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RES IPSA LOQUITUR: SOME RECENT CASES IN SINGAPORE AND ITS FUTURE

Res ipsa loquitur applies when a plaintiff who is injured in an accident does not know the precise cause of the accident and has to rely on the occurrence of the accident itself, as an event which does not happen in the ordinary course of things without the negligence, to infer negligence on the part of the defendant. The plaintiff in such a situation is relying on circumstantial or indirect evidence to raise a *prima facie* case of negligence against the defendant. Used in this way, *res ipsa loquitur* is an ordinary rule of evidence and it is not peculiar to the tort of negligence. Recent cases in Singapore have adopted this view of the effect of *res ipsa loquitur* and a Supreme Court of Canada decision has recently held that the Latin phrase employed in this way is useless and confusing, and should be abandoned in the tort of negligence. However, *res ipsa loquitur* has been used in some older English cases as something beyond a general rule of evidence. It is a unique and a substantive rule of law that shifts the legal burden of proof from the plaintiff to the defendant. On this application of *res ipsa loquitur*, the plaintiff raises a *prima facie* case of negligence against the defendant from which a court must, at the conclusion of the case, infer negligence, unless the defendant gives a reasonable explanation to disprove the presumption of negligence against him. The defendant is prevented by this use of the doctrine as a special rule of law from exploiting his exclusive and advantageous knowledge of the exact cause of an accident to the detriment of a plaintiff. The issue that is confronted in this article is whether *res ipsa loquitur* should perish in Singapore as something that merely signifies an ordinary rule of evidence or survive as a unique rule of law in the tort of negligence to correct the imbalance of knowledge that arises in the appropriate cases of proof of negligence by circumstantial evidence.

I. INTRODUCTION

IN any negligence action, the plaintiff must prove that the defendant owed her a duty of care, that this duty was breached by the defendant acting below the standard of care expected of a reasonable person in the circumstances, that the defendant's act or omission caused the damage suffered by the plaintiff and that damage caused was not too remote. In *res ipsa loquitur* we are only concerned with the breach of the duty of care (the factual negligence issue) and the proof of this by circumstantial or indirect evidence.

Accidents happen in a variety of circumstances. In most cases the plaintiff herself or others would have witnessed the accident and can therefore testify to the negligence of the defendant. If there are such witnesses, the plaintiff

will try to prove her case by this *direct* evidence. By this evidence of those who saw or witnessed the accident, the plaintiff will try to persuade, on a balance of probabilities, the judge in Singapore (or a jury elsewhere, if there is one) of (i) the occurrence of the accident, (ii) that the occurrence of the accident was caused by the specific acts or omissions of the defendant, and (iii) that these acts or omissions indicated negligence on the part of the defendant. This is proving the defendant's negligence by direct evidence.

In a minority of cases, where the plaintiff cannot produce direct evidence of the relevant acts or omissions of the defendant which caused the accident (that is item (ii) above is missing), the plaintiff can still prove her case by *circumstantial* or *indirect* evidence. The plaintiff proves the fact of the occurrence of the accident and then argues that inferences can be drawn from this that the accident was caused by the negligence of the defendant. The inference of negligence that is called for here is wider than in the case of proving negligence by direct evidence. The exact cause of the accident is unknown. The plaintiff is relying solely on the *occurrence* of the accident itself to infer negligence. So if you are visiting a warehouse on the docks, as the plaintiff was in *Scott* v *London & St Katherine Docks Co*,[1] some 150 years ago, and a bag of sugar falls on top of you and nobody, yourself or others, saw why and how this happened (or nobody claims to have seen it), then you seek to infer from the occurrence of the bag of sugar falling on top of you that there was negligence on the part of those persons who were in control of the premises from which that bag of sugar fell. In a much-quoted passage in the case, Erle CJ 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 defendants, that the accident arose from want of care.[2]

In this case we have the beginnings of the maxim or doctrine of *res ipsa loquitur* in England: "the thing or operation speaks for itself".

The *res ipsa loquitur* principle in the tort of negligence is therefore concerned with the proof of negligence. It is about a particular way of giving and evaluating evidence. Direct evidence is the best evidence. But sometimes because an accident happens suddenly (like an unexpected swerve of a vehicle

1 (1865) 3 H&C 596.

2 *Ibid*. In the case a retrial was ordered and on retrial negligence was not inferred.

in a road accident) or in a manner that is unexplained (like a sudden explosion in an industrial accident), the plaintiff has to rely on the next best available evidence, that is, the circumstantial or indirect evidence to establish the defendant's negligence without establishing the exact cause of the accident. *Res ipsa loquitur* is relevant here – the accident is said to tell its own story by indicating the probable negligence of the defendant. In this sense, it is an ordinary rule of evidence and there is nothing unique about this application of *res ipsa loquitur* in the tort of negligence. Proof by indirect evidence is also employed elsewhere in criminal cases and other civil cases. In a criminal case the prosecution may rely on circumstantial evidence to prove a crime when there is insufficient direct evidence of the exact criminal act of the accused.

However, *res ipsa loquitur*, expressed in its Latin form for no convincing reason, has been the source of much misunderstanding and confusion in the tort of negligence. It is a maxim that remains in a student's memory long after a tort course. It is probably remembered because it sounds exotic, not because it signifies any clear legal principle. If *res ipsa loquitur* were indeed merely an ordinary rule of evidence, it would have been better for all of us if such a phrase were never employed. There would have been less room for interminable misunderstanding and the inordinate attention devoted to it, in classes and litigation, would have been spared. However, *res ipsa loquitur* has been treated by some courts as something that is beyond a rule of evidence. When it applies it is said to reverse exceptionally the *legal* burden of proof in a negligence action from the plaintiff to the defendant. If so, it is a unique and a substantive rule or doctrine of law with this special effect in the tort of negligence. Consequently the effect of applying *res ipsa loquitur* in the tort of negligence has never been entirely clear. Recent cases in Singapore have treated the maxim as an ordinary rule of evidence and, more recently, the Supreme Court of Canada has held that the maxim used in this particular way serves no useful purpose and should be abandoned for the sake of clarity. There is much to be said for this point of view. This is discussed below. However, it can be argued that *res ipsa loquitur* used as a rule of law, may still be indispensable in the tort of negligence in order to ensure that there is fairness to the plaintiffs where the facts of the cause of the accident, unlike the usual negligence actions, lie exclusively within the knowledge of the defendants to their advantage, and the plaintiffs have to rely solely on circumstantial evidence to prove negligence. In negligence actions, the plaintiffs and the defendants do not always share equally the precise knowledge of the cause of the accident. Where there is this disparity, admittedly in a minority of cases, to the detriment of the plaintiffs, *res ipsa loquitur*, employed as a special rule of law, may have a useful function in correcting the disequilibrium. If so, we should not move towards the demise of *res ipsa loquitur* without a proper consideration of its role and significance. This will also be examined later in the article.

