balance will be left.[39] Certainly the judgments in the High Court did not attempt to specifically narrow the principle, and the better view might be that it accords with the practical theories of equitable ownership herein advocated, that the courts must decide each case in this field along a criterion of 'closest connection' and practicability rather than any abstract conceptions of the nature of the rights involved.

A. R. CASTAN

WATTS v. RAKE[1]

Tort—Injuries to plaintiff—Shifting burden of proof—Reasonable foresight

Watts sued Rake in the Supreme Court of Queensland for damages arising out of a motor-car accident. The action was tried by Mansfield C.J., who awarded the plaintiff special damages of £4,669 5s. 10d. and general damages of £8,000. Watts appealed to the High Court of Australia on the ground that the learned Chief Justice had made a mistake in law in assessing the general damages. The appeal succeeded, with the result that the general damages were increased to £12,000.

The appellant (plaintiff), a young man of 27, had been struck by a motor-car driven by the respondent (defendant), who admitted his negligence. It was not disputed that before the accident the plaintiff was in apparent good health and that he lived a full and active life. Nor was it disputed that after the accident the plaintiff was, *inter alia,* 'very disabled and unable to move freely', that he could only 'hobble with crutches' and 'not sit down properly'.[2] It was accepted by Mansfield C.J., despite a conflict in the medical evidence, that most of these misfortunes could be attributed to ankylosing spondylitis. But here was the difficulty; it was established that before the accident the plaintiff's good health was only superficial and that he had had, even then, within himself the seeds of this disease, so that according to the medical evidence which was preferred by the court the plaintiff would have reached, even without the mishap, his present state of incapacity within 13 years of the date of the accident; but it was not proved at what stage or stages within those 13 years his various disabilities would have manifested themselves.[3]

On this basis it was answered for the defendant

> first, that [the plaintiff] was predisposed to many or at least some of the arthritic and other conditions which have so seriously and rapidly developed as a consequence of the accident, considered at all events as a precipitating cause. Secondly, that part of his present condition is traceable to causes other than the accident, and thirdly, that had there been no accident he would eventually and prematurely have been incapacitated by the seeds of disability within him.[4]

[39] With regard to the case where there is a trust for sale involved, see *Re Smyth, Leach v. Leach* [1898] 1 Ch. 89.

[1] (1960) 34 A.L.J.R. 186. High Court of Australia; Dixon C.J., Menzies, Windeyer JJ.

[2] *Ibid.* 188, *per* Menzies J. quoting Mansfield C.J.

[3] *Ibid.* 188, *per* Menzies J.

[4] *Ibid.* 187, *per* Dixon C.J.

Dixon C.J.[5] and Menzies J.[6] (with both of whom Windeyer J. agreed) dismissed the first answer as no answer at all on the ground that a defendant must take his plaintiff as he finds him. If a one-eyed man loses his solitary orb through the negligence of the defendant, then the defendant must expect to pay more damages than if a plaintiff with two eyes were reduced to the use of only one.

'As to the second and third of these answers', continued the learned Chief Justice,

> there is undoubtedly a *presumptio hominis* in the plaintiff's favour, which any tribunal of fact should insist that the defendant should overcome. If the disabilities of the plaintiff can be disentangled and one or more traced to causes in which the injuries he sustained through the accident play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the accident as a contributory cause. If it be the case that at some future date the plaintiff would have reached his present pitiable state the defendant should be called on to prove that satisfactorily and, moreover, to show the period at the close of which it would have occurred.[7]

Menzies J. put the matter thus:

> It was for the appellant as plaintiff to prove his damages, and merely to prove his present condition and his incapacity to work could not prove that these things resulted from the accident. It was not, however, for the plaintiff to disprove that his pre-accident ill health would eventually cripple and incapacitate him. *Prima facie*, where a plaintiff was in apparent good health before an accident and is in bad health thereafter, the change would be regarded as a consequence of the accident and it is for the defendant to prove that there is some other explanation for it, *e.g.*, that the plaintiff has aggravated his condition by some unreasonable act or omission. Similarly, although it is of course material to ascertain what was the pre-accident condition of a plaintiff who alleges that his post-accident ill health is due to the accident, it is for the defendant to prove that before the accident the plaintiff was in a condition that, without the accident would have led to his post-accident state of health. Such a case is not unlike that of a defendant in a defamation action proving in reduction of damages that the plaintiff had a bad reputation.[8]

It was in his consideration of the defendant's second and third answers the High Court judges thought Mansfield C.J. had erred. Thus Menzies J. said:

> There are passages in the judgment here under consideration that are susceptible of meaning that the appellant had at the trial to establish not only that his present condition was due to the accident, but further, that he would never have reached that condition had it not been for the accident, whereas it was for the respondent to prove not only that the accident did no more than accelerate the occurrence of a condition that was inevitable, but also the extent of the acceleration.[9]

[5] *Ibid.* 187. [6] *Ibid.* 189. [7] *Ibid.* 187, *per* Dixon C.J.
[8] *Ibid.* 189. [9] *Ibid.* 189, *per* Menzies J.

