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The Circumstantial Evidence Rule, Concert of Action, Alternative Liability, and Related Doctrines in South Carolina: Relaxing and Shifting the Plaintiff's Burdens in Tort Actions

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THE CIRCUMSTANTIAL EVIDENCE RULE, CONCERT OF ACTION, ALTERNATIVE LIABILITY, AND RELATED DOCTRINES IN SOUTH CAROLINA: RELAXING AND SHIFTING THE PLAINTIFF'S BURDENS IN TORT ACTIONS

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> Even the clearest and most perfect circumstantial evidence is likely to be at fault, after all, and therefore ought to be received with great caution. Take the case of any pencil, sharpened by any woman: if you have witnesses, you will find she did it with a knife; but if you take simply the aspect of the pencil, you will say she did it with her teeth.[1]

I. INTRODUCTION

To state a cause of action in tort under South Carolina law, a plaintiff must prove that a defendant owed him a duty, that the defendant breached that duty, and that the breach of that duty caused the plaintiff to suffer injuries which are capable of measurement and not merely speculative or conjectural.[2] With

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1. M. TWAIN, PUDD'NHEAD WILSON 123 (1981)(from *Pudd'nhead Wilson's Calendar*). In 1894 Twain wrote PUDD'NHEAD WILSON, an intriguing tale of a misunderstood lawyer who eventually vindicates himself.

2. Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981); Kemmerlin v. Wingate,

respect to causation, a plaintiff must establish that the defendant's breach was both the "cause in fact"[3] and the "proximate cause"[4] of the plaintiff's injury.[5] Under normal circumstances, the plaintiff must prove each of these elements by a preponderance of the evidence.[6] In certain instances, however, South Carolina courts have either relaxed the plaintiff's burden with respect to these elements or placed upon the defendant a burden normally allocated to the plaintiff. This Article discusses the use of evidentiary presumptions in South Carolina and reviews several South Carolina Federal District Court decisions which have addressed enterprise liability and market share liability.[7]

When a defendant is responsible for a plaintiff's inability to

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274 S.C. 62, 261 S.E.2d 50 (1979); Howard v. Riddle, 266 S.C. 149, 221 S.E.2d 865 (1976); Sherrill v. So. Bell Tel. & Tel. Co., 260 S.C. 494, 197 S.E.2d 283 (1973); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969), *appeal after rem.*, 255 S.C. 136, 177 S.E.2d 548 (1970); Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969); Delk v. Liggett & Myers Tobacco Co., 180 S.C. 436, 186 S.E. 383 (1936).

3. *See Torts, Annual Survey of South Carolina Law*, 27 S.C.L. REV. 554, 555 (1970). *See generally* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 41 at 263-72 (5th ed. 1984). The finder of fact must determine that the plaintiff's injuries would not have occurred "but for" the defendant's conduct. *Id.* at 265-66.

4. *See generally* W. PROSSER & W.P. KEETON, *supra* note 3, § 42 at 272-80; Levis, *Proximate Cause in Law*, 7 FLA. ST. B.A.L.J. 109 (1933); *Torts, Annual Survey of South Carolina Law*, 27 S.C.L. REV. 554, 555 (1970). Proximate causation is a determination that, as a matter of policy, the defendant should be held legally responsible for the conduct involved. Professors Prosser and Keeton assert that the use of the phrase "can lead only to utter confusion." W. PROSSER & W.P. KEETON, *supra* note 3, § 42 at 273.

5. South Carolina courts often consider both elements of causation under the single term "proximate cause." *See, e.g.*, Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977); Horton v. Greyhound Corp., 241 S.C. 430, 128 S.E.2d 776 (1962); Kershaw Motor Co. v. Southern Ry., 136 S.C. 377, 134 S.E. 377 (1926); Willis v. Floyd Brace Co., 279 S.C. 458, 309 S.E.2d 295 (Ct. App. 1983). In *Floyd Brace Co.*, the court of appeals stated that in South Carolina, "[p]roximate cause is the efficient or direct cause of an injury. Negligence is deemed to be the proximate cause of an injury when, without such negligence, the injury would not have occurred or could have been avoided." 279 S.C. at 461-62, 309 S.E.2d at 297-98.

6. *See, e.g.*, King v. J.C. Penney Co., 238 S.C. 336, 340, 120 S.E.2d 229, 230 (1961)(a preponderance of the evidence is "the greater weight" of the evidence). " 'Preponderance of the evidence,' when described in terms of percentages, is set at fifty percent to indicate that a quantum over fifty percent constitutes a preponderance. The verbal definition of 'preponderance' is 'more probable than not.' " McCauliff, *Burden of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1303 (1982). *See also* C. MCCORMICK, MCCORMICK ON EVIDENCE § 339 at 793-96 (2d ed. 1972).

7. Commentators and judges have alternately labeled the doctrines discussed in this Article as theories of liability, rules of evidence, measures of damage, among others. For convenience, this Article uses the phrase "proof doctrines" to describe them collectively.

present evidence or when a plaintiff cannot prove which defendant caused an injury, South Carolina courts have used the circumstantial evidence rule[8] and the concert of action doctrine[9] to affect the procedural aspects of the plaintiff's case. The circumstantial evidence rule may affect a plaintiff's burden of establishing both breach of duty and causation and has been repeatedly likened to *res ipsa loquitur*, a doctrine which supposedly is not recognized in South Carolina.[10] In cases involving multiple defendants who may have caused the injury, the application of alternative liability, concert of action, enterprise liability, and market share liability may affect a plaintiff's burden of establishing the nexus between a particular defendant and the plaintiff's injury. This Article addresses these doctrines with respect to negligence and products liability actions.[11]

II. PROCEDURAL ASPECTS OF A PLAINTIFF'S BURDEN OF PROOF

A plaintiff in a tort action must first plead those elements necessary to establish his cause of action and must produce sufficient evidence on each element to "justify a reasonable jury in finding the existence" of that element.[12] After doing so, the plaintiff bears the burden of proof with respect to all elements of the cause of action.[13] Professor McCormick explained the dif-

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8. *See infra* notes 77-126 and accompanying text.

9. *See infra* notes 128-42 and accompanying text.

10. *See infra* notes 75-76 and accompanying text.

11. Negligence occurs when a defendant breaches a duty of due care owed to the plaintiff. The presence of gross negligence, willfulness, wantonness, or recklessness may affect the plaintiff's case. A discussion of these considerations, however, is beyond the scope of this Article. In a products liability action, the relevant duty is a duty not to sell products in a defective condition unreasonably dangerous to the user or consumer. *See* S.C. CODE ANN. § 15-73-10 (1976)(statutory adoption of RESTATEMENT (SECOND) OF TORTS § 402A (1965)). Products liability actions typically involve claims that the defendant has breached certain other duties, such as the express or implied warranties contained in S.C. CODE ANN. §§ 36-2-313 to -315 (1976). *See* Crystal, *Consumer Product Warranty Litigation in South Carolina*, 31 S.C.L. REV. 293 (1980); Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803 (1976).

12. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1383 (1955). The burden of producing evidence is also described as the "burden of going forward" and the "burden of explanation." *Id. See also* Morgan, *Instructing the Jury Upon Presumptions and Burdens of Proof*, 47 HARV. L. REV. 59 (1933).

13. C. MCCORMICK, *supra* note 6, § 337 at 785. The burden of proof is also known as

ference between these burdens:

> The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding of directed verdict) if evidence on the issue has not been produced. It is usually cast first upon the party who has pleaded the existence of the fact, but . . . the burden may shift to the adversary when the pleader has discharged his initial duty.[14] The burden of producing evidence is a critical mechanism in a jury trial, as it empowers the judge to decide the case without jury consideration when a party fails to sustain the burden.
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> The burden of persuasion becomes a crucial factor only if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced. . . . When the time for a decision comes, the jury, if there is one, must be instructed how to decide the issue if their minds are left in doubt. The jury must be told that if the party having the burden of persuasion has failed to satisfy that burden, the issue is to be decided against him. If there is no jury and the judge finds himself in doubt, he too must decide the issue against the party having the burden of persuasion.[15]

Proving certain facts may create an inference or a presumption in favor of the plaintiff.[16] In other words, the proof of one fact may suggest or establish a second fact or a conclusion. The factfinder usually must treat an inference simply as additional evidence for consideration along with other evidence presented at trial. On the other hand, proving certain facts may raise a "presumption"[17] rather than an inference. A presumption differs significantly from an inference. A presumption[18] has one of two

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the "burden of persuasion" and the "risk of nonpersuasion." *See* McNaughton, *supra* note 12, at 1283-84.

