JAMAICA

IN THE COURT OF APPEAL
SUPREME COURT CIVIL APPEAL NO. 57/96

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN: **ROY REID** **PLAINTIFF/APPELLANT**

AND **FOREST INDUSTRIES DEVELOPMENT CO. LTD.** **DEFENDANT/RESPONDENT**

Winston Spaulding, Q.C. and Norman Harrison for appellant

Dennis Morrison, O.C. and Mrs. Donna Scott-Mottley for respondent

June 1 - 2 1998 and October 22, 1998

RATTRAY, P.

I have read in draft the Judgment of Harrison, J.A. and fully agree with his reasoning and conclusions. I also agree with the order proposed. Consequently, the appeal is allowed with costs to the appellant to be taxed or agreed. The judgment of Granville James, J. (Ag.) as he then was is set aside. Judgment is entered for the appellant with costs to be taxed if not agreed. The matter is returned to the Court below for assessment of damages by the trial judge.

BINGHAM, J.A.

Having read in draft the Judgment prepared by my learned brother, Harrison, J.A. I am fully in agreement with his reasoning and the conclusions reached. There is nothing further that I could usefully add.

HARRISON, J.A.

This is an appeal from the judgment of G. James, J, (Ag.) delivered on 9th May, 1996, entering judgment for the defendant/respondent with costs on the claim for negligence and judgment for the plaintiff/appellant on the counter claim, with costs. It is understood that no appeal on the counter-claim was proceeded with. Although a formal judgment was entered therein, the said counter was formally withdrawn by counsel for the defendant during the course of the trial on 24th November, 1994.

The grounds of appeal, summarised read:

(1) The learned trial judge misdirected himself in that, having accepted the plaintiff's evidence that he was not negligent in the operation of the truck, which was in the possession and control of the respondent for its service and maintenance and was not examined, but dismantled after the accident, to conceal its condition, should have found that the accident was caused by the defective condition of the truck and the respondent was in breach of its duty of care.

(2) The said judge failed to appreciate the significance of and to properly assess the evidence of the appellant's expert witness.

(3) The said judge misdirected himself in accepting that the evidence disclosed by the certificate of fitness in respect of the said truck in contrast with other evidence in the case meant that it was in a fit condition.

(4) The said judge failed to apply the civil standard of proof required and failed to consider the reciprocal obligations of the applicant and respondent under the contract between them and;

(5) That the judgment was unreasonable having regard to the evidence."

The evidence adduced at the trial revealed that the appellant, a mechanic, 29 years of age at the date of the accident was employed to the respondent as a repairer and maintenance man for its heavy duty equipment. On 18th July, 1989, on the instructions of the field supervisor for the respondent the appellant drove the respondent's Mercedes Benz truck No. 714, which he was authorised to do, accompanied by one Markland Nathan, to Spring Mountain, St. Thomas, a forestry reserve. There he repaired a wrench, the property of the respondent, and left at 3:00 p.m. to return to the respondent's premises at Twickenham Park, St. Catherine. At about 7:00 p.m. whilst driving the said truck he proceeded along Marcus Garvey Drive, towards Spanish Town. He was travelling along Spanish Town Road near Riverton City, a straight road and he "suddenly felt a strange vibration throughout the truck..." The appellant said:

> "...After feeling the vibration I applied my brakes. I was travelling in the right lane; the truck suddenly hit the island on my right, when the truck hit the island my head struck the roof of the cab, I was thrown over the left, I tried to rise up and saw a light pole. I woke up in the Kingston Public Hospital. The vibration had the truck going from side to side, the complete truck vibrated heavily, it was going from side to side."

The appellant had pre-checked the oil, fuel and tyre pressure of the said motor vehicle the said morning that he had left the respondent's premises.

The said truck had been worked on for the period 14th April, 1989 to 10th July, 1989; a gear box from another truck, No. 715, was then installed in it. The appellant said:

> "On the day before the accident 714 was being worked on in the garage at Twickenham Park. They removed the gear box from 715 and put it in 714, it was also on block - both were on blocks."

The appellant was hospitalised on the said 18th July, 1989 at the Kingston Public Hospital with fractures to both legs, lacerations and wounds to his forehead, to several fingers on his right hand, to his eye and ear and swellings. He was treated by Dr. Warren Blake and remained in the hospital until 8th May, 1990. His fracture was pinned, a cast was applied, several plastic surgery procedures were performed, his leg was placed in traction and antibiotics were prescribed.

About one year after the accident, the appellant went to the premises of the respondent at Twickenham Park, and saw there the said truck "... scrapped and in pieces."

