RES IPSA LOQUITUR – A RULE, A PRINCIPLE, A MAXIM, A DOCTRINE, A MYTH OR A CONVENIENT LABEL?[1]

Abstract: This article charts the history of the evidential principle of res ipsa loquitur and its interpretation across jurisdictions. It addresses the myriad of descriptions which have been attached to the principle and the inconsistent views of its procedural effect. The view favoured is that the correct characterisation of res ipsa loquitur is as an evidential aid where an inference of negligence, or want of care, arises from the existence of certain facts. It is a rule grounded in common sense. It is not a substantive rule of law. It results in the shifting of the evidential, not legal, burden of proof. The recommendation of academic commentators that the principle is so confused and nebulous that it ought to be abolished is tentatively rejected on the grounds that there exist particular conditions for its applicability and that, when construed and applied properly, it has sufficient internal coherency. The view is also advanced that the principle of res ipsa loquitur is distinct from wider doctrines such as those of peculiar knowledge or capacity for proof and ought not to be conflated with them.

Authors: Mr Justice Michael MacGrath, Judge of the Court of Appeal, with the assistance of Ms Leah Powell, Judicial Assistant.

Introduction

It is unsatisfactory if a principle of law is unpredictable in its application or confusing as to its effect. This may be said of the history and development of *res ipsa loquitur* as a legal concept. 'The thing speaks for itself' was a phrase frequently employed in Roman times. The legal concept can be traced back to at least the 1860's and is thought to have its origins in the common calling cases, such as the old railway collision cases and, thereafter, the falling objects cases. It has variously been described as a principle, a rule, a maxim, a myth,[2] an *evidentiary* doctrine,[3] and 'a species of circumstantial evidence'.[4] Indeed, in *Ballard v North British Railway Co.*,[5] Lord Shaw stated that if it had not been in Latin, 'nobody would have called it a principle.' In *Lindsay v Mid-Western Health Board,* O'Flaherty J[6] adopted as an 'apt description of the scope of the maxim' the characterisation of the principle by the authors of Fleming's *Law of Torts*:[7]

> a convenient label…to describe situations where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident by itself is sufficient in the absence of an explanation to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury. The maxim contains nothing new; it is based on common sense, since it is a matter of ordinary observation and experience in life that sometimes a thing tells its own story.

[1] See Gordon Gregg Webb, 'The Law of Falling Objects: *Byrne v Boadle* and the Birth of *Res Ipsa Loquitur*' (2007) 59(4) *Stanford Law Review* 1065. It has also variously been described as a permissive inference, or presumptive negligence.
[2] Gerald Friedman, 'The Myth of *Res Ipsa Loquitur*' (1954) 10(2) *The University of Toronto Law Journal* 233.
[3] Gordon Gregg Webb, 'The Law of Falling Objects (n 1), however, Megaw LJ said at p 755 that it had never been correct to describe it in terms of doctrine: 'I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.'
[4] See, for example, McMahon and Binchy, *Law of Torts* (n 12) [9-51]. When discussing the procedural effect of the application of the principle, the authors query why it should be given any different status than any other piece of direct evidence.
[5] [1923] SC (HL) 43.
[6] [1993] 2 IR 147, [1992] IESC 4 at p 13.
[7] John Fleming, *The Law of Torts* (n 7), p 291.

Thus, while variously described, for the purposes of this discussion it will be here referred to as the *principle* of *res ipsa loquitur*. When circumstances exist such as to give rise to the invocation of the principle, controversy and disagreement have surrounded its operation and effect. One important point of disagreement has been whether the successful invocation of the principle results in shifting the 'legal' or 'evidential' burden. In almost all cases, and all the way through a trial, the legal burden rests with the plaintiff. The legal burden has also been described as the burden of *persuasion*. In contrast, the evidential burden may shift many times during the course of the trial. It is concerned with the burden of *adducing evidence*. Using these terms interchangeably, as has sometimes happened in the context of the application of the *res ipsa loquitur* principle, has given rise to confusion, particularly in the assessment of when and in what circumstances those burdens shift.

A key question which arises is whether the party against whom the principle is invoked face a type of tactical legal burden which, if not displaced, results in a negative finding against him or her? It is here argued that the law is becoming settled. The legal burden does not shift. The plaintiff always carries the risk of non-persuasion, or it has been described, the burden of overcoming the inertia of the court. Rather, successful invocation of the principle raises an early inference of negligence, made manifest and obvious by the facts of the case. The evidential burden shifts to the defendant. The better view is that the standard of proof placed on a defendant to displace such inference of negligence is not the balance of probabilities; rather it is a less demanding standard.

Origins of the Principle

In *Byrne v Boadle*,[8] a Liverpool flour merchant was sued by a pedestrian who was struck and injured by a barrel which fell from a storeroom on the second story of the defendant's premises. In the Court of Exchequer, Pollock CB, who appears to have particularly championed the application of the principle, ruled in favour of the plaintiff despite his inability to present evidence of the defendant's negligence. Pollock CB observed that '[t]here are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. A barrel could not roll out of a warehouse without some negligence'.

