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Furnish a Complete Explanation of the Specific
Cause of an Accident. *Dover Elevator Co. v. Swann*,
334 Md. 231, 638 A.2d 762 (1994)

Jamey B. Johnson
University of Baltimore School of Law

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TORTS — RES IPSA LOQUITUR IS INAPPLICABLE WHEN A PLAINTIFF OFFERS EXPERT TESTIMONY TO FURNISH A COMPLETE EXPLANATION OF THE SPECIFIC CAUSE OF AN ACCIDENT. *Dover Elevator Co. v. Swann*, 334 Md. 231, 638 A.2d 762 (1994).

I. INTRODUCTION

The doctrine of *res ipsa loquitur* was born on the back of a flour barrel in nineteenth century England. It was in the case of *Byrne v. Boadle*¹ that Chancellor Pollock argued that a flour barrel which had fallen out of a second story window and injured his client was an occurrence explainable by *res ipsa loquitur*, or “the thing speaks for itself.”² From this seemingly “ordinary” incident, a myriad of legal debate and uncertainty has arisen.³ The Court of Appeals of Maryland, in *Dover Elevator Co. v. Swann*,⁴ clarified the impact of direct evidence and expert testimony on the doctrine of *res ipsa loquitur*.

The facts of *Dover Elevator* present a typical *res ipsa loquitur* scenario: Like a barrel falling from a window, the misleveling of an elevator invokes an inference of negligence.⁵ Nevertheless, the Court of Appeals of Maryland reversed the court of special appeals’s determination that a jury instruction on *res ipsa loquitur* was appro-

1. 159 Eng. Rep. 299 (P.C. 1863).

2. RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965). Chancellor Pollock’s reference to the Latin phrase, *res ipsa loquitur*, carried the connotation that such an event would not have occurred but for negligence. *Id.* § 328D cmt. b. Chancellor Pollock is credited with coining the phrase that would soon develop into an evidentiary principle that would permit an inference of negligence from circumstantial evidence. *Id.*; see *infra* notes 19-20 and accompanying text.

3. As Chief Judge Orth noted: “Ever since 1863 . . . the thing has been attempting to speak for itself. . . . The attempts have been loud but not clear.” *Chesapeake and Pac. Tel. Co. v. Hicks*, 25 Md. App. 503, 509, 337 A.2d 744, 748-49 (1975) (citations omitted).

4. 334 Md. 231, 638 A.2d 762 (1994). In *Dover Elevator*, the plaintiff was injured when the elevator he was boarding failed to become level with the floor. *Id.* at 234, 638 A.2d at 764. See *infra* notes 119-21 and accompanying text for further discussion.

5. See RESTATEMENT (SECOND) OF TORTS § 328D cmt. a.

priate in this case.⁶ The court of appeals held that the plaintiff could not rely on *res ipsa loquitur* because he sought to explain the precise cause of the accident with expert testimony.⁷ The opinion is an important declaration of Maryland law on the relationship between direct evidence and *res ipsa loquitur*. As a result of *Dover Elevator*, a plaintiff may not present specific or comprehensive direct evidence and still rely on the doctrine of *res ipsa loquitur*.⁸ More importantly, the holding represents Maryland's departure from the majority of jurisdictions, which have adopted less restrictive principles in this area.⁹

II. HISTORICAL DEVELOPMENT

A. *The Origin of Res Ipsa Loquitur*

The doctrine of *res ipsa loquitur* arose before the advent of the modern discovery system.¹⁰ At that time, wrongly injured plaintiffs had no way to recover if the evidence establishing the injury was solely in the hands of the defendant.¹¹ In order to avoid this inequity, the courts adopted *res ipsa loquitur*.¹² The doctrine gives a plaintiff the opportunity to establish a *prima facie* case of negligence with circumstantial evidence when specific evidence is otherwise inaccessible.¹³

Although the doctrine of *res ipsa loquitur* has been complex in its application, the basic criteria are straightforward. As a general rule, a plaintiff must prove three elements in order to invoke the doctrine: (1) the event must be one that ordinarily does not occur in the absence of someone's negligence; (2) the event must have been

6. *Dover Elevator*, 334 Md. at 234, 638 A.2d at 764. The court of special appeals held that the trial judge erred in refusing to submit a *res ipsa loquitur* instruction to the jury. *Swann v. Prudential Ins. Co.*, 95 Md. App. 365, 413, 620 A.2d 989, 1012 (1993), *rev'd sub nom. Dover Elevator Co. v. Swann*, 334 Md. 231, 638 A.2d 762 (1994).

7. *See Dover Elevator*, 334 Md. at 253, 638 A.2d at 773.

8. *See infra* notes 144-52 and accompanying text for further discussion of the court of appeals's rationale in *Dover Elevator*.

9. *See* RESTATEMENT (SECOND) OF TORTS § 328D cmt. m (1965).

10. Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627-32 (1994). "The rule persists in these post-discovery days because of its added incentive to the full production of information, which is at the heart of modern litigation theory." *Id.* at 628.

11. *Id.*

12. *Id.*

13. *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 359, 517 A.2d 1122, 1130-31 (1986) (citing *Stevens v. Union Memorial Hosp.*, 47 Md. App. 627, 630, 424 A.2d 1118 (1981)).

caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the event must not have occurred due to a voluntary or contemplated act of the plaintiff.¹⁴ Although some jurisdictions use variants of the general rule, these variations are based in whole or in part on these three generally recognized criteria.¹⁵ All jurisdictions agree that the mere happening of an accident does not justify recourse to the doctrine of *res ipsa loquitur*.¹⁶

Res ipsa loquitur is neither an independent tort doctrine nor a cause of action. Rather, *res ipsa loquitur* is an evidentiary principle,¹⁷ and, more specifically, it is a rule of circumstantial evidence.¹⁸ In the majority of jurisdictions, the plaintiff may prove circumstances surrounding an occurrence causing his injury, and the jury may infer both negligence and causation from that occurrence.¹⁹ The jury is not compelled to accept the inference of negligence, and the defendant has no duty to present evidence to rebut it.²⁰ Thus, the burden of production does not shift.

On the other hand, a small minority of jurisdictions hold that the burden of production shifts to the defendant at the completion of the plaintiff's case.²¹ In those jurisdictions, the defendant is

14. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 39 (5th ed. 1984) (citing 4 WIGMORE, *EVIDENCE* § 2509 (1st ed. 1905)).

15. *Id.* For example, some courts suggest a fourth criterion that requires the plaintiff to demonstrate that the defendant either has knowledge of the cause of the accident or is in a better position than the plaintiff to obtain knowledge of the occurrence. *Id.* Other courts require the plaintiff to meet only the first two criteria. See, e.g., *Gayheart v. Dayton Power & Light Co.*, 648 N.E.2d 72, 78 (Ohio App. 1994). Finally, some courts add language to the first criterion that requires a layman to deduce or an expert to provide that the event would not occur but for the negligence of the defendant. See, e.g., *Lecander v. Billmeyer*, 492 N.W.2d 167, 170 (Wis. Ct. App. 1992).

16. See *RESTATEMENT (SECOND) OF TORTS* § 328D cmt. c (1965); PROSSER, *supra* note 14, § 39, at 246.

17. *RESTATEMENT (SECOND) OF TORTS* § 328D cmt. a (1965). Although *res ipsa loquitur* began as merely a rule of evidence, it has been confused as various jurisdictions apply differing procedural effects. See *id.*

18. *RESTATEMENT (SECOND) OF TORTS* § 328D cmt. b (1965); PROSSER, *supra* note 14, § 39, at 243. In fact, "[t]he great majority of American courts [still] regard *res ipsa loquitur* as no more than one form of circumstantial evidence." *Id.* § 40, at 257 (citations omitted).

19. *RESTATEMENT (SECOND) OF TORTS* § 328D cmt. b (1965). Controversy continually surrounds the procedural effects of the doctrine because courts have complicated this simple evidentiary principle with established tort maxims that switched the burden of proof from the plaintiff to the defendant. *Id.* Maryland case law holds that the plaintiff's burden of proof does not shift to the defendant. *Pahanish*, 69 Md. App. at 360, 517 A.2d at 1131.

20. See *RESTATEMENT (SECOND) OF TORTS* § 328D cmt. n (1965).

21. PROSSER, *supra* note 14, § 40, at 258. Louisiana and perhaps Colorado and Mississippi have gone even further and have held that the ultimate burden of proof shifts to the defendant, "requiring [him] to introduce evidence of greater weight than that of the plaintiff." *Id.* at 258-59.

required to overcome a rebuttable presumption that his acts constituted negligence.²² If the defendant fails to produce exonerating evidence, a verdict is directed for the plaintiff.²³

Although both the majority and minority criteria for invoking the doctrine appear straightforward, its application is often complicated and confusing.²⁴ The problems concern evidentiary presentation. Because *res ipsa loquitur* is a rule premised on circumstantial evidence, problems arise as to the amount and type of evidence which may be demonstrated by the plaintiff.²⁵ Courts are split on two issues: (1) Whether a plaintiff may point to specific acts of negligence and rely on *res ipsa loquitur*;²⁶ and (2) whether the plaintiff may introduce expert testimony and still invoke the doctrine.²⁷

B. *Specific Evidence of Negligence and Res Ipsa Loquitur*

Because *res ipsa loquitur* is premised on the existence and use of circumstantial evidence, an obvious problem arises when a plaintiff presents specific evidence of negligence. Courts generally examine the amount of evidence presented and determine on a case-by-case basis whether the doctrine may be invoked.²⁸ "Three categories are generally considered when determining the applicability of *res ipsa loquitur* when specific evidence is offered: (1) A plaintiff can offer little or no evidence of negligence; (2) a plaintiff can offer some evidence of negligence; or (3) a plaintiff can offer substantial evidence of negligence."²⁹

Under most circumstances, a plaintiff may rely upon *res ipsa loquitur* when either little or no evidence of negligence is presented

22. *Id.*

23. *Id.*

24. *Gayheart v. Dayton Power & Light Co.*, 648 N.E.2d 72, 78 (Ohio App. 1994) (noting that "the mere statement of the rule is usually much easier than its actual application") (citing *Soltz v. Colony Recreation Ctr.*, 87 N.E.2d 167 (Ohio 1949)); see also PROSSER, *supra* note 14, § 39, at 243-44; RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965).

