

Summer 1984

Bench Memorandum Second Annual Benton National Moot Court Competition Briefs, 17 J. Marshall L. Rev. 991 (1984)

George B. Trubow

Ralph Ruebner

Kenneth Michaels

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Legal Writing and Research Commons](#)

Recommended Citation

George B. Trubow, Bench Memorandum Second Annual Benton National Moot Court Competition Briefs, 17 J. Marshall L. Rev. 991 (1984)

<https://repository.law.uic.edu/lawreview/vol17/iss3/13>

This Symposium is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

WILLIAM DUFFY,
Appellant/Cross-Appellee,
—AGAINST—
LINCOLN COUNTY STATE BANK CORPORATION,
Appellee/Cross-Appellant.

BENCH MEMORANDUM

GEORGE B. TRUBOW* RALPH RUEBNER**
and KENNETH MICHAELS***

I. STATEMENT OF THE CASE

William Duffy (Duffy), a customer of Lincoln County State Bank Corporation (Lincoln), was a controlling shareholder of Baker Properties, Inc. (Baker), a publicly held corporation. All parties involved in this case were domiciled in the State of Marshall. On March 26, 1981 the *Marshall Tribune* published an article about Baker's plans to undergo a corporate reorganization. Nancy Barnes, an attorney with the State of Marshall Securities Commission, was assigned to investigate Baker's reorganization plan. In 1976 she had investigated Duffy's purchase of the controlling interest in Baker.†****

†1

Barnes sent letters to banks doing business in Lincoln County asking whether Duffy, Baker, or any other Baker shareholders maintained accounts at such banks. On April 11, 1981, having been informed by Marcia Moore, Senior Vice-President of Lincoln, that Duffy was a customer at Lincoln, Barnes asked

* Professor of Law and Director, Center for Information Technology and Privacy Law, The John Marshall Law School.

** Associate Professor of Law and Coordinator of the Benton National Moot Court Competition, The John Marshall Law School.

*** Assistant to the Director, Center for Information Technology and Privacy Law, J.D. 1983, The John Marshall Law School.

**** The Bench Memorandum, Appellant's Brief, and Appellee/Cross-Appellant's Brief are printed here as they were submitted to the Second Annual Benton National Moot Court Competition. Except for a few, obvious typographical errors, no changes have been made and no editing has been done to the briefs. The inverted T's have been used to preserve the internal pagination of the Briefs. The page numbers in the Tables of Contents and Tables of Authorities refer to the internal pagination as is indicated by the inverted T's in the margin.

Moore to send her a list of Duffy's account numbers and types of accounts maintained there. Moore directed the Lincoln data processing department to send the requested information to Barnes.

Lincoln used an electronic data system to collect and store information about its customers, including all transactions relating to any account, as well as financial and other personal information concerning its customers. Upon receipt of Moore's order, Robert Cross, a Lincoln employee, entered the following search for the requested information:

PRINT: WILLIAM DUFFY (NAME ADDRESS, ACCOUNT NUMBR, ACCT TYPE).

A computer print-out was automatically mailed to Barnes by Lincoln's computer. This print-out revealed all of Duffy's personal transactions from January 15, 1981, to April 15, 1981, rather than merely the limited information asked for in the search request. Barnes noticed a \$75,000 electronic fund transfer to Duffy's personal account from Baker's account at First State Bank of Marshall, made on January 20, 1981.

On June 6, 1981, Barnes obtained a judicial subpoena from the state court ordering Lincoln to disclose Duffy's personal bank records, including loan applications, from January 1, 1976, to date. Lincoln promptly complied with the request. Lincoln informed Duffy, on June 11, 1981, that it was cancelling Duffy's \$150,000 line of credit because of the commission's investigations into his personal finances. He had acquired the line of credit in 1980.

Without the line of credit Duffy was unable to exercise an option he held to purchase certain land in Douglas County, Marshall, by June 15, 1981. His option was to purchase the land for \$140,000. On June 16, 1981, after the option had expired, another party purchased the same land for \$220,000.¹

On June 20, 1981, at a meeting with Barnes, Duffy presented notes and corporate documents evidencing that the payment of \$75,000 to Duffy by Baker was in cancellation of a shareholder loan made by Duffy on March 17, 1979. On July 14, 1981, Barnes sent Duffy a letter informing him that the Commission's investigation was closed with a finding of no impropriety on Duffy's part. Included with the letter were the computer print-outs Barnes had received from Lincoln pursuant to her requests of April 11, 1981, and the subpoena of June 6, 1981.

