

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.06.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

C.M.A.No.2815 of 2015
M.P.No.1 of 2015

The Manager,
Reliance General Insurance Co. Ltd.,
Salem 636 004.

.... Appellant/2nd Respondent

Vs.

1.Selvi
2.Minor Vijayabarathi
3.Minor Mathialagan

.... Respondents/Petitioners

(Minors are represented by
the 1st respondent)

4.Padma

.... Respondent/1st Respondent

Civil Miscellaneous Appeal filed under Section 173
Motor Vehicles Act, 1988 against the Judgment and decree, dated
01.08.2014 made in M.C.O.P.No.952 of 2010, on the file of the
Motor Accidents Claims Tribunal, (IInd Additional District
Judge), Special District Judge for MCOP Cases, Salem.

For Appellant : Mr.P.Suresh
for Mr.K.Moorthy

सत्यमेव जयते

JUDGEMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

In the accident, which occurred on 06.09.2009,
husband of the first respondent/claimant, aged 41 years, died.
Parents of the deceased claimed compensation of Rs.25,00,000/-,
under various heads. The appellant-Insurance Company, disputed
the manner of accident, negligence attributed to the driver of
the lorry, bearing Registration No.TAY 5253, owned by the 4th
respondent and insured with the appellant-Insurance Company and
consequently, liability to pay compensation claimed under
different heads.

2. Before the Tribunal, the first respondent/claimant examined herself as PW.1 and PW.2 is an eye-witness to the accident. Exs.P1 to P8 were marked on the side of the respondents/claimants. On behalf of the appellant-Transport Corporation, driver of the lorry, was examined as RW.2 and marked Ex.R1 - Salary Certificate, dated 30.07.2009.

3. On evaluation of pleadings and evidence, the Tribunal held that the driver of the lorry, insured with the appellant-Insurance Company, was negligent in causing the accident and awarded Rs.25,77,976/- with interest, at the rate of 7.5% per annum, from the date of claim, till the date of realisation.

4. Mr.P.Suresh, learned counsel for the appellant-Insurance Company submitted that the Tribunal has failed to see that the rider of the motorcycle was also responsible for the accident, and therefore, ought to have fixed contributory negligence, against both the driver of the lorry and motorcyclist. Quantum of compensation is also disputed.

I Heard the learned counsel for the appellant and perused the materials available on record.

5. It is the case of the 1st respondent/claimant that on 06.09.2009, about 15.30 Hours, when the deceased, Sekar, was riding a Hero Honda Splender Motorcycle, bearing Registration No.TN 54 Y 1058, along with his son, Minor Mathialagan, as a pillion rider, on Salem to Attur Main Road, near Thalavaipatty branch road, a lorry, bearing Registration No.TAY 5253, insured with the appellant-Insurance Company, came from behind, at a high speed, hit the motorcycle. Both the rider and pillion rider, fell down on the road and the wheel of the lorry ran over the head of motorcyclist, Sekar and he died on the spot. Ex.P1 - FIR has been registered against the driver of the lorry, in Cr.No.569 of 2009, under Sections 279 and 304(A) IPC., on the file of Yethapur Police Station. Exs.P3 and P4 are the Motor Vehicle Inspection Reports of both the vehicles, wherein, it is stated that the accident was not due to any mechanical defect of the vehicles. Ex.P5 is the charge sheet, filed against the driver of the lorry. PW.2, eye-witness to the accident, has also corroborated the version of PW.1.

6. Though RW.1, driver of the lorry, in his evidence, has stated that at the time of accident, it was raining and he drove the vehicle, bearing Registration No.TAY 5253, owned by the 4th respondent and insured with the appellant-Insurance Company, slowly and that the Motorcycle,

which came from behind, attempted to overtake the lorry and at that time, on seeing the oncoming bus, the motorcyclist applied sudden break, and slipped from the vehicle, fell down and thereafter, ran over by the wheel of the lorry, there is no independent evidence to support his version. No counter complaint has been filed by the driver of the lorry. Had the driver of the lorry, had driven the vehicle slowly and cautiously, accident would not have happened. Further, it is the case of the 1st respondent/claimant that the motorcyclist was hit from behind, which fact has been substantiated. On the facts and circumstances of the case, doctrine of *res ipsa loquitor*, can be applied. Let us consider some of the decisions on the doctrine of *Res Ipsa Loquitor*.

