HIGH COURT OF AUSTRALIA

Government Insurance Office Of N.S.W.

Vs.

Fredrichberg

(Barwick C.J.(1), Kitto(2), Menzies(3), Windeyer(4) and Owen(5) JJ.)

30 Aug. 1968

BARWICK C.J.

The appellant is the authorized insurer of the third party (N.S.W.) of one Hannon who died in an impact between his car and a semi-trailer upon the Hume Highway, near Gunning, in New South Wales. A verdict was returned for the defendant (the now appellant) in an action brought against it by virtue of the provisions of s. 15(2) of that Act by the respondent under the Compensation to Relatives Act, 1897-1953 (N.S.W.) in respect of the death of her husband, who was a passenger in that car at the time of that collision. The Supreme Court (Court of Appeal Division) upon the respondent's motion set aside that verdict and ordered a new trial of the action. This decision was taken upon two grounds which are not completely independent of each other. The first ground was that the trial judge in summing up did not expressly tell the jury that the case before them was a case to which, as it was said, the "maxim or rule of res ipsa loquitur" applied and the second ground was that the trial judge had unduly restricted the area of the respondent's counsel's address to the jury in that he did not allow counsel to address them upon that "doctrine" and upon its relation to the facts of the case. (at p405)

2. The respondent's husband was one of a number of people travelling along the Hume Highway from Melbourne to Sydney by night in the car. They had stopped to drink hard liquor at one point along the way and they had run into fog not long before the accident and in any case the length of the journey could be said to have induced fatigue which called for a halt to rest. Near Gunning on the Southern Highlands of New South Wales the car was being driven upon its own side of the pavement where the road curved to the car's left when an articulated vehicle approached from the opposite direction. It was said in evidence that the car suddenly without warning or apparent cause swerved to its right bringing itself on to its wrong side of the road and that the truck at about the same time veered to its right. The near side of the car came into contact with the nearside of the truck, the impact apparently taking place at or near a petrol tank on the truck, causing the tank to burst and its contents to ignite. In the result, some of the occupants of the car were not merely killed but incinerated: these included Hannon, who was said to be driving the car at the time, and the respondent's husband. A small car was following so close behind the car involved in the collision that it also collided with the truck and was in turn destroyed by fire. The evidence as to the circumstances of the collision was given by the driver of the truck and by the driver of the small car.

Those occupants of the car who survived were asleep at the time of the impact and unable to speak of what had happened. There was no direct evidence as to who was driving the car at the time of its impact with the truck but there was evidence which, if it were accepted, would support the view that Hannon was then driving. It was possible from the evidence to take either the view that the movement of the car from its correct to its incorrect side of the road was caused by an antecedent movement of the truck across the road or the view that the movement of the truck was consequential upon the sudden swerve of the car across the road: and it was possible that neither possibility preponderated over the other. (at p405)

3. I have carefully perused the summing up of the learned trial judge, bearing in mind the criticisms of the Supreme Court. He told the jury very carefully and precisely, in my opinion, that they must be satisfied on the probabilities that at the time of the impact between the vehicles, the car was being driven, as the respondent claimed, by Hannon or at any rate not by the deceased husband of the respondent and that it was being driven with a lack of reasonable care. He told them quite clearly that they were entitled on the evidence to find negligence in the driving of the car and that they need not find any specific act causing or contributing to the impact which they could say was done or omitted negligently. Perhaps the best way to indicate the precision of the trial judge's summing up is to quote several passages from it which, though they were separated in point of time, do indicate how the case was left to the jury. There was, in my opinion, nothing in the rest of the summing up which either obscured these directions or rendered them unlikely to be effective.

> "In these cases the right to succeed depends upon establishing
> what is known as a legal cause of action and only if that
> is established is the plaintiff entitled to succeed; as it was
> said the mere occurrence of an accident is not sufficient. The
> legal cause of action here has been described by the word
> 'negligence'. In other words, it is alleged that Hannon was
> not only the driver but he was guilty of the legal wrong of
> negligence and it was that legal wrong which caused injury
> to Fredrichberg, so obviously it is necessary for me to indicate
> to you as a matter of law what is meant by this cause of action
> which is called negligence."
>
> . . .
> "So here you must ask yourselves: What were the circumstances
> of that evening, and in those circumstances did this
> driver fail to take that care which a reasonable man would have
> been expected to have taken in those circumstances?"
>
> . . .
> "An allegation is proved if and when you come to the
> considered conclusion that there is a balance of probability
> in its favour. That is what counsel refer to when they talk
> about proof upon a balance of probability."
>
> . . .
> "Now the second issue on this question of liability is whether