Duffy brings action against Lincoln in the Marshall state court. Count I of the complaint alleges that Lincoln should be held strictly liable for injury resulting from the escape of the information, on grounds that to maintain large quantities of per-

sonal financial information in a computer is an abnormally dangerous or ultrahazardous activity. Count II, in the alternative, alleges that Lincoln negligently allowed the personal information to be disclosed, contrary to Duffy's expectation of confidentiality of the information. Duffy further alleges that under the negligence standard of liability, *res ipsa loquitur* applies since the computer which disclosed that information was in Lincoln's control and but for the failure to exercise due care the disclosure would not have been made.

Defendant Lincoln moved to dismiss Count I, arguing that collecting and maintaining information in computers is not an ultrahazardous activity since doing so is a common activity in public and private sectors; that the use of computers is necessary and valuable to society; and, that the use of a computer is necessary to effect Lincoln's purpose of lending money and monitoring its customer's financial activities. Lincoln also moved to dismiss Count II, contending that a bank has no duty under the common law to protect the confidentiality of its customer's bank records, and since there is no express agreement with Duffy no duty has been breached; therefore, *res ipsa loquitur* is inapplicable.

Duffy's response in opposition to the motion to dismiss focused on public policy¹³ to support strict liability because the Lincoln computer stores great quantities of sensitive, personal information and computers, despite the exercise of care, are prone to error in processing information. Furthermore, Duffy contended, the same policy supports a common law duty to protect this personal information from improper disclosures.

The state circuit court denied Lincoln's motion to dismiss on both counts. The court found the public policy arguments persuasive to support strict liability against the bank. Implicit in this holding was a recognition of the bank's duty to its customers to prevent personal information disclosures. Since this duty existed Lincoln's motion to dismiss the negligence count was also denied. The trial court then certified the case for immediate appeal, since a substantial ground existed for difference of opinion on questions of law and an immediate appeal would materially advance the ultimate termination of the litigation.

Affirming in part and reversing in part, the State of Marshall Appellate Court refused to apply strict liability on the grounds that to do so would place an unreasonable burden on recordkeepers. The appellate court held, however, that Lincoln does have a duty to protect sensitive personal financial information from improper disclosure, so the negligence standard applied. Furthermore, due to the state of the art of computer

technology and the difficulty of proving breach under the circumstances, the doctrine of *res ipsa loquitur* applied.

The Supreme Court of the State of Marshall granted leave to appeal and cross-appeal to Duffy and Lincoln.

II. A BRIEF OVERVIEW OF THE COMPUTER

A computer receives, stores, manipulates, and communicates information. The central processing unit (CPU) is the heart of the computer and performs the basic arithmetic and logic functions of computing and supervises the operation of the entire system.

Information is entered into the computer by a keyboard or from magnetic tapes or disks. The computer usually displays its output on a monitor (cathode ray tube or video display terminal), but the output can also be printed on paper.

The physical parts of a computer, including the electronic elements and the various peripheral devices (input-output mechanisms), constitute the hardware. The hardware can do nothing by itself; it requires a set of programs, or instructions, called software. At the core of the software is an "operating system" that controls the computer's operations, manages the flow on information throughout the system, and interfaces between the machine and the human operator and between the machine and an "application program". An application program enables the computer to perform specific functions, e.g., collect, store, or manipulate financial information in a bank account.

For information to be processed, it must be stored, at least temporarily, in the computer's memory banks. There are two kinds of main memory: read-only memory (ROM) and random-access memory (RAM). ROM is for information that is stored permanently, such as the operating system program. ROM cannot be altered because it is installed by the manufacturer and not accessible to the user. RAM, however, accepts information, which can be entered and "read out" as often as needed. RAM is temporary memory; data can be stored in or taken from RAM at any time by the user.

Secondary memory devices, such as tapes or disks, can store information for processing by the computer, at which time the data is "read into" the RAM. When the computer has completed the designated functions, the information can be displayed on various output devices, or returned to secondary memory storage, or both.

In the case under consideration here, Lincoln's customer account information is stored in secondary information storage de-

vices. An applications program permits customer account information to be retrieved, manipulated and displayed. Here, the employee Cross entered an appropriate search command to retrieve certain designated information, but for some unexplained reason the computer retrieved and caused to be printed a complete account summary for Duffy. This printout was automatically mailed to Barnes, as Moore had directed. The error could have resulted from a problem in the application program or because of some hardware malfunction. In any event, the parties to this case are not pursuing any product liability claims at this time.

