Res Ipsa Loquitur in Australia — The Maxim Remains

LEIGH SCHULZ*

> *Res ipsa loquitur* — the thing or matter speaks for itself. A maxim which permits an inference of negligence to be drawn from the mere fact that an accident occurred and an injury was sustained.
>
> Butterworths Australian Legal Dictionary[1]

> 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 ... 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.
>
> Major J, Supreme Court of Canada[2]

The recent decision of the High Court of Australia in *Schellenberg v Tunnel Holdings Pty Ltd*[3] marks yet another milestone in the turbulent history of *res ipsa loquitur*. While the High Court in *Schellenberg* chose not to abandon the common law maxim, it provided a clear indication that the 'inferential reasoning process'[4] should not be over-valued. The decision is of importance for its attempt to clarify the boundaries of *res ipsa loquitur* in Australia, as well as the insight it provides into possible future directions towards '[releasing] judicial minds from the encrustations of authority that have gathered around the maxim'.[5] This Note examines the approach of the High Court in *Schellenberg* and considers the future of *res ipsa loquitur*.

RES IPSA LOQUITUR —FAILING TO SPEAK FOR ITSELF[6]

The phrase *res ipsa loquitur* has been variously described in judicial and academic literature as a 'rule', a 'notion', a 'doctrine', a 'principle' and even a 'presumption' of the law of evidence.[7] Furthermore, the actual operation of *res ipsa loquitur* has often been confused. In England, Australia and Canada, for example, the maxim has been used to reverse the normal burden of proof,

* Articled clerk, Cornwall Stodart.

1 Peter Butt and Peter Nygh (eds), *Butterworths Australian Legal Dictionary* (1997), 1015.

2 *Fontaine v British Columbia (Official Administrator)* [1998] 1 SCR 424, 435 (*'Fontaine'*).

3 (2000) 170 ALR 594 (*'Schellenberg'*).

4 *Schellenberg* (2000) 170 ALR 594, 601 (Gleeson CJ and McHugh J).

5 Ibid 629 (Kirby J).

6 See *Anchor Products Ltd v Hedges* (1966) 115 CLR 493, 496 (Windeyer).

7 See, eg, 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) *Australian Law Journal* 675; McInnes, 'The Death of *Res Ipsa Loquitur* in Canada' (1998) 114 *Law Quarterly Review* 547.

thereby requiring the defendant to prove on the balance of probabilities that his or her action or inaction did not cause the plaintiff's injury.[8] This approach was clearly rejected by the High Court in *Schellenberg.*[9]

So what is *res ipsa loquitur* and how does it affect the evidentiary burden of proof? The Latin maxim literally means 'the thing speaks for itself' and, where it applies, means that the mere occurrence of the accident constitutes evidence of negligence. This interpretation was reflected in Gaudron J's judgment in *Schellenberg.*

> ... 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".[10]

Thus, at least in Australia, the maxim is used as a 'general method of reasoning by which the decision maker can infer one or more of the facts in issue from circumstances proved in evidence'.[11]

Since its first appearance in the law of negligence,[12] courts have developed various propositions to prescribe the boundaries of *res ipsa loquitur.* In *Scott v London and St Katherine Docks Co,*[13] two years after *Boadle's* case, Erle CJ described the maxim in terms widely regarded as the 'foundation of all subsequent authority'.[14] His Lordship said:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such that 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.[15]

Thus the plaintiff must first show that the thing (the '*res*') 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'.[16] If the 'thing' is not under the exclusive control of the defendant, another person may be responsible for the alleged negligence. The plaintiff will then be required to establish the liability of the defendant by direct evidence.[17]

8 See, eg, *Moore v R Fox & Sons Ltd* [1956] 1 QB 596 (CA); *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200, 207–8 (Latham J); *Bartlett v Children's Hospital Corporation* (1983) 40 Nfld & PEIR 88, Nfld (CA). This approach produced the somewhat strange result that the plaintiff who collected pieces of circumstantial evidence under the rubric of *res ipsa loquitur* was able to reverse the onus, whilst a plaintiff who produced eyewitness evidence bore the burden of proof throughout the trial.

