1985 January 14

[TRIANTAFYLLIDES, P., LORIS AND PIKIS, JJ.]

ANDREAS SAVVIDES,

Appellant-Plaintiff,

v.

1. TAKIS MESARITIS,
2. PATROCLOS ANTONOPOULOS,
3. BRITISH AIRWAYS,

Respondents-Defendants.

(Civil Appeal No. 6621).

Negligence—Res ipsa loquitur—Conditions for invocation of—Section 55 of the Civil Wrongs Law, Cap. 148—Road accident—Plaintiff had means of knowledge of the actual circumstances of the accident—And facts proved before the Court not indicative, on balance, of negligence on the part of the defendant—Above doctrine could not be invoked—Plaintiff must set facts giving rise to inferences of negligence—Application of the doctrine not an escape route from failure to prove positive allegations of negligence.

Civil Procedure—Pleadings—Failure to prove the pleaded case —Case liable to be dismissed as unproven.

Costs—Not following the event.

A car driven by respondent 2 for whose acts the third respondents, British Airways, were sued as vicariously answerable, was found stuck behind the vehicle of appellant-plaintiff driven at the time by a servant or agent of the plaintiff. Behind the car of respondent 2 there was a third car driven by respondent 1. Only a short distance of about 2½ ft. separated the front of the third car from the rear of the second, a fact which judged in combination with the damage noticed on the three vehicles by the Investigating Officer was apt to suggest that the three vehicles were involved in an accident. Beyond this it was

difficult to draw any other inference respecting the facts of the accident. In an action by appellant-plaintiff against the respondents-defendants for the recovery of damages sustained by his car in the above accident it was submitted on his behalf, notwithstanding the absence of evidence shedding light on the circumstances of the accident, that from the above evidence a strong prima facie case of negligence on the part of the respondents emerged fixing them with liability in the absence of a proper explanation absolving them of negligence; and as none was given, the provisions of section 55* of the Civil Wrongs Law, reproducing in statutory form the doctrine of res ipsa loquitur, became applicable.

The trial Court held that plaintiff failed to satisfy the first condition set out in section 55, Cap. 148, with regard to the invocation of the doctrine of res ipsa loquitur and on account of that his case was doomed to failure and was dismissed accordingly. Hence this appeal.

Held, per Pikis J., Loris J. concurring and Triantafyllides P. dissenting, that whereas section 55(a) prescribed as a first condition for the relaxation of the burden cast on the plaintiff to prove his case lack of knowledge or means of knowledge of the actual circumstances of the accident, the appellant had such means of knowledge in store in the evidence of the driver of his vehicle; that not only he did not avail himself of such knowledge but objected to any use being made of such knowledge by raising objection to the production of his statement; that one who shuts himself of available means of knowledge cannot set up artificial ignorance arising therefrom, to justify invocation of the provision of section 55(a) of Cap. 148; that whether there are means of knowledge available, is a matter to be decided by reference to objective and not subjective criteria; and that, therefore, the trial Judge rightly held that the plaintiff failed to satisfy the first condition set out in section 55 of Cap. 148 with regard to the invocation of the doctrine of res ipsa loquitur.

Held, further, (1) that even if it were to be accepted that appellant could surmount the first hurdle posed by

* Section 55 is quoted at p. 270 post.

section 55(a), the facts proved before the trial Court could not conceivably give rise to a case of negligence on the part of the respondents and satisfy the conditions of section 55(b); that section 55(b) can only be invoked if the facts proved before the trial Court are in themselves not only suggestive of what happened but indicative, on balance, of negligence on the part of the defendant in view of his exclusive control over the object that caused the damage; and that the inferences arising from the evidence adduced are not prima facie solely consistent with negligence on the part of the respondents and they are not inconsistent with negligence on the part of the driver of the vehicle of the plaintiff a sine qua non for the application of the doctrine of res ipsa loquitur.

(2) That the reasons given by the Court were not the only ones for which the action ought to be dismissed; though in his statement of claim the appellant charged the defendants jointly or in the alternative with positive acts of negligence of which details were given in the particulars of negligence, he totally failed to prove the pleaded case in face of which his case was liable to be dismissed as unproven; that the case developed at the trial rested on entirely different premises that had no relevance to the case adumbrated in the statement of claim; that plaintiff must set up the facts giving rise to inferences of negligence on the part of the defendant and the application of the doctrine is not an escape route from failure to prove positive allegations of negligence.