14. For a discussion of "shifting" this burden, see *infra* note 19 and accompanying text.

15. C. McCormick, *supra* note 6, § 336 at 784 (footnote omitted)(footnote 14 added).

16. For a discussion of the definition and effect of these concepts, see C. McCormick, *supra* note 6, § 336 at 783-85. Courts are not consistent in the use of these terms. South Carolina courts approve an "inference" which requires a defendant to come forward with evidence. *See infra* note 115 and accompanying text.

17. A presumption is more conclusive than an inference; that is, a presumption goes further to prove a fact then does an inference.

18. Presumptions are either rebuttable or "irrebuttable." If a plaintiff establishes a rebuttable presumption, the defendant may still offer proof to disprove the presumption. An "irrebuttable" presumption, however, is technically a conclusion, and not a presump-

procedural effects: either the defendant must *produce* evidence contrary to the fact or conclusion presumed or the defendant must *prove* the contrary of the fact or conclusion presumed.[19] In a situation in which a presumption has the former effect, the plaintiff retains the burden of proof with respect to the fact or conclusion presumed, but the defendant must at least offer some evidence tending to negate the existence of the item presumed. In a situation in which a presumption has the latter effect, however, both a burden of production and the burden of proof shift to the defendant, and the defendant must offer evidence tending to negate the existence of the item presumed as well as *prove* its nonexistence.

In the case of an inference, when the defendant moves for an involuntary nonsuit at the close of the plaintiff's case, the judge, considering the inference along with the other evidence, presumably rules on the motion according to the traditional standard.[20] Upon the judge's denial of the motion, the defendant could technically rest without presenting evidence. The judge could then rule on further motions and the finder of fact could reach a verdict in the usual manner. The plaintiff retains the burden of proving the fact or element upon which the inference arises.

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tion. In South Carolina, the violation of a safety statute is negligence per se; that is, the violation conclusively establishes a defendant's breach of the duty to use due care. *See, e.g.*, Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967)(violation of statute requiring motorist to yield to pedestrian); Morrow v. Evans, 233 S.C. 288, 75 S.E.2d 598 (1953)(violation of statutes prohibiting excessive automobile speed and traveling in wrong lane); Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984)(violation of regulations requiring presence of public pool owner's employee at pool).

19. Most commentators speak of this process as "shifting" the burden of production to the defendant. *See, e.g.*, C. MCCORMICK, *supra* note 6, § 342 at 803; McNaughton, *supra* note 12, at 1384. A burden of production remains on a plaintiff, however. Once the plaintiff has met his burden of production, and has thereby raised a presumption, the defendant must also at least produce evidence. Therefore, a presumption creates, rather than shifts, a burden of production. The burden "shifting" terminology is used herein because of its common usage in other works.

20. In ruling upon a motion for involuntary nonsuit or directed verdict, the court must view the evidence in the light most favorable to the non-movant to determine whether more than one conclusion may be reasonably inferred from the evidence. If more than one conclusion may reasonably be inferred or there is doubt concerning the conclusion that may be inferred, the judge must deny the motion and submit the case to the jury. If there is but one such conclusion to be inferred from the evidence, the judge may grant the motion. *See, e.g.*, Hart v. Doe, 261 S.C. 116, 119, 198 S.E.2d 526, 527 (1973).

In the case of a presumption, the judge treats the element upon which the presumption operates as established when ruling on a defendant's motion for involuntary nonsuit. If the presumption only shifts the burden of production, however, a plaintiff may survive the involuntary nonsuit motion, force the defendant to present evidence, and yet not prove his cause of action by a preponderance of the evidence. This situation results if the judge determines that the plaintiff has established a prima facie case, denies the involuntary nonsuit motion, and requires the defendant to present evidence tending to negate the existence of the element presumed, but the factfinder determines that the plaintiff has not proven the issue by a preponderance of the evidence.[21] If the presumption shifts the burden of proof of an element, the parties switch roles with respect to that element. If the plaintiff survives the involuntary nonsuit motion, the defendant must not only present evidence tending to negate the existence of the element presumed, but must also disprove the existence of that element by a preponderance of the evidence.[22]

The proof doctrines may also alter the normal course of trial with respect to the standard of proof by which the plaintiff must prove his case. Altering the standard of proof differs from placing upon the defendant a burden which is not normally allocated to him. In terms of the practical effect, however, the defendant's burdens are increased to the extent a plaintiff's burdens are lessened. Because of the complexities of trial procedure, requiring proof by less than a preponderance of the evidence is similar to creating a presumption in favor of the plaintiff. The plaintiff's proof of a prima facie case in a relaxed-burden situation may effectively require a defendant to come forward with rebuttal evidence and, if the burden is relaxed far enough, to disprove the fact or element in question. South Carolina courts appear to use

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21. This is true because the plaintiff must establish only a prima facie case to resist a motion for involuntary nonsuit. A plaintiff must offer "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions" to establish a prima facie case. C. McCormick, *supra* note 6, § 338 at 790 (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)).

22. For example, if the burden of proving negligence shifts to the defendant, the defendant must present evidence and prove that he was *not* negligent. Therefore, the defendant must establish lack of negligence prima facie to resist the plaintiff's motions for a directed verdict and by a preponderance of the evidence to prevent an adverse finding on that point.

the terms "relax the burden" and "shift the burden" interchangeably.[23]

In summary, the proof doctrines may have one of several procedural effects. A proof doctrine may generate an inference, which is merely another factor for consideration by the factfinder in the normal course of the trial. On the other hand, a proof doctrine may raise a presumption which, in turn, creates a burden of production, shifts the burden of proof, or conclusively establishes a fact or element of a cause of action.

III. PROOF DOCTRINES IN SOUTH CAROLINA

South Carolina courts have addressed indirect proof with respect to two elements of a plaintiff's case: proof of breach of a duty owed and proof of causation. Concerning proof of negligence, plaintiffs have repeatedly requested the South Carolina Supreme Court to adopt *res ipsa loquitur*,[24] a common law doctrine prevailing in nearly all jurisdictions.[25] South Carolina courts have consistently rejected the doctrine by name,[26] but follow a doctrine known as the circumstantial evidence rule,[27] which is similar in certain respects.[28] South Carolina courts con-

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23. Courts appear to prefer to "relax the plaintiff's burdens" rather than to "shift a burden to the defendant" because the latter concept is arguably a more radical departure from the standard trial format. *See, e.g.*, Brock v. Carolina Scenic Stages, 219 S.C. 360, 366, 65 S.E.2d 468, 470 (1951)(court took "a very liberal view of the testimony," and effectively shifted the burden of production to the defendant).

24. Chief Baron Pollock of England, in Byrne v. Boadle, 159 Eng. Rep. 299 (1863), borrowed the phrase "the thing speaks for itself" from Latin to describe a situation which was obvious, yet not subject to direct proof. *See generally* Griffith & Griffith, *The Doctrine of Res Ipsa Loquitur in Negligence Actions—Old Solutions for New Problems*, 48 MISS. L.J. 259 (1977)(an analysis of common law refinements in the application of the doctrine of *res ipsa loquitur*).

25. W. PROSSER & W.P. KEETON, *supra* note 3, § 39 at 244.

26. See *infra* note 76 for a listing of cases rejecting the doctrine.

27. *See infra* notes 77-126 and accompanying text.

28. Some authors claim that South Carolina follows *res ipsa loquitur* under the guise of the circumstantial evidence rule or by some other subterfuge. *See, e.g.*, W. PROSSER & W.P. KEETON, *supra* note 3, § 39 at 244; Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 253-54 (1936); Comment, *Medical Malpractice—The "Locality Rule" and the "Conspiracy of Silence,"* 22 S.C.L. REV. 810, 820 (1970); *Torts, Annual Survey of South Carolina Law*, 21 S.C.L. REV. 659, 663-65 (1969). Several South Carolina Supreme Court justices have expressed a similar view and have called on the state supreme court to adopt the doctrine expressly. *See, e.g.*, Barnwell v. Elliott, 225 S.C. 62, 68, 80 S.E.2d 748, 751 (1954)(Baker, C.J., dissenting); Orr v. Saylor, 253 S.C. 155, 163, 169 S.E.2d 396, 400 (1969)(Weatherford, A.A.J., dissenting). For a

sistently permit a plaintiff to resort to the circumstantial evidence rule to prove both negligence and causation.

