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Recommended Citation
Roszel C. Thomsen, Presumptions and Burden of Proof in Res Ipsa Loquitur Cases in Maryland, 3 Md. L. Rev. 285 (1939)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol3/iss4/1
PRESUMPTIONS AND BURDEN OF PROOF IN RES IPSA LOQUITUR CASES IN MARYLAND

By Roszel C. Thomsen*

THE IMPORTANCE OF ACCURACY IN TERMINOLOGY

It is important, at the outset, to straighten out the matter of terminology, as far as possible. The term "burden of proof" is used by judges and text writers in two senses, and the word "presumption" is used in at least three. A large part of the difficulty of the problem lies in the use of the same term to express entirely different ideas.

THE DIFFERENCE BETWEEN "BURDEN OF PROOF" AND "BURDEN OF GOING FORWARD WITH THE EVIDENCE"

In its first, or primary sense, the term "burden of proof" means the risk of non-persuasion, the burden of overcoming the inertia of the Court. One party or the other has this burden with respect to each issue involved in the case; with respect to certain facts he has the risk of non-persuasion. It is often said that this burden is upon the party having in form the affirmative allegation, but this is not an invariable test. There is no single principle or rule which will solve all cases. One party may have peculiar means of knowledge enabling him to prove the falsity of certain facts which are at issue. If so, that is one among a number of considerations of fairness and experience to be kept in mind in apportioning the burden of proof in a particular case. This burden—the risk of non-persuasion of the jury, the burden of overcoming the inertia of the

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Court—does not shift during the trial, but remains on the party who had it at the outset. When I use the term “burden of proof” in this paper, I will use it in this sense.

In its second sense the term is used to mean the burden of producing evidence, or the duty of going forward with the evidence. This burden may shift as the weight of the evidence on one side or the other so far preponderates as to require a ruling by the Court which would in effect take the matter from the jury if no further evidence were given, or it may shift as some presumption operates to give to the evidence the effect of prima facie proof. The party having the risk of non-persuasion—i. e., the true burden of proof—under the pleadings or other rules, must first go forward with the evidence, and satisfy the judge that at least enough evidence has been put in to be worth considering by the jury. Having done so, he is before the jury, bearing only his risk of non-persuasion. There is now no duty on either party to produce evidence. Either party may introduce it, but there is nothing that requires either party to do so under penalty of a ruling of law against him.

But if the proponent is able to go further, and to adduce evidence which if believed would make it beyond reason to repudiate his claim, the burden of producing evidence is shifted over to the opponent. This result may be accomplished by the production of an overwhelming mass of evidence, or by the aid of a rule of law, i. e., a presumption, applicable to inferences from specific evidence to specific facts forming part of the issue. When the opponent comes forward with other evidence, the judge must determine whether he has produced sufficient evidence to get the issue back to the jury, and, in certain cases, whether he has gone further, and thrown the burden of going forward with the evidence back on the proponent. A familiar example of this latter situation is where the owner of an automobile, in a negligence case, is able to produce clear and satisfactory evidence to show that the driver of the car at the time of the accident was not his agent or servant acting in the

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1 Wigmore, Treatise on Evidence (2nd Ed.) Sec. 2485 et seq.
3 *Ibid*, Sec. 2487 (c).
course of his employment. This burden, the shifting bur- den, I will call the "burden of going forward with the evi- dence".

The distinction between the two burdens is well illus- trated by the example cited above. A plaintiff sues a de- fendant for injuries alleged to have been caused by the negligence of a servant of the defendant operating defend- ant's automobile. Let us assume that the ownership of the automobile was not admitted by the pleadings. The plaintiff starts out with the burden of proof on two issues—negligence and agency. He also has the burden of going forward with the evidence on both issues. He offers testi- mony legally sufficient to go to the jury on the issue of negli- gence, and legally sufficient to show that the defendant was the owner of the automobile involved. If the case stops there, the defendant may or may not introduce evidence on the issue of negligence. Whether or not he introduces evi- dence on that issue, he is entitled to an instruction that the burden of proof is on the plaintiff to convince the jury that the driver was negligent. The defendant has no burden or duty of going forward with the evidence on that issue. But the testimony that the defendant owned the car, if be- lieved, gives rise to a presumption that the driver was his agent or servant, acting in the course of his employment. With respect to the issue of agency, the burden or duty of going forward with the evidence has shifted. If the de- fendant does not offer any testimony on the issue of agency, the Court will instruct the jury that if they find as a fact that defendant owned the car, they must find that he is re- sponsible for the negligence (if any) of the driver. If the defendant does offer testimony to show that the alleged servant was engaged on a lark of his own, it may be so slight that the Court will rule it is insufficient to be con- sidered by the jury in rebuttal of the presumption, in which case the Judge will grant the same instruction he would have granted if the defendant had offered no evidence on the issue. It may be so strong that it will shift the burden or duty of going forward with the evidence back on the plaintiff, in which event the defendant will be entitled to a
directed verdict if the plaintiff does not produce evidence in reply, unless there is already evidence in the case tending to contradict defendant’s evidence. Or it may fall between the two, and be just sufficient to be considered by the jury, in which event the issue of agency will be submitted to the jury. The burden of proof, in the primary sense of the risk of non-persuasion, will have remained on the plaintiff all the time.

The distinction between the two burdens is recognized by the Court of Appeals, and was discussed by Judge Urner in the recent case of *Baltimore American Underwriters v. Beckley.*

**WHAT ARE AND WHAT ARE NOT REAL “PRESUMPTIONS”**

The term “presumption” is used in a variety of senses, including the following:

1. It is used as a synonym for “inference”, an act of reasoning. This use of the term, frequently in the expression “presumption of fact”, is misleading. A true presumption is a rule of law laid down by the judge, attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent. The presumption is not the inference itself, but the legal consequence attached to it. Hence the use of the word presumption as synonymous with the word inference is erroneous.

