RES IPSA LOQUITUR IN CHILD PROTECTIVE PROCEEDINGS July 2011

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Meaning of "Res Ipsa Loquitur"

Literally, "a thing that speaks for itself." In tort law, the doctrine which holds a defendant guilty of negligence without an actual showing that he or she was negligent. Its use is limited in theory to cases in which the cause of the plaintiff's injury was entirely under the control of the defendant, and the injury presumably could have been caused only by negligence.

Historic Roots of the Res Ipsa Loquitur "presumption".

Historic English case: ***Byrne v. Boadle****,* Court of Exchequer, 1863. 2 H. & C. 722, 159 Eng.Rep. 299

A barrel of flour falls on Plaintiff's head as he walks down street. Plaintiff has no other evidence except that barrels do not fall out of windows without negligence. Under *res ipsa loquitur*, Plaintiff has enough evidence to show negligence on the part of the owner of the store who also was in control of the barrels.

The first prerequisite for invocation of the doctrine of res ipsa loquitur, and the inference of negligence it permits, is that the injury-causing event be of a kind that ordinarily does not occur in the absence of negligence.

First Reported Case Applying "Res Ipsa Loquitur" as an Evidentiary Inference in Family Court Child Protective Proceeding

In the Matter of S
Family Court of New York, Kings County
46 Misc. 2d 161**;** ***259 N.Y.S.2d 164*****;** ***1965 N.Y. Misc. LEXIS 1929***

May 10, 1965

OPINION BY: JUDGE HAROLD FELIX

In respect to the reserved decision on respondents' motion to dismiss the neglect petition at the end of the petitioner's case affecting child Freddie, and after discharge from the petition of the other named children therein: This article 3 proceeding [Family Ct. Act] was initiated undoubtedly by a consensus of view, medical and social agency, that the child Freddie, only a month old, presented a case of a battered child syndrome. Proof of abuse by a parent or parents is difficult because such actions ordinarily occur in the privacy of the home without outside witnesses. Objective study of the problem of the battered child which has become an increasingly critical one, has pointed up a number of propositions, among them, that usually it is only one child in the family who is the victim; that parents tend to protect each other and resist outside inquiry and interference and that the adult who has injured a child tends to repeat such action and suffers no remorse for his conduct.

Therefore in this type of proceeding affecting a battered child syndrome, I am borrowing from the evidentiary law of negligence the principle of "*res ipsa loquitur*" and accepting the proposition that the condition of the child speaks for itself, thus permitting an inference of

neglect to be drawn from proof of the child's age and condition, and that the latter is such as in the ordinary course of things does not happen if the parent who has the responsibility and control of an infant is protective and nonabusive. And without satisfactory explanation I would be constrained to make a finding of fact of neglect on the part of a parent or parents and thus afford the court the opportunity to inquire into any mental, physical or emotional inadequacies of the parents and/or to enlist any guidance or counseling the parents might need. This is the court's responsibility to the child.

I find therefore that a prima facie case has been made out by the petitioner and deny the respondents' motion to dismiss.

The New York State Legislature Adopts Res Ipsa Loquitur as an Evidentiary Rule in Child Protective Proceedings

FCA § 1046. Evidence
(a) In any hearing under this article and article ten-A of this act:

(ii) proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible;

CASE LAW under FCA 1046(a)(ii)
Margaret A. Burt
11/ 2009

1990

Matter of Michael A. 166 AD2d 898 (4th Dept. 1990) – 21 month old with untreated fracture of an arm, bone injury to other arm, multiple bruises all over body – expert says not accidental – mother and boyfriend offer no explanation – both are abusive.

1991
Parents rebutted the presumption

Matter of Anthony R. C., Jr. 173 A.D.2d 623; 570 N.Y.S.2d 205; (2nd Dept. 1991)

A 5 1/2-month old baby was brought to a hospital by his mother and grandmother found to have a fractured arm., X rays taken approximately 10 days showed healing rib fractures. The child's parents testified that they attributed the fractured arm to an incident in which the child fell out of his father's arms when the father tripped while climbing up stairs. As to the rib fractures, there was no evidence that the parents knew of this injury prior to its discovery in the hospital. The parents stated that the only explanation they could offer was that this injury was inflicted on the child while undergoing physical therapy.

For petitioner two medical experts who stated that the arm and rib fractures were not likely to have occurred in the manner described by the parents. Parents expert indicated that the arm fracture could have occurred in the manner described by them and that the rib fractures may have occurred during the child's physical therapy, although this would not be common.

We find that the Family Court incorrectly deemed *Family Court Act § 1046(a)(ii)* to be inapplicable. This statute provides for a presumption of neglect or abuse whenever the injuries or condition of a child are such as would not ordinarily occur except by the acts or omissions of a parent or guardian. That is, once the petitioner has offered sufficient evidence that the child has suffered a "substantial injury", the burden shifts to the respondent parents to come forward with a reasonable explanation for the injury Here, the petitioner offered sufficient expert evidence establishing the applicability of *Family Court Act § 1046(a)(ii)*. Nevertheless, we find that the parents met their burden of coming forward with a reasonable explanation and were properly found to be credible witnesses.

