JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 5/70

BEFORE: The Hon. Mr. Justice Eccleston, Presiding
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

LENFORTH HAMILTON - PLAINTIFF-RESPONDENT

vs.

JAMAICA OMNIBUS SERVICE LTD. - DEFENDANT-APPELLANT

Clinton Hines for the Appellant

Carl Rattray and Norman Wright for the Respondent

November 18, 20, 1970
December 18, 1970

FOX, J.A.

The plaintiff is a school boy nine years old. On 11th December, 1968, he was a passenger in one of the omnibuses owned and operated by the defendant Company in the corporate area of Kingston and Saint Andrew. He had come on the vehicle at the Parade in down-town Kingston, and was occupying a seat immediately beside the emergency door in the middle of the bus on the off-side. The bus came to the stage fare stop at Antrim Road and Oakdene Avenue where it let off and took on passengers. It then proceeded along Oakdene Avenue. Every seat was now occupied. Some persons were standing. As the bus took a deep curve to the left along Oakdene Avenue, the emergency door flew open. The plaintiff fell through the open door on to the street and was injured. In an action in the Resident Magistrate's Court, Kingston, by his next friend claiming damages for negligence, counsel for the plaintiff relied upon the doctrine of Res Ipsa Loquitur. The Magistrate thought that the doctrine applied, and found that the defendant had failed to establish that the accident had not occurred as a result of its negligence. He gave judgment for the plaintiff. The defendant appealed. Counsel's submission before us proceeded on two limbs. Firstly, he argued that the doctrine did not apply because the evidence showed that the defendant was not in control of the emergency door at the time of the [illegible] he contended that if the doctrine was held to apply,

of the driver of the bus, the presumption of negligence which was evoked by the doctrine had been displaced. The chief engineer described in general the way in which an emergency door was fastened. It was kept in a locked position by two catches, one at the top and one at bottom of the door. These catches were connected. They could both be operated together by a lever inside the bus by the door, or by a handle on the outside of the door. When the two catches were in the latched position, they could be released only by a deliberate upward movement of the lever or the handle. The lever was accessible to passengers inside the bus, and the handle to persons standing outside by the door of the vehicle. From his seat, the driver alone operated the entrance and exit doors, but in that position he was unable to open or close the emergency door. If the catches of the emergency door had been released, centrifugal force exerted on the door would cause it to fly open as soon as the bus took a left hand bend. The bus had taken several left hand bends in the course of its journey from the Parade to the stage fare stop at Antrim Road and Oakdene Avenue without the emergency door flying open, and the chief engineer was able to express the opinion that up to that stage the catches must have been in the fastened position. He had not examined the door of the bus on the day of the accident, and was unable to say whether the latch mechanism was working properly then, but in his opinion, if the catches were in a locked position, the occurrence of a defect in the door could not cause it to fly open. In his evidence, the driver of the bus said that he came on duty at 2 P.M. that day at the Parade. He checked the emergency door by looking at it. He saw that it was latched. The accident occurred at about 4 P.M. He was then on his second or third trip. He heard a shout, looked, saw the emergency door open, and brought the bus to an immediate stop. A red light comes on in the driving panel if the door is open. This light was functioning. He did not see it in the driving panel before the accident. There was a conductor on the bus. The driver did not see the conductor interfere with the emergency door.

In Scott v London and St. Katherine Docks Co. (1865) 3 H & C 596, Erle C.J. described the conditions for the application of the doctrine Res Ipsa Loquitur in a statement which has long been famous:

> "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 care."

To obtain the assistance of the doctrine, a plaintiff must therefore prove two facts;-

(1) that the "thing" causing the damage was under the management of the defendant or his servants, and
(2) that in the ordinary course of things the accident would not have happened without negligence.

Mr. Hines submitted that the first fact had not been established because on the evidence the emergency door was not under the continuous and sole control of the defendant's servants, the driver or the conductor of the bus. The authority advanced in support of this proposition was Easson v L.N.E. Ry. [1944] 2 All E.R.421. In that case, the plaintiff, a boy aged four, had fallen through a door of a corridor train about seven miles from its last stopping place. In the course of his judgment, Goddard L.J. (as he then was) said at 429 ibid,

> "..... it is impossible to say that the doors of an express train travelling from Edinburgh to London are continuously under the sole control of the defendant railway company in the sense in which it is necessary that they should be for the doctrine of res ipsa loquitur, or a doctrine analogous to that expression, to apply. People are walking up and down the corridors during the journey and people are getting in and getting out at stopping places. I do not want it to be thought for a moment that I am minimising the duty of the company. It is, of course, the duty of the company to see before a train leaves a station that the carriage doors are closed. I do not mean to say that I think there is a duty upon them to inspect the off side doors of the carriages at every stop. There must be reasonable inspection and they must do the best they can."