In cases in which a plaintiff brings suit against two or more defendants and, without fault on his part, cannot identify which defendant or defendants actually caused an injury, some courts have permitted recovery under the theory of alternative liability.[29] The South Carolina Federal District Court has twice hypothesized that South Carolina would reject market share liability,[30] a theory similar in certain respects to alternative liability[31] and enterprise liability.[32] Under the theory of concert of action, however, South Carolina courts permit recovery against a defendant involved with others in a tortious activity which inflicts injury on a plaintiff, despite the fact that the particular defendant found liable did not actually inflict the injury.[33]

A. The Circumstantial Evidence Rule and Res Ipsa Loquitur

Res ipsa loquitur is an evidentiary doctrine that permits a factfinder to infer or presume a defendant's negligence from proof of certain facts.[34] The expression first became part of Anglo-Saxon law in 1863 in *Byrne v. Boadle*,[35] an English case in which a flour barrel injured the plaintiff when it fell from a window of the defendant's warehouse. In *Byrne* the plaintiff could not offer direct proof which would have established the defendant's negligence with respect to the barrel's falling from the window. The court nevertheless permitted recovery. Remarking on the lack of direct evidence of the defendant's negligence, the court reasoned that of certain events "it may be said *res ipsa*

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discussion of the difference between these doctrines, see *infra* note 101 and accompanying text.

29. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). *Summers v. Tice* contains the classic statement of this theory of liability, which is now embodied in RESTATEMENT (SECOND) OF TORTS § 433B(3)(1979). For a discussion of this doctrine, see *infra* notes 149-52 and accompanying text.

30. Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981). For an analysis of the district court's determination, see *infra* notes 160-64 and accompanying text.

31. *See infra* notes 153-59 and accompanying text.

32. *See infra* notes 143-48 and accompanying text.

33. Skipper v. Hartley, 242 S.C. 221, 130 S.E.2d 486 (1963). See *infra* notes 128-42 and accompanying text for a discussion of the concert of action theory.

34. Griffith & Griffith, *supra* note 24, at 261.

35. 159 Eng. Rep. 299 (1863).

loquitur [the thing speaks for itself]."[36] At its introduction, the doctrine was "a common-sense appraisal of the probative value of circumstantial evidence"[37] and a "formulation of a species of circumstantial evidence"[38] which was somewhat amorphous and without strict prerequisite for its application.

Since its introduction, the doctrine has developed somewhat rigid requirements for its use by a plaintiff.[39] The usual reason given for permitting use of the doctrine is a plaintiff's inability to present direct evidence of negligence.[40] Accordingly, a plaintiff usually may employ the doctrine of *res ipsa loquitur* only by proving that:

> (1) [T]he accident [is] one which ordinarily would not occur in the absence of someone's negligence; (2) the instrumentality which caused the accident [is one] within the defendant's exclusive control; (3) the injured party's conduct [did not contribute] to the accident; and (4) the injured party [is not] in a position to show the particular circumstances which caused the instrumentality to injure him.[41]

In instances in which the doctrine applies, courts typically instruct the jury that it may find that the injury would not have occurred without the defendant's negligence.

Jurisdictions differ with respect to the procedural effect of the doctrine.[42] At the very least, the application of the doctrine

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36. *Id.* at 301. In *Byrne*, the court wrote that "in some cases the courts have held that the mere fact of the accident having occurred is evidence of negligence." *Id.*

37. Note, *Res Ipsa Loquitur: The Extent to Which Plaintiff May Establish Negligence*, 42 ST. JOHN'S L. REV. 410, 410 (1968)(citing Galbraith v. Busch, 267 N.Y. 230, 234, 196 N.E. 36, 38 (1935)).

38. Note, *supra* note 37, at 410 (citing Zaninovich v. American Airlines, Inc., 26 A.D.2d 155, 157, 271 N.Y.S.2d 886, 869 (1966)).

39. *See* W. PROSSER & W.P. KEETON, *supra* note 3, § 39 at 244; *infra* note 41 and accompanying text.

40. Note, *supra* note 37, at 411; Griffith & Griffith, *supra* note 24, at 263. It is also often said that *res ipsa loquitur* applies when "affirmative evidence of a defendant's negligence is more than likely within the defendant's exclusive knowledge and control." Griffith & Griffith, *supra* note 24, at 263.

41. Griffith & Griffith, *supra* note 24, at 261 (citing Morgan v. Miss. Power Co., 298 So. 2d 698, 700 (Miss. 1974)). Some jurisdictions which accept the doctrine do not specifically require the fourth element. W. PROSSER & W.P. KEETON, *supra* note 3, § 39 at 244-45. For a more detailed discussion of each of the elements, see generally 2 S. SPEISER, THE NEGLIGENCE CASE: RES IPSA LOQUITUR (1972). *See also* Note, *Res Ipsa Loquitur—Doctrine of Exclusive Control of the Instrumentality*, 41 N.C.L. REV. 301 (1963).

42. Prosser, *supra* note 28, at 241-43. *See generally supra* notes 12-24 and accompa-

creates an inference, which allows the factfinder to find negligence. This version of *res ipsa loquitur* does not require the defendant to produce evidence and does not shift the burden of proof to the defendant.[43] On the other hand, the doctrine may create a presumption, which has one of two procedural effects. The presumption version of *res ipsa loquitur* compels the defendant to come forward with evidence that tends to disprove his negligence, but may also require the defendant to prove that he was not negligent.[44]

1. Early South Carolina Decisions

Several early South Carolina cases appear to have followed *res ipsa loquitur* in its strongest form, which shifts the burden of proof to the defendant. In *Sullivan v. Charleston & Western Carolina Railway Co.*,[45] a railroad passenger suffered paralysis of his legs upon falling backwards when his seat gave way.[46] The plaintiff in *Sullivan* demonstrated that several screws missing from the seat's frame caused his fall, but could not identify who had removed the screws,[47] and thus could not prove directly whether the defendant had been negligent. The South Carolina Supreme Court discussed and upheld the trial judge's charge:

> The presiding judge charged the jury that the burden was on plaintiff to prove that he was injured while a passenger, by some agency or instrumentality of defendant; and, if the plaintiff had proved those facts, the law raised a presumption that the defendant was guilty of negligence and the burden was then shifted to defendant to prove that the injury did not result from its negligence. The defendant contends that this instruction was erroneous, and that the burden of proof was upon the plaintiff throughout the case, and that when a *prima facie* case was made out by proof of injury to plaintiff while a passenger, the only burden then on the defendant was to introduce evidence tending to show that the injury was not caused

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nying text.

43. *See* Prosser, *supra* note 28, at 244. *See also supra* notes 12-24 and accompanying text.

44. *See* Prosser, *supra* note 28, at 244. In other words, this version creates a burden of production and also shifts the burden of proof to the defendant.

45. 85 S.C. 532, 67 S.E. 905 (1910).

46. *Id.* at 534, 67 S.E. at 905.

47. *Id.*

> by its negligence; but that, when all the evidence was in, unless the greater weight of it showed negligence on the part of the defendant, the plaintiff could not recover. Upon this proposition the authorities elsewhere are in conflict, but the rule in this State has been settled, and is as stated by the Circuit Judge.[48]

Apparently, even the defendant accepted the application of *res ipsa loquitur*, but asserted that the doctrine merely required him to produce evidence and did not shift the burden of proof.

The court in *Sullivan* relied upon the earlier case of *Joyner v. South Carolina Railway Co.*,[49] an action against a railroad for the death of two mules. *Joyner* purportedly settled the " 'misapprehension as to the real point' "[50] of *Danner v. South Carolina Railway Co.*[51] concerning South Carolina's acceptance of a doctrine permitting proof by an indirect method and the doctrine's procedural effect. In *Danner*, the plaintiff's cattle were killed by the defendant's train traveling along tracks located on the plaintiff's property.[52] There was, however, "no [direct] evidence whatever of the circumstances or manner in which they were destroyed."[53] Therefore, the plaintiff could not prove directly that the defendant negligently destroyed the cattle, even though the defendant admitted that the train killed the cattle. The defendant claimed that it could not be held responsible for the destruction of the cattle unless the plaintiff proved that it had been negligent in doing so. The trial judge, sitting without a jury, held the defendant liable when the defendant failed to prove that it was not negligent and had not caused the plaintiff's

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48. *Id.* at 535, 67 S.E. at 906 (citing Joyner v. S.C. Ry. Co., 26 S.C. 49, 1 S.E. 52 (1887); Steele v. S. Ry., 55 S.C. 389, 33 S.E. 509 (1899); Doolittle v. S. Ry., 62 S.C. 130, 40 S.E. 133 (1901)).

49. 26 S.C. 49, 1 S.E. 52 (1887).

50. *Id.* at 63, 1 S.E. at 62 (McIver, J., dissenting)(quoting Jones v. Columbia & Greenville R.R., 20 S.C. 249, 254 (1883)). Justice McIver wrote a lengthy and vigorous dissent to *Joyner*. Justice McIver felt that the decision in *Danner* "did not in any way infringe upon the well-settled and time-honored rule that he who alleges must prove, and that a plaintiff must therefore establish by legal and satisfactory evidence all the essential elements of his cause of action." *Id.* at 61-62, 1 S.E. at 62. Justice McIver felt that the decision permitted only the creation of an inference. *Id.* at 62, 1 S.E. at 63.

