# A PRESUMPTION TOO FAR: MISAPPLICATIONS OF RES IPSA LOQUITUR IN FAMILY POLICING

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## I. INTRODUCTION

*It was the type of accident that every new mother dreads. On February 11, 2010, Melissa J. dropped her nine-week-old baby while lifting him out of the bath. She rushed her son to the hospital, where an MRI revealed bleeding on his brain. The terrifying incident became even more traumatic when the Administration for Children's Services (ACS) filed an abuse petition in family court, alleging that the injuries were "unexplained."*

*At trial, ACS presented expert witnesses. One acknowledged that the injury could have been caused by the fall Melissa described. The second one disagreed, believing the bleeding on the brain sufficient to diagnose child abuse, even in the absence of other indicia of abuse. However, this same expert also testified that he rarely reviewed images of children younger than six. Melissa's expert, a board-certified pediatric radiologist, testified that the injuries were*

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*entirely consistent with the fall Melissa described. Melissa had no history of abuse or neglect allegations—she was a devoted, loving mother who had always prioritized her child's well-being. She was fully cooperative with medical professionals and ACS caseworkers. Witnesses attested to her kindness and care as a parent. No additional evidence of abuse or neglect was presented at trial. Yet, despite all of this, the family court found her guilty of abuse.*

*It took more than two years from the time of the fall for Melissa to overturn the abuse finding. Melissa was separated from her child for over six months, during which time she and her newborn missed critical bonding time. Throughout this painful ordeal, the state never produced any affirmative evidence that she abused her son. Unbeknownst to her, and to many similarly situated parents, the improper application of an old tort doctrine,* res ipsa loquitur, *played a significant role in making such a devastating family court prosecution possible.*[1]

In order to bring this case against Melissa, prosecutors employed an evidentiary rule used in child protection cases which allows abuse cases to proceed even in the absence of direct proof that a parent inflicted harm on a child. This rule is the tort doctrine of *res ipsa loquitur*, which translates literally to "the thing speaks for itself." The doctrine originates from ancient tort jurisprudence and, in New York, which will be the sole focus of this note, has been adapted and applied to the family regulation system through statute.[2] The doctrine of *res ipsa loquitur* originated in the 1863 British case *Byrne v. Boadle*, where a barrel of flour fell from a shop window and struck a passerby.[3] The court concluded that such an accident could not have occurred absent negligence and held that the very fact of the injury created a sufficient inference for the plaintiff to survive dismissal.[4]

The importation of *res ipsa loquitur* from tort to family court in New York was a response to significant proof issues in child abuse and neglect proceedings.[5] In cases where *res ipsa* is invoked, there

1. In re Tyler S. (Melissa J.), 960 N.Y.S.2d 438, 439–41 (App. Div. 2013).

2. In New York child abuse cases, the doctrine is housed in Family Court Act § 1046(a)(ii), which states that "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." N.Y. Fam. Ct. Act § 1046(a)(ii) (McKinney 2025).

3. (1863) 159 Eng. Rep. 299, 299; B. Sonny Bal & Lawrence H. Brenner, *Medicolegal Sidebar: The Law and Social Values: Res Ipsa Loquitur*, 473 Clinical Orthopaedics & Related Rsch. 23, 24 (2015).

4. *Byrne*, 159 Eng. Rep. at 299.

5. *See* Chris Gottlieb, *Improving Res Ipsa Loquitur Doctrine in Child Abuse Cases: A Step Toward Racial Justice*, 25 J. Gender, Race & Just. 411, 416 (2022) ("[T]here

is often a lack of direct evidence, as young children are unable to testify or explain the circumstances leading to their injuries. To overcome this challenge, *res ipsa loquitur* permits prosecutors to bypass the typical requirement of affirmative evidence to initiate a petition against a person legally responsible for a child. Instead, the doctrine allows for the petitioner to make out a prima facie case of abuse, despite the absence of sufficient evidence to sustain a petition in family court under normal circumstances. In New York, a prima facie case of abuse requires that petitioner show that the injury is of a type that does not ordinarily occur except by some act or omission of the parent.[6] The respondent parent may then attempt to rebut the prima facie case during a family court trial, typically in one of three ways. The respondent may:

> (1) establish that during the time period when the child was injured, the child was not in respondent's care[;] (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omissions of respondent; or (3) counter the evidence that the child had the condition which was the basis for the finding of injury.[7]

Importantly, the ultimate burden of proof should always remain on the petitioner (the state).[8]

Furthermore, legal historians have noted that *res ipsa* may have emerged, in part, as an "effort by nineteenth-century jurists to hold business interests accountable for injuries caused by their machines, even as industrial accidents proliferated and industrialists came to dominate Anglo-American government and society."[9] From the start, then, *res ipsa* was a tool designed for civil liability cases, involving monetary damages and jury determinations. Yet today, that same doctrine is embedded in section 1046(a)(ii) of the Family Court Act (FCA),[10] where it is used not to allocate financial fault but to justify

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often is not direct evidence of specific abusive actions in situations in which the state should be empowered to protect children from further harm.").

6. Fam. Ct. Act § 1046(a)(ii).

7. *In re* Philip M., 624 N.E.2d 168, 172 (N.Y. 1993) (citations omitted).

8. *Id.* ("[T]he 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.'" (quoting Plumb v. Richmond Light R.R. Co., 233 N.Y., at 288) (second alteration in original)).

9. G. Gregg Webb, *The Law of Falling Objects:* Byrne v. Boadle *and the Birth of Res Ipsa Loquitur*, 59 Stan. L. Rev. 1065, 1070 (2007).