II. PRECONDITIONS

Fleming[3] points out that *res ipsa loquitur* is no more than a convenient label to summarily describe situations where, notwithstanding the plaintiff's inability to establish the cause of the accident, the fact of the accident by itself is sufficient, in the absence of an explanation, to justify the conclusion that probably the defendant was negligent. He also points out that it is impossible to catalogue the wide variety of *res ipsa loquitur* cases which range from a barrel of flour or a bag of sugar falling from warehouses in *Byrne* v *Boadle*[4] and *Scott* v *London & St Katherine Docks Co*,[5] when the maxim was first introduced in England, to that of an explosion in an outhouse which contains a gas meter in *Lloyde* v *Midland Gas Board*,[6] and to numerous other instances. More recent cases of *res ipsa loquitur* in Singapore include the examples of an uncompleted site office collapsing onto a worker in *Awang bin Dollah* v *Shun Shing Construction & Engineering Co Ltd*,[7] a faulty gas cylinder exploding when the gas was turned on in *Teng Ah Kow* v *Ho Sek Chiu*[8] and a vehicle overturning in the middle of a highway in *Ooi Han Sun* v *Bee Hua Meng*.[9] It is difficult, if not impossible, to classify in advance all the possible types of cases in which *res ipsa loquitur* will arise. The application of *res ipsa loquitur* is dependent on the particular facts proved in each case. Nonetheless, it can be seen that *res ipsa loquitur* applies generally to cases involving accidents that happen suddenly or which are somehow left unexplained.

The application of the maxim can make it easier for the plaintiff to prove his case by circumstantial evidence but certain conditions for its application must be satisfied. These conditions are: first, that the thing must be shown to be under the management of the defendant or someone for whom he is responsible and secondly, that the accident must be such as in the ordinary course of things does not happen if those who have the management use proper care. If these two conditions are satisfied then that affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. The third condition for the application of the maxim, which is a negative one, is that the cause of the accident must be unknown.

The first condition for the application of *res ipsa loquitur* is that the

3 *The Law of Torts* (9th Ed, 1998) at 353.
4 (1863) 2 H&C 722.
5 (1865) 3 H&C 596.
6 [1971] 1 WLR 749.
7 [1997] 3 SLR 677.
8 [1993] 3 SLR 769.
9 [1991] 3 MLJ 219.

thing must be shown to be under the management or control of the defendant or his servants. The requirement is to ensure that the defendant is implicated in the accident. This actual control was said to exist sufficiently even though the entire works in the construction site in *Awang bin Dollah's* case[10] had been subcontracted out by the defendant main contractor to another contractor. In *Ooi Han Sun* when a pick-up overturned the court said, "the pick-up was at all times under the control and management of the defendant"[11] because it was being driven exclusively by him. In *Lloyde*,[12] although the defendant Gas Board did not actually control the defective gas meter that was located in the plaintiff's outhouse, it was sufficient that there was improbability of interference by others. If the requirement of control, even at this minimum level of excluding others, is absent, the case is not a proper case for *res ipsa loquitur* as there is the probability of others causing the accident.

The second condition for the application of *res ipsa loquitur* is that the accident must be such that in the ordinary course of things does not happen if those who have management or control use proper care. The occurrence must justify the inference of negligence. In *Ooi Han Sun*, Yong Pung How CJ said, when a pick-up truck overturned in the middle of the road, that "this could not have happened in the ordinary course of things without negligence on the defendant's part."[13] Also in *Awang*, LP Thean JA said, "In the ordinary course of things, the collapse of the site office would not have occurred."[14] But, in *Tetra Laval Pte Ltd* v *Tan Huan How & BS Engineering Co Pte Ltd*, where the plaintiffs' paper stored in a warehouse was damaged by leakage from the piping system on the installation of fire hosereels by the defendant contractors, S Rajendran J excluded the application of *res ipsa loquitur* because the leakage could in ordinary circumstances have happened "even if no work whatsoever had been carried out on the piping system."[15] The *res* here did not ordinarily indicate negligence on the defendants' part. In *Fontaine* v *Loewen Estate*, Major J for the Supreme Court of Canada said:

> Human experience confirms that severe weather conditions are more

[10] [1997] 3 SLR 677.

[11] [1991] 3 MLJ 219, at 221 *per* Yong Pung How CJ.

[12] [1971] 1 WLR 749. In *Easson* v *London & North Eastern Railway Co* [1944] KB 421 a boy fell through a door of an express passenger train and *res ipsa loquitur* was found inapplicable in an action against the railway company because any of the passengers could have meddled with the door.

[13] [1991] 3 MLJ 219, at 221.

[14] [1997] 3 SLR 677, at 690.

[15] Unreported, Suit No 376 of 1995.

> likely to produce situations where accidents occur and vehicles leave the roadway regardless of the degree of care taken. In those circumstances it should not be concluded that the accident would ordinarily not have occurred in the absence of negligence.[16]

The court in that case refused to draw inferences of negligence from the fact of the vehicle leaving the road in severe weather conditions of torrential rain and fierce wind. The circumstances of the case were such that it was too speculative to infer that "in the ordinary course of things" the accident would not have happened in the absence of negligence. Likewise, in professional negligence cases, the circumstances may be so extraordinary or unusually technical that it cannot be inferred with confidence as to what would ordinarily happen in those circumstances. In such cases *res ipsa loquitur* should not be used, as the inference of negligence will be equally speculative and unsound. However, the expert evidence that is presented in such cases may enable the courts to understand what would ordinarily happen. If so, *res ipsa loquitur* may still be applicable.[17] So what in the ordinary course of things does or does not happen without negligence on the part of the person in control is not always easy to determine, and this can be highly contentious.[18] If the second condition is not satisfied, the case is not a proper case for the application of *res ipsa loquitur*, as the accident does not by common experience indicate negligence.

