SUBAWICKREMA
v.
SAMARANAYAKE AND ANOTHER

COURT OF APPEAL
WIJETUNGA, J. AND
ISMAIL, J.
C.A. APPEAL NO. 211/88(F)
D.C. ANURADHAPURA 11952/M
23 AUGUST 1991

Delict – Negligence – Burden of proof – Res ipsa loquitur – Damages.

A lorry ran off the road crashing into the plaintiff's retail shop and destroying the building with its stock-in-trade allegedly because the spring blades gave way. In a suit for damages –

Held:

(1) The maxim *res ipsa loquitur* applies and the proved facts constituted, in the absence of an explanation, *prima facie* evidence of negligence.

(2) A bare statement that the accident arose as a result of a part of the mechanism giving way at a crucial moment does not displace the presumption which arises from the maxim *res ipsa loquitur.*

(3) The burden on the defendant where the maxim *res ipsa loquitur* is applicable is not only to give a reasonable explanation but also to show that the specific cause of the accident did not connote negligence on his part. The onus is on the defendant to show positively that there was no want of care on his part like periodical checks, attending to necessary repairs and doing everything in his power to ensure the mechanical soundness of the lorry. This the defendant had failed to do and the plaintiff was entitled to damages.

Cases referred to:

1. *Barkway v. South Wales Transport Co., Ltd.,* (1950) 1 AER 392, 403.
2. *Safenaumma v. Siddick* (1934) 37 N.L.R. 25
3. *Wije Bus Co., Ltd., v. Soysa* (1948) 50 N.L.R. 350, 353.
4. *Arthur v. Bezuidenhout and Mieny* (1962) (2) S.A.L.R. 566, 575.
5. *Naude N. O. v. Transvaal Boot and Shoe Manufacturing Co.,* (1938) A.D. 379, 399.
6. *Salmons v. Jacoby* 1939 A.D. 588.
7. *Cabral v. Alberatne* (1955) 57 N.L.R. 368.
8. *Punchi Singho v. Bogala Graphite Co., Ltd.,* (1967) 73 N.L.R. 66.

APPEAL from judgment of the District Judge of Anuradhapura.

R. L. N. de Zoysa for plaintiff-appellant

Defendants-respondents absent and unrepresented.

Cur adv vult.

10th October, 1991.
ISMAIL, J.

This is an appeal from the District Court dismissing the plaintiff's action in which he sought to recover loss and damages resulting from a negligently driven lorry veering off the Anuradhapura-Kurunegala road at Sravasthipura and crashing into his retail shop which stood 15' – 30' away from the road, on the right side, completely destroying it together with its stock-in-trades. Admittedly, the lorry bearing distinctive No. 26 Sri 3410 belonging to the 1st defendant-respondent was driven on the 2nd of April 1986, at about 8.30 or 9 p.m. at the time of the accident by the 2nd defendant-respondent, acting within the scope of his employment. The learned District Judge held that this was a sudden and inevitable accident and dismissed the plaintiff's action as he had failed to establish negligence on the part of the driver. The learned Counsel for the plaintiff-appellant submitted that the admitted facts were eloquent of negligence on the part of the driver and that in the circumstances, the trial Judge misdirected himself by placing the burden of proving negligence on the plaintiff, without making an evaluation of the evidence of the driver to ascertain whether it displaced the inference of negligence on his part.

The maxim *res ipsa loquitur* has its common application where the plaintiff is not in a position to produce direct evidence of the conduct of the defendant. In certain circumstances the mere fact that an accident has occurred raises an inference of negligence and establishes a *prima facie* case which calls for an answer by the defendant. Lord Radcliffe in *Barkway v. South Wales Transport Co. Ltd.*[1] found nothing more in the maxim than a rule of evidence "of which the essence is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence". *Res ipsa loquitur* means what it says, that in certain circumstances the thing, that is the occurrence, speaks for itself. The familiar type of situation where the maxim has been invoked is where the plaintiff suffered injury either to person or property as a result of a motor vehicle running off the road. In *Safenaumma v. Siddick*[2] where it was proved that a bus which was driven along the road at a fast speed, suddenly left the road and knocked down a boy standing on the doorstep of a house, the

proved facts constituted, in the absence of an explanation, *prima facie evidence of negligence*. A witness stated by way of an explanation that the bus went straight on and ran into a house knocking the child down because "the steering gear" broke. Dalton, J. said, "a statement of that kind of course in no way discharges the onus on the defendants or show there was no want of care on their part". The bare statement that the accident arose as a result of a part of the mechanism giving way at a crucial moment did not displace the presumption which arose from the maxim *res ipsa loquitur.*

