*Privy Council Appeal No. 1 of 1988*

Ng Chun Pui and Ng Wang King Administrators of the Estate of Ng Wai Yee and Attornies of Choi Yuen Fun and Ng Wan Hoi and Others — *Appellants*

*v.*

Lee Chuen Tat (also spelt as Lee Tsuen Tat) and Another — *Respondents*

FROM

# THE COURT OF APPEAL OF HONG KONG

---

## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MAY 1988

---

*Present at the Hearing:*

LORD BRIDGE OF HARWICH
LORD FRASER OF TULLYBELTON
LORD GRIFFITHS
LORD ACKNER
SIR JOHN STEPHENSON

*[Delivered by **Lord Griffiths**]*

---

By a judgment dated 15th May 1987 Nazareth J. decided liability in favour of the plaintiffs in respect of a road accident that occurred on 28th February 1982. The Court of Appeal by their judgment dated 23rd September 1987 allowed the defendants' appeal and reversed the finding of the judge. The plaintiffs now appeal to their Lordships.

On the afternoon of 28th February 1982 a coach owned by the second defendant and driven by the first defendant left the westbound carriageway of Castle Peak Road, crossed the grass central reservation between the carriageways and collided with a public light bus being driven in the opposite direction in the near side lane of the eastbound carriageway. The first plaintiffs are the personal representatives of a passenger in the public light bus who was killed in the collision. The remaining plaintiffs are other passengers and the driver, who were all injured in the collision.

At the trial before Nazareth J. the plaintiffs put in evidence without objection a number of documents including a police sketch plan showing the dimensions of the road and the positions of the vehicles after the accident, which showed that the accident had occurred on the defendants' wrong side of the road and after the bus had crossed the central reservation, and a vehicle report showing that the defendants' coach had been in good mechanical order immediately before the accident.

The plaintiffs called no oral evidence and relied upon the fact of the accident as evidence of negligence or, as the judge put it, the doctrine of *res ipsa loquitur*. There can be no doubt that the plaintiffs were justified in taking this course. In ordinary circumstances if a well maintained coach is being properly driven it will not cross the central reservation of a dual carriageway and collide with on-coming traffic in the other carriageway. In the absence of any explanation of the behaviour of the coach the proper inference to draw is that it was not being driven with the standard of care required by the law and that the driver was therefore negligent. If the defendants had called no evidence the plaintiffs would undoubtedly have been entitled to judgment.

The defendants however did call evidence and gave an explanation of the circumstances that caused the first defendant to lose control of the coach. This evidence was given both by the driver of the coach, the first defendant, and a passenger sitting in the front of the coach. Their evidence corresponded closely with the contemporary accounts that both of them had given to the police. The judge accepted their evidence and made the following findings of fact:-

> "The evidence led by the Defendants shows clearly that the coach was proceeding along a straight stretch of the road possibly a little in excess of the speed limit of 40 miles per hour. But the speed of the coach is not alleged to be one of the elements of negligence and I am not particularly concerned with that. The coach was travelling in the fast or outer lane and in that lane there was other traffic about 2 coach lengths ahead of it. In the inner lane there was a vehicle about 10 to 20 feet ahead and between that vehicle and the coach there was a blue car travelling a little faster than the coach. Suddenly that blue car, which did not subsequently stop and has not been traced, cut into the fast lane some 6 to 8 feet ahead of the coach. That was clearly a very dangerous manoeuvre and the 1st Defendant reacted to it by braking and swerving a little to his right. The

> coach then skidded across the central reservation, as I have said, colliding with the public light bus."

The judge however was of the view that, despite those findings of fact, because the plaintiffs had originally relied upon the doctrine of *res ipsa loquitur*, the burden of disproving negligence remained upon the defendants and they had failed to discharge it. In their Lordships' opinion this shows a misunderstanding of the so-called doctrine of *res ipsa loquitur*, which is no more than the use of a latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence. Although it has been said in a number of cases, it is misleading to talk of the burden of proof shifting to the defendant in a *res ipsa loquitur* situation. The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred. One of the earliest examples of the operation of this doctrine is the case of *Scott v. The London and St. Katherine Docks Company* [1865] 3 H & C 596. Bags of sugar being lowered by a crane from a warehouse by the defendants' servants fell and struck the plaintiff. Erle C.J. said:-

> "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."

So in an appropriate case the plaintiff establishes a *prima facie* case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a *prima facie* case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the *prima facie* case. Resort to

the burden of proof is a poor way to decide a case; it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants.

Their Lordships adopt the following two passages from the decided cases as most clearly expressing the true meaning and effect of the so-called doctrine of *res ipsa loquitur*. In *Henderson v. Henry E. Jenkins & Sons and Evans* [1970] A.C. 282 Lord Pearson said at page 301:-

> "In an action for negligence the plaintiff must allege, and has the 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 facts 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."

In *Lloyde v. West Midlands Gas Board* [1971] 1 W.L.R. 749 Megaw L.J. at page 755 said:-

> "I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think that it is no more that 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."

Not only did the judge mislead himself by assuming that there was a legal burden on the defendant to disprove negligence but he also failed to give effect to those authorities which establish that a defendant placed in a position of peril and emergency must not be judged by too critical a standard when he acts on the spur of the moment to avoid an accident. The judge appears to have thought that they were not relevant because of his view about the burden of proof as appears from the following passage in his judgment:-

> "Mr. Bharwaney referred me to *Brandon v. Osborne*, Bingham's p.34 [1924] 1 K.B. 548, *Tocci v. Hankard*, Bingham's p.85 (1966) 110 S.J. 835 and *Banfield v. Scott* (1984) 134 NLJ 550, to illustrate the generous approach adopted by the court where the Defendant is put into a difficult situation. But in those cases the onus did not shift as is accepted it did in this case."

The Court of Appeal rightly rejected the judge's approach and appreciated that once the first defendant's explanation of the accident was accepted his driving had to be judged in the light of the emergency in which he had been placed by the driver of the untraced blue car. There was nothing to criticise in the driving of the first defendant before the emergency arose and when the emergency arose the Court of Appeal said:-

> "At the time he was attempting to extricate himself, his coach and his passengers from a situation which appeared to him - and we would interpose that the judge obviously accepted him as a truthful man - as a situation of extreme danger. The consequence of his action were in fact unfortunate, but that should not be laid at his door. He did what any careful driver would instinctively have done in the circumstances, and we are satisfied that he acted with the alertness, skill and judgment which could reasonably have been expected. Even if he did react slightly more than he should have done, slightly more than was strictly necessary, we are not satisfied that a lesser reaction would not have produced much the same result."

This approach by the Court of Appeal to the facts of this case cannot be faulted. Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellants must pay the respondents' costs.

Their Lordships would record their satisfaction that this will not mean that the innocent plaintiffs will fail to recover damages, as their Lordships were told by counsel that the Motor Insurers Bureau in Hong Kong have agreed to satisfy their claims in full in the event of this appeal being unsuccessful.