An expert witness one Bruce Excell, was called. He is a civil engineer, practicing throughout Jamaica and the Caribbean. He said, in evidence in chief:

> "In 1964 to 1977, I worked as a civil engineer at District 7, Los Angeles, California. I worked in the Design Department. One of the objectives of the Department was to do accident vehicle reconstruction.
>
> In business of accident reconstruction we looked at causes, contributing factors whether it was a driver error or design fault on the freeway and to make them less likely to happen in the future and minimise post impact damage. I was personally involved in about fifty studies that involved all aspects of accident contributing factors."

The witness then gave his opinion of the cause of the accident based on the oral evidence of the appellant which he the witness had heard in court.

Jacqueline Ashmeade, the common-law wife of the appellant also gave evidence of his inability to work, the ease with which he gets emotionally upset and the decrease in his sexual activity, since the said accident.

At the close of the appellant's case, no submissions were made on behalf of the defence. The counter-claim filed had been previously withdrawn. However, although the defence filed alleged that the appellant had been negligent in the operation of the said motor vehicle, no evidence was adduced in support thereof.

The only evidence adduced on behalf of the defence was that of one Donovan McCrae, chief accountant of the respondent's Company. He gave evidence of the earnings of the appellant for work done for the period March 1989 to July 1989 under the latter's contractual relationship with the respondent company.

The burden of proof in a claim of negligence, in a civil case, generally is on the plaintiff, to prove, on a balance of probabilities, the breach of a duty of care, on the part of the defendant. The plaintiff discharges that burden by adducing sufficient evidence to establish that breach of duty, or inferentially or by relying on the doctrine of res ipsa loquitur.

The res ipsa doctrine is in essence a rule of evidence governing the onus of proof, in circumstances where a plaintiff, unable to prove precisely the cause of an accident leads evidence of the happening of an event, involving, for example, an object or machine in the control or management of the defendant and which event, in the ordinary course of things is not expected to happen. An inference then arises that the occurrence was probably caused by a lack of care on the part of the defendant. An evidential burden then lies on the defendant to disprove that the said accident occurred by his fault or to prove that he took reasonably adequate steps to avoid such an occurrence. In the absence of such proof by the defendant, the plaintiff is entitled to succeed.

Mr. Spaulding, Q.C., counsel for the appellant argued that the appellant, having led evidence of the "malfunctioning of the defective truck" which was in control of the respondent for maintenance and repair, "whether by virtue of the doctrine of res ipsa loquitur or the ordinary evidential burden in the case", the onus lay on the respondent to disprove the negligence alleged against it. This it had failed to discharge having dismantled the said truck, wherein existed the means of such proof.

Mr. Morrison, Q.C., counsel for the respondent argued that there was insufficient evidence of negligence in this case, that the principle of res ipsa loquitur did not apply, and that the learned trial judge correctly found that there was no liability in negligence on the part of the respondent.

In explaining the principle of res ipsa loquitur, Earle, C.J. in Scott **v London and St. Katherine Docks Co.** [1861-73] All E.R. Rep. 246, said:

> "There must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant, or his servant, and the accident is such, as in the ordinary course of things, does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

In that case the plaintiff who was injured by a bag of sugar which fell upon him in a warehouse in the possession and control of the defendants, relied on the principle of res ipsa loquitur.

In **Barkway v. South Wales Transport Co. Ltd.** [1950] 1 All ER 390, Lord Porter, in referring to Earle, C.J's statement of the principle, said at page 394:

> "The doctrine is dependent on the absence of explanation, and although it is the duty of the defendants, if they desire to protect themselves, to give adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the

> question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."

In the instant case, the appellant gave evidence of the "vibration" he felt immediately prior to the accident, in the absence of his control of the said truck. His witness Bruce Excell gave his expert opinion of the reason for this manoeuvre by the truck. No evidence proffering an explanation of this was forthcoming from the respondent, although it was probably exclusively within their knowledge.

A very clear exposition of the principle was given by Megaw L.J, in **Lloyde v West Midlands Gas Board** [1971] 2 All ER 1246:

> "I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think it is no more than an exotic, though convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff prima facie establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or ommission constitutes a failure to take proper care for the plaintiff's safety.
>
> I have used the words 'evidence as it stands at the relevant time'. I think this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established the proper inference on a balance of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. If so, res ipsa loquitur. If not, the

> plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter, may rebut the inference. The res, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted."

