English precedents in the common-carrier context and elsewhere to construct their competing analyses of changes in

regime prior to the nineteenth century centered around strict liability and was geared toward compensating accident victims for a wide range of harms regardless of fault. The subsidy thesis asserts that increasing accident rates during the Industrial Revolution—due to the proliferation of factory machines and mass transportation—pressured the legal system into creating higher hurdles for plaintiffs to surmount before obtaining relief for their injuries, such as proving a defendant's negligence while having to dodge contributory negligence themselves or losing the ability to sue for injuries suffered at the hands of a fellow employee.[231] The purpose of these stricter liability standards, according to subsidy theorists, was to insulate business interests from crushing payouts when their machines or behavior became dangerous to average citizens. According to this view, the nineteenth-century common law effectively subsidized the economic growth of the period by making it harder for victims to receive compensation for injuries, even as the rate of accidental harms increased, in order to insulate nascent industries and other commercial enterprises from liability and facilitate their success.[232]

While this extreme version of the subsidy thesis has lain at the heart of modern scholarly debate over the creation of nineteenth-century tort law, there are nearly as many economic-centered accounts of developments in torts during the period as there are individuals espousing such views.[233] Several historians

---

American law during the nineteenth century. Finally, res ipsa loquitur can be analyzed as a thoroughly Anglo-American doctrine, despite its roots in England, because the doctrine's immediate effect was felt widely on both sides of the Atlantic, with courts in both countries applying the doctrine in similar ways following its formal articulation in the 1860s.

231. Karsten lists exemplary barriers, including those identified here. *See* KARSTEN, *supra* note 9, at 79-80.

232. *See, e.g.*, HORWITZ, *supra* note 12, at 102; Gregory, *supra* note 12, at 368, 382. This summary of the subsidy thesis also draws from KARSTEN, *supra* note 9, at 3 & n.2; Schwartz, *Early American Tort Law*, *supra* note 14, at 678-80; and Witt, *supra* note 13, at 704.

233. In the opening endnotes of *Heart Versus Head*, Karsten gives a concise description of the major economics-focused explanations for changes in tort law during the nineteenth century, and discusses several of the major fault lines running through this literature. KARSTEN, *supra* note 9, at 325-28 n.2. However, Lawrence Friedman has rightly criticized Karsten's text for condensing these disparate theories into a monolithic "economic determinist paradigm." *See* Lawrence M. Friedman, *Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History*, 24 LAW & SOC. INQUIRY 253, 253, 257-60 (1999). In this Part, I cannot pretend to account for each of these different ideological shades nor describe what my explanation for the origins of res ipsa loquitur says about each theory, and vice versa. Instead, my goal here is to set out the extremes of this debate as well as a moderate version of the subsidy thesis and then place *Byrne* and res ipsa loquitur along this ideological continuum. I conclude that the outcome in *Byrne*, and res ipsa generally, complements Friedman and Schwartz's more nuanced accounts of nineteenth-century negligence law, in that res ipsa loquitur shows nineteenth-century courts extending the doctrine of an already-expanded enterprise liability (in the form of presumptions of negligence against common carriers) to non-industrial, non-railroad situations. The effect of this new doctrine was greater access to juries and increased compensation for plaintiffs. Res ipsa loquitur and its liberal results amount to one piece of evidence, albeit a small one,

have found truth in the basic premises of the subsidy thesis while diverging from it or moderating its conclusions in important respects. Among the most prominent of these moderate subsidy theorists is Lawrence Friedman, whose landmark work *A History of American Law* includes both hard-line subsidy statements and important qualifications to it for plaintiff-friendly doctrines, such as "last clear chance" and res ipsa loquitur.[234] Friedman colorfully explains emerging industry as the catalyst for a rigorous fault-based negligence standard by pointing to the fact that new machines, like the railroad locomotive and the loom, "had a marvelous, unprecedented capacity for smashing the human body," and according to Friedman, since "[l]awsuits and damages might injure the health of precarious enterprise[,] . . . industry had to be protected from harm."[235] Friedman identifies in the currents of early- and mid-nineteenth-century law a "spirit of the age" that was "a spirit of limits on recovery,"[236] and he maintains that "[t]he thrust of the rules, taken as a whole, came close to the position that businesses, enterprises, and corporations should be flatly immune from actions for personal injury."[237] However, Friedman and other moderate subsidy theorists do identify what they consider exceptions to the economic favoritism in legal doctrine of the period. Friedman states that nineteenth-century judges "were never entirely heartless,"[238] and by acknowledging imperfections in the common law edifice, he recognizes that "the classic nineteenth-century law of torts [i.e., the purely defendant-friendly, subsidy version] held such brief sway that in a sense it never was."[239] In

---

contradicting not only the notion that nineteenth-century judges favored industry and commercial interests, but also contradicting the thesis that economics was the overriding force in the growth of negligence law during the nineteenth century.

234. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 358 (3d ed. 2005). Friedman describes res ipsa loquitur as an example of a doctrine that "eased the burden of proving a negligence case, at least slightly." *Id.* However, Friedman's brief treatment of res ipsa suffers in two respects. First, his account provides only a cursory explanation for res ipsa's origins. According to Friedman, the doctrine emerged as a spontaneous epiphany: "To the court [in *Byrne*], this mysterious falling barrel was as inspirational as Newton's apple." *Id.* at 359. While creative, Friedman's assertion does not address the gradual developments in the law relating to common-carrier liability that constitute res ipsa's true roots. Second, Friedman's account does not explain the doctrine's significance as an exception to the economics-driven legal world of the nineteenth century that he describes. He alludes to res ipsa's relationship to railroad law, but only by referencing a single, post-*Byrne* case in which an appellate court reversed the lower court's finding of a presumption of negligence. *Id.* Moreover, he avoids the counter-subsidy implications of res ipsa loquitur by asserting only that "it was definitely useful to victims of wrecks, crashes, explosions, and those pursued by all manner of falling and flying objects." *Id.* Finally, instead of elaborating on res ipsa's place in the nineteenth century, Friedman bumps the doctrine to the next one, explaining that "[i]t was the middle twentieth century, however, the period of the 'liability explosion,' that really made this doctrine its own." *Id.*

235. *Id.* at 350-51.

236. *Id.* at 352.

237. *Id.* at 356.

238. *Id.*

239. *Id.* at 357.

addition, Friedman hints at other, non-economic explanations for high hurdles to tort compensation during the nineteenth century, including, for example, a society resigned to industrial or commercial disaster and lacking any instinct to seek compensation for such harms.[240] Moderates such as Friedman, by accounting for impulses in nineteenth-century common law that run counter to the subsidy explanation, share the intellectual stage with the principal revisionists of the theory.

In response to the subsidy thesis, legal historian Gary T. Schwartz and others have advanced a competing characterization of the nineteenth-century liability regime. Schwartz argues that common law courts frequently made decisions that incorporated elements of both negligence and no-fault liability.[241] According to Schwartz, such holdings constitute an "intermediate zone" between these two paradigms.[242] In reviewing Schwartz's work, Robert L. Rabin has coined the term "negligence plus" to describe the concept that nineteenth-century courts created, "conceptual categories like the special obligations of common carriers to locate liability in a zone somewhere between negligence and strict liability."[243] Peter Karsten, another anti-subsidy commentator, has identified similar liberal impulses in American jurisprudence of the period, dubbing plaintiff-friendly developments in this country as the "Jurisprudence of the Heart."[244] Though Schwartz's methodology also focuses on American case law, his work discusses developments in the English common law, including the law related to railroad and other common-carrier accidents, thereby recognizing the close relationship between these two parallel bodies of common law.[245] Many of his conclusions about the evolution of American tort law during the nineteenth century apply equally to contemporary English jurisprudence.

---

240. *Id.* at 352. Schwartz critiques this point in *Early American Tort Law*, *supra* note 14, at 665 n.147.

241. *See* Schwartz, *Early American Tort Law*, *supra* note 14, at 672-73; Schwartz, *Tort Law and the Economy*, *supra* note 14.