10. *See* Fam. Ct. Act § 1046 supp. cmt. 4 ("Subdivision (a)(ii) is the equivalent of the tort law res ipsa loquitur presumption (and is obviously borrowed from tort law).").

state intervention in families' lives, often leading to traumatic removals or lasting abuse findings. This is especially concerning in an area of law where

> [t]he State wields its power to intervene in the parent-child relationship, an action which for the present may lead to temporary removal of the child from the home, and which could later result in a permanent severance of the respondent's parental rights. In child-protective proceedings, therefore, it is the burden of the accuser to prove, by a preponderance of the evidence, that the allegations are true before the stigma of neglect attaches. The respondent should not be compelled by the court to facilitate her own adjudication of neglect.[11]

A mechanism once meant to empower plaintiffs against corporate defendants is now deployed to ease the path of prosecution against parents, many of them poor Black and Brown New Yorkers, in a system where the consequences far exceed financial loss.

At the same time, however, case law has indicated that the FCA[12] should be interpreted to engage with families in the least intrusive way possible.[13] Courts can intervene only in cases where sufficient facts support an abuse or neglect petition.[14] Despite this clear

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11. *In re* Comm'r of Soc. Servs. *ex rel.* Verena E., 621 N.Y.S.2d 436, 437 (Fam. Ct. 1994).

12. This is New York's statutory scheme governing family court procedures.

13. The FCA "erects a careful bulwark against 'unwarranted state intervention into private family life,' for which its drafters had a deep concern." *In re* Jamie J., 89 N.E.3d 468, 473 (N.Y. 2017) (quoting Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004)); *accord In re* Loraida G., 701 N.Y.S.2d 822, 827 (Fam. Ct. 1999) ("Parents have a fundamental right to raise their children and the State may intervene only where necessary to protect the child's life, health or safety.").

14. "A proceeding under this article is originated by the filing of a petition in which facts sufficient to establish that a child is an abused or neglected child under this article are alleged." *See* N.Y. Fam. Ct. Act § 1031. Specifically, for neglect cases, the state must show that either (1) the child's physical or mental condition has been impaired or is in danger of becoming impaired, the parent or guardian failed to exercise a minimum degree of care, and the child's impairment or danger of impairment is a consequence of the parent or guardian's failure to exercise a minimum degree of care, or (2) the child has been abandoned by his parent or guardian. N.Y. Fam. Ct. Act § 1012(f). For abuse cases, the state must show that the parent or guardian has either (1) inflicted or allowed to be inflicted physical injury other than accidental injury which causes or creates a substantial risk of death or serious or protracted disfigurement, protracted impairment of physical or emotional health, or protracted impairment or loss of function of a bodily organ; or (2) created or allowed to be created a substantial risk of such injury; or (3) committed, allowed, or encouraged various enumerated sex crimes involving a child. *Id.* § 1012(e). Definitions of abuse and neglect are strictly construed. *See* Nicholson, 820

directive from the FCA, the temptation to take action in cases with proof problems has led courts down a path that deviates both from the mandate of the FCA and, as this paper will show, from the appellate tort law surrounding the use of *res ipsa loquitur*.

In 2006, the appellate tort case *Morejon v. Rais Construction Co.* clarified a frequent error in the application of *res ipsa loquitur* in tort law.[15] Lower courts were sometimes employing a rebuttable presumption once a prima facie case had been established by *res ipsa loquitur*, rather than using the doctrine to draw a permissible inference of negligence.[16] In *Morejon*, the Appellate Court clarified that the rebuttable presumption standard is *not* the correct standard for *res ipsa* cases.[17] Despite this clarification, appellate family court cases rarely cite *Morejon* for this proposition. Instead, family courts remain blind to this change and largely continue to employ the rebuttable presumption in *res ipsa* cases.[18] In failing to correct for the doctrinal error *Morejon* corrected, family courts continue to import a tort doctrine into family policing without the legal protections that make it fair.

While New York *res ipsa* law is the focus of this paper, "[e]very state has a mechanism to grant child welfare authorities the ability to assign responsibility for harm inflicted on a child when the precise cause of the injury is unknown."[19] Understanding how this issue has unfolded in New York offers insights into how attorneys might limit the improper use of *res ipsa* and how judges should address those challenges in New York and other states. While the

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N.E.2d at 845 (noting that the legislature was "deeply concerned that . . . imprecise definition[s]" of statutory terms "might result in 'unwarranted state intervention into private family life.'" (quoting FAM. CT. ACT § 1012 cmt. f (McKinney 1999))).

15. 851 N.E.2d 1143, 1144 (N.Y. 2006).

16. *See id.* at 1146 ("[R]es ipsa loquitur does not create a presumption of negligence against the defendant.").

17. *Id.* at 1146, 1148.

18. *See infra* Part III.

19. Gottlieb, *supra* note 5, at 420; *see, e.g.*, N.J. STAT. ANN. § 9:6–8.46(a)(2) (West 2025) ("[P]roof 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 guardian shall be prima facie evidence that a child of, or who is the responsibility of such person is an abused or neglected child . . . ."); CAL. WELF. & INST. CODE § 355.1 (West 2025) ("Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that finding shall be prima facie evidence that the minor is a [dependent child of the court]."); FAM. CT. ACT § 1046(a)(ii) (allowing *res ipsa* for proof of child abuse and neglect).

legal strategies in other regions may differ due to variations in local laws and precedents, the central idea stays the same: We must remain alert to the unjust application of *res ipsa loquitur* against parents and caregivers of children. This principle holds true across all jurisdictions.