This statement must be understood in the light of the special circumstances of that case. The learned judge was being mindful that in the course of a long journey, when passengers on an express train were free to walk up and down the corridors, it was impossible for the officers on the train to have all such passengers under constant surveillance so as to prevent any one of them from interfering with the doors of the train.

It was also unreasonable to expect the officers to detect at once that a door had been opened by an interfering passenger and to take steps to obviate the danger the moment it occurred. The case is illustrative of circumstances in which a 'thing' is not under the control of a defendant. It does nothing more. It does not lay down any principle of law whereby a plaintiff is required to prove that the 'thing' was under the actual control of the defendant at the time of the accident. If it is shown that the defendant has the right to control, this is sufficient. Thus in Parker v. Miller [1926] 42 T.L.R. 408 where the fact of a car which was left unattended having run down a hill of itself was held to be sufficient evidence of negligence, the defendant, the owner of the car, was held to be liable even though he was not in actual control of the car and was not present at the time of the accident. He had the right to control of the car and this was enough. Also, it is not always necessary that all the circumstances should be within the control of a defendant. This was the view taken by Fletcher-Moulton L.J. in Wing v London General Omnibus Company [1909] 2 K.B. 652 at 663 when in an obiter dicta he generalized that "the principle [res ipsa loquitur] only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a prima facie responsibility for what happened." But in McGowan v Statt, [1930] 143 T.L.R. 217, it was pointed out that the learned Lord Justice had stated the rule too widely, and Atkin L.J. emphasised at 219 that "After all, all that one wants to know is whether the facts of the occurrence do as a matter of fact make it more probable that a jury may reasonably infer that the damage was caused by want of care on the part of the defendants, than the contrary." This is the essential consideration. The basic duty upon the defendant was to provide a vehicle which was as safe for the use of passengers as reasonable care could make it. The defendant must have known that the absence of reasonable care;

(1) in the maintenance of the lock mechanism of the emergency door so as to keep that mechanism free of defects which may cause the door to fly open; or

(2) in securing the catches of the door; or

(3) in guarding against the irresponsible action of meddlers, including passengers who, as the driver said, generally interfered with the emergency door,

could result in the release of the catches of the door whilst the vehicle was in motion, with the consequence of the door flying open and a passenger in the position of the plaintiff being precipitated through the door and injured in the way in which the plaintiff was in fact injured. The defendant therefore owed a duty to the plaintiff to take that reasonable care. The critical question which now arises is whether that duty has been breached. Was the defendant negligent? In answer, the plaintiff is in a position to pray in aid the assistance of the doctrine, Res Ipsa Loquitur. Negligence may be found as a matter of inference from the mere fact that the door flew open whilst the vehicle was in motion. Such negligence may be in terms of any one of the three respects indicated above in which the duty of care was owed. The plaintiff was not required to specify the exact respect in which the duty was breached. It was for the defendant to rebut the inference of negligence. This would have been accomplished if the defendant showed "that the accident was just as consistent with (it) having exercised due diligence as with (it) having been negligent. In that way the scales which have been tipped in the (plaintiff's) favour by the doctrine of res ipsa loquitur would be once more in balance, and the (plaintiff) would have to begin again and prove negligence in the usual way." (vide Lord Donovan in Colvilles Ltd. v. Devine [1969] 1 W.L.R. 475 at 479. Mr. Hines contended that the evidence adduced by the defendant described a plausible explanation which brought the scales once more in balance. His submissions were based upon two propositions which were, however, not mutually exclusive. Firstly, he argued that from the mere fact that the door was accessible to others, it was reasonable to infer that the catches could have been released by a meddler in circumstances which were as consistent with the diligence as with the negligence of the driver and the conductor of the bus. The argument is based upon the view that the control of the door was not exclusively in the servants of the defendant, but was shared by them with other persons. It is a view which has already been discussed in relation to the applicability of the doctrine to the facts of the case, but which

