Res Ipsa Loquitur and Deja Vu: Dulhunty *v.* J B Young Ltd *and* Ward *v.* Tesco Stores Ltd

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Dulhunty v. *J.B. Young Ltd.*,[1] a decision of the High Court of Australia involved somewhat inconsequential facts. J.B. Young Ltd. has a department store in Queanbeyan, New South Wales. The plaintiff whilst in the store slipped on a grape and suffered personal injury. An action seeking damages for this personal injury was brought against J.B. Young Ltd. The plaintiff's case was at best sketchy, the circumstances of the accident were proven but little else. The defendant did not sell food, let alone grapes in its shop. There was evidence to suggest that people using the shop aisle in which the plaintiff slipped would on occasions be eating their lunches which would include fruit. The shop floor, except for the presence of the troublesome grape, was clean. There was evidence that the supervisor of the store in the area where the accident occurred would clean up any matter on the floor observed by her. The trial judge found for the defendant, holding there was no evidence of negligence. The plaintiff appealed to the High Court of Australia and the Court, Barwick C.J., Mason and Jacob JJ., with little soul searching, dismissed the appeal.

Dulhunty v. *J.B. Young Ltd* was seemingly destined for oblivion. Not even the unusual spectacle[2] of a slip engendered by a solitary grape could be taken as a precursor of importance, given the even more freakish circumstances that appear to be necessary for the fabrication of great tort cases. The case has, however, been rescued from oblivion by a manifestation of legal deja vu.[3] Soon after the High Court had satisfied itself as to the unconsequential legal nature of the grape on J.B. Young's floor, the English Court of Appeal faced a similar problem. On this occasion the shop was a supermarket, owned by Tesco Stores and the noisome foreign matter, spilt yoghurt.

Ms. Ward, whilst shopping in Tesco's supermarket, slipped on the yoghurt and suffered minor personal injury. She brought an action against Tesco seeking damages for personal injury, alleging negligence in the maintenance of the shop floors. Before the English High Court the plaintiff was successful. The defendant appealed to the Court of Appeal; *Ward* v. *Tesco Stores Ltd.*[4]

Similarly to *Dulhunty* v. *J.B. Young Ltd.*, the plaintiff's case was weak. She was able to prove the salient facts of the accident, namely that she had slipped on a sticky substance which proved to be yoghurt, and was able to offer the additional fact that three weeks later whilst shopping in the same

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1 (1976) 7 A.L.R. 409; (1976) 50 A.L.J.R. 150.

2. Although the spectacle was unusual, it was not novel to the Australian courts. In *Boyle* v. *G.J. Coles & Co. Ltd.* [1969] Qd. R. 445, the Full Court of the Supreme Court of Queensland upheld an appeal by a store which had been held liable to a shopper who slipped and fell suffering personal injury due to the presence of a grape on the shop floor. Stable and Matthews JJ. held that the findings of the trial court showed the store to have exercised all reasonable care for the safety of its customers. Hanger J. held that there was no evidence that any further care on the part of the store would have prevented the accident.

3. An earlier, and even stranger legal manifestation is seen in *Baker* v. *Willoughby* [1970] A.C. 476 (HL), and *Faulkner* v. *Keffalinos* (1971) 45 A.L.J.R. 80 (HCA).

4. [1976] 1 All E.R. 219. Noted in (1976) 39 M.L.R. 724.

store she had observed over a period of 15 minutes a substance which had been spilt on the floor and which, during that 15 minutes, had remained uncleaned.

The defendant explained to the court its system for cleaning spillages, which it said, occurred about 10 times a week. The employee who discovered the spillage was to stay by it and call somebody else to assist. It was further explained that when the store was open it was swept 5 to 6 times during the day and cleaned every evening. By a majority, Lawton and Megaw L.JJ., Ormrod L.J. dissenting, the Court of Appeal rejected the defendant's appeal. The majority were of the opinion that the trial judge had been right in finding that the plaintiff's evidence was sufficient to give her a prima facie case in negligence, and that this prima facie case was not defeated by the defendant's evidence as to its system for cleaning shop floors.

