TORTS—APPLICABILITY OF RES IPSA LOQUITUR TO THE COMMERCIAL LANDOWNER—*Brown v. Racquet Club*, 95 N.J. 280, 471 A.2d 25 (1984).

Courts have described res ipsa loquitur as a situation in which both the fact and the nature of an injury "speak" and furnish proof of negligence.[1] The basis for the res ipsa doctrine is that the facts support the probability that negligence was the cause of the injury.[2] Res ipsa loquitur also flows from the premise that, in the ordinary experience of man, the accident would not have occurred in the absence of negligence.[3] The New Jersey Supreme Court recently examined the doctrine and its applicability to a commercial landowner in the case of *Brown v. Racquet Club*.[4]

The defendant, Racquet Club of Bricktown (Racquet Club), made its premises[5] available for social functions in order to familiarize people with its facilities and to attract prospective patrons.[6] On April 17, 1977, the Ocean Tennis Association hosted a fashion show and luncheon on the second floor of the clubhouse.[7] Access to the second floor was provided by an interior, wooden stairway, which originated from the entrance floor.[8] Plaintiffs Margaret Piscal and Jerilyn Brown were standing on the stairway when it collapsed.[9] Both women sustained injuries and instituted suit against the Racquet Club.[10]

The Racquet Club property had been owned previously by T. Harry Lang and Associates (Lang), which began construction

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1 Heckel & Harper, *Effect of the Doctrine of Res Ipsa Loquitur*, 22 ILL. L. REV. 724, 724 (1928).

2 *Id.*

3 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 213 (4th ed. 1971).

4 95 N.J. 280, 471 A.2d 25 (1984).

5 *Id.* at 286, 471 A.2d at 28. The premises consisted of a clubhouse building with adjacent tennis courts. *Id.*

6 *Id.*

7 *Id.* at 286-87, 471 A.2d at 28. The date was 11 months after the certificate of occupancy had been issued. *Id.*

8 *Id.* at 287, 471 A.2d at 28.

9 *Id.* At trial, it was ascertained that the stairs were attached with plain nails. *Id.* at 294 n.2, 471 A.2d at 32 n.2. Moreover, the building inspector stated that "he never noticed anything unusual about the stairs and . . . thought they were safe." *Id.* at 294, 471 A.2d at 32.

10 *Id.* at 287, 471 A.2d at 28. Initially at the trial court level, T. Harry Lang and Associates, which began construction of the Racquet Club, was also named as a defendant. It was not, however, involved in any of the subsequent appeals. *See id.* at 287 n.1, 471 A.2d at 28 n.1.

of the facility in 1975.[11] During the course of construction, however, Lang experienced financial difficulties and one of its creditors, the Glen Rock Lumber Company (Glen Rock), executed upon a judgment and assumed ownership.[12] Shortly thereafter, Stephen Leone, president of Glen Rock, founded the Racquet Club, which he began to operate as a tennis club.[13]

At trial, the plaintiffs' counsel relied upon the doctrine of res ipsa loquitur, arguing that the facts presented raised an inference of negligence on the part of the defendant.[14] The defendant, however, claimed that application of the doctrine would unjustly result in its being held vicariously liable[15] for the negligence of its predecessor in title.[16] Rejecting the defendant's argument, the trial court determined that the doctrine was applicable and charged the jury accordingly.[17] The jury was instructed that it should find the defendant liable if it determined that the stairs had constituted a "hazardous condition," which the defendant had failed to take reasonable measures to remedy, regardless of whether the defendant had actual or constructive notice of the defect.[18]

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[11] *Id.* at 286-87, 471 A.2d at 28.

[12] *Id.* at 287, 471 A.2d at 28. Stephen Leone acquired title while the building was still under construction. The stairs that collapsed beneath the plaintiffs had already been installed by a subcontractor, who had been employed by T. Harry Lang and Associates. *Id.* at 300, 471 A.2d at 35 (Schreiber, J., concurring in part and dissenting in part).

[13] *Id.* at 287, 471 A.2d at 28.

[14] *Id.* When a plaintiff is unable to offer direct evidence of negligence, he is permitted to rely upon the res ipsa loquitur rule and make out a case from which negligence may be inferred. Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519, 526 (1934). In a res ipsa case, the facts must be such that "in the general experience of mankind, the event producing the injury does not happen unless the person in control has failed to exercise due care." Cicero v. Nelson Transp. Co., 129 N.J.L. 493, 495, 30 A.2d 67, 69 (1943).

[15] Vicarious liability can be illustrated as follows: "A is negligent, B is not." However, by virtue of some relationship between A and B, although B played no role in the mishap that resulted in injuries to C; in C's action against B, B "becomes liable as a defendant for C's injuries, on the basis of A's negligence." W. PROSSER, *supra* note 3, § 69, at 458. The above concept can be applied directly to the facts of *Brown*. Specifically, a large portion of the construction of the building, including installation of the stairs, had been completed while Lang held title to the property. *See Brown*, 95 N.J. at 286-87, 471 A.2d at 28. Consequently, any negligence in the installation or construction of the stairs probably occurred during Lang's ownership. Nevertheless, under the theory of vicarious liability any negligence is imputed to the successor in title. *See id.* at 298, 471 A.2d at 34 (Schreiber, J., concurring in part and dissenting in part).

[16] *Brown*, 95 N.J. at 287, 471 A.2d at 28.

[17] *Id.*

[18] *Id.* at 287-88, 471 A.2d at 28.