25. PROSSER, *supra* note 14, § 40, at 260. The reason for the confusion is the intermingling of two principles: "one concerned with the sufficiency of circumstantial evidence, the other with the burden of proof . . ." *Id.* § 39, at 243. "From this fusion there emerged a tentative 'doctrine' which has been the source of some considerable trouble to the courts." *Id.* at 243-44. See generally RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965).

26. See *infra* notes 28-43 and accompanying text for a discussion of the treatment of specific evidence.

27. See *infra* notes 44-95 and accompanying text for a discussion of the effect of expert testimony on the doctrine of *res ipsa loquitur*.

28. *E.g.*, *Gayheart*, 648 N.E.2d at 78 (citing *Jennings Buick, Inc. v. Cincinnati*, 406 N.E.2d 1385 (Ohio 1980)); see, *e.g.*, *Perkins v. Hausladen*, 828 S.W.2d 652, 656 (Ky. 1992) (concluding that, based on the facts of this particular case, evidence was sufficient to present *res ipsa loquitur* instruction to the jury); cf. Alan H. Konig, Note, *Tort Law — Res Ipsa Loquitur in Medical Malpractice Actions: Mireles v. Broderick*, 23 N.M. L. REV. 411, 415 (1993).

29. Konig, *supra* note 28, at 415.

or when some evidence of negligence is presented,³⁰ provided that, at a minimum, there is enough evidence to “remove the causation question from the realm of conjecture and place it within the realm of permissible inferences.”³¹ However, when a plaintiff attempts to furnish a complete explanation of the cause of an accident by presenting substantial evidence of negligence, courts are not likely to allow access to the doctrine.³²

The reasoning behind the prevailing view, that presentation of substantial evidence erodes the usefulness of the doctrine of *res ipsa loquitur*, can be found in the meaning of the Latin phrase itself. Because *res ipsa loquitur* literally means “the thing speaks for itself,” courts are willing to let the act or occurrence speak for the plaintiff.

30. *Id.* at 415.

Generally, when a plaintiff offers little or no evidence of negligence, the doctrine is still applicable. When a plaintiff offers some evidence of negligence, a court may still allow the application of *res ipsa loquitur*. When a plaintiff offers substantial evidence of negligence, courts generally tend to prohibit the use of the doctrine.

Id. (citations omitted).

31. *Lecander v. Billmeyer*, 492 N.W.2d 167, 170 (Wis. Ct. App. 1992) (quoting *Turtenwald v. Aetna Casualty & Sur. Co.*, 201 N.W.2d 1, 6 (Wis. 1972)).

32. *E.g.*, *Sanderson v. Chapman*, 487 F.2d 264, 267 (9th Cir. 1973) (holding that if plaintiff introduces specific evidence of negligence, he cannot invoke doctrine of *res ipsa loquitur*); *Southern Bell Tel. & Tel. Co. v. La Roche*, 325 S.E.2d 908, 910 (Ga. Ct. App. 1985) (finding doctrine inapplicable where cause of accident is fully explained but applicable only in cases where there is no evidence of consequence); *McCann v. Baton Rouge Gen. Hosp.*, 276 So. 2d 259, 261 (La. 1973) (finding doctrine irrelevant when body of specific evidence as to cause of accident exists); *Armstrong v. Johnson Motor Lines, Inc.*, 12 Md. App. 492, 497, 280 A.2d 24, 27 (1971) (holding *res ipsa loquitur* inapplicable where everything relative to case is known); *Massengill v. Starling*, 360 S.E.2d 512, 514-15 (N.C. Ct. App. 1987) (finding testimony at trial so complete as to leave no room for inference); *Perry v. H & S Mechanical Constr.*, 578 S.W.2d 423, 427 (Tex. Ct. App. 1979) (holding that where defendant's acts and omissions are conclusively established and undisputed at trial, *res ipsa loquitur* does not apply); *Dodge, Inc. v. Drott Tractor Co.*, 198 N.W.2d 621, 623 (Wis. 1972) (holding that doctrine cannot be applied where cause of accident has been clearly established). *Contra* *Bedford v. Re*, 510 P.2d 724, 727 (Cal. 1973) (introducing specific acts of negligence does not deprive plaintiff of the *res ipsa loquitur* doctrine); *Ciciarelli v. Ames Dep't Stores, Inc.*, 557 N.Y.S.2d 787, 788 (N.Y. App. Div. 1990) (pleading specific acts of negligence does not defeat the doctrine of *res ipsa loquitur*); *Seneca Ins. Co. v. Vogt Auto Serv.*, 573 N.E.2d 223, 224 (Ohio Municip. 1991) (holding that plaintiff does not lose the right to rely on doctrine by pleading or proving specific acts of negligence); *Jones v. Tarrant Util. Co.*, 638 S.W.2d 862, 865 (Tex. 1982) (finding doctrine applicable if specific negligence is shown).

For a thorough discussion of the impact of specific evidence on the doctrine of *res ipsa loquitur*, as well as a description of applicable cases, see 1 STUART M. SPEISER, *THE NEGLIGENCE CASE: RES IPSA LOQUITUR* §§ 5:18 to 5:19 (1972 & Supp. 1995).

The doctrine was created on the premise that the plaintiff either lacked evidence³³ or was denied evidence by the defendant.³⁴ Thus, allowing the plaintiff merely to point to an occurrence and rely upon the circumstances surrounding the incident is justified by the doctrine, while providing a complete explanation of the occurrence is not.³⁵

This reasoning was adopted by the Court of Appeals of Ohio in *Gayheart v. Dayton Power & Light Co.*³⁶ In *Gayheart*, the plaintiff brought an action against a power company and alleged that he was injured when the defendant negligently caused an electrical fire.³⁷ The plaintiff relied on *res ipsa loquitur* and presented testimony at trial that supported three possible causes of the fire.³⁸ Although the defendant argued that the plaintiff's evidence was insufficient to invoke the doctrine,³⁹ the court of appeals disagreed. The court noted that the fact that the plaintiff could not specify which of the three causes was the true cause of the accident did not preclude the *res ipsa loquitur* instruction.⁴⁰ "Rather, it [made] this case a particularly appropriate one for the application of the . . . doctrine."⁴¹ The court concluded that had the plaintiff pointed to the exact cause of the accident there would have been no need to apply the doctrine.⁴²

As the *Gayheart* opinion illustrates, it is often the facts of each particular case that will dictate whether the plaintiff may rely on the doctrine. If a court determines that the amount of specific evidence presented is sufficient to destroy the inference upon which the doc-

33. See PROSSER, *supra* note 14, § 39, at 212-13.

34. *Id.* at 225. Today, however, the fact that evidence is in the hands of the defendant is but one factor to consider. RESTATEMENT (SECOND) OF TORTS § 328D cmt. k (1965). The premise that the plaintiff is in no position to obtain evidence is central to the purpose for which the doctrine was created. See PROSSER, *supra* note 14, § 39, at 217-18.

35. See *supra* note 32 for a comparison of cases addressing the issue of the impact of specific evidence on the doctrine.

36. 648 N.E.2d 72 (Ohio App. 1994).

37. *Id.* at 75.

38. *Id.* The plaintiff's expert, Dr. Mericle, originally testified that any of five causes could have led to the accident. *Id.* Dr. Mericle, however, ruled out two of the five causes — lightning and accidents — and concluded that one of the three remaining causes was responsible for the fire. *Id.* In addition, Dr. Mericle testified that the other three causes were under the complete control of the defendants. *Id.*

39. *Id.* at 77. The defendants presented testimony from three experts. *Id.* at 75-76. The experts disagreed as to the cause of the fire. *Id.* The defense hoped to show that because the cause could not be pinpointed, the plaintiff's case had to fail. *Id.* at 78-79.

40. *Id.*

41. *Id.*

42. *Id.*

trine is based, a *res ipsa loquitur* instruction will not be given to the jury.⁴³

C. *The Impact of Expert Testimony on the Doctrine of Res Ipsa Loquitur*

Problems also arise when expert testimony is presented in a case in which the plaintiff relies on *res ipsa loquitur*. Expert testimony is often used to demonstrate the cause of an accident.⁴⁴ Experts point to specific occurrences and render opinions based on the evidence as to how or why an accident took place. Expert testimony, by definition, is often substantial evidence in itself and, thus, may preclude resort to the doctrine of *res ipsa loquitur*.⁴⁵

1. Medical Malpractice

Medical malpractice cases are the most obvious examples of cases involving expert testimony.⁴⁶ In most jurisdictions, expert testimony is not only needed to demonstrate negligence, it is often required.⁴⁷ Medical malpractice cases are also particularly appropriate for *res ipsa loquitur*.⁴⁸ Such cases are "of the type which come[] within the reason and spirit of the doctrine more fully perhaps than any other."⁴⁹

Patients who are negligently injured during surgery are often unconscious and, thus, are unable to point to the specific cause of the injury.⁵⁰ In addition, unconscious plaintiffs are in no position to

43. See *supra* notes 28-43 and accompanying text for a discussion of the various approaches courts have taken in addressing the impact of specific evidence on the doctrine.

44. Typically, expert testimony is necessary in medical malpractice cases. *E.g.*, *Fulton v. Pfizer Hosp. Prods. Group*, 872 S.W.2d 908, 912 (Tenn. Ct. App. 1993) (holding that because laymen cannot understand the complex nature of medical malpractice cases, expert testimony is required). Cases involving complex matters, machinery or theories also require expert testimony. *See, e.g.*, *Gayheart v. Dayton Power & Light Co.*, 648 N.E.2d 72, 75-76 (Ohio Ct. App. 1994) (finding expert testimony necessary to explain probable cause of fire); *DaVinci Creations, Inc. v. Nu-Frame Co.*, 418 A.2d 851 (R.I. 1980) (holding testimony and photographs taken by expert demonstrated probable cause of accident); *see also* RESTATEMENT (SECOND) OF TORTS § 328D cmt. d (1965). Where there is "no fund of common knowledge," expert testimony may be necessary. *Id.*

45. *See, e.g.*, *Lecander v. Billmeyer*, 492 N.W.2d 167, 171 (Wis. Ct. App. 1992) (where expert testimony points to exact cause of injury, plaintiff may not rely on *res ipsa loquitur*).