242. Schwartz, *Early American Tort Law*, *supra* note 14, at 672-73.

243. Robert L. Rabin, *The Torts History Scholarship of Gary Schwartz: A Commentary*, 50 UCLA L. REV. 461, 466 (2002).

244. Karsten uses the term "Jurisprudence of the Heart" to describe a current in American law of the nineteenth century, whereby "jurists were, on occasion, driven by conscience and principle to alter certain common-law rules in order to produce "justice." KARSTEN, *supra* note 9, at 4. In explaining the rationale for such cases, Karsten asserts that "[g]enerally, on these occasions [judges'] motives were of Judeo-Christian origin and served the needs of relatively poor plaintiffs, not corporate defendants." *Id.*

245. *See, e.g.*, Schwartz, *Early American Tort Law*, *supra* note 14, at 654-55, 672. Karsten's characterization of American common law of the nineteenth century as consisting of twin jurisprudences of the "heart" and the "head" does not allow useful comparison to English common law of the period, as several of Schwartz's observations about the development of common-carrier liability do. While I acknowledge Karsten, I do so in his capacity as a prominent and articulate critic of the subsidy thesis and its offshoots, and not as a model for better understanding res ipsa doctrine.

Schwartz identifies several relevant themes in nineteenth-century tort cases. He argues that, contrary to the theory that the law favored economic gains at the expense of injured workers and passengers, common law judges exhibited a "concern for the risks created by modern enterprise and a judicial willingness to deploy liability rules so as to control those risks."[246] Schwartz also highlights "a judicial willingness to resolve uncertainties in the law liberally in favor of . . . [tort] victims' opportunity to secure recoveries."[247] Among the American cases that Schwartz uses to illustrate this "intermediate-zone" thesis for nineteenth-century tort liability is a set of South Carolina "spark" and "passenger" railroad cases from the 1850s.[248] In these disputes, American courts, like their English counterparts, imposed a "presumption" of negligence on railroads despite only limited evidence from plaintiffs.[249] The standard adopted by the South Carolina courts operated to the same effect as the parallel English standard discussed earlier in this piece. By placing a "presumption" of negligence on the railroads, courts avoided a strict-liability regime while simultaneously placing the burden of disproving fault squarely on the (theoretically) better-informed railroads.

Byrne v. Boadle and the emergence of the res ipsa loquitur doctrine supports the Schwartzian narrative of nineteenth-century tort law, featuring courts willing to create legal opportunities for individual plaintiffs where fairness demanded, even when such a path would lead to increased liability and costs for commercial defendants. Early res ipsa jurisprudence represents a delicate attempt by judges to cut out an "intermediate zone" between the extremes of a negligence standard that might leave plaintiffs without relief for legitimate harms where they lacked affirmative proof and an inadministrable

246. Schwartz, *Early American Tort Law*, *supra* note 14, at 665.

247. *Id.*

248. *Id.* at 653-55, 660. In particular, Schwartz describes a Delaware railroad case from 1857 with almost identical facts to those in *Skinner v. London, Brighton and South Coast Railway Co.*, *see supra* notes 172-78 and accompanying text, in which two trains owned by the same company collided and the court justified a rebuttable presumption of negligence against the railroad. *Id.* at 660. In *Skinner*, Chief Baron Pollock had ruled in favor of the plaintiff in finding a prima facie case of negligence by the railroad company seven years prior to the case cited by Schwartz. In his notes, Schwartz draws a parallel between this Delaware case and the res ipsa doctrine, observing that "[t]his, of course, is the reasoning of res ipsa loquitur—even though Flinn comes several years prior to Byrne v. Boadle." *Id.* at 660 n.114. Schwartz does not plumb this connection any further, but the fact that American courts were responding to railroad collision cases with the same logic of presumptive negligence as their English counterparts helps explain why the doctrine of res ipsa loquitur was incorporated into American common law so rapidly and widely in the wake of *Byrne*. Another example of presumptive negligence in American railroad law of the mid-nineteenth century is *Johnson v. Hudson River Railroad Co.*, 20 N.Y. 65 (1859), which relied on a presumption of negligence and shifted the burden of proof in order to sustain a railroad crossing accident victim's claims. *See* KARSTEN, *supra* note 9, at 367 & n.86 (describing *Johnson* and noting connection to *Byrne* and res ipsa loquitur).

249. Schwartz, *Early American Tort Law*, *supra* note 14, at 660, 673.

strict-liability standard that might saddle growing businesses with over-burdensome litigation costs.