9 *Schellenberg* (2000) 170 ALR 594, 613 (Gaudron J) 625 (Kirby J).

10 Ibid 613 [citations excluded].

11 Ibid 624 (Kirby J) citing *Davis v Bunn* (1936) 56 CLR 246, 268.

12 See Chief Baron Pollock's judgment in *Byrne v Boadle* (1863) 159 ER 299 ('*Boadle*').

13 (1865) 2 H&C 596 ('*Scott*').

14 *Moore v R Fox & Sons* [1956] 1 QB 596, 611 (Evershed MR).

15 *Scott* (1865) 2 H&C 596, 601.

16 *Schellenberg* (2000) 170 ALR 594, 624 (Kirby J).

17 Ibid.

Second, the maxim does not involve a shift of the legal burden of proof from the plaintiff to the defendant.[18] While *res ipsa loquitur* makes it permissible for a jury to draw an inference of negligence, it will always be for the plaintiff to prove negligence on the balance of probabilities.[19] As the High Court made clear in *Schellenberg*, however, where a plaintiff invokes *res ipsa loquitur* and the defendant fails to call evidence, this may have a 'telling forensic impact'.[20] In this sense the defendant may be said to carry an 'onus',[21] but only to the extent as recognised by the United States Supreme Court in *Sweeney v Erving*:

> 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.[22]

Third, a plaintiff will not necessarily lose the benefit of *res ipsa loquitur* by attempting to prove the actual cause of the injury giving rise to the action, that is, by pleading particular acts or omissions on the part of the defendant.[23] The maxim will be available where the tribunal of fact concludes: (i) there is an 'absence of explanation' of the occurrence that caused the injury; (ii) the occurrence was of such a kind that it does not ordinarily occur without negligence; and (iii) the instrument or agency that caused the injury was under the control of the defendant.[24]

SCHELLENBERG v TUNNEL HOLDINGS PTY LTD

The Facts

Mr Schellenberg (the plaintiff)[25] was employed by Tunnel Holdings Pty Ltd (the defendant) as a supervisor/foreman. The defendant company engaged in the supply and service of pumps and valves. As part of his employment, the plaintiff used tools which utilised compressed air. The air was supplied by hoses connected to an external compressor. One such tool was a 'pencil grinder', connected to an air hose by means of a 'jamec' coupling.

18 Ibid. Cf above n 8.
19 Ibid 613 (Gaudron J). As Kirby J noted (at 624), '[t]he defendant can remain silent and still succeed'.
20 Ibid 624 (Kirby J).
21 See *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99, 120–1. Kirby J (at 625) described this as a 'forensic evidential burden of persuasion'. See also *Nominal Defendant v Haslbauer* (1967) 117 CLR 448, 456.
22 228 US 233, 240 (1913), quoted with approval in *Anchor Products Ltd v Hedges* (1966) 115 CLR 493, 500–1 (Windeyer J) [emphasis added].
23 *Anchor Products Ltd v Hedges* (1966) 115 CLR 493; *Piening v Wanless* (1968) 117 CLR 498.
24 Fleming, *The Law of Torts* (9th ed, 1998), 353–9.
25 The parties will, for convenience, be referred to as 'plaintiff' and 'defendant' throughout this Note.

On 9 January 1991, while the plaintiff worked with the pencil grinder, the air hose detached from the coupling and swung up to strike the plaintiff on the face. As a result of raising his upper body sharply to avoid the swinging hose the plaintiff suffered intense back pain. The injury ultimately prevented the plaintiff from returning to work or finding other meaningful employment.

Trial — An Unusual Decision

The plaintiff brought an action for damages in the District Court of Western Australia. The particulars of alleged negligence were broadly stated,[26] although no reliance was placed (as is common) upon *res ipsa loquitur*. The trial judge largely rejected the grounds advanced by the plaintiff and was 'not satisfied the plaintiff ... proved any of the particular acts or omissions it .. relied upon as constituting negligence on the part of the defendant'.[27] Two grounds, in particular, were not accepted by the trial judge. First, that the grinder was equipped with air couplings capable of working loose.[28] Second, that there was insufficient maintenance and inspection of the equipment. As Kirby J noted in the High Court decision,[29] the plaintiff's lack of evidence to support the second claim may have followed from his own employment responsibilities.

