EAGLE CHARALAMBOUS TRANSPORT LIMITED v GIDEON PHIRI (1994) S.J. 52 (S.C.)

SUPREME COURT
CHAILA, CHIRWA AND MUZYAMBA,JJ.S.
9TH MARCH AND 9TH JUNE 1994
S.C.Z. JUDGMENT NO. 8 OF 1994
APPEAL NO. 63 OF 1993

Flynote

Damages - Negligence - Res Ipsi Loquitor - Whether doctrine may be pleaded where the plainntiff knows the particulars of the negligence- Volenti non injuria - When is it applied

Headnote

The plaintiff (respondent) and DW2, one Ellington Simbeye who were both employed by the defendant as lorry mate and driver respectively, left Mufulira to deliver Copper cathodes, laden in the defendant's (appellant) Mercedes Benz truck and trailer registration number Ev 8030, to Tazara Deport at Kapiri Mposhi. On the way, at Kashitu near the destination, a tyre burst and the truck overturned and the plaintiff sustained severe injuries in his left leg and arm. The plainntiff claimed and was granted damages by the High Court where it was found that the defendant had been negligent. The defendant appealed.

Held:

(i) If a plaintiff knows the cause or alleges particulars of negligence it is inappropriate for him to plead res ipsa loquitur as well.
(ii) The accident was caused wholly by the defendant company's negligence through its agent and/or servant
(iii) The doctrine of *volenti non injuria* applied to the respondent because he voluntarily and freely accepted the risk of travelling on a truck with worn tyres.

Authorities referred to:

1. Clerk and Lindsell on Torts, 14th Edition
2. Markway v South Wales Transport Company Limited (1950) 1 All E.R 392
3. Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1

For the appellant: B.C Mutale, Ellis and Company
For the respondent: A.M Mushingwa, Mwanawasa and Company

Judgement

MUZYAMBA, J.S.: delivered the judgement of the court.

This is an appeal against an award of damages for personal injuries sustained by the respondent in a road traffic accident which occurred on 7th October, 1988 at Kashitu, along great North Road , near Kapiri Mposhi due to alleged negligence on the part of the appellant's agent and/or servant.

For convenience we will refer to the respondent as plaintiff and the appellant as defendant which is what they were in the court below.

The facts of this case are that on 7th October 1988 the plaintiff and DW2, Ellington Simbeye

who were both employed by the defendant as lorry mate and driver respectively, left Mufulira to deliver Copper cathodes, laden in the defendant's Mercedes Benz truck and trailer registration number Ev 8030, to Tazara Deport at Kapiri Mposhi. On the way, at Kashitu near the destination, a tyre burst and the truck overturned and the plaintiff sustained severe injuries in his left leg and arm.

It was pleaded in the statement of claim and evidence was led at the trial and support of the allegation that the front left wheel tyre of the truck was worn out and that the accident happened due to excessive speed and bursting of that tyre.

The defendant's evidence pointed in the opposite direction. Both Dw1 Mr Erik Hans Pablanolles, the defendant's technical services manager and DW2, the driver testified that they inspected the tyres before the truck left Mufulira and were in good condition. In addition, DW1 said he went to the scene of the accident and inspected the truck and found that the front right and not the front left wheel tyre had burst. And DW2, said he was not over speeding. He was doing between 30 and 45 kg per hour and not 120 per hour as alleged by the plaintiff. That the accident happened at night, around 20.30 hours.

Mr Mutale advanced two grounds of appeal. First that the learned trial commissioner misdirected himself in law in relying on the evidence of the plaintiff as it was full of fabrications and was grossly exaggerated and second, that the learned trial commissioner misdirected himself in holding that the defendant's negligence was proved by the mere fact of the burst tyre.

On the first ground, Mr Mutale submitted that the plaintiff's evidence was fabricated, exaggerated and full of flaws and that it was totally contracted by the defendant's evidence. That the learned commissioner was biased in favour of the plaintiff and as such failed to evaluate all the evidence before him and to resolve the contradiction between the two sides. He pointed out that whereas the plaintiff testified that the front left wheel tyre burst DW1 said it was the front right wheel tyre which burst and that whereas the plaintiff said the tyres were worn out DW1 and 2 said they were in good condition. That whereas the plaintiff said DW2 was doing 1`20 km per hour DW2 said he was doing between 30 - 45 km per hour. He further pointed out that in his evidence the plaintiff said the truck overturned on his side and was trapped and that he sustained a broken left leg and arm. That in that condition and being at night it was not possible for the plaintiff to see which tyre had burst. He concluded by saying that had the learned trial commissioner balanced all the evidence before him he could have come to a different conclusion and urged the court to interfere with the findings of fact and cited the case of ACHIUME (3) in support.

On the second ground Mr Mutale submitted that the learned trial commissioner was wrong to have concluded that negligence was established by the mere fact

of the bursting of the tyre. That this was a dangerous proposition because, although it could be prima facie evidence of negligence, yet a driver might offer an explanation of what caused the tyre to burst. He further submitted, in the alternative, that on the plaintiff's evidence, this was a proper case for the application of the doctrine of volenti non fit injuria because the plaintiff knew from the start that the tyre was worn out and yet he voluntarily and knowingly assumed the risk by travelling on a truck with defective tyres.

