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RES IPSA LOQUITUR—THE WYOMING SUPREME COURT RELAXES THE ELEMENTS A PLAINTIFF NEEDS TO ESTABLISH BEFORE INVOKING THE DOCTRINE.
Goedert v. Newcastle Equipment Co.,
802 P.2d 157 (Wyo. 1990).

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RES IPSA LOQUITUR—The Wyoming Supreme Court Relaxes the Elements a Plaintiff Needs to Establish Before Invoking the Doctrine. *Goedert v. Newcastle Equipment Co.*, 802 P.2d 157 (Wyo. 1990).

In 1985, Nicholas Goedert was involved in a one-vehicle accident when the brakes on the truck he was driving failed.[1] Prior to the accident, Goedert had experienced difficulties with the truck's brakes and had taken the truck to Newcastle Equipment Company in Newcastle, Wyoming, to have the brakes repaired.[2] An employee of Newcastle Equipment Company worked on the brakes.[3] Goedert then drove the truck through Sundance, Wyoming, and over Warren Peak, to a location where the trailer he was pulling was loaded with wood.[4] Goedert had applied the brakes without incident during the approximately thirteen-hour period since the work on the brakes had been done.[5] When Goedert first attempted to descend a grade with the load of wood, the brakes failed to slow the truck.[6] To prevent the truck from accelerating out of control, Goedert steered into an embankment and was injured.[7]

Goedert sued Newcastle Equipment Company alleging negligence in the repair of the brakes.[8] The evidence at trial established that Goedert was injured as a result of the brake failure.[9] Goedert was unable to establish with direct evidence either the cause of the brake failure or negligence on the part of Newcastle Equipment Company.[10] To compensate for this lack of direct evidence, Goedert attempted to invoke the doctrine of res ipsa loquitur.[11] Res ipsa loquitur would have allowed Goedert to substitute an inference of negligence for direct evidence.[12] The jury would then have been permitted, but not compelled, to infer Newcastle Equipment Company's negligence from the circumstances of the accident.[13] This permissive inference would have been enough to prevent a directed verdict against Goedert.[14]

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1. Appellant's Brief at 2-3, Goedert v. Newcastle Equip. Co., 802 P.2d 157 (Wyo. 1990) (No. 89-68) [hereinafter Appellant's Brief].
2. Goedert v. Newcastle Equip. Co., 802 P.2d 157, 158 (Wyo. 1990).
3. *Id.*
4. Appellee's Brief at 7, Goedert v. Newcastle Equip. Co., 802 P.2d 157 (Wyo. 1990) (No. 89-68) [hereinafter Appellee's Brief].
5. *Goedert*, 802 P.2d at 160.
6. *Id.* at 158.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* Goedert attempted to introduce expert testimony, but the trial court found there was an insufficient basis for such testimony. Appellant's Brief, *supra* note 1, at 3-4.
11. *Goedert*, 802 P.2d at 158.
12. *Id.*
13. *Id.*
14. *Id.*

The trial court ruled that res ipsa loquitur was not applicable to the facts of the case because Newcastle Equipment Company did not have "exclusive control" of the brakes when the injury occurred.[15] The trial court then directed a verdict for Newcastle Equipment Company at the close of Goedert's evidence.[16] The Wyoming Supreme Court reversed and remanded on appeal.[17]

The Wyoming Supreme Court found it reasonable to infer that repair work has been done negligently when a mechanism fails shortly after it has ostensibly been repaired.[18] The court found that Goedert had been improperly denied the benefit of res ipsa loquitur and that a directed verdict for Newcastle Equipment Company was therefore improper.[19]

The Wyoming Supreme Court's decision in *Goedert* can be read as having altered Wyoming's doctrine of res ipsa loquitur by modifying the elements that previously needed to be shown before a plaintiff could invoke res ipsa loquitur.[20] According to Justice Thomas, before the decision in *Goedert*, Wyoming case law required a showing by the plaintiff that the defendant controlled the injury-causing instrumentality before the plaintiff could invoke res ipsa loquitur.[21] In modifying the limitations on the applicability of res ipsa loquitur, the court broadened the reach of the doctrine to cases where it previously did not readily apply.[22] This casenote examines the Wyoming Supreme Court's interpretation of the factors which limit the application of res ipsa loquitur. Further, this casenote criticizes the court's decision allowing a plaintiff to successfully invoke res ipsa loquitur because the defendant's knowledge about the true cause of the plaintiff's injury was superior.