2. The term “presumption” is also used to cover the situation in which the Court is really stating a rule of substantive law, while apparently only supervising the jury’s exercise of its function of judging the effect of evidence produced before it. The so-called “conclusive presumption” is really a rule of substantive law, and not a true presumption. Where from one fact another fact is conclusively presumed, the rule really means that where the first fact is shown to exist, the existence vel non of the second fact is immaterial for the purposes of the case.

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*173 Md. 202, 195 Atl. 550 (1937).*

*Bohlen, Studies in the Law of Torts, 639; Wigmore, op. cit. supra n. 1, Sec. 2491.*

*Bohlen, op. cit. supra n. 5, 641; Wigmore, op. cit. supra n. 1, Sec. 2492.*
3. Again, the term "presumption" is used to mean a rule for requiring the assumption of certain facts upon data whose probative force falls short of that strength usually necessary to justify or require such fact to be inferred, but permitting the assumption to be rebutted. The term "data", as here used, includes all facts before the jury, whether shown by evidence, admitted by the pleadings, or known through judicial notice. This is the true presumption—the rebuttable presumption of law. Its effect is to compel the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. It assumes, of course, that the facts which support the presumption are satisfactorily established. A presumption may be displaced or undermined by showing that the facts upon which it rests are not true. It may be rebutted or overthrown by direct or circumstantial evidence to overcome its effect as sufficient or prima facie proof of the fact presumed.\(^7\)

The term "rebuttable presumption of law" is sometimes defined to include "permitting" as well as "requiring" the jury to presume or take for granted a fact upon data normally insufficient to justify or require a finding that it exists.\(^8\)

"Prima Facie Case"

The term "prima facie case" is sometimes applied to the stage of the case where the proponent, i.e., the party having the burden of proving the issue, has not only met the duty of producing sufficient evidence to get to the jury, but has gone further, and either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence.

The term "prima facie case" is also used to indicate merely that the proponent has produced legally sufficient evidence to go to the jury, or in other words, has relieved himself of the duty of going forward with the evidence, without, however, throwing that duty on (or back upon) his opponent.\(^9\)

\(^7\) Bohlen, op. cit. supra n. 5, 642; Wigmore, op. cit. supra n. 1, Sec. 2491.
\(^8\) Bohlen, op. cit. supra n. 5, 642.
\(^9\) Wigmore, op. cit. supra n. 1, Sec. 2494.
The expression res ipsa loquitur made its appearance in the field of negligence law in the leading case of Byrne v. Boadle. In that case Chief Baron Pollock 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, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident would be prima facie evidence of negligence."

In the famous English case of Scott v. London Dock Co., the Court said:

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

These cases were quoted with approval in the majority opinion of the Court, written by Judge Roberts, in Howser v. C. & P. R. R. Co., the first case in Maryland in which the expression res ipsa loquitur appears.

Chief Judge Bond, in his famous dissenting opinion in Potomac Edison Co. v. Johnson, said that the "expression 'res ipsa loquitur' does not represent a doctrine, is not a legal maxim, and is not a rule." Yet it has been called all three by the Court of Appeals.

The majority opinion in Howser v. C. & P. R. R. Co., referred to the "doctrine" of res ipsa loquitur. It is called

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10 2 Hurl. & C. 722 (1863).
11 3 Hurl. & C. 596 (1865).
13 160 Md. 33, 46, 152 A. 633 (1890).
14 Supra n. 12.
a "maxim" in Potomac Edison Co. v. Johnson, and a "rule" in Frenkil v. Johnson. Professor Wigmore refers to the "rule" symbolized by the phrase res ipsa loquitur. Professor Bohlen calls it a "doctrine". Professor Harper calls it a "doctrine", and also refers to the "principle" which the Courts have developed in these cases.

A very able nisi prius opinion by Chief Judge Dennis, in the case of State, use of Cherry, v. Stewart & Co., Inc., discusses thoroughly the question when the "doctrine expressed in the sonorous Ciceronian phrase 'res ipsa loquitur' " applies. I will not attempt to add anything on the question covered by that opinion. I will consider rather,

I. The effect of the rule or doctrine in cases where it does apply.

II. Whether a prayer referring to the presumption should be granted after the defendant has offered evidence in denial, in rebuttal, or in exculpation.

III. Whether the Court should ever direct a verdict for the defendant in a case where the rule or doctrine applies.

I.

THE EFFECT OF THE RULE OR DOCTRINE IN CASES WHERE IT DOES APPLY

Professor Wigmore calls attention to the fact that the courts do not always make it clear whether the rule symbolized by the phrase "res ipsa loquitur" creates a full presumption, or merely satisfies the plaintiff's duty of producing evidence sufficient to go to the jury.

Professor Harper, who was one of the Reporters of the American Law Institute's Restatement of the Law of Torts, in his recent book, "The Law of Torts", notes that the effect of the doctrine varies in different Courts. The least effect accorded the presumption is a ruling that it fur-

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15 Supra n. 13.
16 3 A. (2nd) 479 (Md. 1939).
17 Wigmore, op cit. supra n. 1, Sec. 2509.
18 Bohlen, op. cit. supra n. 5, 646.
20 Daily Record, March 22, 1939.
21 Wigmore, op. cit. supra n. 1, Sec. 2509.
nishes "some" evidence of negligence, sufficient to insure the plaintiff getting his case to the jury if the defendant offers no rebutting evidence. In other Courts the presumption is held to require the defendant to come forward with some explanation or some rebutting evidence; if the defendant does so, there is a jury case, but if he fails to satisfy this burden, a verdict may be directed against him. Still other jurisdictions hold that when the plaintiff makes out a res ipsa loquitur case, the burden of proof, in the strict sense, shifts to the defendant.\textsuperscript{22}

Professor Harper cites one Maryland case, 
\textit{Pindell v. Rubinstein},\textsuperscript{23} as indicating that Maryland falls within the third or last class, which throws the burden of proof, in the strict sense, upon the defendant in a case of res ipsa loquitur. Is this correct? What is the effect of the rule or doctrine in Maryland?