It has been suggested that such a development was a logical extension of the more exacting standards then being placed by courts during the industrial revolution on the expanded operations of common carriers'. *Byrne v Boadle* was not a 'common carrier' case. As Webb noted:

> The judges who decided *Byrne v Boadle* were clearly uninterested in giving quarter to a merchant and his business when doing so would leave an innocent pedestrian uncompensated for his injuries. Given the opportunity to limit the scope of heightened liability to cases involving railroad or stagecoach passengers, the Court of Exchequer declined to do so and instead recognised a presumption of negligence outside the common-carrier context. The decision in *Byrne* is best understood as a practical expansion of existing liability doctrine, and though it provides only a snapshot of jurisprudence during this period, the case persuasively indicates that judges at the height of nineteenth-century industrialization were not so caught up in

[8] [1863] 159 ER 299.

> big business or big ideas that they had abandoned the ageless imperative of the common law system to seek the fairest legal outcome for every set of facts.[9]

The classic and historical description of the principle's effect was stated as follows by Earl C.J. in *Scott v London and St. Katherine Docks Company*:[10]

> 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 circumstances does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

He did not expressly employ the words *res ipsa loquitur*.[11]

Conditions of Applicability[12]

It has been said that where the principle arises, the plaintiff must show *what happened* and that *harm was occasioned* but is relieved of showing *how it happened*. It does not apply where the cause is known[13] and, historically, it was associated with negligence actions where want of care had to be established as a necessary ingredient of the cause of action. It follows that when *res ipsa loquitur* arises it does not shift the burden of proof of establishing the existence of the duty of care or of causation, which burdens remain on the plaintiff.

The principle is said to apply where:

> The thing[14] or operation was under the management of the defendant.[15]

---

[9] Gregg Webb (n 1)1070.

[10] (1865) 159 ER 665, (1865) 3 H&C 596.

[11] Gregg Webb (n 1) 'The final link in the orthodox account of *res ipsa's* beginnings is *Briggs v Oliver*, the first case in which the phrase '*res ipsa loquitur*' was explicitly combined with Erle's reasoning in *Scott*. In *Briggs*, the plaintiff had been pushed to the ground by the defendant's employee and was subsequently injured when one of the defendant's packing cases fell on the prostrate plaintiff's leg and foot. Though the plaintiff was unable to advance evidence that the packing case had been improperly stacked, two of the three barons hearing the case for the Court of Exchequer ruled that the mere occurrence of the injury served as sufficient evidence to allow the plaintiff to take his case to a jury. In finding for the plaintiff, Baron Bramwell, invoking the term used by his colleague Sir Frederick Pollock in *Byrne v Boadle*, unequivocally ruled that 'this is one of those cases in which, as has been said, '*res ipsa loquitur*.' The phrase was now firmly entrenched in the common law, even if its sudden entrance into the legal lexicon in *Byrne* had left the scope of its application largely undefined.'

[12] See McMahon and Binchy, *Law of Torts* (4th edn, Bloomsbury 2013) 9.16: 'These elements require specific elucidation, bearing in mind the shadow of uncertainty cast by the decision of *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*.'.

[13] Christopher Walton and others(ed), *Charlesworth and Percy on Negligence* (14th edn, Sweet & Maxwell Ltd 2018) [6-18]: 'If the facts are sufficiently known, the question ceases to be one of whether the facts speak for themselves, and the solution is to be found in determining whether on the facts as established, negligence is to be inferred or not'. See also *Barkway v South Wales Transport Company* [1950] 1 All ER 392. See also McMahon and Binchy, *Law of Torts* (n 12) 9.48: 'The *res ipsa loquitur* principle applies only where an explanation of what actually occurred is not forthcoming. Once such an explanation is adduced and accepted, the situation is no longer one calling for the application of the principle. Of course, the explanation may be one which either excuses the defendant or confirms his or her liability'.

[14] See critical analysis in McMahon and Binchy, *Law of Torts* (n 12) [9-40] et seq: 'There are some conceptual difficulties associated with the notion of a 'thing' being 'under the management or control of the defendant'. First, there may be no actual 'thing', other than the plaintiff himself or herself. This is especially the case in health care contexts. The plaintiff is usually complaining, not that some 'thing' such as a scalpel, under the control of the defendant, injured him or her but rather the defendant (or those for whom the defendant is responsible) injured the plaintiff. Of course, the relationship between the parties can often be described as involving the management or control of the patient but treating the patient as a 'thing' is curious, and not all *res ipsa* claims in hospitals involve control as a central issue. Rather is the relationship one of reliance and dependency, generally accompanied, but not necessarily constituted, by control.'

