HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND HAYNE JJ

PETER SCHELLENBERG APPELLANT

AND

TUNNEL HOLDINGS PTY LTD RESPONDENT

Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18
13 April 2000
P39/1999

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation:

E M Heenan QC with D M Bruns for the appellant (instructed by Yesner & Company)

J R Criddle with H M O'Sullivan for the respondent (instructed by J R Criddle)

CATCHWORDS

Schellenberg v Tunnel Holdings Pty Ltd

Negligence – *Res ipsa loquitur* – Circumstances in which *res ipsa loquitur* can be used – Effect of the application of *res ipsa loquitur* – Whether *res ipsa loquitur* affects the burden of proof – Whether *res ipsa loquitur* more than a permissible process of reasoning.

Practice and procedure – Amendment – Reopening of issues at trial – Need for care.

Words and phrases – "*res ipsa loquitur*".

1 GLEESON CJ AND McHUGH J. The principal question in this appeal is whether the plaintiff can rely on the doctrine of *res ipsa loquitur* to make out a case of negligence in circumstances where a hose, carrying compressed air, which he was using in the course of employment, became loose and swung upwards striking him on the face. In our opinion, the doctrine of *res ipsa loquitur* did not apply, but, even if it did, its operation was spent once the trial judge found that the cause of the occurrence was the hose separating from a coupling to which it was attached. Once that finding was made, the question in the case was whether the plaintiff had proved that the separation was the result of the defendant's negligence. Because there was no evidence that established that the defendant was negligent in the assembly, inspection or maintenance of the hose and coupling, the Full Court of the Supreme Court of Western Australia was right to hold that the plaintiff's action failed.

2 The appellant ("the plaintiff") sued his employer, the respondent ("the defendant"), in negligence for personal injury caused by a work place accident. At trial, the plaintiff failed to establish any specific allegation of negligence. He was permitted, however, to amend his pleadings to make "an allegation that the fact that the air hose separated from the fitting was in itself evidence of negligence."[1] The learned trial judge, Muller DCJ, found for the plaintiff on this basis, a finding that was unanimously overturned on appeal[2]. In our opinion, the Full Court was right to so hold. On proper analysis, the "principle" of *res ipsa loquitur* is inapplicable to the facts of this case. Furthermore, the learned trial judge's specific findings based on analogous processes of inferential reasoning are not supported by the evidence. The appeal should be dismissed.

The trial judge's findings

3 The plaintiff was born in Switzerland in 1942 where he qualified as a diesel mechanic before arriving in Australia in 1974. He commenced work in 1990 as a supervisor/foreman with the defendant, a company which is engaged in the supply and servicing of pumps and valves. The defendant's workshop contained a number of tools which utilised compressed air supplied by flexible hoses connected to a compressor outside the workshop.

4 The plaintiff was injured on 9 January 1991 while working with a "pencil grinder" to smooth the inner surface of a "body valve". The pencil grinder being

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1 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 11.

2 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia (Pidgeon, Walsh and Ipp JJ), 17 April 1998.

used by the plaintiff was one of the tools which required compressed air to function. The compressor outside the workshop had approximately 20 outlets for flexible hoses to connect the air to the tools. The hoses were attached to the compressor by a valve to which the hose was plugged. In the present case, the other end of the hose was attached to an adaptor and secured by a "worm drive clamp". The adaptor was itself attached to a special type of fitting known as a "jamec coupling", which in turn was attached to another adaptor which screwed into the pencil grinder. If the tool was unplugged from the adaptor or if the hose was removed from the valve connecting to the compressor, then the appropriate fitting would switch off the air.

5 The plaintiff alleged that, while he was working with the pencil grinder, the hose became detached and that the escaping compressed air caused the hose to strike him in the face and then swing uncontrollably. The plaintiff raised his upper body sharply to avoid the swinging hose and felt an intense pain in his back which caused him to stop work immediately and report the incident to the workshop manager. The pain subsided shortly after, and he resumed work the same day. However, he woke the next morning in considerable pain and was subsequently certified unfit for work by a medical practitioner. He made a number of attempts to return to work but ultimately found that the pain was too great. His employment with the defendant was terminated on 6 January 1992, and he has had no meaningful employment since that date.

6 In his statement of claim, the plaintiff relied on a number of particulars of negligence:

> "The Defendant was negligent in that it
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> (a) failed to provide a safe and/or adequately safe system of work,
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> (b) exposed the Plaintiff to unnecessary dangers and risks,
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> (c) permitted the grinder to operate while attached to a hose that was inadequate for the purposes of supplying high pressure air to the grinder,
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> (d) failed to introduce a velocity fuse within the air system supplying the grinder,
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> (e) permitting [sic] the Plaintiff to operate a pneumatic grinder equipped with airline couplings which were capable of working loose,
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> (f) failed to ensure that the buddy valve was located in a horizontal orientation prior to being worked upon,

(g) failing [sic] to provide the Plaintiff with sufficient protective equipment,

(h) allowed the Plaintiff to operate a grinder which was unsafe in all the circumstances,

(i) failed to ensure that the grinder was connected to hoses capable of delivering high pressure air to the grinder."

7 The trial judge specifically rejected particulars (c), (d), (e), (f) and (i) as establishing a breach of the duty owed by the defendant to the plaintiff. His Honour went on to say that "[f]or the reasons given I am not satisfied the plaintiff has proved any of the particular acts or omissions it has relied upon as constituting negligence on the part of the defendant."[3]

8 At the conclusion of the evidence, the learned trial judge heard and granted a motion by the plaintiff that he be permitted to amend his statement of claim to include particular (j) – that "the fact that the air hose separated from the fitting is in itself evidence of negligence." His Honour adjourned the trial to permit the parties to call further evidence. The evidence that was led was principally concerned with the precise position at which the hose had separated from the grinder. Although his Honour had reservations about the evidence before him, he ultimately found that the hose had separated from the coupling, rather than that the coupling had separated from the grinder. This finding was upheld by the Full Court[4].

9 The learned trial judge found that in this case the risk of the air hose detaching was reasonably foreseeable, as it had occurred on a couple of previous occasions[5]. His Honour then cited this Court's judgment in *Vozza v Tooth & Co Ltd*[6] where Windeyer J said:

> "For a plaintiff to succeed it must appear, by direct evidence or by reasonable inference from the evidence, that the defendant unreasonably

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3 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 11.

4 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 4 per Pidgeon J, 9 per Walsh J.

5 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 15.

6 (1964) 112 CLR 316 at 319.

failed to take measures or adopt means, reasonably open to him in all the circumstances, which would have protected the plaintiff from the dangers of his task without unduly impeding its accomplishment."

10 The learned trial judge went on to say that[7]:

"[I]n Australia the principle of *res ipsa loquitur* simply involves an application of the principles of circumstantial evidence. The onus remains with the plaintiff [throughout] to establish his case on the [balance of] probabilities[8] ... In deciding whether the plaintiff has proved his case to the required standard all the evidence, including any given by the defendant, must be considered ... The plaintiff must show that the accident was of a kind which does not ordinarily happen without negligence and that the defendant is responsible because it was in exclusive control of the equipment which caused the injury."

11 His Honour then proceeded to make findings for the purpose of applying the principle of *res ipsa loquitur*[9], saying:

"I am satisfied on the evidence that the defendant was in exclusive control of the equipment being used by the plaintiff. The evidence is silent as to who assembled the equipment being used by the plaintiff at the time of the accident. Since, however, the equipment was being used in the defendant's workshop it is open to me to infer, as indeed I do, that it was assembled by one of the employees engaged by the defendant."

12 Curiously, his Honour did not refer to the fact that the plaintiff was the employee responsible for the supervision of the hoses and the air pressure system. Nor did he make a finding as to whether this accident was one that would not ordinarily occur without negligence on the part of the defendant. His Honour then proceeded to examine the cause of the separation[10]:

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7 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 16-17.

8 See *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413 per Barwick CJ.

9 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 17.

10 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 17.

"As a matter of common sense there are a number of factors that might have caused the air hose to separate from the jamec coupling. The air hose might have been defective or unduly worn at the end where it was attached to the coupling; the hose clip may have been defective or may have become loose; the end of the adaptor on the one end of the jamec coupling to which the hose was attached may have been defective or become worn; there may have been a sudden surge in air pressure which the equipment could not cope with. These are all speculative factors unsupported by any evidence. The only definite fact established on the evidence is that the air hose became detached when it should not have."

13 The conclusion contained in the last sentence in this passage – "when it should not have" – seems surprising given that the possible causes of the separation are "all speculative". Perhaps his Honour meant no more than that, without negligence, the air hose would not have become detached. But that would mean that the conclusion was not a finding of fact, but a finding of negligence involving a mixed question of law and fact. His Honour then proceeded as follows[11]:

"I am satisfied that the occurrence points strongly towards the separation having occurred at the point where the hose joined the coupling. Given this finding it is more probable than not that the hose and coupling were insecurely fastened. The other hypotheses I have mentioned are conjectural. There was no evidence that the hose, hose clip or jamec coupling were latently defective. There is no evidence, as counsel for the defendant suggested, that the plaintiff might have exerted undue pressure to the air hose. These are all speculative probabilities that remain unestablished on the evidence."

14 His Honour then said[12]:

"Having made the finding that the hose could not have been adequately fastened to the coupling it is but a short step to take to find that the defendant was negligent. The equipment was under its control and it had a duty to ensure that it was reasonably safe for the plaintiff and other employees to work with. No evidence was adduced by the defendant as to how the compressed air equipment was assembled, inspected or maintained.

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11 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 18.

12 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 18-19.

> While Alan Mills, the managing director of the defendant company, said the plaintiff was in charge of the compressors and the compressed air system, he did not give evidence of any system employed by the defendant to ensure that the equipment was checked regularly for incorrect installation, loose fastenings or other possible defects. In the absence of any evidence to displace an inference of carelessness I have reached the conclusion that the separation of the hose from the coupling in the circumstances in which the equipment was being used by the plaintiff justifies the inference that it was more probably than not caused by the negligence of the defendant."

The Full Court

15 The Full Court unanimously upheld the defendant's appeal with respect to the finding of negligence and *res ipsa loquitur*. It was therefore unnecessary for their Honours to consider the defendant's contentions with respect to causation and damages. Pidgeon J said that in his "view there were sufficient known facts which precluded his Honour, by this means [ie *res ipsa loquitur*], of drawing the inference of negligence."[13] His Honour noted that there was no evidence that anything was wrong with the clamp and that the effect of the evidence from the plaintiff's expert, Mr Van der Meer, was that "there is a risk of a hose clamped in a normal way coming apart. Mr Van der Meer did not ... suggest a different type of clamp should be used or that the [defendant] should have done anything to make the clamp stronger."[14] In these circumstances, Pidgeon J stated that "it cannot be said that the happening of the accident is evidence of negligence."[15]

16 His Honour then addressed the trial judge's finding that the hose was insecurely fastened and that the defendant had adduced no evidence on how the compression equipment was assembled, inspected or maintained. Pidgeon J said that the defendant was not required to adduce what was effectively rebuttal or explanatory evidence of this kind because[16]:

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13 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 3.

14 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 9.

15 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 12.

16 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 13-14.

> "[I]t was not established that the happening [of the accident] was of a kind which does not ordinarily happen without negligence. The matter goes further. His Honour, in making the finding that the hose was insecurely fastened, was by reason of his later comments referring to the fact that it was either incorrectly installed or they were loose fastenings or other possible defects. There was, in fact, a particular of negligence relating to this [particular (e) which was rejected by the trial judge as the plaintiff had led no evidence of it] ...
>
> In my view it was not open by circumstantial evidence to make the finding that the hose and coupling were insecurely fastened."

17 Walsh J, with whom Pidgeon J also agreed, stated that given that all the possibilities concerning the cause of the hose's separation mentioned by Muller DCJ were "speculative" and "conjectural"[17]:

> "[I]t was a quantum leap to conclude that the hose and coupling were insecurely fastened as there was no or [no] sufficient evidence to support such a conclusion.
>
> In any event, even if it were insecurely fastened, there was no evidence that adequate maintenance would have prevented it from separating or that adequate maintenance was not provided."

Ipp J stated that[18]:

> "On the basis of his Honour's findings, the cause of the accident was known in the sense that it must have been one of the factors to which the learned judge referred. Thus for the [plaintiff] to succeed, he had to prove that the management did not use proper care in regard to all the factors mentioned. Without such evidence it could not be said that the management's lack of care caused the accident.
>
> However, evidence of the kind mentioned was not led. Indeed, his Honour's finding that the [plaintiff] failed to prove that the [defendant] was negligent as particularised leads inevitably to the conclusion that the [plaintiff] failed to prove that the [defendant] had not used proper care."

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17 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 13-14.

18 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 3.

His Honour went on to say[19]:

> "Moreover, there was nothing in the evidence to prove that, had those who had the management of the [defendant] used proper care, the accident would not have been caused by any of the factors mentioned by the learned Judge. That is to say, there was no evidence from which it could be inferred that proper care on the part of the management would have caused any one of the defects mentioned by his Honour to have been discovered before the accident occurred, or would have prevented those defects from occurring, or would have prevented a sudden surge of air pressure, or would have caused the coupling to be securely fastened when the hose was used by the [plaintiff], or would have caused an insecure fastening to be timeously discovered."

Res ipsa loquitur did not apply to this case

18 In our opinion, the Full Court correctly held that the reasoning of the trial judge was flawed and that the plaintiff had failed to prove negligence on the part of the defendant. Crucially, although the learned trial judge applied the principle of *res ipsa loquitur*, he made no finding that this was a case where the accident would not ordinarily have occurred without negligence on the part of the defendant. For that reason alone, Pidgeon J was right to hold that there was no necessity for the defendant to adduce evidence to displace a prima facie case of negligence in favour of the plaintiff.

19 On the learned trial judge's finding that the occurrence pointed strongly towards the separation having occurred at the point where the hose joined the coupling and that it was more probable than not that the hose and coupling were insecurely fastened, the case was not one for the application of the doctrine or principle of *res ipsa loquitur*. On those findings, the question was whether the plaintiff had proved that the insecure fastening was the result of negligence for which the defendant was responsible.

The history of *res ipsa loquitur*

20 The term *res ipsa loquitur* appears to have been first used in a negligence context by Chief Baron Pollock during argument in *Byrne v Boadle*[20] on the return of a rule nisi for the entry of a verdict for the plaintiff in an action for

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19 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 3-4.