Held, with regard to costs, Pikis J. dissenting, that there should be no order as to the costs of the appeal.

Appeal dismissed.

Cases referred to:

Barkway v. *South Wales Transport Co. Ltd.* [1950] 1 All E.R. 392 at pp. 394, 395, 399;

Morides v. *Ioannou* (1973) 1 C.L.R. 117;

Lloyde v. *West Midlands Gas Board* [1971] 2 All E.R. 1240;

Swan v. *Salisbury Construction Co. Ltd.* [1966] 2 All E.R. 138 at p. 143;

Kealey v. *Heqrd* [1983] 1 All E.R. 973 at p. 976.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Soupashis, D. J.) dated the 27th September, 1983 (Action No. 4709/80) whereby his action for damages due to alleged negligence of the defendants was dismissed.

St. Erotokritou (Mrs.), for the appellant.

M. Hadji Vassili (Miss) for *C. Velaris,* for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: Mr. Justice Pikis will deliver the first judgment.

PIKIS J.: The appeal turns on the complaint of appellant that the trial Court wrongly held that he could not avail himself of the provisions of section 55 of the Civil Wrongs Law in aid of his case against one of the two wrong-doers that he joined as co-defendants in proceedings for the recovery of damage sustained by his car in a road accident on 30th November, 1978.

Counsel argued before us, as she did earlier before the trial Court, that the circumstances of the accident were in themselves suggestive of what happened and indicative of the liability of the respondents to an extent relieving appellant of the burden of proving his case against them. The reconstruction of the events that surrounded the accident could easily be achieved by reference to the real evidence found at the scene, consisting of the resultant position of the three vehicles, apparently involved in the collision, and damage noticed on their exterior by the Police Constable who undertook the investigation of the accident. Upon this reconstruction being completed, a strong prima facie case of negligence on the part of the respondent-driver emerged fixing respondents with liability in the absence of a proper explanation absolving them of negligence; and as none was given, the provisions of section 55 of the Civil Wrongs Law,

reproducing in statutory form the doctrine of res ipsa loquitur, became applicable.

Now, the circumstances that arguably called into play the provisions of section 55 were the following: The car driven by respondent Patroclos Antonopoullos, notably vehicle under registration No. JB. 839, for whose acts the third respondents, British Airways, were sued as vicariously answerable, was found stuck behind the vehicle of plaintiff driven at the time by a servant or agent of the plaintiff, namely, a certain Evagoras Georghiou. Behind the car of respondents there was a third car, i.e. vehicle under registration ET. 547, driven by Takis Mesaritis, joined as first defendant in the action of the appellant before the District Court. Only a short distance of about 2½ ft. separated the front of the third car from the rear of the second, a fact which judged in combination with the damage noticed on the three vehicles by the Investigating Officer was apt to suggest that the three vehicles were involved in an accident. This is a fair inference that may be drawn by juxtaposing the facts relevant to the resultant position of the three vehicles and the damage found thereon. Beyond this it is difficult to draw any other inference respecting the facts of the accident; certainly we cannot infer the sequence of events that preceded the accident nor the circumstances attending its occurrence.

Counsel for appellant submitted, notwithstanding the absence of evidence shedding light on the circumstances of the accident, that the evidence referred to above was sufficient to suggest negligent conduct on the part of the driver of JB. 839 who should be held liable as well as the owners. He had, in the contention of counsel, complete knowledge of the facts of the accident, in contrast to the plaintiff who lacked such knowledge. Despite the complexion of the case of the plaintiff at the trial the appellant did not contest on appeal the findings made with regard to the driver of the third vehicle and confined his case to one of negligence against the respondents. To that extent the case of appellant before us conflicts with that presented before the trial Court.

