JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 11/92

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

BETWEEN	JAMAICA PUBLIC SERVICE COMPANY LIMITED	DEFENDANT/APPELLANT
A N D		
A N D	PAMELA RANCE	PLAINTIFF/~~APPELLANT~~

David Muirhead, Q.C. and Christopher Honeywell instructed by Mrs. Joye Donaldson-Honeywell of Clinton Hart & Company for Appellant

Miss Hillary Phillips and Mrs. Denise Kitson instructed by Perkins, Grant, Stewart, Phillips & Company for Respondent

July 6, 7, 8, 9 and November 10, 1993

RATTRAY P.:

The plaintiff/respondent was at all material times employed to the defendant/appellant Company and on the relevant date was Acting Commercial Superintendent in the Savanna-la-mar district office of the Company. Arising from her employment she was entitled to the use of the Company motor vehicle which she took possession of at 5:00 p.m. each evening for the purpose of driving it to her home. As no special vehicle was assigned to her she did not drive the same vehicle every day.

On 18th of December, 1985, she received a Suzuki motor car LH 1648 from the Company and set out from the Savanna-la-mar office to drive to where she resided at Hedonism in Negril. Two co-workers were travelling in separate motor vehicles behind her, Mr. DaSilva, the Acting District Manager and a Miss Goodall. They both drove Company vehicles. After travelling for about twenty minutes they stopped for about ten minutes at a certain place en route and then resumed their journey. The roadway between Savanna-la-mar and the place at which they stopped was described as "extremely bad - dug up - pot holes." Consequently, they had travelled very slowly. Driving from the place at which they had stopped, the road was still bad until they reached a place called Sheffield. Up to Sheffield the estimated speed at which Miss Rance said she was driving was at 25 m.p.h. After Sheffield the road was asphalted, smooth and wide and with no pot holes. This crucial part of the journey is related by Miss Rance as follows:

> "I went around slight curve at about 40 m.p.h. reached on straight path of road - I felt steering wheel loose - vehicle start to go right and then left. I started to brake and trying to control vehicle. It was going from right to left left to right - heard bang - felt head going in a circle - next found myself in vehicle in passenger seat - vehicle parked on top of fence."

She maintained that she was travelling on the left side of the road approximately two feet from the soft shoulder. As the appellant is not challenging the quantum of damages, I do not deem it necessary to relate the injuries which the plaintiff/respondent received and which were quite serious.

In her amended Statement of Claim the plaintiff/respondent alleged certain specific acts of negligence on the part of the defendant/appellant. She claimed that the appellant was under a duty to provide her with a motor vehicle reasonably

fit for the purposes for which she required it. She alleged that the said motor vehicle should be kept in a reasonable state of repair and maintenance by the appellant. She further maintained that the appellant was negligent and failed in its duty of care to her in that the vehicle provided was defective and that the accident was caused by a defect of the said motor vehicle.

Particularising, the plaintiff/respondent made allegations alleging a defect in (a) the steering apparatus of the motor vehicle and (b) the condition of the tyres on the vehicle. She also relied on the doctrine of res ipsa loquitur.

The defendant/appellant maintained in its pleadings that the accident was caused by the negligent driving of the plaintiff/respondent and relied also upon the doctrine of res ipsa loquitur.

The plaintiff/respondent stated that whilst travelling on the roadway she was driving in front, Miss Goodall in the middle and Mr. DaSilva to the rear. This order is supported by the evidence of Miss Jennifer Goodall, who gave evidence as follows:

> "I was travelling 45 to 50 m.p.h. and I was travelling behind plaintiff she had just turned a corner it was a left hand corner she was actually on straight. The vehicle started to go two sides of road. The vehicle almost hit a light post. There was a property to side of road. Vehicle left road and went over into this field - vehicle spin somersaulted into field - I am not 100% sure where vehicle landed but I say landed on top for wheels exposed. It could have landed on side. When I saw vehicle swerving it was going from right to left. I was travelling about 1 ft. or so from grass verge - Plaintiff travelling on left before accident. Prior to swaying noticed nothing unusual about the passage of that vehicle."

It is clear from all the evidence that the lighting at that time was satisfactory and that there was no other vehicle on the road apart from these three vehicles travelling in convoy.

Mr. DaSilva's evidence does not help much as to how the accident happened. His vehicle was the last in that convoy. He stated:

> "Accident on Sheffield Road - just before accident - I travelling between 40 - 45 m.p.h. other vehicles speed approximately the same - where accident occurred surface of road good. We had just gone through the main part of Sheffield area - proceeding towards Negril - car plaintiff driving entered a curve - car Goodal driving had not yet entered curve I observed a pedestrian on my right hand side of road. After I went around corner I observed vehicle plaintiff driving over the left hand side of road in a pasture. From I entered corner never saw Miss Rance's vehicle again until I saw it in a pasture."

It is the evidence of all these three witnesses that the corner is on a descent. Miss Rance described the curve as a slight curve. Miss Goodall stated the degree of curve about 45° and Mr. DaSilva described it as follows:

> "Curve to the left. It is a gradual and long curve. Last travelled curve mid December. I assume it is 80° curve - 80° to 90° based on a straight line - but actual curve of corner about 30°."

Miss Rance further gave evidence that:

> "I saw a rear tyre deflated after accident. It is right rear tyre."

An affidavit of one Kenneth G. Mills relating to his inspection of the both rear wheels of the Suzuki motor car was not helpful to the Court as his examination took place in May of 1986

and the accident had occurred in December of 1985.

Mr. DaSilva gave evidence in relation to the state of the motor vehicle after the accident as follows:

> "I looked at the front end of vehicle in pasture. I examined ball joints saw nothing wrong. Ball joint part of steering arrangement."

He further stated:

> "I observed no tear or burst to tyre of car."

He further said:

> "I have knowledge of maintenance procedure for vehicles in my district. Procedure - vehicles normally checked on daily basis - minor checks - oil, water, on weekly basis - checked in garage.
>
> To best of my knowledge week-end checked - brakes, oil, lubricants, brake lining or anything like that. This is policy.
>
> Whether car on daily basis this is supposed to be procedure."

Miss Goodall gave the following evidence:

> "Vehicle plaintiff driving fairly new - came to district matter of months - vehicle appeared to be managing pot holes etc. prior to Sheffield."

In relation to the slope she said:

> "It is a fact that road slopes downward in vicinity of left hand corner. I can't recall where slope began in relationship to corner - it is such a long time. Degree of curve about 45°."

A further witness called for the plaintiff/respondent was a Mr. Victor Lawrence, an Automotive Engineer. His evidence however related to the possibility of what would happen if the vehicle had on a tubeless tyre which was repaired in a particular manner.

The repairs upon which he was commenting was the state of the tyre as recorded in an affidavit of one Mr. K.G. Mills and in respect of an examination made by him six months after the accident. The Judge did not regard it as being of any help to the Court.

In reference to this evidence the Judge stated:

> "Mills examined wheels purportedly taken from plaintiff's vehicle. These were wheels which were sent to him some five months after the date of the accident. Where were these wheels during the five month interval? Are these in fact the wheels which were on the plaintiff's vehicle? There is an evidential hiatus."

Mr. Victor Lawrence proffered his opinion based upon Mr. Mills' report.

The Judge in assessing his opinion stated:

> "Lawrence in cross-examination said that 'as a result of collision a tyre on a car could become deflated. This would depend on impact and what caused impact. A car turning over repeatedly could cause deflation of tyre or tyres.' There is no evidence of any deflation before the vehicle somersaulted Deflation is consistent with the car overturning having crashed into the fence bordering the field. Both rims were dented.

The proposition therefore of a deflated tyre arising from a defect in the tyre causing the accident, which was advanced by the plaintiff/appellant was rejected by the Judge, and there was ample evidence and sufficient reasoning upon which he could have properly based such a rejection.

In relation to the condition of the motor vehicle, the defendant/appellant called Mr. Wilbert Reid, a Senior Inspector of Motor Vehicles who conducted an examination of the motor vehicle on the 20th December, 1985, that is two days after the accident. He described the condition of the vehicle when he examined it. He found the steering mechanism to be in good working order, as well as both brakes which he also tested. In relation to the steering he said:

> "Carried out static test on steering ... all ends all right. I inspected ends while someone else move wheel. Steering mechanism in working order."