20 (1863) 2 H&C 722 [159 ER 299].

negligence. At the trial, the evidence had proved only that a barrel of flour fell from a window in the defendant's house and shop. Because that was the state of the evidence, the trial judge had non-suited the plaintiff. The Court of Exchequer made the rule absolute. In giving the leading judgment, the Chief Baron said[21] that "[a] barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous." During argument, Chief Baron Pollock had said[22]:

> "There are certain cases of which it may be said res ipsa loquitur, and this seems one of them."

21 Two years later in *Scott v London and St Katherine Docks Co*[23] Erle CJ enunciated the basis of the principle of *res ipsa loquitur* in terms which have been regarded as the "foundation of all subsequent authority"[24]. His Lordship said:

> "There must be reasonable evidence of negligence.
>
> But where the thing is shewn 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."

The principle of *res ipsa loquitur*

22 Although Australian and English courts have diverged as to the scope and effect of the principle of *res ipsa loquitur*, in this country its scope and effect have been decisively settled by a series of decisions of this Court[25]. Those

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21 (1863) 2 H&C 722 at 728 [159 ER 299 at 301].

22 (1863) 2 H&C 722 at 725 [159 ER 299 at 300].

23 (1865) 3 H&C 596 at 601 (Ex Ch) [159 ER 665 at 667].

24 *Moore v R Fox & Sons* [1956] 1 QB 596 at 611 per Evershed MR.

25 See *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 at 499-500 per Windeyer J; *Piening v Wanless* (1968) 117 CLR 498 at 506-508 per Barwick CJ; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413-414 per Barwick CJ; and Atiyah, "*Res ipsa loquitur* in England and Australia", (1972) 35 *Modern Law Review* 337.

decisions make it clear that the trial judge was correct when he said that the principle is not a distinct, substantive rule of law, but an application of an inferential reasoning process, and that the plaintiff bears the onus of proof of negligence even when the principle is applicable. In *Anchor Products Ltd v Hedges*[26] Windeyer J said that:

> "[F]or Australian courts the phrase res ipsa loquitur denotes a fact from which, if it be unexplained, it is permissible to infer negligence: but that the onus in the primary sense – that is the burden of proving the case against the defendant – remains with the plaintiff. To say that an accident speaks for itself does not mean that if no evidence is given for the defendant the plaintiff is entitled in law to a verdict in his favour. The occurrence speaks of negligence, but how clearly and convincingly it speaks depends upon its circumstances."

His Honour then went on[27] to approve a statement by the Supreme Court of the United States in *Sweeney v Erving*[28]:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."

23 His Honour also referred to *Franklin v Victorian Railways Commissioners*[29] where Dixon CJ said:

> "The three Latin words [*res ipsa loquitur*] merely describe a well known form of reasoning in matters of proof. Convenient as it is sometimes to use them to direct the mind along that channel of reasoning they must not be

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26 (1966) 115 CLR 493 at 500.

27 (1966) 115 CLR 493 at 500-501.

28 228 US 233 at 240 (1913).

29 (1959) 101 CLR 197 at 201; see also *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413-414 per Barwick CJ.

allowed to obscure the fact that it is a form of reasoning about proof leading to an affirmative conclusion of fact and that whenever the question is whether the proofs adduced suffice to establish an issue affirmatively, all the circumstances must be taken into account and the evidence considered as a whole."

24 What flows from these statements of principle is that, while *res ipsa loquitur* may ameliorate the difficulties that arise from a lack of evidence as to the specific cause of an accident, the inference to which it gives rise is merely a conclusion that is derived by the trier of fact from all the circumstances of the occurrence. When it applies, the trier of fact may conclude that the defendant has been negligent although the plaintiff has not particularised a specific claim in negligence or adduced evidence of the cause of the accident. But it does nothing more. For example, it does not reverse the onus of proof or displace the principle in *Jones v Dunkel*[30].

25 *Piening v Wanless*[31] and *Anchor Products Ltd v Hedges*[32] as well as other cases in this Court make it clear that a plaintiff may rely on *res ipsa loquitur* even though he or she has also pleaded particular acts or omissions of negligence on the part of the defendant provided that the tribunal of fact concludes that[33]:

1. there is an "absence of explanation" of the occurrence that caused the injury;

2. the occurrence was of such a kind that it does not ordinarily occur without negligence; and

3. the instrument or agency that caused the injury was under the control of the defendant.

Absence of explanation

26 The defendant argued in this Court that:

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30 (1959) 101 CLR 298.

31 (1968) 117 CLR 498.

32 (1966) 115 CLR 493.

33 See Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 287-296; and Fleming, *The Law of Torts*, 9th ed (1998) at 353-359.

> "The evidence established, to the satisfaction of the trial judge and confirmed at appeal, that the hose had separated from the jamec coupling. The separation of the hose from the jamec coupling provides an explanation for the accident. Proof of that fact by either party excludes the operation of the maxim."

To support that argument, the defendant relied on *Mummery v Irvings Pty Ltd*[34] where Dixon CJ, Webb, Fullagar and Taylor JJ said that "once the cause of an accident has been established and the relevant circumstances proved, there is no further room for the operation of the principle."

27 In our opinion, the defendant's argument is correct in asserting that the principle of *res ipsa loquitur* had no application once the learned trial judge found that the hose separated from the jamec coupling. The question then became whether the plaintiff had proved that the separation of the hose from the jamec coupling occurred in circumstances of negligence. The relevant occurrence in the present case was the accident – the detachment of a hose, carrying compressed air, swinging around and striking the plaintiff in the face. If accidents of that kind do not occur if those who have control of the hose and its attachments use proper care, the plaintiff was entitled to rely on *res ipsa loquitur* to make out a prima facie case of negligence and it was then for the judge to hold whether the occurrence constituted negligence having regard to all the other circumstances of the case. But once the cause of the occurrence was proved, the principle could play no part in the proceedings.

28 Here the trial judge held that the occurrence was caused by the separation of the hose from the jamec coupling. Once that was proved, *res ipsa loquitur* ceased to apply as a reasoning process. This is clear from *Piening v Wanless*[35] where this Court had to consider the application of the principle in circumstances where a car had run off the road as the result of a steering failure. Barwick CJ, who gave the leading judgment, said[36]:

> "But the majority of the Supreme Court have said that the failure of the steering was the occurrence which bespoke negligence. To this there are, in my opinion, two answers. In the first place, the occurrence which had to be examined to ascertain whether it furnished evidence of negligence on the part of the driver was the accident, that is to say, the running off the road.

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34 (1956) 96 CLR 99 at 115.

35 (1968) 117 CLR 498.

36 (1968) 117 CLR 498 at 506-507.

The failure of the steering was, I think, the explanation of that occurrence ..."

29 McTiernan and Kitto JJ agreed with the Chief Justice. Menzies J said[37]:

"[T]he plaintiff could have made a case merely by proving what had happened, res ipsa loquitur.

The plaintiff however did no such thing ..."

Menzies J went on to point out that the case had been left to the jury on the basis that the defendant had "failed to take reasonable care of the condition of his vehicle in that he drove it and continued to drive it knowing that it had defective brakes."

30 Windeyer J said[38]:

"If a motor car runs off the road, that fact, standing alone and unexplained, provides some evidence that the driver was negligent. But here much more was known than that the vehicle ran off the road. *The occurrence was not unexplained. That the steering mechanism had suddenly failed was not in dispute.* Both sides accepted it as the fact. Therefore the only way in which any place could be found for res ipsa loquitur would be if negligence on the part of the driver could be inferred from the unexpected failure of the steering mechanism." (emphasis added)

31 Although the emphasised passage shows that his Honour thought that running off the road was the relevant occurrence and that it had been explained, the last sentence in this passage perhaps indicates that Windeyer J, contrary to other members of the Court, also thought that the failure of the steering mechanism could be regarded as an occurrence for the purpose of the principle. But with respect we think that the view expressed by Barwick CJ is in principle the correct one. *Res ipsa loquitur* is concerned with negligence arising from an unknown or unspecified cause. It is concerned with an external event whose cause is under the control of the defendant. It is a principle that is as much, perhaps more, concerned with proof that the defendant was causally responsible for the occurrence as it is with proof of a breach of duty. In *Mummery v Irvings Pty Ltd*[39], Dixon CJ, Webb, Fullagar and Taylor JJ said that "[t]he requirement

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37 (1968) 117 CLR 498 at 509.

38 (1968) 117 CLR 498 at 511.

39 (1956) 96 CLR 99 at 116 (emphasis added).

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 is of vital importance and fully explains why in such cases *res ipsa loquitur*."

32 Once the cause of the external event is identified, the question becomes whether the plaintiff has proved that that cause was the product of negligence. In *Barkway v South Wales Transport Co Ltd*[40], in a passage which was cited with approval in *Mummery v Irvings Pty Ltd*[41], Lord Porter said:

> "The doctrine is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."

33 In principle, we think the relevant cause must be the immediate cause of the occurrence, which means the occurrence must be defined with reasonable precision if the principle is to operate effectively. Definition of the occurrence will determine whether the accident is of a class that does not ordinarily happen if those who have the management use proper care. Definition of the occurrence will also determine whether the cause of the occurrence has been established. To a large extent, the definition of the occurrence will depend on how much the tribunal of fact knows about the accident. Thus, in *Mummery v Irvings Pty Ltd*[42], the Court pointed out that *res ipsa loquitur* would have applied if the evidence had established no more than that, upon entering the defendant's premises, the plaintiff had been "violently struck by a piece of wood flying through the air." However, the evidence tended to establish that the wood was thrown by a circular saw and this was not *res ipsa loquitur*. The Court said[43]:

> "In these circumstances a court must ask itself, not whether negligence may be inferred from the mere fact that a piece of wood struck the appellant immediately after he had entered the respondent's premises, but whether it may be inferred from the fact that a piece of wood was thrown from the circular saw."

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40 [1950] 1 All ER 392 at 394-395.

41 (1956) 96 CLR 99 at 115.

42 (1956) 96 CLR 99 at 116.

43 (1956) 96 CLR 99 at 117.

34 Definition of the occurrence will also depend upon at what level of abstraction it is defined and upon what facts and circumstances are taken into account in defining the occurrence. No doubt the occurrence may sometimes, perhaps often, be defined at particular levels of abstraction, and judges may disagree as to what are the facts and circumstances that constitute the occurrence. In the present case, for example, it is arguable that the occurrence was more concrete than we have defined it and that what we have described as the cause was in fact part of the occurrence. On that view, the occurrence was the striking of the plaintiff with a hose which had separated from its jamec coupling.

35 Once the occurrence is defined, however, we do not think that there can be an infinite regression in which each "cause" can be traced to its cause with the result that the plaintiff can continue to rely on a claim of unspecified negligence no matter how far back down the causal chain you go. Once what can be properly described as the cause of the occurrence has been identified, it is not necessary that every circumstance surrounding that cause or every cause of that cause also be identified.

36 As soon as the immediate cause of the accident is established, the focus of the case changes. The question then becomes whether that cause was the product of negligence on the part of the defendant. That is the effect of *Mummery v Irvings Pty Ltd*[44] and *Piening v Wanless*[45].

37 That the principle of *res ipsa loquitur* ceases to operate once the cause of the occurrence is identified does not mean that the plaintiff cannot rely on inferential reasoning to prove negligence. Thus, in a case like the present, with sufficient evidence, it might be inferred that it was lack of reasonable maintenance that caused the hose to become detached. There was nothing to stop the plaintiff in this case, for example, from relying on *res ipsa loquitur* and also adducing evidence that the defendant had no system for inspecting the couplings. If he had done so, he would have been entitled to argue that the lack of such a system was negligent and that, if the hose had separated from the jamec coupling, it was proper to infer a causal connection between the lack of an inspection system and the detachment of the hose.

38 In our opinion, therefore, once the trial judge determined the cause of the occurrence, the only question was whether that cause was the result of the defendant's negligence.

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44 (1956) 96 CLR 99 at 115, 117.

45 (1968) 117 CLR 498.

Occurrence of such a kind that it ordinarily does not occur without negligence

39 The learned trial judge did not specifically find that the separation of the hose and its swinging upwards out of control was an event which would not ordinarily occur without negligence. Nor for that matter did he find that the separation of the hose from the jamec coupling was such an event. In our opinion, both findings were precluded in this case because the only evidence before his Honour on this matter – from the plaintiff's expert witness – indicated that in fact this sort of thing was apt to occur without negligence. In cross-examination, Mr Van der Meer said:

> "Initially [the connection between hose and clamp] would be quite solid but this hand tool is operated hundreds and hundreds of times and twisted and bent and pulled. That connection – I wouldn't call it a positive mechanical connection; it's a friction connection. Now, we generally appreciate that friction connections in the industry are not reliable connections long term. They suffer from a very high fatigue failure rate.
>
> ... It's a frictional arrangement, relying on friction to hold the hose, and it's as simple as that. It's not a positive mechanical connection like a bolt going through a hole with a nut on it – much the same as your garden hose comes off the tap. It's not a reliable connection ...
>
> [The hose can come away as a result of the] forces of expansion of the hose ... the forces of the pressure pushing on the tool, the forces of the operator pulling on the hose. These are the forces that cause the connection to come away."

40 This evidence established that the detaching of a hose used in circumstances such as those in the present case or as the result of the hose separating from the jamec coupling may occur without negligence on the part of anyone. No doubt that is the reason that his Honour found it necessary to make the further finding that adequate maintenance by the defendant would have prevented the separation.

41 The defendant also argued that it was not open to the learned trial judge to find that this sort of occurrence ordinarily happens only as the result of negligence because it was outside the ordinary experience of the lay person. In *Piening v Wanless*[46] Barwick CJ said that:

> "If the occurrence is to provide evidence, it can only be that, within the common knowledge and experience of mankind, that occurrence is unlikely

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46 (1968) 117 CLR 498 at 508.

> to occur without negligence on the part of the party sued. By that very statement, the occurrence is unlikely to provide evidence except in connexion with machines or machinery of whose working and use the ordinary man has knowledge and experience. I do not think that the mechanical make-up of, and the forces operating on or with, the steering mechanism of a car are within such knowledge or experience."

