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Res Ipsa Loquitur

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Comment and Casenotes

RES IPSA LOQUITUR

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One of the more frequently expressed maxims arising in tort actions is that of *res ipsa loquitur*. However, notwithstanding its repeated use, the true meaning and effect of its application are obscure. This uncertainty is apparently the result of the tendency of the courts to apply the doctrine beyond its original extent and to treat the phrase as a *nostrum* capable of resolving a host of problems of proof.

It is the purpose of this comment to give a brief statement of the present status of the "doctrine" in Maryland.[1] In doing so, however, it must be remembered that the court has not dealt with the maxim with any great clarity. Reference will be made to Maryland cases, in the main, in order to illustrate the types of situations to which the maxim has been applied in this state and to make an attempt to ascertain the usual consequence of such application.

The term has been variably defined. Literally translated it is "the thing speaks for itself". It is a "phrase often used in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence".[2]

Originally, the expression *res ipsa loquitur* was applied to a case where usury was apparent on the face of an instrument sued upon.[3] In 1863, the phrase was first used in its present application in *Byrne v. Boadle*[4] where the plaintiff was injured by a barrel which fell from the defendant's window. In that case, Pollock, C. B., said, "There are many accidents from which no presumption of negligence can arise, but this is not true in all cases. It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would,

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[1] For a discussion of similar purpose, though from a somewhat different viewpoint, see Thomsen, *Presumptions and Burden of Proof in Res Ipsa Loquitur Cases in Maryland* (1939) 3 Md. L. R. 285.

[2] BOUVIER, LAW DICTIONARY (8th ed. 1914) 2908; PROSSER, TORTS (1941) §43.

[3] Roberts v. Tremayne, 1614 Cro. Jac. 508, 79 Eng. Rep. 433.

[4] 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

beyond all doubt, afford *prima facie* evidence of negligence." This decision was followed by others in which the phrase was used in the same connection, and today most jurisdictions employ the maxim in numerous similar situations.[5]

In Maryland, the first use of the term is to be found in *Howser v. Cumberland & P. R. R. Co.*[6] though a case had arisen fifteen years before in which the owner of a house was held liable for damages arising from injuries sustained by a traveler due to a brick falling from the defendant's house.[7] Though this earlier case bore a striking similarity to *Byrne v. Boadle*,[8] the Court made no mention of the phrase, *res ipsa loquitur*.

In *Howser v. Cumberland & P. R. R. Co.*[9] the plaintiff while walking beside the defendant's railroad track was injured by ties which fell from a passing freight car. In the lower court the case was taken from the jury but on appeal this ruling was reversed on the ground that there was a "presumption arising out of *res ipsa loquitur*". Judges McSherry and Fowler dissented on the basis that no presumption of negligence could ever arise from the mere fact that an injury has been sustained unless there existed a contractual obligation between the defendant and plaintiff, or unless it was a fact established by physical laws that the injury could not have occurred without the negligence of the defendant.

Since this leading case, there have been many Maryland decisions in which the maxim has been invoked.[10] These include actions brought for injuries resulting from contact with a loose wire charged with electricity,[11] the fall of a dumb-waiter,[12] the fall of a brick from a building adjacent to a highway,[13] a steel joist striking a sprinkler,[14] planks

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[5] See cases collected and interpreted in Prosser, *Procedural Effect of Res Ipsa Loquitur* (1936), 20 Minn. L. R. 241.

[6] 80 Md. 146, 30 A. 906 (1894); Baxter, *Res Ipsa Loquitur*, Daily Record, Feb. 19, 1937.

[7] Murray v. McShane, 52 Md. 217 (1879).

[8] *Supra*, n. 4.

[9] *Supra*, n. 6.

[10] For an exhaustive analysis of the types of situations to which the maxim has been applied, see the opinion of Dennis, C. J., in the case of Cherry v. Stewart and Co., decided in the Baltimore City Court, Daily Rec., March 22, 1939.

[11] Western Union Telegraph Co. v. Nelson, 82 Md. 293, 33 A. 763 (1896); Walter v. Baltimore Electric Co., 109 Md. 513, 71 A. 953 (1909).

