Maryland Law Review

Volume 11 | Issue 2 Article 3

Pleading Negligence in Maryland - Res Ipsa Loquitur as a Rule of Pleading

Joseph O. Kaiser

Comments and Casenotes

PLEADING NEGLIGENCE IN MARYLAND— RES IPSA LOQUITUR AS A RULE OF PLEADING

By JOSEPH O. KAISER*

In the recent case of *Livingstone v. Stewart & Co., Inc.*,[1] plaintiff's declaration alleged that the defendant conducted a department store in Baltimore where the plaintiff and the public were invited to enter as customers to inspect or purchase goods and merchandise. On December 20, 1948 while the plaintiff, in response to the invitation, was in the defendant's store and looking at various toys, a "two-wheel bicycle" fell on the plaintiff, pinning her leg against a show case or fixture in the store, as a result of which the plaintiff's leg was most seriously injured. The declaration further alleged that the accident and resultant injuries were caused solely through and by the carelessness, recklessness and negligence of the agents of the defendant and through no fault on the part of the plaintiff.

In answer to a demand for particulars, the plaintiff said the facts constituting recklessness, carelessness and negligence on the part of the agents of the defendant were peculiarly within the knowledge of the defendant inasmuch as the instrumentality causing the injury complained of was within the control of, and under the management and supervision of the defendant, its agents, servants and employees.

The trial court sustained a demurrer to the declaration as limited by the bill of particulars, and thereafter, the plantiff having failed to amend, entered a judgment for the defendant, which was affirmed on appeal. The declaration "contains only the argumentative conclusion that the Plaintiff's injuries were caused by the Defendant's negligence, but states no acts done or left undone by the Defendant which constitute negligence or a negligent manner of doing anything".[2] The requirement that a declaration must in-

* Of the Baltimore City Bar; Lecturer on Pleading, University of Maryland School of Law; A.B. (1933) Johns Hopkins University; LLB. (1936) University of Maryland.

[1] 69 A. 2d 900, (Md., 1949).

[2] *Ibid.*, 901.

clude facts of negligent conduct and not merely circumstantial evidence from which the facts may be inferred, applies where the plaintiff relies upon the doctrine of *res ipsa loquitur.*

The system of pleading which prevails in Maryland is intended to be issue producing.[3] One of its essential and fundamental principles is "*that facts should be stated* 'for the purpose of informing the court, whose duty it is to declare the *law* arising upon those facts, and to apprise the opposite party of what is meant to be proved in order to give him an opportunity to answer or traverse it' ".[4]

The opinion of the Court in the instant case states that at common law, and especially in Maryland, no great particularization of facts and circumstances is necessary in stating a cause of action for negligence.[5] However, under the Maryland system of simplified common law pleading,[6] in stating a cause of action for negligence, there must be "certain and definite allegation of the circumstances" sufficient to show a duty owed by the defendant to plaintiff, a breach of that duty and resulting injury. "The general characterization of an act or omission as negligent or of a condition as unsafe is not usually a sufficient statement."[7]

Thus, a rather flexible standard is presented to the Maryland practitioner for his use in stating a cause of action for negligence. A survey of the Maryland statutory forms and the Maryland cases will demonstrate that where the plaintiff's right and the defendant's corresponding duty are simple and easily perceived, a simple factual statement of the defendant's act or omission in breach thereof, coupled with the general characterization of the defendant's act or omission as negligent, will suffice. On the other hand, the less apparent the plaintiff's right and the defendant's duty, the more likely the pleader will be required to specify the acts or omissions relied upon to constitute the negligent conduct. Otherwise stated, in simple situations involving

---

[3] POE: PLEADING AND PRACTICE (5th ed., 1925), Vol. 1, Sec. 541.

[4] Gent v. Cole, 38 Md. 110, 113 (1878); see Md. Code (1939), Art. 75, Sec. 2.

[5] Supporting this statement as to the common law see, CLARK: HANDBOOK OF THE LAW OF CODE PLEADING, (2nd ed., 1947), p. 300:

"Under the common law precedents it was customary to state in fairly general form what the defendant's act was and to characterize it as negligent."

Early Maryland precedents for forms of declarations for negligence contain allegations no less general. HARRIS' MODERN ENTRIES (1831), Vol. 1, pp. 292-301 (Declarations in Assumpsit), pp. 351-354 (Declarations in Case).

[6] The origin of this system is usually traced to the Act of 1856, ch. 112. See, POE, *op. cit.*, n. 2, secs. 56-60, Chap. XXII.

[7] *Supra*, n. 1, 901.

an easily recognized breach of duty, a general averment of negligence following a simple statement of the defendant's act or omission will be regarded as an ultimate fact; while in more complex situations where the breach of duty is not readily apparent, such an averment will be regarded as a mere legal conclusion.[8]

CARRIER-PASSENGER CASES

Since a common carrier is required to exercise a high degree of care for the safety of its passengers,[9] the code form merely prescribes:[10]

> "That the defendant is a corporation, owning a railroad between B and C; that the plaintiff was a passenger on said railroad, and by reason of the insufficiency of an axle of the car in which he was riding, the plaintiff was hurt; and the defendant did not use due care in reference to said axle, but the plaintiff did use due care."[11]

A note to this form provides:[12] "This form may be varied so as to adapt it to many cases by merely changing the allegation as to the cause of the accident." A declaration in *Phil. B. & W. R. Co., v. Allen*[13] was held to conform to the requirements of the Code. The important allegations of the declaration were that the defendant "so negligently and unskillfully conducted itself in carrying the plaintiff and in managing the said railroad and the car and train in which the plaintiff was a passenger . . . that the plaintiff . . . was thereby thrown down and wounded and injured. . . ."[14] The Court in considering the declaration said:[15]

> "Here, then is a distinct statement of the duty owed by the carrier to the passenger; and a like averment of the breach of that duty in the negligent and unskillful *management* of the railroad, and the car and the train, whereby the plaintiff was thrown down and injured. The dry allegation of fact is that the company negli-

[8] The wide diversity of opinion upon the question whether negligence is an ultimate fact to be stated as such or a conclusion of law to be deducted from facts warranting such an inference may be seen in the cases collected in 59 L. R. A. 209.