51. 16 S.C.L. (4 Rich.) 329 (1851).

52. *Id.* at 330-31.

53. *Id.* at 331.

loss.[54] The court reasoned that because the defendant's employees were in control of the train, and because there were no other witnesses of the damage to plaintiff's cattle, the defendant was required to prove that it was not negligent.[55] The court also noted the defendant railroad's policy of holding their engineers responsible for the value of livestock killed during that engineer's operation of a train.[56] The trial judge reasoned that such a policy "could not have been adopted or tolerated if it were not true that at least most frequently such destruction [of livestock] is caused by culpable want of care."[57]

The court of appeals upheld the trial court, but did not clearly articulate whether it approved the procedural effect the trial judge gave to the doctrine, which shifted the burden of proof.[58] The majority in *Joyner* interpreted *Danner* as approving the shifting of the burden of proof when the doctrine applied, and the court in *Sullivan* reaffirmed that interpretation.[59] At least by the time of the decision in *Joyner*, therefore, South Carolina apparently followed *res ipsa loquitur* without expressly identifying the doctrine.[60] The court's discussion of the facts in *Danner* and *Joyner* reveals that the plaintiffs in those cases established the traditional elements prerequisite to the doctrine's application. Each plaintiff demonstrated that his loss ordinarily would not have occurred without the defendant's negligence, that the defendant controlled the instrumentality which caused the loss, and that he could not present direct evidence concerning the circumstances surrounding the loss.[61] The operation of the doctrine shifted the burden of proof to the defendant to

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54. *Id.* at 332-33.

55. *Id.*

56. *Id.* at 332.

57. *Id.*

58. *Id.* at 337-38.

59. 85 S.C. at 535, 67 S.E. at 906. The court in *Joyner* stated that the court in *Danner* held that the fact of the loss itself presumed negligence because "proof of the single fact of the killing . . . shall have the effect in the first instance of the proof of all the facts necessary to show negligence." 26 S.C. at 53, 1 S.E. at 54.

60. The principles in *Danner* and similar cases are not limited in application to the killing of livestock by railroad companies. *See, e.g.*, Jennings v. Fundeburg, 15 S.C.L. (4 McCord) 161 (1827)(negligent shooting of slaves).

61. The defendant in *Joyner* introduced evidence that the plaintiff did not fence his livestock, but the court in *Joyner* and other similar cases did not discuss the plaintiff's fault, although some courts require an absence of fault for the operation of *res ipsa loquitur*. *See supra* note 41 and accompanying text.

prove lack of negligence[62] and, more importantly, did not expressly require the plaintiff to prove each element.

2. *Current South Carolina Law*

In 1931, the South Carolina Supreme Court expressly refused to apply *res ipsa loquitur* in a case involving a workplace injury[63] which predated the adoption of Workers' Compensation in South Carolina.[64] In *Weston v. Hillyer*,[65] the plaintiff argued that decisions in similar workplace cases[66] were applications of *res ipsa loquitur*.[67] The supreme court agreed with the plaintiff's "suggestion for the application of that doctrine"[68] but found that the doctrine did not apply to the case at bar, in which the injury was "just as likely" the fault of someone other than the defendant.[69] The court in *Weston* concluded, however, that the decisions upon which the plaintiff relied were not the products of *res ipsa loquitur*,[70] that it could find no South Carolina authority for the application of the doctrine, and that it could find

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62. The court in *Joyner* discussed the doctrine's procedural effect:

> [T]he presumption in these cases being a legal one, drawn by the law, can be removed in no other way than by evidence sufficiently strong to rebut it. When the defendant offers no evidence, it becomes conclusive; when the defendant offers evidence which not only fails to explain, but in itself shows negligence, of course the plaintiff will prevail. But if the defendant's evidence overthrows the *prima facies* and makes out affirmatively a case of accident, the presumption is gone and the plaintiff must fail. . . . [If] the evidence of defendant proves nothing, neither negligence nor the want of it, . . . [the presumption] remains until the explanation offered is strong enough to rebut it by making out affirmatively a case of accident.

26 S.C. at 55-56, 1 S.E. at 56.

63. Weston v. Hillyer, 160 S.C. 541, 159 S.E. 390 (1931).

64. Now codified at S.C. CODE ANN. §§ 42-1-10 to 42-19-40 (1976 & Supp. 1984).

65. 160 S.C. 541, 159 S.E. 390 (1931).

66. *See, e.g.*, Grainger v. Greenville, S. & A. Ry., 101 S.C. 73, 85 S.E. 231 (1915) (plaintiff's decedent died when he was crushed in a cave-in). In *Grainger*, the plaintiff recovered for the employer's negligence in failing to provide a safe workplace, but could not offer direct proof that the defendant had been negligent with respect to the particular circumstances surrounding the death. *Id.* at 81-84, 85 S.E. at 231-32.

67. 160 S.C. at 545, 159 S.E. at 391.

68. *Id.* The plaintiff contended that the doctrine should apply "in the case of an unexplained accident which according to the common experience of mankind, would not have happened without fault on the part of the defendant." *Id.* (quoting Ash v. Childs Dining Hall, 231 Mass. 86, 90, 120 N.E. 396, 397 (1918)).

69. 160 S.C. at 545, 159 S.E. at 391 (quoting Ash v. Childs Dining Hall, 231 Mass. 86, 90, 120 N.E. 396, 397 (1918)).

70. *Id.* at 545-46, 159 S.E. at 391.

abundant authority to the contrary.[71] The court in *Weston* failed to distinguish *Sullivan* and the livestock destruction cases,[72] which apparently approved the doctrine.[73] Moreover, the court contradicted itself by validating the use of the theory later in its opinion:

> It is the duty of the plaintiff to prove negligence affirmatively, and while the inferences allowed by the rule or doctrine of *res ipsa loquitur* constitute such proof, it is only where the circumstances leave no room for a different presumption that the maxim applies. When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked.[74]

Arguably, the decision in *Weston* approved *res ipsa loquitur* in certain circumstances, but denied its application to the facts of that case.

Later the same year, without citing authority, the supreme court flatly rejected the doctrine in *Bridge v. Orange Crush Bottlers*.[75] The court has since reaffirmed the rejection of *res ipsa loquitur* in numerous decisions.[76]

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71. *Id.* at 546, 159 S.E. at 391.

72. *See supra* notes 45-62 and accompanying text. This failure is perhaps attributable to the fact that neither party brought these cases to the court's attention.

73. *Id.*

74. 160 S.C. at 549, 159 S.E. at 392 (quoting Klein v. Beeten, 169 Wis. 385, 389, 172 N.W. 736, 738 (1919)).

75. 164 S.C. 351, 358, 162 S.E. 325, 328 (1932)(employee's loss of an eye from exploding soft drink bottle). Justice Bonham, who authored the earlier opinion in *Weston*, wrote the court's unanimous opinion in *Bridge*.

76. Legette v. Smith, 265 S.C. 573, 220 S.E.2d 429 (1975); Crider v. Infinger Transp. Co., 248 S.C. 10, 148 S.E.2d 732 (1966); Bellamy v. Hardee, 242 S.C. 71, 129 S.E.2d 905 (1963); Boyd v. Marion Coca-Cola Bottling Co., 240 S.C. 383, 126 S.E.2d 178 (1962); Bruno v. Pendleton Realty Co., 240 S.C. 46, 124 S.E.2d 580 (1962); King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961); Shepherd v. U.S. Fidelity and Guar. Co., 233 S.C. 536, 106 S.E.2d 381 (1958); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1958); Daniels v. Timmons, 216 S.C. 539, 59 S.E.2d 149, *cert. denied*, 340 U.S. 841 (1950); Merchant v. Columbia Coca-Cola Bottling Co., 214 S.C. 206, 51 S.E.2d 749 (1949); Carroll v. S.C. Nat'l Bank, 211 S.C. 406, 45 S.E.2d 729 (1948); Watson v. Cox Bros. Lumber Co., 203 S.C. 125, 26 S.E.2d 401 (1943); Albergotti v. Dixie Produce Co., 202 S.C. 357, 25 S.E.2d 156 (1943); Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 20 S.E.2d 153 (1942); Shields v. Chevrolet Truck, 195 S.C. 437, 12 S.E.2d 19 (1941); Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857 (1940); Poliakoff v. Shelton, 193 S.C. 398, 8 S.E.2d 494 (1940); Gantt v. Columbia Coca-Cola Bottling Co., 193 S.C. 51, 7 S.E.2d 641 (1940); Irick v. Peoples Baking Co., 187 S.C. 238, 196 S.E. 887 (1938); Hunsucker v. State Highway Department, 182 S.C. 441, 189 S.E. 652 (1937); Delk v. Liggett and Myers Tobacco Co., 180 S.C. 436, 186 S.E. 383 (1936); Perry v. Carolina Theater, 180