[12] Winkleman & Brown Drug Co. v. Colladay, 88 Md. 78, 40 A. 1078 (1898).

[13] Decola v. Cowan, 102 Md. 551, 62 A. 1026 (1906); Strasburger v. Vogel, 103 Md. 85, 63 A. 202 (1906).

[14] Chesapeake Iron Works v. Hochschild, Kohn & Co., 119 Md. 303, 86 A. 345 (1913).

falling from a pile of lumber,[15] the falling of a gate in the defendant's fence along a highway,[16] glass found in a soft drink,[17] spoiled canned meat,[18] scantling falling from a building in the course of construction,[19] the fall of a coal chute upon the plaintiff who was walking along the sidewalk,[20] the fall of stone similar to that used in the construction of defendant's building,[21] paint solvent becoming ignited,[22] explosion of a gas filled house,[23] falling of a meat hook.[24]

To determine what constitutes a *res ipsa* case it may be well to inspect its various essentials and limitations. Three requirements have been set up as necessary for the operation of the maxim. First, the apparatus which causes the injury must be such that in its ordinary operation no injury is to be expected from it; second, both inspection and user must have been at the time of the injury in the control of the defendant; third, there may be no voluntary action on the part of the plaintiff which might have contributed to the injury.[25]

It has been suggested that a fourth circumstance should be found present before the case may be properly classified as a *res ipsa* case; *viz.*, that the knowledge of the cause of the injury shall appear more accessible to the defendant than to the plaintiff.[26] ". . . if there is direct evidence of negligence, and all the facts causing the injury are known and testified to by witnesses at the trial, the condition for the inference does not exist."[27] This fourth suggested requirement is in effect a corollary to the second essential stated above. It will be seen that if the agency causing the injury were within the exclusive control of the defendant then such circumstance would suggest that the defend-

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[15] Surry Lumber Co. v. Zissett, 150 Md. 494, 133 A. 458 (1926); Heim v. Roberts, 135 Md. 600, 109 A. 329 (1920).

[16] Pindell v. Rubenstein, 139 Md. 567, 115 A. 859 (1921).

[17] Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 A. 866 (1922); Salisbury Coca Cola Co. v. Lowe, 176 Md. 230, 4 A. (2d) 440 (1939).

[18] Armour v. Leasure, 177 Md. 393, 9 A. (2d) 572 (1939).

[19] Clough & Molloy v. Shilling, 149 Md. 189, 131 A. 343 (1925).

[20] State v. Emerson & Morgan Coal Co., 150 Md. 429, 133 A. 601 (1926).

[21] B.-L. Stores, Inc. v. Burlingame, 152 Md. 284, 136 A. 622 (1927).

[22] Underwriters v. Beckley, 173 Md. 202, 195 A. 550 (1937).

[23] Frenkil v. Johnson, 175 Md. 592, 3 A. (2d) 479 (1939).

[24] Potts v. Armour & Co., 183 Md. 483, 39 A. 2d 552 (1944).

[25] 9 WIGMORE, EVIDENCE (3d ed. 1940), Sec. 2509; Frenkil v. Johnson, 175 Md. 592, 605, 3 A. 2d 479, 484, 485 (1939), Greeley v. Balto. Transit, 180 Md. 10, 12, 22 A. 2d 460 (1941).

[26] Carpenter, *Res Ipsa Loquitur: A Rejoinder to Professor Prosser* (1937), 10 S. Cal. L. R. 467; 9 WIGMORE, EVIDENCE (3d ed. 1940), Sec. 2509.