(i) In *Shanthi & 3 others v. K.Nallasamy* reported in 2009 (2) LW 606, at Paragraphs 8 to 11, held as follows:

"8.It is pertinent to point out that in an action for negligence, the legal burden of proof, no doubt rests on the claimant, but barring certain exceptional matters it may not be possible for the claimants to know what precisely led to the accident, in the considered opinion of this Court. As a matter of fact, this difficulty to the claimants can be avoided by applying the maxim '*Res Ipsa Loquitor*', which is not a principle of law, but a rule of evidence. Moreover, in certain cases it is quite possible for the claimants to rely on mere fact that something happened as affording *Prima facie* evidence of want of due care on other's part. In reality, '*Res Ipsa Loquitor*' is a principle which help them to do so.

9.In *Surjeet Singh V. Santhosh Kumari*, 1989 ACJ 466 (Punjab and Haryana), it is observed that 'the doctrine of '*Res Ipsa Loquitor*' does not dispense with the need to prove a fact alleged by a person. It only affects the mode of proof, with a view to mitigating the rigour of proof of negligence under certain circumstances, the common law invokes the doctrine'.

10.It is to be pointed out that the maxim of '*Res Ipsa Loquitor*' will come into operative play to the aid of the appellants/claimants, only when the circumstances indicate negligence on the part of the driver of the bus. The general principle that the burden of proof of negligence rests on the claimants cannot be altered in any manner, in the considered opinion of this Court. However, if the accident is proved to have occurred due to the negligence of the driver, the maxim '*Res Ipsa*

Loquitur' squarely applies and the presumption of negligence can be inferred and the burden will shift on the driver of the vehicle to show that he was not negligent at the time of the accident.

11. In *Basthi Kasim Saheeb v. Mysore State Road Transport Corporation*, 1991 ACJ 380, the Hon'ble Supreme Court has observed that 'if accident is admitted and the driver is not able to explain the accident, the principle of 'Res Ipsa Loquitur' can be applied'."

(ii) While explaining the difference between a tort and crime and the principles of *res ipso loquitur*, in *Jacob Mathew v. State of Punjab* reported in 2005 (4) CTC 540, at Paragraphs 10, 11, 27 and 48(1), the Apex Court held as follows:

"10. The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well-stated in the *Law of Torts*, Ratanlal & Dhirajlal (Twenty-fourth Edition 2002, edited by Justice G.P. Singh). It is stated (at p.441-442)- "Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."

11. According to Charlesworth & Percy on Negligence (Tenth Edition, 2001), in current forensic speech, negligence has three meanings. They are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances

but any one of them does not necessarily exclude the other meanings. (Para 1.01) The essential components of negligence, as recognized, are three: "duty", "breach" and "resulting damage", that is to say:-

1. the existence of a duty to take care, which is owed by the defendant to the complainant;

2. the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and

3. damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. (Para 1.23)

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence. (Para 1.24)

27. Res ipsa loquitur is a rule of evidence which in reality belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have been proved or made out by resorting to the said rule (See Syad Kabar v. State of Karnataka (1980) 1 SCC 30). Incidentally, it may be noted that in Krishnan and Anr. v. State of Kerala (1996) 10 SCC 508, the Court has observed that there may be a case where the proved facts would themselves speak of sharing of common intention and while making such observation one of the learned judges constituting the Bench has in his concurring opinion merely stated "res ipsa loquitur". Nowhere it has been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule. In our opinion, a case under Section 304A IPC cannot be decided solely by applying the rule of res ipsa loquitur.

48. We sum up our conclusions as under:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as

given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'."

In the above reported judgment, at Paragraphs 13 to 17, the Apex Court envisages the difference between the tort and crime, as follows:

"13. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimizing violations, may be motivated by thrill-seeking. These are clearly reckless.

14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, stated,

"Simple lack of care such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established." Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. Lord Porter said in his speech in the same case-

"A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability. (Charlesworth & Percy, *ibid*, Para 1.13)

15. The fore-quoted statement of law in Andrews has been noted with approval by this Court in Syad Akbar v. State of Karnataka (1980) 1 SCC 30. The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence, viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

16. Law laid down by Straight, J. in the case Reg v. Idu Beg (1881) 3 All. 776, has been held good in cases and noticed in Bhalchandra Waman Pathe v. State of Maharashtra 1968 Mh.L.J. 423, a three-Judge Bench decision of this Court. It has been held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

17. In our opinion, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree."

(iii) In The Managing Director, M/s.Dunlop India Ltd., v. S.G.Krishnakumari and 2 others reported in 1992 (1) LW 624, at Paragraph 6, held as follows:

"6. What is stated in the judgment of the Calcutta High Court, in Jeet Kumari v. Chittagong

A.I.R. 1947 Cal. 195 is not on the principle of burden of proof. A landmark judgment of the Supreme Court in *Shyam Sunder v. State of Rajasthan*, AIR 1974 S.C. 890, has made it clear that the maxim *res ipsa loquitur* is attracted to a case under Fatal Accidents Act, and the meaning of the word 'negligence' should be understood in the light of the said maxim for the purpose of proving such negligence by the employer. The Supreme Court has said.