Despite the plaintiff's failure to make good any of the grounds of negligence, the trial judge granted a motion to amend the statement of claim to include a further particular: 'the fact that the air hose separated from the fitting is in itself evidence of negligence'.[30] The trial was adjourned to permit further evidence. Two findings resulted from this evidence: (i) the hose had separated from the coupling, rather than the coupling having separated from the grinder; and (ii) the air hose had detached on a couple of previous occasions.[31] In relation to the first finding His Honour said:

> 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.[32]

26 *Schellenberg* (2000) 170 ALR 594. The particulars of negligence are repeated by Glesson CJ and McHugh J at 596.
27 *Schellenberg v Tunnel Holdings Pty Ltd* (District Court (WA), 10 July 1997, unreported), 11.
28 Ibid 10.
29 *Schellenberg* (2000) 170 ALR 594, 620.
30 Ibid 597.
31 Ibid.
32 *Schellenberg v Tunnel Holdings Pty Ltd* (District Court (WA), 10 July 1997, unreported), 17 [emphasis added].

His Honour concluded:

> 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.[33]
>
> 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.[34]

The Full Court — Speculation Not Sufficient

The Full Court unanimously upheld an appeal by the defendant.[35] The presiding judge, Pidgeon J, contrasted the conclusion that the hose was insecurely fastened with the trial judge's earlier finding that the defendant was not negligent in permitting the plaintiff to operate the grinder 'equipped with air line couplings [which were] capable of working loose'.[36] The conclusion that 'the air hose became detached when it should not have'[37] was not sufficient to make the 'speculative'[38] finding that the hose and coupling were insecurely fastened.

Walsh J, in delivering the principal reasons of the Court, said that given the possible explanations for the hose separating from the coupling, 'it 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'.[39] Furthermore, even if the hose was insufficiently fastened, 'there was no evidence that adequate maintenance would have prevented it from separating or that adequate maintenance was not provided'.[40] His Honour remarked that the

33 Ibid.

34 Ibid.

35 *Tunnel Holdings Pty Ltd v Schellenberg* (Supreme Court (WA), Full Court, 17 April 1998, unreported).

36 Ibid 14.

37 *Schellenberg v Tunnel Holdings Pty Ltd* (District Court (WA), 10 July 1997, unreported), 17.

38 *Tunnel Holdings Pty Ltd v Schellenberg* (Supreme Court (WA), Full Court, 17 April 1998, unreported), 2 (Ipp J).

39 Ibid 13.

40 Ibid 14.

trial judge's use of *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 [plaintiff]'.[41]

The High Court — *Res Ipsa Loquitur* (Re)Considered

The plaintiff appealed from the decision of the Full Court to the High Court. It was contended that the trial judge was correct in treating the case as one of *res ipsa loquitur*. In the alternative it was argued that even if the maxim was not suitable, or indeed (as in Canada) the maxim should be abandoned, the ordinary process of reasoning by inference led to the trial judge's conclusion that the defendant was negligent.[42] The majority of the High Court found that *res ipsa loquitur* did not apply in this case and upheld the decision of the Full Court.[43]

An initial question for the Court was whether the 'thing' in this case was under the exclusive management or control of the defendant.[44] Kirby J dismissed this matter quickly, commenting:

> '... 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'.[45]

Glesson CJ and McHugh J, however, took a more literal approach to the question of 'control'. Their Honours believed that the plaintiff's inspection and use of the equipment on the day of the accident[46] suggested 'the defendant may not have had sufficient control to attract the principle of *res ipsa loquitur*'.[47] As the maxim was not available for other reasons, however, their Honours found the issue did not require an in-depth analysis.[48]