III. SHOULD A BANK BE HELD STRICTLY LIABLE FOR INJURY CAUSED BY THE UNEXPECTED RELEASE OF PERSONAL INFORMATION FROM THE BANK'S COMPUTER?

A. Historic Development of Strict Liability

The doctrine of imposing strict liability for injury resulting from abnormally dangerous conditions or activities arose from the English case of *Rylands v. Fletcher*.¹ In *Rylands* the defendants had constructed a reservoir on their land. Water in the reservoir broke through into an abandoned mine shaft below, flowed through mine passageways, and flooded a coal mine located on the plaintiff's land.

The Court of Exchequer held that the plaintiff could not recover damages for injuries suffered to his coal mine since he could not prove negligence, nor an intentional trespass.² On appeal, the Exchequer Chamber reversed, Judge Blackburn writing for a unanimous court:

We think the rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all damage which is the natural consequence of its escape.³

The House of Lords affirmed the Exchequer Chamber, and substantially agreed with Blackburn's opinion, although Lord Cairnes, writing for the majority, restricted Blackburn's opinion by distinguishing between non-natural uses of the land, e.g., a reservoir of water, and natural uses of the land, e.g., water naturally accumulated on the land.⁴ Because the defendants

1. 3 L.R. - E. & I. App. 330 (1868).

2. *Fletcher v. Rylands*, 3 H & C 774, 150 Eng. Rep. 737 (1865).

3. *Fletcher v. Rylands*, 1 L.R. - Ex. Ch. 265, 279 (1865).

4. *Rylands v. Fletcher*, 3 L.R. - E. & I. App. at 338-39.

brought upon their land and accumulated a large quantity of water they were liable for the consequences of their conduct "however skillfully and carefully the accumulation was made."

The English courts subsequently applied the *Rylands* rule to hold a railway company liable when sparks from its engine ignited a fire on adjacent land. *Janes v. Festiniog Rwy.*⁵

Soon thereafter, in *Powell v. Fall*, strict liability was applied against the owner of a traction engine when a spark from the vehicle set fire to a hayrick on a public road:

It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage it occasions; if the reward which he gains for the use of the machine will not pay for the damages, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage.⁶

During the first decade of the twentieth century the English courts curtailed the expanding application of strict liability when the doctrine was held inapplicable for owners of motor buses operating on public highways.⁷ As the novelty of the new technology of motor driven vehicles eroded, so did the application of strict liability. The English courts appear to apply the rule of *Rylands* only when there has been an *escape* of something that causes harm:

In all cases which have been decided, it has been held necessary, in order to establish liability, that there should have been some form of escape from the place in which the dangerous object has been retained by the defendant to some other place not subject to his control.

⊥⁷ *Read v. J. Lyons & Co., Ltd.*⁸ ⊥

B. Strict Liability in the United States

The American experience with strict liability has been troublesome. Shortly after *Rylands* was decided in England, courts in Massachusetts and Minnesota adopted the doctrine in

5. 3 L.R. - Q.B. 733 (1868).

6. 5 Q.B. D. 597, 601 (1880) (Bramwell L.J.).

7. *Wing v. L.G.O.C.*, 2 K.B. 652 (1909); *Parker v. L.G.O.C.*, 73 J.P. 283 (1909). See Spencer, *Motor-Cars and the Rule in Rylands v. Fletcher: A Chapter of Accidents in the History of Law and Motoring*, 42 CAMBRIDGE L.J. 65, 72-73 (1983). Spencer advances several possible reasons, including moral notions of fault and the increasing frequency of accidents involving motor driven vehicles, why English courts refused to apply strict liability to motor-car users. *Id.* at 73-79.

8. A.C. 156, 177 (1947) (Lord Porter).

cases involving water escaping onto the land of others.⁹ Soon thereafter New Hampshire, New York and New Jersey sounded an apparent death knell for the doctrine in America.¹⁰

Dean Prosser analyzes the development of strict liability in America's new industrial age:

[T]he doctrine was condemned by legal writings as an unjustifiable extension of liability to unavoidable accidents, in a field where the law of negligence, aided by the principle of *res ipsa loquitur*, would be adequate to cover the cases where recovery should be allowed.¹¹

