ANCHOR PRODUCTS LTD. v. HEDGES;[1] NOMINAL DEFENDANT v. HASLBAUER[2]

The effect of calling evidence as to the true facts upon the operation of the doctrine of res ipsa loquitur.

In *Mummery v. Irvings Pty. Ltd.*[3] the High Court commented on the application of the doctrine of res ipsa loquitur in situations where evidence is adduced as to the cause of the accident. In a joint judgment Dixon C.J., Webb, Fullagar and Taylor JJ. said:

> But what is the position where the plaintiff, instead of relying on mere proof of the occurrence, himself adduces evidence of the cause of the accident? It is, of course, beyond doubt that the doctrine of res ipsa loquitur will have no place in the case. This, of course, is precisely the same situation when the explanatory matter is proved by the defendant. If his evidence is acceptable to the jury the question will be whether, upon that evidence, the jury is satisfied that he was negligent.[4]

Eight years later in *Priest v. Arcos Enterprises Pty. Ltd.*[5] the Full Court of the Supreme Court of New South Wales held that a plaintiff may not rely upon the doctrine and at the same time adduce evidence of the cause of the accident. The plaintiff, a carpenter engaged in the construction of concrete floors, was injured when the structure on which he was standing collapsed. He led evidence intended to show that there was negligence in the construction of the building in certain respects. The trial judge directed the jury that, if they disregarded that evidence and came to the conclusion that it was more probable than not that the fall itself showed a lack of reasonable care, the plaintiff was entitled to succeed. It was on this direction that the matter went to appeal. The Chief Justice, Sir Leslie Herron, upheld the appeal. Relying on *Mummery v. Irvings*[6] and decisions of the New South Wales courts, he said:

> The situation is that the plaintiff cannot, as it were, have the best of both worlds. He cannot rely upon the rule of res ipsa loquitur and at the same time adduce evidence of the cause of the accident. If he does, then the doctrine of res ipsa loquitur will have no place in the case. The res ceases to speak, and the jury is to decide the case on the affirmative evidence.[7]

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1 (1967) 40 A.L.J.R. 330.
2 (1967) 41 A.L.J.R. 1.
3 (1956) 96 C.L.R. 99.
4 Id. at 122.
5 [1964] N.S.W.R. 648.
6 (1965) 96 C.L.R. 99.
7 [1964] N.S.W.R. 648, 651.

There can be no doubt, in view of the direction appealed from, that the Court considered the doctrine to be excluded once evidence of the cause was led—whether that evidence was accepted or not. The other members of the Court agreed with the decision of the Chief Justice. In 1965 a similar result was arrived at in *Cafe v. Australian Portland Cement Pty. Ltd.*[8]

That the Court, in these cases, had misunderstood *Mummery v. Irvings*[9] was made clear by the High Court (Taylor, Windeyer and Owen JJ.) in *Anchor Products Limited v. Hedges.*[10] In that case the respondent had been injured when a stack of boxes he was about to load on a truck fell toward him. He sprang backwards and hurt his back. At the trial he gave evidence that the worker who had placed the boxes there had done so in circumstances which, if the evidence had been accepted, showed how the stack came to fall. The Judge was not satisfied with that evidence but thought 'it more likely than not that the cause of the accident was some act of negligence on [the worker's] part'.[11]

The appellant contended that because evidence had been adduced tending to show the cause of the fall, the respondent could not rely on the fact of the occurrence as evidence of negligence. *Mummery v. Irvings,*[12] *Priest v. Arcos Enterprises Pty. Ltd.,*[13] and *Cafe v. Australian Portland Cement Pty. Ltd.,*[14] among others, were relied upon in support of this proposition. The submission was rejected by all three Judges. Owen J. dealt with the point in some detail. Referring to the passage from *Mummery v. Irvings*[15] quoted at the beginning of this note he said:

> This passage appears to have been read in some of the later cases as laying down as a proposition of law that the mere fact that a plaintiff has led evidence to show how an accident came to occur prevents the application of the rule of common sense which is expressed by the phrase res ipsa loquitur. But such an interpretation cannot, in my opinion, be supported, and it seems to me to be plain enough when regard is had to the last sentence of the passage which refers to a case in which the explanatory matter is "*proved*" by the defendant that the words "adduces

8 [1965] N.S.W.R. 1364.
9 (1956) 96 C.L.R. 99.
10 (1967) 40 A.L.J.R. 330.
11 per Owen J., quoting the trial judge, id. at 334.
12 (1956) 96 C.L.R. 99.
13 [1964] N.S.W.R. 648.
14 (1965) 83 W.N. (Pt. 1) (N.S.W.) 280.
15 (1956) 96 C.L.R. 99, 122.