The two cases thus involve similar facts and antithetical conclusions. Needless to say, care must be taken in seeking to contrast the two decisions, especially since in each, issues of proof were crucial. Lawyers and scholars are often rightly contented with the adage that each case must be decided on its own facts, but be that as it may, it is thought that these two cases provide useful examples of the fundamental difference in attitude as to proof of negligence between English and Australian judges.

In negligence actions, English and Australian courts have for some time now differed over the significance of the accident in which the plaintiff is injured as proof of the defendant's negligence. Neither reference to the same principles, nor the mysticism of *res ipsa loquitur*, has been able to paper over the quite obvious disagreement.

In neither *Ward* v. *Tesco Stores Ltd.* nor *Dulhunty* v. *J.B. Young Ltd.* is the mystic incantation of *res ipsa loquitur* recited, but the principle behind the latinism was relevant and applied in both cases. The accident which occurred in each case was such that the respective plaintiffs were unable to point specifically to any act of negligence on the part of the stores or their employees. Thus the two plaintiffs relied in essence on the circumstances of the accident as proof of negligence.

The classic statement as to when the plaintiff can rely on the accident to provide him with a case in negligence is the oft cited dictum of Erle C.J. in *Scott* v. *London and St. Katherine Docks*:[5]

> "But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."[6]

The principles outlined by Erle C.J. are common ground for both English and Australian lawyers, but in their application two crucial differences between the two jurisdictions are apparent. Firstly, the Australian courts have taken a much more restrictive view as to whether, in any particular case, it can be said "that the accident is such as *in the ordinary course of things does not happen*" unless there was negligence. Secondly, there is disagreement as to the effect of allowing the plaintiff to prove a prima facie case in negligence by relying on the circumstances of the accident. *Dulhunty* v. *J.B. Young Ltd.* and *Ward* v. *Tesco Stores Ltd.* illustrate both these differences.

5. (1865) 3 H. & C. 596; 159 E.R. 665.
6. *Ibid.*, at 601.

Looking at the first of the two differences, the crucial consideration for all judges who heard the *Dulhunty case* was that there was no evidence as to how long the offending grape had been on the shop floor. In the absence of such evidence the facts as established could not in the opinion of the trial judge and the High Court of Australia support any inference of carelessness on the part of the defendant. In the High Court, Barwick C.J., Mason J. concurring, cited with approval the reasoning of the trial judge:

> "His Honour in his summary of judgment said this: "In my opinion there is no evidence from which I can draw any reliable conclusion as to how the grape came to be where it was or how it had been there" (I think he means how long it had been there).: It is perfectly consistent with the evidence that the grape had been dropped by a member of the public a very short time before the plaintiff stepped on it . . . The fact that remains of the grape were still there some 10 minutes or so after the occurrence raises a doubt in my mind as to whether any system for keeping the department clean was working adequately. It seems to me, however, that this throws no light on the crucial question of how long the grape had been on the floor before the plaintiff stepped on it . . ."
>
> His Honour, in my opinion, was quite correct to say that evidence of the time when the grape was dropped on the floor and of the time it had been there was indispensable in the appellant's case . . ."[7]

Mr. Justice Jacobs added his agreement:

> "There must be some evidence and the evidence must in some way show that an act or omission of the defendant was a cause of the plaintiff's injury. The plaintiff had to show by evidence, however slight, that some omission or some act on the part of the defendant contributed to the injury. The plaintiff slipped on a white grape which was on a floor of mottled yellowish-brown coloured lino tiles. The floor, except for the presence of the grape, was a clean floor. There was no evidence that the grape had been there for any particular length of time. The trial judge found that it was not common to find or inherently likely to expect dropped grapes or other fruit in that area."[8]

The plaintiff in *Ward* v. *Tesco Stores Ltd.* faced exactly the same difficulty; there was no evidence as to how long the yoghurt had been on the shop floor. The majority of the English Court of Appeal was of the opinion that such evidence was not essential to the plaintiff's case. Specific reliance was placed on the principles of Erle C.J. in *Scott* v. *London and St. Katherine Docks.* Lawton L.J., after citing the proposition of Erle C.J. quoted earlier, went on to say that the accident was one requiring an explanation from the defendant:

> "In this case the floor of this supermarket was under the management of the defendants and their servants. The accident was such as in the ordinary course of things, does not happen if floors are kept clean and spillages are dealt with as soon as they occur. If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part; and in the absence of any explanation the judge may give judgment for the plaintiff."[9]

Clearly this is a most generous application of Erle C.J.'s principles. It can be said that his lordship failed to direct his attention to the precise question that must be answered if the case is in fact one of *res ipsa loquitur.* Granted that if a spillage is cleaned up as soon as it occurs, an accident involving a

7. (1976) 7 A.L.R. 409 at 410.
8. *Ibid.*, at 411.
9. [1976] 1 All E.R. 219 at 222.

slip on the offending substance could not happen, but this is hardly determinative of whether, when such an accident does happen, the accident without more is suggestive of negligence.

Lord Justice Megaw in agreeing with the conclusion of Lawton L.J. does, for his part, focus attention on the appropriate issue:

> "It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation is more consistent with fault on the part of the defendants than the absence of fault: and to my mind the learned judge was wholly right in taking that view of the presence of this slippery liquid on the floor of the supermarket in the circumstances of this case: that is that the defendants knew or should have known that it was a not uncommon occurrence; and that if it should happen, and should not be promptly attended to, it created a serious risk that customers would fall and injure themselves."[10]

Ormrod L.J. dissented from his brethren in the English Court of Appeal. In tones reminiscent of the High Court of Australia, his lordship said:

> "Starting from the beginning, I do not think that it was established that this accident was caused by any want of care on the part of the defendants. The accident described by plaintiff—and she did no more than describe the accident, namely that she slipped in some yoghurt which was on the floor of the supermarket—could clearly have happened no matter what degree of care these defendants had taken. The crucial question is how long before the accident the yoghurt had been on the floor.
>
> Had some customer knocked it off the shelf a few moments before, then no reasonable system which the defendants could be expected to operate would have prevented this accident."[11]

As the plaintiff's failure to establish his case in *Dulhunty* v. *J.B. Young Ltd.* shows, at the very least it can be said that the English experience as to shop accidents differs from that in Australia. In Australia, foreign substances are found on shop floors for reasons other than the carelessness of shopkeepers. It is thought unlikely that English shopkeepers are any more wanton in their regard for cleanliness than Australian shopkeepers, and the two cases reveal a substantive difference in approach.

The Australian insistence that the accident must be only explainable on the basis of some carelessness on the part of the defendant before the plaintiff can rely on *res ipsa loquitur* has always been absolute. No more useful reminder of this is available than the words of Dixon C.J. in *Mummery* v. *Irvings*:[12]

> "At this stage it is appropriate to return to the language used in *Scott* v. *London and St. Katherine Docks Co.* (supra), and to observe that the vital condition for the operation of the principle is that "the accident is such as in the ordinary course of things does not happen if those who have the management use proper care". Indeed, to overlook or to exclude this requirement might well be thought to produce the result that mere proof of any occurrence causing injury will constitute sufficient proof of negligence in any case where an object which physically has caused injury to the plaintiff is under the control and management of the defendant and the actual cause is, therefore, not known to the plaintiff and is, or should be known to the defendant. The requirement 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*."[13]

10. *Ibid.*, at 224.
11. *Ibid.*, at 223.
12. (1956) 96 C.L.R. 99.
13. *Ibid.*, at 116 per Dixon C.J., delivering the judgment of Dixon C.J., Webb J., Fullagar J. and Taylor J.

To Australian eyes, the majority in *Ward* v. *Tesco Stores* appears to have committed the very sin frowned upon by the Chief Justice of the High Court, viz. the acceptance of an occurrence causing injury as sufficient proof of negligence without actual regard to common experience.