BACKGROUND

The doctrine of res ipsa loquitur has a long history of confused and imprecise application. This Latin phrase literally means "the thing itself speaks."[23] Chief Baron Pollock in *Byrne v. Boadle* is usually credited with the first use of the phrase in the context of a negligence lawsuit.[24] In this 1863 case, a barrel of flour fell from the win-

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15. *Id.*
16. *Id.* at 157.
17. *Id.* at 161. On remand, the parties reached a settlement and the case was dismissed with prejudice, pursuant to WYO. R. CIV. P. 41. Stipulation of Dismissal with Prejudice, Goedert v. Newcastle Equip. Co., No. 16367 (Sixth Judicial Dist. Ct., Sept. 4, 1991).
18. *Goedert*, 802 P.2d at 161.
19. *Id.* at 158.
20. *Id.* at 161 (Thomas, J., dissenting).
21. *Id.*
22. *Id.*
23. *Id.* at 158 (majority).
24. *Id.* (citing Byrne v. Boadle, 159 Eng. Rep. 299 (1863)).

dow of the defendant's building and hit the plaintiff on the shoulder.[25] The plaintiff was unable to show specifically the particular negligent act that the defendant had committed.[26] The defendant argued that negligence can never be presumed from the mere occurrence of an accident and that the plaintiff could not prevail lacking affirmative proof.[27] Pollock disagreed, stating that courts in certain cases have held the occurrence of an accident to be evidence of negligence.[28] Pollock further stated that "[t]here are certain cases of which it may be said res ipsa loquitur, and this seems to be one of them."[29] The subsequent history of res ipsa loquitur has involved attempts to promulgate criteria that explain with more precision what those "certain cases" are.[30]

The doctrine quickly made its way across the Atlantic Ocean to the United States. By 1905, res ipsa loquitur was so frequently invoked that Professor Wigmore included a discussion of it in his treatise on evidence.[31] Wigmore proposed three considerations to limit the applicability of the rule:

> (1) the apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) both inspection and user must have been at the time of the injury in the control of the party charged; (3) the injurious occurrence must have happened irrespective of any voluntary action at the time by the party injured.[32]

One commentator notes that most current expressions of the rule include elements similar to Wigmore's although the elements are sometimes phrased differently.[33]

Seven years after Wigmore first discussed res ipsa loquitur, the United States Supreme Court applied the doctrine in *San Juan Light & Transit Co. v. Requena*.[34] Justice Van Devanter, writing for the Court, stated that res ipsa loquitur applies

> [W]hen a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does

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25. *Byrne*, 159 Eng. Rep. at 299.
26. *Id.* at 300.
27. *Id.* at 301.
28. *Id.* at 300. The cases Pollock referred to were railroad accidents where two trains owned by the same company collided on the same track. *Id.*
29. *Id.*
30. Goedert v. Newcastle Equip. Co., 802 P.2d 157, 159 (Wyo. 1990).
31. *Id.*
32. 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2509, at 3557 (1st ed. 1905).
33. 1 STUART M. SPEISER, THE NEGLIGENCE CASE, RES IPSA LOQUITUR § 2:1, at 31 (1972).
34. 224 U.S. 89 (1912).

> not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care.[35]

Justice Van Devanter's phrase "exclusive control" would later find its way into Wyoming's res ipsa loquitur rule.[36]

In 1936, the Wyoming Supreme Court decided *Stanolind Oil and Gas Co. v. Bunce*.[37] Bunce was injured by an explosion as he attempted to relight a gas water heater.[38] The water heater was in an oil field dormitory which Stanolind provided for its employees.[39] The court examined various expressions of the rule and cases where it was applied.[40] Relying heavily on Wigmore and the United States Supreme Court's decision in *San Juan*, the court ruled res ipsa loquitur inapplicable because the defendant was not in exclusive control[41] of the water heater at the time of the explosion.[42] The court also found that the explosion would not necessarily have occurred irrespective of any voluntary acts by the plaintiff.[43]

Justice Blume dissented in part, stating that as he interpreted Wigmore's conditions, the defendant did control the water heater and res ipsa loquitur could apply to the case.[44] Justice Blume stated that he was

> [N]ot prepared to hold that a person injured by an apparatus, which he used in the ordinary way with care and for the purpose for which it was intended, cannot, in any case, have the benefit of the rule, on the theory that such use leaves the defendant without exclusive control of user[.][45]

When Wigmore revised his treatise, he referred to *Stanolind* as "the leading case to date on the whole subject."[46] Wigmore also suggested that Justice Blume's qualification to the control element should receive acceptance.[47]

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35. *Id.* at 98-99. Justice Van Devanter's language is adopted from 2 THOMAS M. COOLEY, THE LAW OF TORTS, 1424 (John Lewis ed., 3d ed. 1906). *Goedert*, 802 P.2d at 159.

36. Stanolind Oil & Gas Co. v. Bunce, 62 P.2d 1297 (Wyo. 1936).

37. *Id.*

38. *Id.* at 1299.

39. *Id.* at 1298.

40. *Id.* at 1301-07.

41. The requirement of "exclusive" control was apparently narrowly and literally construed, as the court found a jury instruction to be erroneous when it used the phraseology "under the management and control of the defendant" instead of "under the exclusive control of the defendant." *Id.* at 1307.

42. *Id.*

43. *Id.*

44. *Id.* at 1309 (Blume, J., concurring and dissenting in part).

45. *Id.*

46. 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2509, n.2 (3d ed. 1940).