In the leading case of 
\textit{Howser v. C. & P. R. R. Co.},\textsuperscript{24} the majority opinion stated:

"When the circumstances are . . . of such a nature that it may be fairly inferred from them that the reasonable probability is that the accident was occasioned by the failure of the appellee to exercise proper caution which it readily could and should have done; and in the absence of satisfactory explanation on the part of the appellee, a presumption of negligence arises against it."

In \textit{South Baltimore Car Works v. Schaefer},\textsuperscript{25} the Court said, in discussing the question whether the mere fact that the bolts broke was legally sufficient evidence of defendant's negligence:

". . . it must not be forgotten that the defendant's foreman went upon the witness stand and offered such explanation as he could in regard to the breaking of the bolts, for in this respect this case differs from most, if not all, in which the maxim res ipsa loquitur has been applied to such cases as this. Thus in Colladay's case, 88 Md. 91, it is said: 'There was no attempt to explain

\textsuperscript{22} Harper, \textit{op. cit. supra} n. 19, 184 et seq.
\textsuperscript{23} 139 Md. 567, 115 A. 859 (1921).
\textsuperscript{24} \textit{Supra} n. 12.
\textsuperscript{25} 96 Md. 88, 103, 53 A. 665, 94 A. S. R. 560 (1902).
or refute the negligence imputed by the plaintiff's testimony, and in the absence of this explanation on the part of the defendant the law raises the presumption of negligence."

In *Chesapeake Iron Works v. Hochschild,*, the Court said:

"In the case at bar, the defendant was engaged in erecting the structural iron work in the addition to the plaintiffs' store, and the derrick and other appliances used in doing this work were under the management and control of the defendant and its servants. The accident was such as in the ordinary course of things does not and should not happen if those who have charge of the work use proper care, and the happening of the accident in the manner and under the circumstances disclosed by the plaintiffs' evidence, in the absence of some explanation by the defendant, justifies the presumption that it was due to its negligence or want of due care."

The defendant offered the usual prayer for a directed verdict, and in passing on that prayer the Court of Appeals said:

"As 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 defendant's first prayer was properly refused."

In *Pindell v. Rubinstein,* referred to by Professor Harper, the testimony showed that while the infant plaintiff, then less than three years old, was being led along one of the public highways of Baltimore City, he was struck and injured by a gate which fell from its place in the defendants' fence, because it was insecurely and insufficiently fastened. The Court held that this conclusion was fairly inferable from the evidence, and stated, "Under such circumstances, and in the absence of evidence to show why it fell at that time, it cannot be said that there was no evi-

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*119 Md. 303, 86 A. 345 (1913).*

*Supra n. 23.*
evidence legally sufficient to show actionable negligence on the part of the defendant. The Court said "a prima facie presumption of negligence arises from the accident itself, when taken in connection with the circumstances under which it occurred." The plaintiff was appealing from a judgment entered on a jury verdict in favor of the defendant, and secured a reversal on a number of grounds, including the granting of defendant's fourth prayer, which instructed 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 defendant". The Court said that under the circumstances of that case the prayer was "not only misleading but incorrect".

The refusal of such a prayer as this does not necessarily mean that the burden of proof is on the defendant, as distinguished from the burden of going forward with the evidence. Whether the effect of the presumption was to shift the burden of proof itself, or merely to shift the burden of going forward with the evidence, the prayer under consideration was improper.

The leading text writers are agreed that the presumption should not have the effect of shifting to the defendant the burden of proof—the burden of convincing the jury that his conduct is not negligent. For example Professor Harper says:

"The principle is useful to equalize the position of the parties with respect to proof of the facts which led up to the accident in which the plaintiff sustained harm. Since the only person who knows the manner and circumstances under which the accident occurred is the defendant or some person or persons in his employ, it is necessary and proper that the defendant be required at his peril to explain the nature and circumstances of the accident. If he fails to so do, it is proper to permit or perhaps require the jury to find that the accident happened under circumstances which constitute negligence. But once the defendant convinces the jury of the actual facts of the accident, the situation is entirely different. The parties are now in precisely the same position that they would occupy in any negligence case
RES IPSA LOQUITUR

in which the facts are equally known or capable of being known by both parties. The effect of the presumption of res ipsa loquitur should therefore be terminated. Since the facts are now known, the burden should of course be on the plaintiff to convince the jury that the defendant's conduct should be characterized as negligent. Any other rule would put the plaintiff in a better position than he would have been in had the reason for the doctrine of res ipsa loquitur not existed. . . .

"To summarize the analysis just presented and to indicate the appropriate function of the doctrine of res ipsa loquitur, it may be recalled that in every negligence case, the plaintiff must show (1) what happened in the way of harm to his legally protected interests, (2) how it happened, and (3) that the way in which the defendant thus caused harm to the plaintiff is properly characterized as negligence. Under the doctrine of res ipsa loquitur, the plaintiff must still show (1) what happened. The presumption of res ipsa loquitur relieves him from showing how it happened. But if the defendant shows by convincing proof exactly how the harm occurred, the plaintiff should still run the risk of persuading the jury that the defendant's conduct was negligent."28

In C. & P. Telephone Co. v. Miller,29 the Court speaking through Judge Adkins, said:

"The doctrine has also been applied by this Court to accidents caused by other instrumentalities apparently in the control of defendants, where the circumstances seemed to justify the shifting of the burden of proof."

