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DIRECTED VERDICT IN MARYLAND: LESS OBVIOUS APPLICATIONS OF A SIMPLE RULE

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This Article examines the implications of Maryland Rule 552 with respect to directed verdicts in Maryland. The author collects and discusses the significant cases establishing the criteria for the granting of a directed verdict.

I. INTRODUCTION

If the right to trial by jury in civil cases in Maryland[1] provides a desirable dose of common sense to the arcane machinations of a lawsuit, the Maryland appellate courts' construction of Rule 552 of the Maryland Rules of Procedure,[2] which sets out the procedure for a directed verdict, has generally provided a beneficial limitation on the opportunities for jury abuse.[3] This rule permits a trial judge, in

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1. MD. CONST. art. XV, § 6 provides that the "right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved."
2. Maryland Rule 552 provides in part:
   a. *Motion for — Grounds to Be Stated.*
      In an action tried by a jury any party may move, at the close of the evidence offered by an opponent or at the close of all the evidence, for a directed verdict in his favor on any or all of the issues. Such motion shall state the grounds therefor. An objection on behalf of the adverse party to such motion shall be entered as of course.
   b. *Offer of Evidence After Denial — Effect.*
      A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so, and to the same extent as if the motion had not been made, and in so doing he withdraws the motion.
   c. *Reservation of Decision by Court.*
      Instead of granting or denying the motion for a directed verdict, the court may submit the case to the jury and reserve its decision on the motion until after the verdict or discharge of the jury, but for the purpose of appeal such reservation constitutes a denial of the motion, unless judgment is rendered for the moving party pursuant to Rule 563 (Judgment N.O.V.).

   This article discusses specifically Rule 552, but the same general principles will apply to a motion to dismiss under Rule 535 in non-jury trials in both equity and common law cases. *See* Md. Rule 552 (annotations collecting cases).
3. 3 POE'S PLEADING AND PRACTICE § 294, at 528 (6th ed. H. Sachs 1970).

appropriate instances, to decide an entire civil case, or a particular issue thereof,[4] as a matter of law without submitting it to the jury.[5] The ostensible rationale for this action is that there does not have to be deliberation by a jury on an issue when the evidence adduced indicates that the issue involves no true fact question.[6] Stated otherwise, if in the opinion of the trial judge only one set of facts may reasonably be found, then the jury is not permitted to find another.

The Court of Appeals of Maryland and the Court of Special Appeals of Maryland have indicated in their many constructions of Rule 552 that the directed verdict is a device to be utilized with great caution.[7] Ordinarily, the burden of a party seeking a directed verdict is heavy, as for instance, when a defendant moves for a directed verdict at the close of the plaintiff's case. In reviewing a motion for directed verdict the trial court must assume the truth of all credible evidence tending to support the party against whom the verdict is sought as well as all inferences of fact reasonably and fairly deducible therefrom.[8]

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4. A trial judge may decide to submit a plaintiff's case to the jury on fewer theories of liability than requested by the plaintiff. *See* Maszczenski v. Myers, 212 Md. 346, 354, 129 A.2d 109, 113 (1957). Such would amount to a partial directed verdict for the defendant on the issues not submitted. A trial court judge might also decide not to submit the issue of contributory negligence to the jury. Brown v. Ellis, 236 Md. 487, 491, 204 A.2d 526, 527 (1964). This would amount to a directed verdict for the plaintiff on that issue.
5. A trial judge, of course may deny the motion, submit the case or issue to the jury and then grant the subsequent motion for judgment n.o.v. *See* Md. Rule 563. Alternatively, the trial judge may reverse on the motion for directed verdict, submit the case to the jury and treat its reservation on the motion for directed verdict as a motion for judgment n.o.v. Md. Rule 563(a)(2). The granting of a judgment n.o.v. is in essence the granting of a directed verdict nunc pro tunc because the standard for viewing the evidence with respect to such a motion is the same as that with respect to a directed verdict. Miller v. Michalek, 13 Md. App. 16, 17, 281 A.2d 117, 118 (1971).

   This motion is not appropriate in nonjury cases as the rule itself states its applicability in cases tried by a jury. See note 2 *supra*. *See also* Smith v. State Roads Commission, 240 Md. 525, 539, 214 A.2d 792, 799 (1965). The equivalent in Maryland in nonjury cases, *i.e.*, a rule giving a party an opportunity to test the sufficiency of the opposing partys' evidence before it is weighed by the trier of fact, is Rule 535 which states that "any party . . . may move at the close of evidence offered by an opponent for a dismissal on the ground that upon the facts and the law he has shown no right to relief." Md. Rule 535. Unlike the motion for directed verdict, the motion to dismiss under Rule 535 may not be made at the close of all the evidence, because at that point in a nonjury case, all of the evidence is before the trier of fact, 240 Md. at 539–40, 214 A.2d at 799–800. The standard in considering a motion under Rule 535 is the same as for a motion under Rule 552. J. Whitson Rogers, Inc. v. Board, 285 Md. 653, 402 A.2d 608 (1979).
6. 3 Poe's Pleading and Practice § 293, at 528 (6th ed. H. Sachs 1970).
7. Jacobson v. Julian, 246 Md. 549, 229 A.2d 108 (1967); Miller v. Michalek, 13 Md. App. 16, 281 A.2d 117 (1971).
8. Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc., 283 Md. 296, 328, 389 A.2d 887, 905–06 (1978); Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co., 282 Md. 7, 11, 382 A.2d 867, 870 (1978); Levine v. Renler, 272 Md. 1, 12, 320 A.2d 258, 264–65 (1974); Durante v. Braun, 263 Md. 685, 689, 284 A.2d

After the trial court has thus viewed the evidence, it must deny the motion "unless, in viewing the evidence and all inferences which may reasonably be drawn therefrom, in a light most favorable to the plaintiff, there is no legally sufficient evidence for the jury to consider."[9] A directed verdict, in other words, should not be granted unless the evidence will permit only one inference of fact sustaining the position of the movant.[10]

With the above formulations in mind, the court of appeals has stated, somewhat grandiloquently:

> Maryland has gone almost as far as any jurisdiction we know of in holding that meager evidence of negligence is sufficient to carry the case to the jury. The rule has been stated as requiring submission if there be any evidence, however slight, *legally sufficient* as tending to prove negligence, and the weight and value of such evidence will be left to the jury.[11]

Implicit in this statement is the notion that mere presentation of *any* evidence in support of the position of the party opposing the motion is not *per se* sufficient to avoid a directed verdict.[12] The evidence

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241, 243 (1971); Yommer v. McKenzie, 255 Md. 220, 228, 257 A.2d 138, 142 (1969); Home Ins. Co. v. Metropolitan Fuels Co., 252 Md. 407, 411, 250 A.2d 535, 537–38 (1969); Trionfo v. Hellman, 250 Md. 12, 15, 241 A.2d 554, 556 (1968); Smack v. Whitt, 249 Md. 532, 536, 240 A.2d 612, 615 (1968); City of Baltimore v. Seidel, 44 Md. App. 465, 466, 409 A.2d 747, 748 (1980); Bullis School v. Justus, 37 Md. App. 423, 425, 377 A.2d 876, 878 (1977); Gleason v. Jack Alan Enterprises, Inc., 36 Md. App. 562, 565, 374 A.2d 408, 410 (1977); Lumber Terminals, Inc. v. Nowakowski, 36 Md. App. 82, 84, 373 A.2d 282, 284 (1977); Keene v. Arlan's Dep't Store, 35 Md. App. 250, 253, 370 A.2d 124, 126–27 (1977).

9. Home Ins. Co. v. Metropolitan Fuels Co., 252 Md. 407, 411, 250 A.2d 535, 537–38 (1969).
10. Smack v. Jackson, 238 Md. 35, 37, 207 A.2d 511, 512 (1965); Baltimore Transit Co. v. State *ex rel.* Castranda, 194 Md. 421, 434, 71 A.2d 442, 447 (1950); Garozynski v. Daniel, 190 Md. 1, 4, 57 A.2d 339, 341 (1948); Gleason v. Jack Alan Enterprises, Inc., 36 Md. App. 562, 565, 374 A.2d 408, 410 (1977).
11. Fowler v. Smith, 240 Md. 240, 246, 213 A.2d 549, 554 (1965) (emphasis in original). One jurisdiction which goes further than Maryland in submitting issues to the jury on slight evidence is Alabama. The courts of that state cling to the so-called "scintilla" rule. That rule was recently stated as follows: "[I]ssues in civil cases must go to the jury if the evidence, or reasonable inference therefrom, furnishes a mere glimmer, spark or smallest trace in support of an issue." Elba Wood Prods., Inc. v. Brackin, 356 So. 2d 119, 123 (Ala. 1978). Sometimes, determining how many gossamers constitute "legally sufficient" evidence rather than a scintilla, can be a difficult task. *See* Undeck v. Consumers Discount Supermarket, 29 Md. App. 444, 453, 349 A.2d 635, 640 (1975).
12. The line between what is legally sufficient and insufficient to make out a prima facie case can be nakedly quantitative, as in cases involving invasion of privacy by bill collectors over the telephone. *See* Household Fin. Corp. v. Bridge, 252 Md. 531, 250 A.2d 878 (1969) (five or six calls insufficient to establish a prima facie case of invasion of privacy); *cf.* Summit Loans, Inc. v. Pecola, 265 Md. 43,

supporting the opponent of the motion must be "legally sufficient," to raise an issue for the jury to consider. "Legally sufficient" has been defined in various ways, for example "more than a scintilla,"[13] or evidence which goes beyond mere possibility, surmise, or conjecture.[14]