46. *See supra* note 44 and accompanying text.

47. *See supra* note 44.

48. *See, e.g.*, *Ybarra v. Spangard*, 154 P.2d 687, 689 (Cal. 1944).

49. *Id.*

50. *Id.*

have control over the instrumentality that causes the injury, while the doctor has complete control.⁵¹ Thus, *res ipsa loquitur* has been invoked in a case where a physician left a surgical implement within a patient's body cavity.⁵² In such a case, it is clear, even to laymen, that a surgical implement would not be left in a patient's body in the absence of negligence. In less overt cases, however, a plaintiff may need to introduce expert testimony to demonstrate that the injury complained of resulted from the substandard care of the attending physician.⁵³

There are two opposing theories concerning the use of expert testimony in medical malpractice cases in which the plaintiff relies on *res ipsa loquitur*: "(1) The use of such testimony is fatal to the doctrine; or (2) The use of such testimony is permissible and, in some cases, crucial to the doctrine."⁵⁴

Jurisdictions that subscribe to the view that expert testimony is fatal to *res ipsa loquitur* in medical malpractice cases reason that the doctrine requires that a layperson be able to rely on *common knowledge* and experience in determining whether the occurrence could not have happened in the absence of negligence.⁵⁵ Thus, when an expert

51. *See id.*

52. *See Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990) (citations omitted). Other typical examples where the nature of the injuries are within the common knowledge of laymen include negligence in the operation of a surgical instrument and operating on the wrong portion of the body. *Id.* (citations omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 328D cmt. d (1965). It can be fairly said that types of medical malpractice in which, for example, a sponge is left in the patient's body, are events that do not normally occur in the absence of negligence. *Id.*

53. *See supra* note 44.

54. Konig, *supra* note 28, at 413.

55. *E.g.*, *LePelley v. Grefenson*, 614 P.2d 962, 966 (Idaho 1980) (holding *res ipsa loquitur* applicable only in those cases where layperson can rely on common knowledge and observation), *superseded by statute as stated in Sherwook v. Carter*, 805 P.2d 452, 460 (Idaho 1991); *see Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990) (finding that *res ipsa loquitur* is rarely applied in medical malpractice actions unless the nature of alleged malpractice is within common knowledge of laymen); *see also Ward v. United States*, 838 F.2d 182, 188 (6th Cir. 1988) (addressing Tennessee law); *Lemke v. United States*, 557 F. Supp. 1205, 1210 (D.N.D. 1983) (interpreting North Dakota Law); *Monk v. Vesely*, 525 So. 2d 1364, 1365-66 (Ala. 1988); *McWain v. Tucson Gen. Hosp.*, 670 P.2d 1180, 1183 (Ariz. Ct. App. 1983); *Lacy v. G.D. Searle & Co.*, 484 A.2d 527, 530 (Del. Super. Ct. 1984); *Savina v. Sterling Drug, Inc.*, 795 P.2d 915, 934 (Kan. 1990); *Harris v. Penninger*, 613 S.W.2d 211, 214-15 (Mo. Ct. App. 1981).

There is some confusion as to whether common knowledge is a hurdle which must be passed in order to invoke the doctrine or whether common knowledge is simply a rationale upon which courts base the decision not to allow recourse to *res ipsa loquitur* in medical malpractice actions. *See Konig, supra* note 28,

is necessary to furnish an explanation for the occurrence, the evidence has left the realm of common understanding and the "act" may no longer be said to "speak for itself."⁵⁶

Other jurisdictions proscribe reliance on the doctrine when expert testimony is presented because the testimony purports to furnish a complete explanation for the occurrence.⁵⁷ This rationale is essentially an extension of the argument that presenting specific acts of negligence precludes reliance on the doctrine.⁵⁸ Because experts often testify that a specific surgical procedure was negligently utilized or omitted, courts will treat such specific testimony as direct evidence — evidence which destroys the inferences upon which *res ipsa loquitur* must be based.⁵⁹

"The prevalent view, however, appears to be that expert testimony *may* be used in support of *res ipsa loquitur* in medical malpractice actions."⁶⁰ Whether the doctrine may be invoked depends on the nature and extent of the plaintiff's expert testimony.⁶¹ For example, if the expert testimony merely furnishes a description of a surgical procedure or only provides information necessary to understand the alleged injury, the court will likely give a *res ipsa loquitur* instruction.⁶² On the other hand, if the testimony furnishes a complete explanation of the accident, the court will hold the doctrine inappli-

at 413. Most jurisdictions that adhere to some form of common knowledge requirement in medical malpractice cases accept only those proverbial cases of the "sponge in the body" as common knowledge cases — in which *res ipsa loquitur* is applicable. See *supra* note 52.

56. See PROSSER, *supra* note 14, § 39, at 217. Expert testimony "may destroy an inference which would otherwise arise." *Id.*; see also Jeffrey W. Puryear, *Schmidt v. Gibbs: The Application of Res Ipsa Loquitur to Arkansas Medical Malpractice Litigation*, 46 ARK. L. REV. 397, 404-05 (1993).

57. *E.g.*, *Lecander v. Billmeyer*, 492 N.W.2d 167, 170-71 (Wis. Ct. App. 1992). The court in *Lecander* noted that expert testimony may be utilized in medical malpractice actions to demonstrate that a happening could not have occurred in the absence of negligence. *Id.* "Medical malpractice actions are treated no differently than any other actions in which application of *res ipsa loquitur* is sought." *Id.* at 171. However, the court concluded that the expert "testimony . . . offered was so specific that it provided a full and complete explanation of the event." *Id.*

58. See *supra* notes 28-43 and accompanying text for a discussion of the impact of specific evidence on *res ipsa loquitur*.

59. See *supra* notes 30-32 and accompanying text.

60. Konig, *supra* note 28, at 414 (emphasis added).

61. Compare *Lecander*, 492 N.W.2d at 171 (finding that doctrine may not be invoked where testimony provides complete explanation of event) with *Calvin v. Jewish Hospital of St. Louis*, 746 S.W.2d 602, 607 (Mo. Ct. App. 1988) (holding that expert testimony on several possible theories of recovery does not present necessary specificity required to bar recourse to *res ipsa loquitur*).

62. See *Calvin*, 746 S.W.2d at 607.

cable.⁶³ Thus, whether the testimony is allowed to coexist with the doctrine turns on the earlier question of whether the testimony demonstrates little or some evidence of negligence or substantial evidence of negligence.⁶⁴ In sum, the focus is not on the expert but, rather, on the evidence in general.

2. Expert Testimony Outside Medical Malpractice

Few jurisdictions have addressed the issue of whether expert testimony defeats reliance on *res ipsa loquitur* in cases other than medical malpractice.⁶⁵ The majority of jurisdictions focus on the evidence rather than on the fact that an expert is used.⁶⁶ Their reasoning is the same as that used by those jurisdictions that allow expert testimony in medical malpractice actions in which the plaintiff relies on *res ipsa loquitur*.⁶⁷ For example, if the testimony furnishes a complete explanation of the occurrence, the plaintiff will not be allowed to rely on the doctrine; however, informational testimony or testimony as to the possibility, rather than as to the certainty, of a cause can be used to establish an inference of negligence and the doctrine will not be defeated.⁶⁸

An appropriate example of the use of expert testimony in a *res ipsa loquitur* case was presented by the plaintiff in *Williams v. Otis Elevator Co.*⁶⁹ In *Williams*, the plaintiff "fell and sustained injuries when . . . the elevator in which she was riding suddenly lurched as she was exiting"⁷⁰ The plaintiff sued the manufacturer and alleged that the elevator was negligently maintained and repaired.⁷¹ The plaintiff relied on expert testimony to support her allegation that

63. *Lecander*, 492 N.W.2d at 171. Other courts have held in a similar fashion. See, e.g., *infra* notes 69-80 and accompanying text for a discussion of *Williams v. Otis Elevator Co.*, 598 A.2d 302 (Pa. Super. 1991).

64. See *supra* notes 28-43 for a discussion of the impact of specific evidence on *res ipsa loquitur*.

65. See generally SPEISER, *supra* note 32. Speiser's work provides a comprehensive analysis of *res ipsa loquitur*, including an extensive listing of relevant cases. Although many cases are provided for each proposition (through 1995), there is little case law covering expert testimony in non-medical malpractice cases. See *id.*

66. E.g., *Williams v. Otis Elevator Co.*, 598 A.2d 302 (Pa. Super. 1991).

67. See *supra* notes 46-64 for a discussion of *res ipsa loquitur* as it is used in medical malpractice actions.

68. See *supra* notes 60-64.

69. 598 A.2d 302 (Pa. Super. 1991).

70. *Id.* at 303.