must now be considered in connection with the rebuttal of the inference of negligence. Accessibility of the door to persons other than the servants of the defendant is not necessarily decisive of the issue of negligence in favour of the defendant. It is a question of the demonstrated effect of this accessibility. In Grant vs. Australian Knitting Mills Ltd. and others /1936/ A.C. 85, the garments were merely put in paper packets which in the ordinary course would be taken down by the shop keeper and handled by him. The possibility of the goods being tampered with before they came into the possession of the user had not been excluded. It was argued on behalf of the manufacturers that they had not retained an exclusive control over the goods, and it was therefore impossible to conclude that they had been in breach of their duty of care. Their Lordhsips did not accept that contention. When the garments reached the plaintiff they were in the same defective condition as when they left the manufacturer. The defect had not been shown to be the result of exposure to handling by the shop keeper or his assistants or any other person, and the negligence which had been "found as a matter of inference from the existence of the defects taken in connection with all the known circumstances," (p.101) - (Res Ipsa Loquitur) - was held not to have been rebutted by the mere proof of such exposure. Here too, the mere fact that it was shown that the door was accessible to persons other than the driver and conductor of the bus, is not sufficient to bring the scales once more in balance. The defendants must go further and show, either directly or inferentially, that the catches of the door had been released by an unauthorised person in circumstances which excluded the want of care in the driver or the conductor. The defendant was not able to prove this by direct evidence. Mr. Hines argued that it had been established inferentially by the evidence of the driver and the chief engineer. Here counsel developed the second of his two propositions. It was to this effect. The door could have flown open only if the catches had been released. The catches must have been secure up to the point of the stage fare stop before the accident. The door could not have been interfered with by the driver or the conductor. The inescapable inference which was dictated by the logic of this situation, argued Mr. Hines, was that the door must have been tampered with by some

unauthorised person at or after the stage fare stop. This conclusion challenges a contrary finding of the Magistrate which was based upon his acceptance of the evidence of the plaintiff whom the Magistrate described as "bright-eyed" and as "a very intelligent 9-year-old who happily has nothing to hide", and who said that he didn't see the door open before he fell. The Magistrate's finding flows from the advantage which he had of having seen and heard the plaintiff, and from an evaluation which he was prepared to undertake on the strength of that evidence. I can see no reason why it should be rejected. It is a finding which lays an axe at the root of counsel's second proposition, and is sufficient to dispose of the conclusion for which he argued. But the conclusion itself overlooks a critical factor which cannot be allowed to pass unnoticed. On the assumption that the effect of the evidence of the plaintiff is to be treated as having been neutralized by the evidence of the driver and the engineer, and if it is reasonable to infer that some unknown, unauthorized person tampered with the door either at the stage fare stop or at some point in the very short journey between the stop and the point of the accident, and that this was the sole cause of the door flying open, this would not be sufficient to exonerate the defendant from liability. The defendant would have had to go further and show that the interference had not occurred as a consequence of any neglect on its part to guard against such an event. This was never attempted. The conductor whose evidence might have been of assistance in this area was never called as a witness on behalf of the defendant. In the absence of any evidence as to the precautions which were taken, or the watchfulness which was maintained by the conductor to guard against unauthorized interference with the lock mechanism of the door, it had not been established that the accident was equally consistent with no negligence on the defendant's part, and the scales would therefore remain tilted in the plaintiff's favour by the doctrine of res ipsa loquitur.

But I do not think that interference with the door by an unauthorized person is the only explanation which may be inferred of the cause of the door flying open. On the basis of "common sense and what the Courts so aptly call 'the common experience of mankind,'" the Magistrate was convinced "expert evidence notwithstanding - that if there is a defect in its mechanism, or if the door or any part of its fastening is shaking loose

from not having been properly fastened in the first place, from being worn, or from any other cause, that condition will worsen if not corrected with each mile the bus is driven until - if it's that kind of defect - the door flies open." With due respect to the Magistrate, this view is essentially correct. It was not sufficient for the chief engineer to say that if the catches were in a locked position, the occurrence of a defect in the door would not cause it to fly open. Neither was it adequate for the driver to state that he had checked the emergency door at 2 P.M. when he came on duty by looking at it. To establish that the accident was equally consistent with the exercise of due diligence on its part, the defendant ought to have proved,-

(a) that the mechanism of the catches of that particular door was in fact free of any defect which could have caused the catches to work loose during the course of a journey, and

(b) the safeguards which were maintained to ensure that the catches of the door were kept in a fastened position and had not been tampered with.

As to (a) no evidence was adduced that the mechanism of the emergency door was in good working order. The chief engineer might have been able to rectify this omission, but he had not examined the door and was therefore unable to testify as to the actual condition of the lock mechanism. As to (b) there was also no evidence. There was no proof of periodic inspection of the catches of the door by the driver, or the conductor, or the engineer, and no information as to the condition of the catches at or about or immediately after the time of the accident. In the absence of such evidence in proof of (a) and (b), on this ground also, the defendant failed to restore the equilibrium of the scales which continued tipped in the plaintiff's favour. In the result, it is clear that the onus upon the defendant has not been discharged. The appeal should be dismissed, and the judgment entered for the plaintiff affirmed with costs $40.00.

ECCLESTON J.A.

I agree.

EDUN J.A.

I agree.