the car was driven by Hannon negligently in the manner I have defined. In other words, is it shown that Hannon in the circumstances of that night drove the car in a manner in which it would not have been driven by a reasonable man? Now this presents some more general problems, and I will mention them. In many cases the parties go about the determination of this issue by nominating some specific ground of alleged negligence. They might say for example the speed was too high or that there was no proper lookout being kept because the defendant may have admitted that at the time he was not looking or he was talking to somebody beside him, or something like that; and there can be seen in some specific respect a failure to do something which a reasonable man would have done or the doing of something which a reasonable man would not have done in the circumstances, and that that caused for example his car to run across the road and into another, run across the road in front of some other vehicle. The position here is not quite on those lines. The allegation made here is that the car left its correct side of the road and went on to its incorrect side of the road so as to come into collision with the truck coming from the other direction. The allegation is made that in the circumstances of this case that establishes on the balance of probabilities negligence on the part of Hannon."

. . .

"You are asked to say whether or not upon that evidence it is established that Hannon drove negligently. To enable you to make that determination you must be in a position to say, and you are asked to say, accordingly whether or not of all the possible explanations that might be given for that movement of the car it is more likely than not that that movement
of the car was caused by some failure in care on the part of Hannon. In making that determination you are asked to bring here your own knowledge and experience of the roads and traffic on the roads and so on. It is a question left to four men selected at random from the community to make the decision and you will find negligence established if you consider upon this evidence that that movement of the car is more likely than not to be explained by some act or motion on the part of Hannon which can be called in the circumstances negligence. It is not necessary in these cases for the plaintiff to prove some specific act of negligence or that the evidence should carry it that far. It is sufficient if, and of course only if, you find upon this evidence that negligence is the more probable explanation for this manoeuvre of the car. I cannot say much more than that without putting the arguments put to you by each counsel so fully this morning and that would only be

> trespassing on your time and mine. So let me say in conclusion upon this issue of liability the plaintiff succeeds if she shows upon the balance of probabilities that Hannon was the driver and that he was negligent in his driving and that that was the cause of the injury and death of Fredrichberg. If those two issues of fact are proved by the plaintiff, she succeeds. Unless they are proved, she fails."

4. The transcript of the proceeding at the trial showed that at the close of the evidence the appellant's counsel moved for a verdict by direction upon the footing that there was no evidence fit to be submitted to the jury of negligence on the part of the driver of the car. The case was tried after the decision of the Supreme Court in Priest v. Arcos Enterprises Pty. Ltd. (1964) NSWR 648 and before the decision of this Court in Anchor Products Ltd. v. Hedges [1966] HCA 70; (1966) 115 CLR 493 . It appeared in the course of discussion with counsel that the trial judge felt himself bound to hold that the respondent's counsel could not present the respondent's case to the jury in the alternative depending on the one hand upon establishing negligence by the occurrence itself and, on the other hand, by proof of specific acts of negligence: see Piening v. Wanless [1968] HCA 7; (1968) 117 CLR 498 . It is important in this connexion to identify what the trial judge understood counsel to be indicating as the "occurrence" and to this aspect I will return later. For the moment it is enough to mention that counsel for the respondent submitted that the occurrence which he had in mind did indicate negligence on the part of the driver of the car and that a presumption of fact in favour of the respondent had arisen which it was for the appellant to displace by some explanation of the impact which did not show his negligence. This of course was a view which would conform to the decisions of the English Courts to which reference has been made in Mummery v. Irvings Pty. Ltd. [1956] HCA 45; (1956) 96 CLR 99 and Nominal Defendant v. Haslbauer [1967] HCA 14; (1967) 117 CLR 448 . But the trial judge would not accept the view that there was any presumption arising in favour of the respondent: and on this he was, in my opinion, plainly right. He rejected the appellant's application for a verdict by direction and in ruling formally that there was evidence to go to the jury gave reasons for his opinion. It is proper, I think, having regard to what has happened in this case that I set out what his Honour then said and the responses which counsel gave to his inquiry as to whether he had made himself plain.

> "Dealing with the application for a verdict by direction the plaintiff's case as her counsel broadly put it is that the car in

which the deceased Fredrichberg was travelling, was at the time of the collision being driven by Hannon, that the deceased was a passenger in that car, that whilst that car was travelling north on its correct side of the road there was an articulated

> vehicle travelling in the opposite direction upon the same road and a collision resulted after the car suddenly moved from its correct side of the road on to its incorrect side and across the path of the articulated vehicle. However, there is, in addition, evidence which, so far as it be accepted, gives specific details of the collision and as well there is evidence which gives with some particularity the circumstances of the movement of the two vehicles over some appreciable period preceding the actual collision.

