[HIGH COURT OF AUSTRALIA.]

DAVIS . . . . . APPELLANT;
PLAINTIFF,

AND

BUNN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 29; *June* 1, 2; *Sept.* 9.

Starke, Dixon Evatt and McTiernan JJ.

Negligence—Res ipsa loquitur—Plaintiff standing by motor car in road—Van driven by defendant getting out of control—Injury to plaintiff.

The plaintiff was standing beside his motor car on a road when he was struck by a motor van driven by the defendant which was approaching from the opposite direction. The plaintiff's car was drawn up near the side of the road and on its correct side. There was evidence that when the defendant's van was about fifteen yards from the plaintiff the front off-side tyre and the rim of the wheel came off and there were marks on the road made by the wheel for about ten yards from the place where the plaintiff stood. Evidence was given for the defendant that he was travelling at about fifteen miles an hour on his correct side of the road and when he was seven or eight feet from the plaintiff the van suddenly swerved to the right and would not answer to the steering wheel; the defendant applied his brakes, but did not sound his horn. The van, after hitting the plaintiff and his car, ran through a fence on the side of the road and came to rest in a ditch. After the accident it was found that the steering arm of the van was broken, the front off-side tyre was inflated, and some of the bolts and clamps which fastened the rim to the wheel were bent back towards the centre of the wheel. The trial judge directed the jury that the plaintiff must satisfy it that the defendant had failed to do what a reasonable and prudent driver would have done in the circumstances, and that a reasonable person would see that his vehicle was roadworthy and properly equipped: the "main issue" was whether the van was negligently driven, and "if you think the defendant was negligent either in not applying his

brakes or by not calling out then the plaintiff is entitled to damages." The jury returned a verdict for the plaintiff. On appeal from a refusal to grant a new trial the Supreme Court of Victoria directed that a new trial be had. On appeal to the High Court, *Starke* and *Dixon* JJ. were of opinion that the decision of the Supreme Court should not be disturbed: *Evatt* and *McTiernan* JJ. were of opinion that the verdict of the jury should stand. The court being equally divided, the decision of the Supreme Court was affirmed.

Per Starke J.:—The mere occurrence of an accident on a highway raises no presumption of negligence. It may happen from a variety of causes, some of which may be imputable to the fault of the person sought to be made liable, whilst others may be due to causes for which he is not responsible. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from want of some precaution to which the defendant might and ought to have resorted.

Per Dixon and *McTiernan* JJ.: It is not invariably true that the occurrence of an accident occasioned by a vehicle in a highway cannot in itself supply sufficient evidence of negligence.

Per Evatt J.:—(1) The doctrine of *res ipsa loquitur* does not alter the principle that, in an action of negligence, the onus of establishing his case always rests upon the plaintiff, but means that, at a given point in the trial, the *res* or circumstances proved by the plaintiff constitute sufficient evidence from which negligence may reasonably be inferred. (2) If, at the close of a plaintiff's case, the doctrine of *res ipsa loquitur* can be availed of by the plaintiff, a nonsuit should be refused. But, if the defendant fails to call evidence, the jury should be directed that the onus of proof still rests on the plaintiff, but they are at liberty to find that, by reason of the *res* proved, that onus has been discharged. (3) If the defendant has called evidence, the factual situation at the end of the evidence may be entirely changed, and the possibility of inferring negligence may be weakened or strengthened. In every case the general onus of proof rests on the plaintiff. (4) If the defendant has called evidence, the fact that at the close of the plaintiff's case the doctrine *res ipsa loquitur* was applicable does not preclude a court of appeal from setting aside a verdict for the plaintiff. (5) *Res ipsa loquitur* is merely an instance of the general process of inductive reasoning by which a fact in issue may be inferred from circumstances which are meagre but significant.

APPEAL from the Supreme Court of Victoria.

Edward Montgomery Davis brought an action in the County Court at Melbourne claiming damages against Ernest Walter Bunn for negligently driving a motor vehicle in Como Parade, Parkdale, in consequence of which the plaintiff and his motor car were injured. The action was heard by Judge *Woinarski* and a jury.

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At the trial it appeared that at about 9.30 a.m. on 26th March 1936 the plaintiff had driven his car from his house in Como Parade across the road and had left it standing on the east side of the road, facing south, i.e., on the correct side of the road. He returned to his house and went to his car. He attempted to start the car but it would not start. He got out of the car and, standing on the driving side, leant into the car for the purpose of picking up the starting handle when he was run into and injured by the motor vehicle driven by the defendant, which was proceeding in a northerly direction. Evidence was also given that the defendant's van when approaching the plaintiff was travelling on the correct side of the road at about fifteen or twenty miles an hour and that when it was about fifteen yards from the plaintiff the front off-side tyre came off and the van went across the road and struck the plaintiff. There was also evidence that there were marks on the road for about thirty feet from the place where the plaintiff's car stood to the place where the defendant's van started to veer. The tyre was inflated after it had come off the wheel. The van broke through a railway fence and ran into an excavation before it came to rest.

The defendant gave evidence that he was travelling on the correct side of the road at about fifteen miles an hour, that his left wheel was on the gravel and the other on the bitumen, that when he was seven or eight feet from and about opposite to the front of the plaintiff's car the van suddenly swerved to the right. He at once tried to bring the truck to the correct side and applied his brakes when he found that the wheel would not answer. He said that from the time when the truck swerved he did all he could to prevent the accident. He had both hands on the steering wheel and applied the brakes. The whole incident took a second and a half. The van weighed two and a half tons. The tyre and rim were lying on the east side of the road near the front of the plaintiff's car, two or three ends of the clamps that fit into the bolts to hold the rim in position were bent outwards and the bolts that were affixed to those clamps were bent also, and all the nuts on the bolts were tight. After the accident the defendant noticed that the axle arm of the steering gear was broken, and he said that when that breaks one has no control of the van at all, that the wheel just twists round, that there was

nothing to indicate before the accident that there was anything wrong with the steering or the wheel, that he had had the van since November 1929 and had driven it 50,000 miles, that the steering wheel was adjusted in January 1936 and there was no trouble with the steering from then to the time of the accident, that he saw no signs of any fracture in the steering when greasing the car on the preceding Sunday, that he examined the bolts on the wheels every day and there was no sign of the bolts being loose before the accident. He did not sound the horn, as he had both hands on the steering wheel and he had no time to do so. A motor mechanic gave evidence that the effect of the steering arm breaking would be that the driver would have no control over the van; that if the wheel hit an obstruction there would be a sudden turn of the wheel which could cause a sufficiently severe thrust on the bottom of the tyre to rip the tyre off. In cross-examination he said that to hit a railway fence or to go where there was a ditch might cause a fracture of the steering arm; there were six bolts and nuts on the wheel; all were on and all were tight, but three of the clamps were bent back towards the centre of the wheel. A consulting motor engineer gave evidence that the steel in the steering arm was capable of fracturing by metal fatigue without any impact or sudden blow, and that the fracture in the metal was consistent with metal fatigue.

The jury returned a verdict for the plaintiff for £349 12s. 6d. The defendant applied to Judge *Magennis* for a new trial and the application was refused. From the order refusing to grant a new trial the defendant appealed to the Supreme Court of Victoria, which allowed the appeal and ordered a new trial between the parties in the County Court at Melbourne.