[27] Frenkil v. Johnson, 175 Md. 592, 605, 3 A. 2d 479, 485 (1939). *Cf.*, Livingston v. Stewart & Co., 69 A. 2d 900 (1949).

ant had a better knowledge of the cause; and to require from the plaintiff affirmative proof of the negligence would, in a typical *res ipsa* case, place before him an insurmountable obstacle.[28] Thus the doctrine has been considered a rule of necessity, a "rule based upon common sense applied in the light of experience had from practical facts."[29] But the mere fact of the occurrence of the injury will not give rise to the inference.[30]

If the plaintiff alleges specific acts of negligence it would seem logically to follow that by so pleading he should be denied the benefits of the doctrine. However, the courts are in conflict on this point.[31] Though some courts adhere to the view that by pleading specific negligence the plaintiff is barred from the use of *res ipsa*, the majority of courts take a more liberal stand and hold that by such pleading the plaintiff is not precluded from taking advantage of the application of the doctrine. There is an intermediate third view which gives to the pleading of specific negligence the modified effect of permitting the plaintiff to rely on the doctrine but only within the area delimited by his allegations of specific negligence.[32]

In Maryland the Court of Appeals, in *Lawson v. Clawson*[33] when confronted with the contention that an application of *res ipsa* was precluded because the plaintiff had alleged specific acts of negligence stated the Maryland view to be the converse, namely that the doctrine of *res ipsa loquitur* may be applicable notwithstanding specific allegations of negligence.[34]

Situations where the *res ipsa loquitur* doctrine may be applied have been divided into two classes: first, carrier-passenger relations where "the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of persons or property and is so tortious in its

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[28] Frenkil v. Johnson, 175 Md. 592, 604, 3 A. 2d 479, 484 (1939).

[29] Cherry v. Stewart & Co., *supra*, n. 10.

[30] Benedick v. Potts, 88 Md. 52, 40 A. 1067 (1898); Schier v. Wehner, 116 Md. 553, 82 A. 976 (1911); Greeley v. Balto. Transit Co., 180 Md. 10, 22 A. 2d 460 (1911); Bohlen v. Glenn L. Martin, 67 A. 2d 251 (1949).

[31] See cases collected in 38 Am. Jur., neg. f. 305; 79 A. L. R. 48, and 160 A. L. R. 1450.

[32] Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur (1928), 22 Ill. L. R. 724; Prosser, Torts, (1941) §44.

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

[34] *Ibid.*, 340. Consider Livingston v. Stewart & Co., *supra*, n. 28, where no specific acts of negligence were alleged and a demurrer to the declaration was sustained, and affirmed on appeal. It would seem that the essentials of a *res ipsa* situation were not present.

quality as, in the first instance, at least, to permit no inference save that of negligence on the part of the person in control of the injurious agency."[35] It is with the second group that most of the difficulty arises, though the above statement is to a degree stricter than that applied in most of the *res ipsa* cases in Maryland.

In *Frenkil v. Johnson*,[36] the Court with no great difficulty found the situation to fall under the above rules, stating as its interpretation of the essentials of the doctrine,

> "Where the thing or artificial condition which is the proximate and natural cause of the injury is wholly in the possession and control of the one party or the other, or if he has much greater opportunity to know the facts and ability to prove them, such party is bound, at his peril, to produce the proof of the facts which either he alone can prove or has the much better chance to know and power to prove . . . this rule, which is commonly identified as *res ipsa loquitur* is not applicable unless what inflicts the injury is shown to have directly and naturally been the result of some act or condition with which the defendant is connected and which ordinarily does not happen if those who have the management and control use proper care and diligence."

Where the suggested requisites are found to be present and the maxim is therefore applied, three theories have been advanced regarding the result of its application. First, where a *res ipsa* situation is given the effect of furnishing "some" evidence of negligence. This is the least effect given it and has been termed "permissible inference". This interpretation insures the plaintiff of having his case go to the jury unless the defendant offers sufficient rebutting evidence to overturn the plaintiff's case. Second, where a *res ipsa* case casts the burden of going forward with the evidence on the defendant. In such a situation there is said to arise a "presumption of negligence". If the defendant comes forward with some explanation or rebutting evidence, the case goes to the jury, but if he fails to do so, the plaintiff is entitled to a directed verdict. Third, where a *res ipsa* case shifts the burden of proof to the defendant. This interpretation results in requiring the defendant to

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[35] Benedick v. Potts, *supra*, n. 30.