71. *Id.* The plaintiff also brought an action against the owner of the building in which she was injured. *Id.* The jury returned a verdict and apportioned negligence as follows: manufacturer — 55%; building owner — 30%; plaintiff — 15%. *Id.* The claim against the owner was settled, leaving only the manufacturer as defendant on appeal. *Id.*

the defendant was negligent in failing to respond to "call backs" when the elevator was malfunctioning.⁷² The expert also opined that the lurching of the elevator was probably caused by a defect in component parts.⁷³ After a trial court verdict for the plaintiff, the defendant appealed and argued that the evidence presented was insufficient to warrant the verdict.⁷⁴

On appeal, the Superior Court of Pennsylvania discussed the evidence presented by the plaintiff.⁷⁵ The court concluded that the opinion testimony was sufficient to support the verdict⁷⁶ and that the expert opinion testimony did not preclude recourse to *res ipsa loquitur*.⁷⁷ Acknowledging that a "res ipsa loquitur instruction is not warranted in the face of clear and indubitable proof of negligence . . . ," the court noted that "where the facts of a case lie somewhere in a grey zone . . . [the plaintiff] must rely on the *res ipsa loquitur* instruction alone."⁷⁸ Because the plaintiff's elevator expert was unable to identify the exact cause of the accident, the court held that the trial judge acted properly in issuing a *res ipsa loquitur* instruction.⁷⁹ Thus, the court based its holding not on whether an expert was testifying but, rather, on whether the evidence was of such a specific nature as to preclude recourse to the doctrine.⁸⁰

Although *res ipsa loquitur* generally may not be invoked when a plaintiff demonstrates the exact cause of an accident, some jurisdictions will not allow recourse to the doctrine if the plaintiff's expert does not point to the cause of the occurrence with a certain degree of specificity.⁸¹ Such was the case in the Supreme Court of Rhode Island's decision in *DaVinci Creations, Inc. v. Nu-Frame*.⁸² In *Nu-Frame*, the plaintiff's jewelry store was partially destroyed by fire.⁸³ The fire had allegedly begun on the defendant's premises, which were

72. *Id.* at 304. The expert testified that the defendant should have been on notice that the elevator was in ill repair by the number of "call backs" received. *Id.*

73. *Id.* Specifically, the expert testified that the brushes, brakes or leveling switches — parts which the defendant had agreed to maintain — probably caused the accident. *Id.*

74. *Id.* at 303.

75. *Id.* at 304-05.

76. *Id.* at 304.

77. *Id.*

78. *Id.* at 305-06 (quoting *Farley v. Philadelphia Traction Co.*, 18 A. 1090 (Pa. 1890)).

79. *Id.* at 306.

80. *See id.*

81. *See, e.g.*, *DaVinci Creations, Inc. v. Nu-Frame*, 418 A.2d 851 (R.I. 1980), and the cases cited therein. For a discussion of the facts, holding and rationale of *DaVinci Creations*, see *infra* notes 82-95.

82. 418 A.2d 851 (R.I. 1980).

83. *Id.* at 852.

located directly above the plaintiff's store.⁸⁴ Although the fire did not reach the floor where the plaintiff stored his merchandise,⁸⁵ his wares were nonetheless damaged by water from the automatic sprinkler system.⁸⁶ Plaintiff sued the defendant, alleging property damage, under the theory that the fire resulted from the defendant's negligence in maintaining faulty equipment on his premises.⁸⁷ Expert testimony was introduced by the plaintiff that indicated the fire began on defendant's premises.⁸⁸ The expert testified that, although he could not pinpoint the exact components that might have caused the fire, his testing equipment indicated that the defendant's electrical machinery was in ill repair and was prone to short-circuit.⁸⁹ Based on his observations, the expert opined that a switch-box caused the fire.⁹⁰ In opposition, the defendant presented expert testimony that the machinery in question was brand new and was, thus, not prone to malfunction.⁹¹

The Supreme Court of Rhode Island determined that the trial court did not err either in dismissing the plaintiff's case or in refusing to submit a *res ipsa loquitur* instruction to the jury.⁹² The court first noted that in attempting to establish *res ipsa loquitur* a plaintiff could present expert testimony to "assist the trial court in pinpointing the probable accident-causing agency or instrumentality or to offer a tenable theory of the probable manner in which the accident occurred."⁹³ However, the court cautioned that "an expert positing a theory of causation must speak in terms of strong 'probability.'"⁹⁴ Because the expert left the "manner in which the actual kindling took place . . . to conjecture," and because the expert conceded that other causes were possible, the court held that the plaintiff had failed to establish that minimum of evidence upon which a plaintiff may presume a defendant's negligence.⁹⁵ Thus, the plaintiff's "dilemma"

84. *Id.*

85. *Id.* The fire began on the fourth floor and burned partially through the third floor ceiling. *Id.* The plaintiff's merchandise was stored on the second and third floors. *Id.*

86. *Id.*

87. *Id.* Plaintiff alleged that a poorly maintained switch-box in a jack lathe had malfunctioned and started the fire. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 854-55.

93. *Id.* at 854.

94. *Id.* The court quoted "probability" in an apparent effort to stress that the evidence posited by the expert must point, not necessarily conclusively but, at a minimum, *strongly* to the cause. *See id.*

95. *Id.* The court bolstered its holding with the following reasoning:

in this case was not "proving too much" to rely on the doctrine, it was proving "too little" to even meet the minimal evidentiary standards required to invoke the doctrine.

D. Maryland Law

Maryland requires that the plaintiff prove three elements in order to invoke the doctrine of *res ipsa loquitur*.⁹⁶ A plaintiff must show: (1) an injury that usually does not occur in the absence of negligence, which was (2) caused by an instrumentality within the exclusive control of the defendant, and which occurred (3) under circumstances indicating that the injury did not result from the act or omission of the plaintiff.⁹⁷

The Maryland court of appeals explained the underlying rationale behind the doctrine of *res ipsa loquitur* in *Blankenship v. Wagner*.⁹⁸ The *Blankenship* court explained: "The justice of the rule permitting proof of negligence by circumstantial evidence is found in the circumstances that the principal evidence of the true cause of the accident is accessible to the defendant, but inaccessible to the victim of the accident."⁹⁹ Thus, when a plaintiff offers proof of "specific grounds of negligence" — presumably inaccessible evidence — Maryland courts have held that the plaintiff is precluded from relying on the doctrine of *res ipsa loquitur*.¹⁰⁰

An instructional case addressing this evidentiary limitation is *Hickory Transfer Co. v. Nezbed*,¹⁰¹ in which the plaintiffs, who were injured when a tractor trailer crashed into their home, presented

When a suggested cause of a fire cannot be stated as more probable than any other, or when an agency or instrumentality causing a fire cannot be specified with a sufficient degree of certitude, the factfinder is left to speculate about the existence of negligence. We believe that such is the case here. We cannot say, therefore, that the expert's testimony met the strong-probability standard by which we evaluate the probative value of an expert opinion introduced to establish an evidentiary basis for causation in negligence.

Id.

96. *Chesapeake & Potomac Tel. Co. v. Hicks*, 25 Md. App. 503, 516, 337 A.2d 744, 752 (1975); *see also Meda*, 318 Md. at 423, 569 A.2d at 204; *Pahanish*, 69 Md. App. at 359-60, 517 A.2d at 1131. Virtually every American jurisdiction has adopted some form of this three-element test, with variations occurring only in the language used. *See* RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965).

97. *Hicks*, 25 Md. App. at 516, 337 A.2d at 752.

98. 261 Md. 37, 273 A.2d 412 (1971).

99. *Id.* at 41, 273 A.2d at 414.

100. *Peterson v. Underwood*, 258 Md. 9, 20, 264 A.2d 851, 857 (1970); *Hickory Transfer Co. v. Nezbed*, 202 Md. 253, 262-63, 96 A.2d 241, 245 (1953).

101. 202 Md. 253, 96 A.2d 241 (1953).

evidence that the accident was caused by the failure of the tractor trailer's brakes.¹⁰² The court concluded that the plaintiffs actually "proved the details of the happening," thereby precluding their reliance on *res ipsa loquitur*.¹⁰³ In addition, the plaintiffs failed to prove negligence on the part of the defendants.¹⁰⁴ The court reasoned that by "explain[ing] away the possible inference of negligence" the plaintiffs, "[p]aradoxically, proved too little and too much."¹⁰⁵

Hickory Transfer limited the range of evidence that a plaintiff could present if he intended to rely on *res ipsa loquitur*; this instilled a reluctance in plaintiffs to produce any direct evidence of negligence, especially in light of subsequent case law.¹⁰⁶ For example, in *Blankenship v. Wagner*¹⁰⁷ the plaintiff's attorney, in an effort to avoid proving "too much," elicited testimony from only the plaintiff and the defendant.¹⁰⁸ The plaintiff's counsel rested after presenting the events surrounding the accident.¹⁰⁹ The trial judge refused to submit *res ipsa loquitur* instructions to the jury and granted a directed verdict for the defendant.¹¹⁰ In reversing, the court of appeals addressed the paradoxical situation created by *Hickory Transfer* and

102. *Id.* at 256, 96 A.2d at 242.

103. *Id.* at 263, 96 A.2d at 245.

104. The plaintiffs sought to explain the reason why the truck struck their house after the truck collided with another automobile on a nearby highway. *Id.* at 257-59, 96 A.2d at 242-43. The court found that the plaintiffs' sole theory of negligence was brake failure. *Id.* at 261-62, 96 A.2d at 244-45.

105. *Id.* The court's explanation in *Hickory Transfer* has become the established model to which numerous cases addressing evidentiary presentation in *res ipsa loquitur* cases have deferred. See, e.g., *Blankenship v. Wagner*, 261 Md. 37, 46, 273 A.2d 412, 417 (1971) (holding that where plaintiff and defendant purport to provide all details of accident, *res ipsa loquitur* does not apply); *Wrenn v. Vincent*, 235 Md. 466, 471, 201 A.2d 768, 771 (1964) (finding that direct inference is sufficient to go to jury and precludes reliance on *res ipsa loquitur*).

106. Following *Hickory Transfer*, the court extended the "too much too little doctrine" to preclude reliance on *res ipsa loquitur* when specific evidence was presented by the plaintiff or the defendant. *Coastal Tank Lines, Inc. v. Carroll*, 205 Md. 137, 146, 106 A.2d 98, 102 (1954). Further, in *Smith v. Bernfeld*, where the plaintiff brought suit for injuries sustained when she fell from a beauty salon chair, the court found that the attempt to prove specific grounds of negligence precluded reliance on *res ipsa loquitur*. 226 Md. 400, 403, 174 A.2d 53, 54 (1961). In *Smith*, the plaintiffs attempted to establish the defendant's negligence by offering evidence that the defendant's employees, having knowledge of the defective construction of the chair, failed to bolt it to the floor. *Id.*

107. 261 Md. 37, 273 A.2d 412 (1971). The plaintiff was injured when steps collapsed while he and a co-worker were delivering a refrigerator to the defendant's house. *Id.* at 39-40, 273 A.2d at 413-14.

108. *Id.* at 39, 273 A.2d at 413.

