IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A. Application No. 439/2000 (F)

D.C. Negombo Case No. 7592/M

1. **Director Building,**
   Department of Building,
   Ministry of Housing and Construction,
   Colombo.
2. **Hon. Attorney-General,**
   Attorney-General's Department,
   Colombo 12.

DEFENDANT-APPELLANTS

-Vs-

Dayasena Hettiarachchi
of Uragoda, Welipenne.

1st DEFENDANT-RESPONDENT

Quintus Fernando Pulle
of Godella, Dankotuwa.

PLAINTIFF-RESPONDENT

BEFORE : **A.H.M.D. Nawaz, J.**

COUNSEL : Vikum de Abrew, DSG for the 1st & 2nd Defendant-Appellants
Sajeevi Siriwardane for the Plaintiff-Respondent
Lasith Chaminda for the 1st Defendant-Respondent

Decided on : 17.05.2019

A.H.M.D. Nawaz, J.

This appeal raises the tort of negligence upon which the Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted action against the 1st Defendant, the Director, Buildings Department (2nd Defendant) and the Honourable Attorney-General (the 3rd Department). The Plaintiff averred that he was riding a motorcycle in the direction of *Chilaw* with his sister in law on the pillion around 8.30 p.m. on 29.03.1990, when the 1st Defendant driving a lorry bearing No.26 Sri 1071 crashed into him in *Kochchikade* and caused him and his sister in law severe injuries. The Plaintiff averred that he was riding his motorcycle along *Negombo-Chilaw* road towards *Chilaw*, when the 1st Defendant-Respondent driving the lorry who was in the employment of the 2nd or/and 3rd Defendant-Appellants negligently drove the vehicle and as a result of the serious injuries caused by the negligence of the 1st Defendant, he was hospitalized for 2 months. Owing to the accident, the Plaintiff was deprived of his income from his business and in consequence to the accident, the Plaintiff also suffered loss or damages in a sum of Rs.150,000/-.

The Defendant-Appellants (the 2nd and 3rd Defendants) filed a joint answer pleading negligence or contributory negligence on the part of the Plaintiff-Respondent. There were also pleas of lost opportunity which the Plaintiff was alleged to have had and inevitable accident. It was also pleaded that the 2nd and 3rd Appellants could not be held responsible for the said damages.

So the trial in the District Court of *Negombo* revolved around negligence of the 1st Defendant and contributory negligence as pleaded by the 2nd and 3rd Defendants. The learned Additional District Judge of *Negombo* has found for the Plaintiff by his judgment dated 26.05.2000 and the 2nd and 3rd Defendant-Appellants impugn this judgment.

As the evidence emerged in the case, the 1st Defendant had gone to *Puttalam* to fetch some material for a function in Colombo and they left *Puttalam* around 5.30 p.m. in the evening on 29.03.1990 for Colombo. The accident at *Kochchikade* occurred around 8.30 p.m. in the night and the Plaintiff quite clearly testified that he was on the left-hand side of the road

towards *Chilaw* and he suddenly saw the lorry driven by the 1st Defendant come towards him and crash into him and he and his sister in law were thrown off the motorcycle. Both lost consciousness and he was taken to General Hospital, Colombo as the General Hospital in *Negombo* was not well-equipped to treat him.

The witness spoke of his injuries which necessitated hospitalization at the General Hospital, Colombo for nearly 2 months. Even after he was brought from the hospital, he had to be on the bed nearly for 3 to 4 months. His leg had to be plastered in a cast and kept in an upright position. He suffered from sleep deprivation and he found it extremely difficult to answer a call of nature. The Plaintiff-Respondent stated in Court that he lost about Rs.100,000/- which was due to have accrued to him by way of business.

The 1st Defendant-Respondent-the driver gave evidence that the lorry that he drove in question belonged to the Buildings Department which came under the Ministry of Housing and Construction. The 1st Defendant admitted that the accident did occur but gave his own version. At once he encountered a bicycle from a byroad on the left-hand side and in order to save the cyclist, he swerved to the right and struck the oncoming motorcycle ridden by the Plaintiff-Respondent. He applied the brakes but it did not work well-this was the testimony of the 1st Defendant. It has to be pointed out that the 1st Defendant admitted at the trial that the lorry swerved to the right and dragged along all the way up to a wall on the right hand side of the road. There was another admission on the part of the 1st Defendant. All this happened because of the defective brakes of the lorry. The 1st Defendant also stated that the condition of the brakes was such that at times he was able to apply brakes whilst on certain occasions the brakes did not work well.