47. *Id.*

In 1955, the Wyoming Supreme Court explicitly adopted Justice Blume's more liberal interpretation of the control requirement.[48] In *Rafferty v. Northern Utilities Company*, the plaintiff's building had been partially destroyed in a fire that was started by a gas heater.[49] The defendant had recently repaired the heater and placed it into automatic operation.[50] Even though the plaintiff owned the heater and the heater was located in the plaintiff's building, the court ruled that res ipsa loquitur applied, since the defendant had exclusive control of the heater by virtue of Justice Blume's qualification in *Stanolind*.[51] The court held that since the plaintiff had shown that no one had tampered with the heater or interfered with its operation since the defendant had repaired it, for the purpose of applying res ipsa loquitur, the defendant controlled it.[52]

The Wyoming Supreme Court has stressed the limited applicability of res ipsa loquitur[53] and has also stated that res ipsa loquitur cannot be properly invoked if the circumstances surrounding the injury do not suggest that the defendant's knowledge about the true cause of the accident is superior.[54] The court has hinted that an offer of specific proof by the plaintiff may not negate the applicability of res ipsa loquitur, but that at some point, where the plaintiff has made out a prima facie case with the offered specific proof, application of res ipsa loquitur is no longer either necessary or proper.[55]

Generally, courts in Wyoming and other jurisdictions continue to apply the traditional three-element test to determine if res ipsa loquitur is applicable, but courts have modified the meanings of the elements. The Restatement (Second) of Torts has taken a slightly different approach to defining when res ipsa loquitur applies. The Restatement recognizes the modifications of and exceptions to the control element that most courts have made and provides:

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

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48. Rafferty v. Northwestern Util. Co., 278 P.2d 605, 612 (Wyo. 1955).
49. *Id.* at 606.
50. *Id.*
51. *Id.* at 612.
52. *Id.*
53. Wood v. Geis Trucking Co., 639 P.2d 903, 906-07 (Wyo. 1982). The court held that res ipsa loquitur did not apply when there could be a reasonable inference that "the injury or damage did not result from the negligence of the defendant, or where the object causing [the] injury was not in the exclusive control of the defendant." *Id.* The court in *Wood* seemed to require "exclusive control" even though the facts of the case would have allowed a finding of constructive control as in *Rafferty*, decided some twenty-two years earlier.
54. Hall v. Cody Gas Co., 477 P.2d 585, 586 (Wyo. 1970).
55. Langdon v. Baldwin-Lima-Hamilton Corp., 494 P.2d 537, 540 (Wyo. 1972). The court has skirted this issue several times, and although it has discussed it at some length on occasion, it has nonetheless never found it necessary to directly decide the issue. *See* Western Fire Ins. Co. v. Tim Force Tin Shop, Inc., 599 P.2d 540, 548 n.7 (Wyo. 1979); Rafferty v. Northwestern Util. Co., 278 P.2d 605, 608-10, 12 (Wyo. 1955).

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.[56]

The Restatement has no "control" element per se, but if the defendant had exclusive control at the time of the injury, the "other responsible causes" are inferentially eliminated.[57]

The doctrine of res ipsa loquitur has been more frequently visited by courts in other jurisdictions than it has been in Wyoming.[58] Courts in other jurisdictions have addressed directly the finer points of the doctrine, such as the exact procedural effect of res ipsa loquitur,[59] how direct evidence changes applicability,[60] and whether the plaintiff can have a directed verdict based solely upon a prima facie case made by res ipsa loquitur.[61] In Wyoming, however, the Supreme Court has yet to address many of these issues fully.

PRINCIPAL CASE

Goedert v. Newcastle Equipment Company presented the Wyoming Supreme Court with a case where the plaintiff tried to invoke res ipsa loquitur when the defendant lacked "exclusive control" of the injury-causing instrumentality at the time of the accident. Since the trial court had directed a verdict for the defendant, the Wyoming Supreme Court first stated its standard of review for directed verdicts.[62] If the evidence would inescapably lead reasonable men to conclude

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56. RESTATEMENT (SECOND) OF TORTS § 328D (1966).

57. RESTATEMENT (SECOND) OF TORTS § 328D cmt. g (1966).

58. The volume of case law relating to res ipsa loquitur in other jurisdictions has not necessarily clarified the doctrine. Justice Raper has stated, "[w]e are fortunate, for our jurisprudence in this area consists of a series of soundly reasoned cases rather than the cacophonous mass of decisions that make up the general body of law in this area." *Western Fire Ins. Co.*, 599 P.2d at 545.

59. *E.g.*, Sweeney v. Erving, 228 U.S. 233 (1913) (holding res ipsa loquitur does not shift the burden of proof); Johnson v. Coca Cola Bottling Co., 125 So. 2d 537 (Miss. 1960) (holding res ipsa loquitur does shift the burden of proof).

60. *E.g.*, Schneider v. United States, 188 F. Supp. 911 (E.D.N.Y. 1960) (holding that pleading specific acts of negligence does not preclude application of res ipsa loquitur); Weston v. Gold & Co., 94 N.W.2d 380 (Neb. 1959) (holding that a petition alleging specific acts of negligence precludes application of res ipsa loquitur).

61. *E.g.*, Richard Equip. Corp. v. Manhattan Indus. Contracting Co., 191 N.Y.S.2d 587 (1959) (granting a motion for summary judgment to a plaintiff who relied on res ipsa loquitur).