1993

Matter of Heith S. 189 AD2d 875, 592 NYS2d 795 (2nd Dept. 1993) - Unexplained oral gonorrhea in one child and unexplained evidence of repeated anal sodomy in another – abuse finding

Matter of Chollette W. 194 AD2d 616, 599 NYS2d 985 (2d Dept. 1993) – mother rebuts the res ipsa presumption where child has shaken baby syndrome and child was with a babysitter for parent of the time and when LG calls babysitter to the stand, she takes 5th amendment

Matter of Nassau County DSS ex rel Joseph H. 595 NYS2d 234, 191 AD2d 634 (2nd Dept. 1993) – large number of random injuries – parent claims self inflicted, not consistent, no injuries since foster care placement – finding of abuse

Matter of Vincent M 193 AD2d 398, 597 NYS2d 309 (1st Dept. 1993) - 3 month old child has current fractured leg, healed fractured rib, healed fractured skull – both within last 6 weeks – parents say all injuries were from accidents – court says the credibility of the "accident" explanations diminishes as the number of accidents increases – very small likelihood that a 3 month old had 3 accidents in a 6 week period that resulted in broken bones – father is abusive as he was caretaker

1994

Matter of Dawn D. 204 AD2d 634 (2nd Dept. 1994) – mother and stepfather are abusive where child has fractures of ribs, thigh and skull and brain injuries, parents first could not explain and then gave various explanations – prima facie case had been made and parents were obligated to offer a reasonable explanation of abuse and they did not

Matter of NYC DSS o/b/o H and J 209 AD2d 525 (2nd Dept. 1994) – 22 month old with spiral fracture of leg, bruises on body and burn on chin- parents claimed fracture may have occurred in tub fall and had medical expert who testified to that but court finds abuse as presence of other injuries may it unlikely that spiral fracture was an accident

Matter of Tiffany F. 205 AD2d 429 (1st Dept. 1994) – 4 year old with 9 lesions on her scalp, on e behind her ear and two on her arm, petitioners doctor says they are cigarette burns and discounts parents claims they may be roach bites or injuries from a cat, also parents offered doctor who testified that she did not think that injuries were burns – but parents doctor could not rule out burns and had only seen child 9 hours after other doctor – abuse found against the parents

Matter of C Children 207 Ad2d 888, 616 NYS2d 644 (2nd Dept. 1994) – Child had second degree burns on her hand, medical testimony that burn was caused by nonaccidental immersion in boiling liquid, mother claimed child had turned on tub faucet accidently, also admitted she waited 2 days to take him to doctor, also admitted she hit him with a belt causing contusions for picking at scab caused by bruise – mother is abusive as her explanation was not consistent with the medical testimony and given her subsequent behavior

Matter of Shetonya W. 203 AD2d 144 (1st Dept. 1994) – 10 month old with skull fracture, uncontradicted medical testimony that it would not be likely to occur without abuse, mother's explanation was not sufficient

1995

Matter of Julissa II 213 AD2d 18, 629 NYS2d 335 (3rd Dept. 1995) – very young child had scarring in vaginal area that looked "like a bad episiotomy" that medical experts said would not

occur by accident – parents did not rebut this presumption of abuse with any appropriate explanation – both abusive

In Re Christopher C. 631 NYS2d 666 (1st Dept. 1995) – mother abusive where no explanation for 3 month old having multiple fractures of arm and ribs, failure to obtain medical attention in a timely way

1996

Matter of Matthew and Lucas D 642 NYS2d 526 (Family Court, Queens County 1996) – parents were abusive where 2 month old had more than 20 fractures and no new fractures while in foster care, genetic test for brittle bone disease was negative and court rejected parent's expert who claimed child may have "temporary brittle bone disease"

1997

Matter of Eric CC 653 NYS2d 983 (3rd Dept. 1997) – 6 week old baby with numerous fractures. Parents claimed baby could have been injured during birth or due to medical examinations or due to "temporary brittle bone disease". Res ipsa not overcome by these explanations – the medical community does not accept a diagnoses of "temporary brittle bone disease" – even if such a disease does exist, the child's injuries here were caused by a considerable amount of force more common in battered child syndrome

1998

In Re Jessica H., 681 NYS2d 557 (2nd Dept. 1998) - 6 week old baby with burned fingers, bruises on palm, thigh, multiple fractures of legs – 3 medical experts that injuries were from a trauma – parents explanations did not rebut the "statutory presumption"

Matter of Brandon C. 668 NYS2d 655 (2nd Dept. 1998) – both parents abusive where 17 week old baby has shaken baby syndrome, four broken bones, all at different times in a 4 week period – no appropriate explanation by parents

2000

Matter of Shawna K 11/22/00 3rd Dept. 2000 – 18 month old with broken clavicle – the mother and her boyfriend were caretakers and unable to say how it had happened but thought child may have fallen off a toy slide or off her bed or was hot by toy by other child, only hearsay evidence that boyfriend had prior history of child neglect, no medical witnesses called re likelihood of cause of injury, only hearsay and opinion of caseworker – dismissed for failure to prove prima facie case

Matter of Brandyn P 278 AD2d 533, 716 NYS 2d 830 (3rd Dept. 2000 – infant with spiral fracture of right leg – teenage father says child fell of couch, twisting leg, paternal grandmother testified that she heard fall and a "snap" sound – medical testimony that injury was highly suspicious for abuse and unlikely injury could have occurred as described, doctor did not see couch but caseworker who saw couch did not think injury could have been from couch – dismissed, injury is compatible with abuse but court did find father's explanation credible

In re Magnolia A. 707 NYS2d 176 (1st Dept. 2000) – unexplained gonorrhea in a 5 year old –

prima facie case of child abuse – burden shifts to parents to explain and they must do so or be found to be abusive

Matter of Zachery MM 714 NYS2d 557 (3rd Dept 2000) – 3 month old had skull fracture and 15 broken bones – day care provider told parents child had been injured in a fall, parents took child to doctor who found skull fracture and 15 previous fractures to ribs, legs, wrist. Parents claim day care provide must have done them all – parents had brought child to doctor in the past and no broken bones had ever been seen – doctors testified that it was quite possible that parents had not noticed broken bones as even a doctor would have missed them without a full body x-ray which was not done until the allegations of the head injury in the fall – child may not have exhibited any unusual crying – parents abuse dismissed