It is irresponsible to write a paper about family policing without mentioning its racial impact. While *res ipsa* "does not single out Black families, . . . it falls far harder on them because every legal rule that works poorly in the family regulation system falls hardest on Black families."[20] Black and Brown children make up approximately 90% of child protective investigations in New York City.[21] While only 19% of White children in New York City will experience an ACS investigation by their 18th birthday, 45% of Black and Latino children will.[22] When it comes to *res ipsa* cases, which often arise in hospitals, "Black children are more likely to be evaluated for abuse than white children with comparable injuries."[23] Once a court case is filed, Black families are thirteen times more likely to have their children removed.[24]

This disparity is fueled in part by a conservative instinct to err on the side of caution when it comes to potential child abuse. When a Black or Brown child presents with injuries, system actors are able to default to the most conservative protective actions allowed by the Family Court Act.[25] The presumption used in §1046(a)(ii) cases relieves decision-makers of the need to name or examine the underlying, sometimes racist, assumptions that guide their actions. Accordingly, *res ipsa* offers a facially neutral legal pathway to act on assumptions often influenced by implicit bias without scrutiny. Black

20. Gottlieb, *supra* note 5, at 414.

21. *Racism at Every Stage: Data Shows How NYC's Administration for Children's Services Discriminates Against Black and Brown Families*, NYCLU (June 20, 2023), https://www.nyclu.org/report/racism-every-stage-data-shows-how-nycs-administration-childrens-services-discriminates [https://perma.cc/WAU3-HBUV]; *see also* Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 Colum. J. Race & L. 1, 5 (2022) ("[N]inety percent of children named in [New York City family regulation] investigations . . . are Black or Latinx.").

22. *Racial Disparities 2019*, NYC Fam. Pol'y Project, https://familypolicynyc.org/data-brief/racial-disparities/ [https://perma.cc/35UP-GHXJ] (last visited Oct. 15, 2025).

23. The Child.'s Hosp. of Phila., *Pediatricians May Apply Bias in Abuse Assessment, Study Finds*, PR Newswire (Aug. 17, 2010), https://www.prnewswire.com/news-releases/pediatricians-may-apply-bias-in-abuse-assessment-study-finds-100891369.html [https://perma.cc/R6BZ-BMFE].

24. Gottlieb, s*upra* note 5, at 414.

25. *See id.* at 428 (arguing that courts' implicit biases might motivate findings of guilt through *res ipsa* in abuse and neglect cases brought against minority parents).

and Brown families are more likely to interact with family regulation systems, those interactions are more likely to escalate into investigations, and those investigations are more likely to result in family separation.[26] In this way, broadening the scope of abuse prosecutions and findings perpetuates the centuries of family separation inflicted on minority groups in America.[27]

This paper argues that the persistent misapplication of the *res ipsa loquitur* presumption in family regulation cases, despite the clear directive in *Morejon* to abandon this doctrinal approach, is a legal mistake worth remedying. This is both because it aggravates other doctrinal errors, including the conflation of prima facie and final burdens, and because it unnecessarily and improperly widens the net of child abuse findings. Doing so is unfaithful to the purposes of the FCA, increases the number of traumatic and unnecessary family separations, and continues to exacerbate centuries of racism in family policing.

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26. *See id.* at 414 n.11 ("Black families are six times more likely than white families to be reported to the child abuse hotline, eight times more likely to have a case indicated . . . , and thirteen times more likely to be separated."); Jenna Lauter, *Even "Child Welfare" Workers Say Their Agency Is Racist*, NYCLU (Jan. 23, 2023), https://www.nyclu.org/commentary/even-child-welfare-workers-say-their-agency-racist-0 [https://perma.cc/W8MB-5EZF] ("Black families are seven times as likely as white families to be reported to the family regulation system. . . . Ninety percent of the families ACS investigates are Black or Brown.").

27. *See History of Racial Injustice: Black Families Severed by Slavery*, Equal Just. Initiative (Jan. 29, 2018), https://eji.org/news/history-racial-injustice-black-families-severed-by-slavery/ [https://perma.cc/NR4Y-893K] ("Roughly half of all enslaved people were separated from their spouses and parents; about one in four of those sold were children."); Anita Sinha, A Lineage of Family Separation, 87 Brook. L. Rev. 445, 449 (2022) ("The preservation of a particular notion of the nation also drove the so-called 'orphan trains' movement beginning in the mid-nineteenth century, when child welfare workers removed children often based on '[c]ultural inferiority' . . . whenever families failed to resemble the 'American' values of temperance, wealth, and whiteness.' Most children removed from East Coast cities were not orphans, but instead were from impoverished, immigrant families."); Jessica Lussenhop & Agnel Philip, *Native American Families Are Being Broken Up in Spite of a Law Meant to Keep Children with Their Parents*, ProPublica (June 15, 2023, at 06:00 ET), https://www.propublica.org/article/native-american-parental-rights-termination-icwa-scotus [https://perma.cc/RYP5-3J8T] (highlighting the progress of the Indian Child Welfare Act in addressing systemic family separation and its varied application by the states); Christie Renick, *The Nation's First Family Separation Policy*, Imprint (Oct. 9, 2018, at 05:05 ET), https://imprintnews.org/featured/nations-first-family-separation-policy-indian-child-welfare-act/32431 [https://perma.cc/7E5C-V3G9] ("[In the late 1960s], between 25 and 35 percent of all American Indian children had been placed in adoptive homes, foster homes or institutions. Around 90 percent of those children were being raised by non-Indians.").