With respect to the tyres he said:

> "Right rear tyre punctured - I mean deflated. It was a tubeless tyre. Knew by visual inspection. Also wearing a tubeless valve at time. Tubeless valve not working with tube - Different design between tubeless and tube valve."

He gave evidence also that:

> "I did not dismantle steering box. Turning of wheel is sufficient to test steering."

It is necessary for me at this stage to see how the Judge dealt with the factual evidence presented to him. He analyzed the evidence with respect to the theory put forward by the plaintiff/respondent of a defective tyre which deflated and caused the accident. He posed the question: "Is this theory sustainable?" He concluded that such a theory was not sustainable as the tyre could have become deflated as a result of the collision. In so doing he relied upon Mr. Lawrence's opinion to that effect.

He concluded that the plaintiff/respondent had failed in her effort to theorize as to the accident being caused by the defective condition of the vehicle as specifically alleged and therefore she had to fall back on the doctrine of res ipsa loquitur.

The Judge then looked at the defendant/appellant's case and stated:

> "The defendant does not rely on any direct evidence to substantiate its assertion. Rather, its argument is that the vehicle was in excellent condition, therefore its capsizing must be by the doing of the plaintiff. Now, what are the facts which the defendant wishes the court to find proved so that the court can infer the existence of the fact in issue that it was the defendant's fault? There is the evidence of DaSilva obtained through cross-examination. He said, 'I looked at the front end of vehicle. I examined ball joints. Saw nothing wrong ball joints part of steering arrangements'."

The Judge was not impressed by DaSilva's evidence in this regard:

> "In the first place there is nothing to suggest that DaSilva is competent to give an opinion of this nature. Secondly, this is a mere bald assertion. DaSilva does not tell of the nature of his 'looking'. Thirdly, even if some credence was to be given to his opinion, the court is not in a position to say that it is only defective ball joints that could have produced the phenomenon described by the plaintiff. In any event, DaSilva was quite unimpressive and I could not help but wonder whether he was troubled on the question of where his loyalty lay."

Now how does the Judge deal with the witness Wilbert Reid?

He stated inter alia:

> "He has been an Inspector of Motor Vehicles for twenty-six (26) years as a government employee. He examined the plaintiff's vehicle on December 20, 1985. He said he carried out a 'static test' on the steering and he found all 'ends' alright. The 'static test' was a test whereby he inspected the 'ends' while someone else moved the steering wheel. He found the braking system to be in perfect order. Now, Reid did not divulge the nature of his inspection. One would expect that an expert witness, for it is as an expert that he is called, would be more forthcoming and of much more assistance. This court was entitled to expect that he would demonstrate his expertise in describing the total functioning of the steering mechanism - and the mechanical aspects

> "which together contribute to a fully functional vehicle as regards to steering capacity. This he did not do. Is it only the 'ends' that matter? I know not. I attach no weight to his evidence. Therefore, there are no proved facts from which the inference sought by the defendant can be drawn."

Has the Judge made a fair assessment of Reid's evidence? Has he taken properly into account the position held by Reid as an Inspector of Motor Vehicles for twenty-six years and the expertise which would reasonably be expected from a person holding this position over this period of time? Had there been any cross-examination of Reid which would leave the Judge to conclude that his inspection was not thorough enough or sufficient enough? Is there any evidence which rebuts Mr. Reid's evidence that the steering mechanism and the brakes were in order? Is the failure of the Judge to attach any weight to Mr. Reid's evidence reasonable?

I do not believe that there is any basis established on which Mr. Reid's evidence can be so summarily dismissed. Furthermore, the totality of his evidence is in accord with the plaintiff's own witness Mr. DaSilva in respect of the condition of the steering. In the light of this evidence, on any balance of probabilities it should have been found by the Judge as a fact that there was nothing wrong with the steering mechanism or the brakes of the vehicle.

The Judge formed a most favourable view of the honesty of the plaintiff. He said:

> "I accept that she was an experienced driver of some eighteen (18) years. I accept that she was driving at approximately 45 m.p.h. and just before the phenomemon, she had negotiated a gradual curve which had a not too pronounced downward slope. I accept that the motor vehicle went out of control after the vehicle had negotiated the corner and was on the straight. ... The defendant seems to be suggesting that the plaintiff negotiated the curve in such a negligent manner that the vehicle

> "got out of control. Well, the evidence flies in the face of any such suggestion. If that were so I would expect to find that there was loss of control immediately after completing the curve. This was not so. I accept that at all times the plaintiff was driving carefully. There was no need for any undue haste. They were all travelling as a team."

He goes on further:

> "I accept that the driving conditions were excellent and that at all times immediately prior to the events culminating with the vehicle landed in the field the plaintiff was in full control of the vehicle. The accident is unexplained, the cause is unknown."

Analyzing the Judge's findings therefore, it must be noted that up to this stage he has not found, as the plaintiff attempted to establish that the vehicle given to the plaintiff by the defendant was defective: (a) In respect to the steering or, (b) in respect to the tyres. The question then arises: In what way was this vehicle defective? The Judge said:

> "A vehicle does not defy the control of the driver unless that vehicle is defective."

That conclusion is not supported by the normal everyday experience of mankind. The slightest inattention of a driver however momentarily can result in a loss of control of a vehicle with tragic consequences.

Based purely on the fact that there has been an accident which is unexplained and the cause unknown the Judge continued:

> "The plaintiff has raised a prima facie inference of negligence on the part of the defendant in providing her with a defective vehicle."

He continues:

> "As of this point, the evidential burden shifts. The defendant must now displace the inference raised."

The natural inference that arises from an accident taking place as a result of a motor vehicle leaving the roadway, on a good road 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. Even then however the burden of proving the negligence of the defendant still remains with the plaintiff. On acceptance of the plaintiff's evidence of absence of negligence on her part can the res speak again to establish an inference of negligence in the defendant? I think not. The plaintiff having displaced the inference of negligence against her in this case by the Judge's acceptance of her evidence that she was not, must move on to prove negligence in the defendant since the burden of proving the defendant's negligence still rests with her. It is the plaintiff who must then speak to the negligence of the defendant and not the res which has already spoken. This in my view she did not accomplish.

I am not particularly assisted in this matter by the cases which deal with defective machinery in factories, objects falling from premises causing injuries to passersby and accidents resulting from the provision by an employer of unsafe places and systems of work. Clearly those who were in charge, ie. had the management and control of such machinery and premises, must give an explanation disclosing that they had taken the necessary care to prevent such an accident. These cases fall squarely within the often cited dictum of Erle C.J. in Scott v. London and St. Katherine Docks [1865] 3 H. & C. 590 at 601:

> "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."

The plaintiff in this case was the person in control and management of the motor vehicle when the accident took place.

Analyzing the findings of the Judge:

(a) at the end of the case the Judge found that the plaintiff had failed to establish negligence on the basis of her particulars in the Statement of Claim. The theory of a defective tyre "had been punctured";

(b) with respect to the good condition of the steering as sought to be established by both the plaintiff's witness DaSilva and the defendant's witness, Wilbert Reid, he found without any rebutting evidence that it was not established that the steering mechanism was in good condition;

(c) he made no finding that the steering was in a defective condition, nor could he have done so in the face of the evidence before him which in my own assessment sufficiently established that the steering was not defective.

If, as in my view, it was amply established that the steering and the brakes were free from any defect, and that there was no evidence establishing a defective tyre the question must be posed: On what established facts can an inference be drawn that the accident was caused by the defendant providing the plaintiff with a

defective vehicle? Could the happening of the accident by itself in the light of the evidence before the Court raise a sufficient inference of negligence which placed on the defendant a burden which it had a duty to displace by an explanation, and which, if not explained, must result in a judgment for the plaintiff? I say sufficient inference because in respect to res ipsa loquitur,

> "Where the doctrine applies and the defendant gives no evidence the jury is not bound to find for the plaintiff. The maxim only raises a presumption of fact and the cogency of the presumption varies with the circumstances."
> [See the dictum of Evatt J. in Davis v. Bunn] [1936] 56 C.L.R. 246 at pp. 267-268].