[9] Jackson v. Hines, 137 Md. 621, 626, 113 A. 129 (1920).

[10] Md. Code (1939), Art. 75, Sec. 28 (36).

[11] See the same form in 2 CHITTY PLEADING (16th Am. Ed., 1876), p. 575.

[12] *Supra*, n. 10.

[13] 102 Md. 110, 62 A. 245 (1905).

[14] *Ibid.*, 111.

[15] *Ibid.*, 114.

> gently *managed* its railroad and train and car; but the evidentiary facts proving or tending to prove that negligence are not set forth, and there was no occasion to aver them. The asserted negligence and not the facts which proved the negligence constituted the cause of action. Negligence may be made manifest by a variety of circumstances; but whatever the evidentiary circumstances may be, the thing they prove if they have probative value at all is negligence and negligence in respect of some designated act of commission or omission is the thing to be proved, and therefore the thing to be alleged in the pleading. In this instance it was alleged to be the negligence of the company in *managing* its railroad and the car and train in which the plaintiff was a passenger; and that this averment sufficiently apprised the defendant of the charge it was required to answer is apparent from the circumstances that it entered the plea of not guilty and proceeded to trial thereon instead of challenging the declaration by a demurrer on the ground of vagueness and uncertainty. An averment that the cause of the injury was the *negligence* of the company in managing its railroad and the car and train in which the plaintiff was a passenger is a definite statement of the fact upon which the plaintiff relied to sustain a recovery, and did not need to be amplified by a recital of other facts which, if established, merely proved that there had been negligence in the *management* of the railroad and train and car in which the plaintiff was a passenger."

The rule of pleading applied in the *Allen* case, and illustrated in the above code form, was relied upon in *Smith v. N. C. Rwy. Co.*,[16] to overrule a demurrer to a declaration which alleged that the plaintiff, a gratuitous passenger, had sustained personal injuries when he slipped upon a sheet of ice while crossing a passenger platform, and that the accident was caused by gross negligence on the part of the defendants, its agents and servants.

Negligence in Maintaining Public Ways

In Maryland the duty of a municipality to keep streets and sidewalks under its control reasonably safe for travel,

[16] 119 Md. 481, 87 A. 259 (1912). See also Hanway v. B. & O. R. Co., 126 Md. 535, 95 A. 160 (1915); Lusby v. Balto. Transit Co., 72 A. 2d 754 (1950).

and to prevent and remove any nuisance affecting their use and safety, is well established.[17] The Code form to recover for injuries due to disrepair of streets simply provides:[18]

> "That the defendant is an incorporated city, and is bound to keep its streets in repair; that one of its streets, called ..... Street, was negligently suffered by the defendant to be out of repair, whereby the plaintiff, in traveling on said street and using due care, was hurt."[19]

This form does not contain an allegation that the city had actual or constructive notice of the need for repair, which is an essential element of proof to hold the municipality in such cases. But the form implies a failure to repair after such notice.[20]

This code form was referred to in *Phelps v. Howard County*,[21] where the averments of the declaration were said to present an issue of fact. The plaintiff, while riding the "lazy board" of a wagon, was injured when it collided with a telegraph pole. The declaration alleged that contrary to their duty to keep the public road safe for travel, the defendant Telegraph Company, with the permission of the defendant County Commissioners, had erected a telegraph pole in a dangerous position in a designated public road by placing the pole in the side of the highway and so close to the traveled portion thereof that the part of a hay carriage, known as the "lazy board," which extends from the center of the carriage about two feet beyond its tread, would collide with the pole while the wagon was in the traveled portion of the road.

Relying on this and other code forms, the Court in *Mayor, etc. of Salisbury v. Camden Sewer Co.*,[22] found sufficient the following allegations of negligence: [23]

> "that . . . especially for three years last past, the said defendant has so negligently and carelessly maintained said catch basins . . . and has so negligently and care-

---

[17] Neuenschwander v. Wash. Sub. San. Comm., 187 Md. 67, 48 A. 2d 593, 596 (1946).

[18] Md. Code (1939), Art. 75, Sec. 28 (37).

[19] See similar form in 2 CHITTY, *op. cit., supra*, n. 11, 575.

[20] W. B. & A. R. Co. v. Cross, 142 Md. 500, 505, 121 A. 374 (1923); Neuenschwander v. Wash. Sub. San. Comm., *supra*, n. 17.

[21] 117 Md. 175, 82 A. 1058 (1912).

[22] 141 Md. 254, 118 A. 662 (1922).

[23] *Ibid.*, 259..

> lessly permitted said surface water to be drained into the eastern portion of plaintiff's said sewer . . ., as to cause said part of said sewer to become filled up with said debris. . . ."

In *W. B. & A. R. Co. v. Cross*,[24] the following charge of negligence was held to imply a failure to repair a bridge and remove an obstruction after notice, and to indicate sufficient causal connection between the conditions and fright of a horse:[25]

> ". . . that the bridge was maintained in a negligent manner, to wit, a board out of the floor and an obstruction placed across the same in such a way that while the plaintiff was driving across the said bridge with her horse and buggy, the horse, while on said bridge, and near the said obstruction and open floor, became frightened, and ran away and threw the plaintiff out. . . ."

Without reference to the code form, the allegations of a declaration in *Mayor, etc. of Havre de Grace v. Fletcher*,[26] were held sufficient to charge a negligent failure to abate a dangerous nuisance. The charge was that the defendant municipality, neglecting its duty to care for its streets, permitted certain persons who conducted a hotel, to stack beer kegs on or near one of the traveled streets:[27]

> "in such a negligent manner as to be dangerous to persons passing along and upon said street and failed and neglected to remove the same and failed and neglected to require the said . . . to remove the said beer kegs *so* negligently stacked by them on said street, ..."[28]

But in *Anne Arundel County v. Carr*,[29] the following allegation of negligence was held entirely too general in not specifying how the bridge was out of repair or unsafe:[30]

---

[24] *Supra*, n. 20.
[25] *Ibid.*
[26] 112 Md. 562, 77 A. 114 (1910).
[27] *Ibid.*, 567.
[28] The declaration went on to allege that the defendant hotel owners negligently stacked a number of beer kegs on a certain date to a height of about eight feet and that one of the kegs fell by reason of the negligent and dangerous manner in which they had been piled. The sufficiency of these allegations as against the defendant hotel owners is not discussed.
[29] 111 Md. 141, 73 A. 668 (1909).
[30] *Ibid.*, 144.