The third condition for the application of *res ipsa loquitur* is that the exact cause of the accident or injury must be unknown or at least insufficiently known. This is not a positive requirement, but a negative condition to exclude its application. In *Barkway* v *South Wales Transport Co Ltd*, Lord Porter

[16] (1997) 156 DLR (4th) 577, 586.

[17] See, for examples, *Cassidy* v *Ministry of Health* [1957] 1 All ER 574 and *Roe* v *Ministry of Health* [1954] 2 All ER 131 and also *Ratcliffe* v *Plymouth & Torbay Health Authority* [1998] Lloyd's Rep Med 168 where the Court of Appeal held recently that in medical negligence cases which are contested and technical (medical science being far from simple and not all-knowing), the impact of applying *res ipsa loquitur* is reduced to that of establishing, at the very most, a *prima facie* case. *Res ipsa loquitur* is no more than a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference of negligence. It is not a principle of law that raises a presumption of negligence and, as its usefulness has long been exhausted, it should be dropped from the litigator's vocabulary and replaced with the phrase "a *prima facie* case".

[18] The English courts tend to be more willing to infer that ordinarily an accident is unlikely to happen without negligence. See, for example, the difference in inference from slippage on food in stores between the English and the Australian courts (fn 50 below).

[19] [1950] 1 All ER 392, 394. Whether the cause of an accident is sufficiently known to the extent that there is available direct evidence to exclude *res ipsa loquitur* can be another point of serious dispute (see the same in respect of the second requirement, above).

said: "The doctrine is dependent on absence of explanation ...."[19] In this case, an omnibus veered across the road, left the roadway and fell over an embankment when its offside tyre burst due to the disintegration of plies in its outer cover from previous impact fractures. Lord Normand said: "The fact that an omnibus leaves the road way and so causes injury to a passenger or to some one on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maxim *res ipsa loquitur* is of little moment."[20] In this case, it was held that: "On the evidence it is proved that reasonable care was not exercised."[21] Lord Radcliffe said, "In my view the respondents failed to establish that they had observed an adequate standard of care, and it is for that reason that I think that the appellant is entitled to her damages."[22] There was no need to rely on *res ipsa loquitur* in the case to prove negligence by circumstantial evidence, as there was sufficient direct evidence of the defendants' negligence in using a defective tyre.

In *Lee Say Sugar Factory Pte Ltd* v *Deep-Freeze Refrigeration Pte Ltd*,[23] Christopher Lau JC endorsed the view that where all the facts are known *res ipsa loquitur* cannot have any application. As he put it: "The plaintiffs further pleaded *res ipsa loquitur* but I am unable to see how this doctrine can apply in the particular circumstances of this case where the cause is ascertained or ascertainable."[24] In this case, the plaintiffs who were suppliers of freshly slaughtered chickens sued the defendants who were manufacturers and repairers of refrigeration equipment. The defendants were required to provide a plant that would chill water in sufficient volume for the storage and production of the slaughtered poultry. The plaintiffs alleged that frequent electrical tripping resulted in frequent shutdowns, that rust began to appear in the plant's water and subsequently the plant was unable to produce the chilled water and in the quantity required. The defendants' evidence was that the problems complained of by the plaintiffs were attributable to the environmental pollution existing at the premises and that the close proximity

[20] *Ibid*, at 399.
[21] *Ibid*, at 403.
[22] *Ibid*, at 404.
[23] Unreported, Suit No 30 of 1994.
[24] *Ibid*, at para 22. Similarly in another unreported case, *Loh Siew Keng* v *Seng Huat Construction Pte Ltd*, Suit No 288 of 1996, Chan Seng Onn JC said at para 239: "if the facts were sufficiently known, the question ceased to be one where the facts spoke for themselves and the solution was to be found by determining whether, on the facts as established, negligence was to be inferred or not".

of the chicken coops to the cooling towers resulted in fine chicken feathers and fine particles of chicken droppings in the air being sucked into the cooling towers causing in turn the water in the towers to become acidic and that the acidity in turn caused the condenser pipes to corrode, resulting in the gas in the pipes escaping, and enabling water to enter the pipes. This water then entered into the compressors and through the compressors, the refrigeration system. With this evidence and explanation, Christopher Lau JC held that *res ipsa loquitur* can have no application and found on the adduced direct evidence that the defendants were not negligent. So, if the third condition is not satisfied, as there is evidence as to how and why an accident occurred, there is no need to appeal to *res ipsa loquitur* because the question of the defendant's negligence can be determined by the direct evidence that is available.

III. Application

In cases of negligence, proof of negligence can be given by direct evidence or by circumstantial evidence. Whether it is given by direct evidence or circumstantial evidence (if *res ipsa loquitur* is an ordinary rule of evidence), the legal or ultimate burden (or onus) of proof always remains throughout and at the conclusion of the trial on the party alleging the negligence, *ie,* on the plaintiff. The defendant is not required to prove the negative that he was not negligent. When we refer to the legal or ultimate burden we mean the burden required to be met by law at the end of the trial or case. However, during the trial itself, there is a burden of adducing evidence which may shift in the course of the trial. This is called the practical or evidentiary (or evidential) burden of proof or evidentiary onus and this shifts during the course of the trial from the plaintiff to the defendant and vice-versa according to the state of the evidence at any particular stage of the proceedings.

If a plaintiff establishes a *prima facie* case during the trial against the defendant then the defendant is placed in the very real position where he must choose whether or not to introduce evidence of his own in order to explain or contradict the evidence of the plaintiff. When we talk of a plaintiff establishing or raising a *prima facie* case we mean that the plaintiff has adduced sufficient evidence on which a tribunal of fact (jury, if there is one, or judge alone, as in Singapore) acting reasonably could find in his favour. In such a case if the defendant decides not to introduce any evidence of his own and he leaves the plaintiff's case to stand or fall on its own merits, he runs the obvious risk that the tribunal of fact may make the finding the plaintiff asks of it. In other words, the plaintiff will probably win. Should the defendant introduce evidence to explain or contradict the evidence of the plaintiff then the question simply becomes whether on the whole of

the evidence, the tribunal of fact is satisfied that the plaintiff has made out, on a balance of probabilities, his case.