The maxim *res ipsa loquitur* is resorted to when an accident is shown to have occurred and the cause of the accident is primarily within the knowledge of the defendant. The mere fact that the cause of the accident is unknown does not prevent the plaintiff from recovering damages, if the proper inference to be drawn from the circumstances which are known is that it was caused by the negligence of the defendant. The fact of the accident may, sometimes, constitute evidence of negligence and then the maxim *res ipsa loquitur* applies.

How to understand the maxim is also stated in *Shyam Sunder v. State of Rajasthan*, cases *supra*. The Supreme Court has said,

The maxim is stated in its classic form by Erle, C.J. See *Scott v. London and St. Katherine Docks* (1865) 3 H. and C. 596, 601:

...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 reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

The maxim does not embody any rule of substantive law nor a rule of evidence. It is perhaps not a rule of any kind but simply the caption to an argument on the evidence. Lord Shaw remarked that "If the phrase had not been in Latin, nobody would have called it a principle. See *Ballard v. North British Railway, Company* 1923 S.C. (H.L.) 43. The maxim is only convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without, having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would

result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing in the matter are at the outset unknown to him and often within the knowledge of the defendant. But though the parties' relative access to evidence is an influential factor, it is not controlling. Thus, the fact that the defendant is as much at a loss to explain the accident or himself died in it does not preclude an adverse inference against him if the odds otherwise point to his negligence. (See John G. Fleming. The Law of Torts, 4th ed. p.264). The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on commonsense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant (See *Barkway v. South Wales Transport* (1950) 1 All E.R. 392, 399).

Based upon the above, the Supreme Court has said, The plaintiff merely proves a result, not any particular act or Omission producing the result. If the result, in the circumstances in which he proves it makes it more probable than not that it was caused by the negligence of the defendant, the doctrine of *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability.

In the case of fatal accident, thus, when the victim of the accident himself is no more to disclose all the facts, and his heirs and legal representatives know not how the death occurred, beyond knowing that he suffered the accident while performing his duty, that the circumstances prove the result, and once the result is proved by them, they make it probable that it was caused by the negligence of the defendant. On such facts and doctrine of *res ipsa loquitur*, the Court must ask the defendant to explain how the accident occurred, and how the defendant is not guilty of negligence. This has to apply, particularly when it is not in doubt that in the ordinary course of things the accident would not have occurred if the management had used proper care." (emphasis supplied)

(iv) In *The Management of Thiruvalluvar Transport Corporation Ltd., v. K.Ayyavu* reported in 2002 (1) LW 786, at Paragraphs 4 to 13, 22 and 23, held as follows:

"4. The question is whether the principles of "res ipsa loquitur" would apply. What is res ipsa loquitur? Black's Law Dictionary defines it as follows:

"The thing speaks for itself. Rebuttable presumption or inference that defendant was negligent, which arises upon proof that instrumentality 'causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence. Res ipsa loquitur is rule of evidence whereby negligence of alleged wrongdoer may be inferred from mere fact that accident happened provided character of accident and circumstances attending it lead reasonably to belief that in absence of negligence it would not have occurred and that thing which caused injury is shown to have been under management and control of alleged wrongdoer. *Hillen v Hooker Const. Co., Tex. Civ. App., 484 S.W. 2nd 113,115*. Under this doctrine, when a thing which causes injury, without fault of injured person, is shown to be under exclusive control of defendant, and injury is such as in ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in absence of an explanation, that injury arose from defendant's want of care. *Lux Art Van Service, Inc. v Pollard, C.A. Ariz, 344 F. 2nd 883, 886,*"

5. In *Osborns Concise Law Dictionary* it is stated as follows.

"The maxim applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant, that a reasonable jury could find without further evidence that it was so caused."

6. In *Ramanatha Aiyar Law Lexicon* it is stated as follows:

"Res ipsa loquitur imports that the plaintiff has made out a prima facie case without any direct proof of actionable negligence."

7. In *Biswas Encyclopaedia Law Dictionary* it is stated that,

"this maxim applies in actions for negligence where the circumstances of an accident are such that it is so improbable that it could have occurred without the negligence of the defendant,

that it can be presumed that it was so caused.. The onus is on the defendant to disprove the assumed negligence."