[15] The 'crucial' nature of the disparity between the respective positions of the parties was discussed in *Lindsay v Mid-Western Health Board,* [1993] ILRM 550 by O'Flaherty J 'I believe that the trial judge was, however, correct in regarding

> The accident was such as in ordinary circumstances could not have occurred where care was exercised by those in control[16] of the thing or operation.
>
> Reasonable evidence of negligence has been established.[17] The evidence of negligence adduced does not have to be direct. Circumstantial evidence is just as probative.[18]

Examples of the application, or non-application of the principle include *Mullen v Quinnsworth Ltd*,[19] *Doherty v Reynolds*,[20] *Merriman v Greenhills Foods Ltd*,[21] *Tracey v Hagen*,[22] *Cosgrove v Ryan*[23] and *McKevitt v Ireland*.[24] It has a particularly significant role in medical negligence cases.[25] Resort solely to statistical evidence, however, is unlikely to give rise to the application of the principle.[26]

---

this as a *res ipsa loquitur* case. Disparity between the situation of the respective parties is crucial in this regard.' Following a routine appendicectomy under general anaesthetic, an otherwise fit and healthy girl suffered a fit and went into a permanent coma.

[16] See critical observations of McMahon and Binchy, *Law of Torts* (n 12) 9-41: 'A second difficulty with the control test is its lack of clarity. A person may have management or control of a situation in the sense that he or she has legal responsibility for exercising control in respect of it while in no sense exercising, or being capable of exercising, actual hands-on control over everything or person falling within the remit of that control.'

[17] See John Healy, *Principles of Irish Torts* (n 27) 3-98, 'it is not appropriate to levy the maxim in circumstances that suggest other plausible explanations.' The author also refers to the decision in *Neill v Minister for Finance* [1948] IR 88, where the principle was not held to apply where there are other plausible explanations for an accident in which a toddler injured his hand after a postman had shut the door of a van: 'The gap which exists between the evidence as to the movements of the driver and the injury of the child could reasonably be filled in a number of ways.' Also, particularly in the context of medical negligence actions, see the debate over use of statistical evidence.

[18] See *Lindsay v Mid-Western Health Board*, per O'Flaherty J at p.13: 'Circumstantial evidence is just as probative, if from proof of certain facts other facts may reasonably be inferred'.

[19] [1991] ILRM 439; slip on supermarket floor and evidence of cleaning system.

[20] [2004] IESC 42; Held not to apply on the facts in a medical negligence case concerning a traction injury. There was insufficient proof of facts adduced by the plaintiff to give rise to the application of the principle, particularly where the circumstances suggest other plausible and non-negligent explanations for injury. In such circumstances of evidential uncertainty, a reversal of the burden of proof would be 'unfair and unreasonable'. Also, per Keane CJ, the principle does not apply in all cases of sudden injury and that in medical negligence cases the plaintiff should first adduce expert evidence establishing that the accident was of a type that would not ordinarily occur if the defendants had exercised reasonable care. See also *Ratcliffe v Plymouth and Torbay Health Authority* [1998] EWCA Civ 2000 where reference was made by Hobhouse J at 188 to two types of situations where expert evidence might or might not be required to raise an inference of negligence. He observed that '[t]he vast majority of medical negligence cases will come into the second category and require the plaintiff to adduce some expert evidence before an inference of negligence can be raised'.

[21] [1997] 1 ILRM 46; truck veering off the road. For discussion of these decisions see: John Healy, *Principles of Irish Torts* (n 27) [3-98].

[22] [1973] 3 JIC 0603; No longer under control of defendant when accident occurred.

[23] [2008] IESC 2; Contractor coming into contact with live overhead wires, not applicable where negligence established on the evidence 'as the case ran'. Per Geoghegan J at p3 of the judgment: 'The principle of *res ipsa loquitur* has featured in this action. It is clear from the textbook writers that the precise parameters of that principle have never been conclusively determined. I am in the happy position that I find myself able to avoid their consideration because I, at any rate, consider that the appellant in this case on the evidence, as it ran, established a case of negligence against the ESB and I am therefore of opinion that on that account the appeal should be allowed. The words '*on the evidence as it ran*' should be noted because it may well be that, if appropriate employees of the ESB or indeed appropriate outside technical witnesses had given evidence, the appellant's case might have been successfully answered.' See also the discussion on 24-27 of the judgment regarding the standard of proof in cases involving 'dangerous things', such as electricity and gas. On the more general issue of duty of care in such circumstances, see *University College Court v Electricity Supply Board* [2020] IESC 38.

[24] [1987] ILRM 541; Intoxicated prisoner lighting a fire. Alleged negligence in not conducting proper search of prisoner Per Griffin J '... on no version of how the fire started could the doctrine apply. Only the plaintiff could say (if even he could) how this fire started, so the onus of rebutting negligence could not pass to the defendants.' See commentary on this case in McMahon and Binchy, *Law of Torts* (n 12) 9-34 et seq.

[25] *Lindsay v Mid Western Health Board* [1992] IESC 4 (O'Flaherty J), p 13: 'It should also be said that in an action with regard to a surgical operation the plaintiff rarely knows anything; what happened is known only to the defendants.'