[36] Frenkil v. Johnson, 175 Md. 592, 604, 3 A. (2d) 479, 484 (1939).

show by a preponderance of evidence that he was not guilty of negligence.[37]

In tracing the use of the maxim in Maryland, there is an apparently striking inconsistency of the Court of Appeals as to the procedural effect of a *res ipsa* situation. Maryland has been referred to as a jurisdiction where a *res ipsa* case gives rise to some evidence of negligence and the case goes to the jury unless this evidence is rebutted by the defendant, *i.e.*, a permissible inference jurisdiction under the classification above;[38] as a jurisdiction where the plaintiff is entitled to a directed verdict unless the defendant introduces evidence to meet it, *i.e.*, a presumption jurisdiction;[39] and as a jurisdiction which leans toward the theory that the burden of proof, strictly speaking, shifts to the defendant.[40]

The contention that the doctrine shifts the burden of proof has been ably criticized on the obvious ground that the reason for the rule lies in the equalization of the parties in respect to the proof since the plaintiff may have no means of discovering the circumstances or cause of the accident. Once the defendant has shown the actual facts of the accident, then both parties are on equal footing, the reason for the presumption has disappeared, and the case should proceed as any ordinary negligence case.[41]

The one-time confusion in regard to the effect of the doctrine of *res ipsa loquitur* is well illustrated by the language of the Maryland Court of Appeals in the case of *Pindell v. Rubinstein*.[42] The Court said:

> "the fourth prayer of the defendant which instructs the jury that no presumption of negligence arises from the mere happening of an accident and that the burden was on the plaintiff to prove that it was occasioned by the negligence of the defendants was, under the circumstances of this case, not only misleading but incorrect, because if the plaintiff's evidence is accepted, this is one of that class of cases in which it may be inferred from the mere happening of an accident, when taken in connection with the circumstances sur-

[37] Prosser, *Procedural Effect of Res Ipsa Loquitur* (1936), 20 Minn. L. R. 241, 247; Heckle and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928), 22 Ill. L. R. 724; HARPER, TORTS (1933), Sec. 77; PROSSER, TORTS (1941) §44.

[38] Prosser, *supra*, n. 37.

[39] Prosser, *supra*, n. 37.

[40] Heckle and Harper, *supra*, n. 37.

[41] Harper, *supra*, n. 37; Heckle and Harper, *supra*, n. 37; Thomsen, *supra*, n. 1.

[42] Pindell v. Rubenstein, 139 Md. 567, 578, 115 A. 859, 863 (1921).

> rounding it, that it was due to a breach of some duty on the part of the person controlling or responsible for the agency causing it, for while it is true that in every action for damages arising from negligence, the plaintiff is bound to prove the negligence and the damage complained of as a consequence thereof yet where, as in this case, it appears from the plaintiff's evidence that a person lawfully in use of a public highway was injured by the fall of an object within the exclusive control of the defendant, which was maintained by him in such a condition that he might reasonably have expected it to fall in the highway, just as it did in this case, a prima facie presumption of negligence arises from the accident itself, when taken in connection with the circumstances under which it occurred."

Such language might be referred to as placing Maryland under any of the three classifications. Whatever may have been the confusion as to whether or not the burden of proof shifted in a *res ipsa* case, this point, at least, is well settled today by the case of *Potomac Edison v. Johnson*,[43] as restated by *Underwriters v. Beckley*,[44] in which the Court said, "the burden of proof upon the issue of negligence remains upon the plaintiff throughout the trial". This view again is clearly endorsed in the more recent decisions of *Frenkil v. Johnson*,[45] *Armour v. Leasure*[46] and *Potts v. Armour*.[47]

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[43] 160 Md. 33, 152 A. 633 (1930).
[44] 173 Md. 202, 195 A. 550 (1937).
[45] 175 Md. 592, 604, 3 A. (2d) 479, 484, 486 (1939).
[46] 177 Md. 393, 411, 9 A. (2d) 572, 580 (1939).
[47] 183 Md. 483, 486. "The presumption raised by the rule of *res ipsa loquitur* is one of evidence and not of substance and application of the rule does not shift the burden of proof, but simply shifts the burden of going forward with the evidence. When the rule is applied, the burden of the proof remains upon the plaintiff during the trial. When all the evidence is in, the question for the jury to decide is whether the plaintiff has met the obligation to prove negligence by a preponderance of the evidence."