If the events leading up to the accident were or might well have been under the control of persons other than the defendant, the mere happening of the accident is insufficient evidence against the defendant. In the light of the common experience of mankind does the fact of this accident justify the inference of negligence on the part of the defendant?

In Clerk & Lindsell on Torts, Sixteenth Edition p. 572 para. 10-139, the following passage appears:

> "If it is not known what happened, whether the accident in fact occurred through anything connected with the defendant or not, the doctrine cannot apply since it is not known what the 'res' is."
>
> The case cited in support is Richer v.
>
> A.J. Freiman [1965] 52 DLR (2d) 32.

In Anchor Products Ltd. v. Hedges [1966] 115 C.L.R. 493 Windeyer J. at p. 497 of the report stated:

> "An accident may sometimes speak for itself of negligence on the part of someone; but not necessarily of the defendant. Evidence may be required to attribute to him the negligence of which it speaks."

The nature of the doctrine of res ipsa loquitur is in my view clearly and correctly stated in Anchor Products Ltd. v. Hedges already cited where Windeyer J. stated at page 500 of the report:

> " ... the phrase res ipsa loquitur denotes a fact from which, if it be unexplained, it is permissible to infer negligence: but that the onus in the primary sense - that is the burden of proving the case against the defendant - remains with the plaintiff. To say that an accident speaks for itself does not mean that if no evidence is given for the defendant the plaintiff is entitled in law to a verdict in his favour. The occurrence speaks of negligence, but how clearly and convincingly it speaks depends upon its circumstances. It is evidence from which an inference of negligence may be drawn: it does not mean that this inference must necessarily be drawn, although in some cases it may be evidence so cogent and compelling that any other conclusion would be perverse."

Windeyer J. cited a passage from the Judgment of the Supreme Court of the United States in Sweeney v. Irving [1913] 228 U.S. 233 at p. 240:

> " 'In our opinion', said the Court, 'res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

What is the defect in the motor vehicle which caused the accident? On the plaintiff's case the defects which might cause an accident of this nature would be in relation to the condition of the tyres and the condition of the steering. The Court found that the plaintiff had not established that the cause of the accident was a defective tyre. In my view the evidence established the steering to be in good condition. How could evidence of a maintenance procedure add anything by way of rebuttal to any inference of defect in an unidentified part of the vehicle?

In Henderson (Widow and Administratrix of the Estate of George Arthur Henderson deceased) v. Henry E. Jenkins & Sons and Another [1969] 3 All E.R. 756 the cause of the accident was identified as a failure of the brakes of the lorry. The cause of this failure was a badly corroded pipe conveying the brake fluid, the instantaneous development of which was an unusual occurrence. This latent defect the defendants maintained was not discoverable by the exercise of reasonable care by them. Clearly in that matter the defendants had to establish a satisfactory maintenance procedure and an inspection regime in order to rebut the inference of negligence on their part since the cause of the failure was identified as a defect in a part of the vehicle under their control.

As was stated by Lord Donovan at p. 765:

> "The real question, however, was whether the respondents had proved that they had exercised all reasonable care; ..."

This they failed to do.

On the question of control at the relevant time, the person in control was the driver and not the owner of the vehicle. That it is the duty of the employer to provide the plaintiff with a motor vehicle fit for the purpose for which it was being used cannot be disputed. If the employer provides the defective vehicle and the defect results in an accident causing damage to the employee

the employer is liable in negligence, unless the employer can establish that he took reasonable care to ensure that the motor vehicle was fit for the purpose for which it was provided. The accident per se however, does not provide evidence as to the defect, and when the alleged defect is unidentified no inference can arise that the accident was caused by a defective motor vehicle.

It has been urged by Counsel for the plaintiff/respondent that this was a case in which there was joint control by virtue of the respondent being the driver of the motor car and the appellant as her employer with a duty to provide her with a safe motor vehicle, having the responsibility for the maintenance of the vehicle.

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.

In those circumstances however it would be preferable to rely upon a balancing of the facts on the probabilities rather than a particular legal "doctrine". As was said by Atkin L.J. in McGowan v. Scott [1930] 99 L.J. K.B. 357 at p. 360:

> "I am not sure that the simple issue is not sometimes obscured by referring to a particular formula such as res ipsa loquitur. 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."

In the present case there was no fact (e.g. broken mechanical part) upon which such an inference could reasonably be made that the accident was as a result of a defective motor vehicle being supplied by the employer to the plaintiff/respondent.

In all the circumstances therefore, the Judge erred in holding that the plaintiff could rely on the doctrine of res ipsa loquitur to establish an inference of negligence in the defendant. Furthermore, the finding in relation to the condition of the tyre and the evidence in relation to the steering negated any allegation of defects in these two areas and leaves to speculation the existence of a defect in a part of the vehicle which no one can pinpoint.

On a proper assessment of the evidence the plaintiff/respondent failed to discharge the burden of proof which rested on her throughout the case and judgment should have been entered for the defendant/appellant in this matter.

If I have not referred to several of the many cases cited to the Court in this appeal it is not a failure by me to recognize the industry of counsel on both sides in their preparation of this appeal and the forcefulness and clarity of their presentations.

I would allow the appeal and enter judgment for the defendant/appellant with costs of the appeal as well as of the trial in the Court below.

DOWNER, J.A.

On 18th December 1985, Pamela Rance, the respondent was an employee of the appellant, Jamaica Public Service Company Limited. She was driving a Suzuki motor vehicle assigned to her on that day by her employer. She was the lead driver and she was followed by two other employees who also drove motor vehicles assigned to them. There was an unfortunate accident on that day and since the direct account as to how she lost control of the car came from her did not explain the cause of the accident, the issue of liability must be determined either by expert evidence and if necessary, by some reliance on the maxim res ipsa loquitur. In any event, an aspect which must be evaluated to resolve the issue of liability, is the respective responsibility of the respondent Rance as the driver in control of the motor vehicle, and that of the appellant, as employer, for its proper maintenance to ensure that it was roadworthy when under the control of an ordinary prudent driver.

> Was there evidence of negligence which entitled the learned trial judge to call upon the appellant employer to answer the respondent's case?

What was averred in the pleadings? Paragraph 8 of the amended statement of claim reads:

> "8. On the said day at approximately 6:15 p.m. the plaintiff was driving home in the said Suzuki motor car, proceeding along the Sheffield Road in the Parish of Westmoreland when the steering wheel on the said motor car suddenly became loose, the right rear tyre deflated and the motor car got out of control and violently collided with a fence."

No evidence supported a violent collision with a fence. Then in paragraph 9 of particulars of negligence, the following sub-paragraphs are relevant:

> "(d) Failing to ensure that the motor vehicle was fitted with road-worthy tyres so as not to be a hazard or danger to the Plaintiff.
>
> ...

> "(f) So far as may be necessary, the Plaintiff will rely upon the doctrine of res ipsa loquitur."

Turning now to the evidence marshalled on the respondent Rance's behalf. In her evidence, she reported that she saw a rear deflated tyre after the accident, an assertion she repeated under cross-examination. Winston DaSilva who was the third employee on the scene told the court that he noticed that the right rear wheel was deflated and in re-examination, acknowledged that the appellant employer was responsible for fitting secure tyres to its motor vehicles.

It is now pertinent to examine the evidence of Victor Lawrence, the expert, called on behalf of the respondent, Rance. Apart from his qualifications, his experience includes being a member of the Corps of Royal Engineers British Army. He also works for the Jamaica Automobile Association assessing drivers in defensive driving. His evidence is relevant in two areas. Firstly, as regards the consequence of driving with a deflated tyre and secondly, his opinion as to the degree of control which a normal prudent driver could have exercised on such occasions.