62. Goedert v. Newcastle Equip. Co., 802 P.2d 157, 158 (Wyo. 1990). The court applies the same standard as the trial court, giving no deference to the trial court's decision. The evidence favoring the non-moving party is considered, and all reasonable inferences are drawn therefrom. The evidence is not weighed, nor is the credibility of the witnesses considered. *Id.*

that the verdict must be against the non-moving party, then the directed verdict would stand.[63]

From the number of issues Goedert presented to the court on appeal, the court chose to focus on the propriety of the trial court's refusal to allow the use of res ipsa loquitur.[64] If Goedert had improperly been denied the benefit of res ipsa loquitur, then the directed verdict was erroneous. If res ipsa loquitur applied, a question of fact existed, since the doctrine permits the trier of fact to infer the defendant's negligence from circumstantial evidence.[65] The jury must determine whether to infer negligence, and if so, how much weight to give the inference.

After recapping the early development of res ipsa loquitur, the court noted that the discussion in the first edition of Wigmore's treatise on evidence became one of the bases for the doctrine of res ipsa loquitur in Wyoming.[66] In the original context of Wigmore's discussion, the defendant owned or managed a normally harmless, powerful machine which was capable of producing serious injuries if improperly managed.[67] In this context, the justice in shifting the burden of proof was that the defendant was presumed to have access to the evidence concerning the management and operation of the machine, while the plaintiff did not.[68] The court found this assumption to be logical.[69]

The court pointed to Justice Blume's dissent in *Stanolind*, noting that Justice Blume felt control was more important as an indication of who was in the best position to explain the accident, as opposed to being a strict prerequisite to the application of res ipsa loquitur.[70] According to the court, the United States Supreme Court later interpreted Justice Van Devanter's "exclusive control" language simi-

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63. *Id.*

64. *Id.* Two of the issues presented by Goedert concerned the trial court's refusal to allow the introduction of expert testimony about the cause of the brake failure. Appellant's Brief, *supra* note 1, at 5. Res ipsa loquitur might have been inapplicable if Goedert's expert were able to establish the cause of the brake failure. Therefore, it seems the court should have determined if the offers of proof by Goedert's expert were improperly excluded by the trial judge. If the court found the expert testimony was improperly excluded, but for some reason decided not to remand the case on that basis alone, the court would then have had to determine what effect offers of proof have on the applicability of the doctrine of res ipsa loquitur. *See supra* note 55. While the court may have concluded the trial court was correct in disallowing the testimony, which therefore had no bearing on the res ipsa loquitur question, the court claimed not to have even considered Goedert's other issues. *Goedert*, 802 P.2d at 158.

65. *Goedert*, 802 P.2d at 158.

66. *Id.* at 159. Wigmore understood the doctrine to give rise to a presumption of negligence on the defendant's part. The court pointed out that in Wyoming the rule raises only a permissible inference. *Id.* at 159 n.1. If res ipsa loquitur gave rise to a presumption of negligence, then the defendant would be required to present evidence to rebut the presumption.

67. *Id.* at 159.

68. *Id.*

69. *Id.*

70. *Id.*

larly.[71] The court stated that in *Rafferty*, it adopted the qualified meaning of exclusive control as expressed by Justice Blume and approved by Wigmore.[72] In *Rafferty*, exclusive control did not refer to actual physical control at the time of the injury, but instead its qualified nature was based on superior knowledge.[73] The court had previously stated that "if the circumstances do not show or suggest that defendant should have superior knowledge, or if the plaintiff himself possesses equal or superior means of explaining the occurrence, the rule may not properly be invoked."[74] Therefore, the court concluded that conversely, res ipsa loquitur is proper if the defendant has superior knowledge.[75]

The court found the circumstances in *Goedert* to be similar to those in *Rafferty*.[76] In both cases, the defendants worked on the plaintiffs' machines, which appeared to work normally at first, but later malfunctioned and injured the plaintiffs.[77] In both cases, the defendants were in superior positions to explain what was done at the time the repairs were made.[78] In neither case was there evidence of any interference with the operations of the machines between the times of repair and failure.[79]

The court was not persuaded by Newcastle Equipment Company's argument that the successful application of the truck's brakes during the thirteen hours that passed between the repairs and the accident precluded any inference that the brakes were negligently repaired.[80] Recognizing that the potential for intervening factors increases as the time between repair and injury lengthens, the court was nonetheless unwilling to hold that in this case, the inference of a causal relationship was precluded.[81] The brakes did fail, the court noted, the first time the plaintiff attempted to descend a grade with the loaded truck.[82]

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71. *Id.* at 160 (citing Jesionowski v. Boston & M.R.R., 329 U.S. 452, 456-57 (1947)). Jesionowski was a brakeman employed by the defendant's railroad and was killed in a derailment. *Jesionowski*, 329 U.S. at 453. There were several possible causes of the derailment, including improper switching and signaling, over which Jesionowski had some control. *Id.* at 456. The Supreme Court stated that to hold that "*res ipsa loquitur* cannot be applied even though those non-exclusively controlled factors are clearly shown to have had no causal connection with the accident . . . unduly narrows the doctrine." *Id.* at 457.