In the instant case counsel for both the appellant and the respondent relied on a decision of this Court, namely, **Jamaica Public Service Co. Ltd. vs. Rance** (unreported) S.C.C.A. No. 11/92 delivered 10th November, 1993, in which the plaintiff, an employee of the defendant, and who sustained injuries when the car which she was driving and which was required to be maintained by the defendant, left the road, overturned and crashed, relied on the principle of res ipsa loquitur. She also alleged defects to the steering mechanism and the tyres of the said motor car. The defendant adduced evidence that the steering mechanism was in good working order and that a deflated tyre was not shown to have deflated before the accident. By a majority, the Court found that on the facts, the plaintiff's claim on the inference of negligence, generally and on the principle of res ipsa loquitur both failed. The cases of **Scott vs London and St. Catherine Docks** (supra), **Barkway vs. South Wales Transport** (supra) and **Lloyde vs West Midlands Gas Board** (supra) were cited.

Rattray, P., said at page 11:

> "The natural inference that arises from an accident taking place as a result of a motor vehicle leaving a roadway, on a good surface in good lighting conditions with no other vehicle coming in the opposite direction is that the driver of that motor vehicle, in this case the plaintiff/respondent is negligent. It is of this negligence that the res speaks. This inference may be displaced by evidence accepted by the Judge hearing the issue which establishes that the driver was not negligent."

and at page 16:

> "There can be situations in which both parties to an action could have joint control, and a defendant need not be in complete control of all the circumstances before res ipsa loquitur could apply. If for instance it had been established not only that the accident took place in the manner described by the plaintiff/respondent but also that some mechanical part of the motor vehicle had broken e.g. an axle, the established fact of the broken part could raise an inference that the person in control of the maintenance of the motor vehicle that is the respondent/appellant had failed in the duty of care to the plaintiff/respondent unless a satisfactory explanation was given."

A motorist who drives a motor vehicle off the roadway crashing onto an island at the side of the road, would, without more, be guilty of a duty of care and accordingly negligent.

In the instant case, the appellant, gave evidence that after he felt the vibration, he applied his brakes and:

> "... the truck suddenly hit the island on my right ...
>
> ... vibration had the truck going from side to side...
> ... the complete truck vibrated heavily..."

On the appellant's evidence, travelling at a speed of 25 to 30 miles per hour the said truck did not respond to the application of the brakes by him, nor was he controlling its direction of motion. On this evidence the learned trial judge found and correctly so, that the appellant was not guilty of negligence.

The effect of this finding was that the manoeuvre and the subsequent impact of the truck was caused without any human agency. Having so found, it was the duty of the said judge to go further and examine the evidence in order to ascertain if there was any evidence revealing the cause of that manoeuvre. Motor vehicles, while being driven on the roads do not normally "in the ordinary course of things" leave the

roadway and crash on its own, where the driver is found clearly not at fault, unless there exists some other reason.

In my view, there was, in this case, such evidence revealing a reason, namely, the evidence of Bruce Excell, a civil engineer qualified from Howard University, and who had been specifically engaged in "accident vehicle reconstruction" with the Design Department at District of Los Angeles, California, U.S.A. Of this witness the said trial judge said:

> "Bruce Excell is a highly qualified and experienced engineer, his opinion is based entirely on what the plaintiff said. His testimony is purely speculative.
>
> I am of the view that neither the plaintiff's evidence nor the opinions expressed by Mr. Excell prove the particulars of negligence as alleged in the statement of claim.. It is therefore necessary to see if the doctrine of res ipsa loquitur is applicable in this case."

To describe the evidence of Bruce Excell, an expert, as the trial judge did as "speculative" is less than complimentary and at its highest a failure of the said judge to direct himself properly as to the correct way to treat such evidence.

An expert witness is one called to assist the court on matters within the area of his specific expertise and competence, and in that context to tender for acceptance in evidence his opinion based on actual situations examined by him or based on facts from the evidence of others given in court.

The author in **Phipson on Evidence,** 11th Edition, paragraph 1217, speaking, of expert witnesses said:

> "Any expert may give his opinion upon facts which are either admitted, or proved by himself, or other witness in his hearing, at the trial, or are matters of common knowledge; as well as upon hypothesis based thereon." (Emphasis added).

In **Cross on Evidence, 6th Edition,** the author said at page 441:

> "The facts upon which an expert's opinion is based must be proved by admissible evidence..."

and at page 451:

> "Thus if an expert is relying for his opinion on facts related by a third party who observed them, this would provide a sufficient foundation for the admissibility of his opinion."

The eye witness evidence of the appellant of the events before the collision was clearly admissible and was neither challenged nor controverted. It was therefore a firm basis for the expert opinion evidence of Bruce Excell giving the cause of the activity of the said motor truck immediately before the collision.