From that decision the plaintiff appealed to the High Court.

Pape, for the appellant. The case is put under three heads of negligence: (1) The defendant was negligent in allowing the nuts securing the rim to the wheel to become loose and in failing to rectify that; (2) he was negligent in failing to apply his brakes in sufficient time to avoid striking the plaintiff; and (3) he was negligent in not giving the plaintiff warning of his approach so as to enable him to take some steps to secure his safety. It was open to the jury to

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find against the defendant on any one of these three grounds, and it was open to them to infer that the break in the steering arm did not occur until a later stage in the accident. The evidence showed that the break in the steering arm might have occurred after impact with the fence or ditch. The jury having found for the plaintiff, no court could say that they were not entitled to find that the steering arm did not break until the van went into the ditch, and if they did take this view, they were not left with any explanation as to how the accident happened. They were entitled to find that the bolts on the wheel were loose, and that it was negligence on the part of the defendant not to notice that they were loose. They were entitled to infer that the loosened nuts caused the accident and that that was negligence. This was a case of *res ipsa loquitur*. Even if the jury accepted the view that the steering arm broke in the first instance and thereby caused the rim to become detached, the defendant was negligent in not applying his brakes in time and in not giving warning of his approach (*Middleton* v. *Melbourne Tramway and Omnibus Co. Ltd.* (1)). It was also open to the jury to say that there was negligence on the defendant's part in failing to stop. The judgment of the Supreme Court proceeded on views of the evidence which the members of the court felt they would have formed, and they did not pay attention to the warning which this court has given that they should not substitute their own views for those of a jury.

Sholl, for the respondent. The Full Court has adopted the only commonsense view that could be taken of this accident. The verdict was merely a sympathetic verdict. The only sensible explanation of the accident was that it was due to the breaking of the steering arm. The doctrine of *res ipsa loquitur* cannot be extended to the facts of this case. In some cases that doctrine has been pushed too far. Where the defendant offers a reasonable explanation of the accident, the matter is left in the position that the plaintiff has not proved negligence. The doctrine of *res ipsa loquitur* is not a principle: it is merely a convenient means of describing

(1) (1913) 16 C.L.R. 572, at p. 580.

inferences of fact (*Ellor* v. *Selfridge & Co. Ltd.* (1); *Britannia Hygienic Laundry Co. Ltd.* v. *John J. Thornycroft & Co. Ltd.* (2); *Corcoran* v. *West* (3)). The doctrine is brought into its proper sphere in *Ballard* v. *North British Railway Co.* (4), *The Kite* (5), *Moffatt* v. *Bateman* (6) and *Henderson* v. *Mair* (7). The whole matter was one of inference from the facts (*Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* (8)). It was not a case of *res ipsa loquitur*, and, if it was, the defendant did prove that the accident happened despite all reasonable care on his part. The defendant's explanation proved the cause of the accident within the meaning of the rule in *The Merchant Prince* (9) and the jury were not entitled to reject it arbitrarily. The defendant's explanation made it reasonable to infer that the accident happened without any negligence on his part, so that it was no longer reasonable for the jury to say that negligence was the more probable inference. The matter was not properly explained or put to the jury on this basis at all. It was impossible to apply the brakes effectively in the time at the driver's disposal. There was a period of one and a half seconds in which the driver had to pull up, and no jury could reasonably find that the van could be stopped in that time. In the emergency that suddenly arose it is no evidence of negligence that the defendant did not call out, and, even assuming that the plaintiff had heard a voice about thirty feet away, it cannot be assumed that he could have got out of the way.

Pape, in reply. This was a case of *res ipsa loquitur* and the jury were entitled to infer that the accident was due to the defendant's negligence. The fact that the accident happened was some evidence of negligence on the part of the defendant. Once that stage is reached it is for the defendant to prove that the accident arose from inevitable accident. Once the matter goes to the jury all questions of onus go and it is for the jury to determine which explanation they will accept (*Winnipeg Electric Co.* v. *Geel* (10)).

(1) (1930) 46 T.L.R. 236.
(2) (1925) 95 L.J. K.B. 237; 42 T.L.R. 198.
(3) (1933) I.R. 210.
(4) (1923) S.C. (H.L.) 43, at p. 49.
(5) (1933) P. 154.
(6) (1869) L.R. 3 P.C. 115; 16 E.R. 765.
(7) (1928) S.C. 1.
(8) (1935) 54 C.L.R. 200.
(9) (1892) P. 179.
(10) (1932) A.C. 690, at pp. 694, 697.

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The jury was entitled to say, first, that the happening of the accident was some evidence of negligence, secondly, that they did not accept the explanation of the defendant as to how the accident happened, and, thirdly, that on the whole of the evidence it appeared to them that the wheel did come off by reason of some looseness of the nuts. [He referred to *McGowan* v. *Stott* (1) and *Wing* v. *London General Omnibus Co.* (2).]

Cur. adv. vult.

Sept. 9.

The following written judgments were delivered :—

STARKE J. The appellant brought an action in the County Court at Melbourne against the respondent for that he in March 1935 so negligently drove, controlled or managed a motor vehicle that it ran into and collided with the appellant and the appellant's car, thereby occasioning him injury and loss. The action was tried before a jury, who found a verdict in favour of the appellant for nearly £350 damages. On appeal the Supreme Court of Victoria set aside this verdict and directed a new trial. The appellant has appealed to this court against the judgment of the Supreme Court, pursuant to an order granting special leave to appeal.

The case made for the appellant was that he was standing by and attending to his motor car, which was on the grass at the side of a roadway in good condition and formed of bitumen and known as Como Parade, Parkdale. The car was facing south, and was on the correct side of the roadway. The respondent approached from the south in his motor van, at a speed of about fifteen to twenty miles per hour, and on the correct side of the roadway. Witnesses called for the appellant deposed, in substance, that as the van approached the motor car, the front off-side rim and tyre of the van came off, some thirty or forty feet away from the motor car, and ran along the road beside the van for some feet, when they fell on the roadway. The van itself veered or swerved gradually across the road until it collided with the motor car, and the spokes of the wheel from which the rim and tyre had become detached made marks on the bitumen surface of the roadway. Further, it was established

(1) (1923) 143 L.T. 217, at p. 219.

(2) (1909) 2 K.B. 652.

that the respondent gave no warning of his approach. The evidence led for the respondent was in substance that the motor van had been thoroughly overhauled and repaired in January of 1935, and that the respondent personally oiled and examined it every week; further that the van suddenly swerved to the right, that the respondent tried to bring it back to its correct side but his steering wheel would not answer and the van veered across the road, colliding with the appellant and his car. The whole incident, according to the respondent, took only a second and a half. The respondent deposed that, travelling at fifteen miles an hour, the van could be pulled up, under normal conditions, in its own length, about eighteen feet. No warning of approach was given, but it was impossible for the respondent to sound his horn, with both hands engaged upon the steering wheel. Subsequent examination disclosed that the axle arm of the steering wheel was broken, that the nuts, bolts and clamps fastening the tyre and rim to the front off-side wheel were all on and were all tight, but that three were bent back towards the centre of the wheel, which would render it possible for the tyre and rim to be wrenched off. The appellant insisted in this court that the mere happening of the collision raised a case of negligence without any further proof of actual default on his part: liability must be presumed from the occurrence of the collision and it was for the respondent to clear himself: *res ipsa loquitur*. It was further argued that the evidence disclosed actual default on the part of the respondent in driving his van, and also a defect in the vehicle itself. But before dealing with these arguments, it is important that the charge to the jury should be stated, and how it was dealt with in the Supreme Court.

