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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

SC No. 73 of 1991

BETWEEN:

DAVID ROY SOUTHWELL
Plaintiff

AND:

TAKASHI TOMOMOTO
First Defendant

AND:

KYMSTOCK PTY. LTD.
Second Defendant

AND:

BRIDGESTONE AUSTRALIA LIMITED
Third Defendant

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 4 September 1992)

The application

I rule today on the Plaintiff's application of 26 August 1992 to have the First and Third Defendants' Defence and Amended Defence, respectively, struck out. Alternatively, the Plaintiff seeks an order that within 7 days these defendants file an Amended Defence and Further

Amended Defence, respectively, in which they will plead the facts they intend to prove which differ from those pleaded in pars3 and 4 of the Amended Statement of Claim; and that in default, the Amended Defence of the Third Defendant be struck out, and the Plaintiff be at liberty to enter judgment against the Third Defendant.

The relevant pleadings

Pars1(e), 2, 3 and 4 of the Amended Statement of Claim provides, as far as is material:-

> "1. At all material times:
> - - -
> (e) the Plaintiff and the First Defendant were employees of the Third Defendant acting in the course of their employment;
>
> 2. At approximately 4.45 pm on 23rd November, 1989 the First Defendant was driving the Second Defendant's - - motor vehicle in the course of his employment with the Third Defendant along the Stuart Highway near Mataranka in the Northern Territory of Australia when the said motor vehicle lef (sic) the road and overturned thereby occasioning personal injuries to the Plaintiff.
>
> 3. The motor vehicle's above described manoeuvres were caused by the negligence of the First Defendant, particulars of which are set out below.
>
> PARTICULARS
>
> The First Defendant:
>
> (a) drove too fast in the circumstances;

(b) failed to keep a proper or any control over the said motor vehicle;
(c) failed to keep a proper or any lookout;
(d) failed to slow down or steer or manoeuvre the vehicle in order to avoid the accident.

4. The Third Defendant was in the circumstances vicariously liable for the negligence of the First Defendant."

Pars3 and 6 of the First Defendant's Defence provide, as far as material:-

"3. The first defendant denies the matters pleaded in paragraph 3 of the amended statement of claim.

- - -

6. - - - the first defendant admits that he was driving - - - when the motor vehicle left the road and overturned - - - ."

Pars1, 3, 4 and 5 of the Third Defendant's Amended Defence provide, as far as material:-

"1. The third defendant does not know and cannot admit the matter pleaded in paragraphs - - - 2 - - - of the Amended Statement of Claim.

3. The third defendant admits the matters pleaded in paragraphs - - 1(e) of the Amended Statement of Claim.

4. The third defendant denies the matters pleaded in paragraph 3 of the Amended Statement of Claim.

5. The third defendant does not plead to the matters pleaded in paragraph 4 of the Amended

> Statement of Claim as they constitute an assertion of law."

I consider that par1 must be read subject to the express admission in par3.

The Plaintiff's submissions as to the First Defendant's Defence

Mr Morgan of counsel for the Plaintiff submitted that while both Defendants had denied that the First Defendant had been negligent, they had not proceeded to plead the facts on which they would rely to found that denial. He submitted that in the circumstances of this case R13.12(3) required them to plead those facts. R13.12(1) and (3) provide, as far as material:-

> "(1) - - - every allegation of fact in a pleading shall be taken to be admitted unless it is denied - - - or is stated to be not admitted in the pleading of the opposite party, - - - .
>
> (3) Where the party pleading intends to prove facts which are different from those pleaded by the opposite party, it is not sufficient for the party merely to deny or not to admit the facts so pleaded but the party shall plead the facts he intends to prove."

Noting that the First Defendant in par6 of his Defence admitted that he was driving "when the motor vehicle left the road and overturned", Mr Morgan submitted that this

case was clearly one in which the Plaintiff by his pleading had made it clear he was relying on res ipsa loquitur. In such a case, he submitted, a defendant pleading to the statement of claim and putting in issue the facts pleaded by the Plaintiff to found an inference of res ipsa loquitur must, necessarily, intend "to prove facts which are different to those pleaded" by the Plaintiff. Accordingly, the Defendant must comply with R13.12(3). Mr Morgan relied on *Maitland City Council v Myers* (1988) 8 MVR 113 for this proposition. I turn aside to examine that authority.