8. In Halsbury's Laws of England Volume 23 @ p.671 the principle is restated as follows:

"An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, where the event charged as negligence "tells its own story" of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res ipsa loquitur* applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part. Where, therefore, there is a duty on the defendant to exercise care and the circumstances in which the injury complained of happened are such that with the exercise of requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance on the defendant to disprove his liability. In such a case, if the injurious agency itself and the surrounding circumstances are entirely within the defendant's control, the inference is that the defendant is liable and this inference is strengthened if the injurious agency is inanimate."

9. In Clerk & Lindsell, Fifteenth Edition, Chapter 10-112 page 485 on the Law of Torts it is stated as follows:

"It is only a convenient label to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability."

Two positive conditions and one negative condition must exist for the doctrine to apply:

(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.

Negative condition – (3) there must be no evidence as to why or how the occurrence took place."

10. In *British Columbia Electric Rail Co. Ltd. v Loach* (1914-15 All England Law Reporter 426) the law on the subject has been succinctly stated as follows:

"The inquiry is a judicial inquiry. It does not always follow the historical method, and begins at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origin; for judicial purpose they are remote."

11. "The maxim *res ipsa loquitur* is a principle which aids the court in deciding as to the stage at which the onus shifts from one side to the other. Section 114 of the Evidence Act, 1872 gives a wide discretion to the courts to draw presumptions of facts based on different situations and circumstances. This is in a way a recognition of the principle embodied in the maxim *res ipsa loquitur*." (Law of Torts by P.M.Bakshi - Annual Survey of Indian Law. Volume 23.)

12. In *Barkway v South Wales Transport Co. Ltd.* (1948-2 All England Reporter 460) Asquith, L.J. on the principles applicable as to onus of proof, it is stated as follows:

"(i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption.

(ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause

of the omni bus leaving the road is a tyre-burst, since a tyre-burst per se is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie v Raglan Building Co. Ltd.* (1941-1 K.B. 152) where not a tyre-burst but a skid was involved.

(iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres."

13. In *Roe v Minister of Health* and another (1954-2 Q.B. 66) Morris, L.J. Observed as follows:

"This convenient and succinct formula possesses no magic qualities nor has it any added virtue, other than that brevity merely because it is expressed in Latin."

22. In the Supreme Court decision in *Syed Akbar v State of Karnataka* (AIR 1979 SC 1848) relied on by the learned Counsel for the contesting first respondent it was held that the accident was due to error of judgment and in spite of the driver adopting best course according to his knowledge and belief, the accident occurred and the presumptions or inferences based on *res ipsa loquitur* could no longer be sustained. In that case it was held that,

"as a rule, mere proof that an event has happened or an accident has occurred, the cause of which is unknown, is not evidence of negligence. But the peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. It is to such cases that the maxim *res ipsa loquitur*' may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. In such cases (a) the event or accident must be of a kind which does not happen in the ordinary course of things, if those

who have the management and control use due care and (b) it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for the second requirement is that where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. Thus, for the application of the maxim *res ipsa loquitur* no less important a requirement is that the *res* must not only speak negligence, but pin it on the defendant."

There is absolutely no quarrel over the proposition of law laid down by the Supreme Court. But, what has to be seen in the present case is whether the ratio of the Supreme Court decision would apply.

23. In *Mangilal v Parasram and others* (1970) ACJ 86 (FB) in paragraph 39) it is stated as follows:

"(1) The standard to determine whether a person has been guilty of negligence is the standard of care which, in the given circumstances, a reasonable man could have foreseen.

(2) The test is foreseeability, not probability.

(3) The more serious the consequence if care is not taken, the greater is the degree of care which must be exercised.

(4) While the initial burden of proof of negligence is on the claimant, barring exceptional cases, the principle *res ipsa loquitur* comes into play. It is a rule of evidence and does no more than cast a provisional burden on the defendant.

(5) Having regard to the local conditions prevailing in this country, when '*res ipsa loquitur*' is attracted, it should be given as wide an amplitude and as long a rope as possible in its application to the case of a motor accident.

(6) The defendant cannot escape liability merely by preferring hypothetical explanations, however plausible, of the accident."

In the above reported judgment, this Court, at Paragraphs 17, 18, 19 and 21, held as follows:

"17. It would be appropriate to refer to Halsbury's Laws of England, III Edition, Volume 28 pages 93 and 94 and paragraph 98:

"A distinction must be drawn between children

and adults, for an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child or young person, the reason being that a child cannot be expected to be as careful for his own safety as an adult. Where a child is of such an age as to be naturally ignorant of danger or to be unable to fend for himself at all, he cannot be said to be guilty of contributory negligence with regard to a matter beyond his appreciation, but quite young children are held responsible for not exercising that care which may reasonably be expected of them.