South Carolina courts have consistently preferred resolving disputes by means of jury determination,[77] and, despite rejecting *res ipsa loquitur*, have consistently approved of a similar doctrine, the circumstantial evidence rule.[78] In *Peak v. Fripp*,[79] the plaintiff brought a wrongful death action against the driver of an automobile. The plaintiff's decedent died as a result of injuries received as a passenger in an accident which occurred while the defendant's son was driving the defendant's automobile.[80] Only the defendant's son and a man who had observed the speed of the automobile prior to the accident could testify about the event.[81] The court, however, found a sufficient basis for an inference that the guest passenger statute then in force[82] had been violated.[83] The court, discussing the lack of direct evidence that the defendant's son had violated the statute, gave a general description of the rule:

> It is incumbent upon the plaintiff, in the absence of direct evidence, to show the existence of such circumstances as would justify the inference that the injury . . . was due to the wrongful act of the defendant, and not leave the question to mere speculation or conjecture. The facts and circumstances shown should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense

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S.C. 130, 185 S.E. 184 (1936); Langston v. Fiske-Carter Constr. Co., 180 S.C. 113, 185 S.E. 62 (1936); Heath v. Town of Darlington, 175 S.C. 27, 177 S.E. 894 (1934); Montgomery v. Conway Lumber Co., 171 S.C. 483, 172 S.E. 620 (1934); Correll v. City of Spartanburg, 169 S.C. 403, 169 S.E. 84 (1933); Weston v. Hillyer, 160 S.C. 541, 159 S.E. 390 (1931); Bain v. Self Memorial Hosp., 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984); Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984).

77. *See, e.g.*, S.C. CONST. art. I, § 14; McGlohon v. Harlin, 254 S.C. 207, 174 S.E.2d 753 (1970); Sumter Trust Co. v. Holman, 134 S.C. 412, 132 S.E. 811 (1926); Best v. Barnwell County, 114 S.C. 123, 103 S.E. 479 (1920); Frazee v. Beattie, 26 S.C. 348, 2 S.E. 125 (1886); Smith v. Brice, 17 S.C. 538 (1881).

78. *See* Weston v. Hillyer, 160 S.C. 541, 545, 159 S.E. 390, 391 (1931). In *Weston*, the court quoted the following language: "The burden of proof resting upon the plaintiff to establish [negligence] must be sustained by evidence either direct or inferential." 160 S.C. at 545, 159 S.E. at 391 (italics omitted)(quoting Ash v. Childs Dining Hall, 231 Mass. 86, 90, 120 N.E. 396, 397 (1918)).

79. 195 S.C. 324, 11 S.E.2d 383 (1940).

80. *Id.* at 325, 11 S.E.2d at 384.

81. *Id.* at 328, 11 S.E.2d at 386.

82. This guest passenger statute was codified at § 5908 of the 1932 Code of South Carolina Laws. It required proof of intentional, reckless, or heedless conduct.

83. 195 S.C. at 329, 11 S.E.2d at 385.

dictates.[84]

Leek v. New South Express Lines[85] also involved the application of the circumstantial evidence rule to a fatal automobile accident. In *Leek*, the plaintiff's decedent, driving alone, died soon after he collided with the defendant's truck, leaving the defendant as the only surviving eyewitness.[86] Another driver and his passenger saw the deceased's automobile just before the accident, but did not see the accident itself because of a crest in the highway.[87] As a result, the plaintiff was forced to prove his case by such circumstantial evidence as the position of the vehicles at the accident scene, the type and location of the damage to the vehicles, and the lack of skid marks.[88] The plaintiff recovered on a verdict at trial, but the supreme court reversed.[89] The court reasoned that the plaintiff was required to carry the burden of proof with respect to the cause of the accident, but that he could discharge that burden by showing "proof of circumstances which would furnish a reasonable basis for the inference by the jury of the ultimate fact that the death was caused by the wrongful act of the defendant."[90] Therefore, the court in *Leek* would have applied the circumstantial evidence rule if the plaintiff had established a sufficient nexus between the proof offered and the conclusion that the defendant's act caused the plaintiff's death.

Tate v. Mauldin[91] and *Gantt v. Columbia Coca-Cola Bottling Co.*[92] involved the application of the circumstantial evidence rule to facts concerning the ingestion of an adulterated soft drink. In *Tate*, a mailman purchased a soft drink from a retail store and, after consuming a portion of it, learned that the drink contained the rotted remnants of a rat.[93] At trial, a jury returned a verdict for the plaintiff.[94] The plaintiff in *Tate* could

84. *Id.* at 329, 11 S.E.2d at 385 (quoting Leek v. New South Express Lines, 192 S.C. 527, 534, 7 S.E.2d 459, 462 (1940)).

85. 192 S.C. 527, 7 S.E.2d 459 (1940).

86. *Id.* at 529, 7 S.E.2d at 460.

87. *Id.* at 530, 7 S.E.2d at 460.

88. *Id.* at 530-33, 7 S.E.2d at 461.

89. *Id* at 534-35, 7 S.E.2d at 462.

90. *Id. See also* Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845 (1968)(a case with a similar holding).

91. 157 S.C. 392, 154 S.E. 431 (1929).

92. 193 S.C. 51, 7 S.E.2d 641 (1940).

93. 157 S.C. at 394-95, 154 S.E. at 432.

94. *Id.* at 396, 154 S.E. at 432.

present no evidence of negligence on the part of the defendant other than the presence of the rodent's remains.[95] The plaintiff could not prove by direct evidence when the rat entered the bottle or who permitted or caused the rat's entry.[96] In *Gantt*, the contaminant in the soft drink was bluestone, a poisonous copper sulphate used by farmers to protect corn, wheat, and oats from rust.[97] The plaintiff in *Gantt* similarly could not prove by direct evidence who contaminated the soft drink or that the contamination occurred while the soft drink was in the defendant's custody.[98] In both cases, the South Carolina Supreme Court validated using the presence of the contaminant itself as circumstantial evidence of the defendant's negligence.[99]

The circumstantial evidence rule embodied in *Peak* and other early cases appears to be very similar in application and effect to the early version of *res ipsa loquitur*. The early application of the circumstantial evidence rule permitted the finder of fact to consider the logical inferences reasonably drawn from any indirect evidence presented. The judge, when ruling upon a defendant's motion for involuntary nonsuit,[100] could determine whether the plaintiff had presented sufficient evidence to permit the factfinder to find it more likely than not that the defendant was negligent and had proximately caused the plaintiff's injury. As with the early version of *res ipsa loquitur*, the circumstantial evidence rule had no strict prerequisite items of proof, and permitted all reasonable inferences to be drawn from the evidence introduced at trial, but raised no presumption.[101]

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95. *Id.* at 400-02, 154 S.E. at 434.

96. *Id.*

97. 193 S.C. at 53, 7 S.E.2d at 642.

98. *Id.* at 56, 7 S.E.2d at 643.

99. *Tate*, 157 S.C. at 402, 154 S.E. at 434; *Gantt*, 193 S.C. at 56, 7 S.E.2d at 643. The court in *Tate* stated: "All the facts, and the inferences from these facts, were properly left by the presiding Judge to the jury. . . . Under the decisions of this Court, negligence may be established by not only positive evidence, but by circumstantial evidence as well." 157 S.C. at 401-02, 154 S.E. at 434 (citations omitted). The decisions in these cases appear to allow the circumstantial evidence rule to operate in a fashion similar to alternative liability. *See infra* notes 149-52 and accompanying text.

100. *See supra* notes 20-21 and accompanying text.