109. See *id.*

110. *Id.*

established a less restrictive rule. The court reasoned that a plaintiff should not be discouraged from coming forth with circumstantial evidence that tends to show the defendant's negligence.¹¹¹ Nevertheless, the court explained that *res ipsa loquitur* may not be invoked when a plaintiff presents more than circumstantial evidence and demonstrates that "everything relative to the case is known."¹¹²

Because the presentation of specific evidence precludes the use of *res ipsa loquitur*, an obvious problem arises in cases that involve expert testimony, which by its nature involves detailed explanation. Prior to 1990, the Court of Appeals of Maryland had not definitively answered the question of whether expert testimony precluded reliance on the doctrine of *res ipsa loquitur*. In the 1990 companion cases of *Meda v. Brown*¹¹³ and *Orkin v. Holy Cross Hospital*,¹¹⁴ the court held that *res ipsa loquitur* was not applicable in medical malpractice cases if expert testimony as to the cause of negligence was presented.¹¹⁵ The court explained that while the expert opinions involved inferential reasoning similar to that used in applying *res ipsa loquitur*, the doctrine could not be applied because the jury's inferences must be drawn from the facts surrounding the occurrence rather than from inferences posited by experts.¹¹⁶ The court determined that "[c]omplex

111. *Id.* at 46, 273 A.2d at 417. Circumstantial evidence alone is consistent with the inference relied upon under *res ipsa loquitur* because the jury is free to speculate as to the cause of the plaintiff's injury. *See id.* However, if either the plaintiff or defendant purports to prove every relative aspect of the case, the inference is negated. The jury is left no room to speculate. *Id.*; *see infra* text accompanying note 116.

112. *Blankenship*, 261 Md. at 46, 273 A.2d at 417. The court relied on *Nalee, Inc. v. Jacobs*, 228 Md. 525, 180 A.2d 677 (1962), which qualified the holding in *Smith*. *See supra* note 106. In *Nalee*, the plaintiff brought suit against the defendant hotel for injuries sustained when a bench fell over and struck his right foot. *Nalee*, 228 Md. at 526, 180 A.2d at 677. The plaintiff's evidence consisted of testimony that the bench was not secured to the floor. *Id.* at 528-29, 180 A.2d at 678-79. The *Nalee* court held that *res ipsa loquitur* was appropriate because the plaintiff went no further than showing the happening of the event. *See id.* at 532, 180 A.2d at 680. Addressing its earlier holding in *Smith*, the court explained that the plaintiff in *Smith* was precluded from relying on *res ipsa loquitur* because she developed all of the facts with regard to the actual happening and cause of the accident. *Id.*

113. 318 Md. 418, 569 A.2d 202 (1990). In *Meda*, a surgical patient alleged that she was positioned incorrectly while under anesthesia, resulting in damage to the ulnar nerve of her arm. *Id.* at 427, 569 A.2d at 206. Two physicians testified that the plaintiff's injuries could not have occurred in the absence of negligence. *See id.*

114. 318 Md. 429, 569 A.2d 207 (1990). In *Orkin*, which involved facts nearly identical to *Meda*, the plaintiff's expert testified that the injury was most probably caused by incorrect positioning during surgery. *Id.* at 431-33, 569 A.2d at 208-09.

115. *Id.* at 433, 569 A.2d at 206-07; *see Meda*, 318 Md. at 425, 569 A.2d at 205.

116. *Meda*, 318 Md. at 427-29, 569 A.2d at 206-07.

issues of the type generated by a case of [medical malpractice] should not be resolved by laymen without expert assistance. *Res ipsa loquitur* does not apply under these circumstances."¹¹⁷

The Court of Appeals of Maryland's subsequent holding in *Dover Elevator Co. v. Swann* is significant because it extended the holding in *Orkin* to include all complex cases requiring expert testimony, effectively dropping the medical malpractice qualification.¹¹⁸

III. THE INSTANT CASE

In *Dover Elevator*, the plaintiff, David Swann, injured his back when he entered an elevator in an office building on February 2, 1987.¹¹⁹ Upon stopping at Swann's floor, the elevator failed to become level with the floor. Instead, the elevator came to rest approximately one foot below the floor.¹²⁰ Because Swann was conversing with a co-worker while entering the elevator and did not notice the misleveling, he stumbled and struck the back of the elevator.¹²¹ Swann brought suit in the Circuit Court for Montgomery County praying for three million dollars in damages for injuries sustained from his fall.¹²² The original complaint charged that Prudential, the owner of the building, and Dover were liable under negligence and product liability theories.¹²³

At trial, Swann alleged several theories of liability concerning the maintenance of the elevator.¹²⁴ Swann sought to prove that Dover negligently repaired the elevator by cleaning rather than replacing contacts that had "burned together" and that this negligence resulted

117. *Orkin*, 318 Md. at 433, 569 A.2d at 209.

118. *See supra* notes 113-17 and accompanying text, discussing *Orkin*, and *infra* notes 137-52 and accompanying text, discussing *Dover Elevator*.

119. 334 Md. 231, 234, 638 A.2d 762, 764 (1994). The office building, located at 2277 Research Boulevard in Rockville, Maryland, was owned by the Prudential Insurance Company of America (Prudential). Swann's employer, IBM, leased the building and was the sole tenant. The building was managed by Carey Winston Company (Winston). The elevator was manufactured, installed and maintained by Dover Elevator Company (Dover). *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 235, 638 A.2d at 764.

123. *Id.* An amended complaint included Winston as a defendant to the action as well. Count I of Swann's complaint alleged negligent maintenance of the elevator against all named defendants, and Count II alleged product liability. *Swann v. Prudential Ins. Co.*, 95 Md. App. 365, 370, 620 A.2d 989, 992 (1993), *rev'd*, *Dover Elevator Co. v. Swann*, 334 Md. 231, 638 A.2d 762 (1994). Count II was subsequently dismissed by Swann. *Id.*

124. Swann alleged that Dover was negligent in failing to service the elevator correctly, in keeping proper service records and in failing to stock repair parts. *Dover Elevator*, 334 Md. at 235, 638 A.2d at 764.

in the misleveling of the elevator.¹²⁵ In support of his allegation, Swann offered the expert testimony of Donald Moynihan, an elevator consultant and engineer.¹²⁶ Moynihan testified that he had conducted an inspection of the elevator and had reviewed all of Dover's available maintenance records.¹²⁷ He offered his expert opinion that the probable cause of the misleveling of the elevator was the problem with contacts fourteen and fifteen.¹²⁸ Moynihan also testified that Dover's repairman, Ronald Bothell, acted unreasonably in cleaning the contacts instead of replacing them.¹²⁹ In response, the defense offered the testimony of Bothell, who asserted that the contacts were not welded together and, therefore, that filing and cleaning the contacts, rather than replacing them, was an appropriate course of conduct.¹³⁰ The jury returned verdicts in favor of all named defendants.¹³¹ Swann appealed to the Court of Special Appeals of Maryland, alleging trial court errors in excluding and admitting certain evidence and in failing to give jury instructions on a variety of issues, including *res ipsa loquitur*.¹³²

The court of special appeals held that the trial court erred when it refused to submit jury instructions on *res ipsa loquitur*.¹³³ The court found that Swann's attempt to prove specific acts of negligence did not prevent him from relying on the doctrine.¹³⁴ The court of appeals reversed the intermediate appellate court.¹³⁵ The court of

125. Specifically, Swann's allegations centered around a series of service calls for the misleveling of the elevator from December 1986 to February 1987. *Id.* Swann sought to prove that the misleveling of the elevator was caused by contacts 14 and 15, which had "burned closed." *Id.* at 240, 638 A.2d at 767.

126. *Id.* at 235, 638 A.2d at 764.

127. *Id.*

128. *Id.* at 244, 638 A.2d at 769.

129. Moynihan testified that cleaning the contacts was "[t]errible. It shouldn't be done. . . . It was wrong." He further testified that replacing the contacts was the only reasonable course of conduct, explaining that "[i]t is the only way to do [it]. . . . [Y]ou can't correct them by cleaning them when they are burned like that. They should be replaced." *Id.* at 241, 638 A.2d at 767.

130. *Id.* at 241-42, 638 A.2d at 767.

131. *Id.* at 235, 638 A.2d at 764.

132. *Swann*, 95 Md. App. at 371, 620 A.2d at 992.

133. *Id.* at 397, 620 A.2d at 1005. The court of special appeals found that the proposed jury instruction referred exclusively to Dover because Swann's proposed jury instruction did not make reference to any other named defendants. *Id.* at 389, 620 A.2d at 1001.

134. The court of special appeals reversed the judgment in favor of Dover and affirmed the judgments entered for Prudential and Winston. *Id.* at 418, 620 A.2d at 1015.

135. Dover presented two issues to the Court of Appeals of Maryland: (1) whether the plaintiff, who has offered direct evidence of the specific cause of his injuries, may rely on the doctrine of *res ipsa loquitur* in establishing the defendant's negligence and (2) whether the trial judge erred in refusing to

appeals found that the evidence presented by Swann was direct evidence supported by expert testimony that precluded reliance on the doctrine of *res ipsa loquitur*.¹³⁶

The Court of Special Appeals of Maryland, in *Swann v. Prudential Insurance Co.*,¹³⁷ had held that Swann did not attempt to provide a complete explanation of the accident in question.¹³⁸ The mere fact that Swann offered evidence as to the cause of the accident did not preclude reliance on *res ipsa loquitur*.¹³⁹ The intermediate appellate court found that *Blankenship v. Wagner*¹⁴⁰ and *Nalee, Inc. v. Jacobs*¹⁴¹ had made it clear that attempts to prove specific acts of negligence would not preclude the invocation of *res ipsa loquitur*.¹⁴² The court concluded that *Swann* aligned Maryland with the majority of jurisdictions which hold that "an unsuccessful attempt to prove specific negligence on the defendant's part, or the introduction of evidence of specific negligence not clearly establishing the precise cause of injury, will not deprive the plaintiff of the benefits . . . of *res ipsa loquitur*."¹⁴³

The Court of Appeals of Maryland, however, found factual distinctions between Swann's case and both *Blankenship* and *Nalee*.¹⁴⁴ The court concluded that both *Blankenship* and *Nalee* represented situations in which the plaintiffs sought to introduce circumstantial evidence of the negligent acts.¹⁴⁵ In Swann's case, however, the court

instruct the jury on *res ipsa loquitur*, if *res ipsa* was an appropriate basis for finding the defendant's negligence. *Dover Elevator*, 334 Md. at 234, 638 A.2d at 763-64.