Though the Defendant stated that it was only two weeks since the lorry had been repaired, the defects in the brakes persisted. To a pointed question

In my view the facts engulfed in this case raise the application of *res ipsa loquitur*. It is acknowledged that the rule *res ipsa loquitur* (the thing speaks for itself) is a sort of exception to the rule that in actions for negligence the onus of proof is on the Plaintiff.

Where the accident could not in the normal course of events have occurred without negligence on the part of the Defendant, the rule *res ipsa loquitur* applies and the Plaintiff discharges the burden merely proving the accident. In such cases it is said that the accident itself affords *presumptive evidence* of negligence.

Examples are given of cases in which the facts speak for themselves (*res ipsa loquitur*), as when a barrel of flour fell from an upper floor of a warehouse and injured a person passing in the street-*see* ***Byrne v. Boadle***.[1] In ***Scott v. London & St. Katherine Docks Company***,[2] the defendant was in possession of a warehouse and crane for lowering goods from the warehouse to the ground. Plaintiff who was passing the warehouse was injured by the fall of six bags of sugar that were being lowered by the crane, which fell from the defendant's warehouse. There was no explanation from the defendant as to how it happened, but the presumption was that it may not happen in the ordinary course of things, if the things are under the management of the defendant or his servants. It was held that it was sufficient for the plaintiff to prove that the defendant was in control of the situation and that the accident itself was *prima facie* evidence of negligence.

In this case Erle C.J. made the following observations.

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

It will be seen that this statement prescribes three requisites:-

a. That the thing which caused the damage must be under the management of the defendant,
b. That the accident be such as does not ordinarily happen without negligence, and
c. That the defendant gives no explanation.

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[1] (1863) 2 H. & C. 722
[2] (1865) 3 H. & C. 596

Both (a) and (b) are important. The maxim will seldom have no application unless, not merely the thing, but also "all the surrounding circumstances" are wholly within the defendant's control.[3]

In ***Barkway v. South Wales Transport Co. Ltd***[4] an omnibus belonging to the defendant Company ran off the road and fell over an embankment as the result of a tyre-burst. The plaintiff's husband who happened to be travelling in that omnibus met with his death in consequence of the accident. The plaintiff claimed damages from the defendant Company on the ground of negligence. It was established by the defendants that the tyre-burst was due to what is called an 'impact fracture' due to heavy blows or impacts on the tyre as the result of the tyre coming into violent contact with some hard object. It was also proved by the defendants that the tyres of their vehicle were examined regularly, twice weekly, and this particular tyre was examined two days before the accident by the person appointed to examine the tyres and no defect was discovered. However, it was found that the defendants had not instructed their drivers to report heavy blows to tyres likely to cause 'impact fractures'. Their Lordships held that it was the duty of the defendant Company to have instructed their drivers to report such heavy blows, and the failure to do so rendered them liable to pay damages to the plaintiff on account of negligence.

In the above case, Asquith L.J. in the Court of Appeal [5] sets out in very clear language, the law regarding the onus of proof when the principle of "*res ipsa loquitur*" arises.

> "If the defendant's omnibus leaves the road and falls down an embankment, and this without more is proved, then "*res ipsa loquitur*"; there is a presumption that the event is caused by the negligence on the part of the defendants and the plaintiff succeeds unless the defendants can rebut this presumption.
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> 1. It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre- burst, since a tyre-

[3] See Halsbury, Vol. 23, sect. 965.
[4] 1950 1 All ER 392.
[5] See (1948) A.E.R. 460 for the decision of the Court of Appeal

bust *per se* is a neutral event consistent and equally consistent with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down.....

2. To displace the presumption the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable or (b) if they can point to no such specific cause that they used all reasonable care in and about the management of their tyres".