101. The rule differed from the later version of *res ipsa loquitur* in that,

> *Res ipsa loquitur* and circumstantial evidence have been distinguished upon the question whether the circumstances proved point merely to the physical cause of the occurrence, without having any tendency to indicate the responsible human agency, or, upon the other hand, have some tendency to indi-

In *Brock v. Carolina Scenic Stages*,[102] the supreme court substantially altered the procedural effect of the circumstantial evidence rule's application in certain instances. In *Brock*, the plaintiff could not present direct evidence concerning a fatal collision, which put her in a position similar to the plaintiffs' positions in *Leek* and *Peak*.[103] In *Brock*, a pick-up truck collided with a passenger bus in the early morning hours.[104] Prior to the accident, the truck and the bus had been traveling in opposite directions on a rain-slickened, two-lane road.[105] The collision killed the only occupants of the truck, a father and his twelve-year-old daughter.[106] The physical evidence available to the plaintiff consisted of the condition of the bus, the damage to the left front portions of both vehicles, the gradation and curve of the road at the site of the collision, and the position of the debris from the vehicles on the roadway.[107] Two witnesses testified for the plaintiff. One witness had observed the wreck scene after the initial collision occurred but prior to the time the vehicles came to rest. The second witness had seen the pick-up from a considerable distance just before the collision occurred. The latter witness, a nineteen-year-old youth, testified that the truck had been in the right lane traveling at approximately twenty-five miles per hour prior to the accident.[108] The defendant's bus driver employee was the only eyewitness to the collision, but did not testify.[109] The defendant offered photographs as its only evi-

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> cate some fault of omission or commission upon the part of the defendant. If the former, it is necessary to invoke the rule of *res ipsa loquitur*, which is applicable to the fact of negligence only, in order to make out a *prima facie* case of negligence; if the latter, the general principle, which is applicable to all matters of fact, that a fact may be established *prima facie* by circumstantial evidence, suffices, without invoking the distinctive doctrine of *res ipsa loquitur*.

Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 505, 20 S.E.2d 153, 155 (1942).

102. 219 S.C. 360, 65 S.E.2d 468 (1951).

103. *Id.* at 364, 65 S.E.2d at 470. Although the evidence presented in *Brock* was similar to that presented in *Leek*, in which the court reversed a verdict for the plaintiff, the court stated that its decision in *Brock* did not "impinge" on the decision in *Leek*. *Id.* at 366, 65 S.E.2d at 470.

104. *Id.* at 361-62, 65 S.E.2d at 468.

105. *Id.* at 362, 65 S.E.2d at 468.

106. *Id.* at 361-62, 65 S.E.2d at 468.

107. *Id.* at 362-63, 65 S.E.2d at 469.

108. *Id.* at 363, 65 S.E.2d at 469.

109. *Id.* at 362, 365, 65 S.E.2d at 469, 470. The court treated the defendant's failure to offer the driver as a witness as a reasonable inference that the driver's testimony

dence. The trial court granted the defendant's motion for an involuntary nonsuit[110] because the plaintiff failed to offer direct evidence of the defendant's negligence.[111] The supreme court remanded the case for trial, and held that when a plaintiff presents sufficient circumstantial evidence from which the factfinder may conclude that the defendant's negligence is more probable than not, the defendant must come forward with evidence explaining the accident.[112] The court in *Brock*, quoting the New York decision in *Herbert v. H.W. Smith Paper Corp.*[113] with approval, found it objectionable to

> permit a defendant whose automobile concededly has injured another to assume the attitude that he need not explain, if he can, the injury inflicted, merely because no [independent] witness was present at the instant of the collision and the victim is dead. . . . In circumstances such as these, only slight evidence is required to shift to the defendant the burden of explanation.[114]

The decision in *Brock* embraces a doctrine very similar to the version of *res ipsa loquitur* which creates a presumption requiring the defendant to produce evidence.[115] In *Brock*, the defendant's employee was in control of the bus. Moreover, the physical evidence indicated that the bus was in the wrong lane at the time of the accident, a situation which does not normally occur in the absence of negligence. Additionally, no evidence indicated contributory negligence on the decedent's part. Finally, although the plaintiff could not offer direct evidence concerning the accident, the defendant could have done so. One important difference exists, however, between the court's holding in *Brock* and the traditional application of *res ipsa loquitur*: the court in

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would have been unfavorable to the defendant. *Id.* at 365, 65 S.E.2d at 470 (relying on Robinson v. Duke Power Co., 213 S.C. 185, 48 S.E.2d 808 (1948)).

110. 219 S.C. at 364-65, 65 S.E.2d at 470. The court correctly treated the motion as one for a directed verdict because the defendant had offered evidence. *Id.*

111. *Id.*

112. *Id.* at 366, 65 S.E.2d at 470.

113. 243 A.D. 260, 276 N.Y.S. 820 (1935).

114. 219 S.C. at 366, 65 S.E.2d at 470 (quoting Herbert v. H.W. Smith Paper Corp., 243 A.D. 260, 263, 276 N.Y.S. 820, 823 (1935)).

115. The court in *Brock* stated that the circumstantial evidence presented at trial created "an inference of actionable negligence." 219 S.C. at 365, 65 S.E.2d at 470. In traditional terms, an "inference" which creates a burden of production is the weaker form of a presumption. *See supra* notes 43-44 and accompanying text.

Brock did not require the plaintiff to prove any or all of the foregoing elements to force the defendant to explain the occurrence which caused the injury. Moreover, in *Brock*, the court permitted a presumption of both negligence and causation, unlike the traditional operation of *res ipsa loquitur*. Although the decision indicates that the court found the disparity of the parties' abilities to offer direct proof important, it is not clear exactly which circumstances require a defendant's explanation, and the application and effect of the rule is not strictly defined.[116] The circumstantial evidence rule embodied in *Brock* creates a presumption of negligence and causation which places a burden of explanation on the defendant and apparently applies to situations in which *res ipsa loquitur* would normally apply.[117]

The South Carolina Court of Appeals recently reaffirmed the procedural aspects of the circumstantial evidence rule in *Coleman v. Shaw*.[118] *Coleman* involved an unexplained drowning in a motel swimming pool. The Court in *Coleman* found that the defendant's failure to supply a lifeguard in violation of certain safety regulations and statutes constituted negligence per se.[119] Consequently, the court permitted circumstantial evidence concerning the circumstances surrounding the drowning itself, when coupled with the defendant's responsibility for the lack of direct evidence,[120] to supply proof of causation sufficient to overturn summary judgment in the defendant's favor.[121]

In summary, the South Carolina circumstantial evidence

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116. "*In a situation like this*, the Court should take a very liberal view of the testimony." 219 S.C. at 366, 65 S.E.2d at 470 (emphasis added).

117. Compare the stronger version of presumption followed in Danner v. S.C. Ry., 16 S.C.L. (4 Rich.) 329 (1851) and similar cases. *See supra* notes 45-62 and accompanying text.

118. 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984).

119. *Id.* at 114, 314 S.E.2d at 156.

120. If the defendant had supplied a lifeguard, there would have been an eyewitness to the drowning. *Id.* at 114, 314 S.E.2d at 157.

121. *Id.* The *Coleman* panel relied upon the supreme court's earlier decision in Shepherd v. U.S. Fidelity & Guar. Co., 233 S.C. 536, 106 S.E.2d 381 (1958). In *Shepherd*, the court held that it was proper to require the defendant to explain a collision involving his runaway automobile. 233 S.C. at 544, 106 S.E.2d at 383-84. The *Coleman* panel quoted the following language from *Shepherd*: "The fact that the evidence does not clearly disclose the cause of the accident does not necessarily exculpate the defendant." 281 S.C. at 112 n.2, 314 S.E.2d at 157 n.2 (quoting *Shepherd*, 233 S.C. at 541, 106 S.E.2d at 383).

rule currently resembles an early version of *res ipsa loquitur*. Prior to *Weston* and similar decisions in the 1930s, South Carolina apparently followed a more rigid version of *res ipsa loquitur*, at least in certain circumstances,[122] which created a presumption of negligence and shifted the burden of proof on that issue to the defendant. After *Weston* and prior to *Brock*, South Carolina apparently rejected *res ipsa loquitur* in any form, but permitted the finder of fact to consider the reasonable inferences from circumstantial evidence produced at trial. As demonstrated in *Peak*, circumstantial evidence did not create a presumption, even in cases in which only the defendant could explain an occurrence which allegedly caused an injury.

Brock, *Shepherd v. United States Fidelity & Guaranty Co.*,[123] and *Coleman* demonstrate the current application of the circumstantial evidence rule. In these cases, the factfinder was permitted to draw any reasonable inference from the evidence introduced. Moreover, in cases in which a plaintiff cannot, or cannot without extreme difficulty, present direct evidence concerning breach of duty or causation, the circumstantial evidence rule places a burden of explanation on the defendant. In *Brock*, the defendant controlled the only available eyewitness to the accident and the evidence otherwise indicated a probability of negligence.[124] In *Shepherd* and *Coleman*, however, neither party could explain the occurrences involved.[125]

Practitioners involved in tort cases in which the plaintiff cannot prove negligence or causation should be familiar with the operation of the circumstantial evidence rule. In cases in which a plaintiff lacks direct evidence of the cause of the plaintiff's damage or of the defendant's negligence, and especially in cases in which a defendant is responsible for the lack of direct evidence or can explain an occurrence much more easily than the plaintiff, the court may deem it fair to force the defendant to come forward with an explanation of how the damage occurred. In

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122. *See supra* notes 45-62 and accompanying text.