Maryland appellate courts have indicated on some occasions that slight evidence, if "legally sufficient," will overcome a motion for directed verdict even when there is substantial evidence supporting the position of the movant.[15] Nevertheless, the expansive language of the appellate courts in stating the quantum of evidence necessary to avoid a directed verdict has undoubtedly resulted in the chagrin of many plaintiffs' (and occasionally defendants') counsel. In truth, "legally sufficient," which purportedly represents a rather minimal amount of evidence, is a variable standard that in certain types of cases requires a rather substantial showing. This article will consider several types of cases in which Maryland judicial decisions appear to require an atypically convincing showing by a party with the burden of proof seeking to get an issue to the jury. These instances constitute a potentially hazardous trap for the unwary.[16] Although both plaintiffs and defendants may obtain directed verdicts on issues regardless of whether they bear the burden of proof,[17] the situations discussed in this article all involve plaintiffs resisting motions for directed verdict on the issue of liability. This, actually, is the context in which most disputes concerning directed verdicts arise. For discussion purposes, the cases examined are divided into

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288 A.2d 114 (1972) (20–30 calls per week over a five month period held prima facie case).

13. Baulsir v. Sugar, 266 Md. 390, 395, 293 A.2d 253, 255 (1972); Trusty v. Wooden, 251 Md. 294, 299, 247 A.2d 382, 385 (1968); Walker v. Hall, 34 Md. App. 571, 582–83, 369 A.2d 105, 113 (1977).
14. Trusty v. Wooden, 251 Md. 294, 299, 247 A.2d 382, 385 (1977); Plitt v. Greenberg, 242 Md. 359, 367, 219 A.2d 237, 243 (1969); Walker v. Hall, 34 Md. App. 571, 582–83, 369 A.2d 105, 113 (1977).
15. The court of appeals has held that the testimony of one witness, if legally sufficient, may be the basis for a prima facie case, though it be contradicted by the testimony of ten others. *E.g.*, Cipriano v. Greenbelt Consumer Servs., Inc., 226 Md. 577, 579, 174 A.2d 583, 584 (1961). Even such a lopsided conflict should be resolved by the jury. Richardson v. Rice, 256 Md. 19, 25, 259 A.2d 251, 254–55 (1969).

    The court of special appeals recently held that even when the plaintiff must ultimately bear an evidentiary burden greater than a preponderance of the evidence, as in cases in which fraud is alleged, slight evidence, provided it is competent, will be sufficient to avoid a directed verdict. Fuller v. Horvath, 42 Md. App. 671, 685, 402 A.2d 134, 142–43 (1979).
16. The verdict entered under Maryland Rule 552(e) constitutes a final adjudication of the cause of action. *See* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 302 (1966).
17. Decisions indicate that it is difficult for a party with the burden of proof to obtain a directed verdict. A plaintiff with the burden of proof must adduce "uncontroverted" facts, a concept that will be discussed later in this article in a different context. Alexander v. Tingle, 181 Md. 464, 470, 30 A.2d 737, 740

two major areas: (1) cases in which the plaintiff offers direct evidence in support of the defendant's liability, and (2) cases in which the plaintiff offers circumstantial evidence to give rise to an inference of negligence.[18]

II. CASES IN WHICH DIRECT EVIDENCE IS ADDUCED BY THE PLAINTIFF

It is perhaps surprising, in view of the standards for directed verdict stated previously, that a proponent of a claim or defense might fail to get the issue to the jury, even though adducing direct, rather than circumstantial, evidence tending to support that issue. If such direct evidence is testimonial, then the question would be particularly suited for a jury because questions of weight and credibility are uniquely within a jury's province.[19] Nevertheless, in certain types of cases, direct evidence which would superficially appear to be "legally sufficient" has not been enough to get an issue to the jury. Such cases may be divided into two types: cases in which the evidence supporting liability was overwhelmed by evidence to the contrary and cases in which the plaintiff's evidence was insufficient because public policy requires an unusually strong showing in order to get to the jury.

(1943); C.S. Bowen Co. v. Maryland Nat'l Bank, 36 Md. App. 26, 33–34, 373 A.2d 30, 35 (1977). See notes 45–48 and accompanying text *infra*. A defendant, who bears the burden of proof on the defense of contributory negligence, must be able to point to a single, decisive act which reasonable people could not dispute constitutes contributory negligence, in order to obtain a directed verdict. Clayborne v. Mueller, 266 Md. 30, 35–36, 291 A.2d 443, 446 (1972); Reiser v. Abramson, 264 Md. 372, 378, 286 A.2d 91, 93 (1972).

This showing required of the defendant can be particularly difficult when the plaintiff is deceased and thus entitled to a presumption of due care. Baltimore Transit Co. v. State *ex rel.* Castranda, 194 Md. 421, 434, 71 A.2d 442, 447 (1950); Cluster v. Cole, 21 Md. App. 242, 249, 319 A.2d 320, 325 (1974).

18. The court of appeals has indicated that a case which involves the presentation of direct evidence is more likely to reach the jury than a case which involves only "conflicting inferences" based upon circumstantial evidence. Short v. Wells, 249 Md. 491, 495–97, 240 A.2d 224, 227 (1968). The court cautioned, however: "This is not to say that in every case where the plaintiff has introduced some direct evidence of negligence, it should go to the jury. If the evidence approaches the outer limit of credibility or, in some situations, the direct evidence is merely adjectival, it would be insufficient." *Id.* at 497, 240 A.2d at 228.

Not discussed here are libel cases in which, because of constitutional considerations, the court of special appeals has recently held that the plaintiff bears a heavy burden in overcoming a directed verdict on the issue of actual malice. Hohman v. A.S. Abell Co., 44 Md. App. 193, 201, 407 A.2d 794, 798 (1979).

19. *E.g.*, Fisher v. Finan, 163 Md. 418, 420, 163 A. 828, 828 (1933), *quoted in* Richardson v. Rice, 256 Md. 19, 25, 259 A.2d 251, 255 (1969).

A. *Cases in Which Plaintiff's Evidence Was Overwhelmed by Evidence to the Contrary*

The Maryland appellate decisions which are the most difficult to reconcile with the purported liberality in permitting cases to reach the jury are those in which the plaintiff lost by virtue of a directed verdict after having adduced evidence from which, standing alone, a right to recover clearly could have been inferred. Probably the most troublesome of these cases is *Arshack v. Carl M. Freeman Associates, Inc.*[20] In that case, the plaintiff sued the landlord of an apartment complex on behalf of herself and her minor son who was injured when he allegedly stepped on a piece of glass embedded in the grass on the apartment grounds. The son, 11 years old, was admittedly barefoot when injured.[21] The court did not credit the testimony of the plaintiff and her son very highly.

The son testified that he was injured as he stepped on a piece of glass "embedded . . . in the dirt and part of it . . . sticking out of the dirt."[22] He testified that he thought the glass was from a broken bottle, that it was about four inches high, and that it was "down at the bottom [of the grass] . . . as if the grass had grown up around it."[23] The landlord's grounds superintendent also testified that "about ninety percent" of the tenants walked around barefooted in the summer.[24] It appears that from this testimony a reasonable person might infer that the landlord knew that the presence of sharp objects hidden in the grass would pose a hazard to tenants and infer that the shard of glass which allegedly caused the plaintiff's son's injury was in the grass for a time sufficient to give either actual or constructive knowledge to the landlord.[25]

The *Arshack* decision apparently turned, however, on a meticulous comparison by the court of the testimony of the plaintiff with the remainder of the testimony of the defendant's grounds supervisor. The court noted that the plaintiff testified that there was " 'not only trash and broken glass outside . . . but even in the downstairs hall' " in her building.[26] The court characterized her testimony concerning her complaints about the upkeep of the grounds as vague and noted that she was unable to identify other tenants who had made complaints, according to her testimony, concerning the upkeep

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20. 260 Md. 269, 272 A.2d 30 (1971).
21. *Id.* at 275, 272 A.2d at 33–34. This fact seemed to have concerned the court, but it apparently was not regarded as evidence of contributory negligence.
22. *Id.* at 270, 272 A.2d at 31.
23. *Id.*
24. *Id.*
25. It would seem that these facts, if found to be true, would constitute a basis of liability to the tenant. *See* Langley Park Apts., Sec. H., Inc. v. Lund, 234 Md. 402, 199 A.2d 620 (1964).
26. 260 Md. at 271, 272 A.2d at 31.