In re F Children 707 NYS2d 32 (1st Dept. 2000) – mother is abusive where one year old has a broken wrist and two fractures in arm in separate incidents two months apart. Medical proof that such injuries are not normally sustained except due to abuse – mother has inconsistent and contradictory explanations

Matter of Marquis W. 2/7/00 (2nd Dept. 2000) – parents are not abusive where baby has shaken baby syndrome which is prima facie evidence of abuse but parents did rebut

In re Quincy Y. 714 NYS2d 293 (1st Dept. 2000) – child had unexplained 2 degree burns and mother did not seek medical care - mother is abusive

2001

In re Karla V. 717 NYS2d 598 (1st Dept. 2001) – baby had fractured arm and mother was found to have abused, one year later mother sought to reopen case as she had located a medical expert who would now support her claim that injury had occurred accidently when mother held child down during routine medical exam – court should allow her to present new evidence

Matter of Trevon C 280 AD2d 473, 720 NYS2d 178 (2nd Dept. 2001) – child had second degree burns on 40% of his body, medical evidence that it would not have happened absent abuse, also respondent had not sought prompt medical attention – he was abusive

2002

In Re Malta L. 298 AD2d 141, 747 NYS2d 765 (1st Dept. 2002) – child was burned, mother gave a variety of explanations outside of court and in court claimed it was accidental cigarette burn but could not give a credible description of how it happened, she had failed to seek medical attention

2003

Matter of Sharonda S. 301 AD2d 532, 752 NYS2d 898 (2nd Dept. 2003) – 8 month old baby with fractured leg, medical testimony that injury was suspicious and mother offered no reasonable explanation - finding of abuse

Matter of Marc A. 301 AD2d 595, 754 NYS2d 45 (2nd Dept, 2003) - 7 year old with round burn on shoulder – doctor says it is a cigarette burn or a hot circular metal object pressed into skin – doctor believes child was abused – parents say child fell into a wall and lower court believes injury

"minor" and could be "self inflicted" – 2nd Dept. says parental explanations are unreasonable and unacceptable and made finding of abuse

<u>In Re Damen M</u> 309 AD2d 569, 765 NYS2d 347 (1st Dept. 2003) – 2 month old with 1st and 2nd degree burns on 20% of body – medical proof that child was immersed in scalding water and not brought for medical attention for 1-2 days – parent's present engineer who testifies that tub had faulty hot water valve which could have surged hot water – abuse finding as burns were immersion type not due to a surge of water

<u>In re Keone J.,</u> 309 AD2d 684, 766 NYS2d 192 (1st Dept. 2003) – child had six healing fractures to his ribs, symmetrical bruises on his arms and recent traumatic chest injury – ribs injured about 10-14 days earlier, chest injury 4 days old when brought to hospital by mother – mother says child may have fallen but this is inconsistent with the injuries, child had been at father's home and also cared for at mother's home by her and her boyfriend – court found father to have abused child as ribs injured during period when he was at fathers, mother and her boyfriend also abusive as chest injury would have been at time under mother's care and they had delayed taking child to hospital and claimed not to have noticed child's bruises and his pain

<u>2004</u>

<u>Matter of Peter and Matthew R.</u> 779 NYS2d 137 (2nd Dept. 2004) – ten month old bay had lump on head and doctor told mother to bring child in that day, parents waited 3 days when lump was much larger, said they did not know how baby had been injured and offer various explanations – child had a skull fracture – petitioner's doctor said was not explained but parents claims that child could have rolled off a couch or been pushed over by a toddler brother. Parents offered doctor – who was family friend – to say that toddle sibling could have caused the injury and lower court also called its own witness who said it could have been accidental – App Dive finds abuse by parent s-mother was inconsistent, courts witness was not aware of parents testimony of details about the alleged falls.

<u>In Re Nicholas B.</u> 8 AD3d 108, 778 NYS2d 495 (1st Dept. 2004) – mother is abusive where she is caretaker of child and can offer no reasonable explanation for child's injury

<u>In Re Benjamin L.,</u> 9 AD3d 153, 780 NYS2d 8 (1st Dept. 2004) – 3 year old dies after serious burns - foster parent caretakers claimed child was left alone in tub for brief moment and turned on hot water and produced expert who said this was feasible – agency experts said burn patterns where consistent with being restrained in scalding water and said no evidence that he screamed or tried to get out of water as he would have if turned water on himself – foster mother had given different versions of the incident

<u>Matter of Angelique M.</u> 10 AD3d 659, 781 NYS 2d 705 (2nd Dept. 2004) - 6 month old with broken leg while in father's care – he could not reasonably explain the suspicious injury – unlikely to be an accident

<u>Matter of Nyomi AD</u> 10 AD3d 684, 783 NYS2d 596 (2nd Dept. 2004) – abuse where child has unexplained hymeneal injuries but not as to burns to a second child as that child was in care of babysitter at time of burns

Matter of Infinite G., 11 AD3d 688, 783 NYS2d 656 (2nd Dept. 2004) – abuse where baby who had only been in parents care for 2 weeks had retinal hemorrhaging and subdural bleeding and was diagnosed with "shaken baby syndrome" – both parents were sole caretakers and could offer no explanation for injuries - did not rebut presumption of abuse

Matter of Aniyah F. 13 AD3d 529, 788 NYS2d 119 (2nd Dept. 2004)- 5 month old with subdural hematoma, scalp injuries, scar on forehead, healed fractures of 2 bones in arm, lip abrasion – both mother and aunt are abusive as they were caretakers and neither offered an adequate explanation