Similarly in *Franklin v Victorian Railways Commissioners*[47] Dixon CJ stated that:

> "[U]nless adequate knowledge about railway engineering and practice would suggest otherwise, an unexplained sway or lurch or jerk or jolt in a train travelling in an ordinary way in ordinary conditions does not seem in itself to raise a presumption of negligence. It is not a matter of common knowledge that it would be so unlikely to occur without negligence on the part of the driver or some other servant of the commissioners as to point prima facie to negligence. If a knowledge of railway engineering and practice would suggest hypotheses which would make the lurch more suggestive of negligence than not, then the hypotheses should have been explained by evidence and not left to uninformed reasoning."

42 In our opinion, this case cannot be described as one falling within the "common knowledge and experience of mankind". That being so, on one view, the doctrine is inapplicable[48]. Whether the doctrine is strictly inapplicable or not, however, is to some extent a sterile controversy. As Dixon CJ explained in *Franklin*, expert evidence may be adduced to suggest that an unexplained occurrence would not ordinarily occur without negligence. Moreover, the expert evidence may be unable to isolate a single hypothesis suggestive of negligence. Nevertheless, the expert evidence may suggest a number of hypotheses, all of which indicate negligence but none of which indicate a greater likelihood of having occurred than any other of them. As is pointed out in *The Liability of Employers in Damages for Personal Injury*[49], it is no more than a dispute about terminology to determine whether that sort of case is an instance of expert evidence facilitating the doctrine or a case of unspecified negligence based on affirmative evidence. In our opinion, however, if the expert evidence suggests a number of causes that enjoy an equal probability of occurrence and all involve

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47 (1959) 101 CLR 197 at 204.

48 *Mahon v Osborne* [1939] 2 KB 14 at 21-22.

49 Glass, McHugh and Douglas, 2nd ed (1979) at 215; see also Fleming, *The Law of Torts*, 9th ed (1998) at 355-356.

negligence, the occurrence should be regarded as an unexplained occurrence to which the doctrine applies. It is only when the expert evidence assigns a particular cause as the most probable cause of the occurrence that the case should be regarded as outside the doctrine of *res ipsa loquitur*.

43 In this case, where the occurrence is outside the experience of the lay person, and the evidence, expert or otherwise, does not establish that such an occurrence ordinarily does not occur without negligence, *res ipsa loquitur* is inapplicable. Moreover, although the cause was proved, there was insufficient evidence to determine whether the separation of the hose from the jamec coupling was the product of negligence for which the defendant was responsible. In finding that the "only definite fact established on the evidence is that the air hose became detached when it should not have" when all the possible causes of the separation were "speculative factors unsupported by any evidence" Muller DCJ[50] was effectively imposing a standard of strict liability[51].

44 In *Mummery v Irvings Pty Ltd*[52], Dixon CJ, Webb, Fullagar and Taylor JJ stated that in that case:

> "[I]t is difficult, if not impossible, in these circumstances to attribute the accident to some act of negligence on the part of the operator. If the question is posed 'Was the accident such as in the ordinary course of things does not happen if those who have the management use proper care?' the answer, on the evidence in the case, must be 'We simply do not know.' One may but conjecture but cannot as a matter of inference attribute negligence to the respondent's foreman."

45 In our opinion, this statement applies in this case.

46 The plaintiff contends that the application of *res ipsa loquitur* has accumulated a number of "encrustations" in the course of its judicial history that have hardened the maxim into a rigid rule of law, when it is merely a factor to be weighed "with the direct evidence to determine whether the plaintiff had established, on a balance of probabilities, a case." The plaintiff urged the Court

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50 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 17.

51 See Fleming, *The Law of Torts*, 9th ed (1998) at 358-359, 363-364 for a discussion of how *res ipsa loquitur* is occasionally used as a "straddle between fault and strict liability."

52 (1956) 96 CLR 99 at 117.

to follow the Supreme Court of Canada in *Fontaine v British Columbia (Official Administrator)*[53] and abolish the maxim "as a separate component in negligence actions". To do so, it was said, would be "consonant with the steps taken by this court to absorb isolated pockets of technical law into a context appropriate to its original rationale" as this Court did in *Australian Safeway Stores Pty Ltd v Zaluzna*[54] and *Burnie Port Authority v General Jones Pty Ltd*[55].

47 In our opinion, this Court should not follow that course. The Court has affirmed time and again that *res ipsa loquitur* is merely a mode of inferential reasoning and is *not* a rule of law. The "encrustations" that the plaintiff alleges do not exist. The fact that a plaintiff falls outside the "proper scope" of the rule does not mean that he or she may not avail himself or herself of inferential reasoning. There is therefore no need to subsume the maxim into the general body of tort law: it is already fully consonant with it.

Exclusive control

48 It is well established[56] that if "the defendant is not in control *res ipsa loquitur* does not apply. This follows from the fact that it is not sufficient for the facts merely to speak of negligence: the evidence must point to the defendant's negligence[57]." In our opinion there is much force in the defendant's argument that Muller DCJ was wrong to find that the machine was under the exclusive control of the defendant. In this case, as the defendant's written submissions demonstrate:

> "(i) the Plaintiff was in control of the equipment prior to the accident.
>
> (ii) the Plaintiff inspected the equipment and connection prior to using the equipment on the day of the accident.

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53 [1998] 1 SCR 424 at 435; see also McInnes, "The Death of *Res Ipsa Loquitur* in Canada", (1998) 114 *Law Quarterly Review* 547.

54 (1987) 162 CLR 479.

55 (1994) 179 CLR 520.

56 Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 292; see also *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 at 497 per Windeyer J.

57 *Doval v Anka Builders Pty Ltd* (1992) 28 NSWLR 1 at 13 per Clarke JA.

(iii) the Plaintiff's use of the equipment involved him pulling on the hose in the situation where it was likely that the hose would be caught between the Plaintiff's body and the rim of the [body] valve.

(iv) the Plaintiff was in charge of the air pressure system.

(v) it was part of the Plaintiff's duties to make up extra hoses." (appeal book references omitted)

49 These factors suggest that the defendant may not have had sufficient control to attract the principle of *res ipsa loquitur*. However, the question whether the defendant still has control for the purpose of the principle when an object or instrument is in the sole custody or possession of the plaintiff is a difficult one. In the United States, courts have often held that the principle applies although the plaintiff has sole custody or possession or de facto control where the defendant retains the legal right of control or where it is more probable than not that the negligence occurred while the defendant had control[58]. In *Fletcher v Toppers Drinks Pty Ltd*[59], the New South Wales Court of Appeal held that a tribunal of fact was entitled, but not required, to draw an inference of unspecified negligence against the bottler of a soft drink when the bottle exploded as the plaintiff unscrewed its top. The Court so held notwithstanding that there was no evidence as to how the bottle was handled by a third party from the time it left the bottler's premises until the time it reached the plaintiff's home. As it is not necessary to decide the issue of control in this case, we need say nothing more about it.

There was insufficient evidence to support a finding that the compression equipment was negligently maintained

50 As the above discussion of expert evidence and *res ipsa loquitur* illustrates, the fact that a plaintiff cannot attract the operation of the maxim does not prevent him or her relying on an analogous process of inferential reasoning to establish a specific particular of negligence. In this case, the learned trial judge effectively found that the defendant had negligently failed to properly assemble, inspect or maintain the relevant equipment[60]. That finding is outside the scope of *res ipsa*

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58 See eg *Mobil Chemical Company v Bell* 517 SW 2d 245 (Tex 1974); *Qualls v United States Elevator Corp* 863 P 2d 457 (Okl 1993); *Giles v City of New Haven* 636 A 2d 1335 (Conn 1994); *Trujeque v Service Merchandise Company* 872 P 2d 361 (NM 1994).

59 [1981] 2 NSWLR 911.

60 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 18-19.

loquitur as it is a specific allegation of negligence, even though it was premised on the general finding that the hose was "insecurely fastened". The finding that the hose was "insecurely fastened", however, is either a statement of the obvious, flowing from the fact the hose actually separated – in which case it does not speak one way or the other – or it is an erroneous application of *res ipsa loquitur*.

51 The finding that the equipment was not properly assembled, inspected or maintained, however, need not necessarily rely on the finding that the hose was "insecurely fastened". The trial judge relied on the fact that no "evidence was adduced by the defendant as to how the compressed air equipment was assembled, inspected or maintained."[61] Thus, unless his Honour reversed the onus of proof, he drew a *Jones v Dunkel* inference in favour of the plaintiff[62]. But there was nothing which called on the defendant to lead evidence in respect of these matters: its failure to call evidence therefore had no probative significance and could not assist the drawing of any inference in favour of the plaintiff. In *Cross on Evidence*[63] Mr Dyson Heydon QC declares that:

> "[T]he rule [in *Jones v Dunkel*] only applies where a party is 'required to explain or contradict' something. What a party is required to explain or contradict depends on the issues in the case as thrown up in the pleadings and by the course of evidence in the case. No inference can be drawn unless evidence is given of facts 'requiring an answer'." (footnotes omitted)

52 In this case:

1. the trial judge found that there was insufficient evidence to find that the equipment was faulty or defective;

2. the plaintiff did not plead that the defendant's system of maintenance or inspection was defective; and

3. the plaintiff did not adduce any evidence that the defendant's system of maintenance or inspection was defective or that, if it had been effective, that would have prevented the damage to the plaintiff.

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61 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 18.

62 (1959) 101 CLR 298; *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419 per Handley JA; *R v Beserick* (1993) 30 NSWLR 510 at 532 per Hunt CJ at CL (Finlay J and Levine J agreeing).

63 6th Aust edition (2000) at [1215].

53 In these circumstances, which were quite possibly the result of a tactical decision to avoid a possible plea of contributory negligence on the part of the plaintiff by the defendant, it would be quite wrong to draw an inference against the defendant. A *Jones v Dunkel* inference would not have availed the plaintiff in any event. A *Jones v Dunkel* inference can only make certain evidence more probable. It "cannot be used to make up any deficiency of evidence"[64]. It follows that the trial judge's finding with respect to the assembly, inspection and maintenance of the compression equipment could not stand, as there was insufficient evidence to support the findings, either directly or by inference.

54 The Full Court was therefore right to allow the appeal and dismiss the plaintiff's action.

Order

55 The appeal should be dismissed with costs.

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64 (1959) 101 CLR 298 at 312 per Menzies J; see also at 308 per Kitto J.

56 GAUDRON J. The appellant, Peter Schellenberg, was employed by the respondent, Tunnel Holdings Pty Ltd, in a supervisory position as a mechanical foreman. He was injured as a result of a work-place accident when a hose carrying compressed air came away from a coupling, whipped around and struck him on the face, causing him to twist his body and, thereby, injure his back.

57 The accident happened while the appellant was using a pencil grinder to smooth the inside surface of a valve which was in an upright position and which was approximately one metre high. The hose which struck him was carrying compressed air to the grinder. He claims that his injuries are the result of his employer's negligence. Moreover, he claims, in effect, that that negligence can be inferred from the fact that the hose came away from the coupling. That, however, is not the primary basis upon which his case was conducted at first instance in the District Court of Western Australia.

The proceedings at first instance

58 In order to understand the course which the proceedings took at first instance, it is necessary to say something more of the hose which struck the appellant. The hose was connected to the pencil grinder with which he was working by two adaptors. The first adaptor, the one further away from the grinder, was secured to the hose by a worm-drive clamp. That adaptor screwed into a fitting known as a "jamec coupling". The other end of that coupling was attached to the second adaptor. And that adaptor screwed into the grinder. The appellant's evidence, which was accepted by the trial judge, Muller DCJ, was that the hose came away from the jamec coupling. It is not clear whether it was the hose, clamp and first adaptor that came away from the coupling, or simply the hose and clamp. However, nothing turns on that question.

59 At first instance, the appellant asserted negligence in a number of respects. First, he claimed that the hose was like an ordinary garden hose with light reinforcing and was inadequate to carry compressed air. Next, he alleged that the respondent was negligent in failing to install a velocity fuse in the air supply system. Thirdly, he asserted negligence in the use of a coupling that was capable of working loose. Finally, he alleged that the respondent was negligent in failing to ensure that the valve on which he was working was in a horizontal rather than an upright position. In this respect, he claimed that, if the valve had been horizontal, he would not have had to bend over to perform the work and, thus, presumably, the risk of back injury would have been minimised. Also, if the valve had been placed horizontally, the hose would not have been pulled over the inner and outer rims of the valve and, thus, it would have been less likely to separate from the grinder.

60 At the conclusion of the evidence at first instance, counsel for the appellant indicated that he wished to claim negligence on the basis that the accident spoke for itself. The trial judge thereupon gave leave to amend the statement of claim

to allege that "the fact that the air hose separated from the fitting is in itself evidence of negligence". His Honour also adjourned the matter to enable the respondent to call evidence to address this issue. In due course, the respondent called Dr Steven Chew, a chartered professional engineer, as a witness.

61 Dr Chew's evidence concerned tests which he had undertaken to determine whether, on the one hand, the hose separated from the jamec coupling or, on the other, the pencil grinder separated from the hose and coupling. No evidence was led following the adjournment as to the system, if any, which the respondent employed with respect to maintenance of the air supply system or the inspection of its component parts. Nor was evidence led of any instructions given to the appellant or other employees with respect to their checking the hoses and their attachments before using compressed air tools or of any procedures in place to ensure that those instructions were followed. And none of those matters had been the subject of earlier evidence.

62 So far as concerns the specific allegations of negligence, the trial judge found that the hose in question was adequately reinforced, and that a velocity fuse would not have prevented a hose whipping around in the event that it separated from the grinder. Additionally, his Honour found that there was no evidence of any defect in the component parts of the air line system or their assembly which would cause the coupling to work loose. Finally, his Honour held that the appellant had not established that it was practicable for the work in question to be performed on a valve in a horizontal position, as distinct from an upright position.

63 Although the trial judge rejected the appellant's specific claims of negligence, his Honour noted in his reasons for judgment, under the heading "Res Ipsa Loquitur", that there were a number of factors that might have caused the hose to come away from the coupling. He observed that "[t]he air hose might have been defective or unduly worn at the end where it was attached to the coupling; the hose clip may have been defective or may have become loose; the end of the adaptor on the one end of the jamec coupling to which the hose was attached may have been defective or become worn; there may have been a sudden surge in air pressure which the equipment could not cope with".

64 There being no evidence of any of the matters set out above and no evidence that the hose, hose clip (the worm-drive clamp) or jamec coupling were latently defective, or that the appellant exerted undue pressure on the hose, the trial judge concluded that it was "more probable than not that the hose and coupling were insecurely fastened". It will later be necessary to further consider that finding.