In response to these submissions Mr Mushingwa submitted that the learned trial commissioner

did not err in any way. that the learned commissioner analysed all the evidence before him and in his judgement addressed his mind to the nature of the tyres, the condition of the road and truck and the circumstances under which the accident happened. He further submitted that it was the duty of the defendant to explain the cause of the bursting of the tyre and that since the defendant offered no explanation the learned commissioner was right in concluding that negligence had been proved by the mere fact of the tyre burst and he referred the court to the House of Lords decision in the case of *Barkway v Southwales Transport Company Ltd* (2).

We have carefully considered the submissions by both counsel and the evidence on record and the pleadings. The plaintiff, in addition to alleging negligence pleaded in pars 5 of the statement of claim the doctrine of res ip loquitur in this manner:

> "The plaintiff will also rely on the doctrine of res ipsa loqutur."

In considering the doctrine the learned trial commissioner referred to CLARKE AND LINDSELL ON TORTS (1) at par. 975 where it is stated, inter alia, that where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords responsible evidence in the absence of explanation by the defendants, that the accident arose from want of care. He then came to the conclusion, after satisfying himself that the defendant had failed to explain what causes the tyre to burst, that the defendant was negligent. He said at page 6 and we quote:

> "The fact that the tyre burst and the motor vehicle overturned for no apparent reason in prima facie evidence that the driver was negligent and the defendant has failed to refute that evidence.

The doctrine of res ipse loquitur is no more than a rule of evidence effecting the burden of profit. It is a confession by the plaintiff that he has no affirmative evidence of negligence and a statement that an event which has occurred which in the ordinary course of things is more likely than not to have..... by negligence is but itself evidence of negligence and the duty is on the defendant to disapprove that. We have to decide therefore whether or not it is appropriate for a plaintiff to assert and give particulars of negligence and at the same time, or in the alternative, rely on the doctrine.

The facts in *Barkway v Southwales Transport Company Ltd* (2) referred to by Mr Mushingwa were that the appellant's husband was killed while travelling as a passenger in the respondent's omnibus when a tyre burst and the omnibus veered across the road and fell over an embankment. The appellant claimed damages and relied on the doctrine or res ipsa loquitur saying that omnibus which are properly serviced do not burst their tyres without cause,

nor do they leave the road along which they are being driven. The respondents called evidence to prove that the bursting of the tyre not due to negligence but impact fracture due to one or more heavy blows on the outside of the tyre leading to disintegration of the inner parts over a period. It was however admitted, in cross examination, by the respondent's witnesses that a careful inspection of the tyres would have revealed the disintegration of the tyre. Allowing the appeal and disregarding the doctrine of res ipsa loquitur the House of Lords found that this amounted to negligence on the part of the respondents. In the course of his

judgement Lord Normand said, at page 399.

> "The maxim res ipsa loquitur is no more than a rule of evidence affecting the onus . It is based on common-sense and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and or ought to be within the knowledge of the defendant."

And the learned author of CLERK AND LINDSELL ON TORTS (1) at page 976 says:

> "The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for when he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to res ipsa loquitur is in appropriate, for the question of the defendant's negligence must be determined on that evidence."

It is quite clear from the above authorities that if a plaintiff knows the cause or alleges particulars of negligence it is in appropriate for him to plead res ipsa loquitur as well. In this case, since the plaintiff gave particulars of negligence it was in appropriate for him to rely on the doctrine of res ipsa loquitur and try to shift the burden of proof to the defendant. The burden lay on him throughout to establish the cause of the bursting of tyre and should have done so by calling expert evidence. We would therefore agree with Mr Mutale that the learned commissioner erred in law in finding that negligence was proved by the mere fact of the bursting of the tyre. In our view such a finding would have been sound in law had the plaintiff solely relied on the doctrine of res ipsa loquitur.

We will now consider Mr Mutale's submission on findings of fact by the court below.

In the case of the *Attorney General v Marcus Kampumba Achiume* (3) referred to by Mr Mutale, this court held, inter alia that an appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of the any relevant evidence or upon a misaprehension of the facts or that they were findings which, on a proper views of the evidence, no trial court acting correctly can reasonably make and that an unbalanced evaluation of the evidence, where the only the flows of one side but not of the other are considered, is a

misdirection which no trial court should reasonably make and entitles the appeal court to interfere.