The jury returned a verdict for the plaintiffs.[19] The defendant's motions for a new trial and for a judgment notwithstanding the verdict were denied.[20] The trial court's judgment was affirmed by the appellate division, which held that the doctrine of res ipsa loquitur could be applied to a successor in title in the commercial context.[21] The appellate panel also determined that the jury charge had been equitable.[22] The New Jersey Supreme Court granted certification and affirmed the appellate division's determination[23] that the doctrine of res ipsa loquitur was applicable to a successor in title.[24] The court found, however, that the inclusion of the hazardous condition instruction, especially when "juxtaposed with the charge on *res ipsa loquitur*," had forced the jury to evaluate the defendant's duty of care in an overly strict vein.[25] Accordingly, the judgment was reversed, and the matter was remanded for a new trial.[26]

The doctrine of res ipsa loquitur has its origins in England. The doctrine was first clearly enunciated in the famous case of *Byrne v. Boadle*.[27] In *Byrne*, the plaintiff, while walking down a public street, was struck by a barrel of flour, which fell from a window.[28] The Court of Exchequer, reasoning that barrels do not fall from windows in the absence of negligence, imposed upon the defendant the duty to prevent such an occurrence.[29] More-

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19 *Id.* at 288, 471 A.2d at 28.

20 *Id.*

21 *Compare Brown* (liability of successor in title for negligence of predecessor determined under doctrine of res ipsa loquitur) *with* Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (1981) (strict liability applied to successor corporation for injuries caused by products defectively made by predecessor corporation).

22 *Brown*, 95 N.J. at 288, 471 A.2d at 29.

23 *Id.*

24 *Id.* at 295, 471 A.2d at 32.

25 *Id.* at 296-97, 471 A.2d at 33. The court noted that as a result of the "hazardous condition" instruction, the jury's deliberations diverged from the theory upon which the case was tried, namely negligence. Examination of the facts under the "hazardous condition" standard, as charged by the trial court, effectively precluded the jury from considering the defendant's alleged negligence. *See id.* at 296, 471 A.2d at 33.

26 *Id.* at 297, 471 A.2d at 34.

27 159 Eng. Rep. 299, 301 (1863).

28 *Id.* at 299. The plaintiffs brought suit seeking damages for their resultant injuries. During the course of the trial, however, the plaintiffs failed to offer any evidence of negligence and relied solely on the circumstances surrounding the incident itself. The assessor found no evidence probative as to the issue of the defendant's negligence and, accordingly, nonsuited the plaintiff. *Id.* At the Court of Exchequer, Chief Baron Pollack reversed the lower court's decision. *Id.* at 301.

29 *Id.* The court correctly noted that a dealer in flour, or any merchant for that matter, has a duty to conduct his business in a manner that is not injurious to the

over, the court held that the inability of the plaintiff to offer specific evidence of a breach of that duty would not preclude a finding of negligence.[30] According to the court, the fact that the barrel fell and injured the plaintiff was prima facie evidence of the defendant's negligence.[31]

While *Byrne* established that the occurrence of an accident may afford prima facie evidence of negligence, the practical effect of res ipsa loquitur is to allow a "permissible inference [of negligence,] which the jury may or may not draw."[32] Res ipsa loquitur permits the proof of negligence by circumstantial evidence[33] if the circumstances relied upon to support such an allegation are closely and immediately connected with the injury.[34] The negligence alleged and the injury sustained, therefore, must have the relationship of cause and effect.[35] Upon such a showing, an inference is raised, which constitutes prima facie evidence of a lack of due care,[36] thus placing the burden of explanation upon the person charged with responsibility.[37] The evidence offered by way of

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public at large. *Id.* It seems apparent that the court's decision was predicated upon the rationale that such an occurrence is strongly indicative, in and of itself, of a want of due care. *See id.*

30 *Id.* at 299-300. The lower court found that the lack of evidence offered by the plaintiff was fatal to his cause of action. In reversing, however, the Court of Exchequer found that to compel the plaintiff to introduce specific evidence of negligence would be an unreasonable burden. *See id.*

31 *Id.* at 301.

32 Gould v. Winokur, 98 N.J. Super. 554, 563, 237 A.2d 916, 921 (Law Div. 1968), *aff'd*, 104 N.J. Super. 329, 250 A.2d 38 (App. Div.), *certif. denied*, 53 N.J. 582, 252 A.2d 158 (1969); *see* Den Braven v. Meyer Bros., 1 N.J. 470, 64 A.2d 219 (1949).

33 W. PROSSER, *supra* note 3, § 39, at 211-12. The doctrine of res ipsa loquitur and the permissible inference of negligence that arises under it cannot be invoked in all instances in which an accident occurs with a resultant injury. Rather, the evidence produced must allow a reasonable man to conclude that it is "more likely than not" that the mishap was the result of the defendant's negligence and, more specifically, that the defendant breached some duty that he owed to the plaintiff. *Id.* at 211.

34 Carpenter, *supra* note 14, at 520. Essentially, the purport of this requirement is that the accident and injury be reasonably contemporaneous.

35 *Id.* Thus, once the relationship of cause and effect is established between the accident and the injury, an inference of negligence may be drawn. This ensures that the accident was not attributable to the actions of a third party. *See generally* Den Braven v. Meyer Bros., 1 N.J. 470, 473, 64 A.2d 219, 221 (1949) (instrumentality causing accident must have been under control of defendant, and not third party, at time of mishap).

36 *See, e.g.*, Hughes v. Atlantic City & Shore R.R., 85 N.J.L. 212, 89 A. 769 (1913); Mumma v. Easton & Amboy R.R., 73 N.J.L. 653, 659, 165 A. 208, 210 (1905).