65 On the basis that the hose and coupling were insecurely fastened, his Honour concluded that there had been negligence on the part of the respondent. That was to be inferred from the fact that the equipment was under

its control and, also, from its duty "to ensure that it was reasonably safe for the plaintiff and other employees to work with". There being no evidence from the respondent "as to how the compressed air equipment was assembled, inspected or maintained" and no evidence of a system "to ensure that the equipment was checked regularly for incorrect installation, loose fastenings or other possible defects", his Honour concluded that that inference was not displaced, even though there was evidence that the appellant was in charge of the compressors and compressed air equipment. From that decision the respondent appealed to the Full Court of the Supreme Court of Western Australia.

The decision of the Full Court

66 The Full Court (Pidgeon, Walsh and Ipp JJ) unanimously allowed the respondent's appeal and entered a verdict for the respondent. Pidgeon J was of the view that the trial judge erred in finding that the hose and coupling had been insecurely fastened. However, it was critical, in his Honour's view, that there were sufficient known facts to preclude the trial judge from drawing an inference of negligence. The fact which, in his Honour's view, precluded that inference was that, according to the evidence of an expert witness called in the case for the appellant (the respondent in the Full Court), there was "a risk of a hose clamped in a normal way coming apart". On his Honour's analysis, an inference of negligence could only be drawn if "the accident was of a kind which does not ordinarily happen without negligence" and the effect of the expert evidence was that the accident was of a kind that could. It will later be necessary to refer to this evidence in somewhat greater detail.

67 In the view of Walsh J, the respondent (the appellant in the Full Court) was entitled to a verdict in its favour because, even if the hose was not securely fastened to the jamec coupling, "there was no evidence that adequate maintenance would have prevented it from separating or that adequate maintenance was not provided" and, more generally, "there was no evidence that adequate maintenance and proper care was not provided".

68 Ipp J was also of the view that the trial judge erred in finding that the hose was insecurely fastened to the coupling. However, his Honour allowed the appeal to the Full Court on the basis that "[t]he maxim *res ipsa loquitur* ... generally applies when the cause of an accident has not been established". Ipp J held that, "[o]n the basis of [the trial judge's] findings, the cause of the accident was known in the sense that it must have been one of the factors to which [the trial judge] referred". By "factors", Ipp J was referring to the various factors, extracted above, which the trial judge cited as possible causes of the hose coming away from the coupling. Thus, in his Honour's view, for the appellant (the respondent in the Full Court) to succeed, "he had to prove that the management did not use proper care in regard to all [those] factors".

Res ipsa loquitur

69 In his appeal to this Court, the appellant, by his counsel, raised various matters with respect to *res ipsa loquitur* which, according to the argument, led the Full Court to err in its approach in this matter. Although *res ipsa loquitur* has been the subject of much academic writing[65], it is, in this country, no more than a Latin phrase describing a permissible process of reasoning[66]. The same is true in Canada[67]. However, it may enjoy some higher status as a principle of law or evidence in the United Kingdom[68].

70 *Res ipsa loquitur* was described in *Mummery v Irvings Pty Ltd* as having significance as "a general index to those special cases in which mere proof of an occurrence causing injury itself constitutes prima facie evidence of negligence"[69].

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65 See, for example, Atiyah, "*Res Ipsa Loquitur* in England and Australia", (1972) 35 *Modern Law Review* 337; Starke, "The true nature and effect of 'res ipsa loquitur'", (1988) 62 *Australian Law Journal* 675; McInnes, "The Death of *Res Ipsa Loquitur* in Canada", (1998) 114 *Law Quarterly Review* 547.

66 See *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 114-116 per Dixon CJ, Webb, Fullagar and Taylor JJ; *Franklin v Victorian Railways Commissioners* (1959) 101 CLR 197 at 201 per Dixon CJ (with whom Fullagar and Taylor JJ agreed); *Nominal Defendant v Haslbauer* (1967) 117 CLR 448 at 452-453, 456-457 per Barwick CJ, 461-462 per Kitto J; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413 per Barwick CJ.

67 See *Fontaine v British Columbia (Official Administrator)* [1998] 1 SCR 424 at 435 per Major J, delivering the judgment of the Supreme Court of Canada. The position appears to be the same in the United States of America: see *Sweeney v Erving* 228 US 233 at 240 (1913) per Pitney J, delivering the opinion of the US Supreme Court; *Jesionowski v Boston & Maine Railroad* 329 US 452 at 457 (1947) per Black J, delivering the majority opinion of the US Supreme Court.

68 See *Woods v Duncan* [1946] AC 401 at 439 per Lord Simonds; *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392 at 394-395 per Lord Porter, 399 per Lord Normand; *Swan v Salisbury Construction Co* [1966] 1 WLR 204 at 211-212 per Lord Morris of Borth-y-Gest, delivering the opinion of the Privy Council; [1966] 2 All ER 138 at 143. But compare *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749 at 755 per Megaw LJ; [1971] 2 All ER 1240 at 1246 and *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 at 301 per Lord Griffiths, delivering the judgment of the Privy Council.

69 (1956) 96 CLR 99 at 114 per Dixon CJ, Webb, Fullagar and Taylor JJ. See also *Nominal Defendant v Haslbauer* (1967) 117 CLR 448 at 463-464 per Kitto J; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413 per Barwick CJ.

The particular reasoning process which enables an inference of negligence to be drawn from the mere occurrence of an event is only available if the occurrence in question is of a kind that "in the ordinary course of things does not happen if those who have the management [of the situation] use proper care"[70].

71 It was also said in *Mummery v Irvings Pty Ltd*[71] that, "once the cause of an accident has been established and the relevant circumstances proved, there is no further room for the operation of [*res ipsa loquitur*]". That statement is correct. It needs, however, to be understood in the context that *res ipsa loquitur* has no operation if the event in question can occur in the ordinary course without negligence. Thus, it is more accurate to say that the reasoning process involved has no application if, in the ordinary course, the event can occur without negligence and ceases to apply if it is established that the event, in fact, occurred without negligence. That is not to say that a defendant can only succeed by establishing lack of negligence.

72 Because *res ipsa loquitur* simply describes a reasoning process by which an inference is drawn, it has no impact on the burden of proof. It is always for the plaintiff to prove negligence on the balance of probabilities, and never for the defendant to prove otherwise[72]. And because an inference of negligence may, but need not, be drawn, a defendant may succeed without calling evidence. Thus, for example, if it emerges that there is a possible explanation for the event in question and that explanation involves no negligence, the trier of fact may decline to infer negligence, without calling upon the defendant.

73 Although *res ipsa loquitur* does not alter the burden of proof, it may operate to impose an evidentiary burden on a defendant. It is well recognised in criminal

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70 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 117 per Dixon CJ, Webb, Fullagar and Taylor JJ, quoting from *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 at 601 per Erle CJ, delivering the majority judgment [159 ER 665 at 667]. See also *Nominal Defendant v Haslbauer* (1967) 117 CLR 448 at 452 per Barwick CJ; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413 per Barwick CJ.

71 (1956) 96 CLR 99 at 115 per Dixon CJ, Webb, Fullagar and Taylor JJ.

72 *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200 at 213-214 per Rich J, 219 per Dixon J; *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 114, 118-121 per Dixon CJ, Webb, Fullagar and Taylor JJ; *Griffith District Hospital v Hayes* (1962) 108 CLR 50 at 54 per Dixon CJ, McTiernan, Kitto, Taylor and Menzies JJ; *Nominal Defendant v Haslbauer* (1967) 117 CLR 448 at 453 per Barwick CJ, 461-462 per Kitto J, 473 per Menzies J; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413 per Barwick CJ.

law that there are circumstances which, if unexplained, will support an inference that there is no explanation consistent with innocence[73]. The so-called doctrine of "recent possession" is an example[74]. So too, in the area of negligence, there may be circumstances which, if unexplained, will support an inference that there is no explanation consistent with the exercise of proper care. Thus, for example, it was said in *Piening v Wanless* that "[i]f a motor car runs off the road, that fact, standing alone and unexplained, provides some evidence that the driver was negligent"[75]. That is because, in the ordinary course, if there were an explanation consistent with the exercise of proper care, the driver would be expected to raise that possibility. And as a general rule, that is the case when there is an event or happening which does not ordinarily occur without negligence on the part of the person having the management of the situation.

74 Moreover, because *res ipsa loquitur* is no more than a description of a permissible reasoning process, "a plaintiff may rely both upon [the inference to be drawn from the occurrence in question] and upon evidence, beyond that of the occurrence itself, of specific acts or omissions of the defendant indicating a want of care"[76]. Thus, if an inference of negligence is available in the present case, it is of no significance that the appellant attempted but failed to prove particular negligent acts or omissions on the part of the respondent. And for the same reason, if the evidence as a whole permits of an inference of negligence, it does not matter that the occurrence, standing alone, would not support that inference[77].

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73 See *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227-229 per Mason CJ, Deane and Dawson JJ, 235 per Brennan and Toohey JJ, 241-244 per Gaudron and McHugh JJ (dissenting only as to the result). See also *May v O'Sullivan* (1955) 92 CLR 654 at 658-659 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ; *Bridge v The Queen* (1964) 118 CLR 600 at 615 per Windeyer J; *RPS v The Queen* (2000) 74 ALJR 449 at 462 per McHugh J; 168 ALR 729 at 746.

74 See, with respect to recent possession, *Bruce v The Queen* (1987) 61 ALJR 603 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; 74 ALR 219; *R v Bellamy* [1981] 2 NSWLR 727 at 731 per Street CJ (with whom Maxwell J agreed), 733 per Reynolds JA; *Raviraj* (1986) 85 Cr App R 93 at 103. See also *Weissensteiner v The Queen* (1993) 178 CLR 217 at 244 where Gaudron and McHugh JJ discuss generally that category of cases which calls for an explanation from the defendant because the defendant is "caught practically redhanded", a category which includes the case of recent possession.

75 (1968) 117 CLR 498 at 511 per Windeyer J.

76 *Nominal Defendant v Haslbauer* (1967) 117 CLR 448 at 452 per Barwick CJ.

77 See, for example, *Kouris v Prospector's Motel Pty Ltd* (1977) 19 ALR 343, where negligence was inferred, although not on the basis of *res ipsa loquitur*.

75 There are expressions in the decided cases to the same effect as the statement in *Mummery v Irvings Pty Ltd* that it is no longer possible to draw an inference of negligence from the occurrence of an accident "once the cause of [the] accident has been established and the relevant circumstances proved"[78]. It was apparently by reference to some such statement that Ipp J held that, in this case, the cause of the accident was known, in the sense that it must have been one of the factors mentioned by the trial judge and, thus, to succeed it was necessary for the appellant to prove negligence in relation to all of those factors.

76 *Res ipsa loquitur* is concerned with whether an event was caused by the negligence of the defendant, not with its physical cause. Certainly, an inference cannot be drawn from the occurrence of an event if it is established that it occurred for a reason that did not involve any lack of care. And, ordinarily, the identification of its precise physical cause will indicate whether the occurrence was or was not the result of negligence. But contrary to the view taken by Ipp J in the Full Court, the drawing of an inference of negligence is not precluded if all that can be said is that the event must have resulted from one of several possible physical causes. That is to identify neither the physical cause nor the act or omission that is legally causative of the event in question. Rather, it is to say that the precise physical cause has not been ascertained. And that being so, it is still for the trier of fact to determine whether the occurrence, itself, or the evidence in the case justifies an inference of negligence.

Inferences and the content of the duty of care

77 An inference of negligence may be more or less readily drawn depending upon the content of the duty of care in question. In this case, the question whether an inference of negligence is properly to be drawn arises in the context of an employer-employee relationship. That relationship gives rise to a non-delegable[79] duty to take reasonable steps to provide a safe system of

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78 (1956) 96 CLR 99 at 115 per Dixon CJ, Webb, Fullagar and Taylor JJ. See, for example, *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 at 495-496 per Taylor J, 498 per Windeyer J, 504 per Owen J; *Nominal Defendant v Haslbauer* (1967) 117 CLR 448 at 464 per Kitto J, 465-466 per Taylor J, 479-480 per Owen J; *Piening v Wanless* (1968) 117 CLR 498 at 507 per Barwick CJ. See also *Fontaine v British Columbia (Official Administrator)* [1998] 1 SCR 424 at 432 per Major J, delivering the judgment of the Supreme Court of Canada.

79 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 688 per Mason J (with whom Deane and Dawson JJ agreed), 689 per Murphy J; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ. See also *Wilsons and Clyde Coal Co v English* [1938] AC 57 at 64-65 per Lord Thankerton, 75 per Lord Macmillan, 83-84 per Lord Wright, 87-88 per Lord Maugham.

work[80]. In the present case, the content of that duty involved the taking of reasonable steps to ensure that the tools with which the appellant was required to work and the system supplying air to those tools were safe. Those steps included the maintenance and inspection of the tools and the air supply system. Moreover, it included a duty to instruct the appellant and other employees as to the steps they should take before using the tools to ensure their safety[81] and, also, a duty to implement procedures to ensure[82] that those steps were followed.

78 Where, as here, there is a duty to maintain and inspect the equipment used by employees as well as a duty to instruct them in its use and to implement procedures to see that those instructions are observed and, additionally, where there is no evidence of latent defect in the equipment or of an unforeseeable circumstance (in this case, for example, a sudden surge in air pressure), it is not impossible to infer negligence on the basis that it is more probable than not that there was a failure to maintain, inspect, instruct or implement procedures to ensure that the relevant instructions were carried out. Whether or not such an inference should be drawn, however, depends on the whole of the evidence.

The evidence and factual findings of the trial judge

79 The first piece of evidence which should be noted is that referred to by Pidgeon J in the Full Court as indicating that the separation of the hose from its coupling could occur in the ordinary course without negligence. Before turning to that evidence, it is important to note that the trial judge found that the appellant's injury occurred when the hose came away from the jamec coupling. That finding was not challenged in this Court. However and as already indicated, it is not clear whether it was the hose and clamp that came away from the jamec coupling or the hose, clamp and adaptor.

80 The evidence to which Pidgeon J referred concerns the worm-drive clamp connecting the hose to the jamec coupling. The evidence was that a worm-drive

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80 *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362 at 369 per Taylor and Owen JJ; *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 318 per Windeyer J (with whom McTiernan, Kitto, Taylor and Owen JJ agreed); *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 910 per Lord Hailsham of St Marylebone, 919 per Lord Brandon of Oakbrook (with both of whom Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner agreed).