Looking at the second difference between the Australian and English approach to the doctrine of *res ipsa loquitur*, an apparent reversal of the traditional burden of proof where the plaintiff in a negligence action has relied on the facts of the accident to establish his case has been a feature of some English cases. Whilst the attitude of English Courts on this issue has at best been equivocal, the English Courts have, because of a series of decisions, been identified with the view that where the plaintiff is able to successfully invoke a plea of *res ipsa loquitur*, a positive burden of disproof is cast upon the defendant.[14] According to this view, unless the defendant can establish that on the balance of probabilities he was not negligent, or that the accident occurred in a way unrelated to any negligence on his part, he will be found guilty. Such jurisprudence has won limited acceptance in certain Canadian and New Zealand decisions,[15] but has been repeatedly and consistently rejected by Australian Courts.[16] The Australian position was unequivocally stated as early as 1935 by Dixon J., as he then was, in *Fitzpatrick* v. *Cooper*:[17]

> "When damage is caused by some unusual event which might reasonably be expected to happen only as the result of an omission to take ordinary precautions, or of a positive act of negligence, and it arises, out of operations or the behaviour of inanimate things which are within the exclusive control of a party, no more is required to support an allegation of negligence against him unless and until some further facts appear which supply an explanation of the cause of the accident and displace the ground for inferring negligence. The circumstances may be so strong that a failure to be satisfied of negligence would be unreasonable. But, in my opinion, it is not the law that a legal presumption arises under which the burden of disproving negligence rests upon the party denying it, so that unless evidence is forthcoming reasonably sufficient to support a positive finding that negligence was absent, the party alleging negligence is entitled to a verdict as a matter of law. The distinction is clear between, on the one hand, a rule of law which, as soon as given facts appear, places the legal burden of proof upon the opposite party, and, on the other hand, a presumption of fact arising from circumstances, even if the presumption be so strong that, although the legal burden of proof is unchanged, a finding that the issue was not established would be set aside as unreasonable. The principle expressed in the phrase *res ipsa loquitur* does not more than furnish a presumption of fact."[18]

14. *Woods* v. *Duncan* [1946] A.C. 401; *Moore* v. *Fox* [1956] 1 Q.B. 596; *Swan* v. *Salisbury Constructions Co. Ltd.* [1966] 1 W.L.R. 204; *Colvilles Ltd.* v. *Devine* [1969] 1 W.L.R. 475; *Henderson* v. *Henry & Jenkins & Sons* [1970] A.C. 282.
15. New Zealand: *Voice* v. *Union Steam Ship Co. Ltd.* [1953) N.Z.L.R. 176; *J.M. Heywood & Co. Ltd.* v. *Attorney General* [1956] N.Z.L.R. 668; *F. Maeder Pty. Ltd.* v. *Wellington City Corporation* [1969] N.Z.L.R. 222. But see *Watson* v. *Davidson* [1966] N.Z.L.R. 853; *Hawkes Bay Motor Co. Ltd.* v. *Russell* [1972] N.Z.L.R. 542.
    Canada: *Scrimgeour* v. *Bd. of Management of American Lutheran Church* [1947] 1 D.L.R. 677; *Leppa* v. *Coca Cola Ltd.* [1955] 5 D.L.R. 187; *Varga* v. *John Labatt* (1957) 6 D.L.R. (2d) 336. But see *United Motors Service* v. *Hutson* [1937] S.C.R. 294; *Interlake Tissue Mills Co. Ltd.* v. *Salmon & Beckett* [1949] 1 D.L.R. 207; *Temple* v. *Terrace Co.* (1966) 57 D.L.R. (2d) 631; *Helleoius* v. *Lees* (1972) 20 D.L.R. (3d) 369; *Girard* v. *Royal Columbian Hospital* (1976) 66 D.L.R. (3d).
16. *Mummery* v. *Irvings Pty. Ltd.* (1956) 96 C.L.R. 99; *Anchor Products Ltd.* v. *Hedges* (1966) 115 C.L.R. 493; *Nominal Defendant* v. *Haslbauer* (1967) 117 C.L.R. 448; *Government Insurance Office* v. *Fredrichberg* (1968) 118 C.L.R. 403.
17. (1935) 54 C.L.R. 200.
18. *Ibid.*, at 218–219.