Note that the language of the above case characterizes the doctrine as one of procedure rather than substance. However, such a characterization is inapposite for the purpose of determining the applicable law to be applied in a federal court in a case based on diversity jurisdiction. Though *res ipsa loquitur* relates to trial procedure the question of sufficiency of the evidence may depend upon whether or not *res ipsa loquitur* is applicable under the facts of a given case. Thus the substantive right is so exclusively dependent upon the proof supplied by the application of the rule that the federal court should be governed by the local rule of the state in which it sits. (Lachman v. Pennsylvania Greyhound Lines, 160 F. 2d 496 (1947); Sierocinski v. E. I. DuPont de Nemours Co., 118 F. 2d 531.) To do otherwise would violate the spirit of the Erie rule (Erie R. R. v. Tompkins, 58 S. Ct. 817) as it has been developed by subsequent cases. For a treatment of the extent of the Erie rule see Farinholt, *Angel v. Bullington—Twilight of Diversity Jurisdiction?* (1947), 26 N. Car. L. R. 29.

However, at one period, Maryland had not so satisfactorily answered the question of whether there could be a directed verdict for the plaintiff, or merely a "permissible inference" where the defendant fails to rebut, when a *res ipsa* case gives rise to a presumption of negligence. The language of the Court of Appeals was equivocal in that respect, the difficulty being to some extent one of the ambiguous nomenclature. The phrase "*prima facie* case", "burden of going forward with the evidence", "rebuttable presumption", and "permissible inference" had been loosely and indiscriminately used without regard to the procedural effect of the application of the maxim.[48]

In *Chesapeake Iron Works v. Hochschild Kohn*,[49] the Court said "the presumption of negligence arising from the happening of the accident under the circumstances shown in the evidence produced by the plaintiffs *cast the burden upon the defendant to show that the injury was not caused by any want of care on its part*". The language of the court here could be taken to mean that the effect of the rule was to raise a presumption which would entitle the plaintiff to a directed verdict unless evidence was introduced by the defendant to meet it.

On the other hand, in *Bernheimer-Leader v. Burlingame*,[50] the following prayer was granted and on appeal upheld ". . . the falling of said hard substance is evidence of the negligence of the defendants unless the fall of the same is explained by the defendants to the satisfaction of the jury and their verdict must be for the plaintiff". Judge Adkins, who was author of the opinion, added a note thereto in which he stated that he thought "that the prayer as worded might be construed to permit a recovery without requiring the jury to find negligence", whereas this case holds merely that where the facts proved warrant the application of that principle, there is *some* evidence of negligence to go to the jury.

From the above reference to two typical Maryland cases it is apparent that if the language of the Court be taken literally the result of the application of *res ipsa loquitur* in this jurisdiction was in a confused state.

However, in all probability the Court would never have gone to the extent of directing a verdict for the plaintiff even though the language in some of the cases[51] seems to

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[48] *Supra*, n. 1.
[49] *Supra*, n. 14.
[50] *Supra*, n. 21.
[51] See Chesapeake Iron Works v. Hochschild, Kohn & Co., *supra*, n. 14.

infer that in a proper *res ipsa* case where the defendant failed to introduce evidence in rebuttal, a directed verdict for the plaintiff might have been granted.