This statement might be used as authority for the proposition that the true burden of proof, as distinguished from the burden of going forward with the evidence is shifted in Maryland. But in that case the defendant did not go forward and explain the cause of the accident, and the statement was made in the course of the consideration by the Court of defendant's prayer for a directed verdict. The term "burden of proof" may therefore have been used by

28 Harper, op. cit. supra n. 19, 185, 186.
29 144 Md. 645, 125 A. 436 (1924).
Judge Adkins in the second sense—the burden of going forward with the evidence—rather than in the primary sense— the risk of non-persuasion. Later opinions of the Court, one of them by Judge Adkins himself, would indicate that it was only intended to hold that the burden of going forward with the evidence was shifted.

In *Potomac Edison Co. v. Johnson*, where a freight car of defendant's interurban railway was derailed in a public street in Frederick, the jury were instructed that "the fact of such derailment raises a presumption of negligence on the part of the defendant throwing upon it the burden of rebutting the presumption, by showing there was no negligence on its part." The Court of Appeals, speaking through Judge Adkins, said that this prayer does not shift the burden of proof. "It says in effect that when the presumption attaches, there is cast upon the defendant the burden of meeting it by showing there was no negligence on its part. It does not say, or mean, that the weight of the evidence in that regard must be on the side of the defendant."

In *Singer Transfer Co. v. Buck Glass Co.*, the Court said:

"For where damage to property is caused by the operation of some instrumentality within the exclusive control of the defendant, under circumstances which justify the inference that it would not have occurred had the defendant exercised ordinary care, negligence may be presumed as a rational inference from those facts. (Citing cases.) 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."

The first part of the above quotation states the rule or principle in a form which has been reiterated a number of times by the Court. The last statement, that where the
known facts justify a rational inference of defendant’s negligence, such negligence may be presumed, must be qualified. Taken by itself it would state the rule too broadly, because there may be more than one rational inference from the known facts. The reference to the effect of circumstantial evidence would indicate that in this case the Court felt the plaintiff’s evidence had greater effect than merely to give rise to a rebuttable presumption of law; in other words, the Court appears to have felt that there was evidence not only of “what was done”, but some circumstantial evidence of “how it happened”, which indicated negligence on the part of the defendant.

In Baltimore American Underwriters v. Beckley, Judge Urner quoted the rule set out in Singer Transportation Co. v. Buck Glass Co., and said “the facts proved by the plaintiff made it the duty of the defendant to ‘go forward with the evidence’”.

In Frenkil v. Johnson, Judge Parke said:

“If while such facts support the inference of negligence, 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.”

Judge Bond, in his dissenting opinion in the Potomac Edison case, said:

“Nowhere does it (the expression res ipsa loquitur) mean more than the colloquial 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 some proof of it. The inference may be one of certainty, as when an excessive interest charge appeared on the face of an instrument, or one of more or less probability only, as when negligence in the case of a barrel of flour was found inferable from its fall out of a warehouse.”

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83 Supra n. 4.
82 Supra n. 31.
84 Supra n. 16.
85 Supra n. 13.
This would indicate that the rule, if there be a rule, does not have the same effect in every case, but that the effect depends upon the quality of the inference—whether of certainty, or of more or less probability only—which arises from the facts proved. Certainly, in most Maryland cases the effect has been to create a true rebuttable presumption of law, throwing upon the defendant the duty of going forward with the evidence.

II

SHOULD A PRAYER REFERRING TO THE PREJUSMPTION BE GRANTED AFTER THE DEFENDANT HAS OFFERED EVIDENCE IN DENIAL, IN REBUTTAL, OR IN EXCULPATION?

Professor Wigmore states:

"... it must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule.

"It is therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary."

The Missouri Court has referred to presumptions as "the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." Professor Bohlen likens them to Maeterlinck's male bee, which, having functioned, disappears. If, having functioned, the presumption disappears, why should the Court grant a prayer instructing the jury that it still exists? The data, i.e., the evidence, admissions, etc., upon which the presumption rests, has real

**Notes and Citations**

86 Wigmore, op. cit. supra n. 1, Sec. 2491.
88 Bohlen, op. cit. supra n. 5, 645.
probative value to the juror; it is only the strictness of the law with respect to proof that prevents such data from amounting to legal proof of the fact in issue. The effect of the presumption is to give the data this additional dignity, and to make the legal concept of sufficient proof conform to the popular concept.

Having fulfilled that function, the presumption should disappear. Since the defendant has gone forward with the evidence and offered testimony or other evidence in denial, in rebuttal or in exculpation legally sufficient to be considered by the jury, the issue of negligence vel non is before the jury, and the burden of proof on that issue is on the plaintiff. There is no reason to explain to the jury the steps in the reasoning by which the judge determined that it was a case for the jury. The defendant under those circumstances is not entitled to an instruction that the mere happening of the accident raises no presumption of negligence on the part of the defendant.

Nor should the plaintiff be entitled to an instruction that there is a presumption in his favor, and that the jury may find their verdict for the plaintiff unless they shall find from all of the evidence in the case that the defendant was not negligent.