[26] McMahon and Binchy, *Law of Torts* (n 12) [9-42]: 'What appears to be underlying the judicial thinking here is the need for a plaintiff in civil litigation to establish his or her case by more than resort to statistical evidence of a general kind. It would

Procedural Effect – Varying Views

There has been jurisdictional inconsistency as to the effect of the operation of the principle; whether a burden is shifted and, if so, what burden – legal or evidential. McMahon and Binchy have aptly commented that this state of perplexity is '[o]ne of the most difficult and unsatisfactory aspects of the operation of the *res ipsa loquitur*'. [27]

The authors of *Phipson on Evidence* describe the authorities in England and Wales as having long been confused as to the effect of *res ipsa loquitur*.[28] Wigmore, writing over one hundred years ago in his *Treatise on the Law of Evidence*, commented that courts did not always make it clear whether *res ipsa loquitur* creates a full presumption, or merely satisfies the plaintiff's duty of producing evidence sufficient to go to the jury.[29] This is explored by Thomsen, in an article entitled 'Presumptions and Burdens of Proof in Res Ipsa Loquitur Cases in Maryland'. The author suggests that a consideration of the authorities illustrate that the uncertainty and perhaps, conversely, the flexibility of the principle's application is long standing. He believed that *res ipsa loquitur* was not constituted by a singular rule, because while the facts may speak for themselves, what they say varies in each instance.

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… 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

not be sufficient, for example, for the victim of a traffic accident late at night to establish that most drivers who crash their car at 2am are intoxicated. The plaintiff would have to go further and produce evidence relating to the particular circumstances of the case which connects this general statistical evidence with the facts of the fateful night. It seems that, in *Daniels v Heskin* and *Griffin v Patton* there was a willingness to move from general statistical data to imposition of an onus of proof on the defendant under the *res ipsa loquitur doctrine*, but only where the percentage was very high. Geoghegan J's analysis appears to conflate the question of the infrequency of the damaging occurrence, on the one hand, with the infrequency of its occurrence without negligence relative to its occurrence with negligence, on the other.'

[27] ibid at [9-49]: 'If the plaintiff has established that *res ipsa loquitur* applies, this could have one of a number of consequences. First, it could mean no more than that he or she has established a case sufficient to go to the jury. The jury would be free to find for either plaintiff or defendant, but the plaintiff would have the assurance that he or she would at least get the case to the jury for this consideration. In some (albeit rare) cases, the evidence which merits the application of the *res ipsa loquitur* principle might be sufficiently strong to entitle the plaintiff to a directed verdict in his or her favour. Secondly, it could mean that the defendant is obliged to establish either that he or she was not negligent or to provide a reasonable explanation, equally consistent with negligence and no negligence on his or her part. On this interpretation (in contrast to the first), if the defendant elects not to give evidence, the plaintiff must (not may) win his or her case. Thirdly, it could shift the onus onto the defendant to establish affirmatively that the accident was not caused by his or her negligence'. Later, at s 9-55-9-56, addressing *Lindsay*, the authors commented: 'O'Flaherty J (Finlay CJ and Egan J concurring) was of the view that, in the instant case, the most that the defendant should be required to do was to show that it had exercised all reasonable care; it should not be required to take the further step of proving, on the balance of probabilities, what had caused the plaintiff's brain damage.' See also 9.56: 'The effect of this holding is that a defendant can escape liability in a case where *res ipsa loquitur* applies even where a mystery remains as to the cause of the accident. Once the defendant has established that, whatever the actual cause, it cannot be attributed to his or her negligence, then the defendant has done enough. Of course, if the defendant can establish the actual cause of the plaintiff's injury, he or she will also escape liability, in spite of having been guilty of negligence, if that negligence was not the cause of the injury.'

[28] Hodge Malek, and others, *Phipson on Evidence* (20th edn, Sweet & Maxwell Ltd 2021) 6-33. The authors in Andrew Tettenborn (ed) *Clerk and Lindsell on Torts* (Sweet & Maxwell Ltd 2023) 534-538, consider several authorities where different views were expressed.

[29] John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (Little Brown, 1905).

strong evidence on the part of the defendant, does the evidence introduced by the defendant meet the test?[30]

In certain jurisdictions, it has been held that the principle required a defendant to come forward with some explanation or some rebutting evidence. In others, it was held that the legal burden, in the strict sense, shifted. The position in the US was summarised as follows in McCormick on Evidence: 'although a few jurisdictions have given the doctrine the effect of a true presumption even to the extent of using it to assign the burden of persuasion, most courts agree that it simply describes an inference of negligence. Prosser called it a 'simple matter of circumstantial evidence'.[31] In *Henderson's case*,[32] Lords Bridge and Reid, preferred the proposition that the legal burden shifted. In *Ng Chun Pui v Lee Cheun Tat*,[33] the view that the evidential burden shifted was preferred by the Privy Council. It was there held that the legal burden did not shift to the defendant.