> "That one of the bridges . . . then and there a part of said public road, was negligently and carelessly suffered by said defendants to be out of repair and in an unsafe condition for travel and by reason of the negligence and carelessness of said County Commissioners, allowing said bridge to be out of repair and in an unsafe condition for travel, the said Plaintiff . . . was greatly injured by reason of the horse breaking through said bridge. . . ."

This decision does not refer to the code forms. The defendant had relied principally upon a ground other than indefiniteness in demurring. However, the court apparently on its own motion, noticed the defect of indefiniteness and reversed a judgment for the plaintiff for error in overruling the demurrer and for error in granting a prayer of the plaintiff.

More particularization of the facts and circumstances than required by the code form and the above cases may be necessary to demonstrate that the negligent failure to abate a nuisance in the form of an obstruction on a public way is the proximate and not the remote cause of the injury involved.[31]

INDIVIDUALS RENDERING PUBLIC WAYS MORE HAZARDOUS

The Maryland law recognizes that if an individual, whether an adjoining owner or not, does any act which renders the use of a public street or sidewalk more hazardous or less secure than it was left by the public authorities. he commits a nuisance and is liable to one who is injured in consequence. The question in such cases is due and proper care under the circumstances.[32]

In *Neighbors v. Leatherman*,[33] an adjoining property owner was sought to be held responsible for a traveler's injuries under the following allegations:[34]

> "That the defendant is the owner of a mill situated in Lewistown District. Frederick County, Marvland. along the Frederick and Emmitsburg Turnpike in said county. and had installed and placed in said mill a steam engine, an exhaust pipe of and from which he (the defendant) had. the plaintiff avers, negligentlv

[31] Mayor, etc. of Hagerstown v. Foltz, 113 Md. 52, 104 A. 267 (1910).
[32] Citizens Savings Bk. v. Covington, 174 Md. 633, 199 A. 849 (1938).
[33] 116 Md. 484, 82 A. 152 (1911).
[34] *Ibid.*, 486.

> and wrongfully placed and permitted to extend in such a manner as to expel the *smoke* therefrom, out over the said turnpike or public road aforesaid, negligently and wrongfully permitted and suffered to be discharged and emitted therefrom large quantities of *steam*, much to the annoyance, inconvenience and danger of those rightfully using said public road or turnpike; and that the plaintiff, while using due care, driving along said turnpike in a funeral procession, in a vehicle occupied by himself, his wife and child, his horse going at a very slow gait, was, by reason of the negligence and carelessness of the defendant, in that the defendant negligently and wrongfully caused and permitted to escape from said exhaust pipe large volumes of dense and thick steam, by reason of which said steam the horse the plaintiff was driving became frightened, then and there kicked and threw the plaintiff out of the vehicle to the ground."

These allegations were held to be too general and indefinite. However, the declarations in *Cecil Paper Co. v. Nesbitt*[35] and *Newnam v. Moran*,[36] were held to be sufficiently definite.

NEGLIGENCE BY BAILEE

The Code includes, under the heading "For Wrongs Independent of Contract", the following form:[37]

> "That the defendant hired from the plaintiff a horse to ride from Frederick to Hagerstown, and thence back to Frederick, in a proper manner; the defendant rode said horse so immoderately that he became lame and injured in value."[38]

The duty of a hirer of a chattel to use care, whether contractually assumed or in many instances coextensively imposed by operation of tort law, is readily recognized, and the above Code form merely requires a simple statement of the duty and breach without particularization of the details.

---

[35] 117 Md. 59, 83 A. 254 (1912).
[36] 154 Md. 650, 141 A. 385 (1927).
[37] Md. Code (1939), Art. 75, Sec. 28 (38).
[38] See a similar form in 2 CHITTY, *op. cit.*, *supra*, n. 11, 145. 1 HARRIS, *op. cit.*, *supra*, n. 5, lists a similar form "for immoderate riding a horse", but contains allegations suggesting breach of contract.

The code forms of pleadings are preceded by the statement that "like forms may be used with such modifications as may be necessary to meet the facts of the case", and it is not erroneous "to depart from said forms so long as substance is expressed".[39] This provision would seem to be ample authority that the simplicity and terseness of the illustrative forms should be carried over to allow the pleading of ultimate facts in the statement of other causes of action for negligence. But the Maryland decisions require a varying amount of detail to be presented in pleading other negligence cases than those covered by the illustrative code forms.

HIGHWAY COLLISION CASES

At present, highway collision cases make up the bulk of the negligence cases presented to our courts. In many such cases the force and injury are direct and an action of trespass may be maintained.[40] Where, instead, the remedy of case was elected or required, the early common law precedents simply contained an averment of facts showing the duty and the general manner of its breach.[41] To the trained mind, such cases are quite clear, the breach of duty generally involves violation of the rules of the road or one or more of a limited number of misdeeds. Without the necessity of detailed pleadings, experienced counsel consider their contingency in preparing for trial since the freedom of amendment allows the pleader to supply omissions during the trial. Moreover, depositions and discovery procedure, rather than the pleadings, are relied upon to provide notice of the factual issues.

In *American Express Co. v. Denowitch*,[42] the suit was to recover damages by reason of the death of an infant child. The declaration averred that the defendant, by its agents and servants, operated a motor truck on Baltimore Street near High Street in Baltimore, and the agents and servants of the defendant negligently and carelessly caused the motor truck to run into and against the infant. This declaration was held to contain all the essential and legal requirements necessary to constitute a good cause of action. Though there was filed with it the statutorily required bill

[39] Md. Code (1939), Art. 75, Sec. 28.