"It is clear that the question of law for me to decide in this application is whether upon all this evidence it is reasonably open to a jury to draw an inference upon the balance of probabilities that the collision was due to negligence on the part of Hannon. In my view I should answer that question in the affirmative.
"The issue therefore for the jury will be whether they are satisfied upon the evidence here before them that on a balance of probabilities the collision was due to negligence on the part of Hannon.
"I should make two additional observations. The first is this: the application for a verdict by direction made by the defendant and my decision rejecting it, are not matters for discussion by counsel with the jury. The second observation I make arises from comments made by counsel in the opening of the plaintiff's case to the jury when discussing the law relating to negligence that there is a presumption that a vehicle is not being carefully driven if it goes on to its wrong side of the road and if such is proved there is imposed upon the defendant an obligation to explain this accident. I do not regard these as a correct statement of the law. There is no presumption in law that negligence is established from any limited circumstances in this case and there is no onus or obligation cast by the law upon the defendant of proving any fact or specifically rebutting any such alleged presumption. Do I make myself clear?
Plaintiff's Counsel: Yes.
Defendant's Counsel: Yes.

5. Neither in these reasons nor in any other part of the transcript of the proceedings did the judge set any limitation upon what the respondent's counsel could put to the jury except that as appears above, he would not allow what had passed between himself and counsel in the absence of the jury to be disclosed to or debated with the jury. There could be and was no criticism of this attitude on the part of the trial judge. (at p410)

6. However, the Supreme Court on the motion for a new trial was informed by counsel for the respondent, who was not the counsel who had appeared at the trial, that significant matters had taken place in the discussion between the judge and counsel either before his refusal to direct a verdict or perhaps thereafter which for some unexplained reason had not been recorded by the shorthand writer and transcribed into the judge's notes. The Supreme Court was told that the judge had said that the case was not one to which the "doctrine" of res ipsa loquitur applied and that he had ruled that counsel could not address the jury on the footing that it was such a case. This information we are told the Supreme Court accepted from counsel without formal proof, and it is evident from that Court's reasons for judgment that it was influenced by this information. (at p410)

7. At the hearing of the appeal before this Court, counsel for the respondent proffered an affidavit by his instructing solicitor setting out the solicitor's account of what had happened at the trial but had not been recorded by the shorthand writer. This Court felt obliged because of the course taken

in the Supreme Court to allow this affidavit to be read upon counsel's assurance that it merely contained the matter which had been placed before the Supreme Court in an oral form. Otherwise, of course, such material would not have been received by this Court. It seems to me that the better course, particularly where, as in New South Wales, the judge's notes are taken by an official shorthand writer and transcribed daily, is to refuse to allow that transcript to be supplemented by an account of the proceedings or of any part of them given by one of the parties, or his representative. It might possibly be otherwise if both parties agree upon the supplemental matter: but even in that case considerable caution should be exercised in allowing the additional material to be given (cf. Thompson v. Andrews (1968) 1 WLR 777; (1968) 2 All ER 419). Counsel are well able to ensure at a trial that all significant matters are recorded. (at p410)

8. Annexed to the affidavit is a memorandum which the deponent solicitor said he had made after a lapse of some days from the conclusion of the trial. According to the affidavit, this memorandum had been shown to the senior and junior counsel who had appeared for the respondent at the trial, and each had informed him that it accorded with his recollection of what had occurred. I think it important that this memorandum be set out as its contents have a bearing on the views which I am about to express. (at p410)

9. "Either on the afternoon of 20th October 1966, after the retirement of the jury, or on the following morning, 21st October 1966, before or after the trial judge delivered his judgment on the defendant's application for a verdict by direction and prior to his summing up, there was considerable legal argument directed to the contention of plaintiff's counsel that the case was an appropriate one for the application of the doctrine of res ipsa loquitur. The trial judge indicated to counsel that he felt that this question should be resolved before counsel's closing addresses and Mr. Woodward submitted that he was entitled to address the jury on the application of the doctrine and its effect. The trial judge stated that plaintiff's counsel could not address the jury in the alternative, that is by submitting that the jury was entitled to conclude that the driver had been negligent by means of applying the res ipsa loquitur doctrine, or that if it was not prepared to do this the jury could find that there was some evidence, apart from the mere collision, from which negligence could be inferred. He ruled that the plaintiff's counsel was not entitled to address in the alternative and that he was entitled to address only either on the basis of res ipsa loquitur or on the basis that there was evidence of facts from which specific negligence could be inferred. (at p411)

10. "The trial judge then stated that in his view it was not an appropriate case for the application of the doctrine for the reason that there was evidence which, if accepted, could explain the accident, in that there was evidence of the course of the vehicle and the fact that the vehicle swerved and in addition there was other evidence from which specific negligence might be inferred by the jury and he accordingly ruled that the plaintiff's counsel should be precluded from submitting the doctrine and its effect to the jury. (at p411)