123. 233 S.C. 536, 106 S.E.2d 381 (1959).

124. *See supra* notes 102-17 and accompanying text.

125. In *Coleman*, the defendant's violation of safety regulations requiring a lifeguard prevented an explanation of the drowning. 281 S.C. at 114, 314 S.E.2d at 157. In *Shepherd*, the wife of the defendant's employee had parked the vehicle prior to its rolling away, but could not remember the particulars of doing so. 233 S.C. at 540, 106 S.E.2d at 382.

Coleman, the fact of the injury and the defendant's responsibility for the absence of direct evidence created a burden of production. As in *Brock*, *Leek*, and *Peak*, however, the court may require the plaintiff to produce sufficient circumstantial evidence to demonstrate that the defendant's negligence or causation is probable before it will require rebuttal from the defendant.[126]

B. A Plaintiff's Trial Burdens in Multiple Potential-Defendant Situations

The proof doctrines also apply to situations in which a plaintiff cannot identify, among a group of possible causative parties, which party or parties caused an injury.[127] The use of the concert of action doctrine, alternative liability, enterprise liability, or market share liability may permit a plaintiff to recover against a defendant involved in an activity which injures him, even when another person engaged in the activity may have inflicted or did inflict the injury.

1. Concert of Action

The concert of action doctrine alters a plaintiff's normal method of proof with respect to causation. Under this theory, when two or more persons act together in a single tortious activity, each is liable for all damage done by the activity.[128] This doctrine is variously said to be based upon joint liability, vicarious liability, or joint venture.[129] The two important prerequisites for application of the doctrine are participation in a tortious ac-

126. *Compare Brock*, 219 S.C. 360, 65 S.E.2d 468 (1951)(circumstantial evidence of bus in wrong lane indicated defendant's negligence and causation were probable), *with Leek*, 192 S.C. 527, 7 S.E.2d 459 (1940)(circumstantial evidence failed to indicate defendant's negligence was probable).

127. *Res ipsa loquitur* and the circumstantial evidence rule also apply in these situations, but are discussed in the previous section. For a discussion of the overlap of these doctrines and the other doctrines discussed in this section, see generally Comment, *The Application of Res Ipsa Loquitur in Suits Against Multiple Defendants*, 34 ALB. L. REV. 106 (1969). *See also* Note, *supra* note 41, at 305-06.

128. *See generally* W. PROSSER & W.P. KEETON, *supra* note 3, § 46 at 322-24.

129. *Id.* § 41 at 322; Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 978-85 (1978).

tivity[130] and some degree of agreement or understanding.[131]

In *Skipper v. Hartley*,[132] the South Carolina Supreme Court permitted the plaintiff to recover for the wrongful death of an automobile passenger who was killed by one of three automobiles involved in an unlawful automobile race. The court permitted recovery against the driver of one of the two automobiles which did *not* collide with the automobile in which the plaintiff's decedent was a passenger. The court in *Skipper* held that the violation of the statute which prohibited road racing constituted negligence per se[133] and rejected the defendant's assertion that the plaintiff had not proven proximate cause.[134] The court relied on its earlier decision affirming the criminal conviction of a defendant in a similar position,[135] as well as *Boykin v. Bennett*,[136] a case in which the North Carolina Supreme Court similarly found sufficient evidence of proximate cause:

> Those who participate [in an unlawful road race] are on a joint venture. . . . The primary negligence involved is the race itself. All who willfully participate in speed competition between motor vehicles on a public highway are jointly and concurrently negligent and, if damage to one not involved in the race proximately results from it, all participants are liable, regardless of which of the racing cars actually inflicts the

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130. W. PROSSER & W.P. KEETON, *supra* note 3, § 46 at 323. The range of participation allowed is quite broad, extending to "all those who . . . actively take part in [the activity], or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit. . . ." *Id.* (citations omitted).

131. *Id.* "Express agreement is not necessary, and all that is required is that there be a tacit understanding. . . . There are even occasional statements that mere knowledge by each party of what the other is doing is sufficient. . . ." *Id.* (citations omitted). For a discussion of South Carolina authority on concert of action (sometimes labeled "civil conspiracy"), see Charles v. Texas Co., 199 S.C. 156, 169-70, 18 S.E.2d 719, 724 (1942) (recovery for conspiracy to injure business interests); Hosp. Care Corp. v. Commercial Casualty Ins. Co., 194 S.C. 370, 379-80, 9 S.E.2d 796, 803-04 (1940)(agent cannot act in concert with himself; plaintiff cannot recover for participation in lawful activity).

132. 242 S.C. 221, 130 S.E.2d 486 (1963).

133. *Id.* at 224, 130 S.E.2d at 488.

134. *Id.*

135. *See* State v. Fair, 209 S.C. 439, 40 S.E.2d 634 (1946). In *Fair*, the court stated that "it is clear that the act of each [racer] in violating the law regulating the speed of motor vehicles . . . is, in legal contemplation, the act of both." *Id.* at 443, 40 S.E.2d at 636.

136. 253 N.C. 725, 118 S.E.2d 12 (1961).

injury. . . .[137]

The United States Federal District Court for the District of South Carolina, in *Ryan v. Eli Lilly & Co.*,[138] granted the defendant drug manufacturer's summary judgment motion and rejected the plaintiff's concert of action claim for lack of evidence.[139] In *Ryan*, the plaintiff alleged injury resulting from the "collective efforts, agreements and arrangements" between certain drug manufacturers in marketing, promoting, and presenting the benefits of DES, a drug given to pregnant women in the 1940s and 1950s to prevent miscarriage.[140] Although the court in *Ryan* recognized the validity of the doctrine in South Carolina, the court found that the plaintiff had not presented sufficient evidence to sustain a cause of action under the concert of action

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137. 242 S.C. at 225-26, 130 S.E.2d at 488-89 (quoting Boykin v. Bennett, 253 N.C. 725, 731-32, 118 S.E.2d 12, 17 (1961)). For a definition of a joint venture, see Spadley v. Houser, 247 S.C. 208, 212, 146 S.E.2d 621, 623 (1966).

138. 514 F. Supp. 1004 (D.S.C. 1981). *See infra* note 140 and accompanying text.

139. 514 F. Supp. at 1012. The court found that the plaintiff had not proven concerted action under either South Carolina or North Carolina law. *Id.* Interestingly, courts in two states have permitted DES plaintiffs to recover under the concert of action theory against the same defendant on the same facts. *See* Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1979), *modified*, 418 Mich. 311, 343 N.W.2d 164, *cert. denied sub nom.*, E.R. Squibb & Sons v. Abel, 105 S. Ct. 123 (1984); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). In *Bichler*, the court found "the race to win a market share" tortious, and held that there was sufficient evidence of an agreement among many defendants to substantiate the claim of concert of action:

> The original co-operation by the 12 manufacturers and pooling of information, the agreement on the same basic chemical formula, and the adoption of Lilly's literature as a model for package inserts for joint submission to the FDA in 1941, can rationally be construed as an express agreement for purposes of finding concerted action, even if such co-operation was first invited by the FDA.

79 A.D.2d at 330, 436 N.Y.S.2d at 633.

140. 514 F. Supp. at 1012-13. The drug DES (diethylstilbestrol) allegedly caused cancer in daughters of some mothers who took the drug. For a discussion of the concert of action theory with respect to DES litigation, see generally Endress & Sozio, *Market Share Liability: A One Theory Approach Beyond DES*, 1983 DET. C.L. REV. 1 (1983); Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Note, *DES: Judicial Interest Balancing and Innovation*, 22 B.C.L. REV. 747 (1981); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981); Note, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609 (1982); Note, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW. U.L. REV. 300 (1981); Comment, *DES: Alternative Theories of Liability*, 59 U. DET. J. URB. L. 387 (1982).

theory.[141] Although several drug manufacturers relied upon each other for testing and promoting DES, the court reasoned that,

> Application of the concept of concert of action to this situation would [expand the doctrine] far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.[142]

2. *Enterprise Liability*

Enterprise liability, a theory similar to concert of action, allows a plaintiff to bring all members of an industry before the court and hold the entire industry jointly and severally liable for defects in generically manufactured products.[143] The Supreme Court of Wisconsin, in *Collins v. Eli Lilly & Co.*,[144] defined the doctrine as follows: "Under enterprise liability theory, it is the industry-wide standard that is the cause of injury, and each defendant that participates in perpetuating and using the inadequate standard has contributed to and is liable for the plaintiff's injury."[145] Thus, the application of enterprise liability lifts the burden, traditionally placed on the plaintiff in a tort cause of action, of proving that the acts of a specific defendant caused the plaintiff's injury.[146]

The court in *Ryan* found enterprise liability "repugnant to the most basic tenets of tort law" and predicted that South Carolina would reject enterprise liability because of the traditional South Carolina allocation of the burden of proof.[147] This conclu-

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141. 514 F. Supp. at 1016.