136. *Id.* at 256, 638 A.2d at 774.

137. 95 Md. App. 365, 620 A.2d 989 (1993), *rev'd*, *Dover Elevator Co. v. Swann*, 334 Md. 231, 628 A.2d 764 (1994).

138. The intermediate appellate court specifically explained that because a dispute remained at the close of evidence as to the time of the alleged negligent repair of the elevator and as to what caused the accident, reasonable men could have differed as to the liability of the defendant. *Id.* at 396, 620 A.2d at 1004 (citing SPEISER, *supra* note 32, § 5:19, at 194). The court reasoned: "The evidence of Dover's negligent repair and maintenance 'may merely support one of the many possible explanations of the accident, known or unknown.'" *Id.*

139. *Id.* at 397, 620 A.2d at 1005.

140. 261 Md. 37, 273 A.2d 412 (1971). See *supra* notes 98-99 and accompanying text for further discussion of *Blankenship v. Wagner*.

141. 228 Md. 525, 180 A.2d 677 (1962). See *supra* note 112 for further discussion of *Nalee, Inc. v. Jacobs*.

142. See *Swann*, 95 Md. App. at 394-95, 620 A.2d at 1003-04.

143. *Id.* at 395, 620 A.2d at 1003-04 (quoting W.E. Shipley, Annot., *Evidence of Specific Negligence as Affecting Reliance on Res Ipsa Loquitur*, 33 A.L.R.2d 791, 793 (1954)).

144. *Dover Elevator Co. v. Swann*, 334 Md. 231, 245, 638 A.2d 762, 769 (1994).

145. *Id.* at 245-46, 638 A.2d at 769-70. The court explained that in *Blankenship*, the plaintiff merely sought to provide a partial explanation of the cause of the accident, offering evidence only that he was injured when the steps collapsed.

found that both the plaintiff and the defendant developed all of the facts concerning the actual happening of the accident.¹⁴⁶ The court held that allowing Swann to rely on *res ipsa loquitur* undermined the policy behind the doctrine because the evidence required to explain the cause of the accident was available to Swann, as reflected by Moynihan's testimony concerning the defendant's maintenance records.¹⁴⁷

The court of appeals also offered an alternative rationale to that espoused by the intermediate appellate court.¹⁴⁸ The court of appeals explained that the expert testimony offered by Moynihan created an inference of negligence, even if it was not a complete explanation of the accident.¹⁴⁹ Extending *Meda v. Brown*,¹⁵⁰ the court held that when expert testimony is a necessary element of the plaintiff's case, the plaintiff may not rely on *res ipsa loquitur*.¹⁵¹ Thus, Moynihan's testimony presented the jury with his set of inferences rather than permitting the jury to draw its own inferences.¹⁵²

Id. at 245, 638 A.2d at 769. Similarly, the court reasoned that in *Nalee*, the plaintiff's evidence stopped after showing the happening of the accident, because the plaintiff presented testimony only that the bench was not fastened to the floor or the wall. *Id.* at 247, 638 A.2d at 770.

146. *Id.* at 247-48, 638 A.2d at 770-71. The court found that by presenting expert testimony as to the probable cause of the accident and the unreasonable conduct of the defendant in repairing the elevator, Swann explained the specific happening of the accident and its cause. Thus, the plaintiff's case was not that the misleveling incident caused the accident, but that cleaning rather than replacing the contacts constituted negligence. *Id.*

147. *Id.* at 246, 638 A.2d at 769.

148. See *supra* note 138 and accompanying text.

149. *Dover Elevator*, 334 Md. at 249, 638 A.2d at 771. The court reasoned that "this was not a case where the jury was presented with some evidence and then permitted to draw its own inference At the very least, Moynihan drew his own inference" *Id.*

150. 318 Md. 418, 569 A.2d 202 (1990). See *supra* notes 113-16 and accompanying text for further discussion of *Meda v. Brown*.

151. *Dover Elevator*, 334 Md. at 254, 638 A.2d at 774. The court explained that *Meda* clarified the difference between offering direct evidence of negligence and relying upon *res ipsa loquitur*. The court stated that a presentation of expert testimony may cause a case to resemble a *res ipsa loquitur* case, due to the inferences drawn by the expert witness and then presented to the jury. But the court then stated: "[I]t might be said that the 'thing speaks for itself,' at least in terms of what the facts say to the expert. But that may be said of inferences in general, and yet it is not *res ipsa loquitur* as we know that concept in the law of negligence." *Id.* at 253, 638 A.2d at 773 (citing *Orkin v. Holy Cross Hosp.*, 318 Md. 429, 431, 569 A.2d 207, 208 (1990) (companion case to *Meda*)).

152. *Id.* at 249, 638 A.2d at 770. At one point, the court appears to indicate that had Moynihan simply explained the damage to the elevator's contacts, rather than opining as to the probable cause of the accident, *res ipsa loquitur* would be appropriate. The court explained that "even if we were to accept the premise

The Court of Appeals of Maryland, in dicta, also addressed the issue of *res ipsa loquitur* jury instructions.¹⁵³ After reviewing case law on *res ipsa loquitur* instructions, the court noted that several jurisdictions have found reversible error where a clearly applicable instruction was withheld.¹⁵⁴ The court also noted that Maryland case law supports the converse proposition that it is reversible error to give a *res ipsa loquitur* instruction when it is inapplicable.¹⁵⁵ Finally, the court acknowledged that at least one state leaves the decision as to whether a *res ipsa loquitur* jury instruction is appropriate to the discretion of the trial judge.¹⁵⁶ From this review, the court suggested two guidelines for appropriate jury instructions: (1) that the decision be left to the discretion of the trial judge;¹⁵⁷ and (2) "that a jury instruction concerning negligence in general may fairly cover the area of *res ipsa loquitur*, as long as the judge does not otherwise improperly preclude counsel from making such an argument."¹⁵⁸

IV. ANALYSIS

A. *The Plaintiff's Dilemma*

The effect of the holding in *Dover Elevator* is to prevent a plaintiff who brings a typical¹⁵⁹ negligence claim from relying on *res*

that the plaintiff's expert witness did not seek to furnish a complete explanation of this elevator's misleveling, he drew his own inferences of negligence." *Id.* at 252, 638 A.2d at 773. However, the court subsequently stated:

This case involved the complicated inner workings of [an elevator] which were outside the scope of the average layperson's common understanding and knowledge, and expert testimony was a necessary element to the plaintiff's case. Since expert testimony was necessary to this case, Swann could not rely on *res ipsa loquitur*

Id. at 256, 638 A.2d at 774.

153. *Id.* at 256-57, 638 A.2d at 775.

154. *Id.* at 257, 638 A.2d at 775 (citing *State Farm v. Municipality of Anchorage*, 788 P.2d 726, 730-31 (Alaska 1990); *Davis v. Memorial Hosp.*, 376 P.2d 561 (Cal. 1962); *Terrell v. Lincoln Motel, Inc.*, 443 A.2d 236, 238 (N.J. 1982)).

155. *Id.* at 257, 638 A.2d at 775 (citing *B & K Rentals v. Universal Leaf Tobacco*, 324 Md. 147, 162, 596 A.2d 640, 647 (1991); *Potomac Edison Co. v. Burdette*, 70 Md. App. 566, 575-76, 521 A.2d 1276, 1281, *cert. denied*, 310 Md. 129, 527 A.2d 50 (1987)).

156. *Id.* at 258, 638 A.2d at 775 (citing *Turtenwald v. Aetna Casualty & Surety Co.*, 201 N.W.2d 1, 5-6 (Wis. 1972)).

157. *Id.* Noting that there was Maryland authority on both sides of the issue, the court determined that the best option was to leave the decision of whether to allow a *res ipsa loquitur* instruction to the trial judge's discretion. *Id.*

158. *Id.*

159. "Typical" in this context means a case premised not on mere circumstantial evidence but, rather, a case in which the plaintiff has access to specific and direct evidence of the injury-causing occurrence.

ipsa loquitur as a fall-back position.¹⁶⁰ A plaintiff must either choose to go forward with a general claim of negligence or invoke the doctrine of res ipsa loquitur and rely on a presumptive inference of negligence from circumstantial evidence.¹⁶¹ This holding presents difficulties for the plaintiff, because the plaintiff must scrutinize his evidence before trial to determine whether he may rely on the doctrine of res ipsa loquitur. If a plaintiff fails to consider available evidence and relies, instead, upon the availability of a res ipsa loquitur claim, he leaves himself open to the dilemma of proving "too little and too much."¹⁶²

As the Court of Appeals of Maryland explained in *Hickory Transfer Co. v. Nezbed*,¹⁶³ relying on res ipsa loquitur and presenting specific evidence of negligence may lead to a situation where the plaintiff proves too much to rely on an inference of circumstantial negligence and proves too little to prevail on a general claim of negligence.¹⁶⁴ This holding led to "plaintiff paranoia" when it came time to present evidence.¹⁶⁵ As a result, the court of appeals, sympathizing with the plaintiff, established a less restrictive rule.¹⁶⁶ The line of cases decided shortly after *Hickory Transfer*¹⁶⁷ — in which the plaintiffs, who relied on res ipsa loquitur and who were fearful of proving too much, simply pointed to the circumstances of the accident and rested — exhibited the court's willingness to allow recourse to the doctrine in such situations.¹⁶⁸ The court based these less restrictive holdings on the fact that res ipsa loquitur was premised on a lack of evidence. At the same time, the court reemphasized that, had the plaintiffs sought to introduce specific evidence, reliance would have been precluded.¹⁶⁹ Thus, the court was sympathetic to the plaintiff who provided very little evidence and was unyielding to the plaintiff who provided too much. The court based its position

160. See *Dover Elevator*, 334 Md. at 253, 638 A.2d at 773 (finding res ipsa loquitur warranted only "when 'the demands of justice make its application essential'") (quoting *Blankenship v. Wagner*, 261 Md. 37, 41, 273 A.2d 412, 414 (1971)).