Where a child in doing an act which contributed to the accident was only following the instincts natural to his age and the circumstances, he is not guilty of contributory negligence, but the taking of reasonable precautions by the defendant to protect a child against his own propensities may afford evidence that the defendant was not negligent, and is therefore not liable."

18. It has been held in *Amul Ramesh Gandhi v Abbasbha Kasambhai Diwan* (1978- 19 Gujarat Law Reporter 721) that "it is idle to suppose that a normal boy aged 12 who is not expected to be a paragon of prudence has the road sense or the experience of the hazards of the road traffic to the same extent as his elders.... It appears in the overall conduct of all the circumstances of the case that this is not a case in which a boy aged about 12 could reasonably be expected to take precautions for his own safety and that the only inference which could be drawn is negligence was that of the driver and his alone."

19. In the English case of *Jones v Lawrence* (1969-3 All E.R. 267) a boy of seven years and three months ran across the road from behind a parked van and there was a collision between the motor cycle and the infant plaintiff. It was held that the behaviour of the plaintiff was nothing other than that of a normal child, who was regretfully, momentarily forgetful of the perils of crossing a road; contributory negligence was negatived.

20. It has been held in *Sardar Mohendra Pal Singh v Prakash Chand Goyal* (1988-27 Reports (MP) 65) as follows:

"Normally it is for the claimants to prove the negligence on the part of the driver, but as

in some cases considerable hardship is caused to the claimants as the true cause of the accident is not known to them, but is solely within the knowledge of the driver who caused it, the claimants can prove it, but cannot prove how it happened to establish negligence on the part of the known claimants/driver. This hardship is sought to be avoided by applying the principles of *res ipsa loquitur*."

21. In *Madhya Pradesh State Road Transport Corporation v Kantidevi and others* (1987 SCJ 383) it has been observed as follows:

"In numerous cases it has been held that the driver of the vehicle is required to take notice of children or disabled persons who are using the road so as to ensure their safety within reasonable limits. All persons have right to walk on the road and are entitled to the exercise of reasonable care on the part of the person driving the vehicle. Therefore, it cannot be said that the persons who are using the road for walking etc. they use the road at their own risk. On the other hand, it is the duty of the driver to keep a proper look out for pedestrian and other users of the road. It is his duty, whenever he feels expedient, to give warning to the pedestrian and other road users by mechanical or electrical horn. In such circumstances even if other road users are found negligent it is for the driver of the bus to use his skill carefully and by exercising his due skill in driving the bus avoid the consequences of that negligence so that it may not result in any fatal accident."

In that case, the bus was driven at a very high speed in a busy locality, hit a cyclist from behind causing his death. The bus stopped at a distance of 50 feet from the place of accident. It was held that the accident was caused due to the rash and negligent driving of the bus driver."

(v) In *Cholan Roadways Ltd., v. G.Thirugnanasambandam* reported in 2005 (3) SCC 241, at Paragraphs 22 to 26, held as follows:

"21. *Res ipsa loquitur* is a well-known principle which is applicable in the instant case. Once the said doctrine is found to be applicable the burden of proof would shift on the delinquent. As noticed hereinabove, the enquiry officer has categorically rejected the defence of the

Respondent that the bus was being driven at a slow speed.

22. In Pushpabai Parshottam Udeshi and Others Vs. M/s. Ranjit Ginning & Pressing Co. Pvt. Ltd. and another [AIR 1977 SC 1735] this Court observed:

"6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence"

23. The said principle was applied in Sarla Dixit (Smt.) and Another Vs. Balwant Yadav and Others [(1996) 3 SCC 179].

24. In A.T. Mane [(1997) 2 SCC 745], this Bench observed:

"5. Learned counsel relied on a judgment of this Court in support of this contention of his in the case of Karnataka State Road Transport Corpn. Vs. B.S. Hullikatti [(2001) 2 SCC 574]. That was also a case where a conductor concerned had committed similar misconduct 36 times prior to the time he was found guilty and bearing that fact in mind this Court held thus:-

"Be that as it may, the principle of *res ipsa loquitur*, namely, the facts speak for themselves, is clearly applicable in the instant case. Charging 50 paise per ticket more from as many as 35 passengers could only be to get financial benefit, by the Conductor. This act was either dishonest or was so grossly negligent that the respondent was not fit to be retained as a Conductor because such action or inaction of his is bound to result in financial loss to the appellant corporation."

6. On the above basis, the Court came to the conclusion that the order of dismissal should have

been set aside. In our opinion, the facts of the above case and the law laid down therein applies to the facts of the present case also."