Prosser suggests that while the new industrialization of America created high degrees of risks to others, applying strict liability against users of new industrial technology would hamper economic and industrial growth. In time these values shifted as jurists realized that users of the new technology, for the purposes of profit-making activities, should be liable as insurers of the high risks to others inherent in using the new technology.¹²

Despite its early cold reception in America, the *Rylands* rule was eventually adopted by most of the jurisdictions.¹³ Sometimes courts which initially rejected the rule later adopted it under a theory of continuous or absolute nuisance.¹⁴ By the time the first Restatement of Tort was promulgated in 1934, the focus for application of strict liability had shifted from land use to "ultrahazardous activities."¹⁵ In the second Restatement of Torts the drafters adopted an "abnormally dangerous activity" analysis.¹⁶

The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity . . . The defendant's enterprise, in

9. *Ball v. Nye*, 99 Mass. 582 (1868) (percolating filthy water spilled over into plaintiff's land polluting his well and cellar); *Cahill v. Eastman*, 18 Minn. 324 (1871) (underground water tunnel broke through washing away plaintiff's land and buildings).

10. *Brown v. Collins*, 53 N.H. 442 (1873) (runaway horses scared by railroad engine); *Losee v. Buchanan*, 51 N.Y. 476 (1873) (explosion of steam boiler); *Marshall v. Wellwood*, 38 N.J.L. 339 (1876) (explosion of steam boiler). Prosser notes that in each of these three cases where American courts rejected the *Rylands* rule, the courts did not consider Lord Cairnes demarcation between natural and non-natural land uses, yet each case involved "customary, natural uses, to which the English courts would never have applied the rule." PROSSER, HANDBOOK OF THE LAW OF TORTS § 78 (1971).

11. PROSSER, *supra* note 10, at § 78 (cites omitted).

12. *Id.*

13. *Id.*

14. *Id.*

15. RESTATEMENT OF TORTS § 519 (1938).

16. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

18 other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.¹⁷⊥

The list of factors to be considered in determining whether an activity is abnormally dangerous focuses on risk analysis and the nature of the activity in the community in which it is conducted.¹⁸

The application of strict liability is not limited to cases involving real property. Today American courts apply the rule of *Rylands* to a wide variety of cases. Strict liability has been held applicable to cases involving animals,¹⁹ ground damage from aviation,²⁰ blasting with explosives,²¹ escaping dangerous gases,²² gasoline and oil transportation and storage,²³ industrial waste,²⁴ pile driving,²⁵ and rocketry.²⁶

The first Restatement of the Law, Torts adopted the *Rylands* rule under an ultrahazardous activity analysis.

. . . [O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity . . .

Restatement of Torts § 519 (1938). An activity is ultrahazardous if it:

- (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
- (b) is not a matter of common usage.

Restatement of Torts § 520 (1938). This treatment appears to accept Lord Cairnes' limitation in terms of non-natural use "not a matter of common usage.

17. *Id.* at comment d.

18. *Id.* at § 520 (1977).

19. *McKee v. Trisler*, 311 Ill. 536, 143 N.E. 69 (1924).

20. *Porcell v. United States*, 104 F. Supp. 110 (S.D. W. Va. 1951).

21. *Spano v. Perini Corp.*, 25 N.Y. 2d 11, 250 N.E. 2d 31, 302 N.Y.S. 2d 527 (1969).

22. *McLane v. Northwest Natural Gas Co.*, 255 Ore. 324, 467 P.2d 635 (1970).

23. *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969).

24. *Dutton v. Rocky Mountain Phosphates*, 151 Mont. 54, 438 P.2d 674 (1968) (phosphate manufacturer released flourine gas into the air causing damage to crops and livestock); *Cf.*, *Nelson v. C & C Plywood Co.*, 154 Mont. 414, 465 P.2d 314 (1970) (narrowly construing *Dutton* by limiting strict liability application to the facts in *Dutton*).

25. *Corporate v. C.W. Blakeslee & Sons, Inc.*, 175 A.2d 561 (Conn. 1961); *Sachs v. Chiat*, 162 N.W. 2d 243 (Minn. 1968).

26. *Smith v. Lockheed Propulsion Co.*, 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967).

The second Restatement of Torts discusses the abnormally dangerous activity:

General Principle:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.¹

19

Restatement (Second) of Torts § 519 (1977).

Abnormally Dangerous Activities:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts 520 (1977). Here the inquiry shifts to a balancing of interests, rather than asking whether the activity in question "is a matter of common usage."