Such prayers have been approved by the Court, however, in a number of cases. In *Frenkil v. Johnson*, the Court of Appeals held that the instructions granted by the lower Court were "not prejudicial to the defendant." Plaintiff's first prayer instructed the jury that if they should find certain facts "a rebuttable presumption of negligence on the part of the defendant in connection with the said injury and damage arises and they may find their verdict for the plaintiff unless they further find from all of the evidence in the case that the defendant was not guilty of any negligence which directly caused or contributed to the said injury or damage," or that the plaintiff was guilty of contributory negligence. This prayer was granted in connection with a prayer of the defendant which instructed

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89 Ibid., 648.
41 *Supra* n. 16.
the jury that the burden was upon the plaintiff to prove that the explosion was directly caused or contributed to by negligence on the part of the defendant.

In *Chesapeake Iron Works v. Hochschild,* Plaintiff's Prayer No. 5 involved a ruling of law that if certain facts are found, "there will be prima facie evidence of negligence on the part of the servants or agents of the defendant, under the circumstances, while moving or hoisting said piece of structural iron or column, and unless upon the whole evidence such prima facie evidence is rebutted, the verdict must be for the plaintiffs."

In *Potomac Edison Co. v. Johnson,* where the freight car was derailed, the jury were instructed that "the fact of such derailment raises a presumption of negligence on the part of the defendant throwing upon it the burden of rebutting the presumption, by showing there was no negligence on its part." As we saw above, in considering the first point, the Court held that this prayer did not shift the burden of proof, stating: "that when the presumption attaches, there is cast upon the defendant the burden of meeting it by showing there was no negligence on its part. It does not say, or mean, that the weight of the evidence in that regard must be on the side of the defendant."

Professor Bohlen, in referring to the rulings of certain courts in res ipsa loquitur cases, that not only the burden of producing evidence showing to the satisfaction of the jury what actually took place but of convincing the jury that his conduct is not negligent is shifted to the defendant, says:

"This is in part due to a failure to discriminate between proof by satisfactory evidence of the facts and persuasion as to whether those facts show conduct conforming to or falling short of that of a reasonable man under like circumstances,—and in part is due to a growing tendency to a compromise between the modern theory of tort liability as based exclusively on fault and the more modern renaissance of the ancient concept that every one must answer for the harm done even by his most innocent acts, by not only raising the

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42 Supra n. 26.
43 Supra n. 13.
presumption of negligence upon the mere fact of harm done, but by holding that such presumption requires the defendant to rebut it by proving that he has done all that is possible to prevent the harm that his activities have caused. This tendency chiefly appears in cases in which the harm is done by what are called ultra hazardous operations or businesses."

The Maryland cases in which the prayers referring to the presumption have been granted have generally been cases involving ultra hazardous operations or businesses. In Potomac Edison Co. v. Johnson, the tendency referred to by Professor Bohlen was undoubtedly a controlling factor. And in Pindell v. Rubinstein, which has been cited in support of such a prayer, the Court commented that "the maintenance of such dangerous agencies, which may be little else than traps, constitutes a violation of the duty owed by the abutter to the public." Owning a fence with a gate on it, as in that case, is however, scarcely an ultra hazardous occupation.

It may well be that the Court is moving toward a rule of substantive law, in cases involving extra-hazardous operations, that the defendant should be liable irrespective of negligence unless he is able to show that the injury was caused by some vis major or force beyond his control. If that is the substantive law, the instructions to the jury should say so.

But if the basis for liability in a particular case is negligence, the presumption prayers quoted above are improper. The data upon which the presumption rests is before the jury. As shown above, it has probative value for them. The jury is not interested in the mental processes of the Court, nor in the rules of law by which the judge determines whether there is sufficient evidence in the case to allow it to be considered by the jury. The granting of two such prayers as were granted in conjunction with each other in Frenkil v. Johnson, and in other cases, must be confusing to the jury.

44 Bohlen, op. cit. supra n. 5, 647.
45 Supra n. 13.
46 Supra n. 23.
47 Supra n. 16.
III.

Should the Court Ever Direct a Verdict for the Defendant in a Case Where the Rule or Doctrine Applies?

The final question is perhaps the most important. Let us assume a case of res ipsa loquitur, where the presumption has shifted to the defendant the burden of going forward with the evidence. Let us further assume that the defendant has shown by clear and satisfactory evidence, not inconsistent with any facts proved by the plaintiff, either (a) facts which show that the defendant was not negligent, or (b) facts which explain the accident and show that the real cause of the injury was a cause for which the defendant was not responsible. Should the Court in either case, direct a verdict in favor of the defendant?

There are statements in the decisions of the Maryland Court of Appeals which would indicate that this question must be answered in the negative. A careful review of the cases, however, will raise some doubt as to the proper answer.

The leading case on res ipsa loquitur in Maryland is Howser v. C. & P. R. R. Co., 48. In that case the plaintiff was walking on a path which extended along the roadbed of the defendant but not upon its right of way. A train passed, with some crossties on a gondola car. Some of the ties slipped off the car and hit the plaintiff. He "supposed there was a jar in the track." The majority opinion held that under the circumstances of the case "and in the absence of satisfactory explanation on the part of the appellee, a presumption of negligence arises against it." Judge McSherry dissented, on the ground that the injury could have happened from a jar of the train without negligence on the part of the defendant. The lower Court had directed a verdict in favor of the defendant at the end of the plaintiff’s case. So the question we are now considering was not presented.

48 Supra n. 12.
In *South Baltimore Car Works v. Schaefer*, the Court said:

"As we have said, the first question therefore which presents itself is whether the mere fact that the bolts broke is legally sufficient evidence of defendant's negligence. In discussing this question it must not be forgotten that the defendant's foreman went upon the witness stand and offered such explanation as he could in regard to the breaking of the bolts, for in this respect this case differs from most, if not all, the cases in which the maxim res ipsa loquitur has been applied to such cases as this. Thus in Colladay's ease, 88 Md. 91, it is said 'There was no attempt to explain or refute the negligence imputed by the plaintiff's testimony, and in the absence of this explanation on the part of the defendant the law raises the presumption of negligence.'"

