TORTS — EVIDENCE OF NEGLIGENCE — APPLICATION OF *RES IPSA LOQUITUR*

Knott v. Royal Exchange Assurance of London[1]

The plaintiff suffered injuries whilst a passenger in a motor car owned and driven by one W. and insured with the defendant company. The vehicle, structurally sound, careered off a bituminous highway while rounding a curve, and capsized. The plaintiff claimed £8,000 damages for his personal injuries, alleging negligence on the part of W. for whom the defendant company was responsible as insurer.

The case is interesting because of the paucity of evidence available to explain the accident; the driver died without recovering consciousness, and the plaintiff, according to his evidence, remembered nothing from an early stage of the journey until he awoke in hospital some six weeks later. There were no other witnesses of the incident. The plaintiff averred that *res ipsa loquitur* and argued that inasmuch as a sound motor car does not usually leave a well-surfaced road without negligence of the person controlling it, the fact that this vehicle did so afforded *prima facie* evidence of negligence on the part of W. Reed J. admitted this submission and, as the defendant was unable to rebut it, judgment was entered for the plaintiff for the full amount of damages claimed.[2]

There is a *prima facie* case of negligence against the driver of a sound motor vehicle which leaves the road while rounding a curve of a good road which, if left unrebutted or unexplained, will be sufficient to allow judgment for the party alleging such negligence.

It was clear, and so Reed J. held, that the first two of the generally recognized prerequisites to the application of the maxim *res ipsa loquitur* were satisfied: the circumstances surrounding the cause of the damage were at the material time exclusively under the management of the defendant[3] or someone for whose actions he was in law responsible, and the happening remained unexplained. His Honour held further, through an arguable line of reasoning, that the third prerequisite, that such an event does not usually occur without negligence,[4] was satisfied. It was acknowledged that, save in exceptional cases, it would be contrary to reason to infer negligence on the part of the drivers in accidents involving two or more

[1] [1955] S.A.S.R. 33. Supreme Court of South Australia, Reed J.

[2] An appeal to the Full Court of the Supreme Court of South Australia ([1955] S.A.S.R. 43) on the question whether, on its proper interpretation, the policy of insurance provided only for a maximum payment of £2,000 damages to an injured third party was successful and the action was remitted to Reed J. with a direction to this effect.

[3] *Gee v. Metropolitan Rly* (1873) L.R. 8 Q.B. 161. Compare *Easson v. L.N.E.R.* [1944] K.B. 421.

[4] e.g. *Byrne v. Boadle* (1863) 2 H. & C. 722. Compare *Wakelin v. L.S.W.R.* (1886) 12 App. Cas. 41, and *Jones v. G. W. Rly* (1930) 47 L.T. 39.

motor vehicles or motor vehicles and pedestrians since the vagaries of human conduct must be considered in determining the culpability attaching to the parties in the frequent accidents occasioned in these ways. On the other hand, he argues that if a motor car which is being driven along a road suddenly overturns or leaves the road there is at least ground for saying that the occurrence is unusual and evidence of negligence may be found in its happening more readily than in the other classes of cases.[5] The defendant sought to exclude the principle *res ipsa loquitur* by adducing evidence of several previous accidents at the curve in question. The learned Judge deemed this unhelpful because (i) no evidence was given of the circumstances under which they occurred, and (ii) the present enquiry was not as to whether the curve was dangerous but as to whether the deceased driver was negligent in negotiating it. With respect, it is submitted that perusal of details of these previous accidents may have proved of material assistance to the Court. The High Court has repeatedly pronounced[6] that the brocard *res ipsa loquitur* is not a convenient method of establishing a presumption of law but only enables the presentation of facts through inference which could not otherwise be proved. Any other relevant facts must be blended with them if the logically correct inference is to be obtained.[7] Later in his judgment,[8] His Honour observes that the unusual nature of such an accident as the present should be considered not in a narrow, objective sense but with reference to its venue and the road in question. The assigning of reason (ii) above to reject as unhelpful, evidence, however fragmentary, called to demonstrate the dangerous nature of the curve would appear, therefore, to be inconsistent with this view.

The question of the length to which the defendant had to go in order to rebut the *prima facie* case of negligence inferred against him by the plaintiff occupied little time of the Court, for the former was naturally unable to prove conclusively that W. was not negligent. Nor was any satisfactory explanation given to suggest that the happening was as consistent with an absence of negligence as with its presence on the part of W.[9]

[5] This view is consistent with the view expressed by Dixon J. (as he then was) and McTiernan J. in *Davis v. Bunn* (1936) 56 C.L.R. 246, that it is not invariably true that the occurrence of an accident occasioned by a vehicle on the highway cannot in itself supply sufficient evidence of negligence. Reed J. excludes for the purposes of this judgment any deliberate attempt to cause the accident.

[6] *Fitzpatrick v. Walter E. Cooper Pty. Ltd.* (1935) 54 C.L.R. 200, 219 per Dixon J. Latham C.J. *contra. Davis v. Bunn* (1936) 56 C.L.R. 246 per Dixon and Evatt JJ.

[7] See especially on this point the valuable guidance set out by Evatt J. in *Davis v. Bunn* (1936) 56 C.L.R. 246, 268.