of the premises.[27] The plaintiff further testified that she telephoned the management about broken glass and trash on the grounds and in the halls of her building.[28] Although initially the plaintiff could not remember how soon before her son's injury her complaints occurred, when pressed by the trial judge, she testified that it was "within a few weeks" of the injury.[29] The plaintiff testified that on the day following the injury she looked in the area where her son was injured and found that there was still glass there.[30] She also testified that she found a piece of glass which she thought was from a broken bottle.[31] The court noted, however, that "[t]he record leaves in doubt the question whether she picked up this specific piece of glass; later she said she did not have it."[32] The court also observed that "[i]t is a pity [the plaintiff] did not retrieve what she saw. Laboratory tests might have revealed traces of what might have been [her son's] blood, establishing it, perhaps, as the piece he did step on."[33] The court stated further, and crucially with regard to the landlord's notice, that "[i]t seems quite possible to us that whatever [the plaintiff's son] stepped on may have been there for seven hours, seven days, seven months or seven years."[34]

Perhaps, the plaintiff's evidence in this case did not constitute the ideal model of a prima facie case. Nevertheless, under the standard of care which the court of appeals deemed applicable to landlords,[35] the evidence should have constituted a case sufficient to get past a motion for directed verdict. After all, the record contained testimony that the plaintiff's son had stepped on a piece of glass, that the grass in the area had been permitted to grow sufficiently high to cover the glass, that the plaintiff had seen glass in and about the

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27. *Id.* Such a fastidious analysis of the trial testimony is perhaps inconsistent with the view taken in an admittedly rather different context in Ackerhalt v. Hanline Bros., 253 Md. 13, 23–24, 252 A.2d 1, 7 (1969):

> [The appellee] has directed our attention to other "inconsistencies" and "inaccuracies" in [the appellant's] testimony and it must be acknowledged that there are a few, but any lawyer who is much in court knows that in any case where a witness gives testimony four times, once without counsel, over a period of 20 months, contradictions, inconsistencies and inaccuracies are bound to creep into the record. Indeed any witness who repeats testimony verbatim four times hand running is suspected of testifying by rote.

28. 260 Md. at 271, 272 A.2d at 31.
29. *Id.*
30. *Id.* at 271–72, 272 A.2d at 31.
31. *Id.* at 271–72, 272 A.2d at 31–32.
32. *Id.* at 272, 272 A.2d at 32.
33. *Id.* at 274, 272 A.2d at 33.
34. *Id.*
35. *Id.* The court cited Windsor v. Goldscheider, 248 Md. 220, 236 A.2d 16 (1967), Langley Park Apts., Sec. H., Inc. v. Lund, 234 Md. 402, 199 A.2d 620 (1964), and Landay v. Cohn, 220 Md. 24, 150 A.2d 739 (1959).

building in the past and had complained about it to agents of the landlord, and that she had found a piece of glass in the general area where her son was injured on the day after his injury. Clearly, the testimony contained some equivocations and uncertainties. These problems are for the jury to consider in measuring the weight to accord the testimony. In ruling on this motion the province of the trial and appellate courts[36] is to draw all reasonable inferences against the party moving for a directed verdict.

The court of appeals affirmed the directed verdict for the defendant in *Arshack* because the plaintiff's evidence did not rise "above the level of surmise, possibility or conjecture" that her son's injury resulted from the negligence of the landlord.[37] The court so held, not because of insufficiency of the plaintiff's evidence standing alone, but because of testimony adduced by the defendant, which both the trial court and court of appeals regarded as presenting the uncontroverted and inherently probable facts.[38]

The testimony of the defendant's grounds supervisor clearly tended to refute inferences favorable to the plaintiff. He testified that he and a crew of men worked every weekday to keep the apartment complex "spic and span."[39] In addition to the morning pickups by his crew, the supervisor testified, building custodians were required to "police" the grounds twice a day to be sure that all trash was picked up.[40] The supervisor testified that the grass was cut once a week and that the area surrounding the plaintiff's building "got a little more attention" from his crew because prospective tenants came there for information and to look at model apartments. He testified that he got very few complaints from tenants about the condition of the grounds. Concerning the presence of glass on the grounds, the supervisor stated that glass was found occasionally after "the trash people had emptied the incinerators" and that his crews had a special duty to clean up after the incinerators were emptied.[41] In addition, the supervisor indicated that three days after the plaintiff's son was injured, he could find no glass in the yard area where the injury occurred.

The court of appeals was not required to reach the issue of whether the plaintiff's evidence, standing alone, would have been

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36. The standards for reviewing evidence when considering the propriety of granting a motion for directed verdict are the same at the appellate level as at the trial level. *See* Johnson & Towers Baltimore, Inc. v. Babbington, 264 Md. 724, 728, 288 A.2d 131, 133–34 (1972) (setting the standard applicable to appellate review under Md. Rule 552).
37. 260 Md. at 278, 272 A.2d at 35.
38. *Id.*
39. *Id.* at 272, 272 A.2d at 32.
40. *Id.*
41. *Id.* at 272–73, 272 A.2d at 32.

sufficient to overcome a motion for directed verdict.[42] The court held that the defendant's evidence was sufficient to place the defendant "well within the bounds of the required ordinary care and diligence" because "[i]t was neither contradicted nor controverted and its presence requires a reappraisal of the inferences which might otherwise be drawn properly and legitimately from the testimony of the appellant which, it may be observed, is more remarkable for what it does not prove than for what it does prove."[43] The court's action could hardly be characterized as a mere reappraisal. The court's opinion resolved the conflicts against the plaintiff in a withering refutation of her testimony that does not sound entirely unlike what one would expect to hear in the course of jury deliberations.[44]

While the established tests for reviewing a motion for directed verdict generally indicate that only evidence supporting the opponent of the motion be considered, the court in *Arshack,* in weighing the reasonableness of inferences favoring the plaintiff from her own evidence in light of the defendant's evidence, applied a well-established principle, *viz.,* that evidence supporting the movant may be considered if it establishes uncontroverted facts.[45] Applying this principle in *Arshack,* the court determined that the jury could not reasonably infer negligence from the plaintiff's evidence because of the uncontraverted facts tending to show due care.

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42. Defendant's counsel moved for a directed verdict at the close of the plaintiff's case. The trial judge reserved his ruling on the motion, but the defendant was deemed to have waived it by offering evidence. *See* Md. Rule 552(b). The sole basis for the granting of the motion at that point in the trial would have been the plaintiff's evidence.

43. 260 Md. at 274, 272 A.2d at 33.

44. [S]erving to dissipate any such inference [of want of ordinary care] is [the grounds supervisor's] description of the daily routine of his work force . . . . Nor does [the plaintiff's] testimony in respect of "bits of trash and glass" in the area in general provide a source for a proper and legitimate deduction that there was a want of ordinary care and diligence on the part of the defendant. She did not say precisely where she saw the "bits of trash or glass" or precisely where she saw them . . . . Considering her statement in the light of the grounds supervisor's testimony one is obliged to conclude that if she did see any trash or glass, Alston's men must have seen it, since they were looking for it, and that if they saw it they picked it up.

260 Md. at 275, 272 A.2d at 33.

45. *See* Dunstan v. Bethlehem Steel Co., 187 Md. 571, 51 A.2d 288 (1947); Alexander v. Tingle, 181 Md. 464, 469–70, 30 A.2d 737, 739–40 (1943).

With respect to this principle in the federal courts the Supreme Court held in Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949):

It is the established rule that in passing upon whether there is evidence to submit an issue to a jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.

Wilkerson was decided in the context of a case under the Federal Employers Liability Act, 45 U.S.C. §§ 51–60 (1976), and the federal appellate courts have

The plaintiff in *Arshack* apparently made no attempt, in rebuttal, to refute the evidence, or "facts," adduced in the defendant's case. The court of appeals has made it clear that failure to contradict evidence supporting the movant for directed verdict is not necessarily fatal; the evidence still might be disbelieved by the jury.[46] If, however, the truth of the evidence or facts supporting the movant may not be disputed, then such facts are uncontroverted[47] and the issue is decided against the opponent of the motion as a matter of law.

It is a difficult matter to determine when the evidence offered by a movant for directed verdict overwhelms the evidence of the opponent so as to create merely an issue of law. It is equally difficult to determine when, whether or not any effort is made to refute or contradict it, such evidence creates a fact question to be resolved by the jury. As the court of appeals held in *Dunstan v. Bethlehem Steel Co.*: "In some of the many cases involving this distinction it may be difficult to reconcile the application of the principle to the facts, but the principle is beyond question."[48]

A thorough consideration of the evidence in *Arshack* indicates strongly that the case should have been submitted to the jury. The "facts" adduced by the defendant were uncontradicted rather than uncontraverted or uncontrovertible. The plaintiff and her son testified that there was glass on the lawn; the defendant testified that there was not and probably could not have been because of his maintenance procedures. The plaintiff's son testified that the grass was so high as to cover foreign objects in it; the defendant, however, testified that it was regularly cut. It is difficult to imagine a clearer conflict for resolution by a jury. If the equivocations of the testimony supporting the plaintiff tended to diminish the probability of

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tended to limit its effect to cases under that Act. 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 50.02[1] (rev. 2d ed. 1980). Some federal courts have taken a position similar to Maryland's, *i.e.*, that uncontradicted facts supporting the movant for directed verdict may be considered in disposing of the motion. *See, e.g.*, Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970). *See also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2529 (1971).