> evidence" appearing earlier in the quotation were used in the sense of "proves" or "adduces evidence which is accepted."[16]

Windeyer J. expressed surprise at the misunderstanding and considered that the context of the Court's comments and the sense of the matter made it quite clear that 'when their Honours spoke of a plaintiff adducing evidence of the cause of the accident they were referring to his adducing evidence which showed what was the cause of the accident, that is to say, which establishes what acts, ommissions or events caused it to happen. If the precise cause . . . be fully revealed by evidence which is accepted the occurrence ceases to speak for itself.'[17] He also referred to the matter of pleading and pointed out that, if the plaintiff has made a general allegation of negligence, allegations of particular faults do not necessarily prevent his relying upon the doctrine.

I think His Honour's surprise was justified, and Fleming might have thought stronger terms appropriate. In the third edition of his book he said:

> . . . there is no justification whatever for depriving a plaintiff of the general inference of negligence . . . merely because he pleaded and unsuccessfully sought to substantiate specific allegations. It is senseless to put a plaintiff to an election between different methods of proof.[18]

Notwithstanding the decisions in *Fitzpatrick v. Walter E. Cooper Pty. Ltd.*,[19] *Davis v. Bunn*,[20] *Mummery v. Irvings*[21] and *Anchor Products v. Hedges*,[22] counsel in *Nominal Defendant v. Haslbauer*[23] apparently found room to argue that, where an inference of negligence is open on the facts of the accident, it is for the defendant to disprove negligence.

The respondent was a passenger in a Morris Oxford which was hit from behind by a Holden. At the time the Morris was stationary at a pedestrian crossing, and the respondent's case rested on evidence of the collision and of a police constable who found that the Holden's footbrake did not work. The appellant showed that a fracture of the brakeline caused the failure of brake, and the respondent accepted,

16 (1967) 40 A.L.J.R. 330, 334.
17 Id. at 332.
18 FLEMING, LAW OF TORTS 283.
19 (1935) 54 C.L.R. 200.
20 (1936) 56 C.L.R. 246.
21 (1956) 96 C.L.R. 99.
22 (1967) 40 A.L.J.R. 330.
23 (1967) 41 A.L.J.R. 1.

before the High Court, that there was no evidence that the driver of the Holden had any prior knowledge that the system was faulty or likely to fail. The trial judge had directed the jury that there was such evidence and, as the respondent was successful, a new trial seemed inevitable. However, on the appeal the respondent sought to avoid this result by submitting:

(a) there was evidence of negligence by inference from the fact of the occurrence;

(b) it therefore rested with the appellant to account for the occurrence by an explanation negating negligence. The jury must have disbelieved the driver's evidence that she had no knowledge of the condition of the brakes, and the appellant had not therefore negatived the inference of negligence based on the accident.

The Court (Barwick C.J., Kitto, Taylor, Menzies and Owen JJ.) upheld the appeal. The Chief Justice in particular went to considerable lengths to restate the principles laid down in *Fitzpatrick v. Walter E. Cooper Pty. Ltd.*,[24] *Mummery v. Irvings*[25] and *Anchor Products v. Hedges*.[26] He reiterated that, if his pleadings be wide enough, the plaintiff may rely both on an inference from the occurrence itself and on evidence of specific acts or omissions indicating a want of care. If the occurrence warrants an inference of negligence, whether or not the evidence of specific acts or omissions does so, the defendant is then faced with a choice—to chance that the jury will refuse to draw the inference from the fact of the occurrence or to call evidence. As the Chief Justice pointed out, it is in this sense only that the defendant can be said to have any "burden". By the same token 'the fact that the plaintiff had made a prima facie case of negligence . . . [does not] place the plaintiff in an entrenched position'.[27]

The Chief Justice drew attention to the difference between a situation where all the evidence as to an accident supports an inference of want of care and one where all that evidence does not. In the former instance the plaintiff can succeed 'unless the defendant, by his evidence as to matters beyond the fact of the occurrence, establishes to the satisfaction of the tribunal . . . that he was not negligent in relation to it'.[28] In the latter instance, of course, the plaintiff, with-

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24 (1935) 54 C.L.R. 200.
25 (1956) 96 C.L.R. 99.
26 (1967) 40 A.L.J.R. 330.
27 (1967) 41 A.L.J.R. 1, 3.
28 Ibid.

out other evidence beyond the fact of the occurrence, has no evidence of the defendant's negligence.