In *Maitland City Council* (supra) an experienced driver was taking his son to college in dark and rainy conditions on a wet, unstable, earthen gravelly-type country road on which repairs had been carried out. While driving at about 80 kilometres an hour his vehicle skidded, slid, became airborne and overturned. His son was seriously injured and claimed damages both against his father and the City Council (for failure to give adequate warning of the road hazard caused by the repairs). The Council issued a third party notice against the driver, seeking contribution from him should any negligence be proved against the Council.

The Council's pleadings did not in terms rely upon of res ipsa loquitur. It pleaded six specific particulars of the driver's negligence:- (i) failure to keep a proper lookout; (ii) driving at excessive speed in the circumstances; (iii) failing to steer the vehicle so as to avoid leaving the highway; (iv) failing to keep any proper control of his vehicle; (v) running off the highway and causing the vehicle to collide with an embankment and overturn; and (vi) "a combination of any or all of the above". The trial judge found the Council negligent; he dismissed the claims against the driver. The Council appealed to the New South Wales Court of Appeal, conceding it had been negligent but contending that the driver was also negligent and that damages should be apportioned. It submitted that the driver's negligence should be inferred from the evidence relating to the particulars it had pleaded; it also expressly relied on the doctrine of res ipsa loquitur. The driver contended that negligence on his part was not indicated by the evidence relating to the particulars pleaded by the Council; and that the Council could not on appeal rely on res ipsa loquitur, because it had neither expressly pleaded nor relied upon it at the trial.

The appeal was dismissed, by majority. Kirby P and McHugh JA considered that the Council was entitled to

rely, on appeal, upon res ipsa loquitur. It was not necessary to specifically plead that maxim if the facts which supported its inference were pleaded; in this case the particulars of negligence pleaded were sufficient to indicate that the Council relied on the circumstances of the accident to support an inference of negligence and thus to raise the doctrine of res ipsa loquitur. Their Honours considered that proof of the facts that the vehicle had left the highway, went through or over the adjoining fence and finished at a point 18 to 20 metres away from the road was sufficient to raise an inference of negligence against the driver. On this aspect Kirby P said at 114:-

> "The pleading [of the Council] did not in terms rely upon the doctrine or principle of res ipsa loquitur. That doctrine or principle is often pleaded in particulars of negligence. This is desirably so in order to put the other party on notice that this means of proving the case will be relied upon at the trial. But res ipsa loquitur is not, strictly, a particular of negligence so much as a mode of drawing an inference of negligence from the facts proved. It is an evidentiary tool, used on the way to establishing the case which a party brings upon the facts proved as they are ultimately adduced at the trial. In any case, - - - particulars [(v) and (vi) above], in my view, sufficiently alerted the first respondent to the possible reliance on a case based on res ipsa." (emphasis mine)

I respectfully agree with the words emphasized.

At 120-121 his Honour also said:-

> "It is also true that that magic phrase [res ipsa loquitur] was not apparently mentioned in the trial below. However, I do not regard those facts as of the slightest significance in the appeal, for three reasons.
>
> - - -
>
> Secondly, the [Council] has appealed. It is an appeal on the facts. It is not an appeal limited to an appeal on a point of law. It is therefore for this court to form its own view of the facts, as on a re-hearing. It is its duty to draw from the facts proved such inferences as are available upon the evidence. That includes the inferences available by the application to the evidence of the evidentiary tool of res ipsa loquitur. The inferences of negligence that may be derived from the evidentiary steps which I have outlined are just as available to us as they were to [the trial Judge].
>
> Thirdly and most importantly, although the phrase res ipsa loquitur was not used at the trial or in the third party notice, there was an adequate assertion of it in the particulars of negligence. These sufficiently activated the process of reasoning which res ipsa loquitur involves: cf *Bennett v Chemical Construction (GB) Ltd* [1971] 1 WLR 1571 at 1575. - - - [The particulars] show that the [Council] did sufficiently indicate its reliance on the circumstances as being such as to call for an explanation by the [driver]." (emphasis mine)