Bruce Excell said in evidence, inter alia:

> "I heard the evidence of Roy Reid, I formed an opinion in relation to this accident based on what I heard. There was a sudden vibration that cause(d) him to lose control after having applied his brake, the vehicle hit the island...
>
> The only moving parts in a vehicle that can cause vibration - the wheels, the driver train; steering mechanism ... For a vibration to be sudden and violent gives the impression that some component in the front end broke or parted. If this happen control is no longer possible. It could be a steering linkage which would cause the wheels to be out of alignment and pointing in different directions...
>
> ... If front wheels no longer tract parallel, especially if one wheel is free, this condition would create random motion and excessive vibration.
>
> If I had examined the vehicle, it would substantitate any theories that I have."

The witness said, to counsel for the respondent, in cross-examination:

> "Nothing happens suddenly in a mechanical device unless something parts...

> If what the driver said is true then what I said must follow...
>
> Something had to part for example a tie rod end, drag link...
>
> ...The strong vibration felt by Plaintiff is consistent with something having gone wrong with the front end.
>
> If after the accident the vehicle was inspected and I am told that there were no defects that would be impossible."

This was ample evidence of the cause of the vibration on which the trial judge could have made a finding that there were defects to the said truck and which defects were probably the cause of the malfunctioning of the said vehicle. He failed to make a finding on this evidence.

In addition, he failed to make a finding on the issue of res ipsa loquitur, as he had promised to do, having said:

> "It is therefore necessary to see if the doctrine of Res Ipsa Loquitur is applicable in this case."

I am mindful of the approach that a Court of Appeal may come to a conclusion different from the trial judge, on a question of facts where the trial judge has misdirected himself or "has not taken proper advantage of having seen and heard the witness" (per Lord Thankerton in **Watt vs Thomas** [1947] A.G. 484 at page 487, and followed in **Industrial Chemical Co. (Jamaica) Ltd. vs. Ellis** 35 W.I.R. 303 at page 305)

The respondent in the instant case under the terms of a contractual agreement provided the truck as a means of transport for the appellant to drive in the performance of his job, on his employer's behalf. The respondent therefore had an obligation to provide a motor vehicle for the purpose and free from mechanical defects. The

evidence discloses that the said motor vehicle after having been driven from the respondent's premises to St. Thomas did suddenly develop such defects while returning to the said premises.

The respondent, on the evidence, was responsible for the maintenance and repair of the said motor vehicle and therefore there was a joint control of the said vehicle both by the appellant, the actual driver, and by the respondent, in its management and control whilst in use on the road. In the circumstances, on the appellant's case, there was a breach of the duty on the respondent to provide a motor vehicle free from mechanical defects for the appellant's use, and consequently a prima facie case of negligence arose. The respondent consequently had an evidential burden to prove that it was not negligent or to prove how the said malfunction arose without its fault. The respondent failed to discharge that burden and moreso deprived itself of the means and ability to do so by causing the said motor truck to be dismantled.

The certificate of fitness in relation to the said motor truck tendered during the appellant's case is prima facie evidence of its roadworthiness, at least on 20th March 1989, the date of the said certificate. However, the unchallenged evidence of the appellant is that 25 days after, on 14th April, 1989, the said truck was "... parked in the workshop at Twickenham Park for several months ... a gear box problem .. truck was on block."

The truck had been "on block" in the garage from 14th April, 1989 until 10th July, 1989, almost three (3) months. In addition the appellant said:

> "From January 1989 to date of accident both vehicles 714 and 715 were never on the road at the same time. The reason was that they had to be removing parts from one vehicle to the other."

In view of this history the said certificate should not be taken to convey the same level of probability of roadworthiness of the said truck on the day of the accident, 18th July, 1989, as it did on the date of its issue, three months earlier.

In my view, on the appellant's case there was sufficient evidence of a breach of the duty of care, on the respondent's part to establish a case of negligence. No evidence having been adduced by the respondent in response the trial judge should have made a finding in favour of the appellant. It was not necessary for the appellant, in the circumstances to rely on the doctrine of res ipsa loquitur, which could have arisen, in the absence of the specific evidence of negligence borne out by the evidence of the expert witness Excell. The evidence of the "vibration", and the consequential abnormal manoeuvre of the motor truck, devoid of any human control could have attracted an inference of negligence to ground the said principle of res ipsa loquitur.

Although the matter of damages was fully argued before the learned trial judge, in view of his findings, no assessment was made. Neither was the issue argued before us. It is proper therefore, that the matter of damages should be referred for assessment by the said judge.

For the reasons stated, I would allow the appeal and enter judgment for the appellant with costs, but return the matter to the court below for assessment of damages by the said trial judge.