72. *Goedert*, 802 P.2d at 160.

73. *Id.*

74. *Id.* (quoting Hall v. Cody Gas Co., 477 P.2d 586, 586 (Wyo. 1970)).

75. *Goedert*, 802 P.2d at 160.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* The truck was not driven for the entire thirteen hour period. Goedert claimed he was helping load the firewood onto the trailer for ten or eleven of the thirteen hours. Appellee's Brief, *supra* note 4, at 7.

81. *Goedert*, 802 P.2d at 160-61.

82. *Id.* at 160.

The court found that res ipsa loquitur applied to Goedert's case.[83] The inference that the defendant was negligent could be drawn from the fact that the brakes failed shortly after repair.[84] This inference, favorable to the plaintiff, precluded a directed verdict for the defendant. The case was reversed and remanded.[85]

Justice Thomas dissented. He saw the majority's ruling as permitting the jury to presume negligence from the occurrence of the accident and invoke conjecture as the basis for liability.[86] According to Justice Thomas, this contravened a well established principle of Wyoming law.[87] Justice Thomas also faulted the majority's reliance on *Rafferty*.[88] The operative facts of *Rafferty*, wherein the machine was placed in automatic operation within the plaintiff's building, clearly limited the scope of the decision.[89] The plaintiffs in *Rafferty* and *Goedert* were not similarly involved in the operation of the machines. As Justice Thomas interpreted Justice Blume's dissent in *Stanolind*, Justice Blume would have used a theory of strict liability to justify the jury's reliance on res ipsa loquitur.[90] Justice Thomas felt that while that approach may have been visionary, it was neither the law, nor did it fit the facts in *Goedert*.[91] Restating Wigmore's limitations, Justice Thomas noted that until the majority's decision in *Goedert*, the control element had been maintained in the law of Wyoming.[92]

Justice Thomas argued that the majority's reliance on the supe-

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83. *Id.* at 161.
84. *Id.*
85. *Id.*
86. *Goedert*, 802 P.2d at 161 (Thomas, J., dissenting).
87. *Id.* (citing DeWald v. State, 719 P.2d 643 (Wyo. 1986); Mellor v. Ten Sleep Cattle Co., 550 P.2d 500 (Wyo. 1976); Apperson v. Kay, 546 P.2d 995 (Wyo. 1976); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976); Elite Cleaners & Tailors, Inc. v. Gentry, 510 P.2d 784 (Wyo. 1973)). These cases all support the proposition that "[n]egligence cannot be presumed from the mere happening of [an] accident." *Mellor*, 550 P.2d at 504.
88. *Goedert*, 802 P.2d at 161 (Thomas, J., dissenting).
89. *Id.*
90. *Id.* It would seem that Justice Blume's dissent in *Stanolind* is subject to wildly varying interpretations. The majority in *Goedert* read Justice Blume's opinion as supportive of its theory that control was more important as an indication of which party posses superior knowledge, as opposed to being a prerequisite to application of res ipsa loquitur. *Goedert*, 802 P.2d at 160. The court in *Rafferty* used Blume's *Stanolind* dissent, without elaboration, to find constructive control, "by virtue of the qualifiaction [sic] of the control requirement as heretofore expressed by [Justice Blume.]" Rafferty v. Northwestern Util. Co., 278 P.2d 605, 612 (Wyo. 1955). Justice Thomas found Justice Blume's opinion to use a visionary theory of strict liability to justify the jury's reliance on res ipsa loquitur. *Goedert*, 802 P.2d at 161 (Thomas, J., dissenting). While exactly what Justice Thomas meant is not immediately clear from either his opinion or Justice Blume's, Justice Thomas seemed to suggest that Justice Blume had confused or combined negligence and strict liability theories. For a critical analysis of another court's attempt to clarify some of these same issues, see, Note, *Exclusive Control Under Strict Liability and Res Ipsa Loquitur*, 11 WM. MITCHELL L. REV. 599 (1985).
91. *Goedert*, 802 P.2d at 161 (Thomas, J., dissenting).
92. *Id.* at 161-62.

rior knowledge justification for shifting the duty of producing evidence had no bearing on a situation like that in *Goedert*, where the plaintiff was operating a machine not owned by the defendant.[93] Justice Thomas felt the plaintiff should bear the burden of establishing his claim, and the control requirement should not be overlooked simply to shift the burden to the defendant.[94] Justice Thomas also argued that Goedert had equal if not superior access to evidence about the cause of the accident.[95] Justice Thomas would have affirmed the district court's directed verdict.[96]

ANALYSIS

In *Goedert*, the Wyoming Supreme Court reached a result oriented decision to avoid leaving the plaintiff without a remedy. Through misinterpretation of precedent, unsound inference and an imperfect analogy, the court concluded that the inference of the defendant's negligence was warranted. While the result may have been less harsh to the plaintiff, the resultant rule is too broadly applicable and allows a jury to infer a defendant's negligence when such an inference is not justifiable.