[40] 1 HARRIS', *op. cit., supra*, n. 38, p. 353; Parker v. Providence & Stonington Steamboat Co., 17 R. I. 376, 22 A. 102, 33 Am. St. Rep. 869, 14 L. R. A. 414 (1892).

[41] 1 HARRIS', *op. cit., supra*, n. 38, pp. 351-354.

[42] 132 Md. 72, 103 A. 96 (1918).

of particulars, this did not amplify the general charge of negligence.[43]

MALPRACTICE CASES

In the field of malpractice cases, two decisions should be noted. *Fink v. Steele*,[44] involved a charge of negligent treatment of a child by a dentist. The following allegations were held sufficient to give notice to the defendant of the claim that for a period of five days he had failed to exercise the degree of care required of one in his profession and that as a result, the plaintiff had suffered injury:

> ". . . on or about April 3rd, 1931, the plaintiff was a patient of the defendant, a practicing dentist at Elkton, Maryland, at which time the defendant . . . filled a tooth of the said infant plaintiff, and that said filling remained in said tooth for a period of five days, whereby said infant plaintiff suffered great physical injury, both serious and permanent; that said injuries to said infant plaintiff were caused directly by said defendant in filling said tooth and allowing said filling to remain in said tooth for five days, and that the filling of said tooth and the permitting said filling to remain in said tooth for a period of five days was due to want of reasonable care, skill and diligence on the part of the said defendant. . . ."

Keyser v. Richards,[45] involved a suit against five defendants to recover for pain and suffering allegedly caused by negligent treatment in the nursing and care of a student. The declaration covers six pages in the official report and is largely a chronogolical statement of the events extending over a two month period which led to the student's death. The following general allegation was made:[46]

> "Each and all of the defendants, acting in their respective position and spheres and along the respective lines above stated, jointly participated in the care and management of the said C. Bernard Keyser during his last illness and during all the time hereinbefore mentioned; that they each and all undertook to exercise due

[43] Compare Seeger v. Janocka, Baltimore City Court, O'Dunne, J., Daily Record, March 17, 1941. This opinion concludes that a narr. in an automobile accident case must include more than the general averments that the defendant operated his car in a careless, reckless and negligent manner.

[44] 166 Md. 354, 171 A. 49 (1934).

[45] 148 Md. 669, 130 A. 41 (1925).

[46] *Ibid.*, 676.

and ordinary care in the premises, and that they each and all jointly and severally failed to exercise ordinary care and prudence in connection with the treatment, nursing and care of the said C. Bernard Keyser during his last illness, but were guilty of gross negligence in connection therewith, and that by said conduct they jointly and severally gravely aggravated the illness of the said C. Bernard Keyser, and caused him great physical and mental pain and suffering."

The Court held that the general allegation was only the conclusion of the pleader or his interpretation of the preceding specific charges and was inconsistent with their meaning and effect. Treated separately, the general allegation was held too indefinite.[47]

CONSTRUCTION AND MAINTENANCE OF PUBLIC WORKS

In this State, a municipal corporation does not insure its citizens against damage from works of its construction, and, absent a taking or actual physical invasion of property, is liable only for negligence.[48] The frequently cited case of *Frisch v. Mayor, etc., of Baltimore,*[49] requires the declaration in such cases to apprise the defendant of the particular charge of neglect which it will be required to meet at the trial. The declaration there held demurrable alleged that the plaintiffs[50] "were tenants in lawful possession of a part of the premises known as No. 420 W. Lexington Street . . . that . . . the premises of said plaintiffs were flooded with water as a result of the breaking and bursting of certain water pipes in the alley to the rear of said premises, said water pipes being designed and used for the purpose of supplying water to the entire building and premises, whereby the stock merchandise of said plaintiffs was ruined and damaged, . . . that all the loss, injury and damage aforesaid was caused by the negligence and want of care of said defendants and each of them, in the installation, maintenance, and failure to repair said water pipes. . . ."[51]

[47] The broad reference to negligence at the close of a declaration usual in Maryland is not taken as an allegation of negligence in other respects or in addition to the negligence specified. Greenwald v. McLaughlin, 160 Md. 341, 153 A. 34 (1931).

[48] Hanrahan v. Mayor etc. of Baltimore, 114 Md. 517, 80 A. 312 (1911).

[49] 156 Md. 310, 144 A. 478 (1929).

[50] *Ibid.*, 311.

[51] *Cf.* Mayor, etc. of Salisbury v. Camden Sewer Co., *supra*, n. 22.

Negligence as to Fires

Liability for communicating fire to the property of others in the course of lawful work must be predicated upon the lack of ordinary care and prudence under the circumstances of the particular case. *American Paving & Contracting Co. v. Davis*[52] illustrates the reasonable certainty in the averments required in such cases.

Master and Servant Cases

Perhaps the most frequently cited case on the sufficiency of a declaration in an action of negligence in Maryland is the case of *State of Maryland, use of Jeter v. Schwind Quarry Company*.[53] The substance of the declaration there involved is stated as follows:[54]

> "For that the defendant corporation at the time of the commission of the wrong and injury hereinafter mentioned, was operating a stone quarry in the city of Baltimore, and Edward Jeter, the husband and father of the equitable plaintiffs was employed by it as a stone cutter. And it was the duty of the defendant corporation to provide the said Jeter with a reasonably safe and proper place in which to work, and with reasonably safe and proper tools with which to work, and to employ reasonably competent co-employees, and to promulgate rules for their government, and to refrain from exposing the said Jeter to unnecessary risk and danger while at work. And the plaintiff in fact says that on the day and date mentioned, the said Jeter was directed by one of the employees of said corporation, then and there in command of said quarry, and having authority over him, to extract *a charge of blasting powder theretofore placed in a hole drilled in a rock in said quarry, for which work the said Jeter was not skilled, fitted, or employed, and of the danger of which he was ignorant and unwarned, and in the execution of which he was killed.* And the plaintiff further says that the death of the said Jeter was directly due to the negligence of the defendant corporation in discharge of its aforesaid duties toward him, to wit, the duties to provide him with a reasonably

[52] 127 Md. 477, 96 A. 623 (1915).
[53] 97 Md. 696, 55 A. 366 (1903).
[54] *Ibid.*, 697.

safe and proper place in which to work, and with reasonably safe and proper tools with which to work, and to employ competent co-employees, and to promulgate rules for their government, and to refrain from exposing him to unnecessary risk and danger whilst at work, and that the said Jeter used due care, but the defendant corporation did not use due care. . . ."