IV. WHAT IS A BANK'S LIABILITY FOR NEGLIGENCE IN RELEASING CUSTOMER FINANCIAL RECORDS?

To hold one liable for the negligent disclosure on personal information presumes a duty to act with care to maintain the confidentiality of such information. This problem specifically focuses on the degree of confidentiality, if any, afforded to personal financial information kept by a bank about its customers. In the common law jurisdiction of the State of Marshall, no constitutional or legislative provisions specifically protect a right to financial privacy.¹

110

A. What Privacy and Confidentiality Expectations Attach to Bank Records?

Regarding personal information, the terms "privacy" and

confidentiality" are often interchangeably used and confused.²⁷ Privacy is the value or interest underlying expectations of confidentiality in personal information. Privacy is an interest concerning the person; confidentiality relates to information about a person.²⁸ When personal information²⁹ is kept confidential, by one who receives it, the privacy of the transferor is protected. Whether a recordkeeper has a duty to maintain the confidentiality of information, in certain circumstances depends on whether the person to whom the information pertains has reason to expect such confidentiality.

In *United States v. Miller*,³⁰ a depositor charged with federal offenses sought to suppress production of his bank records pursuant to a subpoena *duces tecum*. The depositor challenged production of the records under the fourth amendment contending that the records were personal, kept by the banks for a limited purpose, and that he had a "reasonable expectation of privacy" in the records. The Court found that "no legitimate expectation of privacy" existed in the contents of the records:

The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.³¹

The *Miller* decision stands today for the proposition that a customer does not have federal constitutional privacy rights in his or her bank records.

In response to *Miller*, Congress enacted the Right to Financial Privacy Act of 1978 [RFPA].³²

The [RFPA] represents a compromise between the individual's interest in the confidentiality of records and

27. This confusion arises in part from difficulties in fashioning a definition of "privacy" which is not overexpansive or underinclusive. See, Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L.L. REV. 233 (1977).

28. "[I]t takes only one person to make information private, it takes two at least to make information, even originally private information, confidential." *Id.* at 282.

29. "Personal information is defined as any information that can be referred to a specific individual by name, number, or other identifying characteristics." Trubow, *The Development and Status of Information Privacy Law and Policy in the United States*, Invited Papers on Privacy: Law, Ethics, and Technology (presented at the National Symposium on Personal Privacy and Information Technology October 4-7, 1981) (available from the American Bar Association's Section of Individual Rights and Responsibilities).

30. 425 U.S. 435 (1976).

31. *Id.* at 442.

32. 12 U.S.C. §§ 3401 *et seq.* (Supp. II 1978).

the needs of federal law enforcement. The Act does establish for the individual, in accordance with the recommendation of the [Privacy Protection Study Commission], a protectable interest in records maintained by financial institutions.³³↓

↓11

The Act creates a confidentiality expectation in bank records to the extent that certain *federal* agencies seek disclosure of the records.³⁴ The Act does not prohibit disclosure of bank records; rather, it prescribes certain avenues of access which *federal* agencies must follow to obtain disclosure. It also requires that in most circumstances notice³⁵ be given to the customer prior to disclosure, and the customer is empowered to challenge disclosure of records through judicial process.

At least four states recognize privacy rights in bank records arising from state constitutions. In *Burrows v. Superior Court of San Bernardino County*,³⁶ the California Supreme Court held that "petitioner had a reasonable expectation that the bank would maintain the confidentiality of those papers which originated with him in check form and of the bank statements into which a record of those same checks had been transformed pursuant to internal bank practice."³⁷ The *Burrows* Court focused on contemporary American lifestyles to support its holding:

For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account.

In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography.³⁸

In *Charnes v. Di Giacomo*,³⁹ and *Commonwealth v. De John*,⁴⁰ the Supreme Courts of Colorado and Pennsylvania, respectively, followed *Burrows* and found that depositors enjoy confidentiality expectations in their bank records pursuant to

33. Trubow & Hudson, *The Right to Financial Privacy Act of 1978: New Protection from Federal Intrusion*, 12 J. MAR. J. PRAC. & PROC. 487, 505 (1979) (cite omitted).

34. 12 U.S.C. § 3403(a).

35. The *Miller* Court perhaps suggested that some notice of the disclosure should have been given to Miller. "Nor did the banks notify respondent, a neglect without legal consequences here, however unattractive it may be." 425 U.S. at 443 n.5.

36. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

37. *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

38. *Id.* at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

39. 612 P.2d 1117 (Colo. 1980).