37 *See* Hamrah v. Clements, 3 N.J. 285, 289, 69 A.2d 720, 721 (1949) (citations omitted).

explanation must be convincing and must show exactly how the harm occurred.[38] The burden of producing explanatory evidence does not affect the ultimate burden of persuasion, which remains with the plaintiff;[39] but, in realistic terms, the burden of persuasion is shifted to the defendant.[40] If the defendant fails to furnish sufficient evidence to rebut the permissible inference that is created by the doctrine of res ipsa loquitur, then the jury may find him negligent.[41]

In New Jersey, the doctrine of res ipsa loquitur was most clearly articulated in the seminal case of *Bornstein v. Metropolitan Bottling Co.*[42] In that case, the court held that a permissible inference of negligence arises where "(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality was within the defendant's exclusive control; and (c) there [was] no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect."[43] The first requirement is based upon the belief that the event that produced the injury ordinarily does not occur unless the person in control has been negligent.[44] The second requirement—that of "exclusive control"—has been scrutinized closely by the New Jersey courts.[45] Specifically, ques-

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[38] *See Brown*, 95 N.J. at 289, 471 A.2d at 29 (citing Ferdinand v. Agricultural Ins. Co., 22 N.J. 482, 493, 126 A.2d 323, 329 (1956)). Once a res ipsa case is established by the plaintiff, the defendant normally must furnish evidence to overcome the presumption of negligence that arises under the doctrine. The requisite weight of this evidence varies. Generally, there have been three accepted views: (1) the least effect given to the presumption occurs when it is only viewed as "furnishing some evidence of negligence," such that the plaintiff's case will reach the jury if the defendant fails to offer rebutting evidence; (2) sometimes the presumption is held to require the "defendant to come forward with explanation or rebutting evidence;" (3) other jurisdictions go so far as to hold that once the plaintiff has made a res ipsa case, the burden of proof shifts to the defendant. F. HARPER, A TREATISE ON THE LAW OF TORTS § 77, at 184-85 (1933).

[39] *See* Gaglio v. Yellow Cab Co., 63 N.J. Super. 206, 210, 164 A.2d 353, 355 (App. Div. 1960).

[40] Gould v. Winokur, 98 N.J. Super. 554, 564, 237 A.2d 916, 921 (Law Div. 1968), *aff'd*, 104 N.J. Super. 329, 250 A.2d 381 (App. Div.), *certif. denied*, 53 N.J. 582, 252 A.2d 157 (1969). If the doctrine of res ipsa loquitur is to be of any use to a plaintiff, it must shift the burden of persuasion to the defendant. Such a shift is derived from the basic proposition underlying the doctrine of res ipsa loquitur, namely that in the ordinary course of events, certain injuries do not occur in the absence of negligence. Heckel & Harper, *supra* note 1, at 725. Thus, when there is such an event, the defendant should have to come forward with sufficient explanatory evidence that will satisfy the burden of persuasion placed upon him. *See id.*

[41] Carpenter, *supra* note 14, at 523.

[42] 26 N.J. 263, 139 A.2d 404 (1958).

[43] *Id.* at 269, 139 A.2d at 408.

[44] Kahalili v. Rosecliff Realty Co., 26 N.J. 595, 606, 141 A.2d 301, 307 (1958).

[45] *See, e.g.*, Hillas v. Westinghouse Elec. Corp., 120 N.J. Super. 105, 293 A.2d

tions have been raised with respect to the time at which control by the defendant is required in order to invoke the doctrine of res ipsa loquitur.[46] For example, the New Jersey Supreme Court, in *Den Braven v. Meyer Brothers*,[47] determined that control, and possible resultant culpability, had to be measured as of the time that the incident occurred.[48] According to a more logical explanation, proffered by Justice Francis in *Bornstein*, control would be measured at the time that the negligence—rather than the accident—occurred.[49]

In order to comply with the third component of the *Bornstein* test, the plaintiff must establish, to a standard of "more probable than not," that the defendant's negligence was the cause of the accident.[50] Res ipsa loquitur thus will not be applied if it is "equally probable" that the negligence was attributable to someone other than the defendant.[51] The evidence offered under the "more probable than not" standard must cover all of the elements of negligence and it must point to a breach of the defendant's duty.[52]

Res ipsa loquitur, however, only creates the inference that the defendant has not exercised reasonable care; it does not, in and of itself, suffice as proof that he was under a duty to do so.[53] Thus, it is the plaintiff's obligation to show that such a duty exists.[54] The nature of the duty is shaped by the status of the de-

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419 (App. Div. 1972); Francois v. American Stores Co., 46 N.J. Super. 394, 398, 132 A.2d 799, 801 (App. Div. 1957).

46 *Compare Bornstein*, 26 N.J. at 276, 139 A.2d at 411 (Francis, J., concurring) (control at time of indicated negligence) *with Brown*, 95 N.J. at 290, 471 A.2d at 30 (control at time of mishap).

47 1 N.J. 470, 64 A.2d 219 (1949).

48 *Id.* at 473, 64 A.2d at 221.

49 *See Bornstein*, 26 N.J. at 276, 139 A.2d at 411 (Francis, J., concurring); *see also Brown*, 95 N.J. at 290, 471 A.2d at 30 (discussing Justice Francis's concurrence in *Bornstein*); *cf.* W. PROSSER, *supra* note 3, § 39, at 221 (advocating that concept of control be discarded and replaced with idea that "apparent cause of accident must be such that the defendant would be responsible for any negligence connected with it").

50 *Bornstein*, 26 N.J. at 273, 139 A.2d at 410. Under the standard of "more probable than not," a plaintiff is not required to exclude other persons or causes that may have been responsible for the mishap. *Id.*

51 *Id.*

52 W. PROSSER, *supra* note 3, § 39, at 212.

53 *Id.* at 226.

54 *See* Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 74 (1941). The issue of duty is certainly a consideration when determining the applicability of res ipsa loquitur. Nevertheless, an accident can be attributable to many causes, none of which may constitute a breach of the defendant's duty. For instance, an accident may be the product of the negligence

fendant and his relationship to other parties.[55]

For example, the New Jersey Supreme Court, in *Butler v. Acme Markets, Inc.*,[56] imposed upon proprietors of business premises the duty to provide "invitees"[57] with a "reasonably safe place to do that which is within the scope of the invitation."[58] Although New Jersey courts have recognized that an owner or occupant of business premises is not an insurer, they have nevertheless imposed liability on an owner or occupant where an invitee has sustained injuries as a result of defects, of which the owner or occupant had either actual or constructive notice.[59] Thus, in the context of landowners, notice, either actual or constructive, imposes upon the owner the affirmative duty to inspect the premises and render them safe.[60] That duty not only extends to the discovery of patent defects, but it also makes the owner responsible for those defects "which have existed for so long a time that, by the exercise of reasonable care, he had both an opportunity to discover and to remedy."[61] A landowner's duty also requires him to prevent risks that are reasonably foreseeable.[62] In sum, a proprietor is under a pervasive duty to exercise due care and to render his premises safe under all circumstances arising within

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of both parties, or neither of them. Thus, the occurrence of an accident should not be relied upon when seeking to apportion responsibility. *See id.* at 75.

