RES IPSA LOQUITUR'—AN EXAMINATION OF ITS PROCEDURAL EFFECT*

THIS NOTE is prompted by the decision of the Western Nigerian High Court in *Olaiya* v. *Ososamt*.[1] Though this case was decided over a decade ago no note has yet appeared in any legal journal, foreign or Nigerian, on this decision. The writer, however, feels that the problems raised in the decision demand some evaluation.

The facts of the *Olaiya* case are indeed, very simple. The plaintiff, a minor, claimed through his father as his next friend, damages for the negligence of the defendant's servants or agents. He was injured when a crane which was being operated by a servant of the defendant in the course of building operations fell on him whilst he was returning from school along a footpath used by members of the public and school children. Neither the defendant nor his witnesses gave any evidence as to the fall of the crane. The plaintiff's witness (a police constable), however, said in evidence that the operator of the crane had told him that the crane fell because one of the two planks on which it rested broke down. Justice Quashie-Idun held that in the circumstances of the case the maxim *res ipsa loquitur*[2] applied and that its effect was to put the onus on the defendent to disprove negligence, which he had failed to do. The Judge said, *inter alia* :

> If I am satisfied from the evidence or from the circumstances that the crane was not properly operated, then I must come to the conclusion that the crane fell as a result of the negligence of the operator. As I have stated, the operator of the crane said he did not know what caused the crane to fall.
> This is not a sufficient answer to the argument of the plaintiff (inter alia) that the manner in which the crane was operated caused it to fall...
>
> In the case of *Moore* v. *Fox and Sons* (1956)1 All E. R. 182 it was held that it was not enough for the defendant to say that he did not know how the accident happened and that the onus was on him to disprove negligence. It was held in that case that the maxim *res ipsa loquitur* applied....[3]

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* Reference will be made in this note to the law of some common law jurisdictions on this topic.

1. (1959) W.R.N.L.R. 264.

2. See Ellis Lewis, "A Ramble With *Res Ipsa Loquitur*", 11 Camb. L.J. 74 (1951); Prosser, "The Procedural Effect of *Res Ipsa Loquitur*," 20 *Minn. L. Rev.* 241, 258 (1936).

3. *Supra*, note 1 at 266.

Indeed the decision of the Court of Appeal in *Moore* v. *Fox and Sons*[4] represents the latest thinking of the British courts on this topic. In that case itself a workman in the employ of the defendants was killed by an explosion while operating a de-rusting tank which contained liquid chemical. The workman's widow sued the defendants relying upon *res ipsa loquitur*. The trial judge held that *res ipsa loquitur* applied but the plaintiff failed in this action because the defendant, while unable to show how the accident happened, was able to give an explanation satisfactory to the court which indicated that the accident was just as likely to have occurred without negligence as with it. On appeal the court held this to be incorrect. In a case to which *res ipsa loquitur* applies, the onus is on the defendant to explain the accident so as to absolve himself from the implication of negligence. Evershed, M.R. (Birkett and Romer, L. JJ concurring) said, *inter alia* :

> As I understand the law upon this subject which has been expounded in the cases, the so-called rule applies where the *res*, that is the 'thing' itself, without more, leads to the inference of negligence. If, then, this is a case of *res ipsa loquitur*, it must be because the happening of the explosion...leads to that result.[5]
>
> For my part I am disposed to agree in this respect with Streatifield, J....Agreeing, therefore, with the judge that this was a case of *res ipsa loquitur*.
>
> I am unable to agree that the defendants so explained the accident as to discharge the onus thrown upon them. In *Barkway* v. *South Wales Transport Co.*[6] (1949) 1 K. B. 54...) Asquith L.J., stated by reference to the facts before him the position as to onus of proof in such cases as follows (1948)2 All E.R. 460, 471) :
>
> (*i*) If the defendants' omnibus leaves the road and falls down an embarkment, and this without more is proved then *res ipsa loquitur* there is a presumption that the event is caused by negligence on the part of the defendants and the plaintiff succeeds unless the defendants can rebut this presumption.
>
> (*ii*) 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

4. (1956) 1 All E.R. 182; see also the Privy Council decision of *Swan* v. *Salisbury Construction Co. Ltd.*,(19661) W.L.R. 204 which appears to favour the view that the onus rests upon the defendant.

5. *Supra*, note 4 at 188.

6. It should be noted that this case went to the House of Lords (1950) 1 All E.R. 392, 395 where their Loadships unanimously held that the maxim could have no application here because there was sufficient evidence as to the causation of the accident. The maxim applies only in cases where the plaintiff does not know the cause of the accident.

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...

(*iii*) 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 tyre; *Woods* v. *Duncan* (The Thetis) (1946) A.C. 401'

In my judgment the formulation of Asquith L.J. which I have cited is correct and is applicable to the present case....