Prior to the court's decision in *Goedert*, it was prerequisite to the application of res ipsa loquitur that the plaintiff demonstrate that the injury he suffered would not have occurred in the absence of negligence.[97] The plaintiff was also required to show that the negligence that occasioned the injury was the defendant's and not his own.[98] While the circumstances surrounding the accident may "speak for themselves,"[99] all the circumstances say is that someone was negligent.[100] More evidence is usually required to point the finger of blame

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93. *Id.* at 162. It is unclear from the majority's opinion exactly why the defendant is presumed to have had superior knowledge about the accident.

94. *Id.*

95. *Id.*

96. *Id.*

97. Wood v. Geis Trucking Co., 639 P.2d 903, 906 (Wyo. 1982).

98. It was argued that with the adoption of the comparative negligence statute in Wyoming, the plaintiff in a res ipsa loquitur case need not demonstrate a complete absence of contributory negligence to avail himself of the doctrine. Glen E. Smith, Comment, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 597, 625-26 (1973). Nonetheless, the Wyoming Supreme Court continued to hold that the doctrine of res ipsa loquitur applied to situations where the damage occurred "without fault of the plaintiff" even after the adoption of comparative negligence. *Wood*, 639 P.2d at 906.

99. There is some disagreement about whether it is the circumstances surrounding the accident, the accident itself or the instrumentality that "speaks for itself." SPEISER, *supra* note 33, § 1:3, at 10.

100. Common human experience is usually the basis for determining if in fact the injury would not have occurred absent someone's negligence. In medical malpractice lawsuits, attempts are often made to invoke res ipsa loquitur despite the fact that common experiences and knowledge are sometimes an insufficient basis to determine if the injury would have occurred in the absence of negligence. For an analysis of res ipsa loquitur in Wyoming as it relates to medical malpractice, *see* Richard R. Wilking, Note, *Res Ipsa Loquitur in Medical Malpractice Actions in Wyoming*, 12 LAND &

at the defendant.[101]

If the plaintiff was not negligent, and the defendant was literally in the exclusive control of the injuring instrumentality, then with logical certainty, the defendant is the only one who could have been negligent.[102] The element of exclusive control is intended to exclude the possibility of causes other than the defendant's negligence.[103] According to one commentator, most courts have recognized that a strict interpretation of the requirement of exclusive control is not always just, and therefore, courts do not strictly apply the requirement.[104]

Often, although the defendant technically lacks exclusive control at the precise instant of the injury, it is still almost certain that the defendant was negligent. This is especially true if the cause of injury is that the defendant has lost control of the injuring instrumentality.[105] The control element thus requires that the defendant had the right to the exclusive control of the injuring instrumentality, or the non-delegable duty to exercise such control.[106] Such a modification in meaning does not corrupt the purpose of the control element.

The Wyoming Supreme Court has recognized that mechanical application of the exclusive control element is sometimes unjustifiable.[107] The court has allowed res ipsa loquitur to be applied when the plaintiff has shown the defendant to have had "constructive control."[108] In *Goedert*, the defendant certainly did not literally have exclusive control.[109] Rather, the plaintiff was in exclusive control of both the truck and the truck's brakes for a reasonably long period after the defendant made the repairs.[110] For res ipsa loquitur to be applicable in the *Goedert* case, some meaning, other than the obvious, must be found in the control element.

The court found that the control element was satisfied if the defendant had "superior knowledge" about the cause of the accident. The court reasoned that, from Justice Blume's *Stanolind* dissent, it was possible to *equate* control with superior knowledge. The court stated that Justice Blume "argued that the 'control' element was more important as a means of determining who was in the best position to

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WATER L. REV. 757 (1977).

101. 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS, § 19.7, at 45 (2d ed. 1986).

102. *Id.*

103. RESTATEMENT (SECOND) OF TORTS § 328D cmt. g (1966).

104. HARPER, *supra* note 101, § 19.7, at 45.

105. For example, even in the classic res ipsa loquitur case of Byrne v. Boadle, 59 Eng. Rep. 299 (1863), the barrel of flour was in fact under the control of no one at the time of the injury.

106. HARPER, *supra* note 101, § 19.7, at 47.

107. *E.g.*, Rafferty v. Northwestern Util. Co., 278 P.2d 605 (Wyo. 1955).

108. *Id.* The Wyoming Supreme Court generally does not use the phrase "constructive control," but commentators describe the qualified nature of control that the court has recognized as "constructive." *E.g.*, SPEISER, *supra* note 33, § 2:13, at 61-62.