His Honour thought the facts of the instant case provided a good example of the operation of these principles. The circumstances of the accident supported an inference that the Holden driver either failed to keep a proper lookout or drove too fast. The occurrence would, however, cease to bespeak negligence on the part of the Holden driver if the evidence of brake failure prior to the collision was accepted. With the exception of Menzies J. the Court did not consider that the brake failure of itself afforded ground for an inference of negligence on the part of a driver who is only a driver.

Menzies J. said that the brake failure was not an explanation which was sufficient to displace the inference arising from the collision, but added that if the Holden driver's evidence that she had no reason to foresee the failure was accepted, the inference was displaced. He held that there was no evidence from which an inference could be drawn that she know the brakes were defective.

However it may be of interest to note that Menzies J. apparently regarded brake failure through metal fatigue as an equivocal explanation. His Honour reviewed authorities where an explanation had been given, and concluded that a finding of negligence remains open where a defendant 'does no more than give an explanation of the accident which, although accepted, is consistent both with negligence and the absence of negligence on the part of the defendant'.[29]

This opinion does not seem to accord with the views of Owen J. in the same case. He said:

> . . . if the braking system of a car suddenly fails because of a fracture . . . due to metal fatigue, that happening in itself does not afford any evidence that the driver of the car was negligent. Such an accident cannot, in my opinion, be said to be more consistent with negligence on his part than with the hypothesis that he was not negligent.[30]

Nor does the view of Menzies J. seem to accord with that of Dixon J. in *Davis v. Bunn*.[31] There the explanation of the accident was susceptible of two different interpretations—one more consistent with negligence than not and the other inconsistent with negligence. Dixon J. held that, if the jury was unable, on a preponderance of probability to choose between them, the plaintiff must fail.

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29 Id. at 12.
30 Id. at 14.
31 (1936) 56 C.L.R. 246.

On reflection, I doubt whether either *Anchor Products v. Hedges*[32] or *Nominal Defendant v. Haslbauer*[33] can strictly be said to represent "developments" in the law. However it may be fondly hoped that there is now no further room for argument as to the effect of raising an inference of negligence from the fact of an accident either as to the burden of proof or the plaintiff's freedom to adduce evidence beyond that fact.

J. A. SAMUEL*

DURAYAPPAH v. FERNANDO[1]

New significance for the audi alteram partem rule.

"Natural justice" is a much maligned term. When used in its technical sense it is not deserving of scorn, for all it connotes is that in some circumstances decisions affecting the rights of citizens must be reached only after a fair hearing has been given. This has two components; the principle audi alteram partem must be observed, and the members of the decision-making body must not be interested or otherwise biased.[2] Three well known classes of case concern, broadly, dismissal from office, expulsion from clubs and unions and deprivation of property; and there are numerous decisions concerning the necessity for natural justice in these areas. It is not proposed to deal with them, beyond observing that the recent developments to be discussed may necessitate a degree of re-examination and re-formulation of some hitherto accepted rules.

Apart from the property, club and office cases, the question whether a fair hearing must be afforded will almost always arise concerning the exercise of power conferred by legislation, whether primary, subordinated or delegated. Generally the statute will grant some official[3] power to do something "if he is of opinion that" or "if he sees fit", and there will often be some vaguely stated qualifications

32 (1967) 40 A.L.J.R. 330.

33 (1967) 41 A.L.J.R. 1.

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1 [1967] 2 All E.R. 152. For another commentary on this case, see Wade, *Unlawful Administrative Action: Void or Voidable?*, (1967) 83 L.Q.R. 499.

2 See BENJAFIELD & WHITMORE, AUSTRALIAN ADMINISTRATIVE LAW 145 (3rd ed.).

3 If this is, e.g., a department head, the maxim *nemo debet esse judex in propria sua causa* may be impliedly excluded; often the department will be interested in the subject matter, but if this disqualified the head a power vacuum would result. The hearing requirement may well remain, however.