The trial judge directed the jury that the appellant was bound to satisfy it that the respondent failed to do what a reasonable and prudent driver would have done in the circumstances: a reasonable person would see, he said, that the vehicle was roadworthy and properly equipped and was not expected to see latent faults. He added:—"First with regard to the condition of the van. Was there anything here to warn a reasonable man of any defect in the vehicle? You have heard the history of the car and inspections and failure to notice anything." Then he proceeded:—"Another complaint is that the van was driven negligently when on the road. That I

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think is the main issue." He reviewed the evidence, and concluded: "If you think the defendant was negligent either in not applying his brakes or by not calling out then the plaintiff is entitled to damages." Before the Supreme Court, the present appellant contended that the jury were entitled to act on the view that there was evidence of negligence in fixing the tyre and rim to the wheel. But the charge, said the learned judges, was directed to the question whether there was a latent defect in the steering arm which the respondent should have noticed. "It seems . . . dangerous and improper to attribute the verdict to a very improbable finding on a point not put before a jury." As to the conduct of the appellant in driving the van, the learned judges thus expressed themselves: —"The evidence makes it quite clear that the time which elapsed was one to one and a half seconds and . . . it is impossible to find evidence to support a charge for negligence during that period. Reasonable care implies opportunity for reason and care. It is absurd to invite the jury to engage in a hunt for an hypothesis as to a better use of hands and feet during those agonising moments. The suggestion is that he may not have used the brakes effectively. The evidence was all one way that he did use the brakes."

In my judgment the order of the Supreme Court for a new trial of the action should not be disturbed. The charge to the jury, as recorded in the transcript, was inadequate and unsatisfactory, in view of the evidence given in the case. As I said in *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* (1), the duty or burden of establishing the negligence charged against the respondent lay, in the beginning and always, upon the appellant. "The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established" (*Central Bridge Corporation* v. *Butler* (2); *Thayer, A Preliminary Treatise on Evidence at the Common Law*, c. ix.). The plaintiff may give prima facie evidence of an allegation, but the defendant may contradict the plaintiff's evidence or prove other

(1) (1935) 54 C.L.R., at p. 215.

(2) (1854) 2 Gray 130, at p. 132.

facts. The conflict thus raised may create real doubt in the tribunal whether the plaintiff has established his allegation. "The burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole of the jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him" (*Abrath* v. *North Eastern Railway Co.* (1)). The defendant thus relieves himself from the presumption of negligence raised by the plaintiff's evidence.

The mere occurrence of an accident on a highway raises no presumption of negligence. It may happen from a variety of causes, some of which may be imputable to the fault of the person sought to be made liable, whilst others may be due to causes for which he is not responsible (*Beven* on *Negligence*, 4th ed. (1928), p. 133 ; *Doyle* v. *Wragg* (2) ; *Moffatt* v. *Bateman* (3)). It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from want of some precaution to which the defendant might and ought to have resorted (*Daniel* v. *Metropolitan Railway Co.* (4) ; *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* (5)). It is contended in the present case that the motor van was defective in condition. Negligence, however, is not established because of the existence of some defect in a vehicle which the usual care and skill of a competent person could not have discovered. But the appellant launched, I think, a case for the consideration of the jury, or gave some evidence of negligence on the part of the respondent in regard to the condition of his motor van. A tyre and rim of a motor van under the control of the respondent suddenly came off whilst the van was proceeding at a moderate speed along a smooth and well-constructed road, with no traffic to impede its progress, and the van sheered across the road and collided with the appellant and his motor car, which was stationary on the side of the roadway and on its proper side. Unexplained, those facts appear to me to constitute some evidence of want of care on the part of the respondent

(1) (1883) 11 Q.B.D. 440, at pp. 452-453.
(2) (1857) 1 F. & F. 7 ; 175 E.R. 601.
(3) (1869) L.R. 3 P.C., at p. 122 ; 16 E.R., at p. 768.
(4) (1868) L.R. 3 C.P. 216, at p. 222.
(5) (1923) 1 K.B. 539.

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(*Halliwell* v. *Venables* (1); *McGowan* v. *Stott* (2)). The respondent, however, gave evidence which, if accepted, explains the accident, and may relieve him of the presumption of negligence raised by the appellant's evidence. The respondent led evidence that his van was inspected and put in good order by mechanical experts shortly before the accident; he also led evidence from which it might be inferred that the steering arm suddenly broke, throwing a great strain upon the nuts, bolts and clamps holding the tyre and rim in position; evidence was led, too, which established that the breaking of the steering arm could not have been foreseen by the exercise of proper care and caution: it may have been due to fatigue of the metal, or to some sudden jolt. Undoubtedly, an examination after the accident established that the steering arm was broken, that three of the bolts holding the tyre and rim in position, though tight, were bent back towards the centre of the wheel, indicating a great strain upon them. The bending back of the bolts was consistent with the breaking of the steering arm, consistent with the tyre and rim being wrenched off the wheel, and consistent also with the motor van sheering across the roadway in the way already mentioned. Against this, it was suggested that the evidence was also consistent with the view that the steering arm was broken and the tyre and rim wrenched off in or subsequently to the collision. The learned trial judge, I think, accepted the view that the accident was due to the sudden breaking of the steering arm owing to some latent defect in the motor van for which the respondent ought not to be held responsible. There is no evidence to support the hypothesis that the tyre and rim were not properly fastened to the wheel unless it be the fact that the tyre and rim came off. But the charge, on any hypothesis, was defective, for it did not inform the jury that if the additional facts proved by the respondent left a real state of doubt in their minds as to the main fact to be established, namely, whether the accident happened by reason of a defect in the motor van due to some negligence or want of precaution on the part of the respondent, then the appellant failed to discharge the burden of proof that lay upon him and the respondent was entitled to their verdict.

(1) (1930) 143 L.T. 215. (2) (1923) 143 L.T. 217.

The conduct of the respondent in driving and controlling his van was also attacked. It was alleged that he did not apply his brakes in time or give warning of his approach. But I do not think these allegations can be dealt with apart from and unconnected with the tyre and rim coming off the wheel of the van. The acts and omissions of the respondent can only be considered in the emergency in which he was called upon to act or omit to act. If the emergency in which he was called upon to act arose from the sudden breaking of the steering arm of his van, then the question is whether he acted with such reasonable care and skill as a prudent man would have exercised in those circumstances. The emergency must be realized before he could act. At best the respondent had only a second or so in which to act, and a very short distance between himself and the appellant. And, according to his own evidence, the appellant did apply his brakes, but was unable to use his horn, for the reason already mentioned. The circumstances, if the respondent's evidence be accepted, were not normal, and the car was not at the time in working condition and capable of instant regulation.

The appeal should be dismissed.

DIXON J. The main question raised by this appeal is whether upon the evidence a verdict might be reasonably found for the plaintiff. The action was tried in the County Court, and the plaintiff, who is the appellant in this court, obtained the verdict.