Of the allegations, other than the italicised portions of the declaration, the Court said:[55]

"The defendant is not told what specific duty is claimed to have been neglected, but is required to meet a charge of general misconduct in the alleged neglect of every duty imposed upon it by law. Not only so, but there is no averment of the manner in which any one of these duties have been violated. It does not specifiy in what respect the place provided for work was unsafe, or how the want of safety caused the death; it does not specify what tools provided for work were unsafe, in what respect they were unsafe, or how their unsafe condition was connected with the accident; it does not state what co-employees were incompetent, or how their incompetency contributed to cause the death of the deceased. It does not show what rules should have been promulgated for the government of employees, or how the failure to promulgate them is connected with the accident, nor does it state what was the risk and danger to which the deceased was unnecessarily exposed while at work.

"Such a lumping aggregation of general charges of neglect of duty, without a single specification upon which to prepare a defense cannot be regarded as gratifying the fundamental principles of pleading which are still recognized and enforced in our simplified system, as we have recently had occasion to observe in *Edger v. Burke,* reported in 96 Md. 715."

The italicized portion of the declaration was found to be scarcely less general and vague:[56]

"It does not state what was the nature of the danger, against which he should have been warned. It does not charge that it was unknown to the servant,

[55] *Ibid.*, 699.
[56] *Ibid.*, 701.

> or not open and obvious to ordinary observation, and therefore one against which it was the master's duty to warn the servant. There is no averment that his death was caused by his want of skill for the work he was directed to perform, or by the failure to warn him of the danger. There is in fact no statement whatever of any cause of his death, but a mere averment that he was killed in the execution of the work."

Suits Against Persons Other Than Employer

Happily, the advent of the Workmen's Compensation Act has made almost entirely unnecessary the drafting of pleadings with an eye to the harsh rules of the common law as to the liability of a master for injuries to his servant. However, in suits by an employee against a person other than his employer to recover for injuries due to defective and unsafe premises,[57] averments of actual knowledge of the defective and unsafe condition of the premises by the defendant or reliance by the employee upon an inspection system maintained by the defendant, must be contained in the declaration.[58]

In such suits to recover for injuries due to inadequate or defective machinery or appliances, the defendant will be held to a duty to use ordinary care to provide reasonably adequate and safe appliances and by reasonable inspection to keep them in a reasonably safe condition.[59]

In *Maryland Casualty Co. v. Union Bridge Electric Mfg. Co.*,[60] a suit filed by an insurer for its own use and for the use of the dependents of a deceased employee against an alleged tort feasor, the Court held the following allegation of negligence sufficiently definite and certain:[61]

> ". . . that the death of the said Benton W. Arbaugh was directly caused by the negligence and want of care of the agents and servants of the said defendant in maintaining an unprotected, highly charged wire within a few inches of the roof of said school house and without negligence or want of care on the part of the said Benton W. Arbaugh."

---

[57] Md. Code Supp. (1947), Art. 101, Sec. 59.
[58] State, use of Fisher v. C. & P. Tel. Co., 162 Md. 572, 160 A. 437 (1932); Bohlen v. Glenn L. Martin Co., 67 A. 2d 251 (Md. 1949).
[59] Petrol Corporation v. Curtis, 59 A. 2d 329 (Md. 1948).
[60] 145 Md. 644, 125 A. 762 (1924).
[61] *Ibid.*, 647.

NEGLIGENCE IN TRESPASSER, LICENSEE AND INVITEE CASES

Other persons present upon the land of another are customarily considered in Maryland as trespassers, licensees or invitees. Toward trespassers, the landowner owes the duty to refrain from wilful or wanton injury, and upon discovery of the trespasser's presence or peril, to exercise reasonable care to protect him from the consequences of his indiscretion.[62] General affirmations of negligence and want of care which do not disclose breach of such duty by the defendant will be held insufficient on demurrer in such cases[63]

Similarly, one upon the land of another by permission, as distinguished from invitation or inducement, is obliged to use the subject of the license as he finds it, with all its concomitant conditions and perils. Here again, general allegations of negligence, not showing that the landowner has covertly altered the property so as to create an unexpected peril, or that the landowner, when actually aware of the licensee's presence, failed to take reasonable care to prevent injury to him after knowledge of impending danger, will be deemed insufficient.[64]

Yaniger v. Calvert Bldg. & Constr. Co.,[65] involved a suit by an invitee to recover for injuries sustained by reason of an allegedly dangerous condition in an office building. Negligence was predicated upon a failure to provide safeguards at a window in a hallway through which window the plaintiff fell and sustained serious injuries. The declaration alleged that plaintiff's injuries were caused:

> "by the negligence of the defendant, its agents, servants and employees, in that it permitted a dangerously low window in the public hallway to be open beside the elevator buttons and shafts, without a bar or guard as aforesaid, knowing that the public generally, including persons who were weak and infirm, or per-

[62] See Note, *Liability of Railroad to Intruders Crossing its Right of Way*, 3 M. L. R. 344, 347-348 (1939).

[63] State, use of Alston v. Baltimore Fidelity Warehouse Co., 176 Md. 341, 4 A. 2d 739 (1939).

[64] Jackson v. Pennsylvania R. Co., 176 Md. 1, 3 A. 2d 719 (1939), Noted 3 M. L. R. 344, *op. cit.*, *supra*, n. 62. In Petrol Corporation v. Curtis, *supra*, n. 59, 331, the Court of Appeals quotes with apparent approval the rule of 2 RESTATEMENT TORTS, Sec. 341, which subjects a possessor of land to liability to visitors or gratuitous licensees from harm caused them by failure to carry on activities with reasonable care for their safety unless they knew or should have known of the activities and risks involved.