46. Lehman v. Baltimore Transit Co., 227 Md. 537, 540–41, 177 A.2d 855, 857 (1962); Smith v. Bernfeld, 226 Md. 400, 405, 174 A.2d 53, 55 (1961); Alexander v. Tingle, 181 Md. 464, 468, 30 A.2d 737, 739 (1943). *Tingle* distinguishes between situations where the evidence mustered in favor of a directed verdict is "practically uncontradicted," in which cases the motion should be denied, and those in which facts that would support the motion are "uncontested or admitted." In the latter type, the motion may be granted on the basis of such facts. *Id.*

47. Language in *Dunstan,* indicating that a directed verdict may be granted when "the facts are undisputed, and the permissible inferences indisputable," indicates that "uncontrovertible" might be a more useful term than uncontroverted because the latter appears almost synonomous with uncontradicted. 187 Md. at 577–78, 51 A.2d at 291.

48. 187 Md. at 578, 51 A.2d at 291.

inferences from the evidence favoring the plaintiff,[49] clearly the potentially self-serving character of the testimony of the defendant's witness, apparently not considered by the court, should have been considered by a jury.[50]

Arshack, whether or not a proper application of the principle that uncontroverted facts may overcome the direct evidence of the opponent of a directed verdict, stands as a powerful warning to counsel, particularly to plaintiffs' counsel. Testimonial evidence, even when it appears to support quite positively an inference of legal liability, is not always sufficient to get a case or issue to the jury. It may be overwhelmed by evidence to the contrary for purposes of a directed verdict.[51]

How far a party must go to attempt to refute evidence supporting the movant for directed verdict is not clear. Nevertheless, counsel must evaluate the probable evidence of opponents not only in terms of ultimately meeting the burden of proof, but also with reference to overcoming a motion for directed verdict.

B. *Cases in Which Public Policy Places an Unusually Heavy Burden upon the Plaintiff in Getting to the Jury*

A review of Maryland appellate decisions indicates that there are a few types of cases in which the plaintiff must make an unusually heavy showing on the issue of liability in order to get past a motion for directed verdict. This showing is necessary even when the plaintiff's evidence of liability is direct. Three such types of cases are "slip and fall" negligence actions against stores, negligence actions against the so-called "favored" driver involving the Boule-

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49. The court of appeals has recognized that the testimony of a witness may be so self-contradictory that it has no probative force and, thus, cannot be made the basis of a jury verdict. Olney v. Carmichael, 202 Md. 226, 232, 96 A.2d 37, 39 (1953); Eisenhower v. Baltimore Transit Co., 190 Md. 528, 537, 59 A.2d 313, 318 (1958). This basis for a motion for directed verdict may be a problem for the proponent of an issue relying on the testimony of a young child. *See, e.g.,* Lenehan v. Nicholson, 214 Md. 414, 135 A.2d 447 (1957).

50. *See, e.g.,* Plitt v. Greenberg, 242 Md. 359, 367–68, 219 A.2d 237, 243 (1966). The plaintiff in *Plitt,* suing for unjust enrichment, was required to prove that a check he issued to a third party (later bankrupt) and then endorsed to the defendant was received by the defendant without consideration paid to the third party by the defendant. The defendant testified that certain debits on his checking account statement represented checks issued to the third party. The plaintiff could not contradict this evidence and the trial court directed a verdict for the defendant on that basis. In reversing the trial court's action, the court of appeals held that the jury could determine that the defendant's testimony was entitled to little weight. 242 Md. at 270, 219 A.2d at 245.

51. *See* Fowler v. Smith, 240 Md. 240, 213 A.2d 549 (1964); Kaplan v. Baltimore & O.R.R., 207 Md. 56, 113 A.2d 415 (1955); Brock v. Sorrell, 15 Md. App. 1, 288 A.2d 640 (1972).

vard Rule,[52] and medical malpractice actions.[53] Only the first two will be discussed here.

1. "Slip and Fall" Suits

It is not surprising that modern supermarkets and department stores are involved in a great deal of personal injury litigation. Shoppers scurrying through narrow lanes between well stocked shelves inevitably cause slippery substances to fall to the floor. Occasionally, these mishaps occur too frequently to be picked up immediately. Even though the unfortunate shopper injured in a slip and fall accident is typically not responsible for the presence of a slippery substance on the floor, neither, typically, is the storeowner. Undoubtedly with these circumstances in mind, the court of appeals has defined the stringent burden the plaintiff must bear in getting such a case to the jury:

> In an action by a customer to recover damages resulting from a fall in a store caused by a foreign substance on the floor or stairway, the burden is on the customer to produce evidence that the storekeeper created the dangerous condition or had actual or constructive knowledge of its existence. The burden is not met if it appears that the injuries resulted

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52. MD. TRANSP. CODE ANN. § 21–403 (1977). *See generally* Comment, *The Maryland Boulevard Rule: A Time for Change*, 6 U. BALT. L. REV. 223 (1977).

53. In medical malpractice actions, a prima facie case requires a showing that makes out a lack of the requisite care on the part of the defendant doctor, and that want of such care was the cause of the injury. *See* Riley v. United States, 248 F. Supp. 95 (D. Md. 1954). This requirement has proved burdensome. *E.g.*, Johns Hopkins Hosp. v. Genda, 255 Md. 616, 258 A.2d 595 (1969) (doctor admitted breaking a needle in the patient while attempting to suture at the wrong angle, and then sewing up the patient with the needle in the body, but nonetheless won a directed verdict on appeal); Baulsir v. Sugar, 266 Md. 390, 293 A.2d 253 (1972). These evidentiary rigors appear to have been lessened somewhat by a recognition that lay evidence may be sufficient to demonstrate want of due care in uncomplicated cases. *E.g.*, Thomas v. Corso, 265 Md. 84, 97–99, 288 A.2d 379, 387–88 (1972). Likewise, the demise of the so-called "strict locality" rule may have had the same effect. Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 349 A.2d 245 (1975). *See* 37 MD. L. REV. 212 (1977).

All of this must be viewed, however, in light of Maryland's Health Care Malpractice Claims Act. MD. CTS. & JUD. PROC. CODE ANN. §§ 3–2A–01 to 3–2A–09 (1980). The Act provides in essence that all actions involving medical malpractice claims in an excess of $5,000.00 are merely a review of awards under the Act's binding arbitration provision. Arbitration awards under the Act are presumed to be correct, *Id.* § 3–2A–06(d), but this does not change the plaintiff's burden of proof if he is the party seeking review. Attorney General v. Johnson, 282 Md. 274, 293–94, 385 A.2d 37, 68–69 (1978). On the other hand, when the claimant, erstwhile plaintiff in a civil action, is successful in arbitration, the Act may be viewed as lessening the procedural hazards of recovery. *See generally* Comment, *The Constitutionality of Medical Malpractice Mediation Panels: A Maryland Perspective*, 9 U. BALT. L. REV. 75, 92–97 (1979).

> either from the defendant's negligence or from some independent cause, for the existence of which the defendant is not responsible, unless the plaintiff excludes the independent cause as the proximate cause of the injuries.[54]

A review of the decisions involving these injuries indicates how difficult it has been for plaintiffs' counsel to meet this burden. For purposes of ruling on a motion for directed verdict, the courts have been willing to assume the presence of the foreign substance, but regard any inference that the defendant might have been responsible as conjecture and surmise, the latter inference being crucial to liability.

In *Montgomery Ward & Co. v. Hariston*[55] the plaintiff fell and broke her leg on a flight of stairs in the defendant's store. She testified that after she fell she saw an "oily, greenish, grayish substance" in which her heel left a mark. The defendant demonstrated that no oily or greasy articles were sold in the store. In addition, the defendant produced testimony that the store had been thoroughly cleaned the previous night and dry mopped on the morning of the plaintiff's injury. The plaintiff won a jury verdict, but the court of appeals reversed the trial judge's failure to grant the defendant's motion for a judgment notwithstanding the verdict. Although the court of appeals assumed the presence of the substance on the floor for purposes of the motion, it determined that "the evidence does not support an inference that the foreign substance was placed there by the employees of the defendant, that its presence was known to them, or that it was there for an appreciable time before the accident."[56] It is not surprising, in view of the large number of people — all potential culprits — who pass anonymously through large department stores or supermarkets that plaintiffs have sometimes been unable to carry the burden of getting such "slip and fall" cases to the jury because of the effectiveness of the defendant's self-serving testimony regarding meticulous cleanup procedures.[57]

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54. Rawls v. Hochschild, Kohn & Co., 207 Md. 113, 119–20, 113 A.2d 405, 408 (1955).
55. 196 Md. 595, 78 A.2d 190 (1951).
56. *Id.* at 598, 78 A.2d at 191. *Cf.* Link v. Hutzler Bros., 25 Md. App. 586, 335 A.2d 192 (1975) (the plaintiff allegedly slipped on built up floor wax; defendant's admitted use of floor wax four months before the occurrence and of a polymer finish three weeks before constituted a sufficient connection to the alleged cause of the plaintiff's injury to permit the issue to go to the jury).
57. *E.g.*, Moulden v. Greenbelt Consumer Servs., Inc., 239 Md. 229, 210 A.2d 724 (1965); Lexington Market Auth. v. Zappala, 233 Md. 444, 197 A.2d 147 (1964); Rawls v. Hochschild, Kohn & Co., 207 Md. 113, 113 A.2d 405 (1955).