The defendant, the respondent in this appeal, applied to the County Court for a new trial. Although the grounds of the application were variously stated, they amounted to one only, viz., that upon the evidence the verdict was unreasonable. The application failed in the County Court, but an appeal by the defendant to the Supreme Court was upheld. That court granted a new trial. It has been decided that on an appeal from the refusal of a new trial it can do no more : *Duncan Furness & Co. Pty. Ltd.* v. *R. S. Couche & Co.* (1)). But the reasons given by the court would almost warrant the withdrawal of the case from the jury by the judge who presided at the new trial if the state of the evidence were the same.

(1) (1922) V.L.R. 660.

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The action was for personal injuries caused by negligence. When the plaintiff sustained his injuries, he was leaning over into his motor car, which was standing at the side of the road. While he was in this position, his car was struck by a motor truck driven by the defendant, which ought to have been on the other side of the road. In a road running north and south the plaintiff's car was standing on the eastern side facing south and the motor truck was travelling north. The plaintiff, who, from his attitude, was unable to see the advancing truck, suddenly found himself lying severely injured in the road some feet from his car with the motor truck brought to a standstill half way through the fence a short distance further to the north. He says that when the defendant came to his side he stated that his front tyre and rim had come off and he could not avoid hitting him. A bystander gave evidence that, while the motor truck was travelling upon its proper side of the roadway at about fifteen to twenty miles per hour, the tyre of the front wheel on the right hand side came off and dropped on to the ground. This occurred when the truck was about fifteen yards from the car. The truck changed its course, crossed the road, struck the car, came round the back of it, and went through the neighbouring fence, where it was brought up by an excavation or drain. The roadway bore the marks of the truck wheel stripped of its tyre. The marks showed a curve extending back from the car for some thirty feet. From the evidence called for the defendant it appeared that, as the truck stood after the accident, not only were the tyre and tyre rim off the wheel, but the steering arm or coupling under the truck was broken. The steering arm might have fractured merely through fatigue or some other weakness, or the immediate cause of the break might have been the stresses arising when the truck hit the car, the fence, or the ditch. The tyre rim carrying the tyre had been secured to the wheel by six bolts bearing clamps and nuts. According to the evidence called on behalf of the defendant, after the accident four of these bolts and three clamps were bent back away from the outer rim. The theory put forward on behalf of the defendant and supported by expert testimony was that the steering arm had suddenly fractured, the wheels, being out of the driver's control, had then turned full to

the right, and the force which the off-side wheel thus encountered laterally tore off the tyre and rim. The defendant deposed that he became aware that the steering gear would not control the wheels before the truck turned towards the standing car. He estimated the distance in which he could pull up his truck at eighteen feet when travelling at fifteen miles per hour. He gave evidence that before the accident his car had been carefully inspected and the tyre rim was securely fastened and the nuts screwed up.

Upon this state of facts, the plaintiff imputed negligence to the defendant in two respects. The first head of negligence charged was failure to take reasonable care that the truck was in a safe condition. The second was the failure in the prompt use of clutch and brakes, or in giving warning when the defendant became aware that something was amiss. The County Court judge left both these questions to the jury, but he described the latter as the main issue and did little more than state the former. The Full Court held that it would have been unreasonable for the jury to find that the accident might have been averted but for the defendant's failure in due care in the management of the vehicle after the steering arm broke or the tyre came off, whichever first happened.

No doubt it was open to the jury to compare the distance in which the defendant said he could pull up his vehicle with the distance which, according to the marks on the road, it travelled after it lost the tyre. The comparison would justify a conclusion that for some reason he did not in the emergency act with the highest degree of quickness and dexterity. But it is a further step to say that, either in preparedness for an emergency or in alertness in meeting it, he did not even attain the standard of the reasonably prudent driver behaving with proper care and skill. *Middleton* v. *Melbourne Tramway and Omnibus Co. Ltd.* (1) is an illustration of such a conclusion being supported. But one feature of that case is quite absent from the present. No suggestion can be made in the present case that the defendant, after adverting to the danger, consciously took unnecessary chances, hoping that the other party would himself escape the danger. In *Middleton's Case* (2) it was held that such

(1) (1913) 16 C.L.R. 572.

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a view of the course taken by the defendant's servant was open to the jury.

On the whole, I agree that the jury was not at liberty to find the defendant guilty of negligence in his management of the truck on the roadway. I think this is also true of the omission to give a warning, whether by a cry or otherwise. Moreover it would be a rash conclusion that the plaintiff would have had time to act on such a warning, if given, and thus save himself.

But the first head of negligence raises an altogether different case. It is not invariably true that the occurrence of an accident occasioned by a vehicle in the highway cannot in itself supply sufficient evidence of negligence (*Ellor* v. *Selfridge & Co. Ltd.* (1); *Halliwell* v. *Venables* (2); *Mercovich* v. *Mullaney* (3); but cf. *Galbraith* v. *Busch* (4)). In the present case, unless and until the cause of the vehicle's change of direction was explained, I think mere proof that it suddenly swerved from one side of the road to the other and hit the plaintiff's stationary car would constitute sufficient evidence of negligence. It is true that such a thing is consistent with more than one cause not implying negligence. For example, the driver might have fainted, or the steering gear have failed through no fault of the defendant. But such unavoidable events are sufficiently unusual to raise a probability that the erratic course of the vehicle is to be accounted for by some failure in due care, whether in its management on the roadway or in the maintenance of its mechanical efficiency. In the absence of all explanation, the probability would be high enough to justify an inference in the plaintiff's favour. The legal burden of proof would not be thrown over to the defendant's side. No more than a presumption of fact would arise and its strength would be a matter for the jury to estimate, in whose province it would be to draw or refuse to draw the inference. But if facts appear which reasonably explain the accident in a manner involving no negligence for which the defendant is responsible, the foundation for the inference is excluded.

The peculiarity of the present case is that, although facts do appear affording an explanation of the accident, they are susceptible

(1) (1930) 46 T.L.R. 236.
(2) (1930) 143 L.T. 215; 99 L.J. K.B. 353.
(3) (1934) V.L.R. 285.
(4) (1935) 267 N.Y. 230.

of two different interpretations. One reading of the facts is that the rim and tyre came off and that in the subsequent impacts of the truck the steering arm was fractured. The other is that the steering arm broke through an innate or a developing weakness and in consequence the wheel turned suddenly at too great an angle with the direction of the car and thus exposed the tyre to forces greater than even a properly secured rim could withstand. If the former be the true account of the accident, the reason for the rim and tyre coming off still needs explaining. Such things do not commonly happen in the absence of some fault in adjustment. If the accepted facts were that the rim came off first, then, in my opinion, it would remain open to the jury to find negligence. It would not be obliged to give effect to the defendant's evidence of the precautions he took for the security of the rims and tyres.

On the other hand, if the view that the steering arm broke first be accepted as the correct account of the accident, it appears to me that the plaintiff's case would necessarily fail. The broken arm was produced. No defect antecedently visible is disclosed by its present appearance. The circumstances do not, in my opinion, enable a jury to find that the accident was due to any want of reasonable care in inspection, examination, or otherwise, in consequence of which the condition of the arm was not discovered.