It is a question of law (*ie*, a question for the judge) whether a plaintiff has established a *prima facie* case. Once the plaintiff establishes a *prima facie* case it is then for the judge (or the jury, if there is one) to decide as a matter of fact and inference whether, applying common sense and experience, he is prepared to accept that evidence as establishing the plaintiff's case as being more probable than not, that is, in numerical terms, a more than fifty per cent chance that the defendant is negligent.

There are several ways in which a plaintiff can establish a *prima facie* case against a defendant. There is no fixed rule regarding how and in what way a plaintiff can go about giving evidence to establish a *prima facie* case. The plaintiff can adduce credible evidence as to the surrounding circumstances of the accident and its precise cause which indicates negligence on the part of the defendant. This is proof by direct evidence. He can choose to rely on this exclusively, or combine this with any other available circumstantial evidence, if relevant, to strengthen the overall probability of the direct evidence of negligence. But, sometimes the mere fact of the occurrence of the accident by itself, without any reference to its probable cause, is sufficient to establish a *prima facie* case. This is because such accidents do not occur without negligence on the part of the person against whom it is alleged. In such cases, the mere fact of the accident provides a sufficient basis for the trier of fact to infer negligence. These are the cases of *res ipsa loquitur* – the thing or event speaks for itself. The circumstantial evidence of the occurrence of the accident by itself constitutes a *prima facie* case of negligence. The strength of the inference of negligence depends on the particular circumstances of each case. The thing that tells its own story may do so in weak whispers or loud screams. *Res ipsa loquitur* is capable of supporting a wide range of inferences of negligence which can vary from that which is marginally persuasive to that which is irresistibly conclusive.

IV. Effect

Assuming that it is a case of *res ipsa loquitur* and that a *prima facie* case of negligence is made out by the mere occurrence of the accident, what is the effect of applying the maxim or doctrine on the question of the legal burden or onus of proof in actions in negligence? The courts have taken two divergent views on the effect of the application of *res ipsa loquitur*.

First, some courts have regarded *res ipsa loquitur* as an ordinary rule of evidence. The evidential burden is cast upon the defendant once the judge decides that *res ipsa loquitur* is applicable and the defendant will likely lose on the issue of negligence unless he adduces some evidence. The

inference of negligence by the court is permissible, but not obligatory. *Res ipsa loquitur* is merely a descriptive device (an unclear one at that) indicating by shorthand that the plaintiff is relying on circumstantial evidence to establish a *prima facie* case against the defendant. It is a summary way of describing a situation in which some inferences of causative carelessness may be drawn from the occurrence of the accident itself. Nevertheless, it is possible that a defendant may still succeed despite failing to adduce rebuttal evidence, if at the end of the case, the *res ipsa loquitur* inference of negligence is as consistent with no negligence on the part of the defendant, or if the court is ultimately not sufficiently convinced that the accident is probably caused by the negligence of the defendant. *Res ipsa loquitur* raises a *prima facie* case of varying weight in favour of the plaintiff. However, and this is undoubted, remaining completely silent is a risky option for a defendant in the face of a successful plea of *res ipsa loquitur*. On application of *res ipsa loquitur*, the courts *may* infer negligence from the occurrence of the accident.

Secondly, other courts have regarded *res ipsa loquitur* as a distinct rule of law in the tort of negligence. The legal burden of disproof of negligence is cast upon the defendant once the judge decides that *res ipsa loquitur* is applicable. The inference of negligence is mandatory once a *prima facie* case of negligence is established from the occurrence of the accident, unless the defendant disproves negligence by a reasonable explanation showing due care (inevitable accident) or that it is due to another's negligence. It is not good enough for the defendant to show merely, at the conclusion of the case, that the accident is inexplicable, or that it is due to some non-negligent hypothetical causes, or that there is an equal chance of his negligence and due diligence. In any such instance, the defendant does not discharge the legal burden on him to prove that he is probably not negligent. The legal burden of proof that ordinarily rests on the plaintiff throughout and at the end of a negligence action is exceptionally shifted to the defendant when *res ipsa loquitur* is successfully used as a special rule of law in the tort of negligence. The courts *must*, in the absence of explanation by the defendant, infer negligence from the occurrence of the event.

That it makes a difference which view is taken by the courts is well illustrated by *Ng Chun-pui* v *Lee Chuen-tat*[25] which went to the Privy Council from Hong Kong. A coach crossed a central reservation dividing two carriageways and collided with an oncoming public light bus. The plaintiffs were persons killed or injured in the collision in the bus. They called no oral evidence and relied upon the occurrence of the accident as evidence

[25] [1988] 2 HKLR 425.

of negligence. They relied upon *res ipsa loquitur*. The defendants, the owner and the driver of the coach, called evidence that a blue car which did not stop and could not be traced cut into the fast lane ahead of the coach and the defendant coach driver reacted to it by braking and swerving a little to his right. The coach then skidded across the central grass reservation, colliding with the public light bus. The trial judge held that because the plaintiff had relied on *res ipsa loquitur* the legal burden of disproving negligence had shifted to the defendant and that this burden had not been discharged. The Privy Council agreeing with the Court of Appeal of Hong Kong, held that this view of the trial judge was wrong and that only the evidentiary burden had shifted and that the evidence produced by the defendants was capable of rebutting the *prima facie* case made by the plaintiffs (who merely showed the defendants' coach went into the other carriageway and into the public light bus) and that once the defendant driver's explanation of the accident was accepted, his driving had to be judged in the light of the emergency in which he had been placed by the untraced blue car. So the plaintiffs failed despite relying on *res ipsa loquitur* because the legal burden had not shifted. Thus, the Privy Council has held, and it is persuasive for Singapore, that in *res ipsa loquitur* cases, only the evidentiary burden shifts.

In Singapore, in *Teng Ah Kow* v *Ho Sek Chiu*, Chao Hick Tin J (now JA) for the Court of Appeal of Singapore explained the *res ipsa loquitur* principle in these terms:

> It seems to us settled law that the principle of *res ipsa loquitur* is no more than a rule of evidence of which the essence is...that an event which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence. It would then be for the defendant to rebut the *prima facie* case.[26]

This dictum suggests that in Singapore *res ipsa loquitur* raises a *prima facie* case of negligence. This shifts the evidentiary burden (not the legal burden) and that the defendant can rebut the *prima facie* case by adducing the appropriate evidence.