25. In *Thakur Singh Vs. State of Punjab* [(2003) 9 SCC 208], this Court observed:

"4. It is admitted that the petitioner himself was driving the vehicle at the relevant time. It is also admitted that the bus was driven over a bridge and then it fell into canal. In such a situation the doctrine of *res ipsa loquitur* comes into play and the burden shifts on to the man who was in control of the automobile to establish that the accident did not happen on account of any negligence on his part. He did not succeed in showing that the accident happened due to causes other than negligence on his part."

26. The burden of proof was, therefore, on the Respondent to prove that the vehicle was not being driven by him rashly or negligently.

(vi) In *Ravi Kapur v. State of Rajasthan* reported in 2012 (9) SCC 284, reported in 2012 (9) SCC 284, the Apex Court held as follows:

"Rash and negligent driving has to be examined in the light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to "rash and negligent driving" within the meaning of the language of Section 279 IPC. That is why the legislature in its wisdom has used the words "manner so rash or negligent as to endanger human life". (Para 12)

"Negligence" means omission to do something which a reasonable and prudent person guided by the considerations which ordinarily regulate human affairs would do or doing something which a prudent and reasonable person guided by similar considerations would not do. Negligence is not an absolute term but is a relative one; it is rather a comparative term. It is difficult to state with

precision any mathematically exact formula by which negligence or lack of it can be infallibly measured in a given case. Whether there exists negligence per se or the course of conduct amounts to negligence will normally depend upon the attending and surrounding facts and circumstances which have to be taken into consideration by the court. In a given case, even not doing what one was ought to do can constitute negligence. (Para 13)

The court has to adopt another parameter i.e. "reasonable care" in determining the question of negligence or contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person (for example a driver) to care for the pedestrian on the road and this duty attains a higher degree when the pedestrians happen to be children of tender years. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty cast on the drivers to see that their driving does not endanger the life of the right users of the road, may be either vehicular users or pedestrians. They are expected to take sufficient care to avoid danger to others. (Para 14)

The other principle that is pressed in aid by the courts in such cases is the doctrine of res ipsa loquitur. This doctrine serves two purposes—one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is prima facie evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of res ipsa loquitur in cases where no direct evidence was brought on record. (Para 15)

The courts have also taken the concept of "culpable rashness" and "culpable negligence" into consideration in cases of road accidents. "Culpable rashness" is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness (luxuria). "Culpable negligence" is acting without the consciousness

that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the neglect of civic duty of circumspection. In such a case the mere fact of accident is prima facie evidence of such negligence. The maxim *res ipsa loquitur* suggests that on the circumstances of a given case the *res* speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct. (Para 15)"

(vii) In *C.Kuppusamy v. Sri.Elumalai* reported in 2010 (4) LW 405, this Court held as follows:

"9. After having considered the evidence, particularly, the evidence given by the driver and conductor of the bus, the principle of *res ipsa loquitur* will apply and in such a case, it is for the owner and the driver of the vehicle to prove that the accident did not take place due to the rash and negligent driving of the vehicle. The Doctrine of *res ipsa loquitur* has been elaborately discussed by the Supreme Court in the case of *Pushpabai v. Ranjit G & P Co.* reported in AIR 1977 SC 1735, wherein Their Lordships held: - (Para 6, page 1739)

"The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Edn.) at p. 306 states: The maxim *res ipsa loquitur* applies whenever it is so improbable that

such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. In Halsburys Laws of England, 3rd Edn., Vol. 28, at p. 77, the position is stated thus: An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged a; negligence tells its own story of negligence on the part of the defendant, the story so told being clear and unambiguous. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part...

(viii) In *V.Kishan Rao v. Nikhil Super Speciality Hospital* reported in 2010 (3) LW 358, the Supreme Court held as follows:

"47. In a case where negligence is evident, the principle of *res ipsa loquitur* operates and the complainant does not have to prove anything as the thing (*res*) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence."

(ix) In *Perumal v. G.Ellusamy Reddiar* reported in 87 LW 122, this Court held as follows:

"The second is, even if the accident was a result of mechanical defect, whether reasonable care had been taken to prevent such breakdown resulting in the accident. The lorry had admittedly gone out of the road, jumped over the pavement and attacked the deceased who was actually standing on the steps of the tea stall. Under such circumstances, the doctrine of *res ipsa loquitur* would come into play. It is then, the burden shifts on to the respondent to prove that the accident was not due to negligence. The doctrine of *res ipsa loquitur* means that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case, the mere fact of the

accident is prima facie evidence of such negligence. Then the burden of proof is on the defendant to explain and to show that it occurred without fault on his part. I will assume in this case that the coming off of the left front wheel was not due to the impact itself but because of the sub-axle nuts breaking or slipping all of a sudden. But the respondent cannot escape liability by merely showing that the accident was as a result of a mechanical defect. He should further show that he took reasonable care to avoid such mechanical defect. There is no evidence as to whether the sub-axle nuts broke or slipped.