The facts proved in evidence being open to these opposing interpretations, the question necessarily arises whether the jury is at liberty to choose between them. Is there material upon which it could hold that there is a preponderance of probability in favour of the first explanation or hypothesis so that the second may be rejected ? The legal burden of disproving negligence does not lie on the defendant. The legal burden of proving that the second hypothesis is the correct explanation cannot, in my opinion, be thrust upon him. If, in the end, the jury finds itself quite unable to say whether the accident is attributable to a series of events which involve no negligence or to another series which justifies a finding of negligence, the plaintiff must fail.

But the probability which one or other of the two possible explanations possesses is a matter about which it is peculiarly for the jury to judge. They cannot base a conclusion on nothing.

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Slight circumstances may nevertheless be enough. If the steering arm broke first, the defendant must almost instantly have become aware of it. When he stated to the plaintiff that his wheel came off his omission to mention the steering gear might be taken into consideration. The state of the road, which is said to be fairly smooth, might also seem to increase the improbability of a break in the metal at that moment. It is true that it also tends to lessen the likelihood of the rim coming off, but the distortion or weakening of the attachments of the rim to the wheel might well have taken place some time before the tyre came off, whereas the fracture of the arm does not seem to have been piecemeal or progressive. Again, a jury might think the curve shown on the road not so sharp as might have been expected if the wheels had been turned far enough round to tear off a firmly secured tyre.

In all the circumstances I think the question was one for the jury. This conclusion raises a difficult question of discretion. The grounds relied upon by the defendant in his application for a new trial and in his appeal from its refusal were, in effect, that the verdict was unreasonable. This ground, in my opinion, fails. But it fails because at the end of the defendant's case there remained a case fit to be submitted to the jury under a head of negligence which was in fact left to the jury not only with a very imperfect explanation but with observations which made it unlikely that the jury would act upon it. The head of negligence described by the learned judge as the main case rested on circumstances which do not, in my opinion, justify a finding in the plaintiff's favour. The plaintiff obtained leave to appeal because it appeared that unless he had further evidence the judgment of the Full Court almost foredoomed him to ultimate failure.

The appeal in a sense was a necessary step if the plaintiff was to succeed at all in his action. But ought we in an appeal by leave to restore a verdict which may have been, and probably was, based upon an untenable ground ? I do not think that the plaintiff was entitled to have his case based on the defendant's supposed failure of reasonable diligence in the emergency submitted to the jury. But the defendant did not at the trial specifically object to this being done.

On the whole I think the proper course for us to adopt is to allow the new trial order to stand and to direct that the costs of this appeal, the appeal to the Full Court, the new trial application and the former trial should abide the event.

EVATT J. The plaintiff, who is the present appellant, brought an action in the County Court at Melbourne against the respondent, claiming damages caused by the negligent operation of a motor truck. The particulars of negligence included (*a*) failure to give proper attention to the nuts, bolts, tyres and wheels of the vehicle, and (*b*) failure to apply brakes to arrest the speed of the vehicle or to give any warning to the plaintiff.

After a summing up of which there is no verbatim record the trial judge left both heads of negligence specified above to be considered by the jury, who returned a verdict for the plaintiff for £349 12s. 6d. The defendant then applied for a new trial, the application being heard by another County Court judge. This application was dismissed with costs. But, on an appeal from this order to the Full Court, the appeal was allowed and a new trial directed. The reasons of the learned judges differed somewhat. *Mann* C.J., after pointing out that the defendant's car had run off the road and injured the plaintiff, who was standing by his own car on his proper side of the road, said that, on the evidence, the time which elapsed between the situation of danger arising and the collision happening was no more than one and a half seconds. He did not think there was sufficient warrant to found a finding of negligence during that period. He added :—" Reasonable care implies opportunity for reason and care. It is absurd to invite the jury to engage in a hunt for an hypothesis as to a better use of hands and feet during those agonizing moments." The Chief Justice dealt with the allegation of negligence by failure to attend to the nuts and bolts, tyres and wheel by holding that it was dangerous to attribute the jury's verdict to a very improbable finding on a point not sufficiently stressed. *Gavan Duffy* J. concurred in the result but thought that, on the evidence, it was possible for the jury to conclude that the defendant negligently allowed the nuts and bolts to become loose and that this was the cause of the accident.

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He agreed with the Chief Justice that there was no evidence of negligence on the other head and that there should be a new trial because the judge in leaving the issue of negligence to the jury singled out the second aspect or head of negligence.

Here it may be interpolated that, recently, in *Fitzpatrick's Case* (1), where the jury had returned a verdict for the defendant this court refused a new trial of an action of negligence causing death, although the trial judge left three separate defences to a jury's consideration, there being no evidence whatever to support two of the three defences, i.e., (1) contributory negligence and (2) *volenti non fit injuria*. It is true that there the trial judge seems to have warned the jury of the danger of accepting either of such two defences. But it was by no means impossible that the jury's verdict for the defendant was based on one or other of such defences. The whole theory of review of jury's verdicts rests upon the postulate that they are at liberty to reject the judge's view of the facts of the case and of their relative importance. Unless this applies to actions of negligence (and the decision on the main point in *Fitzpatrick's Case* (1) indicates how difficult it apparently is to disturb a finding in favour of the defendant as to negligence) the jury system will be defeated. Moreover, the over-emphasis or under-emphasis by a judge of mere heads of negligence should never detract from a finding of a jury which proceeds upon a view of the facts differing from that of the judge. Even if the judge's view of the facts is sounder, this principle applies. There is, however, little reason to suppose that the hypothesis just made is always or even usually correct.

In my opinion there was evidence upon which the jury was entitled to find negligence against the defendant in respect of the condition in which he had left the wheel of his truck. After the accident, it was discovered that there was a fracture in the steering arm and an ingenious theory was advanced on behalf of the defendant that this fracture resulted in the car getting out of control and in a sudden turn towards the right, causing the tyre and rim to come off. On the other hand the jury was entitled to reject this hypothesis and to infer that the nuts and bolts had been allowed by the defendant

(1) (1935) 54 C.L.R. 200.

to become so loose that the increasing lateral thrust finally forced the wheel off the car so that the fracture in the steering arm was the consequence, and not the cause, of the wheel's coming off and of the moving truck being thrown on to the hub of the ejected wheel. The latter inference was more reasonable, having regard to the fact that a turn of the truck to the right would necessarily follow upon the front wheel coming off; for the hub would then act as a fulcrum around which the car would be turned in a clockwise direction. Moreover there was no explanation why, if the steering fracture preceded the loss of the wheel, the car should have turned to the right rather than to the left. This alone is sufficient to support the finding of negligence by the jury, and why we should suppose it was based upon another head of negligence, I cannot see.

Even if the plaintiff had to rely upon the defendant's negligence in failing to give a warning to the plaintiff or to pull up, I think the jury might not unreasonably have found for him. It seems quite incredible that, if the defendant was driving carefully, he received no warning of the insecurity of his wheel. Upon such warning, he should have pulled up. Even when his wheel parted from him and he began his right-hand swerve, he might reasonably have sounded his horn and given the plaintiff a chance to jump aside. I think it clear that the jury were not bound to place any implicit faith upon the evidence as to speed, distance and time, matters always more difficult to state or estimate by way of direct recollection than by way of forensic reconstruction.