Matter of Randy V 13 AD3d 920, 786 NYS2d 823 (3rd Dept. 2004) – 18 month old with 1st and 2nd degree burns on her back in shape of an iron, including steam holes – father and paternal grandmother were caring for child and did not bring child to the doctor for 5-7 hours after burns, doctor says burns were not consistent with accidental fall of iron but with deliberate pressing onto child – who would have screamed and cried in pain for sometime – father was uncooperative and gave conflicting versions of what happened – abuse finding

Matter of Kortney C., 3 A.D.3d 532; 770 N.Y.S.2d 758(2nd Dept. 2004)

An emergency room doctor testified that the seven-month-old child suffered a spiral fracture of the femur which could only have been caused by the intentional infliction of a twisting force to the child's leg. Since the testimony established that the baby was in the care of the appellant, Savitri L., at the time of the injury, the burden shifted to her to explain how the injury occurred. Respondent (apparently a babysitter named as a PLR) stated the child fell from a changing table and that she caught her on her stomach or by her arm, but she failed to tell either the parents or hospital personnel about the fall. The appellant did call the parents after the child began crying, and helped secure treatment for the child.

A medical expert testified that the spiral fracture could have been caused accidentally in two ways, either by the baby landing on her leg after a fall or by being caught by the leg in mid-air after falling. This testimony contradicted the appellant's explanation, as she testified that the child did not hit the ground and she did not grab the child's leg at any point. Res Ipsa finding affirmed

2005

Matter of Alyssa CM 17 AD3d 1023, 794 NYS 2d 224 (4th Dept. 2005) – 14 month old with 2nd degree burns all over lower part of his body, including on soles of his feet, various stages of healing, medical evidence that they were inflicted and that some were in pattern of space heater in mother's home – child had bruises all over his body, adult finger marks on his head, two black eyes, multiple lacerations to his liver consistent with an adult kick or punch – medical testimony that he was abused – mother claimed other respondent said child had been burned by accident when touching the space heater – waited a day to ask someone else to take child to the doctor – mother found to have abused the child

Matter of Ilene M., 796 NYS2d 87 (1st Dept. 2005) – 9 month old twins – both have a fractured limb – medical proof said injuries could not have been sustained without maltreatment and mother has no credible explanation – abuse

2006

Matter of Tyranna M. 27 AD3d 472, 811 NYS2d 118 (2nd Dept. 2006) – both parents are abusive where child was severely burned and burns were of a nature that would not occur without maltreatment – parents were child's caretakers and they did not rebut the "presumptions of culpability"

Matter of Daqwuan G. 29 AD3d 694, 814 NYS2d 723 (2nd Dept. 2006) – 17 month old with abrasions on nose and upper lip, bruises on face and belly, spine, back and chest, four fractured ribs and hematoma on adrenal gland – injuries are those that mother should be able to explain as she was child's caretaker – her explanations are contradictory, implausible, unreasonable and not credible

Matter of Ashley RR 30 AD3d 699 (3rd Dept. 2006) – – respondents rebutted the res ipsa of sex abuse as some 40 other people also had access to sexually abused girls

Albany County CYF v Ana P 13 Misc3d 855 (Family Court, Albany County 2006) – - 3 year old with gonorrhea – both parents have it, no other caretakers have it – father is res ipsa abusive as highly unlikely mother could physically give a child gonorrhea and mother appropriate with child re medical needs so she has rebutted

Matter of Seamus K. 33 AD3d 1030 (3rd Dept, 2006) – – both parent are res ipsa abusive even though others had access as no proof that injuries occurred at time when child was with others and court found respondents not credible – strong dissent

2007

Matter of Fantaysia L. 36 AD3d 813 (2d Dept. 2007) – - prima facie res ipsa abuse agst mother, stepfather with whom child lived and father and grandmother where child visited after 3 year old contracts gonorrhea but mother and stepfather rebutted as stepfather proved he was not a caretaker and mother had shown appropriate concern for child's condition

Matter of Tony B. 41 AD3d 1242 (4th Dept. 2007) – - 4th Dept. says Erie County Family Court dismissal of abuse of 3 month old with fractured skull is upheld as respondents as well as others were caretakers within 48 hours before injury and DSS had no proof which/who was responsible for the injury

Matter of Julia BB 42 AD3d 208, 837 NYS2d 398 (3rd Dept. 2007) – 3rd Dept. reverses Family Court in severe abuse finding, infant had many fractures, bruises and skin discolorations, also had an incident with an airway obstruction – lower court believed parents could not adequately explain injuries and patterns, 3rd Dept. says much evidence of parents being loving and trying to unravel medical question of child's conditions and medical opinions varied

Matter of Christopher Anthony M 46 AD3d 896, 848 NYS2d 711(2nd Dept. 2007) - granted summary judgment for the father in an abuse case -18 month old child brought to the hospital for serious burns on his head and face - father testified at the FCA 1028 hearing that he was in the bedroom and the child was in the kitchen where an unrelated woman who shared the apartment was cleaning. The father heard the child screaming and came to the kitchen to find him burned. The

woman told the father she had no idea how the child had gotten hurt. The medical testimony was that the child had been burned by a hot liquid pouring on the child's head and pouring down his face. The burns could have been from either an accidental or a deliberate pouring of hot liquid on the child. At the FCA 1028 hearing, the father denied knowing how the child could have been hurt although there was testimony that the woman in the kitchen was known to sometimes have a thermos of boiling water. The woman refused to testify. The father had rebutted the res ipsa injury that he had been either abusive or neglectful, shifting the burden to ACS to prove that there was a triable issue of fact and ACS failed to set forth any triable fact. - strong dissent citing that the purpose of the res ipsa exception is to in fact not require that the agency prove what happened.