Analysis of the personalities and reasoning behind the Exchequer's pro-plaintiff decision in *Byrne* reveals many of the same themes at work among the barons that Schwartz identifies in his analysis of contemporaneous American cases. For example, the *Byrne* court's readiness to impute liability to a busy merchant instead of a casual pedestrian corresponds with Schwartz's argument that the nineteenth-century common law frequently resolved legal ambiguities in favor of tort victims. Furthermore, we have seen how the English law of presumptive negligence for enterprise defendants contained numerous guideposts pointing the barons toward a ruling in favor of Mr. Byrne. Extensive case law existed to support the court's decision from the "spark" and "passenger" cases. Likewise, the concept of "presumptions of fact" and the doctrine of "presumptive negligence" lent a theoretical foundation to the court's holding in *Byrne*. When faced with an uncertain question of whether or not to expand the doctrine of presumptive negligence beyond the common-carrier context, the barons did not shy away from manipulating the law in favor of the injured plaintiff.

The *Byrne* decision also bolsters Schwartz's conclusion that nineteenth-century judges used legal liability to control the increased risks facing individuals from modern mechanization and commerce. The barons in *Byrne v. Boadle* clearly felt that a merchant on a bustling street should bear more responsibility than innocent bystanders for managing the risks created by the merchant's commercial activities. Thus, the barons vested Mr. Boadle, as a "person[] who keep[s] barrels in a warehouse," with a special duty "to take care that they do not roll out."[250] Baron Channell elaborated on this duty in *Byrne*, declaring that "a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it."[251] In creating a legal duty for Mr. Boadle, the barons compelled the merchant to accept injury costs arising from his use of a public street for private gain. This allocation of liability gave Boadle an incentive to use extra caution when loading his carts so as to minimize the increased risks from his presence on the road.

The close connection between *Byrne v. Boadle*, the res ipsa doctrine, and enterprise-liability cases do support the subsidy theorists' proposition that innovations in negligence law during the nineteenth century can be linked to a growing number of industrial and transportation accidents. The development of a cognizable "doctrine of presumptive negligence" from heightened standards of care for passenger carriers constituted a clarification in the law of negligence; however, this advancement, in so far as it led directly to the

250. Byrne v. Boadle, 159 Eng. Rep. 299, 301 (Exch. 1863) (Pollock, C.B.).

251. *Id.* (Channell, B.).

creation of res ipsa loquitur, cuts against an interpretation of nineteenth-century law as having been dominated by pro-business interests. Res ipsa loquitur, as it was applied in *Byrne* and its progeny, blurred the edges of negligence in favor of injured plaintiffs, not defendant businesses. Presumptive negligence strengthened common law protections for plaintiffs by forcing railroads and other passenger carriers to disprove their own fault. The *Byrne* opinion is exceptional, in part, because the case carried the onerous burden of presumptive negligence outside the realm of railroads and other (generally deep-pocketed) common carriers and foisted it upon a small business owner in the streets of Liverpool. No one could mistake the arguments of Pollock or Bramwell in *Byrne* for those of a pliant court ready to use fault-based liability to make life easier for selfish businesses. The barons came to do justice, and to their minds, they did it. Rejecting arguments from counsel that ruling for the sympathetic Byrne would unfairly burden the defendant, they placed the onus for disproving liability with the merchant Boadle. There was nothing pro-business about this ruling. Though only a small piece in the mosaic of torts history, *Byrne v. Boadle* and the doctrine of res ipsa loquitur support the conclusion that common law jurists of the nineteenth century had far more on their minds in deciding cases than the narrow interests of relentlessly expanding industrial economies.

CONCLUSION

Byrne v. Boadle may have been the first articulation of the new doctrine of res ipsa loquitur, but it took several more cases for the doctrine to be molded into its modern form. The second case in the conventional res ipsa creation narrative is *Scott v. London and St. Katherine Docks Co.*[252] In *Scott*, a customs agent was injured when six bags of sugar felled him unexpectedly as he walked through defendant's dock yard. As with the plaintiff in *Byrne*, the customs agent could not present affirmative evidence of negligence on the part of either the defendant or its employees but, nonetheless, prevailed on appeal in the higher Exchequer Chamber. The enduring significance of *Scott*, however, resides in the dissent of Chief Justice Erle. Though unwilling to side with the majority in finding "reasonable evidence of negligence" in the record and without relying on Pollock's Latin phraseology, the Chief Justice set out a deceptively conclusive refinement of the presumed negligence principle from *Byrne v. Boadle*, insisting that:

> There must be reasonable evidence of negligence.
>
> But where the [injurious] thing is shewn 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,

252. 3 H. & C. 596 (Exch. Chamber 1865).