142. *Id.* (quoting Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 605, 607 P.2d 924, 933, 163 Cal. Rptr. 132, 141 (1980)).

143. This theory is also similar to alternative liability. Comment, *supra* note 129, at 995. *See infra* notes 149-52 and accompanying text. The theory originated in Hall v. E.I. Dupont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972)(defective blasting caps). For a more detailed discussion of the elements of the doctrine, see Comment, *supra* note 129, at 995.

144. 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied sub nom.*, E.R. Squibb & Sons, Inc. v. Collins, 105 S. Ct. 107 (1984).

145. 116 Wis. 2d at 186, 342 N.W.2d at 47.

146. 514 F. Supp. at 1017.

147. 514 F. Supp. at 1017-18 (citing Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845 (1968)).

sion, however, is not necessarily correct because South Carolina recognizes the concert of action theory and otherwise relaxes or shifts a plaintiff's trial burdens in certain situations.[148]

3. *Alternative Liability*

Alternative liability originated in *Summers v. Tice*,[149] a case in which two hunters injured the plaintiff when both fired their guns in his direction. The plaintiff could not prove which of the two hunters fired the shot which struck him.[150] Despite this lack of direct proof, the court in *Summers* permitted recovery because the plaintiff proved that one of the two defendants must have caused the injury and it would be impractical and unfair to deny recovery in such a situation.[151] The court held that the burden of proving causation shifted to the defendants to exculpate themselves and that each defendant who could not do so was jointly and severally liable to the plaintiff.[152] To recover under the doctrine of alternative liability, a plaintiff must assemble before the court all wrongdoers who could have possibly caused the injury.

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148. *See, e.g., Brock*, 219 S.C. 360, 65 S.E.2d 468 (1951). *See also supra* notes 102-17 and accompanying text.

149. 33 Cal. 2d 80, 199 P.2d 1 (1948). The doctrine is now embodied in RESTATEMENT (SECOND) OF TORTS § 433B(3)(1979). *See also* W. PROSSER & W.P. KEETON, *supra* note 3, § 41 at 270-72; Comment, *supra* note 129, at 985-95.

150. 33 Cal. 2d at 83-84, 199 P.2d at 2.

151. *Id.* at 86-87, 199 P.2d at 4.

152. The court reasoned that, as between an innocent plaintiff and the defendants, each of whom was negligent, the defendants ought to apportion the damages among themselves. *Id.* at 85-86, 199 P.2d at 3-4.

> When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can.

33 Cal. 2d at 86, 199 P.2d at 4. The court in *Summers v. Tice* relied upon its earlier decision in Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). In *Ybarra*, the court allowed recovery under the doctrine of *res ipsa loquitur. Ybarra* is an example of a situation in which *res ipsa loquitur* and alternative liability overlap. The plaintiff in *Ybarra* employed *res ipsa loquitur* to prove negligence and to identify the particular cause of his injury. *See supra* note 127 and accompanying text.

4. *Market Share Liability*

"Market share liability,"[153] first adopted by the California Supreme Court in *Sindell v. Abbott Laboratories*,[154] is similar to alternative liability, but of more recent origin. Market share liability is a hybrid doctrine which establishes liability as well as apportions damages. In so doing, market share liability combines elements of *res ipsa loquitur*, alternative liability, enterprise liability, and concert of action.[155] Unlike alternative liability and enterprise liability, however, the market share doctrine does not require a plaintiff to bring all potential causes of injury before the court.[156] Like concert of action, alternative liability, and enterprise liability, the doctrine permits recovery against multiple defendants engaged in a tortious activity.[157] Like alternative liability but unlike concert of action, a particular defendant may exculpate itself by proving that it did not cause the injury.[158] Unlike alternative liability, concert of action, and enterprise liability, the recovery against a particular defendant is based upon its market share and liability is not joint and several.[159]

The United States Federal District Court for the District of South Carolina rejected market share liability in both *Ryan* and *Mizell v. Eli Lilly & Co.*[160] because the theory allows recovery despite the fact that some possible defendants are not before the

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153. This theory is more properly described by the label "liability according to market share."

154. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1981). *Sindell*, a DES case, is factually similar to *Ryan* and *Mizell*. See *infra* notes 160-64 and accompanying text for a discussion of *Ryan* and *Mizell*. Other jurisdictions have recently approved market share liability. *See, e.g.*, Hardy v. Johns-Mansville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981)(action against manufacturers of asbestos), *rev'd on other grounds*, 681 F.2d 334 (1982); Copeland v. Celotex Corp., 447 So. 2d 908 (Fla. Dist. Ct. App. 1984)(action against manufacturers of asbestos). For a general discussion of the doctrine, see Comment, *Policy and Proof: Shifting the Burden of Proof in a Products Liability Case*, 34 BAYLOR L. REV. 83 (1980).

155. Comment, *supra* note 154, at 94.

156. The court in *Sindell* approved a finding of liability in cases in which the plaintiff joins all defendants who collectively hold "a substantial share" of the market for the injury-causing agent. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. *See also* Abraham & Musgrave, *The DES Labyrinth*, 33 S.C.L. REV. 663, 682 (1982); *Torts, Annual Survey of South Carolina Law*, 34 S.C.L. REV. 215, 225 (1982).

157. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

158. *Id.*

159. *Id. See also* Comment, *supra* note 129, at 999-1000.

160. 526 F. Supp. 589 (D.S.C. 1981).

court.[161] In both instances, the district court based its decision on the traditional South Carolina common law requirement that the plaintiff prove proximate cause.[162] The court in *Mizell* stated that,

> The unequivocal law of South Carolina is the plaintiff in a negligence action has not only the burden of proving negligence but also the burden of proving that the injury or damage was caused by the actionable conduct of the particular defendant. . . . The Supreme Court of South Carolina has not carved out any exceptions to this traditional rule. The Court places the burden of proof of proximate cause squarely on the plaintiff. Application of this burden-shifting theory would violate established public policy and fundamental principles of tort law and procedure in this state in a variety of ways.[163]

The federal court's treatment of this issue, however, does not necessarily preclude the application of the market share liability theory. The district court did not discuss the most important exception to a plaintiff's traditional burden of proof—the operation of the circumstantial evidence rule. Based on the deeply rooted preference for jury resolution and on the decisions in *Brock*, *Tate*, *Gantt*, *Coleman* and similar cases, the South Carolina Supreme Court or the South Carolina Court of Appeals may permit recovery under the theory of market share liability. As in *Tate* and *Gantt*,[164] a South Carolina court may find that sufficient circumstantial evidence exists to permit a jury inference of causation from the fact of substantial market share. In cases involving fungible manufactured goods, in which direct evidence of causation is typically not available to a plaintiff, a court may require a defendant to produce evidence disproving causation.[165]

IV. Conclusion

In South Carolina, a tort plaintiff usually must plead his

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161. Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1018-19 (D.S.C. 1981); Mizell v. Eli Lilly & Co., 526 F. Supp. 589, 597 (D.S.C. 1981).

162. *Ryan*, 514 F. Supp. at 1018; *Mizell*, 526 F. Supp. at 596.

163. 526 F. Supp. at 596 (quoting *Ryan*, 514 F. Supp. at 1018-19).

164. *See supra* notes 91-99 and accompanying text.

165. See the discussion of *Brock* and *Coleman*, *supra* notes 102-21 and accompanying text.

cause of action, produce evidence, and prove his case by a preponderance of the evidence. In some situations, however, the circumstantial evidence rule and the concert of action doctrine may alter the traditional format. The circumstantial evidence rule permits a plaintiff to prove, indirectly, breach of duty and causation. In cases in which the plaintiff is unable to present direct evidence, the court may require the defendant to produce evidence that he was not negligent and did not cause the plaintiff's injury, especially in those cases in which the defendant is responsible for the lack of evidence.

In cases involving participation in a tortious activity which injures a plaintiff, the court may hold all who participate jointly and severally liable. It is unclear whether a plaintiff in South Carolina may recover under alternative liability, enterprise liability, or market share liability. In tort cases in which the plaintiff is confronted with elements of his cause of action which are impossible or difficult to prove, South Carolina plaintiffs and defendants should be familiar with the operation of these proof doctrines.