In *Keller Piano Co (Pte) Ltd* v *Management Corp Strata Title No 1298*, the Court of Appeal of Singapore thought it was "eminently reasonable for the doctrine of *res ipsa loquitur* to apply to shift the burden to the respondents to show how the leak could have occurred without any want of care on their part."[27] This was the leak from a pipe above the false ceiling

[26] [1993] 3 SLR 769, 775.
[27] [1995] 1 SLR 355, 358 *per* Chao Hick Tin J (now JA).

which caused the water to get into the plaintiff's premises and cause damage to the premises and a piano. Although the word "burden" is not qualified by the word evidentiary or evidential it is apparent that the court is referring to the evidentiary burden. The court held that the defendants had not discharged the evidentiary burden of showing how the pin hole in the pipe which caused the leak had occurred as there was "really no relevant evidence at all from the defendants".[28] The Court therefore held that the defendants had failed to rebut the *prima facie* case raised against them. And, in *Awang bin Dollah* v *Shun Shing Construction* where the plaintiff was injured in a site office on a construction site when the site office collapsed when there were gusty winds and heavy rain, LP Thean JA for the Court of Appeal held that this was a case where *res ipsa loquitur* applied and that "the *evidential* burden has shifted to Shun Shing (the defendants) to show that they had taken reasonable care in the construction of the site office and that the collapse thereof was not due to any fault on their part."[29] The Court said that not a "scintilla of evidence"[30] was adduced to rebut this *prima facie* case and therefore the burden (the evidential burden) resting on Shun Shing had not been discharged.

In another case *Ooi Han Sun* v *Bee Hua Meng*[31] the plaintiff and the deceased were passengers in a motor pick-up truck driven by the defendant when the pick-up overturned in the centre lane of a highway. The plaintiff was asleep at the time, none of the other passengers in the truck were able to recall how the accident occurred and no persons responded to the police call for witnesses. The Chief Justice in the High Court said:

> In the present case, the pick-up was at all times under the control and management of the defendant, and the accident which resulted in the pick-up overturning in the middle of the road could not have happened in the ordinary course of things without negligence on the defendant's part. A burden is therefore cast upon the defendant and he must show how the accident actually occurred, and how this was consistent with the care on his part. In other words, he must rebut the inference of negligence raised against him.[32]

Although the Chief Justice said, "a burden is therefore cast upon the defendant", this is probably consistent with the word burden being used to describe

[28] *Ibid*, at 359.
[29] [1997] 3 SLR 677, at 690-691.
[30] *Ibid*, at 691.
[31] [1991] 3 MLJ 219.
[32] *Ibid*, at 221.

an evidential burden. The defendant driver said a taxi swerved in front of him and caused the defendant to swerve and apply his brakes and that was how the pick-up overturned. The Chief Justice did not believe that any taxi was involved and said, "for some reason which has not been explained by him, the defendant lost control of the pick-up at that point, as a result of which the pick-up overturned and skidded along the road."[33] The Chief Justice further said: "I found that the defendant failed to discharge the burden placed on him, and was solely to blame for the accident."[34] The Chief Justice was concerned that the defendant had made insufficient effort to give an explanation for the accident. As he said: "The employer had at least the excuse that he was dozing half the time, but there was no reason why the defendant should not have been able to explain more clearly what happened."[35] As the Chief Justice did not accept the defendant's version of how the accident happened, the defendant did not discharge the evidentiary burden placed upon him and therefore the defendant was held liable for the accident. The case shows how *res ipsa loquitur* can have the effect of placing the defendant in jeopardy of losing the case if he does not give a clear and satisfactory answer or version of how the accident happened which is consistent with no negligence on his part. In the absence of an explanation, the Chief Justice went so far as to infer from the accident that it was probably caused by the defendant's negligence because of his unfamiliarity in driving the pick-up as he was employed as a fitter, not as a driver.

The position in Singapore, that only the evidentiary burden shifts once *res ipsa loquitur* applies,[36] is consistent with the general position in the Commonwealth and after the decision of the Privy Council in *Ng Chun-pui* it is likely that the House of Lords will go the same way if that is not already the position in England.[37] Certainly in the decision of the English Court of Appeal in *Lloyde* v *West Midlands Gas Board*, at least Megaw LJ, appeared to regard *res ipsa loquitur* as a rule of evidence and not as a rule of law which shifts the legal burden of disproof of negligence to the defendant:

[33] *Ibid*, at 222.
[34] *Ibid*.
[35] *Ibid*.
[36] AJ Harding, "The Use of the Maxim *Res ipsa loquitur* in Malaysia and Singapore" in AJ Harding (ed), *The Common Law in Singapore & Malaysia* (1985, Ch 7), concludes on surveying the older cases: "it would appear that the position in Malaysia is uncertain, but the *dicta* tend on the whole to support the "rule of evidence" view. As far as Singapore is concerned, *Menon's case* [*VVV Menon* v *Henri Pigeonneau* [1957] 23 MLJ 85] is the only important authority, and it too would appear on the whole to support the "rule of evidence" theory." See also by the same author, *Res ipsa loquitur in Malaysia and Singapore* (1983), unpublished LLM thesis, submitted to the National University of Singapore.
[37] See Mitchell McInnes, "The Death of *Res ipsa loquitur* in Canada" [1998] 114 LQR 547.

> I doubt whether it is right to describe *res ipsa loquitur* as a "doctrine". I think it is no more than an exotic, though convenient phrase to describe what is in essence no more than a common sense approach, not linked by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was *some* act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.[38]

This sounds very much like the evidential burden shifting once the plaintiff proves a *prima facie* case relying on *res ipsa loquitur*. In *Ng Chun-pui* the Privy Council said that:

> [R]esort to the burden of proof is a poor way to decide a case; it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants.[39]

The Supreme Court of Canada has recently said in *Fontaine*: "It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all it was nothing more than an attempt to deal with circumstantial evidence."[40] *Res ipsa loquitur* used as a distinct rule of law to reverse the legal burden of proof from the plaintiff to the defendant, in the appropriate negligence cases, is now dead in Canada.