As regards the consequences of driving with a deflated tyre, his answers are of sufficient importance to warrant quoting:

> " Immediately deflation occurs loss of motor traction - traction is ability to hold road - tyre adhering to the road. A loss of traction would mean that vehicle drift to the applied turn - this would be in excess of intention - car get out of control. I would expect driver to take corrective action. This would result in meandering across road. Loss of traction could produce feeling that there is no steering or something is wrong with steering. From immediate deflation the weight and motion of vehicle would dislodge the inner circumferential area of tyre beads - becomes dislodged from saddle or rim - rim free to rotate

> "from tyre. Tube becomes dislodged - rim become dented. Great possibility that a tube in tyre which has an improvised plug could become deflated at any time." [Emphasis supplied]

He was cross-examined on this aspect of the matter and his response was:

> " As a result of collision a tyre on car could become deflated. This would depend on impact and what caused impact. A car turning around repeatedly could cause deflation of tyres. In this situation plug could become loose. Instantaneous deflation could but not necessarily so - make a loud noise. It is not necessarily so that in circumstances described by Miss Phillips that air rushed out with fantastic force. I would say rapid emission, but not fantastic force. Quite likely there could be noise from emission of air as in circumstances described but not necessarily so. The emission should be accompanied by hiss. The person travelling 50 - 100 yards behind the vehicle from which the air is being emitted could only hear emission if he had near absolute quiet - sudden deflation cause vehicle to go to right still going left as intended but rotating about his front wheels - back start going faster than front back trying to overtake front - and drifts. Still going into left turn more rapidly. Excess of intention - means vehicle drift or rotate in excess by intention applied turn on steering wheel." [Emphasis supplied]

Under further cross-examination, the following answers were elicited:

> "... A 50% worn tyre is a road worthy tyre. A car with a sudden deflated tyre can be manipulated according to skill. A fairly skilled person could handle car. 80% of everyday drivers could not handle situation - rule of thumb. It has to come from training."

The further response on re-examination is also important if the Judge's order ought to be upheld. The evidence runs thus:

> "If the deflation had been caused either by contact with hard object or as a result of capsizing there would be indication of one form or another. There would be some thing to indicate this by appearance of tyre - for example, mark indicating object came in contact with - for example pointed sidewalk or superficial abrasions, scratch or cut. In most cases if turn over - evidence of squashing - most cases since special tyre, for example stunts."

It is clear from this witness that the deflation of the tyre was not caused by contact with a hard object or as a result of capsizing.

It is important at this stage to emphasize that the bulk of this expert evidence was admissible on the basis of the eyewitness testimony of the respondent Rance and her fellow employees, Jennifer Goodhall and Winston DaSilva. They gave evidence of the movement when the respondent Rance lost control and the state of the tyre when the car came to rest. Further, there was affidavit evidence of Kenneth Mills, the Transport Manager of the appellant company. He was absent from court due to illness. It was in those circumstances that the learned judge admitted his evidence and a report he made to Mr. L. Mordecai, the Insurance Manager of the appellant company.

The report is instructive. The relevant part reads:

> " At your request and based on recent correspondence on the subject, I requested that both rear wheels of the above mentioned vehicle be removed from the vehicle and brought to me for inspection. Both wheels were inspected by me in the presence of Mr. Carney, and the following observations were made.
>
> Right Rear Wheel
>
> (i) This tyre was fitted with a tube - indicatng that some repairs were carried out at some time as the other tyre remained tubeless.
>
> (ii) The tube was displaced inside the tyre, but that could have been caused while being handled by the wrecker crew.

(iii) There was one poorly fitted plug in the tyre which is further evidence of previous repairs. The plug was made up of strips of rubber tubing.

Left Rear Wheel

(i) The tyre fitted without inner tube (tubeless)

(ii) There were four (4) small nails embedded in the surface, any number of which may have penetrated the case.

(iii) Both tyres were deflated

(iv) Both tyres were about 50% worn

(v) Both rims were dented."

His opinion as regards (iii) concerning the right rear wheel, is to be found in paragraph 4 of his affidavit. It states:

"4. That with regard to note (iii) of my report in relation to the right rear wheel, to my knowledge this is not a safe way of repairing a tyre, indeed it is not the professional or the correct way to effect repair. Further, in my experience, it is not normal procedure to insert a tube in a tyre if the tyre has previously been repaired by way of the use of a plug as this may cause friction with the tube, thus causing the same to become flat."

Miss Phillips for the respondent rightly relied on this aspect of the evidence at the trial. So much so that the learned trial judge complained about the time spent in that regard. It was an odd complaint because the appellant company relied on the Mills report to find that the respondent was not blameworthy. Here is the full report:

" MEMORANDUM

TO: MISS PAMELA RANCE

FROM: MOTOR VEHICLE ACCIDENT INVESTIGATION COMMITTEE

DATE: OCTOBER 22, 1986

SUBJECT: MOTOR VEHICLE ACCIDENT ON DECEMBER 18, 1985

> "The Motor Vehicle Accident Investigation Committee met on October 9, 1985, in your presence and that of your Cost Centre Manager to consider the circumstances of your Motor Vehicle Accident on December 18, 1985.
>
> The Committee felt that you were not blameworthy for this accident.
>
> Sgd/ J. Christie
> Chairman M.V.A.I.C.
>
> c.c.: C.D. Barrow
> A.A. Mills
> W. DeSilva
> L. Mordeca (sic)
> K.G. Mills
> F. Bicknall"

It is to be noted that a copy was sent to K.G. Mills. The inference is that the investigation relied on his report. In his evaluation of the evidence, the learned judge said:

> "... The plaintiff is here positing a theory of how and why the accident occurred. Is this theory sustainable? I think not. Lawrence in cross-examination said that 'as a result of collision a tyre on a car could become deflated. This would depend on impact and what caused impact. A car turning over repeatedly could cause deflation on tyre or tyres.' There is no evidence of any deflation before the vehicle sommersaulted. Deflation is consistent with the car overturning having crashed into the fence bordering the field. Both rims were dented. Thus, the theory is punctured. There is another reason for rejection. Mills examined wheels purportedly taken from the plaintiff's vehicle. These were wheels which were sent to him some five months after the date of the accident. Where were these wheels during the five months interval? Are these in fact the wheels which were on the plaintiff's vehicle? There is an evidential hiatus."

There was clear evidence from Jennifer Goodhall and the respondent Rance as to when the car commenced to swerve from left to right and the inference must be that the deflation noted by the respondent Rance and Goodhall commenced at that time. Also the learned judge ignored Lawrence's explanation of how the rim could become dented when it was free to rotate from the tyres.

Another aspect of the error in the learned judge's evaluation was his concern as to where were the rear wheels of the motor vehicle. Mr. K.G. Mills made it clear that the vehicle was in the appellant employer's custody and this was never challenged at the trial or on appeal. It was therefore the learned judge's failure to evaluate the evidence which caused him to discover a hiatus. When directing his mind to res ipsa loquitur, he said:

> " The plaintiff has failed in her effort to thecrise, and now draws the last arrow to her bow - the doctrine of res ipsa loquitur."

Because the learned judge relied on res ipsa loquitur, he rejected the only evidence which was capable of raising the inference of negligence. Was that reasonable? Firstly, he stated that deflation was consistent with the car overturning and crashing into a fence bordering the field. But the evidence of the eyewitness was not juxtaposed with the relevant evidence of the expert and that ought to have been done or at least borne in mind.

As regards the respondent Rance, here is her evidence as to when the steering became loose:

> "... After stop road bad some way until reached Sheffield - a district. While passing through Savanna-la-mar accident - accident took place on Sheffield main road road wide and smooth 3 cars could hold - had slight curve. Up to Sheffield - 25 m.p.h. smooth means asphalted without pot holes - I went around slight curve at about 40 m.p.h. reached on straight path of road - I felt steering wheel loose - vehicle start to go right and then left. I started to brake and trying to control vehicle. It was going from right to left left to right - head bang - felt head going in a circle - next found myself in vehicle in passenger seat - vehicle parked on top of fence -"

Jennifer Goodhall was the co-worker following the respondent. Here is her evidence:

> "... I was travelling 45 to 50 m.p.h. and I was travelling behind plaintiff she had just turned a corner it was a left hand corner she was actually on straight. The vehicle started to go two sides of road. The vehicle almost hit a light post. There was a property to side of road. Vehicle left road and went over into this field - vehicle spin somersaulted into field I am not 100% sure where vehicle landed but I say landed on top for wheels exposed. It could have landed on side. When I saw vehicle swerving it was going from right to left. I was travelling about 1 ft. or so from grass verge - Plaintiff travelling on left before accident. Prior to swaying noticed nothing unusual about the passage of that vehicle." [Emphasis supplied]

Then there was the evidence of Winston DaSilva who was the third member of the party:

> "... After I went around corner I observed vehicle plaintiff driving over the left hand side of road in a pasture. From I entered corner never saw Miss Rance's vehicle again until I saw it in a pasture. I saw vehicle - it had not yet come to a stop and it was moving in pasture - bumpy movement - I think it was on the wheels I am not sure if vehicle remained on wheels. I approached vehicle. When I approached vehicle not able to say if car upright or not. I noticed the right rear wheel was deflated - not completely. Curve to the left. It is a gradual and long curve." [Emphasis supplied]

In the light of these extracts, there is no warrant for the learned judge's theory that deflation might have been caused "having crashed into the fence bordering the field." There is another aspect of DaSilva's evidence which is of vital importance. So it is apt to quote the judge's findings in this regard:

> "... Under cross-examination, DaSilva claimed to have knowledge of the maintenance procedure in respect of vehicles. He said, 'I have knowledge of maintenance procedures for vehicles in my district. Procedure - vehicles normally checked on daily basis minor checks - oil, water. On weekly basis

> "checked in garage. To the best of my knowledge there is a weekend check - brakes - oil, lubricants - brake lining or anything like that. This is policy.' My first comment is that DaSilva has merely outlined as best he could what is supposed to be the policy as regards maintenance procedure. He does not say to what extent if at all this policy is carried into effect. He cannot and does not say that the plaintiff's vehicle, in particular was subject to the policy of the maintenance procedure. There is no evidence that the maintenance procedure accords with any particular standard. It was all so vague. The defendant has not shown that it had taken all reasonable care to provide the plaintiff with a safe vehicle to transport herself. The prima facie inference has not been displaced. There will therefore be judgment for the plaintiff." [Emphasis supplied]

Had these findings been linked to the evidence of the respondent Rance and DaSilva as regards the deflated right rear tyre and the cause of the accident propounded by Lawrence, the learned judge's reasons would have been faultless. Instead he linked his admirable conclusion to the maxim res ipsa loquitur. The only point necessary to note in this context is paragraph 9 (c) of the Particulars of Negligence. Paragraph 6 reads:

> "6. The Defendant Company was at all material times responsible for maintenance and repair of the said motor vehicle and the Defendant knew or ought to have known that in the absence of reasonable care on its part in the maintenance and repair of the said car, damage and injury would or might result in the course of its use."

Paragraph 9 (c) reads:

> "9(c) Failing to ensure whether by regular inspection, examination, testing or otherwise, that the said motor car had no worn or defective parts and/or accessories."

In this regard, it will be seen that no detailed examination of tyre was conducted by Wilbert Reid, the appellant's expert. It was in those circumstances that the appellant company found it necessary to carry out the examination of the tyres by their own transport manager. Here is his affidavit evidence on this issue:

> "2. That on or about May, 1986 I received a request from Mr. L. Mordecai, Manager-Insurance of the Defendant Company that I examine the rear wheels of Suzuki Samurai motor vehicle licence No. NH 1648 which had been involved in an accident on or about December 1985 when driven by Miss Pamella Rance."

The presumption must be that principal servants of the company examined the rear wheels on the basis that they were not tampered with, since the accident. There was no suggestion by the appellant company to that effect. The evaluation by the learned judge that there was an hiatus was not well founded.

It is permissible to rely on the evidence of the right rear tyre and the cause of the accident as explained by Lawrence. Because this Court is a court of rehearing, it can do what the court of first instance ought to have done - see paragraph 12, Court of Appeal Rules, 1962. This is so even when a respondent's notice has not been filed. See paragraph 18 Court of Appeal Rules, 1962. The gist of Miss Phillips' submissions before Cooke J., anticipated the reasoning in this judgment. Yet it was not pursued with zeal at this level. Miss Phillips preferred to rely on the judge's reasoning and relied on res ipsa loquitur when her original approach was correct. It was correct because the unusual behaviour of the motor vehicle is consistent with a deflated tyre from the time when the respondent Rance, an ordinary prudent driver, failed to control the car. True, Rance was in control, but the state of the tyres was the foundation of a prima facie case that the appellant employer was negligent as averred and proved. Therefore the learned judge was correct to call on the appellant employer to answer.

An analysis of the Authorities

A short passage from the speech of Viscount Simonds in Woods v. Duncan [1946] A.C. 401 at 419 cited at page 7 - 8 in the judgment below is pertinent. It reads:

> "The case against Lieutenant Woods has been put as an application of the principle known as res ipsa loquitur ... Even so that principle only shifts the onus of proof which is adequately met by showing that he was not negligent. He is not to be held liable because he cannot prove exactly how the accident happened."

It was contended on behalf of the appellant, by Mr. Muirhead that the principle has no application since the plaintiff was in control of the vehicle. I think Mr. Muirhead is in error with regard to that submission and the cases cited, point to the opposite conclusion. Once it is grasped that the respondent Rance was in control of the vehicle on the road, while the appellant employer was responsible for its proper maintenance, then if the respondent Rance adduced evidence in the court below which raised a prima facie case of negligence as regards maintenance, then the appellant employer was obliged to answer. Since the appellant employer lead no effective evidence to rebut the prima facie case, then the respondent Rance rightly succeeded in the court below.

Since reliance was placed on Turner v. Mansfield Corp. [1975] Vol. 119 S.J. p. 629 by the appellant employer, it is necessary to refer to that case and analyse it. It reads:

> "Lord Denning M R said that it was not a case to which res ipsa loquitur, which started with Scott v. London Dock Co [1865] 3 H & C 596, 601, applied. That was simply a rule as to the weight of evidence from which negligence could be inferred. His Lordship agreed with Megaw L J in Lloyde v. West Midlands Gas Board [1971] 1 W L R 749, 756 on doubting whether to describe it as a doctrine. More v. R Fox & Sons [1956] 1 Q B 596,

> "ought to be relegated to the background. It was for the plaintiff who was in control of the dustcart to give an explanation of the accident. The appeal should be allowed.
>
> Browne L J agreed with Lord Denning M R and with Megaw L J in Lloyde's case supra. The thing, the dustcart, was not under the control of the defendants but under the joint control of the plaintiff and the defendants."

An important fact elicited from the headnote is that the plaintiff driver failed to observe whether the power lever was in an engaged position in an instance where the employer's dustcart which had a tipping body, the moveable body, for some unexplained reason rose and hit a railway bridge. Further, the driver failed to marshall any facts from which it could be inferred that his employers were at fault in the maintenance of the vehicle.

However, in the instant case, the respondent Rance led evidence from which it could be inferred that her appellant employer was at fault in not providing requisite maintenance to ensure that the tyres were roadworthy. That this is the correct reading of the case, is reinforced by Lloyde v. West Midland Gas Board [1971] 1. W.L.R. 749 at 789. That was another case of joint control where the gas board and the householder shared control. The headnote makes this clear. It reads at p. 749:

> " Held, allowing the appeal and ordering a new trial, that even though the gas apparatus was not under the exclusive control of the defendants, yet the plaintiff could still invoke res ipsa loquitur but only if he could establish an improbability of any outside interference with it; since that question had not been carefully investigated at the trial and the defendants were not prepared to meet a case of res ipsa loquitur, fairness required a new trial on the issue of liability."

In the course of his judgment, Megaw L J delivered the following passage which illustrates the principle with clarity:

> "I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think that it is no more than an exotic, although 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 omission 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 that 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 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."

Of the numerous authorities cited, it is helpful to cite Ludgate v. Lovette [1989] 2 All E.R. 1275 especially since it deals with a deflated tyre. Here the owner said the driver, who had hired the car from him, damaged it in an accident and the driver in turn counter-claimed for the personal injuries he had sustained. Here then is another case of joint control, the owner being responsible for maintenance and the driver being in control of the vehicle at the time of the accident. There is no doubt that the plaintiff owner relied on res ipsa loquitur.

Harman L J states this expressly at p. 1276 when he stated that it was admitted that the doctrine applied. Be it noted that the driver counter-claimed and averred that it was the deflation of the tyre which caused the accident. He failed in that regard because the expert evidence of the owner rebutted that contention. Here is how Harman L J treated the matter at p. 1277:

> " Now here the defendant, conscious that things looked black against him, averred and counter-claimed on the footing that in fact it was the deflation of the tyre which brought about the accident: the tyre, therefore, was not in a proper condition and the car was not roadworthy; and he counterclaimed against the plaintiff on that footing. His evidence about the tyre was destroyed by the plaintiff's expert, who showed that it was a tyre in good order and that it was really the impact after the car had left the road, which caused the tyre to deflate."