It would appear that an adherence to the "permissible inference" theory is more advisable if the "doctrine" of *res ipsa loquitur,* as such, is to be given effect at all. If the maxim be deemed to give rise to a presumption which will entitle the plaintiff to a directed verdict unless the defendant meets it, the substantial effect is to emasculate the power and right of the jury to pass on the credibility of the witnesses. Furthermore, should the jury be required to find negligence on the defendant's part in the absence of explanation, which the defendant may not be able to give, the result might be clearly unjust.[52] The suggestion has been made that where the rule applies, a duty rests upon the court to instruct the jury that proof which calls the rule into action constitutes a *prima facie* case, or raises a presumption of negligence. This is a misapprehension both of the principle upon which the rule is founded and its application. Indubitably, the plaintiff is entitled to have a jury pass upon the physical facts and condition, and to say whether in its opinion he has made good his allegation of actionable negligence. The defendant may or may not introduce evidence as it is advised. By failing to do so, it admits nothing but simply takes the risk of *"non-persuasion".*[53]

The federal courts have reached, in *Sweeney v. Erving,*[54] the conclusion that the maxim has only the effect of a permissible inference. The facts of the injury and its attendant circumstances "warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal not necessarily that they require it,[55] that they make a case to be decided by the jury, not that they forestall the verdict". The Court of Appeals of Maryland adopted this language *verbatim* in *Potts v. Armour & Co.*[56]

Whatever may be the merits of either contention, the present view as deduced from the more recent cases seems

[52] Benedick v. Potts, *supra,* n. 30.
[53] Stewart v. Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562 (1905).
[54] 228 U. S. 233, 33 Sup. Ct. 416, 57 Law. ed. 815 (1913).
[55] *Cf.* the plaintiff's 5th prayer granted by the court in Chesapeake Iron Works v. Hochschild, Kohn & Co., *supra,* n. 14.
[56] *Supra,* n. 24, 486.

clearly to uphold the interpretation which gives effect to the rise of merely a permissible inference under the rule. The Court, in the *Frenkil* case, says "while such facts support the inference of negligence (citing with approval *Sweeney v. Erving*),[57] they do not compel such an inference. Before a verdict may be rendered for the plaintiff, the facts upon which the inference depends must be found by the jury to be true and to be sufficient to establish the defendant's negligence after the jury has weighed all other countervailing testimony in evidence whether in denial, in rebuttal, or in exculpation."[58] Thus the Court of Appeals has discarded its prior inconsistencies and clearly approved the view taken in the majority of jurisdictions.

Frenkil v. Johnson,[59] supported by *Armour v. Leasure*[60] and *Potts v. Armour*,[61] seems to crystallize the theory which, though previously poorly expressed in ambiguous language, probably has existed in the mind of the Court since the earliest *res ipsa* case, *i.e.*, the "permissible inference" theory. Be that as it may, apparently the rule in Maryland today, judging from these more recent decisions, is that when the plaintiff presents a fact situation within the requirements of *res ipsa loquitur*, the case goes to the jury; that even though the defendant presents no explanation or rebutting evidence, the plaintiff is not entitled to a directed verdict[62] as has been suggested[63] and intimated by the language of *Chesapeake Iron Works v. Hochschild Kohn*[63a].

If Maryland's position may be correctly interpreted as being within the "permissible inference" rule, a further question arises. What effect will be given the defendant's evidence of freedom from negligence? In this state, the defendant's uncontradicted evidence that he is free from

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[57] *Supra*, n. 54.
[58] *Supra*, n. 23.
[59] *Supra*, n. 23.
[60] *Supra*, n. 18.
[61] *Supra*, n. 24.
[62] Frenkil v. Johnson, *supra*, n. 23; Armour v. Leasure, *supra*, n. 18; See Alexander v. Tingle, 181 Md. 464, 30 A. 2d 737 (1943), for an interpretation of directed verdicts under Trial Rule 4, of the General Rules of Practice and Procedure (1941).
[63] Prosser, *supra*, n. 37; Heckle and Harper, *supra*, n. 37. As this issue of the REVIEW was about to be printed, there appeared the current case of Vogelsang v. Sehlhorst, The Baltimore Daily Record, February 28, 1950 (Md. 1950), which contains at least a dictum to the effect that the lower court might have directed a verdict for the moving party. It might seem that this dictum is directly contra the ruling of Alexander v. Tingle, 181 Md. 464, 30 A. 2d 737 (1943). The REVIEW plans later to publish a treatment of the Vogelsang case.
[63a] *Supra*, n. 14.