The majority, Mahoney and McHugh JJ A, held that on the whole of the evidence no inference of negligence should be drawn against the driver; Kirby P dissented. McHugh JA said at 126-8:-

> "When a vehicle veers out of control and runs off the highway, that occurrence raises an inference

> of negligence in a civil action for damages against the driver: See *Davis v Bunn* (1936) 56 CLR 246 at 260. In the present case, proof that the vehicle driven by the first defendant left the highway, went through or over a fence adjoining the highway and finished approximately 18 or 20m away from the road was sufficient to raise an inference of unspecified negligence against the driver.
>
> However, at the trial the case was conducted by reference to specific heads of negligence. [His Honour then considered the evidence, concluded that the specific heads of negligence (i), (ii) and (iv) had not been established, and continued:]
>
> There remains the question of whether the occurrence itself is sufficient to found negligence. Res ipsa loquitur was not specifically pleaded. However, it is not necessary to plead that maxim. It is enough that the plaintiff has pleaded the facts which support the inference: see *Bennett v Chemical Construction (GB) Ltd* [1971] 1 WLR 1571 - - - particular [(v)] is sufficient to raise the maxim res ipsa loquitur.
>
> - - -
>
> When the doctrine of res ipsa loquitur applies, a defendant may escape a finding of negligence by establishing the cause of the occurrence and showing that it does not constitute negligent conduct. [I interpose that to do so the defendant would have to comply with R13.12(3), in this jurisdiction]. But he may also escape liability although the cause of the occurrence is not established if on the whole of the evidence the tribunal of fact is not satisfied that the inference of negligence should be drawn. Whether the inference should be drawn will depend upon the strength of the various alternatives which are consistent with no negligence." (emphasis mine).

As to the words emphasized, see also *Mummery v Irvings Pty. Ltd.* (1956) 96 CLR 99 at 120.

In *Bennett v Chemical Construction (GB) Ltd* (supra) the plaintiff was injured by a falling panel. The trial Judge was unable to determine precisely how the accident happened, but concluded that there must have been a lack of care by the defendant's workmen; he found the defendant negligent. The defendant appealed on the ground that there was no evidence to base the finding of negligence and contended that it would be wrong for the appeal Court to consider res ipsa loquitur since it had not been pleaded and the trial Judge had not referred to it. The Court of Appeal held that it was not necessary for the plaintiff to plead res ipsa loquitur, if the facts pleaded and proved showed that the accident was prima facie caused by some negligence on the part of the defendant. In that situation, as Davies L.J. said at 1575:-

> "- - - it is for the defendants to explain and show how the accident could have happened without negligence. The defendants made no attempt to do that in this case. In my judgment this is really a classic case of res ipsa loquitur."

In that case the plaintiff's pleading was in the form:-

> "The said accident was due to the negligence - - - of the defendants - - - in that (b) the said workmen caused or permitted one or both panels to fall."

Mr Morgan submitted that if the First Defendant did not plead "facts which are different from those pleaded by [the Plaintiff]", in terms of R13.12(3), he could not seek to rebut the inference of res ipsa loquitur. It can be seen from that part of McHugh J.A.'s opinion in *Maitland City Council* (supra) emphasized above, that there is no substance in that submission. The question is whether the evidence which emerges at trial warrants an inference of res ipsa loquitur being drawn.

The onus lies on the Plaintiff to prove negligence. It is a matter for the First Defendant whether he wishes to frame his case on the basis that he will prove facts different from those pleaded by the Plaintiff, to establish that the accident occurred without negligence on his part. If so, he must comply with R13.12(3). He is not, however, obliged to set up some rival version of the facts. He cannot set up what amounts to an affirmative case at trial, by the simple denial in par3 of his Defence. He must specifically plead any such affirmative case, so as to avoid taking the Plaintiff by surprise; see R13.07(1). He must sufficiently indicate by his pleading what he will actually seek to prove at the trial; the sanction is that he will not be permitted at trial to raise a defence he has not pleaded.

Mr Morgan submitted that if the First Defendant wished to plead by way of confession and avoidance - for example, if he wished to plead inevitable accident - he had to comply with R13.07. That is correct. However, it is a matter for the First Defendant whether he wishes to plead in that way.