In my opinion, it is most unsatisfactory to disturb the finding of juries upon a matter so pre-eminently suitable for their consideration as the reasonableness of motor vehicular control in the circumstances of a given case. Yet there have occurred many cases where appeal judges, possessing no special qualifications to deal with the subject of motor vehicle management and control and no right to act upon such qualifications even if they possessed them, consider themselves at liberty to say that a jury's verdict for a plaintiff is such that no reasonable person could find. I think that the judicial process really amounts to this. The judge himself does not consider the defendant's conduct unreasonable in the circumstances, therefore no other person should consider it unreasonable, therefore any person

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who thinks it unreasonable is an unreasonable person. *A priori* there is just as much reason to suppose that a finding in the defendant's favour is wrong as to suppose the contrary; yet verdicts for the defendants in these cases appear to possess an immunity from judicial attack which is not accorded to verdicts for a plaintiff. It is forgotten that what is "reasonable" conduct is a relative question and must be determined by reference to the altering traffic situations in the modern city, that the jury is selected as the constitutional tribunal for the purpose of saying what is reasonable conduct, that it is for the jury not only to find the facts but to draw the inferences from the facts they find, and that the finding as to reasonable or unreasonable conduct in the management or control of motor vehicles is, in principle, as much the exclusive prerogative of the jury as the question (say) of guilt or innocence in a criminal case. Yet courts who would never (i.e., "hardly ever") imagine that a jury's verdict of guilty in a criminal cause should be set aside —although the preliminary onus of proof upon the prosecutor is greater than that upon the plaintiff in civil cases—have no disinclination to denounce a jury's verdict for a plaintiff in negligence as being unreasonable and even perverse.

The present case also illustrates the disastrous possibilities of interfering with the province of the jury in these matters. A comparatively small County Court action in origin, it has already developed into four separate legal investigations of the question of legal responsibility and the Full Court order now under appeal insists that there shall be a fifth one in which the stake will be increased so as to include much of the costs of the prior investigations. This result is not in any way the fault of the plaintiff, having regard particularly to the fact that no objection was taken by the defendant to any ruling of the County Court. In the end, the plaintiff was practically compelled to invoke the interposition of this court in order to avoid a second jury trial in which all reasonable hope of success had already been denied him owing to the Full Court's taking so unfavourable a view of his case—on the facts.

During the hearing of the present appeal, there was an important discussion as to whether the facts of the present case required the

application of the principle of *res ipsa loquitur*. As a new trial of the present action is to be had, the questions discussed are of direct importance. In expressing my opinion, I leave out of consideration the special situation as to burden of proof which may be created by such a statute as was dealt with in the Canadian appeal of *Winnipeg Electric Co.* v. *Geel* (1) and confine my attention to the position at common law. The position may perhaps be thus stated :—

1. The doctrine of *res ipsa loquitur* does not alter the general principle of law that the onus of proving or establishing his case always rests upon the plaintiff. The position is accurately stated by *Salmond* (ed. *Stallybrass*), *Torts*, 7th ed. (1928), p. 34.

2. The doctrine means that, at a given point of a trial, the *res* or circumstances proved by the plaintiff are of themselves sufficient evidence from which negligence may reasonably be inferred. In Lord *Dunedin's* phrase, the *res* is " relevant to infer negligence " (*Ballard* v. *North British Railway Co.* (2)).

3. The first decisive point of the trial is the close of the plaintiff's case. If the doctrine of *res ipsa loquitur* can then be invoked by the plaintiff, he is enabled to avoid a nonsuit so that, if a nonsuit is granted, it will be set aside upon appeal.

4. If a nonsuit is refused and the defendant decides not to call evidence, the proper direction to the jury is that the onus of proving his case is on the plaintiff but the jury are at liberty to find, by reason of the *res* or circumstances proved, that the onus has been discharged. The charge may well add (1) that the merest balancing of probabilities in the plaintiff's favour is sufficient to satisfy the onus of proof, and (2) that, in the special circumstances of the case, the defendant's failure to call evidence may properly lead to certain inferences being drawn against him if he alone has had the opportunity of explaining the precise cause of injury to the plaintiff.

5. If the trial judge has correctly applied the doctrine of *res ipsa loquitur* and, the defendant having elected to call no evidence, the jury find for the plaintiff, the verdict will stand ; but if they find for the defendant, the verdict will equally stand unless the court of appeal considers that the verdict was so unreasonable as to be practically perverse. It has to be remembered that cases where

(1) (1932) A.C. 690.

(2) (1923) S.C. (H.L.), at p. 53.

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res ipsa loquitur applies may vary enormously in the strength, significance and cogency of the *res* proved.

6. If the defendant has elected to call evidence, the factual situation at the close of evidence may be entirely changed from that existing at the close of the plaintiff's case. In every case the onus of proving negligence rests upon the plaintiff and this the judge must tell the jury.

7. At the close of the evidence, the inference of negligence which, *ex hypothesi*, was open to the jury at the end of the plaintiff's case, may be weakened or strengthened. Very occasionally there may arise cases where the inference is so weakened that it is the judge s duty not to leave the case to the jury. But, almost invariably, the proper course is to leave the question to the jury with the direction that they must take it that the onus of proving his case, upon the balance of the probabilities, rests upon the plaintiff. The factual situation at the end of evidence will determine whether a jury's verdict (whether for plaintiff or for defendant) should be set aside by the court of appeal.

8. It is erroneous to assert that, merely because the plaintiff proved a case of *res ipsa loquitur*, a verdict in his favour can never be set aside by the court of appeal, after the defendant has gone into evidence.

It follows from what I have said above that the doctrine of *res ipsa loquitur* should be regarded merely as an application of the general method of inferring one or more facts in issue from circumstances proved in evidence. Even where such circumstances are extremely few, and often only because they are extremely few, an inference that an injury to the plaintiff has been caused by the negligence of someone for whom the defendant is responsible may properly be drawn. Where the complete story is unfolded an inference of negligence may become practically certain or practically impossible.

With respect, I dissent from the statement of *Latham* C.J. in *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.* (1) where he says that

> " in a case to which the principle of *res ipsa loquitur* applies the position is that the plaintiff launches his case by proving facts which not only permit, but, in the absence of other contrary evidence, require, an inference of negligence

(1) (1935) 54 C.L.R., at pp. 207, 208.

> on the part of the defendant. . . . If " the defendant " can only show that the happening of the accident is as consistent with the absence of negligence as it is with the presence of negligence it appears to me (notwithstanding what *Langton* J. said in *The Kite* (1)) that he leaves the positive inference of negligence unanswered. He has only shown that the accident *might* possibly have happened without negligence, whereas the plaintiff has shown that prima facie it did happen by reason of negligence."

In my opinion *res ipsa loquitur* applies if it is reasonable, not necessary, for the inference of negligence to be drawn at the relevant stage of the inquiry. So long as, at the close of the whole case, the defendant has shown facts from which it appears that the injury to the plaintiff is quite as consistent with the absence, as with the presence, of negligence, the plaintiff should fail because he can no longer weigh down in his favour the balance of probabilities, and that he must always do.