The recent decision of the court of special appeals in *Keene v. Arlan's Department Store*,[58] while presenting an instance of a plaintiff reaching the jury in such a slip and fall case, only underscores the difficulty that plaintiff's counsel usually encounters in such cases. In *Keene*, the plaintiff was injured when she slipped in what she testified was a puddle of a very slippery, slimy substance. The alleged puddle was near a display containing shampoo. There was no direct evidence, however, that the substance on the floor actually was shampoo.[59] The plaintiff in *Keene* was able to present other evidence indicating the legal responsibility of the storekeeper for the presence of the foreign substance. The plaintiff testified that after her fall she heard a nearby cashier exclaim that "I told them if this wasn't cleaned up, someone's going to fall."[60] The court of special appeals, determining this statement to be admissible as an exception to the hearsay rule, reversed the trial court's direction of a verdict for the defendant on the basis that:

> [i]f the testimony of the appellants concerning the cashier's statement was believed by the jury, it could have raised an inference that the cashier, an agent of the owner of the premises, had knowledge of the dangerous condition and had relayed that information to "them." It was for the jury to determine who "them" referred to and to test the weight of the evidence in reaching its conclusion as to whether the [plaintiffs] had met their burden of proof.[61]

The cashier's excited utterance raised a jury question of whether the defendant was responsible for the substance on the floor without the jury having to engage in undue speculation, surmise or conjecture. The success of the plaintiff in *Keene* in getting to the jury, however, does not indicate any lessening of the burden on plaintiffs. It seems unlikely that most plaintiffs will possess such evidence. The public policy of Maryland appears to favor strongly protecting merchants from becoming the insurers of their customers by making it relatively difficult for plaintiffs to get "slip and fall" cases to juries.

2. Cases Involving the Boulevard Rule

Maryland's Boulevard Rule,[62] which is designed to facilitate the flow of traffic on through highways and streets by virtually

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58. 35 Md. App. 250, 370 A.2d 124 (1977).
59. *Id.* at 252, 370 A.2d at 126.
60. *Id.*
61. *Id.* at 257, 370 A.2d at 128. It may be argued that the statement of the cashier *is not imputable* to the owner of the store. Grzboski v. Bernheimer-Leader Stores, 156 Md. 146, 143 A.2d 706 (1928).
62. See note 52 *supra*.

insulating motorists proceeding on roadways from liability in collisions with motorists entering roadways, has been the subject of a significant amount of automobile negligence litigation in Maryland. Under the terminology generally used in this type of litigation, the "favored" driver is the motorist on the boulevard. In litigation in which the favored driver has been the defendant, the Boulevard Rule has placed a nearly insurmountable burden on the plaintiff, whether an "unfavored" driver or a passenger.[63] For the most part, the unfavored driver remains a pariah, unable to overcome a directed verdict because of presumed contributory negligence.[64] In cases involving suits by passengers against the favored driver, on the other hand, there appears to have been an easing of the requirement that the plaintiff adduce evidence of the driver's inattention in order to survive a motion for directed verdict. The plaintiff succeeded in this manner in both *Kopitzki v. Boyd*[65] and *Dean v. Redmiles*.[66]

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63. Such plaintiffs have been able to survive motions for directed verdict only in cases involving last clear chance, *e.g.*, Greenfield v. Hook, 177 Md. 116, 8 A.2d 888 (1939), or in certain "rare cases" (a term of art) in which there is sufficient evidence that the accident may have been caused by the inattention of the favored driver, *e.g.*, Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961).
64. More than a decade ago, the acceptability of this state of affairs was questioned in a thought provoking article. Webb, *Bothersome Boulevards*, 26 MD. L. REV. 111 (1966).
65. 277 Md. 491, 355 A.2d 471 (1976).
66. 280 Md. 137, 374 A.2d 329 (1977). *Kopitzki* and *Dean* are thoroughly discussed in Comment, *Developments in the Boulevard Rule: Expanded Liability for the Favored Driver*, 37 MD. L. REV. 171 (1977). Both cases are considered herein only in that they represent a departure from the heavy burden on plaintiffs suing favored drivers to get past a directed verdict motion by the defendant.

    In a somewhat different context, in reversing the grant by the trial judge of a motion for summary judgment under Maryland Rule 610, the court of special appeals in Gazvoda v. McCaslin, 36 Md. App. 604, 375 A.2d 570 (1977), apparently has provided an added basis for the unfavored driver to avoid a directed verdict in a boulevard case. In *Gazvoda*, the unfavored vehicle, a bicycle, turned left into the southbound lane of a favored roadway. When he had completed his turn he collided into a vehicle proceeding north in the unfavored plaintiff's southbound lane. Following the court of appeals decision in Covington v. Gernert, 280 Md. 322, 373 A.2d 624 (1977), the court of special appeals determined that the vehicle in the wrong lane of the favored roadway, because he was not proceeding in a lawful manner, *see* MD. TRANSP. CODE ANN. § 21–101(o) (1977), was not entitled to preference over the vehicle entering from the unfavored roadway. *Gazvoda*, 36 Md. App. at 612, 375 A.2d at 575. *Cf.* Dail v. Tri-City Trucking Co., 39 Md. App. 430, 387 A.2d 430 (1978). While *Gazvoda* and *Covington* did not involve review of a directed verdict, it would appear that evidence that a driver on a favored roadway is proceeding unlawfully should create a jury question as to whether the protection of the Boulevard Rule is available to such a driver.

Prior to *Kopitzki* and *Dean*, the Maryland courts refused to permit evidence of speeding by the favored driver to serve as the sole basis of negligence.[67] The court in *Kopitzki*, while stating that the evidence would permit a jury to find that the favored driver's inattention caused the accident, noted that the defendant's speed was nearly twice the posted limit. Thus, determining whether the speed of the favored driver was a proximate cause of the passenger's injury would not require "nice calculations of speed, time or distance."[68]

Likewise, *Dean* was an action by the passenger in the favored car against the driver of that car. The court was more direct as to whether evidence of the speed of the favored driver alone is sufficient to overcome a motion for directed verdict by the favored driver. The *Dean* court observed that "if the evidence before the court is sufficient to support a conclusion that the speed of the favored driver was the proximate cause of the accident, then this becomes a jury question."[69]

Thus, when the unfavored driver sues the favored driver in a Boulevard Rule case, the strong public policy of Maryland nearly always compels a directed verdict for the favored driver. The force of this policy, however, has been weakened in cases involving suits by the passengers of the favored driver.

III. CASES IN WHICH ONLY CIRCUMSTANTIAL EVIDENCE IS ADDUCED BY THE PLAINTIFF

A plaintiff who cannot prove exactly how an injury-causing occurrence happened may get past a defendant's motion for directed verdict by relying on inferences of liability arising from proved circumstances. This was demonstrated recently in *Todd v. Weikle*,[70] a case involving the crash of a small plane and the resulting death of all of its occupants. The plaintiffs were the widower and son of the pilot trainee. Because everyone aboard the plane was killed, the plaintiffs could not prove directly whether their decedent or the defendant was at the controls when the crash occurred.[71] The

67. *See, e.g.*, Brown v. Ellis, 236 Md. 487, 204 A.2d 526 (1964); Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961).
68. Brown v. Ellis, 236 Md. at 495–96, 204 A.2d at 530.
69. 280 Md. at 161, 374 A.2d at 342.
70. 36 Md. App. 663, 376 A.2d 104 (1977).
71. The court held that the plaintiff had to produce probative evidence that the defendant was at the controls in order to recover. *Id.* at 669–70, 376 A.2d at 108.

particular facts in *Todd* presented a strong circumstantial showing that the defendant was actually in control of the plane at the critical time.[72] It might easily be contended that any other inference under the circumstances would have been implausible. In cases when the circumstances surrounding the occurrence are more equivocal, as where they plausibly point to more than one set of facts, the plaintiff must make a stronger showing to get to a jury.[73] Whether or not the doctrine of res ipsa loquitur[74] is involved, the plaintiff must demonstrate that inferences which favor the plaintiff are more plausible than those which do not.[75] The showing that a plaintiff must make before a case solely involving circumstantial evidence may go to the jury is somewhat akin to the burden of proof that a plaintiff with direct evidence of liability must bear once the case has reached the jury. It is, in essence, a preliminary burden of proof. An unwary plaintiff, in offering evidence demonstrating the probability of the inference of the defendant's liability, may interject alternative causes into the case. These explanations may actually *decrease* the probability of the inferences favoring defendant's liability.