> it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.[253]

Erle's dissent installed res ipsa loquitur as a fully recognized construction under the common law and has been widely cited by courts ever since.

The final link in the orthodox account of res ipsa's beginnings is *Briggs v. Oliver*,[254] the first case in which the phrase "res ipsa loquitur" was explicitly combined with Erle's reasoning in *Scott*.[255] In *Briggs*, the plaintiff had been pushed to the ground by the defendant's employee and was subsequently injured when one of the defendant's packing cases fell on the prostrate plaintiff's leg and foot.[256] Though the plaintiff was unable to advance evidence that the packing case had been improperly stacked, two of the three barons hearing the case for the Court of Exchequer ruled that the mere occurrence of the injury served as sufficient evidence to allow the plaintiff to take his case to a jury.[257] In finding for the plaintiff, Baron Bramwell, invoking the term used by his colleague Sir Frederick Pollock in *Byrne v. Boadle*, unequivocally ruled that "this is one of those cases in which, as has been said, 'res ipsa loquitur.'"[258] The phrase was now firmly entrenched in the common law, even if its sudden entrance into the legal lexicon in *Byrne* had left the scope of its application largely undefined.

My chief purpose in this Note was to look backwards from the birth of res ipsa loquitur in *Byrne* and investigate why and how the judges deciding that case chose to formulate such a pro-plaintiff rule, one seemingly in conflict with the many anti-plaintiff biases in the common law of the nineteenth century. In doing so, I found that res ipsa loquitur arose out of cases involving presumptive negligence for common passenger carriers during the early nineteenth century. To establish this connection, I analyzed the factual and procedural background behind the landmark ruling in *Byrne v. Boadle*, and I scrutinized the personalities and experiences of the most influential judges who extended the concept of presumptive negligence beyond the world of stagecoaches and trains in order to craft the doctrine of res ipsa loquitur.[259] My conclusion—that *Byrne* and res ipsa doctrine originated in judicial efforts to craft a fair and administrable solution for cases in which plaintiffs had been injured by a lack

253. *Id.* at 601.

254. 4 H. & C. 403 (Exch. 1866).

255. *Id.* at 407; *see also* Shain, *supra* note 8, at 188 & n.5 (observing same).

256. *Briggs*, 4 H. & C. at 403.

257. *Id.* at 406-08.

258. *Id.* at 407.

259. What I did not do was describe the many uses that English and American courts have assigned to the doctrine of res ipsa loquitur since its creation in *Byrne*, *Scott*, and *Briggs*. This is a study of the events leading to the doctrine's creation, not a study of its application thereafter. As described in the Introduction, subsequent applications of the res ipsa doctrine have been confused and conflicting. *See supra* notes 1-4 and accompanying text. Such problems as well as later developments in res ipsa jurisprudence are beyond the scope of these pages.

of care but where evidence for such a showing was beyond the plaintiff's reach—might appear trite at first glance. After all, the ideal of the common law jurist features a legal craftsman hammering law into substantial justice for a given set of facts. That the judges in *Byrne* and successive cases sought to achieve such justice is, however, a very meaningful piece of information for any account of how res ipsa loquitur fits within competing historical narratives of tort law. Aside from providing the first comprehensive portrayal of *Byrne* and the judges deciding it, my other purpose was to place res ipsa loquitur within the evolutionary framework of Anglo-American accident law. Whether res ipsa loquitur represents a mere exception to the "subsidy thesis" as Friedman alludes or persuasive proof of Schwartz's "intermediate zone" or something else entirely is an argument whose full scope reaches beyond the boundaries of this Note. I have cast the first stone by characterizing *Byrne* as compelling support for those who advocate a nuanced version of nineteenth-century tort history in which courts, and the law in general, served as both a stimulus for economic development and an outlet for those seeking protection from the industrial storm. A more extensive examination of the role of the res ipsa doctrine in the development of tort law awaits future research. Nonetheless, the notion that significant historical value remains to be discovered in res ipsa loquitur's past should now speak for itself.