A different view was taken by Windham, J. in the case of *Wije Bus Co. Ltd. v. Soysa*[3] where the plaintiff was injured when a bus in which he was travelling went off the road and overturned upon impact with a culvert on the roadside. The driver of the bus gave evidence which was accepted by the trial Judge as credible, that the steering lock gave way when he was about 20 feet from the culvert which caused the bus to overturn. The Examiner of Motor Vehicles, who inspected the vehicle after the accident was unable to say whether the steering lock gave way before the impact, but he agreed that the steering lock had given way and that if this happened while the bus was being driven it could get out of control. The District Judge following the judgment in *Safenaumma v. Siddick (supra)* held that the defendant Company was liable in damages as it had not proved that the defect in the steering could not have been reasonably foreseen and remedied. In appeal, Windham, J. who considered the judgment in *Safenaumma v. Siddick* expressed the view that the Court in that case applied the wrong principle when it laid down that the onus was on the defendant to show positively that there was no want of care on their part. Windham, J. sought to explain the burden cast on the defence upon the application of the maxim and held that it was not necessary for the defendants to go so far as to prove the absence of negligence on their part but that it was sufficient if they were able to give an explanation of the accident which would negative the presumption of negligence arising from the unexplained accident.

In the instant case the evidence of the driver was that the front spring blades had given way from the anchor to which they were attached by a pin when he was proceeding at a speed of about 15

k.p.h. The front wheels turned suddenly to the right side and he was unable to straighten them, and though he made every effort to control the vehicle he lost control of it. He was of the view that when the spring blades give way the vehicle cannot be brought to a halt by applying the foot brakes. He found that the spring blades had given way on an examination of the vehicle after the collision but he was unable to say whether this occurred before or after the impact. There were no other eye-witnesses to the accident. Although there were two other passengers in the lorry, which was loaded with 150 cases of empty bottles of soft drinks, they were not called as witnesses. The Examiner of Motor Vehicles who may have inspected the vehicle after the accident and the police officer who visited the scene immediately after the accident and made observations were not called. Thus there was no evidence as to the condition of the road, its width, as to whether it was a straight road or not, the location of the shop and its distance from the edge of the road. There was no evidence either as to the condition of the tyres of the lorry, as to whether its lights and wiper blades were in working order considering that there was a drizzle that night at the time of the accident according to the evidence of the driver. There was no cross-examination of the driver to elicit further details of this mechanical defect and its effect, as to whether it could have affected the application of the brakes to bring the vehicle to a halt when the vehicle was proceeding at a very slow speed. The owner of the vehicle stated that this lorry was purchased by him in 1976 and that in January 1986, about four months prior to the accident, its body was replaced and its engine and gear box were completely repaired. He had also got the spring blades repaired and after its repair he had no complaints from the driver as to any mechanical defect in the vehicle which plied regularly between Anuradhapura and Colombo. The driver stated that he heard no noise from the spring blades to indicate that there was any defect in it but he conceded that if the vehicle was in a good condition it could have been brought to a halt by applying the brakes. He also said that a repair to the vehicle was done two weeks prior to this accident but he did not give other details regarding this repair.

The learned District Judge has not expressed his opinion on the evidence of the defendants but has merely stated that if the driver

lost control of the vehicle due to his inability to apply the brakes after the spring blades gave way the accident was not due to the negligence of the driver and that in the circumstances this was an inevitable accident. He further held that the burden was on the plaintiff to prove negligence on the part of the driver in view of his explanation as to the cause of the accident. It would have been more satisfactory if the trial Judge had scrutinized this explanation and expressed his opinion regarding it.

Windham, J. in *Wije Bus Co. Ltd. v. Soysa* [3] clarified the nature of the burden cast upon the defence upon the application of the maxim and stated that the explanation negativing the presumption of negligence must be not only acceptable to reason but must also be founded on evidence. "A mere suggestion or conjecture that the accident may perhaps have been caused in such and such a manner will not be enough; there must be evidence that it was caused or was probably caused, in a particular manner." It is only when this burden is discharged that the plaintiff will have to show the actual negligence on the defendant's part in order to succeed. In South African cases it has been pointed out that "mere theories or hypothetical suggestions will, of course, not avail the defendant" *(Arthur v. Bezuidenhout and Mieny* [4]), "that there must be some substantial foundation in fact for the explanation" *(Naude N. O. v. Transvaal Boot and Shoe Manufacturing Co.* [5]) and that "the defendant in order to succeed had to produce evidence sufficient to displace the inference of negligence" *(Salmons v. Jacoby* [6] .)