55 F. HARPER, *supra* note 38, § 99, at 228. The plaintiffs in *Brown* were "invitees," *see infra* note 57, and as such were owed a higher duty of care than trespassers. They came upon the defendant's premises either through an express or implied invitation. Consequently, there was an affirmative duty on the part of the defendant to render the premises safe. *See* F. HARPER, *supra* note 38, § 98, at 227.

56 89 N.J. 270, 445 A.2d 1141 (1982).

57 A person is an "invitee" on land of another if (1) he enters by invitation, express or implied, (2) his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and (3) there is mutuality of benefit or benefit to the owner. BLACK'S LAW DICTIONARY 742 (5th ed. 1979).

58 *Butler*, 89 N.J. at 275, 445 A.2d at 1143; *see Brown*, 95 N.J. at 290, 471 A.2d at 30.

59 *See, e.g.*, Francisco v. Miller, 14 N.J. Super. 290, 296-97, 81 A.2d 803, 806 (App. Div. 1951); Daddetto v. Barbiera, 4 N.J. Super. 479, 481, 67 A.2d 691, 691 (App. Div. 1949).

60 Notice is a vague term for knowledge. A landowner has an affirmative duty to those who enter upon his premises. A breach of that duty would demonstrate a disregard or indifference toward dangerous conditions present on his land. Consequently, once the landowner gains or should have gained knowledge of a defect on his premises, his duty to remedy the condition is triggered. That duty must be fulfilled within a reasonable time. *See* Francisco v. Miller, 14 N.J. Super. 290, 297, 81 A.2d 803, 806 (App. Div. 1951).

61 *Id.* at 296-97, 81 A.2d at 806. *See generally* RESTATEMENT (SECOND) OF TORTS § 343 comment b (1966) (occupier's duty includes discovery of unknown defects).

62 W. PROSSER, *supra* note 3, § 61, at 393.

the scope of that duty.[63]

In *Brown*, the New Jersey Supreme Court held that the doctrine of res ipsa loquitur had been invoked properly against the Racquet Club.[64] The court reversed and remanded for a new trial, however, on account of the trial court's jury instruction with respect to hazardous conditions.[65] Writing for the majority, Justice Handler stated that the court could not conclude that the jury's finding of liability had not been influenced by the inclusion of the additional instruction.[66]

The court relied upon the three-part analysis enunciated in *Bornstein* to determine how the doctrine of res ipsa loquitur should be applied to commercial landowners who are successors in title. In finding that the first condition of *Bornstein* had been met, the *Brown* court noted that the collapse of the Racquet Club's stairs "[bespoke] negligence."[67] The court also summarily noted that the stairs—the instrumentality that caused the plaintiffs' injuries—were under the Racquet Club's "exclusive control at the time of their collapse."[68] Moreover, it was obvious to the court that the plaintiffs' conduct had not contributed to their injuries and that, therefore, the third criterion of *Bornstein* had been satisfied.[69] According to Justice Handler, however, the critical issue "in determining the applicability of *res ipsa loquitur* in [*Brown*] depend[ed] on the scope of [the Racquet Club's] duty of care."[70]

The court recognized that the nature and extent of a commercial landowner's duty of care is shaped both by his status and by his relationship to those who enter upon his premises.[71] As a proprietor, the Racquet Club was under a duty to exercise reasonable care and to " 'render the premises safe for activities within the scope of the invitation.' "[72] According to the court,

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63 Bozza v. Vornado, Inc., 42 N.J. 355, 359, 200 A.2d 777, 779 (1964).

64 *Brown*, 95 N.J. at 295, 471 A.2d at 32.

65 *Id.* at 296-97, 471 A.2d at 33.

66 *Id.*

67 *See id.* at 289, 471 A.2d at 29; *cf.* Galbraith v. Smith, 120 N.J.L. 515, 1 A.2d 34 (1938) (falling of chandelier, which was fastened to ceiling, "bespeaks" negligence).

68 *Brown*, 95 N.J. at 289, 471 A.2d at 29.

69 *Id.*

70 *Id.* at 289-90, 471 A.2d at 29.

71 *Id.* at 290, 471 A.2d at 29. In *Brown*, a proprietor/invitee relationship existed between the parties. *See id.* at 286-87, 471 A.2d at 28. In such a relationship the proprietor owes a duty of care to the invitee. *See* Brody v. Albert Lifson & Sons, 17 N.J. 383, 389, 111 A.2d 504, 507 (1955).