Matter of SIDNEY FF.., 44 A.D.3d 1121,844 N.Y.S.2d 453(3rd Dept. 2007)

The three-month-old child (born in 2004) of respondent sustained several unexplained injuries, including rib and skull fractures in different stages of healing, and respondent's explanations of how the injuries had occurred while the child was in his care appeared to be highly unlikely. Petitioner submitted expert testimony that the child's fractures and other injuries could not have resulted from accidental events. Instead, each expert opined that only a more violent and abusive event could have caused such severe injuries. Because the expert testimony overwhelmingly supports the finding that the child's injuries were of the type which would not ordinarily occur absent some act by the adult responsible for her care and that the child was injured on at least three occasions while respondent admittedly was responsible for her , the burden shifted to him to "offer a reasonable explanation" for the injuries. Family Court expressly rejected respondent's attempt to do so, having discredited his testimony and that of his witnesses. According due deference to Family Court's credibility determinations, we find no error in its finding that respondent abused and neglected the child.

2008

Matter of Seth G., 50 AD3d 1530, 856 NYS2d 778 (4th Dept. 2008) – mother failed to rebut res ipsa re 3 year old with extensive bruising on his face and shoulder which would have resulted from some pressure being put on his neck – mother gave various explanations which court discredited

Matter of Samuel L., 52 AD3d 394 (1st Dept. 2008) - - mother failed to rebut injuries to 5 month old. Child had bulging fontanel, bilateral subdural hematoma, skull fracture, retinal hemorrhages, injuries were not accidental and would have been inflicted days if not weeks before and no medical help sought – mother offers no plausible explanation

Matter of Jordan XX., 53 AD3d 740 (3rd Dept. 2008) – respondent failed to explain bruising and swelling in child's genital area – boy did not have injuries day before. Medical evidence that injuries were not accidental, explanations offered were speculative and implausible, respondent not credible

Matter of Madeline A., 55 AD3d 430, 866 NYS2d 150 (1st Dept. 2008) – parents could not explain 3 months old baby have internal bleeding in the cranium, fractures of her knee, ankle and rib and retinal hemorrhaging - parents complaint that they were not provided with sufficient means to hire their own expert was without merit

Matter of Arianna, 55 AD3d 733, 866 NYS2d 263 (2nd Dept. 2008) – prima facie proof of abuse

established when child had first and second degree burns on upper body and medical testimony was that the burns were intentionally inflicted by the direct placement of a thermal object and this shifted burden to mother who could offer no reasonable explanation

Matter of Chaquill R., 55 AD3d 975, 865 NYS 716 (3rd Dept. 2008) – prima facie proof of abuse where baby suffered second and third degree burns to buttocks and thighs from scalding water – burden shifted to mother to explain and mother's explanation of a defective water heater was not proven. Other child had recently taken a shower with no problem. Mother admitted not mixing in cold water and burn patterns were consistent with child being held in the water

Matter of Samantha M., 56 AD3d 299, 867 NYS2d 406 (1st Dept. 2008) – 2 year old with multiple bruises to face and body and severe duodenal hematoma - medical evidence that injures were not accidental, BF and mother lie about when BF was alone with child – their expert says child has undiagnosed disease called Henoch0-Schlein Purpura but their experts never examined; medically neglected child who seemed sick for 2 weeks and vomited several times in that period

2009

Matter of Maddesyn K., 63 AD3d 1199, 879 NYS2d 846 (3rd Dept. 2009) – prima facie proof of excessive corp where child has bruises on jaw which look like someone grabbed face, subdural hematoma, retinal bleeding, infarct (dead brain tissue) all within a short period of time, parents said she had accidents including a seizure where she fell on a sidewalk - other child said parents were "mean" to this child and made a choking gesture

Matter of Desmond LL., 61 AD3d 1309 (3rd Dept. 2009) – neglect not proven where child has injury to tops of feet that DSS expert thinks are cigarette burns but mother's expert says child had unusual behavior of rubbing own feet – caseworker had actually seen child doing the behavior

Matter of Kaitlynn I., 64 AD3d 654, 883 NYS2d 126 (2nd Dept. 2009) – excessive corp where child has numerous bruises on body that expert says are not accident and were caused by being hit with a blunt flexible object – mother has no credible explanation.

Matter of Aaron McC., 65 AD3d 1149, 886 NYS2d 408 (2nd Dept. 2009) – GM abusive where child had a left parietal diastatic skull fracture, bilateral subdural hemorrhages and diffuse retinal hemorrhages in both eyes; would not occur without abuse and GM did not rebut

2010

Matter of Alanie H., 69 AD3d 722 (2nd Dept. 2010)

A prima facie case that the child had suffered an injury that would ordinarily not occur without an act of omission by the caretakers and the parents had been the caretakers at the time but parents rebutted the res ipsa case. Multiple medical experts testified that the child's injuries were not caused by head trauma but by a form of meningitis, its sequelae and the treatment the boy received. The parents did obtain proper medical care except in one instance where they did medically neglect the child by not taking the child to the emergency room after having been directed to by the pediatrician.

Matter of Takia B., 73 AD3d 575 (1st Dept. 2010)
Five month old son had unexplained injuries - four broken ribs and a fractured clavicle. The father had admitted to beating a five year old – new child derivative

Matter of Devre S., 74 AD3d 1848 (4th Dept. 2010)
Medical testimony was that the 2 week old infant sustained a fracture of the left leg and a laceration of the liver that the respondents did not adequately explain. The 18 month old child was derivatively abused and neglected due to this level of impaired judgment.