According to the Australian view, all the doctrine of *res ipsa loquitur* does is provide the plaintiff with a *prima facie* case in negligence. The defendant thus cannot obtain a non-suit on the basis that the plaintiff has advanced no evidence of negligence, but the ultimate burden of proving negligence on the balance of probabilities remains firmly with the plaintiff. If the trier of fact is unconvinced the verdict must be for the defendant.

Whilst similar statements of principle to that of Dixon J. in *Fitzpatrick* v. *Cooper* can be found in English cases, such principle is often contradicted by the decision, which can only be explained in terms of a legal burden of disproof cast upon the defendant. Indeed, this appears to be the very situation in *Ward* v. *Tesco Stores Ltd.* The majority of the English Court of Appeal, having satisfied themselves that the plaintiff had a prima facie case in negligence, ruled that the defendant had failed to provide any explanation which negatived such negligence. The defendant's evidence, it was said, went merely to their general system of cleaning; it did not establish that the accident in which the plaintiff was injured occurred without carelessness on the defendant's part.

Lord Justice Lawton indicated that the defendant was not charged with any legal burden of disproof in seeking to neutralize the evidentiary significance of Ms. Ward's slip on the yoghurt,[19] but when the facts which formed the basis of the plaintiff's case are recalled, it is evident that such a burden of disproof covertly existed. If a slip occasioned by foreign matter on a shop floor by itself creates a prima facie case in negligence, and one that is not overborne by proof as to the utilisation of a system for cleaning up spillages, it is difficult to see how else the defendant could excuse himself, except by the fortunate availability of proof which positively negates negligence on his part or points to the causal irrelevance of any negligence.

The judgment of Megaw L.J., the other majority judge, likewise appears to have imposed an actual legal burden of disproof on the defendant. His lordship said:

> "[T]he defendants can still escape from liability. They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, irrespective of the existence of a proper and adequate system, in relation to the circumstances, to provide for the safety of customers. But, if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers. That, in this case, they wholly failed to do."[20]

In terms of legal principle the imposition of a burden of disproof on the defendant has nothing to commend it. A distortion of principle is involved which is readily discernible at two levels.

Firstly, the basic rule of evidence that a person should carry the legal burden of proving his case, is lost.[21] There is no reason in principle why reliance on

19. "Such burden of proof as there is on defendants in such circumstances is evidential, not probative": [1976] 1 All E.R. 219 at 222.
20. *Ibid.*, at 224. His Lordship's conclusion appears to contrast sharply with his views in the earlier case of *Lloyde* v. *West Midlands Gas Board* [1971] 2 All E.R. 1240, in particular at 1246.
21. *Et qui affirmat non ei qui negat incumbit probatio.* See *Robbins* v. *National Trust Co.* [1927] A.C. 515, 520; *Constantine Line* v. *Imperial Smelting Corporation* [1942] A.C. 154, 174; Phipson, *The Law of Evidence*, (12th ed. 1976), para. 91 *et seq.*

the circumstances of an accident as proof of negligence should throw a burden of disproof on to the defendant. *Res ipsa loquitur* is merely a species of circumstantial evidence masquerading behind a latin phrase. No one has ever suggested that circumstantial evidence of negligence, other than the circumstances of the accident, should throw a burden of disproof on the defendant. Indeed to do so, as in the English *res ipsa loquitur* cases, is to place the plaintiff in the strongest possible evidentiary position when his case is at its very weakest.[22]

Secondly, the essential ingredient of a negligence action, namely that the defendant was careless, is circumvented. Defendants, if they are to be burdened with an onus of disproof find themselves, instead of plaintiffs, shouldering the risk that the existence or otherwise of negligence is uncertain. Where on the balance of probabilities it is uncertain whether the defendant was negligent or not, but a plea of *res ipsa loquitur* has been upheld, on the English view of things, the defendant will be held liable.

It is submitted that the approach taken by the High Court of Australia in *Dulhunty* v. *J.B. Young Ltd.* and by the dissentient in *Ward* v. *Tesco Stores Ltd.* is preferable to that of the majority in *Ward* v. *Tesco Stores Ltd.* To Australian eyes, the decision in *Ward* v. *Tesco Stores Ltd.* appears as yet another example of the unsatisfactory English case law involving the maxim *res ipsa loquitur*; a curious decision in which by an overly generous application of the principles in *Scott* v. *London and St. Katherine Docks* the English Court of Appeal has countenanced a form of strict liability for shopkeepers disguised as a negligence action.