Mr Mutale's arguments was that the trial commissioner failed to balance the evidence on both sides and that his findings of fact were perverse. The evidence on record is that truck was old and had a trailer. Both the truck and trailer were carrying 40 tonnes of copper cathodes. At Kashitu near Kapiri Mposhi a tyre burst and the truck overturned on the plaintiff's side trapping him and breaking both his left leg and arm.. The accident happened around 20.30 hours. According to the plaintiff the tyre which burst was the front left wheel tyre and that at the time of the accident the truck was speeding, doing 120 km per hour. But according to DW1 and 2 respectively the tyre which burst was the front right and that the truck was at the time doing

between 30 - 45 km per hour. After reciting the evidence this is what the learned commissioner said at page 54 and we quote:

> "The defendant company has also not given any reason why if DW2 was driving at a relatively safe and a slow speed of between 30- 45 km per hour , the motor vehicle should have moved with so much force that after the tyre burst, it veered into the bush and overturned.

Having carefully considered the issue I believe the plaintiff's evidence on the point that the tyre which burst was defective in that it was worn out and that the cause of bursting. I further believe the plaintiff's evidence that DW2 was driving an unreasonable high speed, so that when the tyre burst, he could not and failed to control the motor vehicle due to high speed, the result of which is that it overturned.

I am therefore satisfied the accident was caused wholly by the defendant company's negligence through its agent and/or servant in that.

(a) he drove a motor vehicle with a defective and worn out tyre which as a result burst
(b) he drove the motor vehicle at unreasonably high speed and so failed to control it and avoid the accident when the tyre burst, resulting in the motor vehicle overturning thereby seriously injuring the plaintiff."

It is quite clear from the quotation that the learned commissioner did not give a balanced evaluation of the evidence before him. Neither did he resolve the contradiction between the plaintiff and DW1 regarding which tyre burst. Was it the front left or front right. Nor did he give reasons for preferring the plaintiff's evidence and for disbelieving the defence witness. We also failed to address his mind to various issues raised by the evidence, namely whether or not an old truck pulling a trailer on both and both laden with 40 tonnes of copper cathodes, quite a heavy load, would speed, and whether the plaintiff, who was so badly injured could be able to inspect the truck in the dark to see which tyre had a burst. We are therefore satisfied that had the learned trial commissioner taken a well balanced view of the whole evidence and addressed his mind to these issues he would have come to a different conclusion. We would therefore reverse the findings of fact below.

We will now consider the question whether on the facts of this case, as pleaded and given by the plaintiff, the doctrine of volenti non fit injuria would apply. Par 4(b) of the statement of Claim reads:

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> "4 The said accident was caused wholly by the negligence of the defendant's agent and/or servant and also constructive negligence or the defendant.
>
> PARTICULARS OF NEGLIGENCE
>
> (b) Driving a defective motor vehicle in the tyres were worn out."

And the plaintiff's evidence on this issue is as follows:

> Before we left I checked the truck we were to use. I observed that one of the front tyres, left was worn out and one of the trailer tyres was also worn out. I brought this

> to the attention of the driver that we would not carry copper cathodes on the truck. The driver said that there was nothing he could do as he had reported the matter to the employers and they did nothing about it. The driver's name is Elliot Simbeye. The defendant owned the truck and trailer. I also brought the same issue to the attention of the foreman who complained that there were no spare tyres to be fitted to the motors vehicle. We went to ZCCM Mufulira Divison and loaded the copper cathodes to deliver to Tazara at Kapiri Mposhi.".

On these facts Mr Mutale urged the court to apply the doctrine saying that the plaintiff, knowing the danger posed assumed the risk by travelling on the truck with defective tyres and heavily loaded.

The English authorities suggest that for the defence of volenti non fit injuria to be applied upon by the defendant, it should be specifically pleaded and that it rarely applied in cases of master and servant relationship because a servant should not be put in a position in which he has to choose between obeying master's orders or disobeying them and risk loosing his job. We take a different view because unlike the maxim res ipsa loquitur which is a rule of evidence and must be specifically pleaded, this doctrine is a rule of law and must be applied whether or not specifically pleaded whenever any given facts disclose such a defence and regardless of the relationship between the parties. We have used the word 'regardless' because the risk posed may be fatal and therefore a matter of life or death and not necessarily one, in case of a servant, choosing between obeying his master's orders or disobeying them and run the risk of dismissal.

In the par. 110 of Clerk and Lindsell on Torts (1) it is stated:

> "whatever the terminology, voluntes must be free, and it is based on knowledge of the risk in the plaintiff; if the defendants desire to succeed on the ground that the maxim volenti non fit injuria is applicable they must obtain a finding of fact that the plaintiff voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agreed to incur it."

It is quite clear from this quotation that for the defence to succeed the defendant must prove that the plaintiff was fully aware of the nature of the risk involved and that he voluntarily and freely assumed that risk. Was the plaintiff aware of the nature of the risk involved and did he voluntarily and freely accept it. The plaintiff said in evidence that he complained to the driver and foreman that two

tyres, one on the truck and the other on the trailer, were worn cut and that they would not carry copper cathodes. He therefore must have foreseen an accident occurring and being injured in the process, but nevertheless jumped on the truck. In so doing he voluntarily and freely accepted the risk. He cannot now be heard to complain.

For the foregoing reasons the appeal is allowed and the award set aside.
Costs will follow the event and to be taxed in default of agreement.

Appealed allowed and award set aside.