[65] 183 Md. 285, 37 A. 2d 263 (1944).

> sons who were or might become faint, had to come to the window in order to signal the elevators, without any negligence on the part of the plaintiff contributing thereto."

The declaration was not objected to on the ground of indefiniteness but it was held to be without any support in law as stating a cause of action since the facts alleged show that the danger was as obvious to the invitee as to the landowner.

Res Ipsa Loquitur Cases

In the field of negligence law the theory of recovery embodied in the phrase *"res ipsa loquitur"* has been applied to test the sufficiency of the evidence in a variety of cases in Maryland.[66] However, it has been unusual in Maryland to test the sufficiency of the allegations of negligence contained in a declaration by resort to the theory underlying the phrase.

In the case of *Murray v. McShane*,[67] sometimes regarded as an early illustration of a *res ipsa loquitur* situation, the plaintiff's theory of the case was that the defendant's had suffered or permitted the front wall of their property adjoining a public street to become dilapidated so that it became a source of peril to persons using the street which constituted a nuisance, and that the plaintiff had been damaged by this illegal act when a brick fell out of the wall upon his head. A demurrer to the declaration setting forth this theory was overruled. The main contention of the defendant was that the plaintiff was a trespasser in seating himself uninvited within the door of the house for the purpose of adjusting his shoe.

In *Hearn v. Quillen*,[68] the Plaintiff's declaration read as follows:

> ". . . for that the said defendants, on the twenty-ninth day of November, in the year eighteen hundred and ninety-nine, were in possession of a steam saw-mill, situated in Worcester County, and were running and managing the same in the manufacture of lumber, and that John S. Quillen, the said plaintiff, by reason of

[66] *Farinholt, "Res Ipsa Loquitur"* (1949), 10 M. L. R. 337; *Thomsen, "Presumptions and Burden of Proof in Res Ipsa Loquitur Cases in Maryland"* (1939), 3 M. L. R. 285.

[67] 52 Md. 217 (1879).

[68] 94 Md. 39, 42, 50 A. 402 (1902).

> the insufficiency of the house, then and there being built by the said defendants as a covering for said mill, in and about which the said John S. Quillen was then employed by the defendants, was greatly injured by the falling of said house, and the defendants did not use due care in reference to the said house, but the said John S. Quillen did use due care. . . ."

The Court held a demurrer to the declaration properly to have been overruled, saying:[69]

> "The declaration although brief contains all of the allegations essential to the plaintiff's case and substantially gratifies the requirements of the Code in reference to the form of pleading to be used in cases like the present one. It avers the plaintiff's employment by the defendants to labor in their sawmill, and that while he was engaged in performing the labor at the mill in the exercise of due care he was greatly injured by the falling upon him, by reason of its insufficiency, of the roof being erected by the defendants over the mill and that the defendants did not use due care in the premises."

In affirming the lower court's action in refusing to take the case from the jury for want of evidence legally sufficient to maintain the plaintiff's case, the Court said: "The fact that the roof fell under the circumstances disclosed by the record while in the course of construction was, until otherwise explained, prima facie evidence of the insufficiency of the building." This language, plus the authorities cited in support thereof, indicate that the Court had in mind as one theory of recovery that embodied in the phrase *res ipsa loquitur,* although the phrase was not used.

The Court in *DeCola v. Cowan,*[70] thus summarizes the plaintiff's amended declaration:

> "The amended declaration, on which the case was tried below, alleges that, while the three defendants were together engaged in erecting the building in question, the plaintiff was passing along the sidewalk in

[69] *Ibid.* The authority of this decision has been doubted by Judge Dennis in State, use of Cherry v. Stewart & Co., Daily Record, March 22, 1939, and Judge O'Dunne in Seeger v. Janocha, Daily Record, March 27, 1941. However, it is cited by Judge Markell in the Livingstone case, *supra,* n. 1, as authority for the proposition that no great particularization of facts and circumstances is necessary in stating a cause of action for negligence.

[70] 102 Md. 551, 552, 62 A. 1026 (1906).

> front of it using due care and caution when 'a brick or large substance fell or was thrown from the building, being so erected as aforesaid by said defendants, by the carelessness and want of due care of the said defendants, their servants and agents', and struck her on the head and seriously injured her."

The sufficiency of this declaration is not discussed by the Court in holding that the evidence offered by the plaintiff was sufficient to require the defendants to explain the falling of the brick.

Strasburger v. Vogel,[71] was a similar case wherein the declaration charged negligence in similar general language. Again, the sufficiency of the declaration was not discussed for it appeared from the evidence that the brick was caused to fall by the acts of third persons.

The Court, in *Chesapeake Iron Works v. Hochschild, Kohn & Co.*,[72] approved the granting of a prayer which stated in effect that a finding that the defendants, while moving a heavy piece of structural iron, permitted and allowed it to strike a valve or pipe on the plaintiff's premises with such force as to break the same, would be prima facie evidence of negligence which, unless rebutted, justified a verdict for the plaintiffs. The opinion states that the negligence charged in the declaration was that the defendant, while moving a heavy piece of structural iron "wrongfully and negligently permitted the same to strike against and break a valve or pipe upon plaintiff's said premises, connected with an automatic sprinkler system therein situated."

Heim v. Roberts,[73] was an action to recover for personal injuries received by the infant plaintiff while walking on the sidewalk in front of the defendant's premises when lumber there piled fell upon him. The Court summarizes the allegations of negligence against the defendant property owner as follows:[74]

> "The negligence charged against the defendant, which is the gravamen of the action, is that he, being in possession of the premises in front of which the lumber was piled, 'directed or knowingly permitted it to be piled, *as aforesaid*', that is, 'in so careless and negligent a manner as to cause it to fall', 'although he knew or,

[71] 103 Md. 85, 63 A. 202 (1906).
[72] 119 Md. 303, 86 A. 345 (1912).
[73] 135 Md. 600, 109 A. 329 (1919).
[74] *Ibid.*, 604.