What will the Supreme Court of Canada put in its place? This is what the Court, like the Privy Council in *Ng Chun-pui* above, said:

> That evidence is more sensibly dealt with by the trier of fact, who

[38] [1971] 1 WLR 749, at 755.
[39] [1988] 2 HKLR 425, 427 *per* Lord Griffiths.
[40] [1997] 156 DLR (4th) 577, at 585.

> should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.[41]

The courts must look at the totality of evidence established, direct and indirect (if any), and decide whether the defendant is or is not negligent without resort to a shift in the legal burden of proof. *Res ipsa loquitur* merely describes a state of evidence and the proof of *prima facie* facts from which it is permissible to draw an inference of negligence.

Atiyah, in a well-known article,[42] however, took the view that in England the legal burden shifts when *res ipsa loquitur* applies. *Res ipsa loquitur* is used as a unique rule of law and therefore distinctly significant in the tort of negligence. It should not be treated merely as an ordinary rule of evidence. He relies on *Henderson* v *Henry E Jenkins & Sons*[43] and *Colvilles Ltd* v *Devine*.[44] In *Henderson*, the plaintiff's husband was killed by a lorry belonging to the defendants which ran down a hill and knocked him over, the cause of the accident being brake failure due to corrosion of the pipe that carried the brake fluid. This brake failure was, however, latent in that the defect was not discoverable by the normal maintenance of the lorry. In *Colvilles'* case the plaintiff was injured as a result of an explosion which occurred in the defendant's factory where he was employed. Although the cause of the explosion was not definitely established, it was found that the most likely cause of the explosion was the ignition of the inner lining of the hose (which supplied oxygen) by particles in the oxygen supply. It was not proved how the particles came to be in the oxygen supply. Atiyah's view of these two cases is expressed as follows in his article: "It is my submission that the effect of these two decisions is that the operation of the maxim *res ipsa loquitur* in English courts places a legal burden of proof on the defendant."[45] By this he means that once *res ipsa loquitur* is accepted the legal burden of proof shifts from the plaintiffs to the defendants. Both the defendants were held liable in negligence, although in *Henderson* the brake failure was latent, and in *Colvilles'* case, the cause of the presence of the foreign particles was unknown, because the defendants failed to discharge the legal burden on them to prove that they were not negligent. Atiyah concludes:

41 *Ibid*, at 585.
42 "*Res ipsa loquitur* in England and Australia" (1972) 35 MLR 337.
43 [1970] AC 282.
44 [1969] 2 All ER 53.
45 (1972) 35 MLR 337, 344.

> The upshot of all this seems to be that, while English judges are reluctant openly to acknowledge the fact, the application of *res ipsa loquitur* in English courts has frequently had the effect of casting a legal burden of proof on the defendant, while a contrary view is taken in Australia. A reasonably impartial commentator may be forgiven if he pays tribute to the clarity of the views expressed by the Australian judges while deploring the result in policy terms, and at the same time welcomes the results generally arrived at by English judges while deploring their inability to express their views more clearly.[46]

Both cases that Atiyah relied on are more than thirty years old and it may be that *Ng Chun-pui* decided by the same judges who sit in the House of Lords today may change the attitude of the House of Lords. It is interesting to observe that in *Ng Chun-pui* the Privy Council relied on *Lloyde* v *West Midlands Gas Board* and on *Henderson*. The quote from *Henderson* contains the specific words that: "The formal burden of proof does not shift."[47] So it is not that clear that *Henderson* and *Colvilles* really cast a legal burden of disproof of negligence on defendants in *res ipsa loquitur* cases in England.

V. Utility

We now turn to the utility of the *res ipsa loquitur* principle as an ordinary rule of evidence and then as a distinct rule of law in the tort of negligence.

First, as a rule of evidence:

(a) It assists the plaintiff to prove his case where there is only circumstantial evidence.

(b) If the conditions for the application of the maxim are met it helps establish a *prima facie* case for the plaintiff which the defendant must then meet by introducing evidence of his own in order to contradict the evidence of the plaintiff or at least explain that the accident is as consistent with no negligence as with negligence on his part.

[46] *Ibid*, at 348. Atiyah relies on the judgment of Barwick CJ in the High Court of Australia in *Government Insurance Office of NSW* v *Fredrichberg* (1968) 118 CLR 403 to illustrate that *res ipsa loquitur* is used clearly as a rule of evidence in Australia.

[47] [1988] 2 HKLR 425, 428 from Lord Pearson, one of the three majority Law Lords, who decided against the defendants. The other majority Law Lords, Lord Reid and Lord Donovan, expressly held that the legal burden shifted to the defendants.

(c) This also helps in flushing out some evidence from the defendant which he would rather not bring forward.

(d) It helps a plaintiff to resist a submission of no case to answer which is made by the defendant at the end of the plaintiff's evidence.

(e) How it works in practice to the advantage of the plaintiff as a rule of evidence is shown by *Ward* v *Tesco Stores Ltd*.[48] There, where the plaintiff slipped on some yoghurt in a supermarket, the court held that the plaintiff had established a *prima facie* case and to overcome that the defendant must show on a balance of probabilities by evidence or inference from evidence given that "this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers."[49] The defendants did not satisfy that evidential burden so the plaintiff succeeded.[50]

Secondly, as a rule of law:

(a) It compels the defendant to share whatever knowledge of the accident that he has with the plaintiff because if the defendant introduces no or insufficient evidence the judge is *obliged* to find for the plaintiff as the legal burden of proof has shifted. The defendant has to prove the negative that he was not, as presumed against him, negligent. It is not good enough for him to show the equal probabilities of his negligence and of him acting with due care.

(b) If, and when, it applies to professional negligence cases, like medical negligence cases, then a conflict of expert evidence as

[48] [1976] 1 All ER 219.

[49] *Ibid*, at 223, *per* Megaw LJ.

[50] However, Ormrod LJ, dissenting, at 222, felt that *res ipsa loquitur* was inapplicable here as the inference of negligence was too speculative: "The crucial question is how long before the accident the yoghurt had been on the floor. Had some customer knocked it off the shelf a few moments before, then no reasonable system which the defendants could be expected to operate would have prevented this accident." In *Dulhunty* v *JB Young Ltd* (1975) 7 ALR 409 the Australian court showed the same reluctance in inferring negligence from slippage on food left for an unknown period.