The Court of Appeals reversed without a new trial a judgment of the lower Court in favor of the plaintiff.

*Strasburger v. Vogel* is frequently cited to support the proposition that the question of exculpation is for the jury. In that case the Court, speaking through Judge McSherry, said:

"If the plaintiff's case had rested exclusively upon an inference of negligence deduced from the single fact that the bricks fell without an apparent or assigned cause; and if the defendant had, by way of answer to that theory, relied upon the intervention of an independent agency, the instruction would have been correct, because the presumption of negligence arising from an unexplained falling of the bricks would have established a prima facie case which the defendant could only have rebutted by showing a state of facts which destroyed or negatived that presumption. Between the two conflicting theories it would have been the province of the jury to pass."

The decision, however, was for the defendant, since the plaintiff's own evidence showed that other persons than those connected with the defendant were on the roof from which the brick fell. Therefore, the statement that it would

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49 Supra n. 25.
50 103 Md. 85, 89, 63 A. 202 (1906)
necessarily have been a case for the jury is merely dictum, however persuasive.

In *Chesapeake Iron Works v. Hochschild*, the Court said, inter alia:

"These prayers must be judged by the effect of the evidence produced by the plaintiffs, and as that evidence was such as to justify the presumption of negligence, it was incumbent upon defendant to rebut that presumption, and it was for the jury, or the Court sitting as a jury, to weigh the evidence adduced by the defendant for that purpose."

Near the end of the opinion, however, is the following statement:

"Under all the evidence in the case, the Court sitting as a jury might have concluded that the breaking of the tag line was due to the fact that it was wrapped around a window sill and to the sudden jerk or fall of the column after it was pried off the floor."

This statement, together with the fact that the defendant could not account for the breaking of the rope, except by a supposition of some hidden defect of which there was no evidence, indicates that the defendant failed either to show by clear and satisfactory evidence that it was not negligent, or to explain the real cause of the accident, and was therefore not in a position to ask for a directed verdict.

In *Heim v. Roberts*, a boy passing along a sidewalk was injured by the fall of pieces from a pile of lumber on the sidewalk in front of defendant’s mill, placed there by defendant’s orders. The Court held that the "doctrine" of res ipsa loquitur applied to the facts of the case, and said:

"The jury were entitled to infer negligence on the part of the defendant, from such facts and circumstances unexplained by the defendant. It is true that Myers, one of those against whom suit was brought, and whose testimony was confined by the plaintiff to the proof of the fact that he piled the lumber on the pavement upon the direction of Heim, testified on cross-examination that the lumber was properly piled

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81 Supra n. 26.
82 135 Md. 600, 109 A. 329 (1920).
upon the pavement; but this mere general allegation that the lumber was properly piled, made by one against whom suit had been brought to recover damages for the personal injuries suffered by the plaintiff, resulting from his alleged negligence in piling said lumber, may or may not have been believed by the jury under such circumstances. It does not explain or throw any light upon 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 stated, from going to the jury to be considered by it."

This opinion is not in conflict with the proposition that if the cause of the accident is explained by the defendant, and is shown to be a cause for which he is not responsible, the Court should direct a verdict for the defendant. It may be argued that it is not even in conflict with the proposition that if the defendant goes beyond a "mere general allegation" that he was not negligent, and shows by clear and satisfactory evidence that he was not negligent, the case may be withdrawn from the jury.

In *Pindell v. Rubinstein*, which has been discussed above, the Court said "Under such circumstances, and in the absence of evidence to show why it fell at that time, it cannot be said there was no evidence", etc. The defendant's attempted explanation, that the child was climbing on the gate, was contradicted by testimony on the part of the plaintiff, and, of course, the conflict was for the jury.

In *Goldman & Freiman Bottling Co. v. Sindell*, the negligence charged was the bottling and selling by the defendant of a bottle of "Whistle" eventually purchased by the plaintiff, which, at the time defendant sold it, contained broken glass. The Court held that the presence of broken glass in the bottle at the time it was sold by the defendant was evidence of negligence. The defendant did not explain how the glass got in the bottle, but offered considerable evidence to show that it had exercised due care and that the glass could not possibly have gotten into the bottle while it was in defendant's possession. The Court

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*Supra* n. 23.

** 140 Md. 488, 117 A. 866 (1922).
held that it was for the jury to say whether there was glass in the bottle when it was sold by the defendant. On the question of res ipsa loquitur the majority opinion said, inter alia:

"While in this case the presence of broken or ground glass in the bottle at the time appellant sold it, and when it could by careful inspection have discovered its dangerous character, was direct proof of a breach of the duty it owed the public to see that its product was not dangerous or unwholesome, and does not necessarily involve the doctrine of res ipsa loquitur, still there is nothing in the cases of Benedick v. Potts, 88 Md. 52; Strasburger v. Vogel, 103 Md. 85; or Streett v. Hodgson, 139 Md. 137, to prevent its application to the facts of this case."

If it be considered a case of res ipsa loquitur, the decision is authority for the proposition that very strong evidence offered by the defendant to show that it was not negligent is not sufficient to entitle the defendant to a directed verdict on the ground that the presumption has been rebutted. The effect of a possible explanation by the defendant of how the glass got in the bottle was not involved and was not considered by the Court.