The trial Court held that appellant failed to satisfy the first condition set out in section 55, Cap. 148, with regard

to the invocation of the doctrine of *res ipsa loquitur* and on account of that his case was doomed to failure and was dismissed accordingly. Whereas section 55(a) prescribes as a first condition for the relaxation of the burden cast on the plaintiff to prove his case lack of knowledge or means of knowledge of the actual circumstances of the accident, the appellant had such means of knowledge in store in the evidence of the driver of his vehicle. Not only he did not avail himself of such knowledge but objected to any use being made of such knowledge by raising objection to the production of his statement. We think the trial Judge was plainly right in his evaluation of the evidence on the subject of means of knowledge on the part of the appellant in acquainting himself about the circumstances of the accident. We must add that one who shuts himself of available means of knowledge cannot set up artificial ignorance arising therefrom, to justify invocation of the provisions of section 55(a) of Cap. 148. Whether there are means of knowledge available, is a matter to be decided by reference to objective and not subjective criteria.

However, this is not the only flaw in the case of the appellant. Even if we were to accept that he could surmount the first hurdle posed by section 55(a), the facts proved before the trial Court could not conceivably give rise to a case of negligence on the part of the respondents and satisfy the conditions of section 55(b). Section 55(b) can only be invoked if the facts proved before the trial Court are in themselves not only suggestive of what happened but indicative on balance of negligence on the part of the defendant in view of his exclusive control over the object that caused the damage.

The inferences arising from the evidence adduced are not prima facie solely consistent with negligence on the part of the respondents. To begin with they are equally consistent with negligence on the part of the driver of vehicle ET. 547, not a party to this appeal. Further, they are not inconsistent with negligence on the part of the driver of the vehicle of the plaintiff a sine qua non for the application of the doctrine of res ipsa loquitur. As stated in

Charlesworth on Negligence(1) on analysis of the caselaw, the application of the doctrine is rarely justified in road accidents. This, with respect, is a sound approach considering the object of the doctrine. It is common knowledge, we may add, that human folly as well as inexperience of drivers of motor vehicles may take a variety of forms that make it difficult and often impossible to predicate the facts or attribute liability to anyone of the drivers involved before first ascertaining the circumstances of an accident.

Whether the doctrine is regarded as rule of evidence(2) or a rule of law, there is no doubt about the purpose it is designed to serve. It is intended to relax in appropriate circumstances the burden cast on the plaintiff to prove his case. And as the Latin emblem of the rule suggests, the facts must be vocal in themselves not only with regard to what happened but about the negligence of the defendant as well. Section 55 of the Civil Wrongs Law, Cap. 148, reproduces those circumstances modelled on the fashioning and application of the principle by Courts in England.

The decision of the Supreme Court in *Achilleas Morides* v. *Chrystalla Ioannou*, (1973) 1 C.L.R. 117, offers a classic illustration of the application of the principle: The house of the defendant collapsed and caused damage to the neighbouring property of plaintiff. The collapse would not ordinarily occur in the absence of some fault amounting to negligence on the part of the defendant. Consequently, the accident was indicative of negligence on the part of the person having control over the property. Plaintiff could not be expected to have knowledge of the nature of the fault, a fact peculiarly within the knowledge of the defendant. In the absence of an explanation absolving him of damage, a finding of negligence was warranted in the interest of justice. The Supreme Court referred with approval to the exposition of the Law made by Megaw L. J. on the subject of the doctrine of res ipsa loquitur in *Lloyde* v. *West Midlands Gas Board* [1971] 2 All E. R. 1240. The learned Judge depicted the doctrine as a common sense guide to

(1) 5th Ed., para. 985.
(2) Berkway v. South Wales Transport Co. Ltd. [1950] 1 All E.R., 392, 399.

the evaluation of the evidence dictated by reason and justice.

For the reasons indicated above, the trial Court was perfectly right to dismiss the case of the appellant. However, the reasons given by the trial Court were not the only ones for which the action ought to be dismissed. In his statement of claim, in para. 5 in particular, the appellant charged the defendants jointly or in the alternative with positive acts of negligence of which details were given in the particulars of negligence. He totally failed to prove the pleaded case in face of which his case was liable to be dismissed as unproven. The case developed at the trial rested on entirely different premises that had no relevance to the case adumbrated in the statement of claim. A plaintiff must set up the facts giving rise to inferences of negligence on the part of the defendant. The application of the doctrine is not an escape route from failure to prove positive allegations of negligence.