72 *Brown*, 95 N.J. at 290, 471 A.2d at 30 (quoting *Butler*, 89 N.J. at 272, 445 A.2d at 1143).

that duty required it to inspect the premises "to discover their actual condition and any latent defects."[73] The court remarked, however, that a proprietor would not be liable for injuries caused by defects of which he had neither actual nor implied notice, nor reasonable opportunity to discover.[74]

The defendant had never addressed squarely the issue of notice.[75] Rather, it had focused on other possible causes of the accident, including the fact that the stairs had been constructed and installed by a third party who had been employed by the defendant's predecessor in title.[76] The court determined that such a showing was insufficient to rebut the inference that the Racquet Club's negligence was a contributing cause of the resulting accident.[77] The court also rejected the defendant's contention that the negligence of its predecessor in title created an undiscoverable, latent defect.[78] The doctrine of res ipsa loquitur, the court reasoned, was applicable "unless defendant's explanation of the accident conclusively negated any inference that the defendant failed to discharge the duty of care it owed to its invited patrons, namely, to make a reasonable inspection that would have disclosed the existence of the defect."[79] The court did qualify its position, however, by explaining that, once a reasonable inspection has been undertaken, failure either to discover a defect or to make an extraordinary inspection would not give rise to an inference of negligence.[80] The determination of what is "reasonable," according to the court, is dictated by the circumstances, and failure to conduct a reasonable inspection would permit an inference of negligence in the absence of any convincing evidence to the contrary.[81] The court thus placed two burdens upon commer-

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73 *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 343 comment (b) (1966)).

74 *Id.* at 293, 471 A.2d at 31 (citing, for example, Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (App. Div.), *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973)).

75 *See id.* at 291, 471 A.2d at 30.

76 *Id.*

77 *Id.* at 292, 471 A.2d at 31.

78 *Id.* at 291, 471 A.2d at 30.

79 *Id.* at 293, 471 A.2d at 31.

80 *Id.* (citing Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (App. Div.), *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973); Dombrowska v. Kresge-Newark, Inc., 75 N.J. Super. 271, 183 A.2d 111 (App. Div. 1962)). It should be noted that in *Dombrowska v. Kresge-Newark, Inc.*, the appellate division recognized the need for a proprietor to have received notice of the dangerous condition before his duty to remedy the condition would arise. *Dombrowska*, 75 N.J. Super. at 275, 183 A.2d at 113.

81 *Brown*, 95 N.J. at 293, 471 A.2d at 31 (citing, for example, Galbraith v. Smith, 120 N.J.L. 515, 1 A.2d 34 (1938)).

cial landowners: the duty to make an inspection and the duty to ascertain whether such inspection was "reasonable under the circumstances."[82]

Justice Handler reasoned that the collapse of the stairs was caused at least partially by the defendant's failure to make a reasonable inspection,[83] because such an inspection would have revealed that the stairs had been installed defectively.[84] The court also observed that the defendant had occupied the premises for a sufficient period of time to allow for such an inspection.[85] The court therefore concluded that the defendant's failure to make a reasonable inspection during its occupation of the premises gave rise to an allowable inference that its negligence contributed to the collapse of the stairs.[86]

Justice Handler next addressed the trial court's additional jury instruction on hazardous conditions.[87] The validity of that instruction was deemed tenuous because the trial court had failed to provide a standard for determining what was "hazardous."[88] The absence of any limiting instruction, the court observed, was especially relevant because *Brown* involved the collapse of a stairway, a situation that could readily be characterized as a hazardous

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82 *See id.* This dual burden imposed by the *Brown* court allows the factual circumstances to dictate the type of inspections that must be undertaken by the owner/occupier. *See id.* By imposing this standard, courts are given a wide degree of latitude when scrutinizing the propriety of a landowner's conduct with regard to those who enter upon his premises.

83 *Id.* The court noted that the plaintiff need only show that the negligence of the defendant contributed to the accident. *Id.*

84 *Id.* at 294, 471 A.2d at 32. This particular aspect of the majority's opinion is difficult to reconcile with the "more probable than not" standard. The court expressed the belief that the plaintiff must show only that the defendant's negligence may have contributed to the accident. Under this standard it is unclear whether the defendant must simply omit a duty or whether a breach of that duty must be the most significant factor contributing to the mishap. *See id.* at 292-93, 471 A.2d at 31.

85 *Id.* at 294, 471 A.2d at 32. Eleven months had elapsed between the time at which the certificate of occupancy was issued and the time of the collapse of the stairs. *Id.* at 287, 471 A.2d at 28.

86 *See id.* at 294, 471 A.2d at 32. Stephen Leone, president of one of the Racquet Club's creditors, stated that "the stairs looked substantial," and that there was no reason to examine how the stairs were fastened to the wall. Moreover, he admitted that he never bothered to see how the stairs were fastened. Essentially absent from his testimony was any suggestion that a reasonable inspection was conducted, regardless of whether or not the defect was latent. *Id.* at 294-95, 471 A.2d at 32.

87 *See id.* at 295, 471 A.2d at 32. The purport of the trial court's instruction was that, if the jury concluded that the stairs constituted a hazardous condition, the defendant would be liable, regardless of whether the Racquet Club had actual or constructive notice of the defect. *Id.* at 295-96, 471 A.2d at 33.

88 *See id.* at 295, 471 A.2d at 33.

condition.[89] Because the trial court's instruction permitted the jury to find liability without determining the issue of negligence, the supreme court could not conclude—as the appellate division had—that, in context, the error was harmless.[90]

Justice Schreiber, joined by Justice O'Hern, concurred in part and dissented in part.[91] Initially, Justice Schreiber's analysis centered upon the majority's assumption that a defendant bears the burden of coming forward with proof of a reasonable inspection.[92] Justice Schreiber asserted that it is incumbent upon a plaintiff to prove both that the defendant failed to make a reasonable inspection and that, if the inspection had been conducted, the defect would have been uncovered.[93] The plaintiffs in *Brown*, he observed, did not show that the Racquet Club had breached its duty; they also failed to rebut evidence—introduced by the Racquet Club—that the defect in the stairs was latent.[94]

Justice Schreiber believed that the duty that a proprietor owes to his invitees—to provide reasonably safe premises—should extend to protect those invitees from dangerous conditions created by a predecessor in title.[95] His position was supported by the analogy drawn between the facts of *Brown* and the imposition upon successor corporations of strict liability in tort "for damages caused by . . . defects in products manufactured and distributed by [their] predecessors."[96] In fact, Justice Schreiber opined that the need to impose strict liability under circum-

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89 *See id.*; *supra* note 68 and accompanying text.