81 *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225 at 229 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ.

82 *McLean v Tedman* (1984) 155 CLR 306 at 313 per Mason, Wilson, Brennan and Dawson JJ.

clamp is usually a solid but not a reliable connection. In particular, it may work loose because of the expansion of the hose, the pressure of pushing on the tool or the pressure caused by pulling on the hose. That evidence needs to be understood in the context of evidence that, to the knowledge of the respondent's managing director, hoses had come away from hand-held tools on "a couple of occasions" prior to the event involving Mr Schellenberg. In that context, the evidence that a worm-drive clamp can work loose emphasises the duty of maintenance, inspection, instruction and, also, the duty of establishing procedures to ensure that those instructions were carried out. It does not, however, indicate that, in the ordinary course, the clamp might have worked loose without negligence on the part of the respondent.

81 In the context of the evidence as to the unreliable nature of the worm-drive clamp, it is convenient to repeat the trial judge's findings with respect to the possible physical causes of the hose separating from the coupling:

> "The air hose might have been defective or unduly worn at the end where it was attached to the coupling; the hose clip may have been defective or may have become loose; the end of the adaptor on the one end of the jamec coupling to which the hose was attached may have been defective or become worn; there may have been a sudden surge in air pressure which the equipment could not cope with."

82 For the moment, the possibility of a sudden surge in air pressure may be put to one side. That aside, the other matters to which the trial judge referred are matters which also serve to emphasise the respondent's duty to regularly inspect and maintain the air supply system and its component parts, to instruct its employees to check the system prior to using air pressure tools and, also, to adopt procedures to ensure that these instructions were carried out. And the same is true if, as the trial judge found, the hose and coupling were insecurely fastened.

83 As already mentioned, it is necessary to consider the trial judge's finding that, on the balance of probabilities, the hose and coupling were insecurely fastened. That finding appears to have been based on the likelihood that, if the hose and attachments had been worn or defective, there would have been some evidence to that effect. Since there was no such evidence, the trial judge concluded, by elimination, that the hose came away from the coupling because the hose and the coupling were insecurely fastened. Nevertheless, there was no evidence that the hose and coupling were insecurely fastened. That being so, the trial judge's finding to that effect was wrong. However, the matter can be decided on the basis that insecure fastening was a possible cause, along with the other possibilities identified by the trial judge.

84 It is convenient to refer now to the trial judge's reference to the possibility of a sudden surge in air pressure with which the air supply system could not cope. There was no evidence that that occurred. Nor, as the trial judge noted,

was there any evidence of a latent defect in the hose, the worm-drive clamp or the jamec coupling. Further, there was no evidence that the appellant exerted undue pressure on the hose. In those circumstances, the trial judge would have been entitled to infer that the relevant part of the air supply system was worn, defective, or insecurely fastened. Moreover, his Honour was entitled to infer that proper maintenance and inspection procedures or proper procedures whereby employees were required to check the air supply system before use would have resulted in detection of the problem. And there being no evidence from the respondent as to its maintenance and inspection procedures, its instruction to employees or its procedures for ensuring that those instructions were followed, it was open to the trial judge to find, on the balance of probabilities, that the appellant's injuries resulted from the respondent's negligence and to enter a verdict for the appellant. The Full Court erred in holding to the contrary.

Conclusion and orders

85 Although the trial judge was entitled to infer negligence on the part of the respondent, that was not a necessary inference. And as the trial judge wrongly proceeded on the factual basis that the hose and coupling were insecurely fastened, it was for the Full Court to determine, for itself, whether an inference of negligence should be drawn[83]. That it did not do. However, this Court is as well placed as the Full Court to engage in that exercise. In my view, for the reasons already given, negligence should be inferred. Accordingly, the appeal should be allowed, the order of the Full Court set aside and, in lieu of that order, the appeal to that Court should be dismissed.

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83 *Warren v Coombes* (1979) 142 CLR 531 at 551 per Gibbs ACJ, Jacobs and Murphy JJ (Stephen and Aickin JJ not deciding this point); *Gronow v Gronow* (1979) 144 CLR 513 at 526 per Mason and Wilson JJ, 539 per Aickin J; *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 262 per Gibbs CJ; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306 at 325-326 per Kirby J; 160 ALR 588 at 613-614.

86 KIRBY J. Nearly a century ago, in the first reported decision of this Court[84], it was recorded that the judgment under appeal was uncertain because it did not clearly appear whether the reasons below were based upon the maxim *res ipsa loquitur*. At that time, the maxim (or as it has variously been described, the "rule"[85], "principle"[86], "doctrine"[87], "notion" or "method of inferring"[88]) had been propounded for nearly 40 years[89]. But, although, in the intervening century, the maxim has been a frequent visitor to this Court[90], its application has continued to give rise to problems. The same has been true in other common law jurisdictions. The maxim has also occasioned much judicial and academic writing. A century after it was first propounded, such facts caused Windeyer J to remark that the one thing that can certainly be said of the "phrase" *res ipsa loquitur* is that "it has not been allowed to speak for itself"[91].

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84 *Hannah v Dalgarno* (1903) 1 CLR 1 at 2.

85 cf Atiyah, "*Res Ipsa Loquitur* in England and Australia", (1972) 35 *Modern Law Review* 337.

86 *Bergin v David Wickes Television Ltd* [1994] PIQR P167.

87 cf *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749 at 754 per Megaw LJ; [1971] 2 All ER 1240 at 1245. See also Prosser, "The Procedural Effect of Res Ipsa Loquitur", (1936) 20 *Minnesota Law Review* 241 at 241 and Prosser, "Res Ipsa Loquitur in California", (1949) 37 *California Law Review* 183 at 234.

88 *Davis v Bunn* (1936) 56 CLR 246 at 268.

89 Since *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 at 601 [159 ER 665 at 667]. There were two earlier formulations: *Hammack v White* (1862) 11 CB(NS) 588 [142 ER 926] and *Byrne v Boadle* (1863) 2 H & C 722 [159 ER 299]. *Scott's Case* has been described as the "foundation of all subsequent authority": *Moore v R Fox & Sons* [1956] 1 QB 596 at 611 per Evershed MR.

90 See eg *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200; *Davis v Bunn* (1936) 56 CLR 246; *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99; *Franklin v Victorian Railways Commissioners* (1959) 101 CLR 197 at 201; *Griffith District Hospital v Hayes* (1962) 108 CLR 50; *Anchor Products Ltd v Hedges* (1966) 115 CLR 493; *Lambos v The Commonwealth* (1967) 41 ALJR 180; *Nominal Defendant v Haslbauer* (1967) 117 CLR 448; *Piening v Wanless* (1968) 117 CLR 498; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403; *Kouris v Prospector's Motel Pty Ltd* (1977) 19 ALR 343.

91 *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 at 496; cf *Winfield and Jolowicz on Tort*, 15th ed (1998) at 188.

87 Some writers have criticised the maxim as an "illegitimate offspring of a chance remark"[92]. Others have complained that it is "a chameleon" which "seems to change its colour to suit whatever branch of facts it currently sits on"[93]. Still others have noted that, in certain situations, the facts will "merely whisper negligence" whilst in others they will "shout it aloud"[94]. Unfortunately, the alleged shout often sounds different to different judicial ears, as the present case again illustrates[95]. In consequence, judges both in Australia[96] and overseas[97] have searched for different legal methods, in appropriate cases, to lighten the burden on plaintiffs who claim that their damage is a consequence of a defendant's negligence. Such means have included the assignment to the defendant of a legal burden to disprove negligence in certain circumstances[98], and in others the imposition of strict liability in tort where physical harm arises from defined events, as where it is caused by dangerously defective products[99]. Neither of these approaches has been accepted by this Court. Neither was advanced in the present appeal.

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92 Prosser, "Res Ipsa Loquitur in California", (1949) 37 *California Law Review* 183 at 234.

93 Reid, "Res Ipsa Loquitur: A Chameleon in Medical Negligence Cases", (1999) 7 *Journal of Law and Medicine* 75 at 86.

94 Linden, *Canadian Tort Law*, 5th ed (1993) at 233 cited in *Fontaine v British Columbia (Official Administrator)* [1998] 1 SCR 424 at 431-432.

95 See eg McTiernan J's dissent in *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 122 favoured by Murphy J in *Kouris v Prospector's Motel Pty Ltd* (1977) 19 ALR 343 at 358. There are many other cases in this Court (see eg Barwick CJ's dissent in *Kouris* at 344) and in courts below it (see eg Asprey JA's dissent in *Wanless v Piening* (1967) 68 SR (NSW) 249 at 262).

96 See eg *Kilgannon v Sharpe Bros Pty Ltd* (1986) 4 NSWLR 600 at 614-619.

97 See eg *Escola v Coca Cola Bottling Co of Fresno* 150 P 2d 436 at 440 (1944) per Traynor J.

98 cf *Colvilles Ltd v Devine* [1969] 1 WLR 475; [1969] 2 All ER 53; *Henderson v Henry E Jenkins & Sons* [1970] AC 282.

99 *Restatement of Torts*, 2d, vol 2, Ch 14, §402A, "Special liability of seller of products for physical harm to user or consumer", (1965); Hanson, "Easing Plaintiffs' Burden of Proving Negligence for Computer Malfunction", (1983) 69 *Iowa Law Review* 241.

88 Dissatisfied with the defects of *res ipsa loquitur*, the Supreme Court of Canada recently declared, unanimously[100]:

> "Whatever value *res ipsa loquitur* may have once provided is gone. Various attempts to apply the so-called doctrine have been more confusing than helpful. Its use has been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident. Given its limited use it is somewhat meaningless to refer to that use as a doctrine of law.
>
> 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. That evidence is more sensibly dealt with by the trier of fact, who 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."

89 In these proceedings this Court has been invited, if necessary, to follow the Canadian lead[101]. The only basis upon which the otherwise unpromising features of the case would appear to warrant the attention of this Court is to permit consideration of the maxim once again, and a determination of whether the confusion that continues to surround its application suggests that, in Australia as in Canada, the judicial *coup de grâce* should be administered.

The facts and issues

90 Mr Peter Schellenberg (the appellant) began work with Tunnel Holdings Pty Ltd (the respondent) in August 1990. His duties included supervision of operations in the respondent's workshop. They extended to the mechanical overhaul of pumps and valves[102]. He was injured in the course of this

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100 *Fontaine v British Columbia (Official Administrator)* [1998] 1 SCR 424 at 435 per Major J for the Court.

101 cf McInnes, "The Death of *Res Ipsa Loquitur* in Canada", (1998) 114 *Law Quarterly Review* 547.

102 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 1 per Muller DCJ.

employment on 9 January 1991. The circumstances of his injury are set out in the reasons of the other members of this Court[103].

91 The appellant brought an action for damages framed in negligence in the District Court of Western Australia. The original particulars of negligence were broadly stated. However, they did not include an express reliance, as has become common pleading practice in Australia, upon the maxim *res ipsa loquitur*[104]. It is unnecessary to repeat the verbal largesse of the pleader[105]. At the trial the appellant's case, with the aid of his own evidence (of which the primary judge was dubious in some respects), the evidence of other employees and his expert (Mr Van der Meer), presented a series of possibilities to explain the incident in a way consistent with the negligence of the respondent.

92 The negligence which the appellant successively sought to prove was:

1. *That the employer had used an incorrect type of hose:* The primary case of the appellant was that instead of using a reinforced hose specially suitable for the carriage of compressed air, a domestic garden hose had been employed which was prone to failure when subjected to compressed air estimated as probably in the vicinity of 115 pounds per square inch. However, this allegation was heavily dependent on the testimony of the appellant. In the event, Mr Mills was able to produce proof of the purchase of pneumatic hoses of a suitable type. The primary judge accepted that evidence. With that finding, the principal case of negligence collapsed.

2. *That a "velocity fuse" should have been installed:* It was next suggested that a fuse should have been installed which would have cut the supply of compressed air in the case of detachment and thus would have prevented the movement of the hose once it became detached. The primary judge rejected this ground of negligence. He found that even if such a fuse had been installed it would not have prevented the initial flexion of the hose which produced the sudden movement on the part of the appellant that caused his injury.

3. *That the valve which the appellant was grinding should have been placed on a stand so that the grinder might be used in the horizontal rather than the vertical plane:* The theory behind this suggestion was that, if adopted, it

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103 Reasons of Gleeson CJ and McHugh J at [3]-[5] and Gaudron J at [58]-[59].

104 cf *Bennett v Chemical Construction (GB) Ltd* [1971] 1 WLR 1571; [1971] 3 All ER 822; Fleming, *The Law of Torts*, 9th ed (1998) at 353.

105 See reasons of Gleeson CJ and McHugh J at [6].

would have removed or reduced the build-up of pressure that contributed to the hose coming apart from the grinder. However, such a positioning of the valve would have involved new and different risks to the operator. Ultimately, it was not supported by the appellant or his co-employees. It was rejected by the primary judge.

4. *That the grinder was equipped with air couplings capable of working loose:* This allegation was not ultimately elaborated nor was it accepted by the primary judge.

93 The rejection of the foregoing explanations for the separation of the air hose from the grinder gave rise to two further possibilities mentioned in argument:

5. *That the appellant had imposed excessive pressure on the air hose whilst using the grinder:* This was a variant of the suggestion that the grinder and air hose should have been kept in a horizontal plane. It was rejected by the primary judge as "speculative". It can be disregarded.

6. *That there was insufficient maintenance and inspection of the equipment:* At trial the appellant did not particularise or present evidence in support of such a claim. In part, this might have followed a tactical decision because of the appellant's own employment responsibilities. In part, it might also have been because there was no evidence that prior inspection would have found whatever it was that caused the air hose to separate from the coupling. In the absence of a specific allegation of negligence on this ground, it is not wholly surprising that the respondent's case at trial did not extend to adducing its own evidence as to its system of inspection and maintenance of work equipment such as the grinder and its component parts.

<u>*Res ipsa loquitur* at trial</u>

94 The trial of the appellant's action took an unusual course. When it appeared that the appellant had failed to make good any of the specific allegations of negligence upon which he relied, the primary judge allowed the appellant to amend his statement of claim to include an allegation that the fact that the air hose separated from the fitting was itself evidence of negligence. After the amendment was allowed, the hearing was adjourned to give the respondent the opportunity, if it so chose, to call evidence relevant to the amended ground. In the event, further evidence was called by both sides. There is no point criticising what the judge did. No ground of appeal challenges the course which he took.