## II.
## FAMILY COURT'S LEGAL MISSTEP: CLINGING TO THE REBUTTABLE PRESUMPTION

*In re Philip M.*, a landmark 1993 appellate family court case on the application of *res ipsa* in the family regulation system,[28] is essential to understanding the use and misuse of the doctrine today. This decision clarified a fundamental element of *res ipsa* from tort law: The burden of proof always rests with the petitioner.[29] The court emphasized that, even in the absence of a rebuttal by the respondent, a judge may reasonably determine that the petitioner has failed to meet the burden of proof by a preponderance of the evidence, despite having established a prima facie case.[30] *Philip M.* not only clarified a misunderstanding in the family regulation context regarding the application of the burden of proof, but also reaffirmed that the structure and design of *res ipsa loquitur* in tort law should generally be adopted in the family regulation context.[31]

Although *Philip M.* provided important safeguards on the use of *res ipsa loquitor* in child abuse proceedings, it still treated the establishment of a prima facie *res ipsa* case as a rebuttable presumption. Under this presumption, after petitioner establishes there was abuse using *res ipsa*, the burden of explanation (but not the burden of proof) shifts to the respondent, and the respondent can rebut the presumption of parental culpability, usually in one of three ways.[32] Respondent's evidence may:

> (1) establish that during the time period when the child was injured, the child was not in respondent's care[;] (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omissions of respondent; or

28. 624 N.E.2d 168, 172 (N.Y. 1993).

29. *Id.*

30. *Id.*

31. *See id.* (noting that the court's application of § 1046(a)(ii) is consistent with "negligence cases tried on the theory of res ipsa loquitor"). In New Jersey, a similar practice of improper burden shifting was occurring in *res ipsa* cases. A seminal case clarified and eliminated that practice. The New Jersey Supreme Court explained that it "ha[s] no authority to import the burden-shifting equitable doctrine of conditional res ipsa loquitur from . . . tort law into [New Jersey's child welfare law], a comprehensive and carefully conceived statutory scheme in which the Legislature has determined that [the state] bears the burden of proving by a preponderance of the evidence that a parent or guardian has committed an act of child abuse or neglect." N.J. Div. of Child Prot. & Permanency v. J.R.-R., 258 A.3d 1094, 1106 (N.J. 2021).

32. *In re* Philip M., 624 N.E.2d 168, 172 (N.Y. 1993).

(3) counter the evidence that the child had the condition which was the basis for the finding of injury.[33]

Despite *Philip M.*'s role in clarifying the relevant burdens, the courts continued to use divergent standards. Judges disagreed as to whether establishing the prima facie case of *res ipsa loquitur* created a rebuttable presumption of negligence or merely an inference of negligence.[34] In 2006, the New York Court of Appeals addressed what it termed the "dizzying array of formulations" surrounding the application of *res ipsa loquitur* in the tort law context.[35] The court sought to clarify the proper application of the doctrine. Specifically, the court concluded that "res ipsa loquitur does not create a presumption of negligence against the defendant."[36] The court further explained that the indiscriminate use of the terms "presumption" and "inference" had led to procedural confusion.[37] Thus, *Morejon* stands for the clear proposition that a rebuttable presumption is not the correct standard in *res ipsa* cases. The standard adhered to in *Morejon* is one of past "jurisprudence, in which [the courts] denominate *res ipsa loquitur* as creating an inference" of negligence.[38]

Despite the important clarification from *Morejon*, Appellate Division or family court cases largely fail to cite the decision for the proposition that *res ipsa loquitur* does not create a rebuttable presumption in the context of child abuse cases. Given that the use of *res ipsa* in the family regulation system is deeply rooted in tort doctrine, the clarification provided in *Morejon* must similarly be applied to the family regulation context. While appellate courts in the tort context

33. *Id.* (citations omitted).

34. *See* Morejon v. Rais Constr. Co., 851 N.E.2d 1143, 1148 (N.Y. 2006) (describing the various forms of *res ipsa loquitur* applied by New York courts).

35. *Id.*

36. *Id.* at 1146.

37. *See id.* ("Slowly thereafter, res ipsa loquitur gained general acceptance with us, but there was some confusion over the doctrine's procedural effects. Courts, including ours, used 'prima facie case,' 'presumption of negligence' and 'inference of negligence' interchangeably even though the phrases can carry different procedural consequences.").

38. *Id.* at 1148. This standard was in fact consistent with earlier tort doctrine. *See, e.g.*, Kambat v. St. Francis Hosp., 678 N.E.2d 456, 458 (N.Y. 1997) ("Submission of res ipsa loquitur, moreover, merely permits the jury to infer negligence from the circumstances of the occurrence. The jury is thus allowed—but not compelled—to draw the permissible inference."); Loeffler v. Rogers, 523 N.Y.S.2d 660, 660 (App. Div. 1988) ("The facts underlying the occurrence of this incident, although not compelling a finding of negligence, give rise to an inference of negligence [under *res ipsa loquitur*] and, thus, create a question of fact for the jury.").

have acknowledged this aspect of the doctrine,[39] family courts remain blind to it, continuing to treat *res ipsa loquitur* as establishing a rebuttable presumption.

## III.
## WHEN FAMILY COURTS GET IT RIGHT—AND WRONG: INFERENCE VS. PRESUMPTION IN THE CASE LAW

*Morejon* clarifies that the rebuttable presumption is the incorrect standard to apply once a *res ipsa* prima facie case has been established.[40] When a prima facie case is made out, it supports only an inference of negligence, which does not compel a finding of negligence. Instead, the inference creates a question of fact for the factfinder, where there may have otherwise not been enough evidence to survive a summary judgement motion, or to even bring the case at all.[41] More often than not, trial and appellate courts fail to understand the permissible inference standard and erroneously use a rebuttable presumption. In fact, this is the outcome in many *res ipsa* cases within the family regulation system.[42] These cases involve two legal mistakes. One is simple: the appellate courts clarified the application of *res ipsa* in *Morejon*, but family courts repeatedly fail to

39. *See, e.g.*, *Kambat*, 678 N.E.2d at 458; *Loeffler*, 523 N.Y.S.2d at 661 ("The facts underlying the occurrence of this incident, although not compelling a finding of negligence, give rise to an inference of negligence and thus create a question of fact for the jury."); George Foltis, Inc. v. City of New York, 38 N.E.2d 455, 462 (N.Y. 1941) ("[E]vidence which under the rule of res ipsa loquitur satisfies the plaintiff's duty of producing evidence sufficient to go to the jury does not create a full presumption and is ordinarily not sufficient, even where the defendant produces no evidence in contradiction or rebuttal, to entitle the plaintiff to the direction of a verdict.").