In this case their Honours seem to be laying down a new doctrine rather similar to that of *'res ipsa loquitur'*; and just as the latter is used to establish negligence on the part of the defendant without proof of his every act which contributed to the plaintiff's damage,[10] so this new rule is used to establish the extent of the resulting harm suffered by a plaintiff without proof of a causal connexion between each and every disability under which he labours and the injuries he suffered in the accident. Both doctrines seem to be designed to help the plaintiff get his case to the jury where a paucity of evidence prevents his establishing every link therein, and to enable the tribunal of fact to draw certain deductions from the facts as proved, aided by its knowledge of the daily course of men's affairs. Therefore it would be logical if both could be rebutted by the same type of defence, and such seems to be the case. In *Barkway v. South Wales Transport Co. Ltd*[11] the House of Lords held that where the facts are sufficiently known, the doctrine of *'res ipsa loquitur'* ceases to be applicable and the solution must be found by enquiring whether, on the facts in evidence, negligence can be inferred. In this present case Dixon C.J.[12], and Menzies J.[13] implied that if the defendant can prove the cause of every one of the plaintiff's disabilities the presumption that they were the result of the accident will cease to apply.

There has been much controversy concerning the precise procedural advantage which a plaintiff obtains from the maxim, *'res ipsa loquitur'*. Essentially the question is whether in such a case the jury is entitled to refuse to find negligence and to return a verdict for the defendant. More precisely, does the maxim raise a presumption of law, in which case the court must direct a verdict for the plaintiff if the defendant fails to adduce sufficient evidence to discharge the presumption set up by the maxim, or a mere presumption of fact, in which case the court can never direct a verdict and can, except under statutory powers, but set aside the verdict as unreasonable and submit it to another jury?[14] In Australia there is no doubt but that it is to be regarded merely as setting up a presumption of fact.[15] But what is the effect of this new rule? It would seem that it too is to be regarded as a mere presumption of fact. This appears from the words of Dixon C.J.:

> But while the foregoing are the burdens of proof which the law places on the parties, states of fact may be proved by the evidence as the case advances, or may appear as inferences which the evidence supports, and those states of facts may authorise or even demand findings in favour of a party unless and until some further or other state of fact is made to appear by evidence. There are, in other words, presumptions of fact as well as presumptions of law.[16]

Menzies J. is not as explicit as this. But he does say that by proving his apparent good health before the accident and his bad health thereafter,

[10] Fleming, *The Law of Torts* (1st ed. 1957) 297. [11] [1950] 1 All E.R. 392.
[12] 34 A.L.J.R. 187. [13] *Ibid.* 189.
[14] *Fitzpatrick v. Cooper Pty Ltd* (1935) 54 C.L.R. 200, 219, *per* Dixon J.
[15] *E.g. ibid.* 217-220. [16] 34 A.L.J.R. 187.

the plaintiff has made out a *'prima facie'* case,[17] which term, it is submitted, is neutral; so that, since Dixon C.J. states that he and Menzies J. are in agreement,[18] his assertion that they are dealing with a presumption of fact may be accepted as part of the *ratio decidendi* of the case.

The writer has described the rule here laid down by the High Court as 'new', because their Honours make no reference to any authority, judicial or otherwise, to support their contentions and because he has been unable to find any reference to such a doctrine in the standard textbooks and digests. This rule therefore must be justified, if at all, on principle, but this writer respectfully submits that the principle on which it rests is, at best, doubtful. *'Affirmanti non neganti incumbit probatio'* is a proposition sanctified not only by antiquity, but in this day and age, when the huge damages awarded can, despite compulsory insurance, so often lead to bankruptcy, by justice also. The *'res ipsa loquitur'* rule was and is necessary because in cases where stones are found in buns,[19] barrels drop from buildings,[20] or bags of plaster fall from skips[21] many of the facts are inevitably beyond the plaintiff's discovery; but at the same time they are everyday affairs about which ordinary men and women can make deductions. Yet there are no reasons why a plaintiff should not call medical witnesses to testify to the cause of his misfortunes, while, in addition, medical knowledge is not normally in the unaided possession of judges and juries, a fact which has been recognized in the *'res ipsa'* cases themselves.[22]