According to Kirby J, the difficulty with invoking *res ipsa loquitur* in this case lay with the requirement that the occurrence of the thing must be such that it would not have happened without negligence. As the trial judge recognised,[49] there were various possible explanations for the hose becoming disconnected from the coupling, several of which would not involve any negligence on the part of the defendant.[50] The trial judge attempted to overcome this problem by concluding that, on the balance of probabilities, the hose and coupling were insecurely fastened. Kirby J observed the error in this reasoning:

41 Ibid 10.
42 *Schellenberg* (2000) 170 ALR 594, 622.
43 Per Glesson CJ, McHugh, Kirby and Hayne JJ (Gaudron J dissenting).
44 See text above at n 16.
45 *Schellenberg* (2000) 170 ALR 594, 626.
46 See the defendant's written submissions: Schellenberg (2000) 170 ALR 594, 607–8.
47 *Schellenberg* (2000) 170 ALR 594, 608.
48 Ibid.
49 See text above at n 36.
50 See Kirby J's list: *Schellenberg* (2000) 170 ALR 594, 627.

> ... 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"?[51]

A slightly different approach was adopted by Glesson CJ and McHugh J. Their Honours were of the opinion that once the trial judge found that the hose separated from the coupling, there was no scope for the operation of *res ipsa loquitur*.[52] Instead, as the 'occurrence'[53] was identifiable, it was for the plaintiff to prove that the separation had occurred *in circumstances* of negligence. Interestingly, their Honours recognised that 'occurrence' can be defined 'at particular levels of abstraction, and judges may disagree as to what are the facts and circumstances that constitute the occurrence'.[54]

A further reason for holding *res ipsa loquitur* inapplicable in this case related to the occurrence falling outside the experience of a lay person. Glesson CJ and McHugh J relied upon the comments of Barwick J in *Piening v Wanless* in this regard:

> If the occurrence is to provide evidence, it can only be that, *within the common knowledge and experience of mankind*, that occurrence is unlikely to occur without negligence on the part of the party sued. By that very statement, the occurrence is unlikely to provide evidence except in connection with machines or machinery of whose working and use ordinary man has knowledge and experience.[55]

Their Honours found that the occurrence in this case was outside the experience of the lay person and, furthermore, there was no evidence (expert or otherwise) to suggest that the occurrence would not normally occur without negligence.[56] This necessarily led to the exclusion of the maxim. Kirby J reached a similar conclusion:

[51] *Schellenberg* (2000) 170 ALR 594, 627–8. Hayne J (at 635) reached a similar conclusion.

[52] This reasoning follows the decision of the High Court in *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99. Dixon CJ, Webb, Fullagar and Taylor JJ (at 115) said: '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'.

[53] Their Honours stated '[t]he 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': *Schellenberg* (2000) 170 ALR 594, 602.

[54] Ibid 604. Indeed, presumably Kirby J believed that the 'occurrence' in this case related to the question of how the hose and coupling separated, rather than the separation itself.

[55] (1968) 117 CLR 498, 508 [emphasis added].

[56] *Schellenberg* (2000) 170 ALR 594, 606. The expert evidence — from the plaintiff's expert witness — established that 'the detaching of a hose used in circumstances such as those in the present case or as a result of the hose separating from the jamec coupling may occur without negligence on the part of anyone' (at 605 Glesson CJ and McHugh J).

> [The grinder and coupling do] not constitute simple implements with whic the ordinary decision-maker (judge or jury) is familiar in daily life ... Tł peculiarities of the work equipment required explicit evidence. Such ev dence was given ... But this fell far short of establishing that the occurrenc which happened would not have occurred in the absence of negligence ...

In providing the single dissenting judgment of the High Court, Gaudron J wa of the opinion that *res ipsa loquitur* not only applied in this case, it nece sarily led to the inference of negligence. Her Honour's approach to the maxi was similar to that of Kirby J:

> *Res ipsa loquitur* is concerned with whether an event was caused by th negligence of the defendant, *not with its physical cause* ... the drawing c an inference of negligence is not precluded if all that can be said is that th event must have resulted from one of several possible physical causes.[58]