40. *Morejon*, 851 N.E.2d at 1148.

41. *Loeffler*, 136 A.D.2d at 824 ("The facts underlying the occurrence of this incident, although not compelling a finding of negligence, give rise to an inference of negligence and, thus, create a question of fact for the jury.").

42. *See, e.g.*, *In re* Tyree B., 75 N.Y.S.3d 391, 391 (App. Div. 2018) ("Petitioner . . . established a prima facie case of child abuse [using § 1046(a)(ii)], and the father failed to rebut the presumption of parental responsibility." (citing *In re* Philip M., 624 N.E.2d 168, 173 (N.Y. 1993))); *In re* Daughtry A., 941 N.Y.S.2d 888, 889 (App. Div. 2012) (The petitioner agency established a prima facie case of neglect [under Fam. Ct. Act § 1046(a)(ii)]. In response, the mother failed to rebut the presumption of culpability. . . . Accordingly, the finding of neglect was supported by the preponderance of the evidence); *In re* Zarhianna K., 19 N.Y.S.3d 465, 465 (App. Div. 2015) (applying the rebuttable presumption); *In re* Devre S., 902 N.Y.S.2d 739, 740 (App. Div. 2010) (same); *In re* Jacob B., 909 N.Y.S.2d 755, 756 (App. Div. 2010) (same); *In re* Aaron McC., 886 N.Y.S.2d 408, 409 (App. Div. 2009) (same); *In re* Seth G., 856 N.Y.S.2d 778, 778 (App. Div. 2008) (same); *In re* Nasir J., 827 N.Y.S.2d 41, 42 (App. Div. 2006) (same); *In re* Jessica H., 681 N.Y.S.2d 557, 557 (App. Div. 1998) (same); *In re* Nakym S., 877 N.Y.S.2d 241, 242 (App. Div. 2009) (same).

apply that clarification. The second, and more complex, doctrinal error will be discussed in the next Part. This error arises when, at the conclusion of a case, courts neglect to reassess whether the preponderance of evidence standard has been met, effectively relying on the prima facie standard for the final burden of proof.[43]

As for the legal error, a handful of trial and appellate courts have properly applied *res ipsa* to create an inference rather than a rebuttable presumption. It is useful to discuss these examples when considering what the legal standard should look like, and how the outcomes may differ when a permissible inference rather than a rebuttable presumption is used.

Take *In re Ashley RR.*, where the trial court "erred in finding that respondents abused and neglected their daughters."[44] In this case, medical evidence suggested that the children had been sexually abused, resulting in charges of abuse and neglect against both the mother and father.[45] In reviewing the trial court decision, the appellate court clarified the proper application of *res ipsa*, noting that "[a]lthough generally referred to as a presumption, this method of proof does not create a true presumption; it creates a permissible inference which the factfinder may draw, but does not compel a finding in accordance with that inference."[46] By describing section 1046(a)(ii) as allowing a "permissible inference" of abuse or neglect,[47] the Third Department emphasized *Morejon*'s point that *res ipsa* is not a rebuttable presumption.[48]

Following this legal framework, the appellate court evaluated the facts. Notably, the children had been exposed to "approximately 40 different adults" while under the care of the respondent grandmother during the relevant time period.[49] In contrast, the respondent parents had rarely been alone with the children, and the parents credibly testified that they ensured the children were never left alone with other adults while under the parents' supervision.[50]

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43. *See infra* Part IV.

44. 816 N.Y.S.2d 580, 583 (App. Div. 2006).

45. *Id.* at 582.

46. *Id.* at 582–83.

47. *Id.* at 583.

48. Morejon v. Rais Constr. Co., 851 N.E.2d 1143, 1146 (N.Y. 2006). The *Ashley RR.* opinion, which came out only a month after *Morejon*, relied on tort cases from the 20th century in holding that *res ipsa* is a permissible inference. *Ashley RR.*, 816 N.Y.S.2d at 583 (first citing Kambat v. St. Francis Hosp., 678 N.E.2d 456, 458 (N.Y. 1997); and then citing Loeffler v. Rogers, 523, N.Y.S.2d 660, 660 (App. Div. 1988)).

49. *Ashley RR.*, 816 N.Y.S.2d at 581–83.

50. *Id.*

Importantly, the court acknowledged that the petitioner had made out the prima facie case which created the permissible inference.[51] But the court remained faithful to the standard laid out in *Philip M.*, maintaining that the "petitioner retained the burden of proving abuse and neglect by a preponderance of the evidence."[52] The Third Department emphasized, "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." Instead, Family Court is required to weigh all the evidence in the record before making a determination regarding abuse or neglect.[53]

Unlike the trial court, which found respondent's testimony "self-serving and insufficient to *rebut the presumption*" under the permissible inference framework, the Third Department found that an abuse finding was "inconsistent with the record evidence."[54] The court reached this conclusion because of the strong evidence that others, such as the respondent grandmother, were more likely responsible for the abuse and neglect.[55]