The point to note is that any plaintiff can rely on res ipsa loquitur if the averment of negligence is in respect of matters under the control of the defendant. In the instant case, the maintenance of the vehicle which includes the provision of tyres was under the control of the appellant employer.

To my mind, the relevant case which supported the respondent Rance's stance was cited on behalf of the appellant employer below, but scarcely referred to directly on appeal. It is Barkway v. South Wales Transport Co Ltd [1950] 1 All E R 392. However, equally important was Arthur Henderson v. Henry Jenkins & Sons & Another [1969] 3 All E R 756 which was considered. The relevant passage is to be found in the speech of Lord Pearson. It reads thus at p. 766:

" My Lords, in my opinion, the decision in this appeal turns on what is sometimes called 'the evidential burden of proof,' which is to be distinguished from the formal (or legal or technical) burden of proof. Passages which bear on this distinction will be found in Esso Petroleum Co. Ltd. v. Southport Corpn. [1955] 3 All E R 864; [1956] A C 218; [1956] 2 W L R 81; 120 J P 54; rvsg. sub nom per Devlin J and per Lord Radcliffe, and in Barkway v. South Wales Transport Co. Ltd. [1950] 1 All E R 392; [1950] A C 185; 114 J P 172; 36 Digest (Repl.) 144, 764 per Lord Porter and per Lord Normand. For the purpose of the present case the distinction can be simply stated in this way. In an action for negligence the plaintiff must allege, and has a burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of fact which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants. I have some doubts whether it is strictly correct to use the expression 'burden of proof' with this meaning, as there is a risk of it being confused with the formal burden of proof, but it is a familiar and convenient usage. With this approach to the case, I must consider the pleadings."

The respondent Rance adduced relevant evidence regarding the probable cause of the accident. The learned judge misdirected himself as to the effect of that evidence and described the evidence as a theory which was puntured. He then elected to rely on res ipsa. In those circumstances, the appellant employer should have rebutted that evidence and it is now necessary to consider their response.

> What response did the appellant employer make in respect of the prima facie case made out by the respondent Rance?

The evidence of Winston DaSilva, the district manager of the appellant employer is relevant. To reiterate, under cross-examination, this was his evidence:

> " I have knowledge of maintenance procedure for vehicles in my district. Procedure - vehicles normally checked on daily basis - minor checks - oil, water, on weekly basis - checked in garage.
>
> To best of my knowledge weekend checked - brakes, oil, lubricants, brake lining or anything like that. This is policy.
>
> Whether car on daily basis this is supposed to be procedure."

The only evidence adduced on behalf of the appellant employer was that of Wilbert Reid who examined the vehicle a few days after the accident. As regards the state of the tyres, his evidence in chief ran thus:

> "Right rear rim dented outside edge part, part tyre goes on. Right rear tyre punctured - I mean deflated. It was a tubeless tyre. Knew by visual inspection. Also wearing a tubeless valve at time. Tubeless valve not work with tube - Different design between tubeless and tube valve. Not attach tubeless valve to a tube, dent appeared recent. Dent such that immediate deflation. Carried out static test on steering ... all ends

> all right. I inspected ends while someone else move wheel. Steering mechanism in working order. Check on both brakes - in working order - the other 3 tyres were intact." (Emphasis supplied)

Be it noted that although evidence was led that the right rear tyre was in such a condition, that it could have been the reason for the inability of the respondent driver to control it, no questions were directed to this witness in that regard. Moreover, although the evidence was that the car was out of control before it was stationary, this aspect was not put to the witness by the appellant employer. Since from this evidence the inference could be drawn that the deflation occurred before the car stopped, it was the duty of the appellant employer to rebut the inference of negligence raised by the respondent Rance, that the deflated tyre was the cause of the accident. This, they failed to do.

On the other hand, Miss Phillips for the respondent Rance, cross-examined this witness as regards the tyre. Here are his answers:

> "... I did not make a note of condition of right tyre at time of making notes.
>
> I don't know if tube in any of the other tyres. Have no knowledge if right rear tyre patched before. I did not note if any plug and I made no note as to what type of valve right rear had. I did not make any note of any of the valve in any of the other three tyres. I cannot recollect now what type of valves in other 3 tyres, but I now recollect valve in right tyre. Only note right tyre is that punctured. My purpose is to see if defects and if so before or after accident. Can distinguish immediately the difference between tubeless and tube valve."

With regards to res ipsa loquitur, the learned judge relied on the credibility of the respondent, Rance. He said:

> " I now examine the plaintiff's contentions. It is crucial to my assessment of her evidence that I subject her credibility to the closest scrutiny because hers is essentially the only evidence which grounds the proposition that the accident was an un-explained occurrence. I formed a most favourable view of her honesty."

Her evidence could never be relied on, as the basis to apply the maxim of res ipsa loquitur. It is the res which must speak if there is reliance on the maxim. The learned judge was driven to this course because he failed to take into account the evidence of DaSilva and the respondent Rance, concerning the deflated right tyre. Then he failed to note that there was no challenge to the fact that the tyres which included the right rear tyre were examined by the transport manager. Further, there was his failure to link the expert evidence of Victor Lawrence on the tyres to the findings of the transport manager, K.G. Mills.

It is useful in this context, where I am disagreeing with the evaluation of the evidence by the learned judge to reiterate the words of Lord Thankerton in Wattor Thomas v. Thomas [1947] A C 484 at pp. 487 - 488 cited by Lord Oliver in Industrial Chemical Co (Jamaica) Ltd v. Ellis 35 W I R p. 303 at p 305. They read:

> "(I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witness, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (II) The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any

> satisfactory conclusion on the printed evidence.
>
> (III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'"

As there were misdirections by the learned judge and his reasons were unsatisfactory, the matter became at large for this Court. So although I agree with the judge's order on liability, my reasoning is different. The respondent was seriously injured but there was no cross-appeal on damages although general damages were assessed at a mere $100,000. To my mind, the award is in a somewhat low range.

In the event, I would dismiss the appeal, affirm the order below and order that costs of the appeal go to the respondent, Rance. These costs must be agreed or taxed.

PATTERSON J A (AG)

Pamela Rance, the respondent in this appeal, was employed to the appellant, Jamaica Public Service Company Limited. The appellant provided her with a motor car as a means of transport between her office and home. On the 18th December 1985, she was the driver of a Suzuki motor car (owned and maintained by the appellant) when it left the road at Sheffield in Westmoreland, went into a pasture and collided with a fence, causing her severe injuries.

In an action brought by her against the appellant claiming damages for personal injuries, she pleaded that "the steering wheel on the said motor car suddenly became loose, the right rear tyre deflated and the motor car got out of control and violently collided with a fence." She alleged that the collision was caused "solely by the negligence and/or breach of duty" on the part of the appellant, its servants and/or agents. The particulars of negligence pleaded were these:

> " PARTICULARS OF NEGLIGENCE
>
> (a) Providing the Plaintiff with the said Suzuki motor car when it knew or ought to have known that the same or some part thereof was defective.
>
> (b) Failing to ensure that the said steering wheel was properly fitted in a manner that was safe and secure and not liable to become loose and cause injury to the Plaintiff while driving.
>
> (c) Failing to ensure whether by regular inspection, examination, testing or otherwise, that the said motor car had no worn or defective parts and/or accessories.

(d) Failing to ensure that the motor vehicle was fitted with roadworthy tyres so as not to be a hazard or danger to the Plaintiff.

(e) Failing to observe, to inspect, to warn or report to the Plaintiff that there were worn tyres on the said motor vehicle.

(f) So far as may be necessary, the Plaintiff will rely upon the doctrine of res ipsa loquitur."

The appellant, in its defence, denied that the steering wheel on the motor car became loose, and that the right rear tyre became deflated. It further denied that "the collision was caused solely by the negligence and/or breach of duty of the defendant, its servants and/or agents." It alleged that the collision was caused or contributed to, by the negligence of the respondent, the particulars of which were stated thus:

" PARTICULARS OF NEGLIGENCE

(a) Driving at an excessive or improper speed.