> in the exercise of ordinary care, ought to have known that the piling of said lumber in the place aforesaid rendered the said sidewalk dangerous for persons having occasions rightfully to use the same.' "

A prayer that the evidence offered did not tend to show the negligence of the defendant as alleged in the declaration was held properly refused, and the submission of the case to the jury upon the inference of negligence arising from the fall of lumber under the circumstances was held proper.

Apparently, it was assumed that these cases justified general allegations of negligence where *res ipsa loquitur* applied. Thus, in *State use of Cherry v. Stewart Co., Inc.*,[75] the essential allegations of the declaration were stated to be:

> "That the defendant . . . owning or operating and conducting a retail store and restaurant . . . that Helen Cherry . . . on January 18, 1938 was a customer in said store and by reason of the insufficiency of a chair therein on which she tried to sit, said chair suddenly broke and collapsed whereby she was mortally injured and died on April 8, 1938 . . . that the defendant did not use due care in reference to said chair, but the said Helen Cherry did use due care,", etc.

The Court (DENNIS, C. J.), said:

> "Since the allegation of negligence is general and not specific, it is obvious that the plaintiffs rely upon the doctrine expressed in the sonorous Ciceronian phrase 'res ipsa loquitur', the thing speaks for itself. That imposes upon the Court no concern with the matter of contributory negligence or preponderance of proof, but only to determine if the declaration sets up a legal cause of action based upon primary negligence; and does state facts which speak for themselves.
>
> "The rules applied are the same whether the point be raised by demurrer or by prayer."

The opinion concluded that the collapse of a chair was an accident of a nature consistent with the absence of negligence on the defendant's part and that being so, the demurrer was sustained on the ground that the allegations of negligence were too general.

[75] Baltimore City Court—filed March 20, 1939, Daily Record, March 22, 1939.

The genesis of the rule adopted in the *Livingstone* case, that *res ipsa loquitur* is not a rule of pleading, may be seen in *Bohlen v. Glenn L. Martin Co.*,[76] which involved a suit under the Workmen's Compensation Act.[77] Plaintiff's injuries were alleged to have been due to the negligence of the defendant, Martin, "its agents, servants or employees, for their failure and negligent failure to provide him a safe place in which to work, and for their failure and negligent failure to warn him and other employees of The Williams Construction Company, of the possibility of the explosion of any of the metal drums mentioned aforesaid, if and when they were in close proximity of fire, although for many days, the defendant, its agents, servants or employees had seen the plaintiff and other employees of The Williams Construction Company burning the debris aforesaid in the near proximity of the metal drums aforesaid, and without negligence or want of due care on the part of the plaintiff thereunto contributing."

The plaintiff, in oral argument on appeal, claimed that the doctrine of *res ipsa loquitur* was applicable. The Court first pointed out that the allegations of the declaration plainly do not set out the necessary requirements for application of the doctrine and then, without citation of authority, said:[78]

> "The doctrine res ipsa loquitur is not a rule of pleading. It relates to burden of proof and sufficiency of evidence. When it is applicable, for example, between passenger and carrier in case of collision between two trains of the same railroad, the fact of the collision is evidence of negligence in the operation of the trains. The declaration must allege negligent operation causing the collision not merely the evidence; to wit, the collision, from which negligent operation may be inferred."

The opinion in the instant case quotes this passage from the *Bohlen* case and states that the first two sentences state what seems to be universally recognized and the last two at least state Maryland law of pleading. The effect of the decision is that where the allegations of negligence are too indefinite to state a cause of action, their sufficiency may

---

[76] 67 A. 2d 251 (Md. 1949).
[77] *Supra*, n. 57.
[78] *Supra*, n. 76, 254.

not be aided by resort to the theory expressed by the phrase *res ipsa loquitur.*

It has been suggested that the question whether *res ipsa loquitur* has application to the pleadings should turn on the manner in which negligence is required to be pleaded —whether generally or particularly.[79] Thus, it is said that in jurisdictions where negligence may be pleaded as an ultimate fact, the need for applying *res ipsa loquitur* as a rule of pleading is slight. But where negligence must be stated with particularity, the use of *res ipsa loquitur* has been urged to test the sufficiency of the pleading, for the reasons that the plaintiff does not know the specific facts in the first place, and secondly, the doctrine may be waived by the pleading of specific acts of negligence.

The Maryland Code forms and judicial opinions relating to the manner of pleading negligence do not require great particularity in pleading negligent conduct. Indeed, in some situations rather general allegations with but slight particularization of facts and circumstances have been held sufficient. The need for resort to the theory of *res ipsa loquitur* to state a cause of action for negligence is not great under this system, as is demonstrated by the multitude of cases wherein the pleading requirements have been met, and *res ipsa loquitur* applied to the proof to allow recovery. Moreover, in Maryland the making of specific allegations of negligence, at least when coupled with the usual general allegation, does not preclude or restrict the right to resort to *res ipsa loquitur* to test the sufficiency of the evidence produced at the trial.[80] The leading effect, then, of the decision in the *Livingstone* case is to bury the problem of the application of the theory of *res ipsa loquitur* until at least the plaintiff's evidence has been presented at the trial.

The Court was not disposed to decide the application of the doctrine of *res ipsa loquitur* to the fall of the bicycle here, saying that it was not conceivable that the case could be tried without the evidence showing more circumstances than those alleged in this declaration.

This reluctance under the circumstances to theorize about the doctrine of *res ipsa loquitur* may be readily understood. It is submitted that experience has demonstrated that ordinarily it is not necessary to apply the doctrine at

---

[79] *Hargett, "Res Ipsa Loquitur As A Rule of Pleading"* (1937), 11 U. of Cinn. L. Rev. 375, 379.

[80] Lawson v. Clawson, 177 Md. 333, 340, 9 A. 2d 755 (1939).

the pleading stage in Maryland. Nor does the *Livingstone* case present insurmountable pleading obstacles. Had the plaintiff alleged that the defendant had negligently positioned the bicycle without adequate support at a place where it was likely to be jostled and fall upon a business invitee, these allegations would have been deemed a sufficient statement of the facts constituting negligent conduct on the part of the defendant, assuming that the danger was not equally apparent to the plaintiff.

