consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved? It is the immediate consequence of the proximate cause."[20]

Upon its zone of duty argument, the court seems to be on stronger grounds. While plausible arguments might be made either way on this point, it is believed that most courts would support the view taken by the court, that the plaintiff was not within the class protected by the statute. S.L.

TORTS — NEGLIGENCE — RES IPSA LOQUITUR

The plaintiffs drove to the defendant's gasoline station to have their car lubricated. The defendant was then engaged in blending gasoline of different grades of volatility. The vapors arising from the gasoline exploded and caused injury to the plaintiffs. In action of negligence it was held that the doctrine of *res ipsa loquitor* was applicable.[1]

The phrase literally translated means, "the thing speaks for itself." The classic legal definition was given by Erle J. in *Scott* v. *London Docks Co.* as follows: "When the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."[2]

The doctrine has probably been most frequently invoked in carrier cases. It has been applied where the plaintiff was injured as a result of a collision of two trains of the defendant,[3] and also where plaintiff's injury was due to the collision of defendant's train with that of another carrier.[4] Derailment cases have been a frequent subject for its application.[5] Likewise the plaintiff was permitted to rely upon it in the upsetting of a stagecoach.[6] The court applied it to the case in which the plaintiff, while waiting on the defendant's car, was struck on the head by the falling of the trolley pole from the top of the electric car.[7]

[20] Atkinson v. Newcastle & Gateshead Waterworks Co., Law Rep. 6 Exch. 404 (1871).

[1] Hiell v. The Golco Oil Co., 137 Ohio St. 180, 28 N.E. (2d) 561, 17 Ohio Op. 544, 31 Ohio L. Abs. 429 (1940).

[2] 3 H. & C. 596, Exchequer court (1865).

[3] The Iron Railroad Co. v. John Mowery, 36 Ohio St. 418, 38 Am. Rep. 597 (1881).

[4] Toledo Consolidated Street Railway Co. v. Fuller et al., 17 Ohio C. C. 562, 9 Ohio C. D. 123 (1894).

[5] Lake Shore Electric Railway Co. v. Hobart, 32 Ohio C. C. 154, 13 Ohio C. C. N. S. 592 (1909).

[6] McKinney v. Neil, 1 Ohio Fed. Dec. 703, 1 McLean 540 (1839).

[7] Cincinnati Traction Co. v. Holzenkamp, 74 Ohio St. 379, 78 N.E. 529, 112 Am. St. Rep. 980 (1906).

The *Railroad Co.* v. *Walrath*[8] case held that the doctrine was applicable to the falling of a sleeping berth. A Pennsylvania court applied it to a situation in which the passenger was injured by being thrown against the seat in front of him when the car came to a sudden stop.[9]

There has been some suggestion that the doctrine of *res ipsa* should only be invoked where the relation of carrier and passenger exists but it is believed that such an arbitrary limitation would be generally rejected today. No such limitation is imposed in Ohio. In the *Cincinnati Traction Co.* v. *Holzenkamp* case,[10] the court declared that it was the nature of the act rather than the relation between the parties which determined whether the doctrine was to be applied. This distinction is supported by numerous cases. Thus the plaintiff successfully relied on the doctrine when damage was caused by a driverless, loaded truck.[11] The doctrine was applied when the defendant's car left the road and plunged over an embankment and injured the plaintiff.[12] It was invoked when the plaintiff fell into an elevator shaft because of the sudden moving upward of a semi-automatic elevator.[13] The doctrine was used against a store owner when a sign resting on a narrow ledge fell on the plaintiff.[14]

On the other hand the court refused to apply it to a misplaced manhole cover because the defendant municipality did not have the exclusive control which is necessary.[15] In the case of an explosion in the cellar of the decedent, the court would not permit the plaintiff to rely on *res ipsa* for there was not the control present in the defendant which would justify its application.[16] Where an intending passenger was injured by window glass falling from a crowded street car, the court refused to impose the doctrine for it was as easy to infer that it was caused by other means as to infer that it was caused by the defendant's negligence.[17] A more recent case held that the accident must be of such a character that there could be no reasonable inference but that the injury complained of was due to the negligence of the defendant.[18]