Matter of Jacob B., __AD3d__, dec'd 10/26/10 (2nd Dept. 2010)
Multiple fractures that the medical expert testified where intentionally inflicted and that there was no evidence of a bone disease. The mother did not rebut the prima facie case of child abuse.

2011
Matter of Jose Luis T., 81 AD3d 406 (1st Dept. 2011)
Baby had a "single nondisplaced oblique fine-line fracture" of his femur. Although this is a res ipsa injury, rebuttal evidence was offered that the injury could have occurred accidently when the mother bent down to pick up garbage while the infant was in a "snuggly" on her chest. Further any injury could have been exacerbated when later than day the pediatrician performed a "Barlow-Ortolani" procedure during a well baby visit.

Matter of Alexander F., 82 AD3d 1514 (3rd Dept. 2011)
Youngest child suffered bilateral subdural hematomas, bilateral infractions of the brain, substantial loss of brain tissue and several rib fractures. The child will suffer from severe brain injury and other permanent disabilities. The medical evidence was that the injuries were caused by violent shaking, slamming against a hard surface or a deceleration injury and at least one of the injuries had occurred not more than 3 or 4 days before the child was taken to the hospital. The father claimed that he had not had contact with the child during that period of time and that he took the child to the hospital when the aunt told him the child was acting oddly. He claimed a babysitter watched the child. The caseworker testified that the oldest child told her that he had overheard the grandparents say that the father had hit the child on the head with a TV remote and had hit the child on the back. The court found that the father's claim that a babysitter was watching the child was not convincing and that in fact the evidence showed that he was the child's caretaker during the 3 days before the child was taken to the hospital. Further the oldest child's out of court statements corroborated the medical proof.

Matter of Keara MM., 84 AD3d 1442 (3rd Dept. 2011)
Six week old son had a fractured left upper arm and collar bone, fractures in his upper and lower left leg, fractures in both bones in his right arm and six broken ribs. The medical evidence was that a child of this age could not have so injured himself and that the injuries would have likely occurred in 3 or 4 separate incidents of trauma. The mother and the father were the child's primary caretakers. The maternal grandparents and a friend also lived in the house but they provided very limited care and there was no evidence that they had injured the baby. A paternal grandmother also cared for the child briefly for two periods but she testified and there was no indication that she was responsible. The mother admitted in criminal court that she had jerked the baby's arm and had broken it but also offered other explanations at times that were incredible and implausible. The

mother had also told the father that she has “smacked” the child across the face shortly before the child’s injuries were revealed and the father had also noticed bruises on the child’s legs. The father denied that he had ever hurt the baby but reported that the mother had been violent towards himself and had thrown the older child onto the bed on one occasion.

Matter of Jezekiah R.A., 78 AD3d 1550 (4th Dept. 2010)
Son had shaken baby syndrome and had a fracture of his femur, bilateral subdural hematomas and retinal hemorrhages. The injuries would have been inflicted at different times. The father would not testify at the fact finding. This is sufficient proof by a preponderance that the father abused the child or allowed someone else to do so. However, since the child was also in the care of the mother and the grandparents and no proof was deduced as to how the child actually was injured, there was not clear and convincing proof that the father severely abused the child. Severe abuse requires proof of serious physical injury but also proof that the child was abused by reckless or intentional acts under circumstances evincing a depraved indifference to human life and there was not such evidence offered.

The Lead Res Ipsa Case in Child Protective Proceedings in New York.

The full text of the New York Court of Appeals *Matter of Phillip M .* case

Matter of Phillip M . 82 NY2d 238, 604 NYS2d 40 (1993)
OPINION BY: Simons, J.

Family Court has found respondent parents responsible for the sexual abuse of two of the five children living in their home. Accordingly, it ordered all five children placed under the supervision of the Child Welfare Administration (CWA) of the petitioner Department of the Social Services for a period of 12 months. Petitioner established its case by presenting evidence that respondents "allowed" two of the children, while under their care, to contract chlamydia, a sexually transmitted disease. The issue presented is whether respondents satisfactorily rebutted petitioner's prima facie case that they were legally answerable for the children's condition. I.

Respondents are the parents of four children,

Philip, 15; Jacob, 12, Brandon, 8, and Belit,5

The children lived with respondents in a three-bedroom home which the parents have maintained for the last several years.

Angel, age 9, a nephew of the mother, also lived with them.

In 1989, at the request of petitioner, respondents took Angel's sister and brothers,

Cathy, Wilfredo and Alfredo, into their home. (latter removed)

During April or May of 1990, Belit's mother observed Alfredo, then six years old, lying on top of Belit. Both were naked below the waist. As a result she insisted that petitioner remove Alfredo, Wilfredo and Cathy. Seven months later she observed a discharge from Belit's vagina and sought medical treatment for her and advice from a consultation center. As a result, the incident was reported to petitioner and in April 1991, following an investigation, petitioner instituted this proceeding charging respondents with sexual abuse. Petitioner alleged that while in the sole care of respondents Belit had been vaginally penetrated and her hymen broken and that Philip, Brandon and Belit had tested positive for chlamydia.

At a fact-finding hearing before Family Court, petitioner presented two witnesses, Mr. Mendez, a social worker employed by the CWA, and Ms. Harrison, a pediatric nurse practitioner at Montefiore Medical Center. Mr. Mendez testified that he could learn little about how the disease was contracted during his investigation of the family. Respondents denied any knowledge of sexual abuse and although Belit eventually told him that she had been touched in the vagina by a "little kid" in a park near her home, the children gave him no explanation of how the abuse had occurred. The CWA requested respondents to have all the children tested for sexually transmitted disease. Belit was tested by Ms. Harrison at Montefiore Medical Center in December 1990 and the four boys were tested several weeks later. Ms. Harrison also made appointments to test Alfredo, Wilfredo and Cathy. They were living with their grandmother at the time, however, and respondents did not produce them for testing.