Exceptional cases may arise where the rule of the *Livingstone* case will create more difficult problems for the Maryland pleader. Such a case is *State of Maryland, use of Ortiz v. Eastern Airlines, Inc.*[81] This was a suit in the United States District Court for the District of Maryland under the Maryland wrongful death statute to recover damages sustained by the equitable plaintiffs when their decedent met his death while a passenger in the airplane of the defendant company which suddenly crashed while in flight near Bainbridge, Maryland. The complaint alleged that the crash and death resulted from negligence and lack of care on the part of the defendant, its agents and servants. The defendant demanded particulars of this general charge of negligence. The Court ordered the plaintiffs to state the particulars or show cause why they could not make the complaint more specific within thirty days after the publication of the final findings of the Civil Aeronautics Board. Subsequently, the plaintiffs filed a petition in which they stated they were unable to be more specific and attached a copy of the report of the C. A. B. which concluded that the probable cause of the crash was a "sudden loss of control, for reasons unknown, resulting in a dive to the ground". The plaintiffs prayed that the Court require the defendant to answer. Thereupon, the defendant moved to dismiss on the grounds that no specific negligence had been charged and the doctrine of *res ipsa loquitur* was not applicable. The Court concluded that under the Maryland law, the doctrine of *res ipsa loquitur* was inapplicable, yet the complaint should not be dismissed and the plaintiffs should be given an opportunity to present whatever evidence was available at a trial.[82]

---

[81] United States District Court, Maryland, No. 3850 Civil Action (1948).

[82] Chief United States District Judge Coleman, in his oral opinion, said: "We should not stretch the technicalities of pleading too far and say that the allegations are not adequate because the whole argument today has resulted from an utter impossibility of making such allegations as would normally be required." Detailed statement of the circumstances constituting

In a similar case in the State courts, the pleader would no doubt be required to be more definite. But what more is there that he is likely to know or could add? To get over the pleading hurdle he may have to make specific charges of negligence which he has no intention of attempting to prove, since under the Maryland rule specific allegations of negligence do not preclude or restrict the right to resort to *res ipsa loquitur*.[83] Such pleading would defeat the fundamental purposes of the Maryland system of pleading by raising false issues and misinforming rather than informing the defendant of the charge he is to meet.

Advocates of the system of a simplified pleading embodied in the Federal Rules of Civil Procedure may regard the opinion in the *Livingstone* case as expressing a rather technical view of a declaration for negligence.[84] They may point to Rule 8 of the Federal Rules of Civil Procedure and Official Form 9, Appendix of Forms,[85] to indicate the simple non-technical view of the Federal Rules as to a complaint for negligence. But not all causes of action for negligence may be as generally stated under the Federal Rules as the one illustrated by Form 9, where the wrong is closely akin to trespass to the person. Thus, Official Form 14 "Complaint for Negligence under Federal Employer's Liability Act" and Official Form 15, "Complaint for Damages Under Merchant Marine Act" contemplate some brief statement of the defendant's negligent conduct.[86] It is submitted that all the opinion in the instant case requires is some brief statement without undue particularization of the defendant's negligent conduct which was totally lacking and could readily have been supplied as heretofore indicated.

The wisdom of the adoption by the Court of a rule which in effect buries the problem of the application of the theory of recovery embodied in the phrase *res ipsa loquitur* until the trial may also be questioned. The argument may be made that the application of *res ipsa loquitur* is a question of substantive law,[87] which should be issuable on demur-

negligence is ordinarily not necessary under the Federal Rules. A general allegation of negligence is sufficient except that a motion for a more definite statement may be granted where the allegations are so general as not to disclose what is involved in the case. BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, Vol. 1, Sec. 270.

[83] *Supra*, n. 80.

[84] CLARK: SIMPLIFIED PLEADING (1943), 2 F. R. D. 456; BARRON AND HOLTZOFF, *op. cit.*, *supra*, n. 82.

[85] Title 28 U. S. C. A.

[86] Klug v. Palmer, 2 F. R. D. 273 (D. C. E. D. N. Y. 1942).

[87] Compare Potts v. Armour, 183 Md. 483, 486, 39 A. 2d 552 (1945); Lachman v. Pennsylvania Greyhound Lines, 160 F. 2d 496 (C. C. A. 4th, 1947).

rer,[88] or on a motion for a more definite statement,[89] or on a motion to strike.[90]

In *Smith v. Pennsylvania Central Airplines Corp.*, the Court, speaking of the application of *res ipsa loquitur* to an airplane crash, said: "It is obviously desirable to determine this basic question as near the inception of the actions as possible."[91] And other courts, while recognizing that *res ipsa loquitur* relates to burden of proof and sufficiency of evidence, neverthless hold that it should have and does have its concomitant rule of pleading.[92]

In Maryland, the Bench and Bar in general are well satisfied with the present system of simplified common law pleading. Two committees of the Court of Appeals over a period of approximately nine years have seen fit to recommend but one new rule relating solely to pleading.[93] The code forms, now in use for almost a century, have not been revised nor have new forms been added. Despite the general excellance of the system, the fact that it may lead to "barren appeals" and "barren victories" makes fairly debatable the question whether some innovations should not be made.

---

[88] State, use of Cherry v. Stewart & Co., *supra*, n. 75; Cohn v. United Air Lines Transport Corp., 17 F. Supp. 865 (D. C. Wyo. 1937).

[89] If the doctrine were determined to be applicable, the motion would be denied; if not applicable, the motion would be sustained. Zichler v. St. Louis Pub. Ser. Co., 332 Mo. 902, 59 S. W. 2d 654, 658 (1933); Gebhardt v. McQuillen, 230 Iowa 181, 297 N. W. 301 (1941).

[90] Smith v. Pennsylvania Central Airlines Corp., (D. C. D. C.), 76 F. Supp. 940, 6 A. L. R. 2d 521 (1948).

[91] *Ibid.*, 942.

[92] Kaemmerling v. Athletic Mining & Smelting Co., 2 F. 2d 574, 579 (C. C. A. 8th, 1924). See also, *Hargett, op. cit., supra*, n. 79.

[93] General Rules of Practice and Procedure, Pleading Rule 1.