109. Goedert v. Newcastle Equip. Co., 802 P.2d 157, 157 (Wyo. 1990).

110. *Id.* at 160.

explain the accident rather than as a strict prerequisite for the application of res ipsa loquitur."[111]

This would seem to be a questionable characterization of Justice Blume's opinion. Justice Blume did not advocate disregarding exclusive control as a prerequisite to the application of res ipsa loquitur. He did argue that the defendant in *Stanolind* still had control of the injury-causing instrumentality, even though the plaintiff was operating it at the time of the accident.[112] Justice Blume's argument was based on Wigmore's language[113] that, the "user must have been at the time of the injury in the control of the party charged."[114] Justice Blume argued that the defendant had undertaken to supply hot water with a gas water heater and was therefore the "user" of the water heater.[115] As Justice Blume interpreted Wigmore's requirement, the fact that the plaintiff operated the heater did not deprive the defendant of exclusive control.[116] Justice Blume's only reference to superior knowledge was his statement that when a person uses an apparatus as intended, it "in no way shows that he is in [a] better position than, or in as good a position as, the owners of the apparatus to explain the accident."[117]

Inherent in Justice Blume's statement is the belief that the defendant's superior knowledge about the true cause of the accident is a justification for the entire doctrine of res ipsa loquitur. The fact that the defendant likely has access to information and evidence has been seen by some commentators as the underlying rationale which justifies allowing the inference of negligence and the possible imposition of liability on a defendant when the plaintiff cannot prove his case with direct evidence.[118]

Usually, permitting an inference of negligence would be unjust. It is less so if the defendant was in the exclusive control of the injuring instrumentality and by that fact does presumably have superior knowledge about its management. The presumption of the defendant's superior knowledge becomes weaker as the exclusivity of the de-

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111. *Id.* The majority cited Stanolind Oil & Gas Co., 62 P.2d 1297, 1309 (Wyo. 1937) (Blume, J., concurring and dissenting in part), to support this statement, but probably meant to cite page 1310. *See infra* note 117 and accompanying text.

112. *Stanolind*, 62 P.2d at 1309 (Blume, J., concurring and dissenting in part).

113. Justice Blume was interpreting language from 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2509, at 3557 (1st ed. 1905).

114. *Stanolind*, 62 P.2d at 1309 (Blume, J., concurring and dissenting in part).

115. *Id.*

116. *Id.*

117. *Id.* at 1310.

118. SPEISER, *supra* note 33, § 2:26, at 83-84; 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2509, at 507 (Chadbourn rev. 1981); HARPER, *supra* note 101, § 19.9, at 62. Harper acknowledges the "notion" that the defendant's superior access to the facts is an underlying foundation to the res ipsa loquitur doctrine, but he argues that it should not be a "hard and fast" prerequisite to the application of res ipsa loquitur. *Id.*

fendant's control is diminished.[119] The defendant in *Goedert* did not own the truck and exercised no control over the truck's brakes after the truck left his shop. Therefore, the presumption that he had superior knowledge seems weak at best.

Some characterize the defendant's superior knowledge as being a separate element to the prima facie case made by res ipsa loquitur.[120] Indeed, the Wyoming Supreme Court has found res ipsa loquitur inapplicable to situations where the defendant did not possess superior knowledge about the accident, even though the defendant had control.[121] Control and superior knowledge were distinct elements.

The court in *Goedert* uses the fact that the absence of the defendant's superior knowledge could operate to exclude application of res ipsa loquitur and verbal sleight of hand to make its application of the doctrine in *Goedert* seem more reasonable. The court quoted Justice McIntyre's statement in *Hall v. Cody Gas Company* that, "if the circumstances do not show or suggest that defendant should have superior knowledge, or if the plaintiff himself possesses equal or superior means of explaining the occurrence, the rule may not properly be invoked."[122] "Conversely," the court concludes, "res ipsa loquitur may properly be invoked when circumstances do show or suggest that defendant has superior knowledge or means of explaining the occurrence."[123] This conclusion is the converse of the statement in *Hall* in the loose sense that it is roughly the opposite. Such a conclusion disregards the fact that in *Hall*, the plaintiff would also have been required to show the other traditional elements of res ipsa loquitur. In fact, the court's conclusion is logically invalid.[124] The true converse of the quotation from *Hall* is, "If res ipsa loquitur may be properly invoked, then the defendant should have superior knowledge or means of explaining the occurrence." This does not seem to help justify the court's apparent elimination of the control element in *Goedert*.

Although the Wyoming Supreme Court does not state that it was

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119. The defendant in *Goedert* heard nothing from the plaintiff until the complaint was filed nearly three years later. Appellee's Brief, *supra* note 4, at 6-7. Under these circumstances it seems unlikely that Newcastle Equipment Company would have better access to evidence, or superior knowledge about the true cause of the accident.

120. SPEISER, *supra* note 33, § 2:27, at 85-86. Harper is critical of the superior knowledge requirement and suggests that the case law indicates courts do not adhere to the requirement even when they claim to. HARPER, *supra* note 101, § 19:9, at 60.

121. *See* Hall v. Cody Gas Co., 477 P.2d 585 (Wyo. 1970).

122. *Goedert*, 802 P.2d at 160 (quoting *Hall*, 477 P.2d at 586).

123. *Goedert*, 802 P.2d at 160.