These propositions were not dissented from by the House of Lords.

In an action founded upon a collision between the plaintiff's omnibus which was at a standstill and the defendant's motor car which ran into it from behind, there is a presumption of negligence and it is for the defendant to offer an explanation in negativing negligence-*see* ***Abeypala v. Rajapakse***.[6] In this case the defendant's motor car, negligently, ran into the plaintiff's omnibus from behind which was at a standstill at the time of the impact. Keuneman, J. applying the rule laid down in the case of ***The Arnot Lyle***,[7] said, at page 291, that, "In the present case the presumption of negligence is strengthened in view of the fact that the plaintiff's bus was halted at the side of the road. I can see no reason why the rule laid down in ***The Arnot Lyle*** case should not be extended to the case of a land collision. In the present case, I think there is *prima facie* proof of negligence, and it is for the defendant to offer an explanation which the Court may or may not accept, or regard as reasonable true in negativing negligence".[8]

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[6] 44 N.L.R. 289

[7] L.R. (1886) 11 P.D. 114. In The Arnot Lyle case the collision took place in the sea when the plaintiff's ship was at anchor and the defendant's vessel was in motion. It was held in this case that, in an action founded upon a collision between a vessel at anchor and one in motion, the burden of proof is on the owners of the latter to prove that the collision was not occasioned by any negligence on their part. The ruling in The Arnot Lyle case founded upon a collision between a vessel at anchor and one in motion, was applied by Keuneman J. in this case.

[8] In *Abeypala vs. Rajapakse* (supra), in addition to the claim for damages for the bus, a claim for the injured conductor was also made by the plaintiff. Under the Roman-Dutch law a master can claim damages for the loss of services of his servant

The rule of *'res ipsa loquitur'*, *i.e.*, the 'facts speak for themselves, when the facts regarding the accident are not sufficiently known', has been applied in several English as well as local cases. ***Scott v. London & St. Katherine Docks Company***,[9] ***Mersey Docks and Harbours Board v. Proctor***,[10] ***Colman v. Dunbar***,[11] ***Barkway v. South Wales Transport Co. Ltd.***;[12] ***Silva v. Pate***,[13] ***Supramaniam Chetty v. Fiscal W.P.***[14]

Thus, in the case of ***Safeena Umma v. Siddicket al***,[15] where, in an action to recover damages for injuries caused by a motor bus, it was proved that the 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 two feet high and some 27 feet from the middle of the road-

It was held that, the facts proved constituted, in the absence of an explanation, *prima facie* evidence of negligence on the part of the driver. In this case Dalton, J. quoted a passage from the judgment of Erle C.J. from ***Scott v. London & St. Katherine Docks Company*** *(supra)* and said, "It is not suggested and I have yet to learn that in Ceylon one may usually or naturally expect a bus to leave the road at any moment and charge the steps of a house as was done here". The passage referred to by Dalton, J. is as follows:-

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

(the conductor) if he is injured, although he cannot sue if the servant is dead. Medical expenses incurred by the plaintiff for the conductor were proved and claimed. In support of the plaintiff's claim, *Attorney-General vs. Valle-Jones* L.R. (1935) 2 K.B.D. 209, and *Admiralty Commissioners v. ss. Amerika* L.R. (1917) A.C. 38 were cited. But it was argued on behalf of the defendant that unless there is a legal obligation on a person to spend on another, he cannot recover the expenses, and that there was no such obligation between the plaintiff and the conductor. As the case was sent back for retrial de novo by another Judge and the question of damages claimed by the plaintiff was also referred to the new Judge to consider with the authorities thereto.

[9] (1865) 3 H.& C. 596
[10] 1923 A.C. 253
[11] 1933 A.D. 141
[12] (1950) 1 A.E.R. 392
[13] 2 S.C.R 71
[14] 19 N.L.R. 129
[15] 37 N.L.R. 25

Scrutton L.J., applying the above words of Earl C.J., held, in ***Ellor v. Selfridge & Co. Ltd.,***[16] that, "where a motor van got on to the pavement and injured persons standing there, these facts, in the absence of explanation, constitute evidence of negligence".