Both parties appear to have gone along with it. Similar amendments have been allowed in the past, based on a judicial suggestion[106].

95 In the way that the proceedings developed, I find it difficult to sidestep the content and application of the *res ipsa* question. Clearly, this was the basis upon which the primary judge approached, and eventually upheld, the appellant's claim. The section of his reasons which followed his rejection of the claim so far as it was based on "particular acts or omissions" as constituting negligence, bears the heading "Res Ipsa Loquitor [sic]". It refers to many of the leading cases and texts on that subject. In eventually finding for the appellant, the primary judge did so on his understanding of the requirements, and entitlements, of a *res ipsa* approach. After explaining a factual point not now in dispute (namely where exactly the air hose and the grinder became detached), his Honour reached his critical findings[107]:

> "I am satisfied that the occurrence points strongly towards the separation having occurred at the point where the hose joined the coupling. Given this finding it is more probable than not that the hose and coupling were insecurely fastened. …
>
> Having made the finding that the hose could not have been adequately fastened to the coupling it is but a short step to take to find that the defendant was negligent. The equipment was under its control and it had a duty to ensure that it was reasonably safe for the plaintiff and other employees to work with. No evidence was adduced by the defendant as to how the compressed air equipment was assembled, inspected or maintained. [The manager] did not give evidence of any system employed by the defendant to ensure that the equipment was checked regularly for incorrect installation, loose fastenings or other possible defects. In the absence of any evidence to displace an inference of carelessness I have reached the conclusion that the separation of the hose from the coupling in the circumstances in which the equipment was being used by the plaintiff justifies the inference that it was more probably than not caused by the negligence of the defendant."

The Full Court decision

96 The Full Court of the Supreme Court of Western Australia unanimously allowed an appeal from this conclusion. It set aside the judgment in favour of the

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106 See eg *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 at 499.

107 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 18-19.

appellant. The presiding judge, Pidgeon J, contrasted the finding that the hose was insecurely fastened with an earlier finding made by the primary judge by which he had dismissed an allegation that the respondent was negligent in permitting the appellant to operate the grinder "equipped with air line couplings [which were] capable of working loose". Of this, the primary judge had said[108]:

> "No evidence was led by the plaintiff to establish this allegation. The evidence is silent on whether the various components of the equipment used by the plaintiff, including the air line couplings, were subsequently examined and tested for defects or faulty assembly. I am not satisfied this allegation of negligence has been proved."

97 In the opinion of Pidgeon J it was not permissible "by circumstantial evidence" to make the finding that the hose and coupling were insecurely fastened[109] on the tenuous basis that the only definite fact was that the "air hose became detached when it should not have"[110]. By this, I take Pidgeon J to mean that, the want of secure fastening or clamping not having been proved by direct evidence, it was impermissible in the circumstances to infer something that the appellant had expressly alleged but failed to establish. This was especially so in light of expert evidence led by the respondent and accepted by the primary judge that even if the hose was fastened by a clamp "in a normal way", there was still a risk of the hose "coming apart" from the coupling[111].

98 The principal reasons in the Full Court were given by Walsh J, with whom the other judges agreed. His Honour remarked that the primary judge's application of the "principle *Res ipsa loquitur*" had "somewhat unnecessarily and unduly complicated the essential issue which was required to be determined, viz whether there was an act or omission on the part of the [employer], its servants or agents which caused or contributed to the injuries sustained by [the appellant]"[112]. Walsh J expressed the opinion that it was a "quantum leap" to

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108 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 10.

109 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 14 per Pidgeon J.

110 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 17.

111 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 9.

112 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 10 per Walsh J.

conclude from the uncoupling of the air hose and the grinder attachments that "the hose and coupling were insecurely fastened as there was no … sufficient evidence to support such a conclusion"[113]. In any event, even if it were insufficiently fastened, Walsh J was of the opinion that "there was no evidence that adequate maintenance would have prevented it from separating or that adequate maintenance was not provided"[114]. Walsh J having so found, the appellant's claim necessarily failed.

99 The third judge, Ipp J, also concluded that the finding of insecure fastening was a "speculative factor" which was not open to the primary judge on the evidence[115], especially when it was only among a number of other identified speculative factors of equally persuasive force denying liability. Like Walsh J, Ipp J emphasised that[116]:

> "[T]here was no evidence from which it could be inferred that proper care on the part of the management would have caused any one of the defects mentioned by [the primary judge] to have been discovered before the accident occurred, or would have prevented those defects from occurring, or would have prevented a sudden surge of air pressure, or would have caused the coupling to be securely fastened when the hose was used by the [appellant], or would have caused an insecure fastening to be timeously discovered."

100 From the judgment for the respondent that followed these conclusions, the appellant now appeals to this Court. He does so contending that the primary judge was correct in his reasoning that this was a case of *res ipsa loquitur*. Alternatively, if his case was not one suitable for the application of the maxim, or if (as in Canada) the maxim should now be abandoned, the appellant submitted that the ordinary processes of reasoning by inference sustained the primary judge's finding that the respondent was negligent.

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113 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 13 per Walsh J.

114 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 14 per Walsh J.

115 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 2 per Ipp J.

116 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, Full Court of the Supreme Court of Western Australia, 17 April 1998 at 3-4 per Ipp J.

The ambit of an employer's liability in negligence

101 *Basic principles of liability:* Before considering the maxim *res ipsa loquitur*, it is appropriate to state a number of general propositions, applicable to the present case, which I do not take to be in dispute. First, it is the duty of an employer at common law to take reasonable care to avoid exposing an employee to unnecessary risk of injury[117]. That duty includes the provision of a safe system of work; a safe place of work; and proper plant, equipment and appliances. The duty is not delegable. It is personal to the employer. It extends to taking reasonable steps in accident prevention and not waiting for accidents to happen before safeguarding the health and safety of employees[118]. The concept of the employer's duty is not a static one. Although the same verbal formulae have been used in the cases, there can be no dispute that the scope of the duty expanded with every decade of the twentieth century. In part, this may reflect an interaction between the common law of negligence and the growing network of statutory duties imposed on employers for the protection of their employees[119]. In part, it may reflect increased awareness of the necessities of accident prevention and an unwillingness to tolerate the imposition of unreasonable burdens on employees injured whilst contributing to the profits of their employers. The relationship between the parties which defines the duty of care applicable in the present case was that of employer and employee. That relationship was uncontested. There was accordingly no need to invoke the maxim of *res ipsa loquitur* either to establish a duty of care or to define its general content[120].

102 Secondly, because, in this case, there had been two previous incidents involving the separation of the air hose and the grinder, the risk of a similar incident occurring was clearly foreseeable. Accordingly, the question was whether the employer failed to take the measures necessary to protect employees, such as the appellant, from the dangers inherent in such a foreseeable risk[121].

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117 *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25.

118 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309; cf *Mihaljevic v Longyear (Australia) Pty Ltd* (1985) 3 NSWLR 1 at 9, 18; Fleming, *The Law of Torts*, 9th ed (1998) at 560.

119 *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570-572; *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12; cf *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 30-31 per Gummow J; 167 ALR 1 at 40; Gummow, *Change and Continuity: Statute, Equity, and Federalism*, (1999) at 11-18.

120 cf *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 484-488.

121 *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 319.

Given the findings about the immediate cause of the appellant's injuries, the issue is whether the plant and equipment provided by the respondent to the appellant were deficient, either of their nature or in their maintenance, in a way relevant to the cause of the appellant's injury. So far as equipment such as the grinder used by the appellant here was concerned, the employer was not an insurer for its safety. An employer does not warrant that equipment which it supplies to employees will not in any circumstances fail, causing harm. But the employer does owe a duty of care to procure suitable equipment and then to ensure that it is inspected from time to time against reasonably detectable risks of failure or deterioration[122]. Whatever may have been the requirement in earlier times, a continuous duty, demanding vigilance and attention to the needs of accident prevention, is now imposed by the common law upon employers, enforceable in the case of breach causing damage by an action framed in negligence.

103 Thirdly, the duty remains that of *reasonable* care. It is not one of strict liability. Workers' compensation legislation affords basic protection upon proof of the happening of an injury to an employee in defined circumstances. But to recover damages, the added element of negligence or breach of a statutory duty sounding in damages must be shown. This requirement imports considerations of reasonable care which must be demonstrated to be wanting if a more substantial recompense, in the form of damages, is to be recovered at common law.

104 Fourthly, the burden of establishing a claim in negligence rests on the plaintiff throughout the proceedings[123]. That burden requires the proof of a preponderance of evidence in favour of the plaintiff's case. This does not necessarily mean proof by direct evidence. The facts necessary to establish liability may be inferred from the proof of other facts. A plaintiff is not obliged to exclude all possibilities inconsistent with the defendant's liability[124]. However, if at the end of the evidence the plaintiff has proved the negligence of someone but not identified the defendant as the person responsible[125] (or has left it equally possible that some person other than the defendant was negligent or that some cause consistent with reasonable care brought about the plaintiff's damage) the claim must be dismissed.

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122 *Pearce v Round Oak Steel Works Ltd* [1969] 1 WLR 595; [1969] 3 All ER 680; Fleming, *The Law of Torts*, 9th ed (1998) at 563.

123 *Davis v Bunn* (1936) 56 CLR 246 at 267; *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362 at 364; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 417.

124 *Restatement of Torts*, 2d, vol 2, Ch 12, §328D (1965).

125 *Restatement of Torts*, 2d, vol 2, Ch 12, §328D (Comment f) (1965).

105 *Introduction of res ipsa:* The incantation of the phrase "*res ipsa loquitur*" cannot alter any of the foregoing general propositions. The adoption of the Latin tag may have given the process of reasoning described the appearance of legal "doctrine". But as this Court has repeatedly emphasised, both from its origin and its purpose, all that is involved in the maxim is a description of a "general method" of reasoning by which the decision-maker can infer "one or more facts in issue from circumstances proved in evidence"[126]. In its origins, the maxim was offered as nothing more than a means by which a plaintiff could establish, by reasoning, the existence of "reasonable evidence of negligence"[127]:

> "But where the thing is shewn 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."

Res ipsa in Australian courts

106 From its simple beginnings a number of propositions have been derived from the maxim *res ipsa loquitur.*

107 First, the plaintiff must show that the thing (*res*) which, without more, is said to indicate negligence was under the exclusive management and control of the defendant or someone for whom the defendant is responsible or whom it has a right to control[128]. If someone else had control of, or access to, the thing, that person might be responsible for the suggested negligence. The plaintiff must then differentiate the liability of the defendant by direct evidence.

108 Secondly, the invocation of the manner of reasoning which the maxim describes does not, as it has been traditionally expounded, involve a shifting of the legal burden of proof from the plaintiff to the defendant, such that, unless the defendant establishes a want of any negligence on its part, it will be presumed to

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126 *Davis v Bunn* (1936) 56 CLR 246 at 268; cf *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 at 300 (PC).

127 *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 at 601 [159 ER 665 at 667] per Erle CJ.

128 *Restatement of Torts*, 2d, vol 2, Ch 12, §328D (Comment g) (1965); cf Tate, "Wex Malone and Res Ipsa Loquitur in Louisiana Tort Law", (1984) 44 *Louisiana Law Review* 1397. See Atiyah, "*Res Ipsa Loquitur* in England and Australia", (1972) 35 *Modern Law Review* 337 at 340; Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 292-296.

be liable. Some early dicta in this Court[129] and in the English courts[130] in this respect have been rejected by later decisions[131]. Thus, the maxim does not import a legal presumption having such effect. The defendant can remain silent and still succeed[132]. If, in the particular case, the manner of reasoning described as *res ipsa loquitur* is applicable, it merely renders it *permissible* for the tribunal of fact to draw the inference which the plaintiff invites. It is not *obligatory*, as it would be if the maxim had the effect of creating a presumption which the defendant was obliged in law to rebut[133].

109 Thirdly, this does not mean that a failure on the part of a defendant to call evidence in a case where a plaintiff has invoked *res ipsa loquitur* is treated, in Australia (any more than elsewhere), as completely irrelevant. In some circumstances such an omission will have a telling forensic impact. From the earliest descriptions of the method of reasoning which *res ipsa loquitur* sanctions, reference has been made to the relevance of the "absence of explanation by the defendants"[134]. The practical necessities of an adversarial trial might, in at least some situations, effectively compel a defendant to attempt to show that the accident happened without negligence on its part[135].

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129 *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200 at 207-208 per Latham CJ.

130 *Barkway v South Wales Transport Co Ltd* [1949] 1 KB 54; *Moore v R Fox & Sons* [1956] 1 QB 596; *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 at 242-243; *Swan v Salisbury Construction Co* [1966] 1 WLR 204; [1966] 2 All ER 138; *Colvilles Ltd v Devine* [1969] 1 WLR 475 at 478-479; [1969] 2 All ER 53 at 58; *Henderson v Henry E Jenkins & Sons* [1970] AC 282; cf *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 at 300. See *Salmond and Heuston on the Law of Torts*, 21st ed (1996) at 246.

131 *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 at 495 per Taylor J; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 417 per Windeyer J.

132 Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 466.

133 cf *Sweeney v Erving* 228 US 233 at 240 (1913): "the facts of the occurrence *warrant* the inference of negligence [rather than] *compel* such an inference" (Emphasis added).

134 *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 at 601 [159 ER 665 at 667].

135 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 120.

110 It was in this sense, as a matter of forensic rather than legal necessity, that this Court was willing in *Mummery v Irvings Pty Ltd*[136] to accept that "the defendant may, perhaps, be said, to carry an onus". However, the distinction between the *legal* burden (which remains throughout upon a plaintiff[137]) and the *forensic* evidential burden of persuasion (which the state of the evidence may effectively impose upon a defendant) although elusive is important. The position consistently followed in this Court for more than half a century is that described by Barwick CJ in *Nominal Defendant v Haslbauer*[138]:

> "If then all the evidence as to the occurrence (if accepted) would itself support an inference of want of care on the defendant's part, it can properly be said that the defendant must negative that inference. … [I]f he has given evidence as to the occurrence, which if accepted, and taken with the plaintiff's evidence, does not logically warrant an inference of his negligence, it is … quite erroneous to say that none the less he must go further and show that the occurrence was without want of care on his part. So to conclude would be to reverse the onus, placing it on the defendant whereas in truth and unquestionably it remains throughout with the plaintiff."