Ms. Harrison testified that the initial physical examination of Belit revealed that Belit's hymen was irregular and bled when touched. Tests done that day showed that Belit was infected with chlamydia in her vagina. Ms. Harrison testified that Belit told her she had been "bad touched", but would not identify the incident or the person who touched her. Respondents were provided with a prescription for Belit, and at a February 15, 1991 follow-up examination, she tested negative for chlamydia.

Ms. Harrison also examined the four boys. Brandon and Philip both tested positive for chlamydia in their rectal area but neither offered any explanation for the source of their [*242] infections. The test results for Jacob and Angel were negative. Ms. Harrison concluded that Belit and Brandon had been the victims of sexual abuse, but made no determination about Philip. He may have been a victim she said but, because of his [***43] age, he also could have acquired the disease through consensual sexual activity.

Both parents testified. They admitted that they alone were responsible for the care of the children but, other than conjecture, offered no explanation for how Belit had been injured or how the children had become infected. They also testified that they did not believe the positive test results for Brandon and Philip. Indeed, because they did not believe them, they had not given either Brandon or Philip the medication Ms. Harrison prescribed for the boys. Nor did they take either boy to a scheduled follow-up examination at Montefiore Medical Center. Instead, in March 1991,

some two months after the initial examination, respondents had Philip and Brandon retested for chlamydia at another hospital. On the second examination the boys tested negative. Respondents offered no explanation for not believing the earlier positive test results or the possible source of the disease. They simply maintained that the earlier test results were incorrect. Respondents did not have themselves tested for chlamydia until March and April of 1991.

The record contains some evidence of a possible source for Belit's injury. There were the accounts of Belit and her mother of the incident in the park in which, as Belit said, an unidentified boy touched her vagina or, as her mother testified at the hearing, touched Belit outside her clothing. There was also evidence of Belit's contact with Alfredo after he came to live with respondent in October 1989. Alfredo's sister, Cathy, told Mr. Mendez that during the time they lived with respondents she saw Alfredo touching Belit on two occasions, once in the living room and once in the bedroom. One of these was the incident Belit's mother observed in April of 1990, when she saw Alfredo lying on top of Belit. Alfredo admitted to Mr. Mendez that he had touched Belit's vagina with his hand once when Cathy was present and Mr. Mendez confirmed that Department records indicated that Alfredo had been sexually abused while in a foster home and that while living with respondents he apparently had asked both Belit and Cathy to have sex with him.

The children's mother testified that she had Wilfredo, Alfredo and Cathy moved to their grandmother's home immediately after witnessing the incident between Belit and Alfredo. Some seven months later, respondents noticed a vaginal discharge from Belit, which ultimately proved to be a symptom of chlamydia, and led to this proceeding.

Family Court found that petitioner had established injury to the children while under respondents' care and it had, therefore, established a prima facie case of child abuse under *article 10 of the Family Court Act*. It also found that respondents' explanation for the source of injuries failed to rebut petitioner's prima facie case. Accordingly, the court ordered the children released to respondents under CWA supervision for 12 months, during which time the parents were to seek counseling with their children. The Appellate Division confirmed the factual findings of Family Court and affirmed its order. We agree with the result reached by the Appellate Division but not with its view that once a prima facie case of child abuse had been established under the statute, the "burden of proof" shifted to respondents, who were then required to provide a " 'reasonable and adequate explanation of how the injuries were sustained' " *(Matter of Philip M., 186 AD2d 462, 463).*

II. Historically, it has been difficult to prove acts of sexual abuse involving young children because such acts "are predominantly nonviolent and usually occur in secret" making it difficult to acquire evidence fixing blame *(Matter of Nicole V., 71 NY2d 112, 117).* Article 10 was enacted to alleviate these difficulties *(Matter of Christina F. [Gary F.], 74 NY2d 532, 535).* It defines an "abused child" as a child under the age of 18 whose parent or other person legally responsible for the child's care "commits, or allows to be committed, a sex offense against such child" (*Family Ct Act § 1012 [e] [iii]*). *Section 1046 (a) (ii)* provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) that respondents were the caretakers of the child at the time the injury occurred. Unexplained sexually transmitted disease in a child is evidence of sexual abuse *(see, Matter of Tania J., 147 AD2d 252, 259).*

The statute is fault based. There must be evidence of child abuse and petitioner must establish it by "a preponderance of the evidence" (*Family Ct Act § 1046 [b] [i]*; *and see, Matter of Tammie Z., 66 NY2d 1*). The application of the statute, however, permits a finding of abuse or neglect based upon evidence of an injury to a child which would ordinarily not occur absent acts or omissions of the responsible caretaker. It authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur *(see, Dermatossian v New York City Tr. Auth., 67 NY2d 219, 226*; *Plumb v Richmond Light & R. R. Co., 233 NY 285*; *see also,* 2 McCormick, Evidence § 342, at 451 [Practitioner's 4th ed 1992]). Indeed, the statute is modeled on the res ipsa loquitur doctrine *(see, Matter of S, 46 Misc 2d 161, 162*; *Matter of Roman, 94 Misc 2d 796, 801-802).*

As in negligence cases tried on the theory of res ipsa loquitur, once a petitioner in a child abuse case has established a prima facie case, the burden of going forward shifts to respondents to rebut the evidence of parental culpability. But contrary to the statement of the Appellate Division, the burden of proving child abuse always rests with petitioner; "[s]hifting the burden of explanation or of going on with the case does not shift the burden of proof" *(Plumb v Richmond Light & R. R. Co., 233 NY, at 288*). It is sometimes said that once a prima facie case is established a "presumption" of parental responsibility for child sexual abuse arises but this refers to a presumption which is "evidentiary and rebuttable, whether by [respondent's] own testimony or by any other evidence in the case" *(People v Leyva, 38 NY2d 160, 167*; *see also, Dermatossian, supra, at 226*). While the fact finder may find respondents accountable for sexually abusing a child or allowing sexual abuse to occur after a prima facie case is established, it is never required to do so *(cf., Dermatossian, supra, at 226*).