Applying these guidelines to the evidence in the instant case I am of the view that the explanation tendered by the driver as to the cause of the accident was not sufficient to displace the inference of negligence on his part. A defendant in seeking to displace the inference of negligence arising upon the application of the maxim *res ipsa loquitur* should offer evidence based upon supporting facts to explain an occurrence which, if true, is very rarely and exceptionally encountered in the ordinary course of human experience.

The Supreme Court has not followed the views expressed by Windham, J. in *Wije Bus Co. Ltd. v. Soysa* on the question of the burden of proof which the application of the maxim casts upon the

defence. The reference by Dalton, J. In *Safenaumma v. Siddick* to the "onus on the defendants to show that they were not guilty of any want of care" has been cited in two later cases, *Cabral v. Alberatne*,[7] and *Punchi Singho v. Bogala Graphite Co., Ltd.*[8] and the decision in that case has been approved.

In *Cabral v. Alberatne*,[7] a motor truck belonging to the defendant ran into the plaintiff's house which was about six feet away from the edge of the road and stood at a bend in the road. The defendant pleaded inevitable accident. He sought to rebut the inference of negligence arising from the maxim *res ipsa loquitur* by stating that the immediate cause of the accident was that the steering rod got out of place at the crucial moment. He did not adduce any evidence as to how and why the steering rod came out of place. There was no evidence that the vehicle was regularly serviced or serviced at all. Even the Motor Car Examiner who examined the vehicle had not been summoned by the defendant to give evidence. The bare statement of the driver in the circumstances that the steering rod gave way was found not sufficient to displace the *prime facie* case of negligence arising from the application of the maxim *res ipsa loquitur.* It was held following the earlier case of *Safenaumma v. Siddick*[2] that the steering rod went out of control was no answer unless the defendant proved and the legal burden was on him to prove that it was no fault of his that the steering rod failed.

In *Punchi Singho v. Bogala Graphite Co., Ltd.*[8] the 1st defendant's lorry driven by the 2nd defendant swerved to the wrong side of the road and collided with the plaintiff's lorry which was moving on its correct side in the other direction. The plaintiff claimed extensive damages to his lorry. The evidence showed that the accident was due to a sudden disorder in the steering mechanism of the defendant's lorry. It was held that the maxim *res ipsa loquitur* was applicable and that the burden was on the owner to satisfy the Court that he caused periodical checks and had the necessary repairs attended to and did everything in his power to ensure the mechanical soundness of the lorry.

Thus the burden on the defendant where the maxim *res ipsa loquitur* is applicable is not only to give a reasonable explanation but

also to show that the specific cause of the accident did not connote negligence on his part. In the present case the defendants have not succeeded in offering a reasonable explanation of the accident to displace the *prima facie* inference of negligence which the unexplained accident has raised. I therefore set aside the finding of the learned District Judge in which he has held that this was an inevitable accident in view of the explanation tendered by the driver of the lorry.

The learned District Judge has also held that the plaintiff has failed to prove the damages claimed by him. The plaintiff claimed a sum of Rs. 150,000/- as loss and damages and a further sum of Rs. 7500/- by way of continuing damages. The trial Judge has found that the plaintiff had not adduced sufficient evidence to justify his claim that he had a monthly income of Rs. 8000/- to Rs. 9000/-. However, it appears that the plaintiff has assessed the value of the damaged building at Rs. 45,000/-, its fixtures at Rs. 18,000/- to Rs. 20,000/- and the cost of getting electricity connection at Rs. 5,000/- and these assessments have not been disputed. I am therefore of the view that a reasonable estimate of his damages taking into account also the loss in transacting business immediately following the accident would be Rs. 85,000/-. For these reasons I set aside the finding of the District Court and enter judgment for the plaintiff-appellant in a sum of Rs. 85,000/- and allow the appeal of the plaintiff-appellant with costs.

WIJETUNGA, J. – *I agree.*

Appeal allowed.