111 Statute may alter the foregoing position[139]. However, no Australian statute has changed the oft-repeated exposition of the law by this Court[140]. In Australia, the invocation of the maxim creates no presumption and shifts no burden of proof to the defendant. All that it does, when applicable, is to raise an inference of the existence of negligence[141]. In days when jury trials of factual contests in civil causes were more common in Australia than they are today, the maxim was an

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136 (1956) 96 CLR 99 at 120-121; cf *Henderson v Henry E Jenkins & Sons* [1970] AC 282 at 301 per Lord Pearson.

137 *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 at 301 per Lord Griffiths.

138 (1967) 117 CLR 448 at 456.

139 See eg *California Evidence Code* §646(b) which defines *res ipsa loquitur* as "a presumption affecting the burden of producing evidence"; cf *Perry v Murtagh* 662 NE 2d 587 (1996).

140 The same appears to apply in several overseas jurisdictions. See eg *Voice v Union Steam Ship Co of New Zealand Ltd* [1953] NZLR 176; *Eaton v Eaton* 575 A 2d 858 (1990).

141 *C B Norwood Distributors Ltd v Burnetts Motors Ltd* unreported, New Zealand Court of Appeal, 21 August 1991 at 9-10 citing *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 at 301.

occasional friend to a plaintiff to ensure that the plaintiff got to the jury[142]. It did not, however, ensure a verdict from the jury in the plaintiff's favour. It still remained for the judge to instruct the jury that the plaintiff bore the onus of proving the case on the balance of probabilities[143] and for the jury to conclude whether they should draw the inference which the plaintiff invited[144].

112 Fourthly, there was for a time a belief that a plaintiff would lose any benefit of reliance on the maxim of *res ipsa loquitur* if an attempt were made to prove, by direct evidence, the *actual* cause of the injury giving rise to the proceedings[145]. In Australia, this belief derived, understandably enough, from a remark in the reasons of the majority in *Mummery's Case*[146]. The misunderstanding was corrected by this Court in *Anchor Products Ltd v Hedges*[147]. In that decision the Court made it clear that the evidence might still give rise to an inference of negligence although a plaintiff has sought, but failed, to explain the specific cause as arising from the defendant's want of due care[148]. For example, where a defendant drove his motor vehicle into the back of the plaintiff's vehicle the maxim would be given *prima facie* operation[149]. However, when the defendant established explicitly that the cause of that action was an unexplained and unforeseen brake failure, the plaintiff could no longer rely on the maxim to prove negligence. If, as a result of evidence of a fact directly concerned with the cause of the incident, there is no room for inference, the method of reasoning which the maxim expresses was unavailing. The plaintiff would have to convince the court that the cause actually established betokened

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142 Discussed in *Davis v Bunn* (1936) 56 CLR 246 at 267 in relation to avoidance of a non-suit or of the entry of a verdict by a direction for the defendant; cf *Griffith District Hospital v Hayes* (1962) 108 CLR 50 at 54.

143 *Davis v Bunn* (1936) 56 CLR 246 at 268.

144 cf *Voice v Union Steam Ship Co of New Zealand Ltd* [1953] NZLR 176.

145 *Priest v Arcos Enterprises Pty Ltd* [1964] NSWR 648; cf *Lockwood v Auckland Electric Tramways Co Ltd* [1917] NZLR 857.

146 (1956) 96 CLR 99 at 122.

147 (1966) 115 CLR 493.

148 (1966) 115 CLR 493 at 497. See also *Voice v Union Steam Ship Co of New Zealand Ltd* [1953] NZLR 176; *Neal v T Eaton Co* [1933] OR 573 at 577; [1933] 3 DLR 306 at 309.

149 *Nominal Defendant v Haslbauer* (1967) 117 CLR 448; cf *Government Insurance Office of NSW v Best* [1993] Aust Torts Reports ¶81-210.

negligence on the defendant's part or, with some other fact, directly proved such negligence.

Res ipsa is unavailing in this case

113 Assuming that the maxim *res ipsa loquitur* remains part of our law, I do not consider that it assisted the appellant in the circumstances of this case.

114 The difficulty lies not in respect of that element of the general exposition of the maxim which requires that the thing in question (in this case the grinder connected to the air hose supplying compressed air) should at all relevant times remain under the control of the respondent. During argument, it was faintly suggested that this was not the case here because the grinder was outside the control of the respondent and, for relevant purposes, was within the control of the appellant himself. Upon one view of the facts, this is undoubtedly true. But the "control" referred to in the authorities is not simply the physical possession of the thing in question. It is such control as imports responsibility for the event which has occurred. The duty resting on an employer to ensure that safe plant and equipment are provided to an employee cannot be deflected by asserting that it was the responsibility of others (including of the injured employee) to ensure that the plant and equipment in question were safe. For the purposes of the maxim, the "control" of the grinder and its component parts remained in the management of the respondent. The primary judge correctly so found[150].

115 If it were suggested that the appellant had himself failed adequately to inspect and check the equipment supplied (which was otherwise safe and suitable) this could be relevant to an argument for the respondent that any default on its part was not the cause of the appellant's injury[151]; or that the appellant had contributed by his own negligence to the damage which he had suffered. In this case, those considerations can be put to one side.

116 Instead, in this case, the difficulty of invoking the maxim of *res ipsa loquitur* arises from the requirement that the occurrence must be such that it would not have happened without negligence. This was not the present case. The air hose could have become disconnected from the coupling without any negligence on the part of the respondent. This would be so in a number of

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150 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 18.

151 *Kouris v Prospector's Motel Pty Ltd* (1977) 19 ALR 343 at 356 per Jacobs J.

circumstances which are readily imaginable. They were in fact contemplated by the primary judge as a matter of "common sense"[152]. They would include:

1. That there was some latent defect in the hose not discoverable by external inspection (whether on the part of the appellant or of another employee of the respondent performing routine inspection on its behalf).

2. That there was some defect in the clamp used or in the coupling which was similarly not discoverable by prior inspection.

3. That the process of using the equipment, and the friction of the pressure involved, caused the hose clip to work itself loose in a way wholly unpredictable and insusceptible to discovery by prior inspection.

4. That the disconnection occurred as a result of a sudden, unexplained surge of air pressure, either from its source or as a result of the appellant's manoeuvring of the grinder in a particular way.

5. That even if the failure of the manager, Mr Mills, to give evidence of regular inspections of the equipment were deemed to carry some forensic weight, this would have to be judged in the context of a case in which the appellant (whilst making many other allegations of negligence) omitted to complain that his injuries were caused by the want of regular and timely inspection of the grinder and of its connection to the compressed air supply.

117 The primary judge endeavoured to overcome these difficulties by concluding, on the probabilities, that the hose and couplings were insecurely fastened. But neither in the express factual finding which his Honour made (ie that the hose detached when it should not have), nor in inferences available from those findings, was this more than a bare possibility. The foregoing possibilities, excluded by the primary judge as "speculative", were no more speculative than the one which he ultimately embraced. In particular (as Pidgeon J observed) it is difficult to reconcile his final conclusion by way of inference with his explicit rejection of the appellant's attempt to prove by evidence that the "air line couplings [were] capable of working loose". If this was a possibility, but one which had not been proved, how could it be excluded from account by a leap to the conclusion that the "hose and coupling were insecurely fastened"[153]?

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152 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 17.

153 *Schellenberg v Tunnel Holdings Pty Ltd* unreported, District Court of Western Australia, 10 July 1997 at 18.

118 In the end, therefore, there were various possibilities. All of them were "conjectural". This conclusion is not entirely surprising. The appellant's basic case was the one which he attempted, but failed, to prove against the respondent. As the record of the trial shows, the invocation of the maxim *res ipsa loquitur* was an afterthought. The first thoughts of those advising the appellant were correct. This was not a case where the maxim would avail the plaintiff. Air pressure hoses and their connection by specially designed couplings and clamps to grinders operated by hydraulic air pressure are not within the ordinary knowledge of tribunals of fact. They do not constitute simple implements with which the ordinary decision-maker (judge or jury) is familiar in daily life or which are so rudimentary that they may be readily understood[154]. As the evidence revealed, it is a mistake to equate such equipment with garden hoses attached to domestic water taps. The peculiarities of the work equipment required explicit evidence. Such evidence was given. Once given, it left no real scope for the legitimate operation of informed inference. There was ample scope for speculation and conjecture. But this fell far short of establishing that the occurrence which happened would not have occurred in the absence of negligence on the part of the respondent. Equally consistent was the possibility that the defect was latent, the incident unpredictable and that any reasonable system of inspection and maintenance instituted by the employer would not have detected and predicted it.

Survival of the *res ipsa loquitur* maxim?

119 Faced with this conclusion, the appellant grasped at two possibilities which it is necessary to mention.

120 The first was an invitation that this Court should follow the lead of the Supreme Court of Canada, abolish the special exposition of *res ipsa loquitur* and substitute in its place an endorsement of the general principle that the trier of fact should weigh circumstantial evidence with direct evidence when judging whether, on the balance of probabilities, a *prima facie* case of negligence has been made out against the defendant.

121 There are various attractions in taking this course. This Court has emphasised many times, and for over 60 years, that the maxim *res ipsa loquitur* "should be regarded merely as an application of the general method of inferring one or more facts in issue from circumstances proved in evidence"[155]. In this

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154 *Piening v Wanless* (1968) 117 CLR 498 at 508; *Lambos v The Commonwealth* (1967) 41 ALJR 180 at 182; cf *Voice v Union Steam Ship Co of New Zealand Ltd* [1953] NZLR 176.

155 *Davis v Bunn* (1936) 56 CLR 246 at 268.

respect, this Court has not been alone. Judges elsewhere have been at pains to deny to the maxim any "magic qualities"[156]. They have expressed exasperation at the suggestion that the maxim amounts to a "principle", or even worse, a doctrine of law[157]. Lord Shaw of Dunfermline remarked nearly 80 years ago that if it "had not been in Latin, nobody would have called it a principle"[158]. Its invocation "is no substitute for reasonable investigation and discovery"[159]. Nor does it "relieve a plaintiff too uninquisitive to undertake available proof"[160].

122 As these reasons demonstrate, despite the foregoing criticisms, in Australia as in other countries, the maxim has proved most resilient. Doubtless this is because its brevity expresses a vivid idea which may occasionally promise hope to a plaintiff who, through no fault of his or her own, is unable to establish exactly what caused the damage said to be the result of the defendant's want of care in respect of matters wholly or largely within the knowledge and control of the defendant.

123 An advantage of abolishing the maxim would be that it might release judicial minds from the encrustations of authority that have gathered around the maxim and its multitude of attempted applications over the 130 years of its existence. But even if, in this case, *res ipsa loquitur*, as such, were overthrown and the facts analysed by reference solely to ascertaining the inferences available from the facts as found, this would make no difference. The position would remain the same. The attempts at specific explanations of the disengagement of the air hose and the grinder coupling would remain rejected. The possibility that the disengagement occurred for other reasons not alleged would still be, as the primary judge described them, "speculative". The question would come back to whether, in this context, the tribunal of fact was justified in inferring that it was more probable than not that the hose and coupling were insecurely fastened. That inference would remain just one of many possibilities. Selection of it as more probable than not would be as impermissible if no Latin maxim were invoked as it is if the established jurisprudence of *res ipsa loquitur* was applied.

124 Whilst, therefore, I am inclined to favour the conclusion reached by the Supreme Court of Canada, it is unnecessary to decide the point in this appeal. Nothing turns on it in this case. Where a maxim of the law has endured for so

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156 *Roe v Minister of Health* [1954] 2 QB 66 at 87 per Morris LJ.

157 *Ballard v North British Railway Co* [1923] SC 43 at 56.

158 [1923] SC 43 at 56.

159 *McDonald v Smitty's Super Valu Inc* 757 P 2d 120 at 125 (1988).

160 757 P 2d 120 at 125 (1988).

long, its resilience suggests a measure of utility that should restrain needless abolition. Perhaps *res ipsa loquitur* will continue to linger for a time as yet another indication of the attraction of lawyers to exotic labels. This case may have the merit of acting as a reminder of its limitations, the danger of treating it as a rule of law and the necessity to limit its use to that of an aid to logical reasoning by inference when considering whether the plaintiff has, or has not, established a cause of action in negligence.

A final appeal to inference is rejected

125 The second argument which the appellant embraced, like a raft in a very uncomfortable storm, would have it that the inference which the primary judge drew was supported by (1) the control which the respondent had over the plant and equipment that it made available to the appellant; (2) the duty of care resting on the appellant to provide safe plant and equipment as its employer; and (3) the fact that the air hose came away from the grinder at the coupling and that this is not an event that ordinarily occurs in the use of plant and equipment of that kind if it is in a proper state when supplied and thereafter properly inspected and maintained.

126 I have serious doubts whether, at this late stage in these proceedings, and before this Court, the appellant should be permitted to recast his case in such a way. He brought a claim alleging specified negligence. When this failed, he was permitted to recast his claim in reliance on the maxim *res ipsa loquitur*. It would exceed all bounds of proper procedural norms to entertain, now and so belatedly, a third and different case.

127 For the reasons that I have explained, it is not (or until now has not been thought to be) the duty of an employer to guarantee the absolute safety of plant and equipment provided to employees. In so far as this Court extends the common law liability of employers and imposes liability in circumstances where there is no relevant fault on the part of the employer, its decisions must conform to the fundamental assumption of the tort of negligence. If it be the case that (contrary to the primary suggestion for the appellant) the plant and equipment provided by the respondent to the appellant were perfectly suitable, purchased from a reputable source, checked before use and found to be in proper condition, there is no warrant to infer from the facts postulated that the respondent failed in its duty of care simply because the hose came away from the coupling linking it to the grinder which the appellant was using. Assuming, then, that it would be just to allow the appellant to rely on such arguments given the chequered history

of this litigation, I would reject them. The tort of negligence is fundamentally concerned with fault[161]. If that concern is forgotten, the law has lost its compass.

Conclusion and orders

128 In the result none of the suggested bases upon which the appellant claimed the restoration of the judgment in his favour has been made good. The Full Court acted within its authority to substitute its own conclusion on the facts. No relevant finding affecting the credibility of witnesses or the evaluation of the evidence prevented the Full Court from giving effect to its own conclusion on those facts. In my opinion the conclusion reached by the Full Court was correct. The appeal to this Court should be dismissed with costs.