161. See *supra* notes 101-12, 145-46, 151-52 and accompanying text.

162. See *supra* note 105 and accompanying text.

163. 202 Md. 253, 96 A.2d 241 (1953).

164. *Id.* at 261-62, 96 A.2d at 244-45. See *supra* notes 100-05 and accompanying text for further discussion of *Hickory Transfer Co. v. Nezbed*.

165. See *Blankenship v. Wagner*, 261 Md. 37, 273 A.2d 412 (1971) (plaintiffs presented very little evidence, hoping to avoid proving "too much").

166. See *supra* notes 111-12, 149-52 and accompanying text for a discussion of the rationale behind the court's less restrictive rule.

167. See, e.g., *Blankenship*, 261 Md. at 39, 273 A.2d at 413; *Nalee, Inc. v. Jacobs*, 228 Md. 525, 528-29, 180 A.2d 677, 678-79 (1962).

168. See *supra* notes 106-12 and accompanying text for a discussion of the court's willingness to allow recourse to the doctrine when very little evidence of negligence was presented.

169. See *supra* note 100 and accompanying text.

on the fact that *res ipsa loquitur* was originally intended to aid the plaintiff who had little or no evidence of the occurrences leading to his injury.¹⁷⁰ This rationale, which had its genesis forty-four years ago, in *Hickory Transfer*,¹⁷¹ was reaffirmed in *Dover Elevator*.¹⁷² The court's holding in *Dover Elevator*, that *res ipsa loquitur* may not be relied upon in complex cases, has virtually shut the door on the doctrine in the state of Maryland. Although the court of appeals should be recognized for this display of unerring consistency, it should not be heralded for its lack of insight and its archaic disposition.

Times change and with them the law. Legal theories of tort law recovery, such as products liability,¹⁷³ have evolved to address the technological advances and social evolution that have resulted since the inception of our legal system. In addition, the elements of tort recovery have been modified by courts to address the growing complexity of the twentieth century. For example, proximate cause has undergone a series of modifications as complex machinery and services make it more difficult to determine the cause of injury and the extent of duty.¹⁷⁴ Maryland, unlike many other jurisdictions, has failed to recognize that *res ipsa loquitur*, like any other theory of recovery, must be allowed to change as society changes.

Chancellor Pollock first coined the Latin phrase *res ipsa loquitur* in 1863. Since that time, a plethora of technological advances have taken place.¹⁷⁵ As a result, *res ipsa loquitur* has been applied in

170. See *supra* notes 98-100 and accompanying text.

171. See *supra* notes 101-05 and accompanying text for further discussion of *Hickory Transfer*.

172. See *supra* notes 98-100, 144-47 and accompanying text.

173. A recent decision of the Court of Appeals of Maryland provides an excellent example of modifying a theory of recovery to fit a present-day situation. In the oft-cited case of *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 467 A.2d 1143 (1985), the court of appeals held that manufacturers of a type of gun designated as "Saturday Night Special" could be strictly liable for injury resulting from the gun's discharge during the commission of a crime. *Id.* at 157-59, 467 A.2d at 1159-60. The court's holding has been described as an atypical extension of products liability. DAVID A. FISCHER & WILLIAM POWERS, JR., *PRODUCTS LIABILITY, CASES AND MATERIALS* 200 (2d ed. 1994). This holding presented such an extension, in fact, that the Maryland legislature passed a statute negating the holding. See MD. ANN. CODE art. 27, § 36-I(h) (1992 & Supp. 1995).

174. See, e.g., *Palsgraff v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (Cardozo's and Andrew's debate concerning technological innovations such as explosives and locomotive transportation playing a role in extension of proximate cause).

175. For example, air travel, elevators and the mass consumption of electricity and gas are modern technological innovations that have been developed since the conception of *res ipsa loquitur*, and each represents a situation to which *res ipsa loquitur* is typically applicable. See *infra* notes 176-77 and accompanying text.

situations where injury has occurred through the use, or misuse, of complex machinery.¹⁷⁶ For example, the Second Restatement of Torts cites falling elevators, train derailments, airplane crashes, the escape of gas or electricity from wires or appliances and the explosion of water boilers as occurrences for which *res ipsa loquitur* may be applicable.¹⁷⁷ These occurrences were certainly not contemplated when *res ipsa loquitur* was created. However, many jurisdictions have consistently allowed application of the doctrine in such situations.¹⁷⁸ The Court of Appeals of Maryland, however, rather than modifying the doctrine to allow it to be justly applied in these typical scenarios, has, instead, sounded the death knell for *res ipsa loquitur* in the state of Maryland.

One could argue that the court of appeals has not precluded the use of the doctrine altogether but, rather, has restricted its application to those cases where specific evidence of negligence is not required. In other words, it could be argued that the court has merely held that the doctrine may not be invoked when specific evidence of negligence has been presented. This view is misguided for two reasons. First, the court of appeals, in *Dover Elevator*, concluded that *res ipsa loquitur* may not be applied in complex cases.¹⁷⁹ The above examples obviously involve complexity, either in operation or geometry, to some degree. Thus, under a literal reading of the court's holding, *res ipsa loquitur* could never be invoked to explain an elevator falling or an airplane crashing. Second, the court concluded that *res ipsa loquitur* may not be invoked in cases requiring expert testimony.¹⁸⁰ Under most circumstances, expert testimony is required in order for a jury of laymen to understand the nature of the above occurrences. Thus, the court's rationale is likely nothing more than a smoke screen intended to obscure its blanket preclusion of *res ipsa loquitur*, except, of course, in those archaic circumstances where a barrel falls from a window, provided that there was no complex machinery involved in the fall.

Ironically, the court of appeals' holding has solved the "paranoid plaintiff's" dilemma of proving "too little and too much." In

176. RESTATEMENT (SECOND) OF TORTS, § 328D cmt. c (1965).

177. *Id.*

178. *E.g.*, *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir.) (applying *res ipsa loquitur* in case involving complete disappearance of airplane), *cert. denied*, 389 U.S. 1044 (1967); *United States v. Kesinger*, 190 F.2d 529 (10th Cir. 1951) (applying *res ipsa loquitur* in case involving unexplained airplane crash); *Nelson v. Zamboni*, 204 N.W. 943 (Minn. 1925) (applying *res ipsa loquitur* in case involving gas explosion); *Williams v. Otis Elevator Co.*, 598 A.2d 302 (Pa. Super. Ct. 1991) (holding *res ipsa loquitur* instruction proper against company maintaining elevator).

179. *See supra* note 117 and accompanying text.

180. *See supra* notes 117, 147, 151-52 and accompanying text.

complex cases, a plaintiff cannot rest after simply pointing to the circumstance of an occurrence because a jury of laymen would not be able to understand the injury-causing instrument.¹⁸¹ Conversely, a plaintiff who provides expert testimony or who presents specific evidence concerning the complexity of the accident causing device will, of course, be precluded from relying on the doctrine altogether.¹⁸² Based on the literal holding of *Dover Elevator*, *res ipsa loquitur*, for all intents and purposes, is no longer a desirable option in the state of Maryland.¹⁸³

B. Promoting Complication and Expense

Potential defendants, especially those in the medical malpractice arena, must have collectively cheered when the Court of Appeals of Maryland handed down its decision in *Dover Elevator*. Maryland defendants will no longer live in fear of those three Latin words and can instead take comfort in the fact that litigation will be decided, not by circumstances and presumptions, but by battling experts and corporate money.

By and large, defendants in cases vulnerable to *res ipsa loquitur* are product manufacturers and insurance companies.¹⁸⁴ Defendants in these cases often have more money to spend on defense than the plaintiff has to support his own litigation efforts. Because a claim based on *res ipsa loquitur* requires little evidentiary presentation — hence, less money — such a claim has the effect of keeping litigation costs down for the plaintiff. For this reason, less affluent plaintiffs often have been able to challenge successfully wealthy corporations and insurance companies.¹⁸⁵ Restricting the application of *res ipsa*

181. A complex case, by definition, would be beyond the grasp of a layman; thus, resting after simply pointing to the occurrence would result in confusion rather than an inference of negligence.

182. Presenting expert testimony in a complex case precludes recourse to the doctrine. See *supra* notes 117, 147, 151-52 and accompanying text.

183. The result of the court's holding in *Dover Elevator*, becomes, in a sense, a "catch-22." A plaintiff must not present expert testimony in a complex case if he wishes to rely on *res ipsa loquitur*; yet, complex cases require expert testimony. In the end, the only solution is to forgo reliance on the doctrine altogether.

184. See, e.g., *Barrett v. Danbury Hosp.*, 232 A.2d 748 (Conn. 1995) (defendant was a hospital); *Nalee, Inc. v. Jacobs*, 228 Md. 525, 180 A.2d 677 (1962) (defendant was an owner of hotel chains); *Swann v. Prudential Ins. Co.*, 95 Md. App. 365, 620 A.2d 989 (1993) (defendants were an elevator manufacturer and an insurance company); *Gayheart v. Dayton Power & Light Co.*, 648 N.E.2d 72 (Ohio App. 1994) (defendant was a power company); *Williams v. Otis Elevator Co.*, 598 A.2d 302 (Pa. Super. Ct. 1991) (defendant was an elevator manufacturer); *Turtenwald v. Aetna Casualty & Surety Co.*, 201 N.W.2d 1 (Wis. 1972) (defendant was an insurance company).

185. See *supra* cases noted in notes 4, 36, 69, 82, 101.

loquitur may prevent many plaintiffs from initiating litigation, because many plaintiffs lack the funds to pay the rising costs associated with expert testimony and detailed evidentiary gathering and production. Even cases taken on a contingent fee basis may be affected. Attorneys accepting such fee arrangements often weigh the potential award against likely litigation costs. If the assessment does not indicate that a certain margin of profit will be attained, the attorney will likely decline the case. Thus, if the expert fees and discovery costs are too high, a plaintiff may have no avenue to pursue compensation. Denying plaintiffs recourse to *res ipsa loquitur* in expensive, complex cases may deny wrongly injured individuals access to the justice system.