*In re Christopher Anthony M.*[56] likewise illustrates that courts utilize *res ipsa* more precisely when they understand the attendant legal standards. In this case, the Second Department noted that "Family Court Act § 1046(a)(ii) permits an inference to be drawn so as to establish a prima facie case of abuse or neglect against the parents or other caretakers of a child when the child suffers an injury which would not ordinarily occur in the absence of an act or omission of the caretakers."[57] The posture of this case was a motion for summary judgment by the respondent parent, which the court granted, finding that there was no triable issue of fact.[58] Notably, the court agreed with the petitioner that "[c]learly, the testimony of the physician as to the mechanism of the burn was sufficient to permit the statutory inference."[59] However, the court concluded that the evidence the respondent presented demonstrating that he was not present the moment the child was injured "was sufficient to rebut the statutory inference and to establish, prima facie, that his conduct was neither negligent nor abusive."[60] At this

51. *Id.* at 582.
52. *Id.* (citing *In re* Philip M., 624 N.E.2d 168, 172 (N.Y. 1993)).
53. *Id.* at 583 (quoting *In re* Philip M., 624 N.E.2d at 172).
54. *Id.* at 584 (emphasis added).
55. *Id.* at 583–84.
56. 848 N.Y.S.2d 711 (App. Div. 2007).
57. *Id.* at 713.
58. *Id.* at 712.
59. *Id.* at 713.
60. *Id.* at 714.

point, "the burden shifted back to the petitioner to demonstrate the existence of a triable issue of fact."[61] However, "the petitioner merely submitted an affirmation of counsel who argued that the statutory inference applied."[62] Under the inference framework the appellate court concluded that there was no triable issue of fact.[63]

In limited instances, trial courts have also applied this standard correctly in the first instance, including in *In re Nicole C.*, where the court understood that

> [a]lthough the statute is often described as providing for a 'presumption' of culpability, it does not create a true presumption. Rather, it creates a permissible inference of culpability that the finder-of-fact may choose to draw upon all the evidence in the record . . . .[64]

With this in mind, the court completed a careful analysis of the evidence and concluded that "respondents have rebutted the *res ipsa loquitur* statutory inference and, further, that the record as a whole does not support a finding that respondents abused their child."[65]

When a trial court errs in its judgment, even if the appellate court subsequently corrects the error, families endure prolonged separation and emotional distress while awaiting the resolution of the case. This can mean years of unnecessary family separation. To mitigate such harm, trial courts must use the law created by appellate courts, as articulated in *In re Ashley*, *In re Christopher*, and *Morejon*. The potential consequences for families involved are far too significant to allow for anything less than a faithful application of the law from the beginning of Family Court proceedings.

## IV.
## HOW THE PRESUMPTION DRIVES A FURTHER DOCTRINAL ERROR

Part III outlines courts' failure to adopt tort doctrine's permissible inference framework in place of the rebuttable presumption standard. However, this error is not isolated: It exacerbates another doctrinal misunderstanding, namely, the courts' tendency to conflate the initial prima facie *res ipsa* burden with the final preponderance-of-the-evidence burden of proof. The rebuttable

61. *Id.*
62. *Id.*
63. *Id.*
64. No. NA–21238/09, 2013 WL 3064054, at *26 (N.Y. Fam. Ct. June 10, 2013).
65. *Id.* at *29.

presumption framework aggravates the conflation of burdens because of the short distance between a presumption and a final preponderance showing. When the status quo of abuse is established through a presumption, courts struggle to reassess the evidence at the conclusion of a case to discern whether a preponderance standard has been met.

Importantly, the preponderance standard is still a relatively low threshold, especially when compared to the criminal standard of beyond a reasonable doubt. Holding petitioners to this standard does not preclude findings of abuse when sufficient evidence exists; rather, it simply ensures that such findings are based on sufficient evidence, not on the inertia of a presumption. To avoid conflating the initial and final burdens, courts must pause and evaluate whether, after hearing all the evidence, the case still supports a finding based on the preponderance of the evidence. This is a modest but essential safeguard that protects against infringement on parents' due process rights.

The use of the permissible inference standard, rather than the rebuttable presumption, can help to clarify the difference between the initial burden and the final burden. This is best demonstrated in family court cases that do apply the permissible inference standard rather than a rebuttable presumption. For example, in *In re Nicole C.*, the appellate court successfully applied a permissible inference while also addressing the issue of conflating burdens.[66] The interplay between the permissible inference and the discussion of final burdens offers valuable insight into how the use of an inference could serve as a bulwark against the conflation of burdens. When assessing whether the permissible inference had been refuted, the court discussed expert testimony, ultimately finding that the expert witness "did not provide this Court with any particular insight in this case."[67]

> Dr. Palusci's testimony simply established that, in his opinion, neither Rickets nor vitamin D deficiency was a contributing factor to the infant's injuries. Therefore, since he had no other identified cause, abuse was the *presumed* cause "until [we are able to] identify some other cause." That, in the Court's view, is not persuasive expert testimony establishing that abuse was the cause. It is simply a *restatement of the permissible inference* set forth in Family Court Act § 1046(a). In other words, since Nicole, a 47-day-old baby, suffered two fractures and there was no cause that Dr. Palusci was able to identify, abuse was presumed to be the cause.[68]

66. *Id.* at *26–27.
67. *Id.* at *33.
68. *Id.* (alteration in original) (emphasis added).

The appellate court here made a critical point: Courts cannot restate the statutory inference to meet the final burden of proof.[69] This distinction is facilitated by the use of a permissible *inference*, which facially and definitionally can never meet a final burden. With no additional evidence besides that used to create the inference, the appellate court in the case appropriately saw the distance between the initial burden and the final burden and overturned the trial court decision.