(b) Failing to maintain any or any sufficient control of the said motor car.

(c) Failing to take any or any sufficient care for her own safety.

(d) Failing to stop, slow down turn aside or otherwise so to manage or control the said motor car as to avoid the said collision."

It further stated that it "will rely on the principal (sic) res ipsa loquitur."

The respondent gave evidence that as she drove the car on her way home, she negotiated a slight curve at about 40 m.p.h. and then, while on the straight road, she felt the steering wheel become loose. The vehicle started to go right and then left; she braked and tried to control it. However,

despite her efforts, it kept going from right to left and left to right until she said she heard a "bang" and discovered that the vehicle had come to rest on a fence in a field adjoining the left of the roadway. She could not say what caused the "bang" that she heard. She did recall that when the motor car went to the left, she tried to correct it and it went to the right. She tendered evidence with a view of establishing that the motor car was fitted with at least one defective tyre which had become deflated and caused her to lose control. The appellant contended that the motor car was mechanically sound and in good condition, and asked the Court to find that the circumstances called for the application of the res ipsa loquitur doctrine, and to infer that the accident must have occurred as a result of the negligent manner in which the respondent drove the motor car.

The learned judge did not accept the explanation of the respondent as to the cause of the accident. He held that the accident was an unexplained occurrence, and that the cause was unknown. He nevertheless found that the respondent had made out a prima facie case of negligence on the part of the appellant, and that the evidential burden shifted to the appellant to displace the inference raised. He held that the prima facie inference had not been displaced, and accordingly, he gave judgment for the respondent.

It is obvious that the learned judge, in order to find that the respondent had made out a prima facie case, must have been satisfied that the circumstances of the accident were such that the doctrine of res ipsa loquitur could be invoked in favour of the respondent. It seems to me, having regard to his rejection of the respondent's explanation as to the cause of the accident, and rightly so in my view, that the respondent could not have succeeded in her claim unless

he found that the doctrine came to her assistance. It is settled law that a plaintiff who alleges the cause of an accident, but fails to prove it may nevertheless, in certain cases, rely on the doctrine.

The learned judge's rejection of the respondent's explanation as to the cause of the accident cannot be faulted. There was no evidence of any defect in the steering mechanism of the car. The respondent could not say that the right rear tyre of the car was defective and consequently, it became deflated and caused her to lose control of the car. She said she saw the deflated tyre after the accident although she cannot recall any other damage to the car. The car was badly damaged after the accident; it seemed to have somersaulted twice before coming to rest on its wheels in the field. A witness who had been driving closely behind, said she saw when the car started to go from side to side of the road, and that it did so for about 100 feet before it eventually somersaulted, but she did not see either of the rear tyre "burst", nor did she hear any unusual sound. Another witness who was quickly on the scene, said that before the car stopped, he saw it "moving in pasture - bumpy movement". He thought the car was on its wheels, but he was not sure if it remained on its wheels. However, he subsequently examined the car in the pasture and noticed that "the right rear wheel was deflated - not completely." He did not observe a tear or burst on the tyre. A Senior Inspector of motor vehicles employed to the government examined the vehicle on the 20th December 1985 at the request of the police. He described the damage to the car which included the entire right side. He noticed that the rim of the right rear wheel was "dented outside" - it was fitted with a tubeless tyre, which was deflated, but he did not make a note of it. He opined that the dented rim would result in immediate deflation of the tyre

The respondent persevered in her effort to explain the cause of the accident and to show that she was not at fault. A report of the transport manager employed to the appellant dated May 20, 1986 was admitted in evidence. It showed that he examined the two rear wheels of the car, which had been removed from the vehicle and taken to him some five months after the accident. Both tyres were deflated, one being fitted with a tube while the other was tubeless. Both rims were dented. An expert witness was called whose opinion was that a tyre with a poorly fitted plug, such as the one described in the transport manager's report, could cause a tube in that tyre to be punctured and the tyre to be immediately deflated.

Such then was the state of the evidence presented in proof of the cause of the accident. I see no reason to disturb the learned judge's finding of fact that at the end of the day the respondent had failed to satisfy him as to what caused the accident and that the accident remained unexplained.

The appellant's main contentions were firstly, that "the learned trial judge erred in law in finding that the maxim res ipsa loquitur was applicable on the plaintiff's case" and secondly that "the learned trial judge erred in law in finding that the plaintiff had made out a prima facie case against the defendant as all the possible reasons posited by the plaintiff as being the cause of the accident were unproved or effectively discredited."

As a general proposition of law, it is incumbent on a plaintiff to prove his case on a balance of probabilities, if he is to succeed in his action, whether the cause of action be negligence or otherwise. I take the law on this point to be that stated in Halsbury's Laws:

> "The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. However, if the plaintiff proves injury resulting from conduct which can be reasonably explained only by attributing to the defendant a breach of duty or which points prima facie to a breach of duty on the defendant's part, the burden of proof is shifted, and it is then for the defendant to show that he has taken all reasonable precautions to avoid the act complained of."

(see 34 Halsbury's Laws (4th Edition) paragraph 54).

As I understand it, in order to succeed in a negligence action claiming damages for personal injury, the plaintiff must ordinarily bring evidence of an act done by the defendant, or an omission on the part of the defendant, which, on a balance of probabilities, supports a finding of the defendant's negligence. But it does not necessarily follow that if the plaintiff fails to prove such an act or omission, he must thereby fail in his claim. The evidence may be such that it proves a set of facts which raises a prima facie inference that the injury suffered by the plaintiff was caused by the negligence of the defendant. In other words, if the event which caused the accident resulting in the injury to the palintiff is unexplained and such an event probably would not have occurred if the defendant had taken reasonable care for the plaintiff's safety, then prima facie, negligence may be inferred on the part of the defendant. In such a case, the evidential burden of proof shifts to the defendant, and the plaintiff will then succeed only if the defendant fails to lead evidence sufficient to displace the prima facie inference.

Generally speaking, the doctrine res ipsa loquitur applies when an accident occurs, and the plaintiff is unable to explain its cause, and an inference of the defendant's negligence can properly be drawn. In Scott v. The London and St. Katherine Docks Company [1865] 3 H & C 596 Ex. Ch., the majority of the Court concluded that:

> "In an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant the Judge in leaving the case to the jury. But where the thing is shewn 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 defendant, that the accident arose from want of care."

It seems quite clear that the court was there stating the principle underlying the application of the doctrine of res ipsa loquitur. Where the cause of an accident is unknown, the facts surrounding the happening of the event may lead to an inference of negligence on the part of the person who has the control or management of the thing that causes the accident. It should be remembered, however, that such a person is not always the defendant in a case, but where he is, the doctrine will come to the aid of the plaintiff who has the primary burden of proving that the defendant was negligent. Lord Denning M R elucidated the doctrine by pointing out, in Turner v. Mansfield Corpn. [1975] 119 Sol Jo 629, that it was "simply a rule as to the weight of evidence from which negligence could be inferred."

If the cause of the accident is alleged by the plaintiff, and if the facts are sufficiently known, the question for the court to decide would then be whether, on the established facts, negligence is to be inferred or not, and in that case, the doctrine is inapplicable. However, if the plaintiff alleges

particular acts of negligence and fails to prove them, that in itself would not be sufficient reason to preclude him from relying upon the doctrine. If the plaintiff gives a partial account of the accident, that too, by itself, would not render the doctrine inapplicable. So long as the cause of the accident is unknown, the partial account may have the effect of making it crystal clear that a reasonable inference of negligence on the part of the defendant, ought to be drawn from the facts surrounding the nature of the accident.

The case of Ludgate v. Lovette [1969] 2 All E R 1275, provides a very good example of the applicability of the doctrine. In that case, the defendant hired a van in good mechanical order and condition from the plaintiff. Sometime after, the van overturned while the defendant was driving it along the motor way, and was wrecked. The plaintiff claimed that the defendant was responsbile for the accident. In answer, the defendant denied responsibility and said he was not guilty of negligence and that the accident happened without any fault on his part. He counterclaimed against the plaintiff to recover damages for the injuries he suffered in the accident on the footing that a tyre had deflated and caused the accident. On the plaintiff's case, it was admitted that the doctrine res ipsa loquitur applied. Harman L J said (at p. 1277):

> "... it being admitted on all hands that the plaintiff's prima facie case is one where res ipsa loquitur, the burden is cast on the defendant to explain that which otherwise is without explanation, or, if he cannot explain it, at least to show that no fault of his was involved."