In C. & P. Tel. Co. v. Miller,55 where a telephone wire was in the road, the defendant apparently made no attempt to explain how the accident happened, but made some effort to show that the facts which gave rise to the presumption were not true. This conflict, of course, was for the jury.

In Clough & Molloy v. Shilling,56 plaintiff's decedent was killed by a piece of scantling which fell from a scaffold on the eaves of a building. Defendant's servants were the only persons at work near the point where the scantling fell. The Court cited with approval Strasburger v. Vogel,57 and said: "These facts, we think, are sufficient to raise the presumption of negligence on the part of the servants of the defendant and make such a prima facie

55 Supra n. 29.
56 149 Md. 189, 131 A. 343 (1925).
57 Supra n. 50.
case as needs to be rebutted by the defendant. This being true, it presented a jury question." The opinion does not indicate that the defendant offered any evidence tending to prove what caused the piece of scantling to fall or to show that it was not negligent. The record shows that the testimony on behalf of the defendant on this point was not satisfactory.

The opinion of the Court in State v. Emerson & Morgan Coal Co., contained very little discussion of the prayer to take the case from the jury. The Court said merely, "There is enough in the evidence tending to support the plaintiff's case to take it to the jury." Defendant had a "theory" of the accident, and offered some testimony to support it, but the Court did not discuss that testimony at all.

In Potomac Edison Co. v. Johnson, the majority opinion written by Judge Adkins first discussed what he called "the maxim" res ipsa loquitur. In the course of that discussion he said:

"The great weight of authority seems to be with appellant on the proposition that the burden or duty of explanation, which is cast on defendant by operation of the doctrine of res ipsa loquitur where it is applicable, is, not satisfactorily to account for the occurrence and to show the actual cause of the injury, but merely to rebut the inference that it had failed to use due care."

And again:

"It is further strenuously urged by appellant that its A prayer should have been granted on the theory that it had gone forward with evidence and exculpated itself from the inference of negligence by uncontradicted testimony, there being, it claims, no affirmative proof of negligence."

It should be noted that defendant had apparently not attempted to explain or show what really caused the accident, but had merely attempted to show that it had used

58 Supra n. 40.
59 Supra n. 13.
due care. Judge Adkins referred to the fact that the position taken by defendant was supported by authorities from at least sixteen states, including New York, but stated that there was in Maryland, at least one comparatively recent case which held that the question of exculpation was for the jury, namely, *Heim v. Roberts.* I have discussed that case above. The reference to *Heim v. Roberts* by Judge Bond in the *Hunsberger* case, should also be noted. Judge Adkins also cited *United Railways Co. v. Dean,* and *Strasburger v. Vogel.*

Judge Adkins said, however, that it was not necessary to decide the case on the basis of "the maxim res ipsa loquitur". The Court held that the case was controlled by *West Va. Central & Pittsburgh R. Co. v. State, use of Fuller,* where Judge McSherry had said that "when a car has, by a collision, been hurled outside the right of way, and an injury has been inflicted on one lawfully there, a breach of duty has occurred, and consequently there has been negligence, and for the injury this inflicted an action will lie unless it be shown that an unavoidable accident was the efficient cause of the injury". Although Judge McSherry used the word "negligence", it is clear from the whole opinion that he meant "tort" or "actionable wrong", and that he was really applying a rule of liability without fault. That the Court in *Potomac Edison Co. v. Johnson* took this view is apparent from the following statement by Judge Adkins: "Likewise, in the present case, there was no attempt by defendant to show that the occurrence was unavoidable. Defendant undertook to show that it was not negligent, but here, as in the *Fuller* case, the right of the plaintiff to recover did not depend upon negligence alone."

Judge Adkins concluded: "From what we have said, it will be apparent that our decision does not hold that the

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60 Supra n. 52.
62 117 Md. 686, 84 A. 75 (1912).
63 Supra n. 50.
64 96 Md. 652, 54 A. 669, 61 L. R. A. 574 (1903).
65 Supra n. 13.
burden of proof was on the appellant, but only that the
duty was cast upon it to go forward with the evidence, and
it was for the jury to say whether it had met that obliga-
tion.” The statement that it was for the jury to say
whether the defendant had met its obligation (i. e., to go
forward with the evidence) must be read in connection with
what went before. It was really a case of trespass, or a
case where a dangerous instrumentality had gotten out of
control. It can scarcely be considered to have determined
conclusively whether in an ordinary case of res ipsa loqui-
tur, where the ultimate problem is negligence and negli-
gence alone, the case must always go to the jury in spite of
the fact that defendant’s explanation is clear and satisfac-
tory and consistent with the evidence offered by the plain-
tiff.

In Singer Transportation Co. v. Buck Glass Co., the
question of the effect of defendant’s evidence was not dis-
cussed, since the defendant did not offer any evidence.

In Engineering Co. v. Hunsberger, the Court of Ap-
peals reversed without a new trial a judgment in favor of
the plaintiff, saying:

“‘And apart from any question of the effect on a
prima facie presumption, if there should be one, of
evidence of the facts produced by a defendant (Byrne
600, 605, 109 A. 329), the Court is of opinion that the
mere fall of a tool being used within the building, in
work of construction, cannot be presumed to result
from negligence, because it cannot be supposed that
such a thing is probably the result of negligence every
time it occurs.’”

This would appear to be a recognition of the principle
that, in certain cases at least, in determining whether or
not there is legally sufficient evidence to carry plaintiff’s
case to the jury, the Court should consider whether the
defendant has rebutted the prima facie presumption of
negligence.