It might be argued by some that there are sound reasons of policy, if not of principle, for favouring the approach taken by the majority in *Ward* v. *Tesco Stores*.

Professor Atiyah, for one, in an incisive analysis of certain aspects of the dichotomy between English and Australian *res ipsa loquitur* cases[23] has argued as much:

> "The normal principle that the legal burden of proof rests on the plaintiff is liable to lead to unjust results in many cases in which the plaintiff does not know but the defendant does know the facts relevant to the issue of negligence or not. In particular, where accidents are caused due to sudden vehicle failure on the roads, or to unexplained disasters (such as explosions) in factories, the plaintiff may be in grave difficulties because he will have no information as to the standards of inspection, maintenance, etc. which the defendant has adopted. The defendant may be able to adduce evidence on these matters but the plaintiff will frequently be unable to do so."[24]

As a general statement of the policy consideration supporting the doctrine of *res ipsa loquitur*, Professor Atiyah's view is unexceptionable. The plaintiff should not be prevented from proving a case in negligence where he is unable to point to any specific act of negligence but common experience suggests that the accident would in all likelihood only happen because of negligence. In such circumstances it is entirely appropriate to allow the plaintiff to rely on the accident itself as proof of negligence. It is suggested, however, that when Professor Atiyah's view is pressed further in favour of the imposition of a burden of disproof on the defendant in *res ipsa loquitur* cases, it ceases to be compelling.

22. See *Mummery* v. *Irvings Pty. Ltd.* (1956) 96 C.L.R. 99, in particular Dixon C.J. at 121.
23. Atiyah, *Res ipsa loquitur in England and Australia*, (1972) 35 Mod.L.R. 337.
24. *Ibid.*, at 339.

There appears to be an implicit assumption behind Professor Atiyah's argument that the defendant will always be able to explain the accident, or establish that he was not negligent, if in fact he was innocent. This, unfortunately, is far from the truth. The imposition of a legal burden of disproof on the defendant is equally likely to result in the liability of a non-negligent defendant as it is likely to expose the careless but recalcitrant wrongdoer to liability.

The problems of the defendant in *Ward* v. *Tesco Stores* are instructive in this regard. The dissentient, Ormrod L.J., chronicled the difficulties presented by the approach of the majority:

> "It seems to me quite clear that unless there is some evidence as to when the yoghourt got on to this floor no prima facie case can be made against these defendants. I would only add that to hold otherwise would seem to me to put on the defendants a wholly unreasonable burden, not only of care, but also of proof. I ask myself what evidence could they have called? It would have been fortunate, perhaps, if they had been able to show that their sweeper had passed over this bit of the floor five minutes before the accident. But it would not have shown that their system was either better or worse than if the sweeper had gone by that bit of the floor an hour earlier. And I cannot think that the case would have been carried any further by calling evidence from such employees as may or may not have been about. This is a supermarket, not a place with counters and assistants behind the counters. I cannot imagine what evidence they could give except to say that they had not noticed the spill; and the matter would have been taken no further."[25]

In the final analysis, Professor Atiyah's argument, it is suggested, finds its true basis not in any consideration as to the appropriate methods for determining issues of fault in negligence actions, but in sentiments as to the proper basis for the compensation of accident victims. The English application of the maxim of *res ipsa loquitur* is favoured for its pro-plaintiff bias in favour of compensation.

Ideally, there is much to be said in favour of some system of accident compensation independent of fault, and decisions such as *Ward* v. *Tesco Stores* and *Dulhunty* v. *J.B. Young Ltd.*, the one with its distortion of legal principle, and the other with its denial of compensation, might for the advocate of such a system point to the same conclusion for different reasons.

For the present, however, it is thought that *Dulhunty* v. *J.B. Young Ltd.* was rightly decided whilst *Ward* v. *Tesco Stores* remains as a further unhappy example of aberrant English jurisprudence.

25. [1976] 1 All E.R. 219, at 223.