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[8] 38 Ohio St. 461, 10 Am. Neg. Cases 706 (1882).
[9] Tilton v. Philadelphia Rapid Transit Co., 231 Pa. 63, 79 Atl. 877 (1911).
[10] Cincinnati Traction Co. v. Holzenkamp, 74 Ohio St. 379, 78 N.E. 529, 113 Am. St. Rep. 980 (1906).
[11] Cleveland Ice Cream Co. v. Call, 28 Ohio App. 521, 162 N.E. 812 (1928).
[12] Weller, Exrx. v. Worstall, 129 Ohio St. 596, 196 N.E. 637, 3 Ohio Op. 12 (1935).
[13] Class v. Y.W.C.A., 47 Ohio App. 128, 191 N.E. 102, 16 Ohio L. Abs. 610 (1934).
[14] Benjamin v. Sears Roebuck & Co., 62 Ohio App. 83, 23 N.E. (2d) 447, 15 Ohio Ops. 442 (1939).
[15] Cleveland v. Amato, 123 Ohio St. 575, 176 N.E. 227 (1931).
[16] St. Marys Gas. Co. v. Brodbeck, Admr., 114 Ohio St. 423, 151 N.E. 323 (1926).
[17] Cleveland R. Co. v. Sutherland, 115 Ohio St. 262, 152 N.E. 726 (1926).
[18] Kovacs v. G. M. McKelvey Co., 24 Ohio L. Abs. 625 (1937).

It has also been suggested that the doctrine does not apply when there is direct evidence as to the cause of the accident.[19]

While courts in other states have frequently permitted plaintiffs to establish a cause of action in certain types of explosion cases by a reliance upon the *res ipsa* doctrine,[20] there had previously been little support for such reliance in Ohio. It may be that the effect of the principal case will be to extend the use of the doctrine of *res ipsa loquitur* in Ohio to this type of case. R. L. R.

Sales-Torts—Manufacturer's Liability for Sale of Unfit Food

Plaintiff's intestate purchased a can of corned beef from his neighborhood grocer and ate a part of it for his supper. By midnight he was seriously ill, and he died the following morning. The coroner's certificate stated that an autopsy revealed that death was the result of ptomaine poisoning caused by eating canned meat. The can of meat was packed by a South American company, but was distributed by the defendant under its own name. The court held that violation of a penal statute covering the sale of unwholesome provisions was negligence *per se*, that the statute set up an absolute standard, and it was no defense that the defendant exercised a high degree of care and was free from negligence. Plaintiff had only to prove that the meat was sold under the defendant's name and that the death was caused because the meat in the can was unfit.[1]

The problem of who shall be liable for the sale of unfit food has long been before the courts. They have experienced no difficulty in holding the retailer liable. Since the thirteenth century it has been recognized that one who sells food for human consumption is liable in tort for any injury caused by unfitness of the food sold.[2] The development of the doctrine that one who sells food impliedly warrants to the purchaser that the food sold is wholesome gave to the claimant a choice of remedies.[3] He could sue either in tort for the negligence of the seller or in contract for the breach of the implied warranty. Public policy was behind the formation of these rules since the ordinary consumer

[19] *See* Cleveland R. Co. v. Sutherland, 115 Ohio St. 262, 264, 152 N.E. 726, 727 (1926).

[20] For discussion of cases on this point see, 25 C. J. 205, Sec. 38. Also see notes in 8 A.L.R. 500, 23 A.L.R. 484, 39 L.R. 1006 and 56 A.L.R. 593.

[1] Hunter v. Derby Foods, Inc., 110 F. (2d) 970, (1940). This case was decided in a Federal District Court in New York, but the Ohio law was the basis for the decision.

[2] 51 Hen. III Stat. 6, (1266); Burnby v. Bollett, 16 M.&W. 644, (1847).

[3] Sinclair v. Hathaway, 57 Mich. 60, 23 N.W. 459 (1885); Fairbank Canning Co. v. Metzger, 118 N.Y. 260, 23 N.E. 372, 16 Am. St. Rep. 753 (1890); Van Bracklin v. Fonda, 12 Johns. (N.Y.) 468 (1815); 3 Bl. Comm. 165.