The defendant's evidence as to the deflation of the tyre prior to the accident was rejected by the court, and the accident remained unexplained. However, the defendant's further

evidence was to the effect that he was not negligent in controlling the van; he did not fall asleep and he did not fail to pay attention, and that the accident occurred through no fault of his. The Court considered the weight of the evidence of the defendant against that of the plaintiff, and Harman L J, in his judgment, had this to say (at p. 1278):

> " Now is it enough for the defendant to say: 'I am sure I never went to sleep; I am sure I did not lose any attention for an instant; I knew I was going at 60 m.p.h.; I knew where I was; and the man following behind me saw what happened, namely, that the car swerved violently to the right and as I corrected it came over to the left and there was no reason I can give for it but it was not my fault?' In my judgment that will not do. The learned judge felt that that would not do and that is why he evolved out of his own consciousness and ingenuity, if I may say so, his theory why the accident happened. His theory is admittedly untenable, and I cannot avoid the conclusion that if he had not evolved such a theory he must have held that res ipsa loquitur remained in the case and that, therefore, there being no explanation, it must have been some cause for which the defendant was responsible. Everybody knows how, travelling on a motorway, there may be a loss of concentration of a momentary kind; and, the defendant going at speed - 60 m.p.h.- it needs only an infinitesimal gap in the stream of consciousness to bring about the kind of result which occurred in this case."

Edmund Davies L J, in his judgment, was constrained to say that he had "rarely come up against a case where the res ipsa loquitur maxim applied more vividly than in the present case."

The doctrine has been applied in accident cases where, for example, without any proven reason, a motor vehicle runs off the road or it overturns or it mounts the bank, causing injury to its passengers or other users of the road.

But though evidence of the manner in which the accident occurred may be sufficient to give rise to the doctrine, it is not so that in every case the negligence of which it speaks is attributable to the defendant. The doctrine cannot be invoked by a plaintiff who has the control or management of the thing that causes the accident. The plaintiff may only invoke the doctrine where the defendant or his servants or agent has the control or management of the thing that causes the accident. Turner v. Mansfield Corpn. (supra) is a case in point. The plaintiff was the driver of the defendants' dustcart when the tipping body of the cart raised itself and hit a railway bridge, with the result that the plaintiff was injured. The plaintiff was unable to give an explanation as to the cause of the accident. It was held that the doctrine of res ipsa loquitur did not apply, because "it was for the plaintiff who was in control of the dustcart to give an explanation" (per Lord Denning M.R). Browne L.J. said that -

> "the thing, the dustcart was not under the control of the defendants but under the joint control of the plaintiff and defendants."

The plaintiff did not lead evidence to show that his injury was caused by some act or omission on the part of the defendants which could be reasonably explained only by attributing it to the negligence of the defendants. There was therefore no prima facie evidence capable of giving rise to the doctrine and shifting the evidential burden to the defendants. That case may be contrasted with Barkway v. South Wales Transport Co. Ltd. [1950] 1 All E R 392 where Lord Porter emphasized the principle that if the facts were sufficiently known, the question is whether on the established facts, negligence is to be inferred or not. In this case, the front tyre of the defendants' omnibus burst, causing the vehicle to overturn and as a consequence the plaintiff's

husband was killed. The plaintiff adduced sufficient prima facie evidence to cast an evidential burden on the defendants to show that the tyre did not burst as a result of negligence on their part. The defendants were unable to displace the inference of negligence and accordingly, were held liable.

In the instant case, the respondent failed to explain to the satisfaction of the court, what was the cause of the accident. On the evidence, the accident was unexplained. Nevertheless, the learned judge, in his judgment, sought to explain it. He said that he accepted that at all times the respondent was driving carefully. He accepted that the driving conditions were excellent and that -

> "at all times prior to the events culminating with the vehicle landed (sic) in the field the plaintiff was in full control of the vehicle."

He then said that -

> "a vehicle does not defy the control of the driver unless that vehicle is defective,"

and it is on that hypothesis it seems to me, that he made the finding that:

> "The plaintiff has raised a prima facie inference of negligence on the part of the defendant in providing her with a defective vehicle."

Miss Phillips submitted that on the judge's findings, the respondent had adduced sufficient evidence to invoke the doctrine of res ipsa loquitur on her own behalf, and consequently, the evidential burden of proof shifted to the appellant. She based her submissions on the premise that the respondent had given a satisfactory explanation of the incident, and that the court was satisfied that the accident occurred without any negligence on the part of the respondent, and that the respondent had furnished evidence from which negligence could be inferred on the part of the appellant in supplying the respondent with a defective vehicle. She submitted that,

on the facts of this case, both the appellant and the respondent were in joint control of the motor car at the time of the accident, but that, she said, did not preclude the respondent from relying on the doctrine. She submitted that the appellant had not discharged the evidential burden placed on it, and consequently, the judgment should stand.

I find myself quite unable to agree with the submissions and arguments of Miss Phillips. In my view, the finding of the learned judge that the vehicle was defective is untenable. Clearly, there was no evidence capable of giving rise to a prima facie inference of negligence on the part of the appellant in providing the respondent with a defective vehicle. The respondent failed in her bid to establish that a loose steering or a defective tyre was the cause of the accident, and no other defect whatsoever was alleged or proved. The cause of the accident remained unexplained at the close of the respondent's case. But as the learned judge found, the respondent was in "full control" of the vehicle, and in my view, the onus was on her to prove her case by showing what it was that caused her to lose control of the vehicle; this is not a case in which she could invoke the doctrine of res ipsa loquitur. In my judgment the mere fact that a vehicle runs off the road does not give rise to an inference that it did so becasue of some defect in its condition. Where there is no direct evidence of the defective condition of a vehicle which would render it uncontrollable, then any loss of control, prima facie, must be attributed to the bad driving or negligence on the part of the person who is in control of it. A person who takes a vehicle unto the public highway is under a duty to exercise such skill and control in its operation and management so as not to cause injury or damage to person or property. If he fails in that duty, then surely a prima facie presumption

of his negligence arises, and that presumption cannot be displaced by his bare assertion that he was not negligent in his driving. The best of drivers may be momentarily inattentive or may be just downright careless, and thus cause an accident.

I hold that the learned judge fell in error in finding that, on the proven facts, and in the circumstances of this case, the doctrine of res ipsa loquitur applied in favour of the respondent. Consequently, there was no basis for his finding that an evidential burden had been placed on the appellant to show that all reasonable care had been taken to provide the respondent with a safe vehicle to transport her. In my judgment, the respondent failed in her duty to discharge the primary burden of proof, and therefore, her claim for damages must fail.

Accordingly, I would allow the appeal, set aside the judgment of the court below, and enter judgment for the appellant with costs to the appellant both in this court and the court below to be agreed or taxed.

RATTRAY, P

By a majority the appeal is allowed. Judgment of the court below set aside. Judgment entered for the appellant with costs here and below to the appellant, to be taxed if not agreed.

Cases referred to

(1) Scott v London and St. Katherine Docks (1865) 3 H&C 596.
(2) Richer v A.J. Freiman (1965) 51 DLR (2d) 32
(3) Anchor Products v Hedges (1966) 115 CLR 493.
(4) Sweeney v Irving (1913) 228 US 233
(5) Henderson v Henry E Jenkins & Sons (1969) 3 All ER 756
(6) McGowan v Scott (1930) 99 LJKB 257
(7) Woods v Duncan (1946) AC 401
(8) Turner v Mansfield Corp (1975) Vol 119 SJ 639.
(9) Lloyde v West Midland Gas Board (1971) 1 WLR 749
(10) Ingate v Lovette (1959) 2 All ER 127 [illegible]
(11) Barkway v South Wales Transport Co. Ltd (1950) 1 All ER 392
(12) Walter Thomas v Thomas (1947) AC 484
(13) Industrial Chemical Co (Jamaica) v Silvera 35 W.I.R 305