90 *Brown*, 95 N.J. at 296, 471 A.2d at 33.

91 *Id.* at 297, 471 A.2d at 34 (Schreiber, J., concurring in part and dissenting in part).

92 *Id. See generally* Gould v. Winokur, 98 N.J. Super. 554, 564, 237 A.2d 916, 921 (Law Div. 1968) (in res ipsa case, burden of proof remains upon plaintiff, but realistically burden of persusion shifts to defendant), *aff'd*, 104 N.J. Super. 329, 250 A.2d 38 (App. Div.), *certif. denied*, 53 N.J. 582, 252 A.2d 157 (1969).

93 *Brown*, 95 N.J. at 297, 471 A.2d at 34 (Schreiber, J., concurring in part and dissenting in part).

94 *Id.* at 297-98, 471 A.2d at 34 (Schreiber, J., concurring in part and dissenting in part). The stairs that collapsed beneath the plaintiffs were affixed by nails "that protruded about one-half to one inch from the beam to which each step was attached." Therefore, it could not be determined through a visual inspection how the stairs were attached to the wall. *Id.* at 298, 471 A.2d at 34. (Schreiber, J., concurring in part and dissenting in part).

95 *Id.* at 300, 471 A.2d at 35 (Schreiber, J., concurring in part and dissenting in part).

96 *Id.*; *cf.* Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (1981). The successor corporation in *Ramirez* never had control over the defective product manufactured by its predecessor. Yet, because it continued to manufacture the same line of products, the court concluded that imposition of strict liability was appropriate. *See id.* at 358, 431 A.2d at 825.

stances such as those in *Brown* is greater than in the successor corporation context, because of the "direct relationship" that existed between the plaintiff and the Racquet Club.[97]

Finally, Justice Schreiber discounted the need for a proprietor to have received notice of a defective condition before he can be held liable for any resultant injuries sustained by his invitees.[98] He reasoned that notice should not be a factor when the hazardous condition is created either by the owner or by a third party under his care.[99] In reaching this conclusion, Justice Schreiber utilized a strict liability approach and concluded that "[a]s between the business proprietor and the innocent, invited patron injured as a result of a dangerous structural condition on the premises, equities favor imposing the costs attributable to the injury on the owner."[100]

Justice Clifford, in a dissenting opinion, noted that the plaintiffs had failed to allege any cause for the collapse of the stairs other than the fact that they had been improperly appended to the wall by short nails.[101] According to the dissent, "[n]o reasonable inspection would have disclosed [that] latent condition."[102] He opined that such a narrow offer of proof did not entitle the plaintiff to an inference of negligence under the doctrine of res ipsa loquitur.[103]

Focusing upon the issue of control, Justice Clifford asserted that the only logical application of that requirement must be to look at control at the time of the negligence rather than at the time of the accident.[104] Under such an application, the dissent reasoned, the plaintiff might have had a cause of action under res ipsa loquitur against the builder of the stairs, but not against the Racquet Club, a successor in title.[105] Justice Clifford agreed with Justice Schreiber that it was the plaintiffs' obligation—and not

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97 *Brown*, 95 N.J. at 300, 471 A.2d at 35 (Schreiber, J., concurring in part and dissenting in part).

98 *Id.* at 301, 471 A.2d at 36 (Schreiber, J., concurring in part and dissenting in part).

99 *Id.* (citing Bozza v. Vornado, Inc., 42 N.J. 355, 360, 200 A.2d 777, 780 (1964)).

100 *Id.* at 301-02, 471 A.2d at 36 (Schreiber, J., concurring in part and dissenting in part).

101 *Id.* at 303, 471 A.2d at 37 (Clifford, J., dissenting).

102 *Id.*

103 *Id.*

104 *See id.* at 304, 471 A.2d at 37 (Clifford, J., dissenting); *see Bornstein*, 26 N.J. at 275-76, 139 A.2d at 411 (Francis, J., concurring) (control should relate to time of negligence and not time at which accident occurred).

105 *Brown*, 95 N.J. at 305, 471 A.2d at 38 (Clifford, J., dissenting).

the Racquet Club's—to prove that if a reasonable inspection had been conducted, the defect would have been revealed.[106] Therefore, Justice Clifford concluded that, because the plaintiffs in *Brown* had failed to satisfy their burden of proof, the court should have reversed.[107]

In drawing its conclusion, the *Brown* majority blended two important principles of law: the landowner's duty of care to those who enter upon his premises[108] and the permissible inference of negligence created by the doctrine of res ipsa loquitur.[109] Res ipsa loquitur leads only to the conclusion that the defendant has not exercised reasonable care.[110] The existence of a duty to exercise such care is dependent upon the parties' relative status.[111] In *Brown* the defendant Racquet Club, as a proprietor, owed a duty to the plaintiffs—its invitees[112]—to maintain safe premises.[113] The court found that the defendant had breached that duty by applying the doctrine of res ipsa loquitur.[114]

This conclusion, however, was reached without any consideration of the defendant as a successor entity. Such an omission becomes questionable when it is viewed against the doctrine of res ipsa loquitur, a theory under which control of the instrumentality is a vital element.[115] By holding that control should relate to the time of the accident, and not to the time of the alleged negligence,[116] the *Brown* court avoided the possible inapplicability of res ipsa loquitur. Logically, if, as in *Brown*, a case is being presented on a theory of negligence, any consideration of control should focus on the time of the negligence and not the time of the injury.[117]

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106 *Id.*

107 *Id.*

108 *See supra* notes 57 & 58 and accompanying text.

109 *See supra* notes 32-37 and accompanying text.

110 W. PROSSER, *supra* note 3, § 39, at 226. Res ipsa loquitur does not itself afford proof that the defendant was under a duty to exercise reasonable care to a particular individual at a specific time. *Id.*

111 F. HARPER, *supra* note 38, § 99, at 228. As a result, a trespasser who is injured by a defective condition on the premises "may have no right to recover" for his injuries. W. PROSSER, *supra* note 3, § 39, at 226.