The Plaintiff's submissions as to the Third Defendant's Amended Defence

Par4 of the Third Defendant's Amended Defence is in the same terms as par3 of the First Defendant's Defence. Mr Morgan largely relied on the same submissions in relation thereto as those he had put in relation to the First Defendant's Defence; it is unnecessary to discuss them further.

He also submitted that the Third Defendant had to plead to par4 of the Amended Statement of Claim. I note that by par3 of the Amended Defence the Third Defendant admitted the allegation in par1(e) of the Amended Statement of Claim that the First Defendant was an employee of the Third Defendant and had been acting in the course of his employment at the time of the accident. Par4 of the Amended Statement of Claim alleges the legal result of material facts earlier pleaded. It is permitted by R13.02(2)(b). The Plaintiff was not bound to plead that legal result, and

at trial he is not bound to rely on it. What he is required to plead are the facts which impose on the defendant the liability which founds the claim in his Writ. The Third Defendant is not required to plead to the conclusion of law pleaded in par4 of the Amended Statement of Claim; that is necessarily a question in issue at trial. The system of pleading in the Rules is a system of fact-pleading; the defendant is required to plead only to the facts alleged.

The Defendants' submissions

Mr Deane of counsel for the Defendants conceded that if the Defendants intended to prove facts different to those pleaded by the Plaintiff, they had to comply with R13.12(3). However, he submitted, the Defendants did not so intend, and were entitled to plead as they had, by way of a simple traverse under R13.12(1).

Conclusions

Under the Rules, the former clear distinction in function between pleadings and particulars has disappeared; see R13.10(1). The Rules are intended to ensure full disclosure by both plaintiff and defendant. Formerly, a party did not have to plead to the particulars; now that must be done, since they constitute part of the pleadings. Par3 of the First Defendant's Defence (and par4 of the Third Defendant's Amended Defence) are adequate in that

respect, though not ideal; they sufficiently specifically deny all the matters particularized in par3 of the Amended Statement of Claim.

I do not consider that the Plaintiff's Statement of Claim presently indicates with sufficient clarity that he proposes to rely at trial on the maxim res ipsa loquitur; that is, it does not clearly show that the Plaintiff relies on the circumstances of the accident to support an inference of negligence against the driver. The Plaintiff has alleged four specific causes of the accident in par3 of his Amended Statement of Claim. To rely on res ipsa loquitur presupposes a pleading in which a plaintiff is unable to allege a specific cause of the accident, but relies on the circumstances in which it occurred as justifying an inference that the Defendant had probably been negligent and that his negligence had caused the Plaintiff's injury. See *Barkway v South Wales Transport Co. Ltd.* [1950] 1 All ER 3922. But, as the High Court said in *Mummery v Irvings Pty. Ltd.* (supra) at 115 "once the course of an accident has been established and the relevant circumstances proved, there is no further room for the operation of the principle [of res ipsa loquitur]".

In the present case, in seeking to rely on res ipsa loquitur, the Plaintiff would allege that the vehicle

was solely under the control of the First Defendant at the time of the accident, and the accident was such that in the ordinary course it would not have happened if the First Defendant had used proper care. No such pleading appears in the Amended Statement of Claim. It appears that the Plaintiff would seek to establish these facts at trial and then to submit (by the application of res ipsa loquitur) that they constitute reasonable evidence that the accident arose from the First Defendant's lack of care, with a consequence that the First and Third Defendants must then provide an explanation so as to avoid a possible finding that they are liable in negligence. This accords with the classical formulation of res ipsa loquitur in *Scott v London & St. Katherine Docks Co.* (1865) 3 H.&.C. 596; 159 E.R. 665.

'Res ipsa loquitur' describes a process of logic by which an inference of negligence may be drawn in certain circumstances; see *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413, per Barwick CJ. I consider that it is the better practice, however, specifically to plead res ipsa loquitur in a Statement of Claim when it is intended to rely on it at trial. See generally *Mummery v Irvings Pty. Ltd.* (supra) at 110-117, and 121-2.

The relief sought in pars1 and 2 of the Plaintiff's application of 26 August is refused, for reasons sufficiently indicated above. I will hear the parties on costs.

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