*In re Christopher*,[70] discussed in Part III, is another clarifying example. In this case, the appellate court overturned the trial court by applying a permissible inference, rather than a presumption, in granting the respondent's summary judgment motion.[71] The court notably concluded that relying "solely on the statutory inference to defeat the motion for summary judgment . . . *would be elevating the statutory inference to an irrebuttable presumption* in the face of a motion for summary judgment."[72] The specific posture of this case underscores the dynamics at play: the statutory inference serves merely to bridge an evidentiary gap arising from the unique context of injuries to young children. However, bridging the evidentiary gap cannot be conflated with the petitioner's final burden of proof. In this motion for summary judgement, the petitioner bore the burden of demonstrating a triable issue of fact; in other cases, the burden may be to prove the claim by a preponderance of the evidence. Although the final burden remains the same whether there is a rebuttable presumption or an inference, this case again displays how it may be easier for courts to make the distinction between the initial and final burden with a permissible inference rather than a rebuttable presumption.

Other appellate courts have successfully identified the issue of conflating burdens, even if they fail to rely on the inference standard delineated in *Morejon*. These cases are similarly useful in dissecting the ways in which the rebuttable presumption may aggravate the doctrinal error of conflating burdens.

Consider *In re Liana HH*, where the appellate court concluded that the evidence presented by the respondent "was enough to rebut the presumption of parental responsibility afforded by [§1046(a)(ii)] and, inasmuch as petitioner's case relied upon that presumption, petitioner failed to sustain its burden of showing by a preponderance of the evidence that respondent abused or neglected the

69. *Id.*
70. 848 N.Y.S.2d 711.
71. *Id.* at 714.
72. *Id.* at 714 (emphasis added).

child."[73] In this case, the appellate court noted that the "respondent advanced a persuasive, factually based explanation as to how the child's 'condition *could* reasonably have occurred . . . without the acts or omissions of respondent.'"[74]

This finding by the appellate court centered on the argument that the child's condition could have arisen independently of any actions by the respondent. The child had been diagnosed with brain bleeding and hemorrhaging, yet there were no bone fractures, bruising, or other signs typically associated with abuse, nor was there any direct evidence that the respondent had acted inappropriately toward the child.[75] The respondent's medical expert testified that it would be "'exceedingly rare' for trauma to cause a stroke in the well-protected cerebellum" and that there was "no evidence of trauma such as a skull fracture or brain contusion."[76] A second medical expert "agreed that there was no evidence of trauma and opined that the venous thrombosis and fluid buildup around the child's brain could have resulted from natural disease and would have led to the child suddenly becoming symptomatic as she did."[77] When the burden shifted back to the petitioner, the medical expert admitted that "retinal hemorrhages could arise from causes other than trauma and that the medical community was divided on whether retinal hemorrhages were a secondary effect of brain problems rather than the result of direct trauma."[78] Despite this expert medical testimony, the "Family Court questioned respondent's account of events and found petitioner's experts more credible . . . ."[79] The appellate court, however, conducted its own review of the competing expert evidence and reached the opposite conclusion, ultimately reversing the lower court's finding.[80]

Through the medical experts described above, the respondent presented evidence of a reasonable alternative explanation for the injury—one of the defenses that should have rebutted any inference of abuse. Yet the trial court found that this failed to overcome the presumption. Use of the presumption aggravated the doctrinal error, as even with the concessions from petitioners after the defense case concluded, the respondents still lost in the lower court. This

73. 86 N.Y.S.3d 278, 282 (App. Div. 2018).
74. *Id.* (quoting *In re* Philip M., 624 N.E.2d 168, 172 (N.Y. 1993)).
75. *Id.* at 280.
76. *Id.* at 281.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 282.

outcome suggests that the trial court conflated the initial prima facie burden with the final preponderance burden. Despite the presentation of multiple expert opinions strongly supporting an alternative medical explanation, the status quo of "abuse" proved challenging to disrupt, even where a petitioner had produced no direct evidence of abuse.

An additional example of a lower court finding abuse or neglect without sufficient evidence is *In re Tyler S. (Melissa J.)*, where the Second Department overturned a finding of abuse, reasoning that "the Family Court erred in determining that the mother failed to come forward with sufficient satisfactory evidence to rebut the petitioner's case."[81] According to the Second Department:

> The mother adduced evidence, through her expert, that the subdural hematoma and hemorrhage sustained by the subject child were not caused by another unexplained event, but rather were consistent with the same accidental trauma described by the mother. No other evidence was presented to support the allegation of abuse. Indeed, the record reflects, and it was undisputed, that the mother was a concerned parent who cared for her child. She was forthcoming and cooperative with the medical professionals attending her child as well as the petitioner's caseworkers. Witnesses testified that the mother was a loving and caring parent and she had no other history with child protective agencies.[82]

After reviewing the record, the appellate court concluded that the evidence indicating that this was accidental trauma, coupled with the plethora of circumstantial evidence that the mother was a responsible parent, indicated that petitioner fell short of the final preponderance standard.[83]

Another illustration of the legal mistake of conflating burdens occurs is *In re Amir L.*[84] The lower court held that the respondents had in fact rebutted a presumption of abuse by providing a credible explanation of their child's injury, but they failed to rebut a presumption of neglect.[85] However, on appeal, the First Department overturned the neglect finding as well.[86] The appellate court held that

81. 960 N.Y.S.2d 438, 441 (App. Div. 2013).
82. *Id.*
83. *Id.*
84. 961 N.Y.S.2d 386 (App. Div. 2013).
85. *Id.* at 387.
86. *Id.* at 389.