The appeal is, for the reasons indicated above, dismissed with costs.

LORIS J.: I had the opportunity of reading the judgment of my learned brother Pikis, J. in advance and I am in full agreement with him as to reasons and outcome of the appeal; but having given the matter very careful consideration respecting the question of costs, I am inclined to the view that the costs in this case owing to the particular facts and circumstances of this appeal, should not follow the event. Therefore, in my view there should be no order as to the costs notwithstanding the outcome of this appeal.

TRIANTAFYLLIDES P.: The appellant has appealed against the dismissal, by the District Court of Nicosia, of his claim, as plaintiff, for damages due to the alleged negligence of the three respondents, as defendants.

As, however, respondent 1, who was defendant 1 at the trial, was not served with notice of this appeal, counsel for the appellant could not proceed with it against respondent 1; and, thus, this appeal was heard only in so far as respondents 2 and 3 are concerned.

The salient facts of this case appear to be as follows:

While a taxi, belonging to the appellant and being driven by a certain Evagoras Georghiou, was stationary along the side of the Limassol to Nicosia main road there occurred an accident in the course of which the car of the appellant was hit from behind by a motor-car driven by respondent 2, who was at that time in the employment of respondent 3; and the car which was driven by respondent 2 was hit from behind by a motor-car driven by respondent 1.

No evidence was adduced as regards the occurence of the accident other than that of a police officer who investigated it, took measurements and prepared a plan which was produced before the trial Court.

In the statement of claim it is stated that the taxi of the plaintiff was stationary at the time of the collision, having stopped because traffic ahead of it had come to a standstill.

In the statement of defence of respondent 3, which was the only statement of defence which was filed before the trial Court, it is stated, again, that the taxi was stationary, that the car driven by respondent 2 managed to stop behind it without coming into collision with it, even though the taxi had stopped without giving sufficient warning, and that the car driven by respondent 1 failed to stop, hit the rear of the car driven by respondent 2 and forced it into collision with the rear of the taxi of the appellant.

The trial Judge found that the liability in negligence of respondents 1 and 2 and, consequently, the vicarious liability of respondent 3, had not been established on the basis of the evidence adduced and dismissed the action on this ground, having not upheld the contention of counsel for the appellant that, on the basis of the facts established by the plan which was prepared as aforesaid by the police officer and in the light of the damage caused to the vehicles, the principle of res ipsa loquitur should be applied and the burden of proof to show that there was no negligence on their part had shifted to the respondents.

The relevant provision of our Civil Wrongs Law, Cap. 148, is section 55 which reads as follows:

"55. In any action brought in respect of any damage in which it is proved-

(a) that the plaintiff had no knowledge or means of knowledge of the actual circumstances which caused the occurrence which led to the damage, and

(b) that the damage was caused by some property of which the defendant had full control,

and it appears to the Court that the happening of the occurrence causing the damage is more consistent with the defendant having failed to exercise reasonable care than with his having exercised such care, the onus shall be upon the defendant to show that there was no negligence for which he is liable in connection with the occurrence which led to the damage."

As was pointed out in *Morides* v. *Ioannou*, (1973) 1 C.L.R. 117, 120, the said section 55 makes the principle of res ipsa loquitur, of the English Common Law, part of the Law of Cyprus.

In *Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E. R. 392, Lord Porter said the following in relation to the principle—or doctrine or maxim—of res ipsa loquitur (at pp. 394-395):

"The doctrine is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."

In the same case Lord Normand stated the following (at p. 399):

"The maxim is no more than a rule of evidence affecting onus. It is based on commonsense, and its

purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown, to the plaintiff and are or ought to be within the knowledge of the defendant."

The above dicta in the *Barkway* case, supra, which was decided by the House of Lords in England, were referred to with approval and applied by the Privy Council in England in *Swan* v. *Salisbury Construction Co., Ltd.,* [1966] 2 All E. R. 138, 143.