Gaudron J placed greater emphasis on employer responsibility than did th other members of the High Court. While the majority in *Schellenberg* used th evidence that the hose had come away from tools 'on a couple of occasions' a indicating that such an occurrence could happen without negligence, Gaudro J used the same evidence to emphasise 'the [employer's] duty of maintenanc inspection, instruction and, also, the duty of establishing procedures to ensur that those instructions were carried out'.[59]

In the final analysis, however, the approach of Gaudron J appears to involv the 'quantum leap' (as recognised by the Full Court)[60] from a duty on the pa of the employer to an inference of negligence. Her Honour was prepared t accept an inference of negligence on the basis that no evidence was presente supporting certain possible explanations for the accident (such as evidence o latent defect).[61] This approach, it is submitted, uses *res ipsa loquitur* not as tool of reasoning, but rather as a substitute for evidence. The judgment o Hayne J recognises such an approach in this case:

> where the equipment is as complex as this equipment was, *and there are s many possible reasons for its failure*, I do not accept that its failure proba bly points to the employer being the negligent party. There are too many dif ferent intermediate steps that must be taken before that conclusion can b drawn, even on the relatively undemanding standard of the balance o probabilities.[62]

57 Ibid 628. See also Hayne J at 635.
58 Ibid 614 [emphasis added].
59 Ibid 615.
60 See above n 39.
61 *Schellenberg* (2000) 170 ALR 594, 616.
62 Ibid 635.

CONCLUSION — THE FUTURE OF *RES IPSA LOQUITUR*

So what of the future of *res ipsa loquitur* in Australia? With the exception of Kirby J, the High Court in *Schellenberg* gave little consideration to the question of whether the maxim — once described as an 'illegitimate offspring of a chance remark'[63] — should exist at all in this country. The plaintiff in *Schellenberg* argued that a number of 'encrustations' over its judicial history had hardened the maxim into a rigid rule of law. Glesson CJ and McHugh J rejected this contention:

> The [High] 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.[64]

While Kirby J was 'inclined to favour' the decision of the Supreme Court of Canada in *Fontaine*, that is, to abolish *res ipsa loquitur*, it was nonetheless 'unnecessary to decide the point in this appeal'.[65] According to His Honour, abolition may help to release judicial minds from the confusion that has resulted from the 'multitude of attempted applications' of *res ipsa loquitur*.[66] Kirby J recognised that although removing the maxim from the common law would not alter the operation of inferential reasoning, it would remove the possibility of (lower) courts attaching 'magical qualities' to the Latin phrase.[67] This reflects the view of Major J in *Fontaine* that 'the maxim's sole function . . . is to attach an obfuscating label to the simple proposition that the trier of fact must assess the totality of the evidence in deciding whether or not the plaintiff has established that the defendant wrongfully caused harm'.[68]

Given the differing approaches of the members of the High Court in *Schellenberg* to the question of how *res ipsa loquitur* should operate, it is not surprising erroneous application of the maxim continues today. Intricate questions such as what is an 'occurrence' and who has 'control' suggest that 'reference solely to ascertaining the inferences available from the facts as found'[69] may be the preferable approach to cases of hidden negligence. In any event, the discussion in *Schellenberg* provides a clearer indication of what res ipsa loquitur actually means, and how it should be applied. In the words of Kirby J:

63 Prosser, 'Res Ipsa Loquitur in Claifornia' (1949) 37 *California Law Review* 183, 234 cited by Kirby J (at 617) in *Schellenberg* (2000) 170 ALR 594.
64 *Schellenberg* (2000) 170 ALR 594, 607.
65 Ibid 629.
66 Ibid.
67 Ibid 628. See further, '*Res Ipsa Loquitur*' (1996) 34(1) *Law Society Journal* 28.
68 McInnes, above n 7, 550.
69 *Schellenberg* (2000) 170 ALR 594, 629 (Kirby J).

> This case may have the merit of acting as a reminder of . . . [the] limitation [*of res ipsa loquitur*], 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 whe considering whether the plaintiff has, or has not, established a cause o action in negligence.[70]

Despite its 'long and muddled'[71] history, it appears *res ipsa loquitur* i Australia still has something to say.

[70] Ibid 629.
[71] McInnes, above n 7, 547.