7. Bingham in Motor Claims Cases (6th Edition, page 183) points out that if an accident is due to a latent defect which is not discoverable by reasonable care, there is no negligence. Therefore it is not enough for the respondent to prove that the accident is due to latent defect, but he must further prove that the said defect was not discoverable by reasonable care. Regarding cases of mechanical defect causing accident, it is pointed out in R. v. Spruge (1961) 2 All E.R.688. that the defence of mechanical defect has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. In the present case, no doubt, there is no evidence to show that the defective nature of the sub-axle nuts was known to the driver or the owner of the vehicle. But the matter does not rest there. It must be shown by the respondent that the defect could not be detected in spite of exercise of reasonable care. In the case of mechanical break-down unless the defendant satisfies the Court that he arranged periodical check-up and carried out necessary repairs regularly and that he did everything in his power to eliminate mechanical unsoundness, the break-down would be only a neutral factor and not a valid defence. In the present case, there is absolutely no evidence to show that the 1st respondent took any care to avoid the mechanical defect. R.W. 1 the driver of the lorry, said that he did not know whether the mechanism was ever checked. Therefore I think the 1st respondent has not discharged his burden of rebutting the presumption arising from the doctrine of *res ipsa loquitur*."

7. Testing the findings of negligence, on the principles of preponderance of probability, we are of the view that there are no grounds for reversal. Hence, finding of negligence is confirmed. Therefore, the appellant-Transport Corporation is liable to pay compensation.

8. According to the 1st respondent/claimant, the deceased was aged about 41 years and as a Wireman in Tamil Nadu Electricity Board, earned Rs.17,287/- per month. According to the respondents/claimants, the deceased was the only earning member of the family, and that they were depended on him. Age of the deceased, as per Ex.P8 - 8th Standard Mark Sheet, is 41 years. Ex.P7 is the authoritative proof for the pay certificate of the deceased, wherein, it has been stated that the deceased was paid Rs.17,287/-. The said document has been marked through the Assistant Administrative Officer of the department. Though the appellant-Insurance Company has marked Ex.R1 - Salary Certificate, dated 30.07.2009, considering the Pay Certificate, marked as Ex.P7 - Salary Certificate, marked through Assistant Administrative Officer, the Claims Tribunal has fixed the monthly income as Rs.17,287/- and after adding 30% of actual salary towards future prospects, ie., Rs.5,186/-, computed the monthly income of the deceased as Rs.22,473/- (Rs.17,287/- + Rs.5,186/-).

9. Considering the number of dependants, 1/3rd of the income has been deducted towards personal and living expenses and the monthly contribution works out to Rs.14,982/-. As per the decision made in Sarla Verma v. Delhi Transport Corporation reported in 2009 (5) LW 561, the multiplier that may be adopted for the age group of persons from 40 years and 45 years is "14". The Tribunal has rightly applied "14" multiplier and arrived at the loss of contribution to the family as Rs.25,16,976/- (Rs.14,982/- x 12 x 14). That part, the Tribunal has awarded Rs.25,000/- towards loss of love and affection, Rs.25,000/- towards loss of consortium, Rs.5,000/- for transportation, Rs.5,000/- towards funeral expenses and Rs.1,000/- towards damages to clothes. Altogether, Rs.25,77,976/-, has been awarded as compensation to the respondents/claimants, with interest at the rate of 7.5% per annum, from the date of claim, till deposit, to be apportioned by the respondents in the manner set out in the award.

10. Though wife, aged about 32 years and children aged about 15 and 13 years respectively, have lost the love and affection of the bread winner of the family, the Tribunal has awarded an overall compensation of Rs.25,000/- under the head, loss of love and affection and Rs.25,000/- towards loss of consortium. 'Consortium' as per the Best v. Samuel Fox reported

in 1952 AC 716 means, "Duty owned by a wife to her husband and vice versa, companionship, love and affection, comfort, mutual services, sexual intercourse, etc." Consortium is not a pecuniary loss. In Rajesh and others v. Rajbir Singh and others reported in 2013(3) CTC 883, the Hon'ble Apex Court held as follows:

"In legal parlance, 'Consortium' is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for Loss of Consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By Loss of Consortium, the Courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the Courts award atleast Rupees one lakh for Loss of Consortium."