Evershed, M.R. then reviewed some previous decisions among which was *The Kite*[7] in which Justice Langton's opinion was in favour of the view that the burden rests with the plaintiff.[8] In Evershed's view that opinion was not justified.

Indeed it is not easy to see why the burden of proof should rest with the defendant. The maximum which, after all, is a rule of evidence arose out of the need to help a plaintiff out of the considerable hardship which might be caused him if he could not, as is the rule in actions for negligence prove the defendant's negligence because the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident but he cannot prove how it occurred so as to show its origin in the negligence of the defendant. The courts, therefore, hold that in such a situation the *res* speaks for himself in the sense that the mere fact of the accident happening raises an inference of negligence so as to establish a *prima facie* case. It is at this stage, as the decisions in the *Olaiya* and the *Moore* cases[9] indicate, that the onus of disproving negligence falls on the defendant. In my own view this is a serious misdirection. Of course, if the defendant shows how exactly the accident happened and the explanation shows that he exercised due care he is not liable. Moreover, even if he cannot explain the accident but shows that there was no lack of reasonable care on his part or on the part of his agents for whom he is vicariously responsible, then again he is not liable[9]. The problem, however, arises when the defendant does not do either of the above things. For instance, he may not as in the *Olaiya* case call any evidence after the close of the plaintiff's case. Such a situation is not very common. Indeed, it is most unwise of the defendant not to call any evidence. But even in such a situation it is submitted that the judge should still direct the jury that the onus of proving negligence remains with the plaintiff. The jury or the

7. (1933) p. 154.

8. *Supra*, note 7 at 168.

9. See *Woods* v. v. *Duncan* (1946) A.C. 401; *Walsh* v. *Holst Co. Ltd.*, (1958) 1. W.L.R. 800.

judge, if sitting alone, will then be at liberty to find, by reason of the *res* or the circumstances proved, that the onus on the plaintiff has been discharged. On the other hand he may, as in the *Moore* case, only be able to give an explanation which indicates that the accident is just as likely to have occurred without negligence as with it. In my view such an explanation, if it is satisfactory to the court, should suffice. The onus of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, must then still remain with the plaintiff. Indeed as Salmond has rightly explained :

> If a motor-car leaves the road, and the defendant's explanation of this occurrence is that the steering failed, the onus of proof has not been discharged by the plaintiff, for the steering may have failed for a reason which is as consistent with the absence of negligence as its presence.[10]

Indeed the decisions in the *Olaiya* and the *Moore* cases can only mean that a plaintiff in a *res ipsa* case is in a better position than a plaintiff who attempts to prove negligence in the ordinary way. This would, in my view, be stretching the procedural advantage of the maxim too far.

The view that the onus of proof rests with the plaintiff has, however, gained support with the Australian courts. The most emphatic pronouncements are found in the majority opinion of the High Court in *Mummery* v. *Irvings Ltd.*[11] and the judgments by Justice Dixon in *Fitz Patrick* v. *Cooper*[12] and by Justice Evatt in *Davis* v. *Bunn.*[13] In the case of *Mummery* v. *Irvings Ltd.* the appellant, who had come to the respondent's premises in order to purchase timber, was struck on the face by a flying piece of wood and suffered severe injuries. Holding that *res ipsa loquitur* did not apply to the circumstances of this case, the High Court, however, went on to make a few observations regarding the procedural effect of the maxim. Their Lordships reviewed the English decisions of *Woods* v. *Duncan*[14] and *Barkway* v. *S. Wales Transport Co. Ltd.* and said, *inter alia :*

> No doubt when the principle of *res ipsa loquitur* is properly invoked the defendant is faced with a situation where he must elect whether the question of his liability will be determined upon the plaintiff's evidence alone or whether he will attempt to show that the accident happened without negligence on his part. This, of course, he may do only by calling evidence. If he is aware of the cause of the accident

10. *Solmond on the Law of Torts* 309 (15th edn. R.F.V. Heuston ed.).
11. (1966) C.L.R. 99. 118-21.
12. (1935) 54. C.L.R. 200, 217-20.
13. (1936) 56 C.L.R. 246, 267-272. Evatt J.'s explanation is the best, with his epitome of eight rules.
14. (1946) A.C. 401.
15. (1949) 1 K.B. 54.