The authors of *Charlesworth and Percy on Negligence* describe *res ipsa loquitur* as a rule of evidence, rather than of substantive law. They refer to it as a 'maxim' which is not a rule of law, but merely describes a state of the evidence from which it is possible to draw an inference of negligence in the context of causation:

> It is based on common sense, its purpose being to enable justice to be done when the facts bearing on causation and the standard of care exercised are unknown to the claimant but ought to be within the knowledge of the defendant. It cannot assist where there is no evidence to support an inference of negligence and a possible non-negligent cause of the injury exists.[34]

The authors of *Phipson* describe it as a rule of evidence based on fairness and common sense, 'likely to be applied in a flexible way which reflects its underlying purpose, rather than mechanically',[35] and state that the matter appears to have now been settled by dicta of Lord Reed in *David T Morrison and Co. Ltd v ICL Plastics Ltd*,[36] that it belonged to the law of evidence, concerning the circumstances in which an inference can be drawn so 'as to shift the evidential burden of proof to a defender.'[37]

O'Flaherty J, in *Lindsay,* also adopted a graph from Fleming's *The Law of Torts* which speaks to this conclusion:[38]

> In some circumstances, the mere fact that an accident has occurred raises an inference of negligence against the defendant. A plaintiff is never obliged to prove his case by direct evidence. Circumstantial evidence is just as probative, if from proof of certain facts other facts may reasonably be inferred. *Res ipsa loquitur* is no more than a convenient label to describe situations where, notwithstanding the plaintiff's

[30] Roszel C. Thomsen, 'Presumptions and Burdens of Proof in *Res Ipsa Loquitur* Cases in Maryland' (1939) 3(4) *Maryland Law Review* 285 at 312.
[31] John W Strong, *McCormick on Evidence* (7th edn, West Group 1999) 342.
[32] [1970] AC 282.
[33] [1988] RTR 298.
[34] Christoper Walton and others (eds)), *Charlesworth and Percy on Negligence* (14th edn, Sweet & Maxwell Ltd 2018).
[35] Hodge Malek and others (eds.), *Phipson on Evidence* (n 28) 6-32.
[36] [2014] UKSC 48.
[37] [2014] UKSC 48 (Lord Reed) at 4: 'The rationale of that approach is not immediately obvious, since the principle *res ipsa loquitur* is not concerned with the establishment of knowledge on the part of a pursuer, whether actual or constructive. The principle belongs to the law of evidence, and refers to circumstances from the establishment of which an inference of negligence can be drawn, so as to shift the evidential burden of proof to a defender.'
[38] John G. Fleming, *The Law of Torts* (n 7).

> inability to establish the exact cause of the accident, the fact of the accident by itself is sufficient in the absence of an explanation to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury. The maxim contains nothing new; it is based on common sense, since it is a matter of ordinary observation and experience in life that sometimes a thing tells its own story. Unfortunately, the use of a Latin phrase to describe this simple notion has become a source of confusion by giving the impression that it represents a special rule of substantive law instead of being only an aid in the evaluation of evidence, an application merely of 'the general method of inferring one or more facts in issue from circumstances proved in evidence'. (*Davis.v. Bunn* (1936) 56 C.L.R. 246 at 268).[39]

In this jurisdiction, therefore, the better view seems to be that the evidential burden shifts, *the court retaining final discretion to determine whether the inference ought to prevail.*[40] The defendant is required to show that all reasonable care was exercised on their part; he is not required to prove the cause of the alleged harm to a persuasive standard. Debate has arisen, however, in the light of the much commented upon and often criticised observations of Henchy J in *Hanrahan v Merck Sharp and Dohme*.[41] This decision is now considered in the context of the wider principle of peculiar knowledge and capacity for proof.

Res Ipsa Loquitur as Part of a Wider Doctrine: Peculiar Knowledge and Capacity for Proof

The authors of *McGrath on Evidence* describe as of uncertain ambit the long-established principle of the reversal of the onus of proof when a matter is not within the means of knowledge of one party and is peculiarly within the knowledge of the opposing party.[42] This principle can be traced back to over a century ago. In *Mahoney v Waterford, Limerick and Western Railway Company*,[43] it was held that the onus of proving whether goods damaged in transit were caused by wilful misconduct of the defendant's servants rested with the defendant railway company. Some recent examples of the application of this principle, unconnected with the law of negligence, are also referred to in *McGrath*, and include *Wicklow County Council v Fortune*[44] and *Brennan v Windle*.[45]

The rule applies where exclusive capacity for proof (not just knowledge *simpliciter*) lies with the opponent.[46] John Healy, in his book, *Principles of Irish Torts*, summarises the position as follows:

---

[39] [1992] IESC 4. This had been the subject of academic commentary. See McMahon and Binchy, *Law of Torts* (n 12) 9.61.