The difficulty that a plaintiff may face in relying on inferences from proved circumstances was demonstrated long ago in *County Commissioners of Harford County v. Wise*.[76] The plaintiff in *Wise*

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72. The circumstances proved included the following: the defendant occupied the left front seat on takeoff customarily occupied by the pilot; an air traffic controller had conversed with a male prior to the crash; the defendant had substantial flying experience while the plaintiffs' decedent had little; conditions required instrument flying and instruments were located only in front of the defendant's seat; and there was no evidence that plaintiffs' decedent had changed seats, that the defendant had suddenly become ill, or that the plaintiffs' decedent had seized the controls in panic. *Id.* at 671–72, 374 A.2d at 109.
73. Short v. Wells, 249 Md. 491, 495, 240 A.2d 224, 226 (1968).
74. The requirements of res ipsa loquitur are that the plaintiff must show he was injured "(a) by a casualty of a sort which usually does not occur in the absence of negligence, (b) by an instrumentality within the defendant's exclusive control, (c) under circumstances indicating that it was not caused by any involuntary act or neglect of the plaintiff." Munzert v. American Stores Co., 232 Md. 97, 104, 192 A.2d 59, 63 (1963) (citing Proctor Elec. Co. v. Zink, 217 Md. 22, 141 A.2d 721 (1958)).
75. RESTATEMENT (SECOND) OF TORTS § 328D, Comment b at 157 (1965) indicates: "A res ipsa loquitur case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it." While res ipsa loquitur relieves the plaintiff of the requirement of demonstrating specific acts of negligence, it must appear from the plaintiff's case that negligence is more probable than any other explanation for the occurrence. *Id.*, Comment e at 159. *See also* W. PROSSER, LAW OF TORTS § 39 at 211–14 (4th ed. 1971).
76. 75 Md. 38, 23 A. 65 (1891).

owned a mill-dam which was washed away during a flood. Prior to this occurrence several ties of the dam were cut in removing a railroad trestle which had been carried downstream and lodged against the dam. The plaintiff's declaration contained two counts, one regarding the defendant's cutting of the ties on the dam and the other alleging negligent construction of a bridge upstream that made the flow of water more forceful during periods of high water.[77] At trial, however, there was no evidence connecting the defendant to the cutting of the timbers on the dam, nor was there evidence that the construction of the bridge was the cause of the damage. The court of appeals, in nonsuiting the plaintiff, clearly indicated that the plaintiff's critical shortcoming was her failure to demonstrate that the set of facts that would impose liability on the defendant, the alleged negligent construction of the bridge, was more probable than the alternative explanation she had interjected into the case, the cutting of the timbers. The court stressed that a finding against the defendant would require ignoring the exculpatory evidence.[78]

If a jury had weighed the evidence in the same manner as the court of appeals, the plaintiff undoubtedly would have lost.[79] The court of appeals held that the case should never have reached the jury because the plaintiff did not sufficiently refute, with evidence supporting the inference favorable to her, an alternative explanation that tended to exonerate the defendant. The court indicated that the plaintiff's scatter-gun approach to proving liability was her undoing:

> [H]ad the plaintiff confined her case to the second count, and had the defendants relied by way of defence upon the facts which tended to show that the injury resulted from the cutting of the ties of the dam, it would have been the province of the jury to determine which of those two opposite causes, the one asserted by the plaintiff, or the other relied on by the defendants, produced the damage.[80]

The plaintiff in *Wise* thus proved both too much and too little to get to a jury.

Another old case which starkly demonstrates the difficulty with circumstantial evidence is *Strasburger v. Vogel*.[81] The plaintiff was injured by a brick falling from the chimney of the defendant's building. The court noted that the plaintiff could have relied on an

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77. *Id.* at 39–40, 23 A. at 65.
78. *Id.* at 42–43, 23 A. at 66.
79. Actually, the plaintiff below won a jury verdict against the defendant.
80. 75 Md. at 43, 23 A. at 66.
81. 103 Md. 85, 63 A. 202 (1906).

inference of negligence from the falling of the brick itself.[82] Unfortunately for the plaintiff, however, some of his own witnesses testified that unidentified men were standing on the defendant's roof and leaning on the chimney prior to the plaintiff's injury. In view of that evidence, which was corroborated by a defense witness, the court of appeals held that it was error for the trial court to submit the case to the jury. The court noted that if the plaintiff had relied solely on the inference of negligence arising from the falling bricks and the defendant had relied on the intervention of an independent agency, the case would have been proper to submit to the jury.[83]

The *Wise* and *Strasburger* cases are not simply dusty curios. Both cases illustrate the hazards faced by a plaintiff's counsel building a case on inferences from proved circumstances. Where the inference of negligence is available on the basis of res ipsa loquitur, it may be lost in an attempt by the plaintiff to prove that the inference of defendant's negligence is more probable than other inferences concerning the cause of the injury. Yet, while efforts to exclude other causes may be risky in cases involving res ipsa loquitur, failure to make such attempts under some circumstances may result in a directed verdict for the defendant.

A. Cases in Which Res Ipsa Loquitur Is Not Available

Plaintiffs in negligence cases may not rely on the inference of negligence arising from an occurrence unless the defendant had exclusive control over the instrumentality which caused the injury[84] or the premises where the injury occurred,[85] and unless no action by the plaintiff, or an intervening force, could just as probably have caused the injury.[86]

A review of more recent decisions involving attempted proof of negligence by circumstantial evidence indicates the presence of the "preliminary" burden of proof, referred to above, which a plaintiff must meet in order to get a case to the jury. One of the most graphic examples is *Peterson v. Underwood*,[87] a wrongful death action arising

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82. Applying the doctrine of res ipsa loquitur to the facts the court noted: "[If] the chimney was in a condition of repair and if no independent agency intervened, the bricks would not have fallen; and if no other fact had appeared in the case reflecting upon or accounting for their falling, the mere fact that they fell was a sufficient circumstance from which a jury might have fairly concluded that their fall was due to a failure on the part of the defendant to keep the chimney in proper repair; and such a failure would be negligence." *Id.* at 90, 63 A. at 203–04.
83. *Id.* at 91, 63 A. at 204.
84. *E.g.*, Leikach v. Royal Crown Bottling Co., 261 Md. 541, 276 A.2d 81 (1971).
85. Lee v. Housing Auth. of Baltimore, 203 Md. 453, 101 A.2d 832 (1954).
86. Munzert v. American Stores Co., 232 Md. 97, 105–06, 192 A.2d 59, 63–64 (1963).
87. 258 Md. 9, 264 A.2d 851 (1970).

out of the defendant property owner's negligence. The plaintiff's son, aged five, was killed when a wall at the rear boundary of the defendant's property collapsed upon him. The plaintiff was unable to rely on res ipsa loquitur because the defendant did not have control over the premises; they had been leased several years earlier to the decedent's aunt and uncle.[88] The plaintiff was also unable to rely on res ipsa loquitur because she attempted to establish specific grounds of negligence.[89] There was no testimony or other evidence on how the accident occurred. The plaintiff's case was based on the defendants' alleged negligent construction and failure to inspect and repair the wall. There was testimony by a neighbor that the wall was of shoddy construction and that it contained cracks and leaned inward. There was also testimony that a clothesline pole had been placed in the wall, apparently in the hollow cells of the concrete blocks, and that children used the clothesline for a swing.

In *Peterson,* the plaintiff introduced evidence and produced an expert who testified that the wall had not been constructed in compliance with the Baltimore City Code. The evidence indicated that the wall had been built at a slight angle and that the clothesline poles added lateral pressure.[90] At trial, the plaintiff obtained a verdict against both defendants but the trial judge granted a judgment n.o.v. for the defendant prior owner.[91] In reversing the entry of judgment against the second defendant the court of appeals held:

> We think plaintiff's proof was clearly sufficient to allow the jury to find that [the prior owner] negligently constructed the . . . wall, and that [the child's] death was the result of the collapse of that wall. What we find to be a fatal defect in [the plaintiff's] case is lack of any evidence causally linking defendants' negligence to the injury suffered. Such a defect is described as a failure to prove that defendant's negligence was the proximate cause of the accident.[92]

The court of appeals, while noting that proof by inference is not "inherently insufficient,"[93] held in *Peterson* that the passage of time between the construction of the wall and its collapse — four and a half years during which it stood stable and in apparently unchanged condition — rendered the link between the defendant's conduct and

88. *Id.* at 19–20, 264 A.2d at 856.
89. *Id.* at 19–20, 264 A.2d at 857.
90. *Id.* at 14, 264 A.2d at 853–54.
91. The wall was built at the behest of Norman Peterson, owner of the premises in 1959. In that same year Norman sold the property to his mother, Christine, who owned the premises at the time of the occurrence. Judgment n.o.v. was granted in favor of Norman. *Id.* at 12–13, 264 A.2d at 853.
92. *Id.* at 15, 264 A.2d at 854.
93. *Id.* at 17, 264 A.2d at 855.

the collapse too remote for the jury to consider.[94] The court stated that a plaintiff may get to the jury by producing legally sufficient proof, specifically proof showing that it is more probable than not that defendant's act caused his injury.[95] Because of the passage of time, it could not be said that the child's death resulted, more probably than not, from the defendant's conduct.

