1955 *Present :* Swan, J., and K. D. de Silva, J.

L. E. CABRAL, Appellant, *and* R. A. ALBERATNE, Respondent

S. C. 241—D. C. Colombo, 25,212/M

Negligence—Accident—Application of maxim res ipsa loquitur—*Onus of proof—Nature of burden on defence.*

In a case where the doctrine of *res ipsa loquitur* is applicable, the burden on the defendant is not only to give a reasonable explanation of the accident in question but also to show that the specific cause of the accident does not connote negligence on his part.

A motor truck belonging to the defendant ran off the road into the plaintiff's house, which was about six feet away from the edge of the road and stood at a bend in the road. Defendant pleaded inevitable accident. He sought to rebut the presumption arising from the maxim *res ipsa loquitur* by merely stating that the immediate cause of the accident was that the steering-rod got out of its place at the crucial moment. He did not, however, adduce any evidence as to how and why the steering-rod came out of its place. There was no evidence whatsoever that the vehicle was regularly serviced or serviced at all. Even the Motor Car Examiner who examined the vehicle soon after the accident had not been summoned by the defendant to give evidence.

Held, that the fact that the steering-rod went out of control was no answer unless the defendant proved—and the legal burden was on him to prove—that it was no fault of his that the steering-rod failed. The defendant did not discharge, or even attempt to discharge, the burden that lay on him and was therefore liable to pay damages.

Wije Bus Co., Ltd. v. Soysa (1948) 50 N. L. R. 350, not followed.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the plaintiff appellant.

A. H. C. de Silva, for the defendant respondent.

Cur. adv. vult.

September 14, 1955. DE SILVA, J.—

This is an appeal from a judgment of the District Judge, Colombo, dismissing the plaintiff's action in which he sought to recover damages resulting from a motor truck belonging to the defendant running off the road into the plaintiff's house and causing damage to it owing to the negligence on the part of the driver of that vehicle. Admittedly, at the time of the accident, this truck was being driven by the defendant's driver acting within the scope of his employment. The house in question stands about six feet away from the left edge of the Kandy-Colombo road when facing Colombo. This building consists of a room, a kitchen and a front verandah and is a few feet below the road level. It stands at a bend in the road. At the time of this accident which was on the 27th June,

1951, this house was in the occupation of the plaintiff's tenant Joachim Fernando. Joachim Fernando stated that on the day in question when he was standing on the road about 10 fathoms away from this house he saw this truck being driven past him at a fast speed. He then heard a crash and saw the front portion of the truck inside his verandah. The front pillars had come down and his father and daughter who happened to be in the verandah at the time were found injured. James Singho who was driving this truck at the time of this accident said that on the day in question he drove the vehicle a distance of 43 miles from Galapitamada and that when he approached this house he found his steering wheel "turned by itself" and that he then applied the brakes. On the application of the brakes the vehicle went down the slope in spite of his attempt to control it. He admitted that the front wheels of the truck entered the verandah of the house. He also stated that when he examined the truck after the accident he found that the steering-rod had come out of the joint where it meets the tie-rod. The defence, in short, is that this was an inevitable accident The learned trial Judge was of the view that there was no evidence to hold that at the time of the accident the vehicle was being driven at a fast speed He held that this was clearly a case where a sudden mechanical defect developed in the course of the journey which took the driver unawares. He rightly held that this is a case to which the maxim "res ipsa loquitur" applied. He was satisfied, accepting the evidence of the driver, that the truck ran off the road because the steering ceased to function. He held that the explanation given by the driver displaced the presumption which roso under the maxim "res ipsa loquitur". As the plaintiff had failed to establish negligence on the part of the driver, once the presumption was displaced, he dismissed the action with costs. He was of the view that the correct principle applicable to the facts of this case is set out in *Vijaya Bus Co. Ltd. v. Soysa* [1]. The plaintiff in that case was a passenger travelling in a bus and he sustained injuries as a result of that vehicle going off the road. He sued the Company which owned the bus to recover damages. The defence was that the bus ran off the road as a result of the steering lock giving way and that it was an inevitable accident. The learned District Judge following *Safenumma v. Siddick* [2] held that the defendant was liable to pay damages as the defence had not proved that the defect in the steering could not have been reasonably foreseen and remedied. In appeal, the judgment of the lower Court in that case was set aside. Windham J. held that the maxim "res ipsa loquitur" applied in that case and consequently a prima facie case of negligence had been made out against the defendant. But he proceeded to state that the burden cast upon the defence was not that of proving the absence of negligence but merely that of giving a reasonable explanation of the accident—"an explanation which would negative the presumption of negligence which the unexplained accident had raised". This judgment which was delivered in the year 1948, is clearly in conflict with the principle enunciated earlier by Dalton J. in *Safenumma v. Siddick* [2]. The facts in the latter case were that a boy standing on the doorstep of his house which was about 27 feet away from the middle of the road was knocked down and

[1] (1948) 50 N. L. R. 351.