negligence will not be deemed sufficient, in a proper *res ipsa loquitur* case, to entitle him to a directed verdict. In *Heim v. Roberts,* Judge Pattison, in speaking of the defendant's evidence, said, "It does not explain or throw any light on the question as to why the lumber fell, causing the injury complained of, and was not, we think, in itself, sufficient to prevent the inference of negligence, under the doctrine [*res ipsa loquitur*] stated, from going to the jury to be considered by it."[64]

As a logical implication of this statement, one could infer that the defendant might, though he did not do so here, offer sufficient evidence to entitle him to have the case taken from the jury. However, the opinion in *Potomac Edison v. Johnson*[65] in a strong *dictum* cites *Heim v. Roberts*[66] as being a "case which holds that the question of exculpation is for the jury".[67] The opinion clearly upholds the contention that the defendant, even though he has offered uncontradicted testimony that he was not negligent, is still not entitled to a directed verdict in Maryland.

It is interesting to compare the effect of the defendant's uncontradicted testimony in a *res ipsa* case with its effect where an agency relationship exists. In the latter cases,

> "the rule is well established in this state that if the vehicle causing the accident belongs to the defendant and is being operated at the time of the accident by one in the general employment of the defendant, there is a presumption that at such time he was acting within the scope of his employment and in the furtherance of the defendant's business; but this presumption is only prima facie and may be rebutted and overcome by evidence to the contrary, adduced during the trial by any parties to the suit; and where such evidence is undisputed and uncontradicted it becomes a question for the court."[68]

The Court in *Erdman v. Horkheimer*[69] uses language which clearly indicates that when the plaintiff establishes the agency the burden is shifted to the defendant. Judge Parke in that opinion remarked, "Should this presumption be rebutted by the uncontradicted testimony, the case could not be submitted to the jury."

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[64] *Supra*, n. 15.
[65] 160 Md. 33, 152 A. 633 (1930).
[66] *Supra*, n. 15.
[67] Potomac Edison v. Johnson, 160 Md. 33, 36, 37, 152 A. 633, 634 (1930).
[68] Wells v. Hecht Bros., 155 Md. 618, 623, 624, 142 A. 258, 260 (1928). See also Scott v. Gibbons, 64 A. 2d 117 (Md. 1949).
[69] Erdman v. Horkheimer, 169 Md. 204, 181 A. 221 (1935).

Of the two views, that followed in the *res ipsa* cases seems to be more justifiable. For *res ipsa,* then, the presumption is evidence, the defendant's rebuttal is evidence, therefore it is a question of evidence against evidence.[70] It is within the province of the jury to pass upon the credibility of the witnesses and to weigh the facts. The effect of taking the case from the jury in such a situation is to impair its right and duty to estimate the efficacy and truth of the defendant's evidence.

Though at first the effect of the defendant's uncontradicted rebutting testimony in these two types of cases seems at variance, it is possible to distinguish between the two in the following manner. In the agency situation, the plaintiff sets up first, that the tortfeasor was the agent of the defendant, second, that the instrument, causing the injury belonged to the defendant. From this arises the presumption that the agent was acting within the scope of his employment. The defendant, by introducing uncontradicted evidence that the agent was not acting within the agency, destroys the presumption. The plaintiff, then, is left with nothing more than these two established facts, which, having no probative force concerning the scope of employment problem, do not make out a case to go to the jury.

In the *res ipsa* situation, the plaintiff sets up the essentials of a *res ipsa* case. From these arises a presumption of negligence on the part of the defendant. The defendant's uncontradicted evidence, showing himself free from negligence, snatches away the presumption but leaves certain facts which have some probative value. Consequently, such a case may not be taken from the jury as a result of the defendant's rebuttal.