I agree with *Langton* J. that the ultimate question is always whether the plaintiff has proved that the defendant was negligent (*The Kite* (2)). Where *Langton* J. suggests that, in a case where *res ipsa loquitur* has been applied, that is " sufficient to shift the burden of proof for the moment, and it is for the defendants to give an explanation of how " the accident " occurred " (2), I do not understand him to suggest that there is at any time any real shifting of the onus of proof from the plaintiff to the defendant. All he means is, I think, that, if the defendant elects to call evidence rather than run the grave risk that negligence will be inferred against him merely from the *res* established by the plaintiff, then the defendant is bound to afford " an explanation " if he can. What the defendant calls an " explanation " may really support the plaintiff's case of negligence, for by showing precisely how the accident occurred the defendant may leave the inference of negligence not merely likely but almost certain.

I do not agree that in *Chaproniere* v. *Mason* (3) the Court of Appeal regarded the doctrine of *res ipsa loquitur* as involving the assertion that the *res* amounted to a " presumption of negligence " in the strict sense of a " presumption of law capable of being rebutted." Where *Collins* M.R. said of the bun there sold that " the unexplained presence of the stone in the bun was prima facie evidence of negligence " (4) and threw on the defendant the onus of giving evidence

(1) (1933) P. 154.
(2) (1933) P., at p. 168.
(3) (1905) 21 T.L.R. 633.
(4) (1905) 21 T.L.R., at p. 634.

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to rebut " this prima facie presumption of negligence " so that the jury were really starting with " a presumption of negligence on the part of the defendant " (1), I do not take him as denying that the onus of proof remained on the plaintiff throughout but as asserting that, prima facie evidence of negligence having been given because the stone in the bun warranted an inference of negligence, the plaintiff was under no duty to make out " a specific act of negligence " (1) but could ask the jury to infer negligence as a fact from the proved facts of the case. Further, as *Collins* M.R. said, the defendant's evidence, so far as it proved that under the system of manufacture properly carried out it was not possible for a stone to be introduced into the dough, did not negative the possibility of negligence, but, if anything, strengthened such inference as showing that some servant or other, employed by the defendant, must have been negligent. In my opinion *Collins* M.R. was not using the phrase " onus of giving evidence " to indicate any alteration of the general onus of proof, neither was he using the phrase " presumption of negligence " as indicating any " presumption of law." On the contrary, he used the word " presumption " in the sense of a presumption of fact, which, as Sir *James FitzJames Stephen* pointed out, " is simply an argument " (*Digest of the Law of Evidence*, 5th ed., (1899), Note I.). Of course " a presumption of fact " may, like some circumstantial evidence, be a very strong argument, practically irresistible, as *Thoreau* illustrated.

Regarding the doctrine of *res ipsa loquitur* as merely affording one instance of the general process of inductive reasoning, I applied *Chaproniere* v. *Mason* (2) to the facts of the case in *Australian Knitting Mills Ltd.* v. *Grant* (3) and treated the inquiry as one of inference only, not one of presumption of law. In particular I regarded the fact that the substance causing the plaintiff's injury was introduced as part of the process of manufacture as an important fact which, coupled with others, warranted the inference of negligence although the actual person who had been at fault could not be indicated. As has recently been pointed out in an important article by Mr. *F. C. Underhay* of the Yale Law School (*Canadian Bar*

(1) (1905) 21 T.L.R., at p. 634. (2) (1905) 21 T.L.R. 633.
(3) (1933) 50 C.L.R. 387, at p. 442.

Review, vol. 14, at p. 284), a similar method of approach was adopted by the Judicial Committee and the doctrine of *res ipsa loquitur* was applied as a method of inference and not regarded as altering the general onus of proof. Lord *Wright* said :—

> " According to the evidence, the method of manufacture was correct ; the danger of excess sulphites being left was recognized and was guarded against ; the process was intended to be fool proof. If excess sulphites were left in the garment, that could only be because some one was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances : even if the manufacturers could by apt evidence have rebutted that inference they have not done so " (*Grant* v. *Australian Knitting Mills Ltd.* (1)).

The above passage shows clearly that the reasoning was by way of logical induction, not legal presumption. Perhaps it may be added that Lord *Macmillan's* warning (given in *Donoghue* v. *Stevenson* (2)) against applying the maxim *res ipsa loquitur* to cases of manufacturers' liability for negligence, seems to be directed mainly against any theory that the mere proof of injury from a manufactured article shifts the legal onus of proof from the plaintiff to the defendant. More than that Lord *Macmillan* cannot mean, because *res ipsa loquitur* in the strict sense describes a method of legal or logical inference which can only be applied in special circumstances but which there can always be applied.

Professor *Paton's* recent contribution to the problem of *res ipsa loquitur* (*Canadian Bar Review*, vol. 14, p. 481) distinguishes sharply between the opinion of *Langton* J. in *The Kite* (3) and the view of Lord *Dunedin* in *Ballard's Case* (4). For the reasons already suggested herein, I think that the judgment of *Langton* J. is intended to do no more than discuss the changing factual situation where a defendant has elected to give evidence, and that his judgment is really in accord with the view of Lord *Dunedin* as indeed it purported to be. Further, the rule *res ipsa loquitur* is hardly to be described as being " merely a technical device by which the case can be left to the jury " (*Canadian Bar Review*, vol. 14, p. 481). It is best regarded as an application of the general principle of inferring a

(1) (1936) A.C. 85, at p. 101 ; 54 C.L.R. 49, at pp. 60, 61.
(2) (1932) A.C. 562, at pp. 622, 623.
(3) (1933) P. 154.
(4) (1923) S.C. (H.L.) 43.

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fact in issue from circumstantial evidence where the circumstances are meagre, but significant (Cf. *Martin* v. *Osborne* (1)). In civil cases such an inference may be made if supported by a mere balance of probabilities. Such phrases as " reasonable explanation," " onus of adducing evidence," " onus of going forward with the evidence," " answering the prima facie presumption," all describe more or less accurately the varying stages of the evidence throughout the course of a trial. But the legal onus of proving negligence always rests upon the plaintiff and every other " onus " or " presumption " is merely descriptive of arguments or inferences. At the end, the jury will determine whether, as a matter of reasonable inference, the plaintiff has proved his case; and if a defendant ventures an " explanation " which (as in *Grant's Case* (2) and perhaps in *Fitzpatrick's Case* (3)) really supports the view that, in the absence of negligence, the injury to the plaintiff was impossible or highly improbable, the circumstances proved by the plaintiff become strengthened by the so-called " explanation " of the defendant.

Mr. *Sholl* for the respondent was, I think, justified in the criticism of the phrasing of many of the judgments to which reference was made on the question of *res ipsa loquitur*. Proposition No. 8, as stated above, is the answer to the argument for the plaintiff that, as he proved a case of *res ipsa loquitur* in the first instance, it is necessarily wrong for a court of appeal to disturb a verdict in his favour, although the defendant has called evidence. A further point is whether, on the new trial, the principle *res ipsa loquitur* can be invoked by the plaintiff. In my opinion, if all that then appears is that the plaintiff was on his proper side of the road attending to his car which was there parked and that the wheel of the defendant's truck became detached from it as it was travelling on the opposite side of the road and that the defendant's truck without signal or other warning swerved on to its wrong side of the road and injured the plaintiff and his car—then a case of *res ipsa loquitur* is established. For, on the whole, I think it is open to a jury, upon such meagre material, to conclude that the accident was probably caused by the defendant's negligence either in not properly attending

(1) (1936) 55 C.L.R. 367.
(2) (1933) 50 C.L.R. 387; (1936) A.C. 85; 54 C.L.R. 49.
(3) (1935) 54 C.L.R. 200.

to his wheel before driving or in not pulling up when his wheel began to loosen or in not giving the plaintiff a warning of the danger. In other words, the circumstances though few are "relevant to infer negligence." Upon the defendant's calling evidence as to the probable cause of the wheel's becoming detached and the plaintiff's calling further evidence in reply, the question for the jury will be whether, on the balance of the probabilities, the plaintiff has made out his case of negligence in one or more respects. It will be quite wrong for the plaintiff to assume that the legal onus of proof ever shifts from his shoulders and he should, as a matter of prudence, be prepared to meet the interesting theory advanced by the defendant as to the cause of the accident.