112 *See* W. PROSSER, *supra* note 3, § 61.

113 *See Brown*, 95 N.J. at 296, 471 A.2d at 33.

114 *See id.* at 295, 471 A.2d at 32.

115 The *Brown* court openly acknowledged that control at the time of the indicated negligence is a logical application. *See id.* at 290, 471 A.2d at 30. It dealt with the issue of control, however, in terms of the happening of the accident. *Id.*

116 *See supra* note 115 and accompanying text.

117 *See Bornstein*, 26 N.J. at 275-76, 139 A.2d at 411 (Francis, J., concurring). The position taken by Justice Francis in *Bornstein* is in accord with that of Dean Prosser,

The court characterized *Brown* a res ipsa loquitur case and ostensibly rendered its decision within the parameters of that doctrine. Nevertheless, as noted by Justice Schreiber, the facts presented in *Brown* are analogous to those in cases in which strict liability has been imposed upon the successor entity.[118] Notably, in *Ramirez v. Amsted Industries, Inc.*,[119] the New Jersey Supreme Court held that where a corporation acquires the assets of another corporation and continues to manufacture the same product or product line "the purchasing corporation is strictly liable for injuries caused by [manufacturing] defects . . . even if previously manufactured and distributed by the selling corporation or its predecessor."[120] The imposition of strict liability in such a context has been seen "as a means of providing a financial incentive for manufacturers of products to reduce the level of accidents below that which would exist under a negligence standard of liability."[121] This essentially is an attempt by courts to compel "manufacturer[s] to avoid accidents where the cost of avoidance is less than the cost of potential accidents."[122] It should be noted, however, that strict liability has only been imposed for injuries caused by defectively manufactured products, and not in situations wherein a visitor or customer of a business enterprise is injured.[123]

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who believes the standard should be "that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it." W. PROSSER, *supra* note 3, § 39, at 221.

118 *See Brown*, 95 N.J. at 300, 471 A.2d at 35 (Schreiber, J., concurring in part and dissenting in part).

119 86 N.J. 332, 431 A.2d 811 (1981).

120 *Id.* at 358, 431 A.2d at 825. The *Ramirez* court advanced three particularly strong reasons for imposing strict liability upon successor corporations. First, the plaintiff's remedy against the original manufacturer was lost when its assets were purchased. Second, imposition of liability upon the successor corporation "is consistent with the public policy of spreading the risk to society at large for the cost of injuries from defective products." *Id.* at 350, 431 A.2d at 820. Finally, the *Ramirez* court noted that "the imposition upon Amsted [the successor corporation] of responsibility to answer claims of liability for injuries allegedly caused by defective Johnson [the predecessor corporation] presses is justified as a burden necessarily attached to its enjoyment of Johnson's trade name, good will and the continuation of an established manufacturing enterprise." *Id.* at 352, 431 A.2d at 822.

121 Ursin, *Strict Liability for Defective Business Premises—One Step Beyond* Rowland *and* Greenman, 22 UCLA L. REV. 820, 829 (1975) (Rowland v. Christian, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), represents further judicial development toward doctrine of strict liability for dangerously defective business premises).

122 *Id.*

123 Despite the somewhat doctored version of res ipsa loquitur that was adopted by the *Brown* court, the clear thrust of the opinion is a move toward strict liability for dangerously defective business premises. New Jersey has recognized strict liability for manufacturers of defective products, a position which is completely in

It is apparent that if the doctrine of strict liability in tort were extended to situations in which business premises are defective, then the actual attribution of whose negligence caused the resultant injury would become insignificant.[124] The facts of *Brown* provided an ideal situation for application of strict liability—the stairs that collapsed had been installed prior to the Racquet Club's assumption of ownership.[125] Moreover, the specific cause of the stairway's collapse was the small nails that were used to attach it the wall,[126] a condition which was not detectable by an ordinary inspection.[127] It is clear that, given the facts in *Brown*, the doctrine of strict liability in tort would have been a more appropriate basis for imposing liability than the somewhat doctored version of res ipsa loquitur that the court chose to apply.[128]

The policy behind holding successor corporations strictly liable for the manufacturing defects of their predecessors is

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accord with that of most jurisdictions. *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

124 Strict liability in tort is a theory under which liability will attach regardless of fault. Strict liability looks only to the resulting harm, and does not seek to determine whether there has been a lack of due care. W. PROSSER, *supra* note 3, § 75, at 494.

125 *See supra* note 12.

126 *Brown*, 95 N.J. at 292, 471 A.2d at 31. The defendant conceded that the use of such small nails was improper, but argued that any liability resulting therefrom should be attributed to the former owner. *Id.*

127 *Id.* at 298, 471 A.2d at 34 (Schreiber, J., concurring in part and dissenting in part).

128 The reason for the *Brown* court's failure to articulate its decision in strict liability terms is unclear, especially when the direct relationship between the parties in *Brown* is juxtaposed to the plaintiff-defendant relationship in *Ramirez*. Specifically, in *Brown*, the plaintiffs were patrons on the defendant's premises, of which the defendant had assumed ownership eleven months earlier. *See id.* at 287, 471 A.2d at 28. In *Ramirez*, however, the machine that caused the plaintiff's injuries was manufactured in 1948 or 1949. *Ramirez*, 86 N.J. at 335, 431 A.2d at 813. Yet, Amsted, the successor corporation, did not purchase its predecessor's assets until 1962. *Id.* Despite that span of time, the *Ramirez* court found that imposition of strict liability should not be precluded. *See id.* at 352, 431 A.2d at 822.