However, the authorities are not certain.[23] In *Mummery v. Irvings Pty Ltd*[24] the High Court seems to infer that the *'res ipsa loquitur'* doctrine need not be confined to matters of common knowledge and that, if necessary, evidence can be called to establish 'the ordinary course of things' even among the mysteries of medicine. If this is so, then this new rule is but a logical extension of the law. But if this point is still not settled, as at least one learned writer seems to think,[25] there is still time to halt this tendency, which the writer in brief contends makes things too easy for plaintiffs, and asks too much of judges and juries.

There remains one other point in this case to be discussed. Both Dixon C.J. and Menzies J. regarded it as indisputable that a defendant, once it is proven that his negligence caused damage to the plaintiff, must take the plaintiff as he finds him and pay all his damages, even though the plaintiff is unusually susceptible to certain injuries. However, since this appeal was heard, the opinion of the Privy Council in *Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. Ltd*[26] has been reported. This case expressly disapproves the principle in *In re Polemis and Furness Withy and Co. Ltd.*[27] In the words of the Board's spokesman, Viscount Simonds: '[Their Lordships] have inevitably insisted that the

[17] *Ibid.* 189. [18] *Ibid.* 186. [19] *Chaproniere v. Mason* (1905) 21 T.L.R. 633.
[20] *Byrne v. Boadle* (1863) 2 H. & C. 722.
[21] *Fitzpatrick v. Cooper* (1935) 54 C.L.R. 200.
[22] *E.g., Mahon v. Osborne* [1939] 2 K.B. 14, 23, *per* Scott L.J.
[23] *E.g. ibid.* 45-47, *per* Goddard L.J.
[24] [1956] Argus L.R. 795. [25] Fleming, *op. cit.* 298-299. [26] (1961) 34 A.L.J.R. 451.
[27] [1921] 3 K.B. 560.

essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen?'[28] The question therefore arises whether the reasonable man would foresee a fracture of the skull which results from a light blow on the head suffered by a man not previously known to have an 'egg-shell' skull. Alternatively, would the reasonable man have expected Mr Watts to have developed ankylosing spondylitis if he had not previously known that he (Watts) had a predisposition towards doing so. Professor Morison, in his article 'The Victory of Reasonable Foresight',[29] points out:

> Consequences are regarded as foreseeable [even] when there is only a small degree of probability of their occurring. If a man throws a lighted match out of a high window, even into a city street, there is surely only a remote possibility that it will continue burning throughout its descent and do damage when it falls on someone. Yet equally surely commonsense would say that this is foreseeable.[30]

If this is correct, as the present writer respectfully agrees it is, then perhaps we can draw an analogy. For surely it is not too much to say that a reasonable motorist would agree that it was possible that he might hit someone who would suffer more seriously than the usual person; and so the eventuality which occurred in this case comes within the test laid down by the Privy Council. Thus the High Court's rejection of the defendant's first answer may still be regarded as correctly stating the law.

At the time of writing this note, the case had not been reported in the Commonwealth Law Reports, so that no account of counsel's arguments was generally available. However, the writer has private information, to the effect that the plaintiff's advisers relied particularly on the following two cases: *Nitro-Phosphate and Odam's Chemical Manure Company v. London and St Katharine Docks Company*[31] and *Middleton v. Melbourne Tramway and Omnibus Co. Ltd.*[32] In both of these cases, specific defences were pleaded by the defendants: in the former, Act of God, and in the latter, contributory negligence. It was held in both cases that it was for the defendants to prove how much of the damage, if any, was attributable to the defence raised. But in the present case no such thing was done by the defendant. He said, in effect, that the plaintiff was suffering from his disease before the accident and that the plaintiff had not shown conclusively to what extent the accident had harmed him, that is, that he had not proved his damages. In denying effect to this answer, it is respectfully submitted, the High Court went beyond the principle stated in the two cases cited; and it is to be noted that their Honours did not specifically rely on them.

G. D. GOLDBERG

[28] 34 A.L.J.R. 451, 457.
[29] (1961) 34 *Australian Law Journal* 317.
[30] *Ibid.* 322.
[31] (1878) L.R. 9 Ch.D. 503.
[32] (1913) 16 C.L.R. 572.