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66 Supra n. 31.
67 Supra n. 61.
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In Baltimore American Underwriters v. Beckley, which has been already referred to, the Court of Appeals reversed a judgment on a verdict which had been directed for the defendant at the close of plaintiff's case. Therefore the question now under discussion was not directly involved. The Court held that "the facts proved by the plaintiff made it the duty of the defendant to 'go forward with the evidence'" and quoted a passage from the opinion in Potomac Edison Co. v. Johnson which contained the statement discussed above, that "it was for the jury to say whether it (the defendant) had met that obligation."

In Frenkil v. Johnson, the Court considered the question whether the evidence offered by the defendant amounted to an explanation of how the accident happened, but found that there was evidence in the case from which the jury were justified in finding that the defendant was negligent, even if the facts proved by the defendant were admitted to be true.

The question under consideration involves a problem discussed by Professor Bohlen in a footnote to his article on Presumptions, as follows:

"Here it is necessary to discriminate between the credibility of a witness and the probative value of his testimony if believed. It is the duty of him against whom any presumption operates to produce evidence, not merely witnesses, and therefore he must satisfy the jury of the credibility of his witnesses. And where as in this particular sort of presumption, the witnesses are necessarily persons in his own employment who generally are the very persons who are at fault, or the proof is by books and records kept and produced by him, it is only natural that a wide latitude is allowed to the jury in distrusting such testimony as proof. While the common law prohibition against admitting the testimony of persons in any way interested in the result of the litigation has been universally removed by legislation, there remains in practice a strong distrust of such testimony. And where the presumption requires a party to give an account of his own actions, he is bound to satisfy the jury that he is giving a full

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supra n. 4.
supra n. 16.
account, and is not merely stating that part which is most favorable to him and holding back that part which is to his disadvantage.”

It has been suggested that a judge is never authorized to rule as a matter of law that the evidence offered by a defendant has rebutted a presumption which arose from facts proved by the plaintiff. The Court of Appeals of Maryland, however, has not taken this view. The Court has ruled many times that the presumption that the person driving an automobile is the agent or servant of the owner acting in the scope of his employment may be so rebutted by positive evidence offered by the defendant that the Court should direct a verdict in his favor.

Has the Court adopted a different rule with respect to the presumption involved in the res ipsa loquitur cases? I do not believe that it has. Most of the cases refer to the absence of explanation by the defendant. In those cases in which the plaintiff’s evidence gave rise to a true rebuttable presumption of law, it has been recognized that the burden of proof, in the primary sense, remains on the plaintiff. Let me repeat a part of the quotation from Professor Harper, above:

“To summarize the analysis just presented and to indicate the appropriate function of the doctrine of res ipsa loquitur, it may be recalled that in every negligence case, the plaintiff must show (1) what happened in the way of harm to his legally protected interests, (2) how it happened, and (3) that the way in which the defendant thus caused harm to the plaintiff is properly characterized as negligence. Under the doctrine of res ipsa loquitur, the plaintiff must still show (1) what happened. The presumption of res ipsa loquitur relieves him from showing how it happened. But if the defendant shows by convincing proof exactly how the harm occurred, the plaintiff should still run the risk of persuading the jury that the defendant’s conduct was negligent.”

— Bohlen, op. cit. supra n. 5, 645, 646.
— Harper, op. cit. supra n. 19, 183.
If the defendant’s proof of how the harm occurred is convincing and uncontradicted, and if it permits of no inference that he was guilty of any negligence directly contributing to the accident, the Court should direct a verdict in favor of the defendant, as it does in the agency cases. This exact situation has never been presented to the Court. The evidence on behalf of the defendant has never been sufficiently strong, e. g., Frenkil v. Johnson. The principal was recognized in South Baltimore Car Works v. Schaefer and in Engineering Co. v. Hunsberger, in both of which cases the plaintiffs were denied recovery. It seems to me, however, that recovery in the Schaefer case was denied more because of the weakness of the plaintiff’s proof than because of the strength of defendant’s explanation. It is clear that the weakness of the plaintiff’s case was the reason for denying recovery in Engineering Co. v. Hunsberger.

In conclusion let me refer again to Judge Bond’s dissenting opinion in Potomac Edison Co. v. Johnson. Res ipsa loquitur is not one rule. The facts may speak for themselves, but what do they say? In one case they may show that it is not a negligence case at all, but that some other test of liability should be applied. In another case they may amount to circumstantial evidence of negligence, or may give rise to an inference of negligence which has the quality of practical certainty. A verdict cannot properly be directed for the defendant in such a case, whatever his evidence may be. But in other cases the facts proved by the plaintiff may afford ground for an inference of “more or less probability only” that the injury was due to defendant’s negligence. The defendant’s evidence, too, may vary from a clear and satisfactory explanation of the accident, by proof of facts not inconsistent with the facts proved by the plaintiff, through the testimony of witnesses whose credibility is not questioned, or other data which is not in dispute, all the way down to a

73 Supra n. 16.
74 Supra n. 25.
75 Supra n. 61.
76 Supra n. 13.
"mere general allegation" that the defendant used ordinary care by a witness whose credibility is not admitted. The question whether a verdict may be directed for the defendant cannot be settled by any simple rule in these cases, but must be determined by a consideration of the situation in each case. How strong is the inference of negligence from the facts proved by the plaintiff? If it is so weak an inference that the presumption may be rebutted by sufficiently strong evidence on the part of the defendant, does the evidence introduced by the defendant meet the test? Ordinarily, no doubt, the decision of the judge will be that it is a case for the jury. But the courts should not divest themselves of their power to rule, in a proper case, that the presumption has thrown the burden of going forward with the evidence on the defendant, that the defendant has by a mass of strong evidence, thrown it back on the plaintiff, and that the Court must direct a verdict in favor of the defendant unless the plaintiff himself comes forward and introduces some evidence in reply.