While the *Peterson* court indicated that the plaintiff's failure was in not establishing the cause of the collapse of the wall[96] rather than in failing to negate or refute alternative causes of the injury, it criticized the plaintiff's use of expert testimony that discounted the role of children pulling on the clothesline as an alternative cause. The court held that this testimony "left the jury with no data with which they could evaluate how 'substantial a factor' the original negligent construction was in causing the later injury."[97] It is paradoxical that evidence which served to negate a very obvious alternative explanation of the occurrence that would tend to exonerate the defendant, could serve to make the jury's task in considering negligence more difficult. The court apparently assumed that, if there had been testimony that children playing could have pulled the wall down, the jury could more appropriately have evaluated whether the construction and maintenance of the wall had anything to do with its collapse. It is apparent from the court's opinion that expert testimony to the effect that the defendant's conduct caused the collapse might have been sufficient to get the case to the jury.[98]

Peterson is troublesome in view of Maryland's expressed policy concerning directed verdicts. The plaintiff was unable to get to a jury although her testimony indicated that a wall did not meet applicable construction safety standards when constructed and that it leaned in the direction in which it ultimately fell. There are decisions, including that of the Court of Special Appeals of Maryland in *Rafferty v. Weimer*,[99] in which the burden on the plaintiff relying on circumstantial evidence does not appear to be as heavy as that in *Peterson*.

Otis Elevator Co. v. LePore,[100] a case which antedated *Peterson*, is difficult to reconcile with *Peterson*. *Otis Elevator* involved a suit against a department store and the company that serviced, maintained, and inspected the store's escalator and arose out of the

94. *Id.* at 19, 264 A.2d at 856.
95. *Id.* at 17, 264 A.2d at 855.
96. *Id.* at 18–19, 264 A.2d at 856.
97. *Id.* at 18, 264 A.2d at 856.
98. *Id.* at 17, 264 A.2d at 855.
99. 36 Md. App. 98, 373 A.2d 64 (1977). See also note 105 and accompanying text *infra*.
100. 229 Md. 52, 181 A.2d (1962).

amputation of part of the foot of the plaintiff's three-year old son on the escalator. Only Otis Elevator appealed the judgment entered on a $70,000 verdict for the plaintiff.

There was no direct testimony in *Otis Elevator* as to exactly how the plaintiff's son was injured. While descending the escalator on the step below his father, the child's foot became caught in an unknown manner. His foot was not released until he reached the bottom of the escalator. The plaintiff produced testimony that the clearance space on both sides of the escalator between the steps and side panels was twice the maximum width approved by the National Bureau of Standards, the American Institute of Architects, and the American Society of Mechanical Engineers.[101] The plaintiff argued that the child's foot had been caught in this abnormally wide clearance space. The court characterized the defendant's position in *Otis Elevator* as an argument that "even if it be assumed that the large clearance between the step and the skirt panel amounted to negligence, [the defendant] cannot be held liable for such negligence unless the plaintiff showed that said negligence proximately caused the injuries complained of."[102] Although the *Otis Elevator* court pointed out that the plaintiff need not establish causation to an absolute certainty, the court stated:

> It would serve no useful purpose to set forth all of the plaintiff's testimony in minute detail. Suffice it to say that there was ample circumstantial evidence to support a rational inference by the triers of fact that the child's foot was caught and injured in the clearance between the step and the side skirt panel.[103]

Although the cases involving directed verdicts must turn on their particular facts,[104] it is difficult to reconcile why the chain of circumstances was too remote to tie the construction and maintenance of the wall to the defendant in *Peterson* while the link between the escalator defect and the injury was not too remote in *Otis Elevator*. Counsel should be aware, however, that in both cases the plaintiffs were required to show that their inferences were more probable than inferences to the contrary.

The recent decision in *Rafferty v. Weimer*[105] provides guidance in how to get these cases to a jury. *Rafferty* involved a suit on behalf of Rafferty, who was allegedly injured when his car, which was parked

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101. *Id.* at 55–56, 181 A.2d at 661.
102. *Id.* at 57, 181 A.2d at 662.
103. *Id.*
104. Beahm v. Shortall, 279 Md. 321, 368 A.2d 1005 (1977).
105. 36 Md. App. 98, 373 A.2d 64 (1977).

on the side of the road and protruded two feet into the right lane of an interstate highway, was sideswiped by a truck in the right lane of the highway. The plaintiff, a cerebral cripple as a result of the accident, was unable to communicate sufficiently to testify at the trial. The plaintiff alleged that Rafferty was standing at the front of his automobile when it was struck by the defendant's vehicle, and that the impact of the collision threw him to a nearby grassy plot where he was found. The plaintiff offered testimony indicating the presence of grease stains on the hood and blood on the guardrail at the front of Rafferty's car. A medical witness testified "that Rafferty's injuries were caused by a vehicular accident."[106]

There was no direct evidence in *Rafferty* indicating that the accident occurred as the plaintiff contended. The court, citing both *Peterson* and *LePore,* however, noted that proof of causation need not amount to direct and positive proof to an absolute certainty.[107] The defendants, who obtained a judgment notwithstanding the verdict, contended on appeal that because the skid marks made by Rafferty's vehicle when it was hit were only six inches long and perpendicular to the car, which indicated lateral movement, the vehicle's movement could not possibly have thrown him a distance of twenty feet. The court determined that "skid marks without more, are not conclusive as to movement."[108] The court noted further:

> The absence of forward skid marks merely suggests that the tires on the Rafferty vehicle were pointed straight ahead without application of the brakes. Consequently, at the moment of impact there was no resistance or friction to cause forward skid marks. *Any other conclusion* under the physical facts here would, in our opinion, be contrary to common knowledge and experience if not contrary to scientific principles.[109]

The court's conclusion is not surprising. It likely assumed that in a high speed sideswipe collision the plaintiff's vehicle would have to move significantly, a fact essential to the plaintiff's theory. Certainly the physical evidence indicating the plaintiff was at the front of the vehicle enhanced the probability of the plaintiff's contention. While the plaintiff was ultimately successful in getting to the jury, *Rafferty* demonstrates, again, the showing a plaintiff must make in order to get a case based on circumstantial evidence to a jury. The plaintiff was fortunate that any other factual conclusions, in view of the

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106. *Id.* at 102, 373 A.2d at 67.
107. *Id.*
108. *Id.* at 103, 373 A.2d at 67.
109. *Id.* (emphasis added).

evidence, would have been contrary to common knowledge, experience and scientific principles. As *Peterson* indicates, circumstances surrounding an accident are sometimes more ambiguous than those in *Rafferty*.[110] The *Rafferty* decision should be seen, therefore, as underscoring plaintiffs' counsels' need for great care in constructing such cases.

B. Cases in Which Res Ipsa Loquitur Is Available

In a case where the plaintiff is relying on the happening of an occurrence itself for an inference of negligence, the plaintiff must demonstrate that the inference of negligence is more probable than any other in order to get the issue of negligence to the jury. Making this showing can be hazardous for a plaintiff attempting to rely on res ipsa loquitur because it often involves producing evidence about the occurrence itself. If the plaintiff can explain the occurrence, there is no longer any justification for reliance on the inference of negligence.[111] The disappearance of the inference means that the plaintiff must demonstrate by circumstantial evidence specifically how the occurrence happened.

The leading case demonstrating this quandary is *Hickory Transfer Co. v. Nezbed*.[112] That case involved a nighttime crash by the defendant's truck into the plaintiff's house. There was no indication that the defendant's truck made any skid marks. The facts would appear to have presented an appropriate case for submission to the jury on the basis of res ipsa loquitur. Unfortunately for the plaintiffs, however, their own evidence was the basis for rejection of the inference.

The plaintiffs, in presenting their case in *Hickory Transfer,* elicited the testimony of a police officer concerning a statement given to him by the defendant's driver. The statement indicated that the collision into the plaintiff's house followed a collision with an automobile at a nearby intersection. The earlier collision was

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110. What may have helped negate the defendant's crucial inference that Rafferty was struck by another vehicle while on the highway, was the presumption entertained by the court, in light of Rafferty's inability to testify, that he exercised ordinary care for his own safety. 36 Md. App. at 107–08, 373 A.2d at 69–70. The court so held, in disposing of a contention by the defendant that Rafferty was contributorily negligent as a matter of law, relying on Nizer v. Phelps, 252 Md. 185, 249 A.2d 112 (1969), and Baltimore Transit Co. v. State *ex rel.* Castranda, 194 Md. 421, 71 A.2d 442 (1950). Conceivably, this presumption lent credence to the inference favoring the plaintiff's recovery.