What has been described, also, as the "res ipsa loquitur situation" has been considered at length in *Lloyde* v. *West Midlands Gas Board,* [1971] 2 All E. R. 1240, 1246, 1247, and it is useful to quote, in particular, in addition to what has been quoted from the judgment of Megaw LJ in the judgment given in the *Morides* case, supra, the following passage (at p. 1247):

"But if at the end of the evidence for the plaintiff, taking into account the possibility, whatever it may be, of outside interference, on the evidence and on proper inferences one way or the other from the evidence or absence of evidence with regard thereto, the correct conclusion is that on balance of probability the cause of the accident was some negligent act or omission on the part of the defendants, then res ipsa loquitur applies, and, subject to the effect of any rebutting evidence on behalf of the defendants thereafter, the plaintiff's claim succeeds."

A rather recent case in which the res ipsa loquitur approach was adopted is *Kealey* v. *Heard,* [1983] 1 All E. R. 973, where Mann J. stated the following (at p. 976):

"The plaintiff relies on the proposition encapsulated in the phrase res ipsa loquitur. He says, and I agree, that traps on scaffolding do not happen if those who have the control of it exercise proper care. He fur-

ther says, and I agree, the defendant has given no explanation how the accident came to occur. It remains therefore to consider whether the defendant has shown that there was no lack of care on his part."

As regards the principle of res ipsa loquitur useful reference may be made, also, to Halsbury's Laws of England, 4th ed., vol. 34, pp. 48-51, paras. 57-61, Charlesworth on Negligence, 6th ed., pp. 178-188, paras. 264-279 and Clerk and Lindsell on Torts, 14th ed., pp. 596-603, paras. 975-982.

In particular, it is to be noted that the doctrine of res ipsa loquitur is applicable, in a proper case, to a traffic accident situation (see, inter alia, Charlesworth, supra, at p. 182, para. 271, Halsbury's Laws of England, 4th ed., vol. 5, pp. 184-185, para. 382).

In relation to the circumstances of this case it is interesting to note that in Speiser on Res Ipsa Loquitur (1972), vol. 2, p. 301, para. 26:2, there is to be found the following passage:

"In another case it appeared that the plaintiff's stopped car was struck in the rear by one defendant's car, which in turn was struck in the rear by the second defendant's car, and forced under the plaintiff's car. The Court held that the res ipsa loquitur doctrine was applicable, and stated the rule that where two or more persons acting independently are guilty of consecutive acts of negligence closely related in point of time, and cause damage to another under circumstances where the damage is indivisible, the negligent actors are jointly and severally liable."

Also, at pp. 378, 379, para. 26:27, of the same textbook the following are stated:

"However, the circumstances of a collision may be such as to create a reasonable inference based on

common experience that it would not have occurred if the operator of the colliding vehicle had been careful, and under such circumstances the doctrine may be applicable. Thus, it has been held, a plaintiff who is the victim of 'the usual rear-end collision' may, under appropriate circumstances, have the benefit of the res ipsa loquitur doctrine."

In the present instance as neither respondent 1 nor respondent 2 have filed statements of defence, nor have they appeared at all at the trial in order to put forward any explanation as to how it came that the car driven by respondent 2 collided with the rear of the stationary vehicle of the appellant while the car driven by respondent 1 collided with the rear of the car driven by respondent 2, I am inclined to the view that, on the balance of probabilities, there could have been properly drawn the inference by the Court that either respondent 1 or respondent 2 or both of them, jointly and severally, were prima facie to blame and that the burden shifted on to them to explain that the damage caused, as aforesaid, to the car of the appellant was not attributable to any negligence on the part of either or both of them; and since they have failed to do so I am inclined to find that the appellant was entitled to judgment against them.

The fact that the driver, at the material time, of the car of the appellant was not called as a witness at the trial does not prevent the principle of res ipsa loquitur from coming into play; nor do I attribute any sinister significance to the stand taken by counsel for the appellant that his statement to the police investigating officer was not admissible evidence.

I would, therefore, had I not been in the minority, have allowed this appeal in so far as respondent 2 and his employer at the time, respondent 3, are concerned; and I would have done so in so far as respondent 1 is concerned had the appeal been proceeded with against him as well.

TRIANTAFYLLIDES P.: This appeal is dismissed by majority. As regards its costs we have decided not to make any order as to such costs.

Appeal dismissed by majority. No order as to costs.