40. 403 A.2d 1283 (Pa. 1979).

state constitutions. The Illinois Appellate Court, First District, recently took a similar position.⁴¹

Some states have financial privacy statutes, patterned after the RFPA, which prescribe procedures for access to customer bank records by state agencies or others. The State of Marshall does not have such a statute.

Aside from statutory protection, some jurisdictions recognize a common law prohibition of disclosure to third parties because of an expectation of confidentiality in the records. In the seminal case of *Tournier v. National Provincial and Union Bank of England*,⁴² the English Court of Appeal held that a bank had breached an implied duty of nondisclosure when it informed the depositor's employer that one of the depositor's checks was payable to a local bookmaker; the depositor was promptly fired, and he prevailed against the bank in a suit for damages.

The Maryland Court of Special Appeals, citing *Tournier*, also held a bank liable for civil damages where the bank disclosed to the local police a cash deposit of sequential bills. The plaintiff depositor was subsequently arrested for armed robbery on the basis of the bank's disclosure. *Suburban Trust Co. v. Waller*.⁴³ The fact that charges against the depositor was eventually dropped did not vitiate the bank's civil liability. The *Waller* court based its decision on an implied contractual duty not to disclose customer records information absent compulsion by law or a customer's consent.⁴⁴ A Maryland statute⁴⁵ mandated that an employee of a fiduciary institution who knowingly and willfully discloses financial records is guilty of a misdemeanor. The *Waller* court considered such legislation as an articulation of public policy buttressing its holding.⁴⁶

Other American courts have addressed this issue and held, for various reasons, that banks have a duty not to breach a customer's confidentiality expectations in his or her bank records. In *Brex v. Smith*, 146 A. 34, 36 (N.J.Eq. 1929), the court said that "[t]he information contained in the records is certainly a property right", and the bank was held to an implied obligation to protect account records from the scrutiny of the prosecutor until compelled by a court to do otherwise. In *Milohnich v. First National Bank of Miami Springs*, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969), a bank was held to have an implied legal duty not to dis-

41. *People v. Jackson*, 116 Ill. App. 3d 430, 452 N.E. 2d 85 (1983).

42. 1 K.B. 461 (1924).

43. 408 A. 2d 758 (Md. Ct. Spec. App. 1979).

44. *Id.* at 764.

45. MD. ANN. CODE art. 11, § 227(a) (1976).

46. 408 A. 2d. at 764.

close information about a depositor's accounts willfully, maliciously, negligently or intentionally to individual third parties. 113

B. Is the Doctrine of Res Ipsa Loquitur Applicable to this Case?

One noted scholar explains the doctrine of *res ipsa loquitur* thus:

[W]here it is shown that the thing or instrumentality which cause the injury complained of was under the control of management of the defendant, and that the occurrence resulting in the injury was such as in the ordinary course of things would not happen if those who had its control or management used proper care, there is sufficient evidence . . . that the injury arose from or was caused by the defendant's want of care." Spiser, *The Negligence Case: Res Ipsa Loquitur* § 1.1 (1972).

In the majority of the American courts, the operational effect of the doctrine is to raise an inference of negligence on the defendant's part. *Drewick v. Interstate Terminals, Inc.*, 42 Ill.2d 345, 247 N.E.2d 877 (1969) (steel ventilator-window sash fell from building striking plaintiff on head and shoulders); *Wilson v. Paul*, 176 N.W.2d 807 (Iowa 1970) (plumbing contractor's employee was sweating pipes using a blow torch and fire broke out between the walls from which the pipes projected); *George Foltis, Inc. v. New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941) (break of a city water main); *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954) (crop damage resulting from manufacture of insecticide); See Spiser, *supra*, at § 3:4.

In a few states the doctrine creates a presumption of negligence. *Holmes v. Birmingham Transit Co.*, 116 So.2d 912 (Ala. 1959) (*res ipsa loquitur* held not to apply, however, where plaintiff fell through open bus door while exiting the bus); *Weiss v. Axler*, 328 P.2d 88 (Colo. 1958) (loss of hair after administration of permanent wave); *Easterling v. Walton*, 156 S.E.2d 787 (Va. 1967) (physician's failure to remove a laparotomy pad from plaintiff's abdomen before closing the incision).

Whether an inference or a presumption, the Restatement of Torts suggests:

To determine whether *res ipsa loquitur* applies the courts will ask whether:

- a. the event is of the 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.

⊥15 Restatement (Second) of Torts § 328 D (1977).⊥