111. One of the justifications for res ipsa loquitur is the defendant's superior knowledge concerning the occurrence. RESTATEMENT (SECOND) OF TORTS § 328D, Comment k (1965).

112. 202 Md. 253, 96 A.2d 241 (1953).

apparently caused by a malfunction of the stoplight controlling traffic traveling in the same direction as the defendant's truck. The driver testified that he was unable to avoid hitting the plaintiff's house after the first collision because his brakes failed. Brake failure, standing alone, does not constitute negligence.[113] Thus, the court of appeals, per Chief Judge Sobeloff, found that the plaintiff had not offered enough evidence for submission to the jury.

It is clear, from the *Hickory Transfer* court's reaffirmance of and reliance upon *Strasburger v. Vogel*,[114] that the plaintiff could have relied on the happening of the occurrence itself to raise the inference necessary to get the case to the jury.[115] The attempt to fill in the details of the occurrence, whether intended to get the case to the jury by establishing exclusive control, to establish absence of an intervening cause, or to assist the jury when it retired for deliberation, caused the inference of negligence to vanish. The court found that the plaintiffs "explained away the possible inference of negligence. Paradoxically, the plaintiffs proved too much and too little."[116]

A similar fate befell the plaintiffs in *Maszczenski v. Myers*.[117] This case involved a suit against a private nursery school by the parents of a child who was injured in a fall caused by the breaking of a chain on a swing. The court strongly hinted that the plaintiffs could have proved the breaking of the chain and then rested, relying on the inference of negligence to get to the jury.[118] The plaintiff, however, adduced testimony from one of the owners of the school, a co-defendant, about the maintenance of the chains on the swing. The plaintiff's expert's testimony indicated that the manner in which the defendant replaced broken links was negligent, and that issue was submitted to the jury. The jury returned a verdict for the defendant.

The plaintiffs also wished to have submitted to the jury the issue of whether the defendants were negligent in failing to discover, through inspection, any latent defects in the chain. The judge refused to submit this issue. While this contention might have been a premise underlying submission on the basis of res ipsa loquitur, the allegation and attempted proof of specific grounds of negligence precluded resort to res ipsa loquitur. The trial judge in *Maszczenski*, noted that there was no evidence indicating that a latent defect could have been discovered.

It is easy to understand, with hindsight, how a plaintiff might be inclined to prove "too much" for the inference of negligence to

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113. *Id.* at 261, 96 A.2d at 244.
114. 103 Md. 85, 63 A. 202 (1906).
115. 202 Md. at 263, 96 A.2d at 245.
116. *Id.*
117. 212 Md. 346, 129 A.2d 109 (1957).
118. *Id.* at 353, 129 A.2d at 112.

survive. Failure to prove control by the defendant in a case involving res ipsa loquitur would be as damaging to the plaintiff as the disappearance of the inference of negligence.[119] It can be difficult to determine in advance what sort of issues which evidence intended to show the defendant's control over an instrumentality will interject into a case especially when the witness is hostile and the plaintiff is unable to contradict the testimony.[120] While the plaintiff may want to be cautious in introducing evidence which would raise the possibility of alternative causes of the occurrence, the plaintiff must be aware that case law in Maryland clearly disfavors a plaintiff's holding back facts in order to rely on res ipsa loquitur.[121] It is sensible that a plaintiff should not be able to rely on res ipsa loquitur when the facts are more available to the plaintiff than to the defendant.

The holding of the court of special appeals in *Gleason v. Jack Alan Enterprises, Inc.*[122] appears directed at explaining the degree to which a plaintiff must come forward to prove defendant's control over an instrumentality when the plaintiff is relying on res ipsa loquitur. The plaintiff in *Gleason* was standing four feet back from the curb near an intersection when he was struck by defendant's driverless van. The van had rolled 400-500 feet down an incline before hitting the plaintiff. At trial, the plaintiff apparently relied almost exclusively on the happening of the occurrence as evidence of negligence. No testimony was adduced concerning when or how the vehicle had been parked. The trial court directed a verdict for the defendant on the basis that the plaintiff, relying on res ipsa loquitur, had "failed to establish that the instrumentality causing the injury was within the exclusive control of the defendant."[123]

On appeal in *Gleason,* the defendant-appellee relied on *Johnson v. Jackson,*[124] a case involving a similar mishap. The plaintiff in

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119. *See* Lee v. Housing Auth. of Baltimore, 203 Md. 453, 462, 101 A.2d 832, 835–36 (1954); *cf.* Blankenship v. Wagner, 261 Md. 37, 46, 273 A.2d 412, 417–18 (1971) (plaintiff's evidence consistent with the inference arising from res ipsa loquitor does not preclude reliance upon that theory).

120. *See* Trusty v. Wooden, 251 Md. 294, 297, 247 A.2d 382, 384 (1968). *See also* Plitt v. Greenberg, 242 Md. 359, 369, 219 A.2d 237, 244 (1966); Proctor Elec. Co. v. Zink, 217 Md. 22, 32–33, 141 A.2d 721, 726–27 (1958).

121. Johnson v. Jackson, 245 Md. 589, 226 A.2d 883 (1967); Joffre v. Canada Dry Ginger Ale, Inc., 222 Md. 1, 158 A.2d 631 (1960). In Livingston v. Stewart & Co., 194 Md. 155, 160, 69 A.2d 900, 902 (1949), the court of appeals observed that:

> never in Maryland — and seldom, if ever, elsewhere — has it been held that, if the facts do not give rise to a reasonable inference of the defendant's negligence, the plaintiff, who has the burden of proof, can make out a case by proving that he is ignorant of other facts or knows less about them than the defendant.

122. 36 Md. App. 562, 374 A.2d 408 (1977).

123. *Id.* at 564, 374 A.2d at 410.

124. 245 Md. 589, 226 A.2d 883 (1967).

Johnson, who was hit by the driverless vehicle, testified on cross-examination, but not on direct nor in the course of discovery, about hearing a child yelling immediately before the occurrence. This apparently available knowledge about what may have been the cause of the injury prevented the plaintiff from relying on res ipsa loquitur. There was no evidence in *Gleason* that the plaintiff possessed or had access to any similar knowledge.[125] The court held that factors such as the passage of time might be considered by a jury as to the issue of exclusive control but made clear that the plaintiff was not required to establish exclusive control by showing the time and circumstances of the parking of the vehicle. The court noted that such a requirement would emasculate the inference arising under res ipsa loquitur. Requiring the plaintiff to shoulder such a burden would increase the number of instances in which the plaintiffs would, in essence, stumble over their own proof. Clearly *Gleason,* in a very pragmatic way, has lessened the burden on a plaintiff attempting to demonstrate the exclusive control of the defendant over the injury-producing instrumentality.[126] *Gleason* indicates that a plaintiff relying on res ipsa loquitur cannot suffer a directed verdict through failure to come forward to explain that which circumstances dictate he cannot reasonably be expected to explain.

The opinion in *Gleason* is a constructive step in resolving the quandary of a plaintiff seeking to rely on res ipsa loquitur and yet who is fearful of so doing because of the limitations it imposes on proof. Yet, *Gleason* effectuates use of res ipsa loquitur in those cases in which its use is most appropriate, instances when the plaintiff's knowledge is, by happenstance, scant.

IV. CONCLUSION

As noted at the outset, the intent of this article is to examine the less obvious applications of Maryland Rule 552. In the ordinary civil jury trial, the plaintiff's sole practical concern is what happens once the case gets to the jury. A motion for directed verdict by the defendant is perfunctory and usually unsuccessful.

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125. Neither side produced the driver of the van, who was no longer employed by the defendant at the time of trial. 36 Md. App. at 570, 374 A.2d at 412–13.

126. This appears in line with the holding in Leikach v. Royal Crown Bottling Co., 261 Md. 541, 276 A.2d 81 (1971), which held that the requirement that the plaintiff demonstrate exclusive control was not to be applied literally. *Gleason* appears to be a more liberal holding from a plaintiff's point of view, because in *Leikach* there was rather involved testimony tending to establish exclusive control, the sort of testimony that proved troublesome in *Strasburger* and *Hickory Transfer*.

Counsel should note, however, that in a limited number of situations the plaintiff must, before getting to a jury, demonstrate that the plaintiff's evidence outweighs evidence or inferences that have been or may be raised against his or her case. That these special situations may be based upon policy rather than logic in a very strict sense is no reproach to the reasoning of the decisions which mandate them. Fixation of liability itself involves resolution of important questions of fairness and social policy.[127] It is important, however, that counsel recognize that a motion for directed verdict is much more likely to play a decisive role in the outcome of such cases. Thus, counsel should plan trial strategy accordingly.

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127. Peterson v. Underwood, 258 Md. 9, 16, 264 A.2d 851, 855 (1970).