In *Brown*, Justice Schreiber noted that:

> [T]he situation at bar is somewhat analogous to the strict tort liability of a successor corporation for damages caused by latent defects in products manufactured and distributed by its predecessor. In the product liability case the successor entity that never had control over the defective product is nevertheless responsible. Here, in contrast, the current owner of the real property has control over the premises and has a direct relationship to the plaintiff who has encountered the hazardous condition upon accepting the owner's invitation to enter the premises. If policy justifies liability in the product field, why is not the business invitee entitled to at least similar protection?

Brown, 95 N.J. at 300, 471 A.2d at 35 (Schreiber, J., concurring in part and dissenting in part) (citations omitted).

equally applicable to other succeeding entities in a commercial context.[129] Defective business premises present as real a danger to the public as defectively manufactured products.[130] Clearly, in either instance, the owner or manufacturer "is in a position to correct defective conditions and to spread these costs through a liability insurance policy and in the pricing of its goods or services."[131]

As noted in the dissenting opinion, the collapse of stairs obviously "bespeaks negligence."[132] The plaintiff in *Brown*, however, failed to show whose negligence was the more significant cause of the resulting accident.[133] The plaintiffs' limited offer of proof seemed to fall below the "more probable than not" standard previously established in res ipsa cases.[134] Despite that tenuous offer of proof, the *Brown* court drew an especially strong inference of negligence under the guise of res ipsa loquitur.[135] This is especially apparent in the *Brown* court's determination that a defendant must "conclusively negate" any inference that it has failed to discharge its duty.[136] In effect, the *Brown* court has created a stricter standard than has been imposed previously by the courts, which generally have held that the defendant's proof need only be explanatory and not exculpatory.[137]

The inference of negligence applied by the *Brown* court is virtually insurmountable.[138] The majority stated that the effect of

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129 *See generally* Ursin, *supra* note 121, at 839 ("doctrine of strict liability for defective business premises seems imminent in New Jersey").

130 *See supra* notes 120-22 and accompanying text.

131 *Brown*, 95 N.J. at 302, 471 A.2d at 36 (Schreiber, J., concurring in part and dissenting in part).

132 *See id.* at 304, 471 A.2d at 37 (Clifford, J., dissenting).

133 *Id.*

134 *See Bornstein*, 26 N.J. at 273, 139 A.2d at 410 (showing that it was "equally probable that the negligence was that of someone other than the defendant" will not invoke permissible inference of negligence created under doctrine of res ipsa loquitur). In *Brown*, Justice Clifford correctly noted that the plaintiff had failed to specify whose negligence was the probable cause of the mishap. *Brown*, 95 N.J. at 304, 471 A.2d at 37 (Clifford, J., dissenting).

135 *See infra* notes 136 & 137 and accompanying text.

136 *Brown*, 95 N.J. at 293, 471 A.2d at 31.

137 *See, e.g.*, Hamrah v. Clements, 3 N.J. 285, 69 A.2d 720 (1949); Hughes v. Atlantic City & Shore R.R., 85 N.J.L. 212, 89 A. 769 (1914).

138 Courts have split as to the strength of the inference created by res ipsa loquitur. *Compare* Galbraith v. Smith, 120 N.J.L. 515, 516, 1 A.2d 34, 35 (1938) (defendant may always come forward with explanatory evidence, but inference created by res ipsa loquitur should remain) *with* Gaglio v. Yellow Cab Co., 63 N.J. Super. 206, 210, 164 A.2d 353, 355 (App. Div. 1960) (res ipsa loquitur does not create pre-

res ipsa loquitur is to create a "permissive presumption."[139] This is, in essence, a hybrid between a permissible inference, which allows, but does not require, the jury to infer from the plaintiff's case that the defendant has been negligent, and a presumption, which requires the jury to find that the defendant was negligent if he failed to submit sufficient evidence to the contrary.[140]

In *Brown*, the supreme court combined these two principles and created a standard under which a finding of the permissible inference of negligence under res ipsa loquitur mandates a finding of negligence, unless the defendant's proofs are so strong that they remove any reasonable doubt of negligence.[141] In creating this standard, the court effectively has precluded a defendant from overcoming the inference of negligence that is created under the doctrine of res ipsa loquitur.[142] Realistically, the court recognized that the injuries sustained by the plaintiffs were the result of dangerously defective business premises, and thus, it was proper to hold the Racquet Club liable. It seems apparent, however, that the so-called "permissive presumption" created by the *Brown* court comes strikingly close to strict liability in tort,[143] despite the assertions of the court to the contrary.[144]

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sumption of negligence and only allows plaintiff to avoid dismissal for his failure to prove negligence specifically).

The majority opinion in *Brown*, although formally recognizing that the defendant may come forward with evidence to rebut an inference of negligence, seemed to focus upon the fact that the collapse of the stairs was the result of a dangerous defect in the defendant's business premises. *See Brown*, 95 N.J. at 293-94, 471 A.2d at 32. Thus, it can be argued that the defendant's ownership was the conclusive factor in terms of liability.

139 *Brown*, 95 N.J. at 288, 471 A.2d at 29.

140 F. HARPER, *supra* note 38, § 77, at 184-85.

141 *Brown*, 95 N.J. at 289, 471 A.2d at 29 (citing Ferdinand v. Agricultural Ins. Co., 22 N.J. 482, 493, 126 A.2d 323, 329 (1956)).

142 *See supra* note 134. In *Brown*, the burden placed upon the defendant to remove the inference of negligence that is created by res ipsa loquitur forces the defendant to come forward with exculpatory evidence. *But cf.* Hughes v. Atlantic City & Shore R.R., 85 N.J.L. 212, 214, 89 A. 769, 770 (1914) (defendant need only come forward with explanatory evidence).

143 *Compare Brown*, 95 N.J. at 288, 471 A.2d at 29 (res ipsa loquitur applied to successor in title) *with Ramirez*, 86 N.J. at 358, 431 A.2d at 825 (strict liability applied to successor corporation).

144 The *Brown* court's accommodation of the doctrine of res ipsa loquitur generated a holding that is in actuality grounded upon the doctrine of strict liability in tort.