[40] See also John Healy, *Principles of Irish Torts* (n 27) 3-101 et seq.

[41] [1998] ILRM 629.

[42] Declan McGrath and Emily Egan McGrath, *McGrath on Evidence* (3rd edn, Round Hall 2020), [2-141].

[43] [1900] 2 IR 27 (Palles C.B): '[A]lthough it is the general rule of law that it lies upon the plaintiff to prove affirmatively all the facts entitling him to relief, there is a well-known exception to such rule in reference to matters which are peculiarly within the knowledge of the defendant. In such cases the onus is shifted'. See discussion of this principle in *McGrath*.

[44] [2013] IEHC 255 per Hogan J, the onus of proving that application, under s 160 of the Planning and Development Act 2000, lay with respondent.

[45] [2003] IESC 48; Proof of service of summons in judicial review proceedings seeking to quash a conviction.

[46] *Rothwell v Motor Insurers Bureau of Ireland* [2003] 1 IR 268 (Hardiman J) at p.14: 'It appears to me that the judgment in *Hanrahan*, requires not merely that a matter in respect of which the onus is to shift is within the exclusive knowledge of the defendant, but also that it is 'peculiarly within the range of the defendant's capacity of proof'. That is not the position here. As the learned trial judge clearly and succinctly held, neither party could go further: the matter was not within the knowledge, exclusive or otherwise, of either of them. This might apply whether the defendant was the MIBI or an individual driver.' (Emphasis in original) On the facts, the principle was not applicable where it could not be said

> The effect of an early inference may be severe and unjust on a defendant, however, particularly where the evidential gaps in a case are unbridgeable and it is not within his means to explain the plaintiff's injuries. The courts have therefore restricted the maxim *res ipsa loquitur* to exceptional cases. Although the contours of the maxim in Ireland are still being negotiated – on this issue there appears uncommon potential for disagreement between the Supreme Court and the High Court – it is fair to conclude from recent authority that to attract its application in a case, the plaintiff must first prove the occurrence of damage highly suggestive of the defendant's negligence in the context of an event under the control of the defendant, and secondly, that the defendant possesses the exclusive or peculiar means of proof that the plaintiff's damage was not suffered in consequence of any carelessness or breach of duty on his own part.[47]

In *Hanrahan v Merck Sharp and Dohme*,[48] Henchy J, with whom the other members of the Supreme Court agreed, noted:

> The ordinary rule is that a person who alleges a particular tort must in order to succeed prove, save where there are admissions, all the necessary ingredients of that tort and it is not for the defendants to disprove anything. Such exceptions as have been allowed that general rule seem to be confined to cases where a particular element of the tort lies or is deemed to lie pre-eminently within the defendant's knowledge in which case the onus of proof as to that matter passes to the defendant. Thus, in the tort of negligence, where damage has been caused to the plaintiff in circumstances in which such damage would not usually be caused without negligence on the part of the defendant, the rule of *res ipsa loquitur* will allow the act relied on to be evidence of negligence in the absence of proof by the defendant that it has occurred without want of due care on his part. (Emphasis added).

As for *shifting* the burden, he stated:

> The rationale behind the shifting of the onus of proof to the defendant in such cases would appear to rely on the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach, and which is peculiarly within the range of the defendant's capacity of proof.[49]

---

that knowledge of the source of an oil spill on which the plaintiff's car skidded was a matter peculiarly within the knowledge of the Motor Insurers Bureau of Ireland.

[47] John Healy, *Principles of Irish Torts* (Clarus Press 2006) [3-93].

[48] [1998] ILRM 629.

[49] The reasoning in *Hanrahan* has been the subject of criticism, noted by Hardiman J in *Rothwell v MIBI* [2003] IESC 16, p.14: 'The first passage cited above has been the subject of academic criticism on the basis that it departs from the classic formulation of the *res ipsa loquitur* rule. But it appears to me to be authoritative unless and until specifically considered in a case where its reversal is sought. In any event, it appears accurately to state circumstances in which, and the basis on which, the onus of proof may shift in civil litigation. As the learned trial judge approached the present case, that is an issue separate from whether the circumstances are those of *res ipsa loquitur*'. The authors of McMahon and Binchy, *Law of Torts* (n 12) outlined their criticism at [9-53] as follows: 'This approach gives rise to difficulty. It is not the case that *res ipsa loquitur* may be invoked only where the evidence is more accessible to the defendant. Of course, proof of the elements of a case based on *res ipsa loquitur* frequently shows superior or exclusive knowledge on the part of the defendant as to how the accident occurred: of the nature of things, those in control of the instrumentality causing the injury are generally more likely to have such knowledge than their victims. However, the *res ipsa loquitur* doctrine is neither reducible to, nor dependent on, this element'. At [9-54] the authors state 'Henchy J's statement that *res ipsa loquitur* applies 'where damage has been caused to the plaintiff in circumstances in which such damage would not usually be caused without negligence on the part of the defendant' involves an unfortunate elision of the separate elements of the doctrine. In fact, the plaintiff does not have to discharge such an onus. The whole point of the doctrine is to permit the making of an inferential conclusion that the