[51] See, however, fn 17 above, and see also, for *eg*, *Clark* v *MacLennan* [1983] 1 All ER 416. The case was however criticised by Mustill LJ in the Court of Appeal in *Wilsher* v *Essex Area Health Authority* [1986] 3 All ER 801.

to the correct professional practice, which frequently happens in such cases, would be resolved in the plaintiff's favour.[51]

(c) It also favours the plaintiff where the cause is also unknown to the defendant and unknown to him he is actually not negligent. He is found negligent because he is unable to discharge the legal burden placed on him to disprove negligence. This has the effect of introducing a kind of strict liability in the law of negligence when the doctrine of *res ipsa loquitur* applies. Negligence is otherwise fault-based.

VI. Conclusion

It is unlikely that courts in Singapore will regard *res ipsa loquitur* as introducing a unique rule of law that shifts the legal burden of disproving negligence to the defendant. Rather it is more likely that the courts in Singapore will treat *res ipsa loquitur* as a general rule of evidence, like that held in the decision of the Privy Council in *Ng Chun-pui*, and will continue to hold that when *res ipsa loquitur* applies a *prima facie* case of negligence arises which shifts the evidentiary burden of proof to the defendant. The defendant must then attempt to meet that evidentiary burden. The invocation of *res ipsa loquitur* does not result in any shift in the legal burden of proof. If so, the courts in Singapore should go to the logical conclusion, as has happened in Canada, and abolish the maxim as having no special significance in the tort of negligence since the maxim is merely a general rule of evidence and is not peculiar to tort law. Maintaining the maxim expressed in its present Latin form is superfluous and raises the possibility of confusion and misinterpretation. It should for the sake of clarity be abandoned in the tort of negligence so that there is no ambiguity as to any special effect from the use of the maxim.

However, before taking this irrevocable step, the courts in Singapore may want an opportunity to seriously consider whether there is any merit in having *res ipsa loquitur* as a special rule of law in the tort of negligence which reverses the legal burden of proof in circumstances where it is capable of being applied. *Res ipsa loquitur* used as a distinct rule of law undoubtedly introduces a stricter liability than that which is ordinarily required under negligence in some rare, but unavoidable, cases of proving negligence by circumstantial evidence. The introduction of this inconsistent basis of liability in negligence may be the price that has to be paid so that the knowledge of the plaintiff and the defendant is equalised in a situation where the plaintiff only knows the mere fact of the occurrence of the accident (and therefore has to rely on circumstantial evidence), but the defendant knows this and knows also the precise cause of the accident. In such a case, the defendant will not readily share his knowledge on why and how the accident happened,

if this is not in his best interest, unless he is forced by a reversal of the legal burden of proof. By placing the legal burden of disproof of negligence on him, the defendant is put in a position whereby he is not better off in suppressing his knowledge by remaining silent or maintaining a conspiracy of silence with others who favour him. The defendant is forced to share his knowledge on the issue of negligence in order to discharge the legal burden which is exceptionally shifted to him in such circumstances. If the defendant is actually not negligent, he can easily discharge this burden by explaining his innocence which is known to him, but not to the plaintiff.[52] It may, however, sometimes happen that the defendant is as ignorant of the precise cause of the accident as the plaintiff, and he cannot disprove negligence because he does not know that he is innocent, and is made liable in negligence even without want of care on his part because of the reversal of the legal burden of proof. When this occurs it is obviously unfair to the defendant, but the unfairness of this rule may be necessary to ensure that the scheme of proving negligence under a fault-based system of liability in negligence is always transparent and just and that a plaintiff is never non-suited by a defendant's exploitation of his better knowledge.

In the *res ipsa loquitur* cases of proving negligence by circumstantial evidence, the courts have to decide whether it is better for them to ignore the imbalance of knowledge favouring the defendant or rectify this by reversing the legal burden of proof in the plaintiff's favour. Which is the greater evil in the tort of negligence in such cases: the problem of a defendant's unfair superiority of knowledge or the risk of introducing an inconsistent stricter basis of liability as a result of the reversal of the legal burden of proof in a very few of these cases?

If the introduction of inconsistent bases of liability is considered in principle unacceptable, then *res ipsa loquitur* should not be treated as a distinct rule of law in the tort of negligence (it should only be recognised as a general rule of evidence) and it should be abandoned, Latin phrase and all, as being both confusing and not particularly necessary in the tort of negligence. A plaintiff who does not know of the cause of an accident that harms him has to rely on the ordinary rules of evidence, that are not

[52] It is most unlikely that the plaintiff in a *res ipsa loquitur* case would know more than the defendant as the defendant in such a case has control or management of the thing or event which leads to the accident. Further, it is fallacious to argue that a resort to the burden of proof is a defective way of deciding a case as a plaintiff is always required, as the person who alleges, to prove his claim in negligence and he can fail or succeed in this depending on his ability to discharge the burden. Equally, when *res ipsa loquitur* is used as a rule of law in the appropriate cases of proof by circumstantial evidence, a defendant's liability depends on his ability to discharge the burden of proof placed on him to disprove negligence. Where the burden of proof is located is, therefore, material in deciding all negligence cases and this is critical in some cases.

peculiar to the tort of negligence, to prove negligence by circumstantial evidence.