11. Legal representatives of the deceased, in particular, children have lost the love and affection of the deceased. In Rajesh v. Rajbir Singh reported in 2013 (2) TNMAC 55, the Hon'ble Apex Court has awarded Rs.1,00,000/-, to the legal representatives of the deceased, towards the loss of love and affection. Minor Daughter and son were aged 15 and 13 years respectively. Loss of love and affection, for the rest of their lifetime, cannot be measured, in terms of money. But the same has to be just.

12. Quantum of Compensation of Rs.5,000/- awarded under the head, funeral expenses, is less. On the aspect of quantum of compensation, under the head, funeral expenses, the Hon'ble Supreme Court in Rajesh and others Vs. Rajbir Singh and others reported in 2013(3) CTC 883, held as follows:

"21. We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of compensation under the head 'Funeral Expenses'. The 'Price Index', it is a fact has gone up in that regard also. The head 'Funeral Expenses' does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs.25,000/-."

13. Compensation of Rs.5,000/- awarded towards transportation and Rs.1,000/- towards damages to clothes is also less. In view of the above, the compensation awarded by the Tribunal, cannot be said to be excessive, warranting interference. Quantum of compensation awarded by the Tribunal is less.

14. In view of the above discussion and decisions, this Civil Miscellaneous Appeal is dismissed. The appellant-Insurance Company is directed to deposit the award amount, less the amount already deposited, with proportionate accrued interest and costs, to the credit of M.C.O.P.No.952 of 2010, on the file of the Motor Accidents Claims Tribunal, (IInd Additional District Judge), Salem, within a period of four weeks, from the date of receipt of a copy of this order.

15. On such deposit being made, except the minor, the 1st respondent/claimant is permitted to withdraw the same, by making necessary applications before the Tribunal. Minors' share shall be deposited in any Nationalised Bank in fixed deposit, under the reinvestment scheme initially for a period of three years, proximate to the residence of the 1st respondent herein/claimant. The interest accruing on the share of the minor shall be paid to the first respondent/guardian once in three months, till they attain majority. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

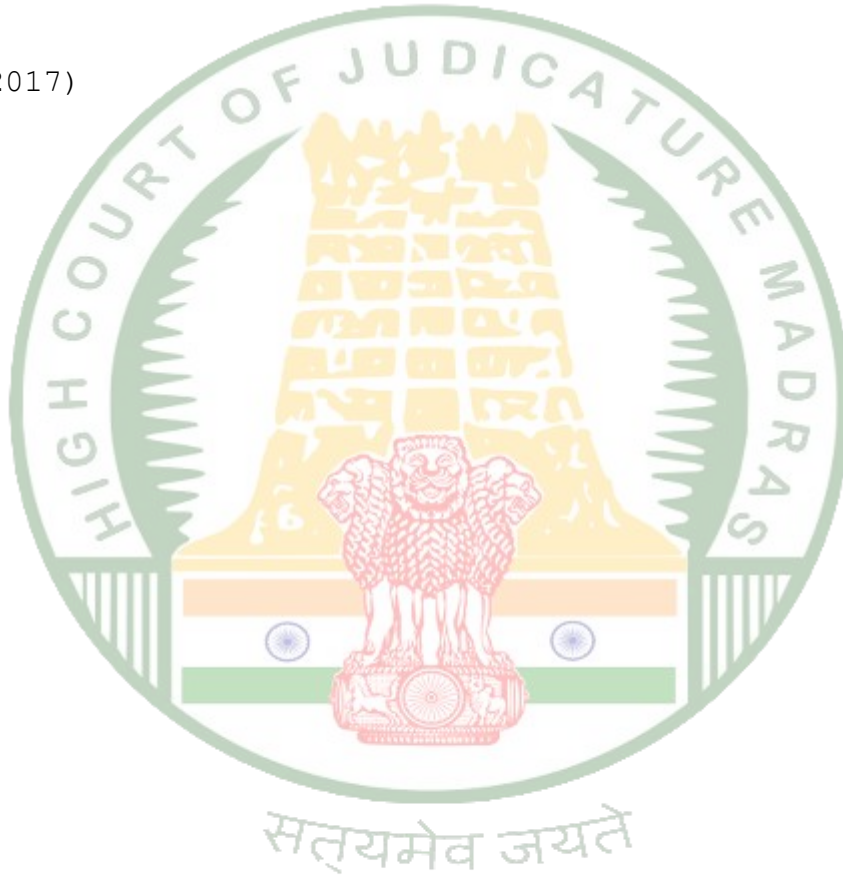
To

The Motor Accidents Claims Tribunal,
(IInd Additional District Judge),
Special District Judge for MCOP Cases,
Salem.

+lcc to Mr.K.Moorthy, Advocate, S.R.No.42341

C.M.A.No.2815 of 2015

SJ(CO)
CA(07/07/2017)



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