124. The fallacy of the court's reasoning may be more easily seen by considering an argument that is identical in form to the one the court made. For example: "If Bob is not sober, then Bob should not drive a car." This is true even if Bob is seven years old or, for that matter, if Bob is a dog. The court's "converse" statement would be structurally identical to, "If Bob is sober, then Bob should drive a car." This is clearly not true if Bob is seven years old or if he is a dog. On the other hand, the actual converse would be, "If Bob should drive a car, then Bob is sober." The actual converse of the quote from *Hall* is given in the body of the text above.

doing so, the court may actually have been trying to apply a Restatement approach. Under the Restatement, the plaintiff could invoke res ipsa loquitur if the evidence substantially eliminated the other responsible causes except for the defendant's negligence. In *Goedert*, nothing indicates that the plaintiff produced evidence to eliminate sufficiently either his conduct or conduct of some third party as the cause of his injury. It is unlikely that a plaintiff in active control of the injuring apparatus could sufficiently eliminate his conduct as a cause of his own injury.[125] It is a well-settled rule in most jurisdictions that a plaintiff in control of the injuring instrumentality cannot have the benefit of res ipsa loquitur.[126]

A permissible inference of negligence may be reasonable if all other possible causes of the accident between the time of Newcastle Equipment Company's control and Goedert's injury can be eliminated.[127] If no one else exercised control of the brakes in the time between the repairs and injury, an inference of negligence on the repairman's part may again be warranted.[128] This was the case in *Rafferty*, where the court found the defendant to have constructive control at the time of the injury.

The court in *Goedert* relied heavily on *Rafferty*'s similarity to *Goedert* to justify the application of res ipsa loquitur in the latter.[129] However, as Justice Thomas pointed out, there is a glaring dissimilarity in the facts of the two cases.[130] In *Rafferty*, the repairman was the last person to touch the heater before it exploded. While the plaintiff potentially controlled the heater, he never exercised that control. In *Goedert*, the plaintiff not only potentially controlled the truck's brakes, but exercised the control actively for a reasonably long period after repairs were effected.

The court in *Goedert*, in making the *Rafferty/Goedert* comparison, stated that in neither case was there evidence of tampering or interference with the operation of the machines.[131] This is true, but it is of little significance in furthering the inference that the defendant was negligent. When plaintiffs have presented their evidence, a failure to demonstrate their own tampering or interference with the machine is meaningless. A plaintiff should be required to produce evidence that demonstrates he did not interfere or tamper with the machine.[132] If this is done, the inference that the defendant was negligent is reasonable. In *Rafferty*, the plaintiff affirmatively and with uncontra-

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125. SPEISER, *supra* note 33, § 2:19, at 68.
126. *Id.*
127. This is the approach taken by the Restatement (Second) of Torts § 328D(1)(b). RESTATEMENT (SECOND) OF TORTS § 328D (1966).
128. SPEISER, *supra* note 33, § 2:13, at 62.
129. *Goedert*, 802 P.2d at 160.
130. *Id.* at 161 (Thomas, J., dissenting).
131. *Id.* at 160 (majority).
132. SPEISER, *supra* note 33, § 2:12, at 57.

dicted evidence demonstrated that no one else touched the heater after the defendant made repairs.[133] Such was not the case in *Goedert*, and therefore it seems there was no basis for an inference that the defendant was negligent.

CONCLUSION

The Wyoming Supreme Court greatly reduced the difficulty of establishing a prima facie case with res ipsa loquitur. Satisfying the element of the defendant's control has been made unnecessary. Relaxing the requirements for making a prima facie case by res ipsa loquitur is usually dangerous since, lessening what the plaintiff must show, weakens the inference that the defendant was negligent. It also more frequently forces the defendant to bear the burden of proving his nonnegligence.[134]

In *Goedert*, the court has blurred what was before a clearly defined rule of law in Wyoming. The court does not give a clear exposition of the res ipsa loquitur rule as it now stands. In the aftermath of the *Goedert* decision, it would seem res ipsa loquitur can be invoked by showing that the injury would not normally have occurred absent negligence and little else. The plaintiff does not need to establish control or even constructive control, but only that the defendant had superior knowledge about the unspecified negligent act of which he is accused. The court does not explain how the plaintiff in *Goedert* showed that the defendant had superior knowledge. In fact, the court failed to explain exactly what "superior knowledge" means. Whatever it means, the court seems to have presumed that the defendant had it. The plaintiff can also apparently demonstrate his injury was not caused by his own actions, or those of a third party, by not introducing evidence to the contrary. In almost any case where there is even a suspicion that the defendant may have committed some negligent act which injured the plaintiff, res ipsa loquitur would seem to be available to the plaintiff. In Wyoming, the doctrine is no longer one of necessity, but instead seems it is one of broad applicability. In the American judicial context, such an expansive doctrine is unwarranted, unfair to defendants, and there is an undeniably real potential for abuse.

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133. Rafferty v. Northwestern Util. Co., 278 P.2d 605, 613 (Wyo. 1955).

134. The defendant is perfectly able to just let the case go to the jury after the plaintiff successfully utilizes res ipsa loquitur, since only a permissible inference of negligence is raised. The jury is not required to conclude the defendant was negligent, but as a practical matter, they almost always do and the defendant is foolish not to put on a defense, if intending to let the jury decide the case. HARPER, *supra* note 101, § 19.11, at 69-70, 74.