On the other hand, if the imbalance of knowledge is considered more untenable than the inconsistent bases of liability, then *res ipsa loquitur* should be preferred as a special rule of law in the tort of negligence and should be retained and clarified as having such effect. The plaintiff in such a *res ipsa loquitur* case is considered deserving of special protection so much so that the courts are prepared to reverse the legal burden of proof and assume that the defendant is negligent in the absence of disproof of negligence. If the defendant, despite his superior knowledge, refuses to explain or cannot explain adequately that he exercised due care, he is probably negligent and the court will find him so because of his failure to disprove his negligence. These are the usual cases of *res ipsa loquitur* and it is entirely fair to all the parties. But it must be conceded, as discussed above, that there can be, in such *res ipsa loquitur* cases, the infrequent case of a defendant who is as ignorant as the plaintiff of the cause of the accident and, unknown to himself, actually not negligent. Yet the court would have to find him liable in negligence because he cannot disprove that he is not negligent. Balancing the knowledge between the plaintiff and the defendant is obtained at the cost of turning some such rare cases of negligence into cases of stricter liability (liability without the proof of negligence). *Res ipsa loquitur*, as a rule of law, has the effect of giving circumstantial evidence a greater weight than direct evidence in that a plaintiff adducing direct eye witness accounts of the cause of the accident bears the legal burden of proof of negligence, whereas a plaintiff relying on circumstantial evidence, shifts this burden to the defendant. The inference of negligence against a defendant from the occurrence of an accident is turned into a presumption of negligence when *res ipsa loquitur* is used as a rule of law.[53] The greater weight anomalously accorded to circumstantial evidence by the shift of the legal burden of proof in all such cases, and the possible consequential risk of introducing a stricter basis of liability for negligence in a few of these cases, must be openly acknowledged by the courts as something that is unavoidable in policy and necessary in justice to ensure that the disadvantaged plaintiffs are capable of countering those defendants who are reluctant to share, in their own best interest, their monopoly of knowledge. It must be emphasized here that not all cases of disparity of knowledge requiring proof by circumstantial evidence are necessarily *res ipsa loquitur* cases. Only some

[53] It is acknowledged that the effect of this is sometimes exaggerated. MA Jones, *Textbook on Torts* (6th Ed, 1998), at 199 succinctly states: "After all, it is a fine line between the probabilities being equally balanced [favourable to the plaintiff when *res ipsa loquitur* applies and is used as a rule of law] and tipping the scale one way or the other."

of these cases are *res ipsa loquitur* cases. The conditions discussed above for the proper and fair application of *res ipsa loquitur* must be strictly complied with, and this is especially so, if *res ipsa loquitur* were to be treated as a rule of law with the distinctive effect of reversing the legal burden of proof.

The decision of the Supreme Court of Canada in *Fontaine* v *Insurance Corporation of British Columbia*[54] has heralded the demise of *res ipsa loquitur* in Canada. In England, decisions of the Court of Appeal in *Lloyde* v *West Midlands Gas Board*[55] and *Ratcliffe* v *Plymouth & Torbay Health Authority, Exeter & North Devon Health Authority*[56] appear to regard *res ipsa loquitur* as a rule of evidence and not as a rule of law which shifts the legal burden of disproof of negligence to the defendant. Earlier English cases which regarded *res ipsa loquitur* as a rule of law must now be treated as suspect. In *Ng Chun-pui* v *Lee Chuen-tat*[57] the Privy Council, on an appeal from Hong Kong, specifically held that the view of the trial judge, that because the plaintiff had relied on *res ipsa loquitur* the legal burden of disproof of negligence had shifted to the defendant, was wrong. The Privy Council held that even where *res ipsa loquitur* is raised, "the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that the injury was caused by the negligence of the defendants."[58] If anything shifts at all, it is the evidential burden that shifts. There is therefore nothing special about *res ipsa loquitur*. As *Ng Chun-pui* was decided by the same judges who sit in the House of Lords it is not unreasonable to suggest that the House of Lords today would take the same view as to the effect of *res ipsa loquitur.*

In Singapore, even though some older dicta might suggest ambiguity on this point, the position is that only the evidentiary burden shifts once *res ipsa loquitur* applies.[59] The position in Australia is the same. *Res ipsa loquitur* simply involves an application of the principles of circumstantial evidence to raise a *prima facie* case. The legal burden of proof remains with the plaintiff to establish his case on the balance of probabilities.[60] The

54 (1997) 156 DLR (4th) 181.

55 [1971] 1 WLR 749.

56 [1998] Lloyd's Rep Med 168. See fn 17, above.

57 [1988] 2 HKLR 425.

58 *Ibid,* at 427.

59 See *VV Menon* v *Henri Pigeonneau* [1957] 23 MLJ 85 and fn 36 above. See also the discussion, above, on the effect of *res ipsa loquitur*.

60 See *Government Insurance Office of New South Wales* v *Fredrichberg* (1968) 118 CLR 403.

61 P 17/1998 (6 August 1999) High Court of Australia Transcripts. The appeal will be heard by the High Court in October 2000.

High Court of Australia has, however, very recently given special leave to appeal in *Schellenberg* v *Tunnel Holdings Pty Ltd,*[61] to enable the High Court to consider whether in a *res ipsa loquitur* case the legal burden of proof shifts or merely the evidential burden and whether it is time for the demise of *res ipsa loquitur* in Australia following its demise in Canada. As Kirby J said: "If the proper approach is, as apparently the Supreme Court of Canada has said, that you do not use these Latin phrases but you just draw inferences from evidence, then it may be that this is a matter that this Court should look at and pass upon for the help it will give to many trials where there is no direct evidence but simply inferences."[62] The future of *res ipsa loquitur* is therefore being considered by the High Court of Australia.

The issue as to the effect of *res ipsa loquitur* and its existence has to be faced. In due course, the courts in Singapore will confront the question as to whether *res ipsa loquitur* is to perish or survive in a stronger form in Singapore. When that time comes, the issues faced by, and the decisions of, the various Commonwealth courts, discussed in this article, may provide some assistance. The first author favours *res ipsa loquitur* being regarded as an ordinary rule of evidence without the Latin phraseology, while the second author prefers to regard *res ipsa loquitur* as a distinct rule of law in the tort of negligence, although he concedes that it may be a little too late to revive this. Both of us, however, are in agreement that this area of negligence law, whatever view one takes of the effect of *res ipsa loquitur*, must always be stated clearly. *Res ipsa loquitur* has the unrivalled propensity of being unremittingly misunderstood if it is not demystified.

Postscript

After this article was in press, the High Court of Australia delivered its decision in *Schellenberg* v *Tunnel Holdings Pty Ltd* [2000] HCA 18. That decision assumes that *res ipsa loquitur* remains part of Australian law and that the invocation and application of the maxim creates no presumption and shifts no legal burden of proof to the defendant.

FRANCIS TRINDADE*
TAN KENG FENG**

[62] *Ibid*, at 4-5.

* Sir Owen Dixon Professor of Law, Monash University, Melbourne, Australia.
** Associate Professor, Faculty of Law, National University of Singapore.
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