> In light of respondents' rebuttal evidence and the lack of evidence of other neglect, the finding of neglect was not supported by a preponderance of the evidence. Just as the court found with respect to the abuse charges, the inconsistent statements in the medical records attributed to respondents do not tip the scales in petitioner's favor with respect to the neglect charges.[87]

Once again, the appellate court concluded that the final preponderance standard had not been met, and that the lower courts' weighing of the evidence had been incorrectly tipped towards the petitioner.[88]

The conflation of the prima facie burden with the final preponderance of evidence standard is a doctrinal issue that improperly widens the net for abuse and lowers the final burden of proof, thus diluting due process for parents in family court. The use of rebuttable presumptions exacerbates this conflation by blurring the lines between the initial and final burdens. To rectify these errors, courts must shift towards the permissible inference model, ensuring a clearer, more consistent application of the burdens of proof, in line with the purposes set forth in the Family Court Act.

## V.
## A NOTE ON THE LIMITATIONS OF LEGAL LANGUAGE

Transforming a presumption into an inference is, of course, not a panacea. It is essential to pause and consider the potential pitfalls of focusing too narrowly on language without addressing the underlying practices that shape legal outcomes. For the inference to effectively rectify the legal errors discussed above, it must remain strictly a permissible inference. If properly applied, the permissible inference standard may not only be easier to rebut, but it should also increase the gap between the prima facie burden and the final burden of proof, reducing the frequency with which trial courts conflate these burdens. In at least a few cases from the 1970s and 1980s, courts employed the inference standard but effectively treated it as a rebuttable presumption.[89] Courts must be wary of this. One case from that era notes that "[a]lthough the establishment of a prima facie case does not shift the burden of proof, it does permit an inference, and in some cases, *so strong an inference that 'no reasonable man could fail to*

87. *Id.*

88. *Id.*

89. *See, e.g.*, *In re* Edwards, 335 N.Y.S.2d 575, 579 (Fam. Ct. 1972) (stating that parents must present "satisfactory proof to negate the prima facie case established by statute" or else "a finding of neglect will be made").

*accept it.*'"[90] New and old cases have further muddled the issue by using both the inference and the presumption language.[91] These cases should serve as a cautionary reminder that merely changing language cannot resolve all underlying doctrinal issues. In fact, *Morejon* itself warned of the complicated nature of labels.[92] Still, a faithful application of the permissible inference standard would more accurately align with the legal framework laid out in *Morejon* and afford parents a more genuine opportunity to present their case and challenge the statutory inference.

## VI.
## CONCLUSION

This paper identifies several legal misapplications of *res ipsa loquitur* within the family regulation system. While family court has logically turned to this tort doctrine to address cases where direct evidence of wrongdoing may be inaccessible, particularly due to the young age of the children involved, family courts have erroneously applied this doctrine. Specifically, courts have misapplied *res ipsa* by relying on a presumption (rebuttable or not) rather than a permissible inference. This misapplication has contributed to an additional legal error: At the conclusion of a case, courts neglect to reassess whether the preponderance of the evidence standard has been met, effectively relying on the prima facie standard for the final burden of proof.

The consequences of this misapplication are significant, particularly for low-income Black and Brown families. The use of an improper standard may result in an increased number of abuse findings and the unnecessary or prolonged separation of families. Moreover, this approach further undermines due process protections in family

90. *In re* Tara H., 494 N.Y.S.2d 953, 958 (Fam. Ct. 1985) (emphasis added) (quoting William L. Prosser, Handbook of the Law of Torts § 40, at 229–30 (4th ed. 1971)).

91. *See, e.g.*, *In re* T.A., No. 21833–4/11, 2012 WL 745087, at *7 (N.Y. Fam. Ct. Feb. 28, 2012) ("The evidentiary presumption . . . does not shift the overall burden of proof from Petitioner to Respondents; however, when evidence sufficient to activate the presumption has been presented, a finding can be made unless Respondents satisfy their burden of coming forward with an adequate explanation."); *In re Edwards*, 335 N.Y.S.2d at 579 (first describing the Family Court Act as permitting "an inference of neglect to be drawn," then referencing the standard as a "statutory presumption").

92. *See Morejon v. Rais Constr. Co.*, 851 N.E.2d 1143, 1148–49 (N.Y. 2006) ("The dizzying array of formulations (from mandatory inferences to permissive presumptions), however, suggests that things would be far less complicated if we viewed the res ipsa loquitur/summary judgment issue without undue emphasis on labels and pigeonholes.").

court prosecutions, which are already few and far between (a lower final burden of proof, no right to a jury, and fewer evidentiary protections, to name just a few).[93] Despite these reduced due process protections, the consequences for parents remain incredibly serious. Employing a rebuttable presumption, where appellate courts have established that a permissible inference is the correct standard, removes yet another layer of protection for families and continues to ease the path to an abuse finding for the petitioner.

Going forward, courts should apply the precedent established in *Morejon* to the family regulation system to ensure that *res ipsa* is used with a permissible inference rather than a rebuttable presumption. While this shift would mitigate some doctrinal errors, it is not a panacea. Courts must remain vigilant, carefully reviewing all evidence to ensure that the permissible inference does not inadvertently function as a rebuttable presumption. Furthermore, after the petitioners and respondents have presented their cases, courts must rigorously reassess the entirety of the evidence to ensure that the preponderance of the evidence standard has been properly met before making abuse findings. Only through such careful application of the law can we ensure more equitable and just outcomes in family regulation proceedings.

93. *See* Eli Hager, *In Child Welfare Cases, Most of Your Constitutional Rights Don't Apply*, ProPublica (Dec. 29, 2022), https://www.propublica.org/article/some-constitutional-rights-dont-apply-in-child-welfare [https://perma.cc/36UZ-HJTG] (discussing the inapplicability of Fourth, Fifth, and Sixth amendment protections in child welfare cases); *see also* Julia Hernandez & Tarek Z. Ismail, *Radical Early Defense Against Family Policing*, 132 Yale L.J.F. 659, 666–69 (2022) (discussing lack of substantive and procedural protections for parents during often-coercive child welfare investigations).