The Court of Appeals of Maryland has assured defendants that as long as they can make their cases complicated they will not be vulnerable to *res ipsa loquitur*.¹⁸⁶ Defendants engaged in cases that may be applicable for *res ipsa loquitur* will, and should, attempt to make the injury-causing occurrence as confusing as possible. Based upon the holding in *Dover Elevator*, the defendant need only make the details of the happening sufficiently complex to require expert testimony. This could lead to some interesting defense arguments, especially in medical malpractice actions.¹⁸⁷

Considering the court's holdings in *Orkin v. Holy Cross Hospital*,¹⁸⁸ *Meda v. Brown*¹⁸⁹ and *Dover Elevator*, it is apparent that *res ipsa loquitur* will be applicable only in those cases involving obvious acts or omissions of negligence. This leaves *res ipsa loquitur* available, arguably, only in simple cases, such as those involving the proverbial "sponge left in the body" scenario.¹⁹⁰ If the court's holding is taken literally, however, the doctrine may be precluded even in these extreme cases. For example, it is possible to make even the act of leaving a medical instrument in the body cavity complicated. This can be illustrated using the "sponge left in the body" example. It could be argued that a sponge may become discolored by blood, thereby making it difficult to detect or that a sponge was relocated by body fluids or other bodily functions. Perhaps the sponge was manufactured by a company that claimed it could be absorbed by the body over time. In each of these scenarios, a defendant could

186. See *supra* notes 117, 150-52 and accompanying text.

187. See discussion of "sponge in the body" scenario, *infra* text accompanying note 190.

188. 318 Md. 429, 569 A.2d 207 (1990); see *supra* notes 112-16 and accompanying text.

189. 318 Md. 418, 569 A.2d 202 (1990). See *supra* notes 113-17 and accompanying text for a discussion of the companion cases of *Meda v. Brown* and *Orkin v. Holy Cross Hospital*.

190. See *supra* note 52 and accompanying text.

argue that expert testimony would be required due to the complexity of surgery and the difficulty in understanding the functioning of the human body. In addition, depending upon who is sued or impleaded, the composition and manufacturing process of the sponge could be at issue. Thus, a sly defendant could make even a simple case appear complex in application, thereby bringing it within the preclusive holding of *Dover Elevator*.

C. *The Ends Do Not Justify the Means*

The court's holding is a harbinger of impending tort reform. Perhaps the court is convinced that personal injury lawyers have enough ammunition as is and need not be provided with one more bullet. In light of the court's holding, and, specifically, its reference to the dissent by Chief Judge Wilner of the court of special appeals,¹⁹¹ the court of appeals is indicating an intention to move away from the use of *res ipsa loquitur*. Although protecting defendants from our litigious society may be an admirable goal, doing so at the expense of the wrongly injured plaintiff may not be a just cure.

The Court of Appeals of Maryland appears to be initiating its own brand of tort reform. Public outcry over the media's ridiculously exaggerated stories concerning damage awards and a perceived rise in litigation have led some courts to side with defendants on issues subject to public and media scrutiny.¹⁹² *Res ipsa loquitur* represents one such issue. One need look no further than the court of appeals's recent decisions sustaining damage caps to note this judicial paradigm.¹⁹³ Although the current tort system is not perfect, limiting

191. "To allow an inference that the malfunction is due to someone's negligence when the precise cause cannot be satisfactorily established appears to me to be unwarranted." *Dover Elevator*, 334 Md. at 256 n.4, 638 A.2d at 774 n.4 (citing *Swann*, 95 Md. App. at 419, 620 A.2d at 1015-16 (Wilner, C.J., dissenting)).

192. See Glenn W. Bailey, *Litigation is Destroying American Companies*, USA TODAY (MAGAZINE), Jan. 1994, at 76 (painting particularly bad picture of American lawyer and legal system and citing legal expenses and damage awards).

193. See *Oaks v. Connors*, 339 Md. 24, 660 A.2d 423 (1995) (upholding cap on noneconomic damages against constitutional challenge and holding that cap covers loss of consortium damages); *Ellerin v. Fairfax Savings*, 337 Md. 216, 652 A.2d 1117 (1995) (vacating jury award of punitive damages and holding trial court's jury instruction on damages too broad).

It is also troubling to note that the court has opined that legislative policy may be considered when determining the proportionality of an award for punitive damages. *Ellerin*, 337 Md. at 242 n.13, 652 A.2d at 1129 n.13. Considering legislative policy could be akin to considering tort reform as more legislatures are swayed by public and media pressure to cap damages. Judge Bell, concurring and dissenting in *Ellerin*, described this policy as troubling. *Id.* at 246, 652 A.2d at 1132 (Bell, J., concurring and dissenting). Judge Bell noted that "[r]eferring in punitive damage instructions to these maximum monetary penalties, but telling the jury it is not a cap, would only confuse the jury and, very likely, would tend to usurp the jury function." *Id.* at 246-47, 652 A.2d at 1132 (Bell, J., concurring and dissenting).

plaintiff recovery for the sake of lessening litigation and ameliorating a perceived, media-inspired social outcry is missing the point. Limiting recovery on a case-by-case basis would place less of a burden on the plaintiff and would, at least, allow a *res ipsa loquitur* claim to be brought. Precluding reliance on the doctrine altogether removes a valuable weapon from the plaintiff's arsenal and unfairly benefits large corporate entities and insurance companies. The courtroom should be the arena, not the airwaves.

D. Recommendation: Allowing Instructional Testimony

Instead of precluding reliance on the doctrine of *res ipsa loquitur* in all complex cases requiring expert testimony, the court of appeals should have taken the "middle road" that several other jurisdictions have adopted.¹⁹⁴ Some jurisdictions allow expert testimony to coexist with the doctrine, as long as the expert does not offer an opinion as to the exact cause of the accident.¹⁹⁵ This type of instructional testimony allows the plaintiff the opportunity to apply the doctrine in complex cases without destroying the inferences and presumptions upon which *res ipsa loquitur* is based. The testimony serves to inform the laymen of the jury as to the operation, maintenance and effects of the injury-causing device. The jury is then free to draw its own conclusions based on the circumstances of the occurrence. Thus, the focus is still on the evidence, but the blanket preclusion in complex cases is lifted.¹⁹⁶

Such a holding would better serve the Maryland litigant, because it would allow a plaintiff recourse to the doctrine in complex cases without prejudicing the defendant. The testimony does not specify the cause of the accident, nor does it point a figurative finger of blame at the defendant. The defendant is free to rebut evidence as to the operation of the injury-causing device. In addition, this process is more cost-effective for the plaintiff than precluding reliance on the doctrine altogether. Rather than having to pay for the opinions

194. See *supra* notes 69-80 and accompanying text for a discussion of *Williams v. Otis Elevator Co.*, 598 A.2d 302 (Pa. Super. Ct. 1991), in which expert testimony is allowed to co-exist with the doctrine. See also *DaVinci Creations, Inc. v. Nu-Frame Co.*, 418 A.2d 851, 853 (R.I. 1980) (introducing expert testimony to pinpoint probable accident-causing agency or instrumentality or to offer tenable theory).

195. See *supra* notes 69-80.

196. This may be what the court of appeals had in mind to begin with because its reasoning is focused on evidentiary presentation. See *Dover Elevator Co. v. Swann*, 334 Md. 231, 245-56, 638 A.2d 762, 769-74 (1994). However, the court's literal holding precludes reliance on the doctrine in *any* complex case requiring expert testimony. *Id.* at 256, 638 A.2d at 774. The court's holding is, in effect, much broader than the rationale upon which it is based.

of a battery of qualified experts, the plaintiff need only present testimony sufficient to explain the underlying complexity associated with his injury. Because the focus is on clarification rather than on the quality of opinion, the need to find an expert with a "more respected opinion" than the opponent's expert is lessened.

This solution would best modify the doctrine of *res ipsa loquitur* in order to make it compatible with the present technological and social environment, without destroying the doctrine's foundation. In other words, allowing instructional testimony to coexist with the doctrine keeps the focus of inquiry on circumstantial evidence and inferential reasoning, while allowing the plaintiff the opportunity to apply the doctrine to a complex, twentieth-century situation. Precluding recourse to the doctrine in all cases requiring expert testimony does a great injustice to Maryland plaintiffs and ignores the dynamics upon which the legal system should, and must, be based if it is to evolve to fit the needs and circumstances of today's complex, multi-faceted society.

V. CONCLUSION

Dover Elevator Co. v. Swann addresses the issue of whether a plaintiff may present specific evidence as to the cause of an accident or occurrence and still rely on the doctrine of *res ipsa loquitur*.¹⁹⁷ The resulting opinion clarified Maryland's law on the doctrine of *res ipsa loquitur* and significantly restricted its use.¹⁹⁸ The court of appeals, holding that a plaintiff's attempt to offer specific evidence concerning the cause of an accident precluded the application of *res ipsa loquitur*, reaffirmed Maryland's divergence from the majority of jurisdictions.¹⁹⁹ The court went further to preclude the use of *res ipsa loquitur* in complicated cases requiring expert testimony. In doing so, the court has burdened Maryland plaintiffs and has ignored the evolutionary nature of tort law recovery. The court of appeals has taken a large step towards returning the doctrine to the use for which it was originally intended — cases in which flour barrels fall from second story windows and the "thing speaks for itself."²⁰⁰

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197. See *supra* notes 119-58 and accompanying text for a discussion of *Dover Elevator*.

198. See *supra* notes 136-52 and accompanying text.

199. See *supra* note 9 and accompanying text.

200. See *supra* notes 1-2 and accompanying text; *Blankenship v. Wagner*, 261 Md. 37, 42, 273 A.2d 412, 415 (1971) ("Classic patterns [are those] in which someone is struck by a falling object.").