Hanrahan concerned the torts of nuisance and *Rylands v Fletcher*. It was not a negligence action.[50] Henchy J concluded:

> That is not the case here. What the plaintiffs have to prove in support of their claim in nuisance is that they suffered some or all of the mischief complained of and that it was caused by emissions from the defendants" factory. To hold that it is for the defendants to disprove either or both of those matters would be contrary to authority and not be demanded by the requirements of justice. There are of course difficulties facing the plaintiffs in regard to proof of those matters, particularly as to the question of causation, but mere difficulty of proof does not call for a shifting of the onus of proof. Many claims in tort fail because the plaintiff has not access to full information as to the true nature of the defendant's conduct. The onus of disproof rests on the defendant only when the act or default complained of is such that it would be fundamentally unjust to require the plaintiff to prove a positive averment when the particular circumstances show that fairness and justice call for disproof by the defendant. The argument put forward in this case for putting a duty of disproof on the defendants would be more sustainable if the plaintiffs had to prove that the emissions complained of were caused by the defendants" negligence. Such is not the case. In my view, having regard to the replies given by the defendants to interrogatories and notices for particulars and to the full discovery of documents made by them, it is not open to the plaintiffs to complain that for want of knowledge on their part it would be unjust or unfair to require them to bear the ordinary onus of proof.[51]

It would seem that *res ipsa loquitur* was considered by Henchy J to be part of this wider 'general rule … confined to cases where a particular element of the tort lies or is deemed to lie pre-eminently within the defendant's knowledge in which case the onus of proof as to that matter passes to the defendant.'[52] He does not expressly state whether it is the legal or evidential burden that shifts.[53] On the face of it, this would seem to be a reference to the legal burden; [54] the judge speaking of the 'rationale' behind the shifting of 'the onus of proof' to the defendant. The court also emphasised that the burden of proof would only be shifted by the interests of justice and that mere difficulty in proof will not suffice. [55]

---

defendant's negligent conduct caused the plaintiff's injury from the fact that (a) the thing causing the injury was under the defendant's control, and (b) accidents such as the one befalling the plaintiff do not ordinarily happen if those in control exercise due care. Under Henchy J's approach, the inferential conclusion has become, in effect, a premise. In Hanrahan, the issue at the core of the case was whether in fact the 'thing' that was under the control of the defendants was the 'thing' which caused injury to the plaintiffs. Unless it could be proven on the balance of probabilities that it was, the plaintiffs could not succeed. *The res ipsa loquitur* doctrine would not assist in providing this proof'.

[50] It is suggested that this was acknowledged by Henchy J at page 11 of the judgment when he stated, *'this is not the case here'*.

[51] *Rothwell v MIBI* [2003] IESC 16 (Hardiman J) at 14: 'The first passage cited above has been the subject of academic criticism on the basis that it departs from the classic formulation of the *res ipsa loquitur* rule. But it appears to me to be authoritative unless and until specifically considered in a case where its reversal is sought. In any event, it appears accurately to state circumstances in which, and the basis on which, the onus of proof may shift in civil litigation. As the learned trial judge approached the present case, that is an issue separate from whether the circumstances are those of *res ipsa loquitur*.' See also *Jordan v Minister for Children and Youth Affairs* [2013] IEHC 458 (McDermott J), in which there was no shifting of burden in referendum petition challenge.

[52] *Hanrahan v Merck Sharp & Dohme* [1988] IESC 1 10-11.

[53] In the context of the specific concept of res *ipsa loquitur*, this might be considered to be unsurprising as the case was decided on the basis of the torts of nuisance and *Rylands v Fletcher*.

[54] See also *Brennan v Windle* [2003] 2 ILRM 520.

[55] *Hanrahan* has been the subject of academic criticism in this context.

Potential Disconnect

If *res ipsa loquitur* simply shifts the evidential burden but is also considered to be part of a *wider principle* where, potentially, the legal burden shifts, then does this give rise to a potential disconnect between the true legal effect of the application of *res ipsa loquitur* and that of the peculiar knowledge principle of which it is stated to be part?[56] Or, as it has been suggested, has there simply been an unintended conflation of the issues? The authors of McMahon and Binchy propose that consideration be given to the abolition of the *res ipsa loquitur* principle, with the underlying issue to be considered in the context of the evaluation of its weight as circumstantial evidence. [57] *Hanrahan* was not a negligence case. It was primarily concerned with nuisance. Therefore, while strong obiter, it may be said that Henchy J's observations regarding *res ipsa loquitur* are not conclusive.

Does It Matter?