[8] [1955] S.A.S.R. 33, 39.

[9] The view that a defendant against whom a *prima facie* case of negligence has been inferred must, to rebut it, prove conclusively that he was not

The only plausible explanation offered was, in effect, that he may have been misled by the appearance of the curve and, after finding himself in difficulties, endeavoured to correct the vehicle without success but also without negligence. In rejecting this explanation, Reed J. held that no question arose as to the negligence of W. after the car had left the bitumen but that the important question was whether he had been negligent in allowing it to leave the bitumen. The 'speed value' of the curve was calculated by an expert witness as approximately 28 m.p.h. so that a car which could not be controlled must have been travelling at considerably more than 28 m.p.h. or at least in excess of the speed at which the reasonably careful driver would round it. The inference of negligence was thus considered reasonable.

The decision, it is submitted, has done little to clarify the *modus operandi* of the principle *res ipsa loquitur*. It has certainly done nothing to simplify the difficult question of the burden of proof which lies upon the defendant. On the other hand, the case goes further in its original application of the maxim than have most previous cases, at least in Australian Courts.[10] In most other cases in which *res ipsa loquitur* has been applied, the penultimate cause of the accident resulting in injury to the plaintiff has been known, although the circumstances in which it happened could not be proved. In the present case the penultimate cause of the motor car's career, which caused the accident (the ultimate cause of the plaintiff's injury) was not known, because the driver was dead. Any one of several conceivable penultimate causes might have occasioned the car to leave the road, and it is respectfully submitted that Reed J. was approaching very closely the thin line dividing inference and conjecture in arriving at his conclusion. Although 'it were infinite for the law to judge the causes of causes', a short history of the causes may assist immeasurably in determining whether negligence occasioned a road accident or not; without any knowledge of the penultimate cause, it may be prudent to give a defendant the benefit of the doubt, especially when he cannot lift a finger to save himself.[11]

It is therefore suggested that this decision should not be taken too far lest the admirable principle of *res ipsa loquitur* be abused and become oppressive.

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negligent was expressed by Latham C.J. in *Fitzpatrick v. Walter E. Cooper Pty. Ltd., loc. cit.* See also *Barkway v. South Wales Transport Co. Ltd.*, [1948] 2 All E.R. 460, 461 *per* Asquith L.J. *The Kite* [1933]. P. 154, and *Lomax v. Reed* [1952] S.A.S.R. 225 lay down a seemingly less exacting standard.

[10] *Halliwell v. Venables* (1930) 143 L.T. 215, is perhaps the most comparable English decision.

[11] For a clear explanation of the difference between inference and conjecture and their respective values in legal processes see *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152, 169-70, *per* Lord Macmillan.

It is worth mention, also, that such a case as the present, through its exceptional circumstances, leaves virtually no defence open to the defendant. A distressing angle of this is that those responsible for the defendant's conduct can offer no evidence of contributory negligence of the plaintiff such as the plaintiff's distraction of the driver. This is admittedly conjecture, but it is perhaps little more arbitrary than the learned Judge's inference of primary negligence.

Whatever his reasons for reaching it, the decision of Reed J. is no doubt an illustration *par excellence* of the current attitude being shown by the Courts to victims of one of the greatest hazards of our time.

CLIVE TADGELL

CRIMINAL LAW — INDICTMENT FOR MURDER OF WOMAN — RAPE ALLEGED AND IMMEDIATE DEATH — DIRECTION TO JURY — THAT MANSLAUGHTER OPEN — DIRECTION ERRONEOUS — CRIMES ACT 1901-1951 (N.S.W.) ss. 5, 18 — CRIMINAL APPEAL ACT 1912 (N.S.W.) s. 6.

Mraz v. The Queen[1]

The appellant was tried before the Supreme Court of New South Wales on an indictment for murder, it being alleged that the deceased, a woman, had died from shock after being ravished by the appellant. Upon appeal to the New South Wales Court of Criminal Appeal,[2] it was held[3] that the direction of the trial judge that rape is not necessarily a malicious act within the meaning of ss. 18 (2) (a) and 5 of the Crimes Act 1901-51 (N.S.W.)[4] was wrong, but the appeal was dismissed on the ground that no substantial miscarriage of justice had occurred.[5] The High Court affirmed the

[1] [1955] A.L.R. 929. High Court of Australia, McTiernan, Williams, Webb, Fullagar, Taylor JJ.

[2] Street C.J., McLelland, Herron JJ.

[3] Herron J. *dubitante.*

[4] Crimes Act 1901-51 (N.S.W.) provides: s. 18 (1) (a) 'Murder shall be taken to have been committed where the act of the accused, or the thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or of a crime punishable by death or penal servitude for life.'

s. 18 (1) (b) 'Every other punishable homicide shall be taken to be manslaughter.'

s. 18 (2) (a) 'No act or omission which was not malicious, or for which the accused had lawful cause or excuse shall fall within this section.'

s. 5 defines 'maliciously': 'Every act done of malice . . . or done without malice but with indifference to human life or suffering, or with intent to injure some person. . . and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient of the crime.'

[5] Criminal Appeal Act 1912 (N.S.W.) s. 6: 'the court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might