> he may seek to avoid liability by proving the relevant facts ; if he is not he may attempt, by evidence, to show that he was not negligent. But in either case the principle will continue to operate unless the facts are proved....In this sense and in this sense alone, the defendant may, perhaps, be said to carry an onus....But if the defendant's evidence, being acceptable, shows how the accident was caused the operation of the principle ceases and it becomes a question whether, upon that evidence, the defendant was negligent or not and the defendant will succeed unless the jury is satisfied that he was. In cases such as *Woods* v. *Duncan* (1946) A.C. 401 where the defendant is unaware of the real cause of the accident, it will be for the jury to say whether, in the first place, his evidence is acceptable to them and, if so, whether notwithstanding that evidence they are satisfied that he was negligent. The contrary view would, it seems to us, create a state of affairs entirely anomalous and completely foreign to the grounds upon which the principle is based. The rule itself is merely descriptive of a method by which, in appropriate cases, a *prima facie* case of negligence may be made out and we can see no reason why a plaintiff, who is permitted to make out a *prima facie* case in such a way, should be regarded as in any different position from a plaintiff who makes out a *prima facie* case in any other way....[16]

A review of the decided cases in Canada indicates that some of the Courts there have not come down firmly on the side of this theory.

The Canadian Supreme Court, however, appears to favour it. Thus, in *United Motors Services Inc.* v. *Huston*[18] Chief Justice Duff speaking of cases in which the *res ipsa loquitur* principle applies said :

> In such cases where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff....

This statement was referred to with approval in *Gootson* v. *The King*[19] where a car operated by a servant of the Crown mounted the sidewalk and struck the plaintiff. Witnesses called by the plaintiff proved that the driver had fainted and so lost control of the car. In the Supreme Court of Canada, Justice Kerwin dealt with the case on the assumption that this was the only evidence before the court. He admitted that the plaintiff could rely on *res ipsa loquitur* upon proof of the car mounting the sidewalk. There was, however, the additional evidence of fainting and loss of control. To the argument that the defendant ought to have shown affirmatively that the servant was not subject to epileptic fits, Justice Kerwin

16. *Supra*, note 11 at 118-21.
17. See, for example, *Dessaint* v. *Carriere*, (1958) D.L.R. (2d) 222 (Ont. C.A.).
18. (1937) 1 D.L.R. 737.
19. (1948) 4 D.L.R. 33.

said that this would impose upon the defendant a greater onus than is recognized as devolving upon a defendant in circumstances where the maxim applies.

And yet a similar view represents the clear weight of American authority.

In the majority of the states the burden of proof is not placed upon the defendant.[20] The most frequently quoted statement was made by the United States Supreme Court in *Sweeney* v. *Erving*[22] :

> *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 defence. When all the evidence is in the question for the jury is, whether the preponderance is with the plaintiff...

Regrettably, *Olaiya* v. *Ososamt* is not the only Nigerian case in which the onus of proof in a *res ipsa* case has been held to devolve upon the defendant. In fact in almost all the Nigerian cases on this topic the same direction is found to be given.[22] As has, however, been shown in this short

20. Prosser states that only two states, Lousiana and perhaps Mississippi have held that *res ipsa* shifts to the defendant the ultimate burden of proof. He, however, adds that :

> such courts frequently have been compelled to retreat from this position, either by occasional decisions to the contrary, or by recognizing, under other names, the type of *res ipsa* case which creates only a permissible inference of negligence.

Prosser on Torts 232-239 (3rd edn.).

21. 228 U.S. 233, 240, 33 Sup. Ct. 416, 57L. Ed. 815 (1913), See also *Foltis Inc.* v. *City of New* York, 287 N.Y. 108, 121, 38 N.E. 2d 455, 462 (1941).

22. See, for example, the unreported decision of Byoola, J. in *Slee Transport Limited* v. *Oluwasegun and Akande* (Suit No. 1/127/68 Ibadan Judicial Division) decided on 1st Dec. 1969 where the plaintiff company claimed damages against the defendants for the loss sustained by the plaintiff company through the negligence of the second defendant, the servant of the first defendant when the second defendant drove the vehicle of the first defendant and collided with the petrol tanker of the plaintiff company. The plaintiff company pleaded *res ipsa loquitur*. Upholding the plaintiff company's claim Ayoola, J. said *inter alia* (p. 9) :

> In this case, the 2nd defendant has failed to show any circumstances which made it reasonable for him to swerve to the wrong side of the road. Applying as I do apply the maxim *res ipsa loquitur* to this case, the onus is on the 2nd defendant to explain why he swerved to the wrong side of the road. This onus he has failed to discharge. Accordingly I find as a fact that he was negligent and that the plaintiff's claim, based on the tort of negligence, must succeed against both defendants, the 1st defendant being vicariously liable.

comment, this, in my view, is grave misdirection.[23] It is hoped that our courts and the British courts whom we have followed in this regard would soon jettison this view.

*F.O.B. Babafemi**

See also *Ashiru & Co.* v. *Benson & Ors.* (LD. (20) 64 decided 25th January 1965 per Adedipe J); *Jibowu* v. *Kuti & Ors.* (Western State Court of Appeal decided 31st March 1970, CAW (67) 1969)—both unreported.

23. *Supra*, note at at 4-6.

* LL. M. (Lond.), Ph. D. (Lond.); Lecturer, Faculty of Law, University of Ife, Ile-Ife; Member of the Nigerian Bar.