The distinction, briefly, seems to be that when the presumption is destroyed by the defendant's uncontradicted evidence there remains, in an agency situation, no evidence of the tort being within the scope of employment; whereas, in a *res ipsa* case the destruction of the presumption leaves the plaintiff with some evidence of probative value.[71]

In fine, the *res ipsa* presumption has more of a core of logical probability, and merely gives added effect to the basic probative force of the evidence raising it. Thus it is the more plausible for the jury still to be allowed to

[70] *Cf.* statement in Armour v. Leasure, 177 Md. 393, 407, 9 A. (2d) 572, 578 (1939).

[71] *Cf.* Thomsen, *supra*, n. 1, 311 *et seq.*

speculate, even in the face of some apparent rebuttal. On the other hand, the agency presumption is more of the type which gives an artificial effect to basic evidence, actually of little or no probative force, for the purpose of assigning the duty of producing evidence to the side having control of what is probably the only available evidence on the point. For this, when that duty is performed, even by false testimony, there is no longer any justification for reminding the jury of the presumption and, the plaintiff having produced nothing of any real probative force, must face a directed verdict against him for that reason.

The advisability of the use of the phrase *"res ipsa loquitur"* in any manner whatsoever, may be questioned. Chief Judge Bond, in his dissenting opinion in *Potomac Edison v. Johnson*[72] expresses disapproval of the use of the term: "Nowhere does it mean more than any colloquial English expression that the facts speak for themselves, that facts proved naturally afford ground for an inference of some fact inquired about, and so amount to proof of it. The inference may be one of certainty, as when an excessive interest charge appeared on the face of an instrument,[73] or one of more or less probability only, as when negligence in the care of a barrel of flour was found inferable from its fall out of a warehouse."[74] This view apparently made some impression, for in *Combustion Engineering Co. v. Hunsberger*[75] which is a typical *res ipsa* case, the court declined to mention or apply the doctrine.

Avoidance of the use of the phrase and refusal of its application as a doctrine would allow the circumstantial evidence of negligence or evidence of specific acts of negligence to be treated according to its own natural probative force.[76]

If we thus allow the circumstances of each situation to give rise to an inference, the strength of which is dependent upon the weight of this evidence, the circumstances are given their natural probative effect, and then the phrase is demoted to its proper place, that of a mere shorthand symbol.

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[72] *Supra*, n. 65.

[73] Citing Roberts v. Tremayne, 1614 Cro. Jac. 508, 79 Eng. Rep. 433; Bank of the U. S. v. Waggener, 9 Pet. 378, 399, 34 U. S. 378, 399 (1835).

[74] Byrne v. Boadle, *supra*, n. 4.

[75] 171 Md. 16, 187 A. 825 (1936). See also, Coca Cola Bottling Wks. v. Catron, 183 Md. 156, 46 A. 2d 303 (1946), and Livingston v. Stewart & Co., *supra*, n. 28.

[76] Harke v. Haase, 335 Mo. 1104, 75 S. W. (2d) 1001 (1934); Carpenter, *supra*, n. 26.

The Court, in *Singer Transfer Co. v. Buck Glass Co.*[77] was apparently in accord with the above contention. In that opinion it was said,

> "Where damage to property is caused by the operation of an instrument within the exclusive control of defendant under circumstances which justify an inference that it would not have occurred had defendant exercised ordinary care, negligence may be presumed as a rational inference from such facts. Whether that presumption falls under the classification of the doctrine of *res ipsa loquitur* or that of the effect of circumstantial evidence is a mere matter of indexing, but the principle itself is firmly established that where the known facts justify a rational inference of defendant's negligence, such negligence may be presumed."

Because the term has no fixed meaning in different jurisdictions and because it gives rise to a temptation to regard it as an end in itself instead of a convenient way of characterizing the standards ordinarily requisite for the application of a well established rule of evidence, the discontinuance of the use of the phrase would probably simplify the process of reaching a sound result. When the phrase is so firmly embedded that its frequent use by counsel may be expected to continue, it is a healthy sign to see the Court, as in the *Singer Transfer Co.* case[78] so clearly analogize its character as being merely a classification under which a given result is described or indexed.

[77] 169 Md. 358, 181 A. 672 (1935).
[78] *Ibid.*