In the result I think that the verdict in favour of the plaintiff should be restored and that all costs of the four previous investigations should be paid by the defendant.

McTIERNAN J. The issues which the learned trial judge left to the jury were, firstly, whether the defendant had neglected to see that the vehicle which collided with the plaintiff was, to use his Honour's words, "roadworthy and properly equipped," and, secondly, whether the van was driven negligently by the defendant. By the summing up they were directed to consider all the evidence which they heard relevant to the first issue. The second issue was described as the main issue and the evidence upon which the jury was asked to decide that issue was reviewed at length. On this issue they were directed in these words: "If you think the defendant was negligent either in not applying his brakes or by not calling out then the plaintiff is entitled to damages."

The jury found a verdict for the plaintiff for £349 12s. 6d. An application by the defendant to the County Court for a new trial of the action failed, and upon an appeal to the Supreme Court a new trial was ordered. This is an appeal by leave against that order.

In allowing the defendant's appeal the learned Chief Justice, with whom *Macfarlan* and *Gavan Duffy* JJ. agreed, in the course of his judgment said:—"The evidence makes it quite clear that the time which elapsed was one to one and a half seconds and in my view the judge should not have left to the jury the case he did leave as

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it is impossible to find evidence to support a charge of negligence during that period. Reasonable care implies opportunity for reason and care. It is absurd to invite the jury to engage in a hunt for an hypothesis as to a better use of hands and feet during those agonizing moments. The suggestion is that he may not have used the brakes effectively. The evidence is all one way that he did use the brakes." The judgment denies the probability that the jury found for the plaintiff on the other issue. But *Gavan Duffy* J., in concurring with the Chief Justice, added that if the jury accepted all the plaintiff's evidence and rejected all the defendant's evidence it was " just possible for " them " to conclude there was evidence of allowing the nuts which had been tightened up to become loose." But his Honour agreed about the improbability of the jury having directed their attention to that issue and also that it was not reasonable for the jury to find that the defendant could have taken action to avoid the accident between the loss of the tyre and the collision.

With great respect I do not think that what was said by the learned Chief Justice conveys an adequate account of the evidence which was before the jury relative to the issue whether the defendant acted negligently in the management of his vehicle. It is in the defendant's evidence that the statement is found that his van collided with the plaintiff in a second and a half after the tyre came off. The defendant said that his van then " swerved suddenly to the right " and when this began to happen he was within seven or eight feet away from and about opposite the plaintiff's car. The evidence is that the plaintiff was leaning into his car for the purpose of getting the starting handle. The defendant's evidence is at variance with that given by the witnesses Eadie and Drysdale. The former estimated that the tyre came off about fifteen yards away and that the defendant's van had been going at from fifteen to twenty miles per hour, and then went " a little slower " and that " the swerve was just a gradual swerve." Drysdale, a senior constable, examined the marks on the road. He said that the point where the defendant's vehicle " started to veer " was thirty feet away from where the plaintiff's car stood, but he did not take any measurements. It should be mentioned that another witness, who was a passenger in the defendant's van, said that it swerved very quickly to the right when it was

just about opposite the plaintiff's car. This witness estimated the speed of the van at between twelve and fifteen miles per hour. It may be observed that after the jury retired the trial judge, at the request of the defendant's counsel, redirected the jury that Eadie's estimate of distance was made on what he saw after the accident and before that he could not say how far apart the vehicles were, and that he was not asked if he agreed with the constable's evidence. Upon this evidence it was open to the jury to conclude that when the defendant's van was thirty feet away from the point of collision and going at twelve miles per hour, the tyre came off, that its rate of speed dropped and that it gradually swerved off the road, thus running against the plaintiff. The defendant also gave evidence that the brakes of his van were in good order and that he could pull it up in eighteen feet when it was going at fifteen miles per hour. In cross-examination the defendant said that in the emergency there was no time to sound the horn or call out, but that he did apply the brakes " hard," and that although he did so he " didn't pull up much." He admitted that he saw no brake marks on the road. The fact was, however, that the van was not pulled up and indeed did not come to a halt even after it had collided with the plaintiff and his car, but went through a fence and stopped at some drain or excavation. There was no evidence that there was any fall in the level of the road to the place where the plaintiff was standing. The passengers in the defendant's van said that he put his foot on the brakes as soon as the van began to swerve and that he tried to turn it to the left.

There was in all this evidence a reasonable basis for the jury to find that the defendant had been guilty of negligence. It would not be unreasonable to say that it was his duty to apply his brakes the moment his van began to swerve. He himself claims to have discharged that duty and thus bears witness to the action required by the circumstances. There was evidence upon which the jury could have found that the defendant had not applied his brakes at all, and that but for this failure the van would not have hit the plaintiff and his car. (Compare *Middleton's Case* (1)). In my opinion the verdict of the jury should stand.

It becomes unnecessary to say whether there was evidence upon which the jury could reasonably have found for the plaintiff on the other issue. I would be prepared to adopt the view of *Gavan Duffy* J. that there was some evidence upon which the jury could have so

(1) (1913) 16 C.L.R. 572.

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found. It was open to them to find that the order of events was that the tyre came off before the steering arm broke. That would dispose of the defendant's evidence that the tyre was thrust off as a sequel to the snapping of the steering arm due to metal fatigue and in no way attributable to the defendant's negligence. There was evidence that a sharp swerve by the van off its course such as might follow on the breaking of the steering arm would loosen the nuts and clamps, making the tyre fast to the wheel, and cause it to come off. But there was evidence upon which the jury could find that the swerve of the van was only gradual. In addition there was evidence that the first account given by the defendant was that the tyre came off. He did not say that the steering arm broke. If that were the order of events there was a reasonable basis of evidence upon which the jury could have found that the defendant negligently allowed some of the nuts and bolts fastening the tyre to its wheel to become loose, with the result that the tyre came off and the van swerved off the road. In my opinion the summing up does show that this issue was explicitly, if not prominently, put to the jury.

These conclusions have been reached independently of any assistance which the doctrine of *res ipsa loquitur* might afford to the plaintiff. On that question I agree with the view, for which my brother *Dixon* has cited authority, that it is incorrect to say that the doctrine never applies where an accident is occasioned by a vehicle on the highway.

In my opinion the appeal should be allowed, the jury's verdict restored and the appellant should have the costs of the appeals to this court and to the Supreme Court and of the application to the County Court.

Order that the costs of the former trial, the new trial application, the appeal to the Supreme Court and the appeal to this court, abide the event of the new trial. Otherwise appeal dismissed.

Solicitors for the appellant, *Newman & Wingrove.*
Solicitors for the respondent, *Clarke & Ness.*

H. D. W.