Where the maxim *res ipsa loquitur* applies, the burden on the defendant is merely of giving a reasonable explanation of the accident provided it is not conjectured but founded on evidence. Where that is done, the plaintiff has to show actual negligence on the part of the defendant in order to succeed-(***Wije Bus Co., Ltd. v. Soysa).***[17] In this case the decision in ***Safeena Ummah v. Siddicket al*** *(supra)* was not followed. However, subsequent decisions, such as, ***Cabral v. Abeyratne,***[18] ***Punchi Singho v. Bogala Graphite Co. Ltd.,***[19] the decision in ***Safenaumma v. Siddicket al*** *(supra)* has been followed.

In ***Cabral vs. Abeyratne*** *(supra)*, K.D. de Silva, J. following the case of ***Safeena Ummah v. Siddick et al*** *(supra)* held that, where the doctrine of '*res ipsa loquitur*' was applicable the burden on the defendant was not only to give a reasonable explanation of the accident in question but also to show that the specific cause of the accident did not connote negligence on his part.

It was further held that, the fact 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. The defendant did not discharge, or even attempt to discharge, the burden that lay on him and was therefore liable to pay damages.

In the case of ***Subawickrema v. Samaranayake and Another,***[20] a lorry ran off the road crashing into the plaintiff's retail shop and completely destroying the building with its stock-in-trade, allegedly because the spring blades gave way. In a suit filed by the plaintiff for damages, the District Judge held that this was a sudden and an inevitable

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[16] 46 Times L.R. 236
[17] 50 N.L.R. 350
[18] 57 N.L.R. 368
[19] 73 N.L.R. 66
[20] 1992 (2) Sri L.R. 142

accident and that the plaintiff had failed to prove negligence on the part of the defendant, and dismissed the plaintiff's action. However, the Court of Appeal held that:-

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.*

The facts of this case certainly resonate with the facts engulfed in this case and 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

In this case too the 1st Defendant admitted that the accident occurred due to defective brakes. Even though they were repaired, they were loose. If the brakes were good at one stage and turned defective at other times, this vehicle should not have been put at all on the roads. It is foreseeable that a vehicle such as this was likely to encounter inevitable accidents and the Plaintiff and sister in law were within the range of foresee ability. Thus there was a want of duty of care and negligence and the only question that remains to be answered is the quantum of damages. The orthopedic who treated the Plaintiff gave evidence and for two months the Plaintiff had been hospitalized. He could not walk for 8 months. The learned Additional District Judge of *Negombo* concluded that it was quite reasonable to impose a sum of Rs.150,000/- as damages. Needless to say, I do agree that there is no quantification of damages in the case.

An actuary specializes in making mathematical calculations based on proven facts and realistic assumptions about the future. The important role that an actuary could play in the assessment cannot be overemphasized but unfortunately in our country actuarial

calculations are a rarity as mathematical calculations, more specifically actuarial calculations, are an exact science in their own right and its non-existence in delictual cases are a given in our nation.

Boberg[21] distinguishes between the burden of proof that rests on the plaintiff to prove his loss (with a preponderance of probabilities) and the burden to prove the extent of his loss:-

> *"The element of patrimonial loss, like the other elements of Aquilian liability, must be proved by the plaintiff on a balance of probabilities. This requirement relates to the fact of damage; its quantum, particularly where it is prospective, may depend on various imponderables, some of which have a less than 50 per cent chance of materialising. They are not ignored on that account, but are properly represented by a contingency allowance of the same percentage as the chance of the events occurring. Moreover, a plaintiff who has laid the best available evidence before the court should not be non-suited merely because his loss is difficult to quantify: the court must do the best it can with the materials to hand."*

I take the view that merely because quantification of damages has not been done with mathematical precision, that is no reason to refuse damages provided negligence has been established and the Court forms a reasonable view of a fair quantum in favor of the injuries, pain of mind and suffering suffered by a Plaintiff in the context of particular facts and circumstances of a case. I take the view that a sum of Rs.150,000/- is fair and reasonable in light of the facts and circumstances of this case and I would affirm the judgment of the learned Additional District Judge of *Negombo*. The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

[21] The law of Delict