The significance of whether the legal or evidential burden shifts is well illustrated in *Clerk and Lindsell on Torts*.[58] The authors observed that if the effect of *res ipsa loquitur* is to simply raise an inference of negligence which requires the defendant to provide a reasonable explanation of how the accident could have occurred without his negligence, the defendant does not have to prove on the balance of probabilities that his explanation is the correct one.[59] If what the defendant advances is equally plausible to that advanced by the claimant, the claimant will fail because he bears the 'legal' burden of proof. On the other hand, if the effect of the application of *res ipsa loquitur* is to reverse the burden of proof (ie, the legal burden of proof), if a defendant's explanation is equally plausible but not more so, then he/she will lose.

O'Flaherty J's observations in *Lindsay* appear to support the position that the lesser standard applies:

> In my judgment, the submission that *res ipsa loquitur* does not apply in the circumstances of this case should be rejected. It is true that a precise circumstance of negligence cannot be pointed to - such as in the classical cases of bags of sugar falling on a passing pedestrian (1) or a motor car driven onto a footpath (2) - but it seems to me that if a person goes in for a routine medical procedure, is subject to an anaesthetic without any special features, and there is a failure to return the patient to consciousness to say that that does not call for an explanation from defendants would be in defiance of reason and justice. Equally, *however, it seems to me that in this case the most that the defendants should be required to do is to show that they exercised all reasonable care; that they were not negligent and that they should not be required to take the further step of proving, on a balance of probabilities, what did cause the plaintiff's brain damage* (emphasis added). [60]

[56] John Healy, *Principles of Irish Torts* (n 27) 3-104. The author comments that the 'better view of *res ipsa loquitur* is that it gives rise to an inference of negligence in circumstances where the facts of the accident without more point strongly to the defendant's negligence, and that when deciding when a plaintiff is entitled to this inference, the court may have regard to the means of knowledge on either side and the extent to which a defendant controlled or managed the event that engendered the plaintiff's damage'.

[57] McMahon and Binchy, *Law of Torts* (n 12) 9-62: 'It remains to be seen whether the Irish courts will take the entirely different course, favoured by the Supreme Court of Canada and finding certain sympathy in the High Court of Australia, of announcing the demise of the *res ipsa loquitur* doctrine, leaving negligence litigation involving circumstantial evidence to be resolved simply on the weight of that evidence. Such a development could only contribute to clarity in our law'.

[58] Michael Jones, Anthony Dugdale, Mark Simpson (eds.), *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020).

[59] ibid, at [7-207].

[60] [1992] IESC 4, 8-9, [1993] 2 IR 147.

As *Clerk and Lindsell* point out, this does not mean that a defendant can redress the balance simply by suggesting vaguely plausible theoretical alternatives. It appears to this author that the matter was well put in *Clerk and Lindsell* where it is stated that for a chance of success a defendant's assertion must have the colour of probability.[61]

Res Ipsa Loquitur, The Reversal of the Onus of Proof and Causation

The principle of *res ipsa loquitur* does not apply to causation. In *Best v Wellcome Foundation Ltd*,[62] it was held that a finding on negligence did not affect the requirement to prove causation.[63] *McGhee v National Coal Board*[64] concerned proof of causal connection and while it is often cited as authority for the proposition that proof of risk may be equated to proof of cause, it does not result in shifting the burden of proof of causation.[65] The distinction between the inferences generated by the *McGhee* principle and *res ipsa loquitur* is that the former raises an early inference of proof of causation, whereas the latter raises an early inference of want of care.

Conclusion

Confusion has been the hallmark of the development, application and *understanding of res ipsa loquitur*. The term has been indicted as confounding and has led some to call for its abolition. While legal concepts which give rise to uncertain outcomes are normatively undesirable, it is suggested that the prevalent view in this jurisdiction does not give rise to a level of confusion which would warrant the rule's abolition or its repositioning in the law. In this context *res ipsa loquitur* is best understood as an evidential tool to be deployed where an early inference of negligence arises from a set of factual circumstances, which satisfy certain conditions of applicability. In those circumstances the evidential burden shifts. Conflation of the principle with separate, wider doctrines, such as that of peculiar knowledge, it is submitted, places its coherency and usefulness as an evidential aid at risk. As a rule of evidence, however, it must have some degree of flexibility to aid the determination of new situations which give to negligence litigation in a modern society.

[61] Michael Jones, Anthony Dugdale, Mark Simpson (eds.), *Clerk & Lindsell on Torts* (n 58) 7-207.
[62] [1993] 3 IR 421.
[63] See also *Quinn v Mid-Western Health Board* [2005] IESC 19. See also *Cosgrove v Ryan* [2008] IESC 2; See John Healy, *Principles of Irish Torts* (n 27) 1-101, where the author notes that in *Cosgrove,* the court highlighted the fundamental distinction between *res ipsa loquitur* and proof of causation.
[64] [1973] 1 WLR 1.
[65] John Healy, *Principles of Irish Torts* (Clarus Press, 2006), 3-103. Healy observes that there are significant differences between *res ipsa loquitur,* and the principles laid down in *McGhee* that 'bear crucially on the quality of the rebuttal evidence required of the defence'.