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161 *Donoghue v Stevenson* [1932] AC 562 at 580 noted Murphy, "Formularism and Tort Law", (1999) 21 *Adelaide Law Review* 115 at 120; cf Owen (ed), *Philosophical Foundations of Tort Law*, (1995) at 201.

129 HAYNE J. The appellant sued his employer, the respondent to this appeal, for damages for personal injury which the appellant alleged that he suffered at work. He alleged that while he was using a pneumatic powered pencil grinder, the hose which connected it to the air compressor system separated, whipped around and caused him to jerk upright out of its way. The appellant alleged that he injured his back and that his injuries had been caused by the respondent's negligence.

130 At the trial of the action in the District Court of Western Australia, the appellant contended that there were three acts or omissions of the respondent which were negligent: first, that the hose provided by the respondent was a garden hose, not a hose of the kind which should be used; secondly, that a device called a "velocity fuse" should have been, but was not, installed in the air compressor system in the respondent's workshop; and thirdly, that the valve on which the appellant was working with the grinder should have been moved to a different position and put on a stand. The trial judge said that the appellant's claim of negligence "rest[ed] to a significant extent" upon the first of these allegations: that the wrong kind of hose had been provided. Very late in the proceedings, at the suggestion of the trial judge, the appellant sought, and was granted, leave to amend his claim by adding a further particular of negligence to the effect that the separation of the hose spoke for itself of negligence by the respondent. Each party was then permitted to reopen its case and lead further evidence from experts who had given evidence earlier in the trial.

131 The trial judge gave judgment for the appellant. His Honour was not persuaded that the hose that had been provided was the wrong kind of hose or that a velocity fuse should have been installed. The allegation that the valve should have been moved into a different position was also rejected. The trial judge found, however, that

> "[i]n the absence of any evidence to displace an inference of carelessness I have reached the conclusion that the separation of the hose from the coupling … justifies the inference that it was more probably than not caused by the negligence of the [respondent]".

132 The respondent appealed to the Full Court of the Supreme Court of Western Australia which allowed the appeal and ordered that judgment be entered for the respondent[162]. By special leave the appellant now appeals to this Court.

133 The central issue in the appeal is whether the trial judge was entitled to infer, from the facts which had been found, that it was more probable than not that the respondent's negligence was a cause of the appellant's injuries. The appellant submitted that the case was one in which the accident spoke for itself of

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162 *Tunnel Holdings Pty Ltd v Schellenberg* unreported, 17 April 1998.

negligence by the respondent. He submitted further that the Full Court had wrongly applied the doctrine that underlies the maxim *res ipsa loquitur* and that the time had come for this Court to strip away what were referred to as "encrustations" on the doctrine and, perhaps, go so far as the Supreme Court of Canada has and treat the maxim "as expired and no longer [to be] used as a separate component in negligence actions"[163].

134 It may be accepted that reference to *res ipsa loquitur* in this particular case may obscure more than it illuminates. It will certainly mislead (not only in this case but also in others) if close attention is not paid to some well-established principles. First and foremost, it is for a plaintiff (the appellant in this matter) to establish its case. The appellant bore the onus of persuading the trial judge that it was more probable than not that the respondent's negligence was a cause of the injuries that he had suffered. Whether the appellant discharged that burden "depends upon the effect of the whole of the evidence given in the case, including such inference as may be drawn from the happening of the accident, if its cause remains unexplained"[164].

135 Secondly, as Dixon CJ said in *Franklin v Victorian Railways Commissioners*[165]:

> "The three Latin words [*res ipsa loquitur*] merely describe a well known form of reasoning in matters of proof. Convenient as it is sometimes to use them to direct the mind along that channel of reasoning they must not be allowed to obscure the fact that it is a form of reasoning about proof leading to an affirmative conclusion of fact and that whenever the question is whether the proofs adduced suffice to establish an issue affirmatively, all the circumstances must be taken into account and the evidence considered as a whole."

136 Thirdly, the fact that a plaintiff seeks to support a general allegation of negligence by proof of particular acts or omissions does not necessarily prevent the plaintiff also relying on an inference to be drawn from the fact that the accident happened[166].

137 No point has been taken in this Court about the stage at which, or the circumstances in which, the appellant was given leave to amend by adding the

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163 *Fontaine v British Columbia (Official Administrator)* [1998] 1 SCR 424 at 435.

164 *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 at 500 per Windeyer J.

165 (1959) 101 CLR 197 at 201.

166 *Anchor* (1966) 115 CLR 493 at 499 per Windeyer J.

particular alleging that the accident spoke for itself. It follows, therefore, that we must deal with the present appeal on the basis that it was open to the appellant to rely on the inference alleged and that he was not to be confined to the particular case which, at the start of the trial, he had set out to prove. It is as well to point out, however, that permitting an amendment of this kind at a very late stage in a trial may sometimes lead to injustice. Trials are to be conducted according to the issues which the parties identify by their pleadings. Decisions are made about what witnesses will be called and what lines will be pursued in cross-examination on the basis of those pleadings. Third parties may not be joined, or defences of contributory negligence may not be advanced, because of the way in which the pleadings are cast.

138 Introducing an amendment of the kind made here will often raise an issue of very great width because it may be seen as inviting consideration of any and every possible reason for the happening of the accident that was a reason over which the defendant had some measure of control. The course taken by parties at a trial in which such a general issue is not raised may be very different from the course they would have taken if it had been raised. These, however, are not matters that must be considered in this case.

Where and why did the hose separate?

139 There was a deal of debate at the trial about where the hose separated from the rest of the equipment being used by the appellant. The trial judge found (contrary to what seems to have been the primary case of the appellant) that the hose had separated where it joined a "jamec coupling" which was attached to an adaptor screwed into the pencil grinder, rather than at the join between the grinder and the coupling. The hose was joined to the jamec coupling by being pushed over some serrations and secured in that position by a worm gear-driven hose clip.

140 I have already set out the trial judge's finding that the respondent's negligence was a cause of the hose separating. The reasoning that led his Honour to this finding was described by him in the following way:

> "I am satisfied on the evidence that the defendant was in exclusive control of the equipment being used by the plaintiff. The evidence is silent as to who assembled the equipment being used by the plaintiff at the time of the accident. Since, however, the equipment was being used in the defendant's workshop it is open to me to infer, as indeed I do, that it was assembled by one of the employees engaged by the defendant. As a matter of common sense there are a number of factors that might have caused the air hose to separate from the jamec coupling. The air hose might have been defective or unduly worn at the end where it was attached to the coupling; the hose clip may have been defective or may have become loose; the end of the adaptor on the one end of the jamec coupling to which the hose was

attached may have been defective or become worn; there may have been a sudden surge in air pressure which the equipment could not cope with. These are all speculative factors unsupported by any evidence. The only definite fact established on the evidence is that the air hose became detached when it should not have. …

I am satisfied that the occurrence points strongly towards the separation having occurred at the point where the hose joined the coupling. Given this finding it is more probable than not that the hose and coupling were insecurely fastened. The other hypotheses I have mentioned are conjectural. There was no evidence that the hose, hose clip or jamec coupling were latently defective. There is no evidence, as counsel for the defendant suggested, that the plaintiff might have exerted undue pressure to the air hose. These are all speculative probabilities that remain unestablished on the evidence.

Having made the finding that the hose could not have been adequately fastened to the coupling it is but a short step to take to find that the defendant was negligent. The equipment was under its control and it had a duty to ensure that it was reasonably safe for the plaintiff and other employees to work with. No evidence was adduced by the defendant as to how the compressed air equipment was assembled, inspected or maintained. While Alan Mills, the managing director of the defendant company, said the plaintiff was in charge of the compressors and the compressed air system, he did not give evidence of any system employed by the defendant to ensure that the equipment was checked regularly for incorrect installation, loose fastenings or other possible defects."

141 It can be seen that the steps in the trial judge's reasoning were:

(a) The hose could have separated from the jamec coupling for any of a number of stated reasons (defective or worn hose, defective or loose clip, defective or worn adaptor on the jamec coupling, sudden surge in air pressure, undue pressure exerted on the hose by the appellant).

(b) It was more probable than not that the hose and coupling were insecurely fastened.

(c) The respondent had exclusive control of the equipment, which was probably assembled by an employee.

(d) There was no evidence of how the equipment was assembled, inspected or maintained, nor any evidence of any system for inspection of the equipment.

(e) The hose became detached when it should not have, and this was more probably than not the respondent's fault.

142 The conclusion of fault is, of course, critical. At first sight it is a conclusion that seems to proceed from the finding that it was more probable than not that the hose and coupling were "insecurely fastened". But on closer examination it can be seen that the finding of insecure fastening either is no more than a statement of fact (the hose separated) or is no more than a restatement, in other words, of the conclusion of fault. And that conclusion of fault does not depend on any of the other steps that I have described other than (perhaps) the conclusion that the respondent had exclusive control of the equipment.

143 There was some evidence that the appellant was in charge of the compressors and compressed air system. This appears not to have been treated by the trial judge or the parties as significant. (It may, however, explain why the appellant did not seek to mount a case at trial alleging that the equipment had been poorly assembled or maintained. Any such allegation would very likely have invited a plea and finding of contributory negligence by the appellant[167].)

144 The other two steps I have mentioned were negative findings: that there was no evidence showing a particular reason for the separation of the hose and no evidence showing how it was assembled, inspected or maintained or whether there was any system for inspection. It follows that the essence of the trial judge's reasoning was that the employer controlled the equipment and, there being no explanation for the hose having separated, the fact of separation demonstrated negligence by the employer.

145 This conclusion was not open in this case. As was pointed out in oral argument of this appeal, the appellant's submission could be distilled to a general proposition that if any equipment supplied by an employer for use by an employee fails, it is more probable than not that the employer's negligence was a cause of that failure. I do not accept that this is so, at least in the case of equipment as complex as the equipment the appellant was using when he was injured. The reasons that no such inference can be drawn may be illustrated by the facts of this case.

146 As the trial judge acknowledged, there were many reasons why the hose could have separated from the jamec coupling. Not all of those reasons suggested negligence on the part of the respondent. There was no basis for concluding that the reasons which did not suggest negligence were any more or less probable causes of what happened than other reasons which did suggest negligence by the respondent.

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167 *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611.

147 The trial judge noted that there could have been latent defects in the hose, the clip or the coupling. There was no evidence that demonstrated, or suggested, that this was so. But if one of these items had had a latent defect, why would the employer have been negligent for not discovering such a defect? And given that the cause of the hose separating was not known, what made latent defect an improbable cause?

148 The trial judge also noted the possibility that the appellant had exerted undue pressure on the hose. Again, there was no evidence that this was so. But if it had been, a conclusion that the respondent had been negligent may have required a close examination of the system of work prescribed by the respondent and the steps taken to ensure that it was followed. Again, given that the cause of the incident was not known, what was it that made undue pressure by the appellant an improbable cause? (And if undue pressure by the appellant was a probable cause, what was it about that which suggested a want of care by the employer?)

149 An employer's duty of care to an employee is a duty that will ordinarily require attention to a number of very different matters. An employer must take reasonable care to provide a safe system of work and a safe place of work. An employer must provide "proper and adequate means of carrying out [the employee's] work without unnecessary risk"[168]. The fact that a piece of equipment fails while being used by an employee will ordinarily invite consideration of many of the features of the employer's duty which I have mentioned. Did the equipment fail because it was unsuited to the task? Was it unsuited to the task because the place or system of work was inappropriate or unsafe? (Allegations of this kind can be seen lying behind the appellant's contention in this case that the grinder should not have been used to grind the inside of the valve unless the valve was first put onto a stand in a horizontal position.) Was the equipment unsuited to the task because other or better equipment was available? (Again, the appellant's allegation that a velocity fuse should have been installed seems to have been an allegation of this kind.) Or did the equipment fail because no sufficient system for maintaining and checking the equipment was implemented by the employer? Or, and this is of critical importance, did the equipment fail for some reason beyond the control of the employer?

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168 *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225 at 229 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ. See also *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25 per Dixon CJ and Kitto J; *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611 at 616-617 per Mason CJ, Toohey and Gaudron JJ.

150 Negligence on the part of the respondent would lie behind some but not all of these possible explanations of what happened in the present case. It follows that inferring from the separation of the hose that the respondent's negligence was probably a cause of the separation assumes that some explanations for the incident were more probable than others. But there was no basis for that assumption.

151 Given what the trial judge said in his reasons, it may be that it could not be assumed or inferred that one or other of the particular causes identified by the trial judge (but described as speculative) happened. But even if all of those particular causes were to be treated as possible causes of the separation, there was no basis (whether in the evidence or in ordinary human experience) for assuming or inferring that some or all of them could probably have been avoided had the employer taken reasonable care. If there had been some other cause of the separation of the hose (other, that is, than the particular explanations suggested by the trial judge) there was again no basis in the evidence or in experience for assuming or inferring that *whatever* that cause may have been, it could probably have been avoided by the employer taking reasonable care. Indeed to make such assumptions or inferences would be to convert the burden of proving negligence from a burden borne by the appellant to a burden of disproving negligence borne by the respondent. That is a step which long since has been held by this Court to be impermissible[169].

152 It must be accepted that the duty which an employer owes to an employee imposes heavy obligations on the employer. One important aspect of that duty is the duty to provide safe equipment for the employee to use. If the equipment fails and nothing more is known about why it failed, it may be possible to say in some cases, in the words of the *Restatement of Torts*, that the event (the failure) "is of a kind which ordinarily does not occur in the absence of negligence"[170]. But where the equipment is as complex as this equipment was, and there are so many possible reasons for its failure, I do not accept that its failure probably points to the employer being the negligent party. There are too many different intermediate steps that must be taken before that conclusion can be drawn, even on the relatively undemanding standard of the balance of probabilities.

153 In these circumstances I do not think that it is necessary to examine whether the use of the expression *res ipsa loquitur* can or should be reconsidered or

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169 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99; *Anchor* (1966) 115 CLR 493; *Nominal Defendant v Haslbauer* (1967) 117 CLR 448; *Piening v Wanless* (1968) 117 CLR 498; *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403.

170 *Restatement of Torts*, 2d, vol 2, Ch 12, (1965), § 328 D (1)(a).

whether, as the appellant contended, there are "encrustations" on the doctrine that should be stripped away.

154 The appeal should be dismissed with costs.