[2] (1934) 37 N. L. R. 25.

injured by a passing bus. The defence was that the accident was due to the fact that the steering-gear had broken. Dalton J. in dealing with that defence observed,

> "A statement of that kind of course in no way discharges the onus of the defendants or show there was no want of care on their part. Even assuming that the steering-gear was worn and defective but that the defendants had no knowledge of the defect, to place the bus on the road in that condition was a thing necessarily dangerous to users of the road and others and it amounts to negligence."

It would appear that Dalton J. was of the view that the bare statement that the accident arose as a result of a particular part of the mechanism giving way at the crucial moment, does not displace the presumption which arises from the maxim "*res ipsa loquitur*". The learned trial Judge took the view that the decision in *Vijaya Bus Co. Ltd. v. Soysa* [1] was in accord with the judgment of the House of Lords in *Barkway v. South Wales Transport Co. Ltd.* [2]. With respect, I am unable to share that view. In that case an omnibus belonging to the defendant Company ran off the road and fell over an embankment as the result of tyre-burst. The plaintiff's husband who happened to be travelling in that omnibus met with his death in consequence of the accident The plaintiff claimed damages from the defendant Company on the ground of negligence. It was established by the defendant that the tyre-burst was due to what is called an "*impact fracture*" due to heavy blows or impacts on the tyre as the result of the tyre coming into violent contact with some hard object. It was also proved by the defendant that the tyres of their vehicles were examined regularly, twice weekly, and that this particular tyre was examined two days before the accident by the person appointed to examine the tyres and no defect was discovered. However it was found that the defendants had not instructed their drivers to report heavy blows to tyres likely to cause "impact fractures". Their Lordships held that it was the duty of the defendant Company to have instructed their drivers to report such heavy blows and the failure to do so rendered them liable to pay damages to the plaintiff, on account of negligence. In regard to the maxim "res ipsa loquitur" Lord Porter in his judgment in that case cited with approval the following observation of Erle C.J. in *Scott v. London Dock Company* [3].

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

The doctrine of "res ipsa loquitur" comes into operation when the facts regarding the accident are not sufficiently known. Lord Porter stated in that case that the explanation in order to rebut the presumption of

[1] *(1948) 50 N. L. R. 351.* [2] *(1950) 1 A. E. R. 392.*

[3] *1865 H. & C. 596.*

negligence arising under this doctrine must be an adequate one. The judgment of the Court of Appeal in *Barkway v. South Wales Transport Co. Ltd.* [1] is reported in 1948 A. E. R. 460 where Asquith L. J. set out in very clear language the law regarding the onus of proof when the principle of "res ipsa loquitur" arises. He stated "The position as to the onus of proof in this case seems to be fairly summarised in the following short propositions:—

1. If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then "res ipsa loquitur"; there is a presumption that the event is caused by the negligence on the part of the defendants and the plaintiff succeeds unless the defendants can rebut this presumption.

2. It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst *per se* is a neutral event consistent and equally consistent with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down . . . .

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

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

In the present action the defendant seeks to rebut the presumption resulting from "res ipsa loquitur" by merely stating that the steering-rod got detached from its joint. Undoubtedly, that is the immediate cause of the accident but how and why did the steering-rod come out of its place? Motor vehicles which are regularly serviced and properly looked after are not generally subject to such defects. In order that the Court may ascertain whether it was due to any lapse on the part of the defendant that the steering mechanism gave way it is incumbent on the defendant to establish that all necessary precautions for the avoidance of a defect of this nature had been taken by him. There is no evidence whatsoever that this vehicle was regularly serviced or serviced at all. All that the driver says is that during this unfortunate journey of 43 miles from Galapitamada he did not find any defect in the engine or steering or in the tie-rod until the vehicle crashed into the plaintiff's verandah. Even the Motor Car Examiner who examined the vehicle, soon after the accident, had not been summoned by the defendant to give evidence. In these circumstances it is idle to suggest that prima facie case of negligence which arose in accordance with the doctrine of "res ipsa loquitur" has been displaced by the bare statement of the driver

[1] (1950) 1 A. E. R. 392.

that the steering-rod gave way. In this connection the observations of Denning L.J. in *Southport Co-operation v. Esso Petroleum Co., Ltd.* [1] which read as follows are in point:—

> "Applying the *Merchant Prince* [2] we find here that the ship ran on to the revetment wall. If the steering-gear was in order, that was plain negligence. The ship seeks to escape from this charge of negligence by saying that her steering-gear had failed and she was out of control. But that is no answer unless she proves—and the legal burden is on her to prove—that it was no fault of hers that the steering-gear failed. She has not discharged that burden, or even attempted to discharge it. She is therefore liable."

Adopting the language of Lord Denning I would say that the defendant in this case too has not discharged the burden that lay on him or even attempted to discharge it. The defendant is therefore liable to pay damages. I would also observe that the case reported in *51 N. L. R. 350* was decided before the cases reported in *(1950) 1 A. E. R. 392* and *(1954) 2 A. E. R. 561.*

The learned trial Judge has assessed the damages at Rs. 500 in the event of the plaintiff being entitled to recover them. There is now no dispute about the quantum of damages. Accordingly I allow the appeal and enter judgment for plaintiff in the sum of Rs. 500 with costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.