Once a prima facie case has been established, respondents may simply rest without attempting to rebut the presumption and permit the court to decide the case on the strength of petitioner's evidence or, alternatively, they may present evidence which challenges the establishment of the prima facie case.

Their evidence may, for example,

(1) establish that during the time period when the child was injured, the child was not in respondent's care *(see, e.g., Matter of Vincent M., 193 AD2d 398, 403)*;

(2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omissions of respondent *(see, e.g., Matter of Eric G., 99 AD2d 835*); or

(3) counter the evidence that the child had the condition which was the basis for the finding of injury *(see, e.g., Matter of Smith, 128 AD2d 784, 785-786).*

III. In this case, respondents conceded that they were responsible for the children's care and they did not challenge the finding that Belit had been abused and had contracted chlamydia. To defeat petitioner's prima facie case, they relied principally on evidence that Belit's injury had another source.

Family Court found respondents' explanations "insufficient" to overcome petitioner's prima facie case. Insofar as the incident in the park was concerned, the boy was not identified and there was no reason to presume he was infected with chlamydia or that he transmitted the disease to Belit during the encounter. Moreover, the versions of Belit and her mother differed on whether the boy had touched Belit over her clothing or not. Family Court accepted the mother's version and

since chlamydia could not be communicated in this way, it rejected the park incident as the source of Belit's injury.

The incident with Alfredo presented a closer question. Alfredo's contacts with Belit were witnessed by Cathy and Belit's mother and confirmed by Alfredo. Moreover, Alfredo apparently had a history of emotional and sexual abuse when he came to live with them, although respondents were unaware of it at the time and had no reason to take precautions to prevent Belit's injury. The evidence is not persuasive, however, that he caused Belit's infection. Considering that Alfredo was never tested for chlamydia to determine if he was the source, that Belit's symptoms of chlamydia did not manifest themselves until seven months after Alfredo was removed from respondents' home and that no evidence before the court showed Alfredo penetrated Belit, the court cannot be faulted for rejecting Alfredo as a source of injury. Indeed, respondents did not advance the theory that Alfredo had infected Belit when the injury to her hymen was discovered or when the chlamydia was diagnosed. It was not until these proceedings were initiated that they suggested those possibilities.

Furthermore, respondents failed to present any evidence to rebut Brandon's injury or to explain why some of their children were infected with the disease but not others. Though they did not accept the positive test results from Montefiore Medical Center, they produced no evidence that the first test was flawed or that the second test, in which Brandon and Philip tested negative, was more reliable. Their simple refusal to believe the results of a medical test did little to counter petitioner's prima facie case, particularly when they accepted the Montefiore test results for Belit, Jacob and Angel without challenging the test's accuracy or reliability.

IV. Respondents fault this assessment of their defense, claiming that the trial court's insistence that they present evidence to support their explanations changed the burden of proof. They assert that such a procedure places reasonable, prudent, and caring parents lacking knowledge of how their child has become injured, in an impossible position because, by application of the statute, they may become the subject of coercive intrusion into their family life by the Department of Social Services.

Section 1046 (a) (ii) of the Family Court Act attempts to strike a fair and reasonable balance between a parent's right to care for a child and the child's right to be free from harm. **The establishment of a prima facie case does not require the court to find that the parents were culpable; it merely establishes a rebuttable presumption of parental culpability which the court may or may not accept based upon all the evidence in the record.**

Before relying upon its provisions, the court should consider such factors as

the strength of the prima facie case and

the credibility of the witnesses testifying in support of it,

the nature of the injury,

the age of the child,

relevant medical or scientific evidence and

the reasonableness of the caretaker's explanation in light of all the circumstances.

In weighing the caretaker's explanation, the court may consider the inferences reasonably drawn from his or her actions upon learning of the injury. Certainly, the caretaker's failure to offer any explanation for the child's injuries, to treat the child, or to show how future

injury could be prevented are factors to be considered by the court, for they reflect not only upon the caretaker's fault and competence but also the strength of the caretaker's rebuttal evidence.

In this case, respondents appear to have acted responsibly concerning Belit's treatment, but they failed for reasons not sufficiently explained, to take steps which could assist in fixing the cause of the injuries or to insure that they were not repeated. For example, they waited three months after Belit, Brandon and Philip had tested positive for chlamydia, before they had themselves tested for chlamydia and, apparently believing Alfredo to be the source of the infection, they nevertheless failed to have him tested. Moreover, they failed to give Philip and Brandon the medicine provided by nurse Harrison and they waited some two months before having them retested for chlamydia. Even if respondents doubted the accuracy of the tests performed by Ms. Harrison, they needlessly exposed their own children to harm by allowing two months to go by without taking any action to treat or retest Philip and Brandon. While no one of these facts is dispositive, once a prima facie case had been established, Family Court was entitled to consider all of them when determining respondents allowed the children to be abused.

Accordingly, the Appellate Division order in this case should be affirmed, without costs.

Chief Judge Kaye and Judges Titone, Hancock, Jr., Bellacosa, Smith and Levine concur.

Order affirmed, without costs.