11. "In accordance with his Honour's ruling, plaintiff's counsel addressed only on the basis that there was certain factual evidence before the jury from which the jury was entitled to infer specific negligence, and he made reference to the matters from which the trial judge had in argument suggested that negligence could be inferred, that is the fact that the driver had been driving for a considerable time, there was some evidence of alcohol having been consumed and it might be that the driver's control of the vehicle had been affected by the fog; plaintiff's counsel at no time addressed the jury on the basis of the doctrine of res ipsa loquitur." (at p411)

12. It is not very easy either from the transcript record of the trial or from that record supplemented

by the above material to obtain a clear picture of what case the respondent's counsel at the trial was seeking to make. The trial judge, it seems to me, must have had difficulty in comprehending it. Doing the best I can with the material now before this Court, it appears to me that the respondent's counsel sought to maintain the proposition that the impact of the vehicles was itself the occurrence which raised a presumption of negligence in the respondent's favour or, at the least, which afforded evidence of negligence on the part of the driver of the car. The trial judge appears to me to have so understood the matter. Counsel claimed, I think, to be entitled to put the respondent's case to the jury on that footing as well as upon the basis of the other proved facts which included the swerve of the car. I cannot understand that part of the solicitor's memorandum which says that "there was some evidence apart from the mere collision, from which negligence could be inferred", or expressions in the trial judge's reasons for refusing to direct a verdict, except upon the footing that that was what the respondent's counsel was seeking to do. (at p412)

13. It is incontestable that his Honour correctly refused to regard the impact itself as raising an inference, let alone a presumption, of negligence on the part of the driver of the car. I can quite understand the trial judge saying that the so-called "doctrine" of res ipsa loquitur had no application to the case if, as I think, the respondent's counsel sought to treat the impact itself as the occurrence. As appears from the quotation I have made from his reasons for refusing to direct a verdict and from his summing up to the jury, the trial judge ruled that the facts proved in evidence would support an inference of negligence on the part of the driver of the car. In that evidence, nothing but the circumstances of the swerve of the car across the road, if the jury believed it to have preceded the movement of the truck across the road, would support such an inference. Taking that movement of the car as the relevant occurrence, it did furnish some evidence of negligence by the car driver. The evidence as to the taking of hard liquor, the continued driving over a long period of time despite fatigue might tend to fortify, though it would not itself without the swerve support an inference that there was negligence in fact in the driving of the car at the relevant time. Thus, in leaving the case to the jury and telling them that they could find for the respondent without finding any specific act of negligence on the part of the driver of the car, the trial judge, in my opinion, gave the respondent the full benefit of what has been referred to in these proceedings as the "maxim, rule or doctrine of res ipsa loquitur". (at p413)

14. But it has been claimed that none the less counsel ought to have been allowed to discuss the "doctrine" with the jury: and that the judge was bound to tell the jury that the case was one to which the doctrine applied. (at p413)

15. In my opinion, these propositions are misconceived. So far as Australia is concerned, the question of finding some evidence of negligence on the part of the defendant in the occurrence itself has now had considerable discussion. Fitzpatrick v. Walter E. Cooper Pty. Ltd. [1935] HCA 82; (1935) 54 CLR 200 ; Davis v. Bunn [1936] HCA 44; (1936) 56 CLR 246 ; Mummery v. Irvings Pty. Ltd. [1956] HCA 45[1956] HCA 45; ; (1956) 96 CLR 99 ; Anchor Products Ltd. v. Hedges [1966] HCA 70; (1966) 115 CLR 493 ; Nominal Defendant v. Haslbauer [1967] HCA 14; (1967) 117 CLR 448 ; Piening v. Wanless [1968] HCA 7; (1968) 117 CLR 498 . (at p413)

16. Out of these cases emerge, it seems to me, as decisions of the Court, the following relevant propositions binding upon the Courts in Australia. First, that the so-called "doctrine" is no more than a process of logic by which an inference of negligence may be drawn from the circumstance of the occurrence itself where in the ordinary affairs of mankind such an occurrence is not likely to occur without lack of care towards the plaintiff on the part of a person in the position of the defendant; or perhaps, as it might more accurately, in my opinion, be expressed, where, in the

opinion of the judge, the jury would be entitled to think that such an occurrence was not likely to occur in the ordinary experience of mankind without such a want of due care on the part of such a person. Second, that a case in which this can properly be said should be allowed to go to the jury whether or not there is evidence of specific acts or occurrences which could be found to be negligent but that no presumption of any kind in favour of the plaintiff thereby arises. That the occurrence affords evidence of negligence does not merely not alter the onus which rests on the plaintiff to establish his case on the probabilities to the satisfaction of the jury, but does not give the plaintiff any entrenched or preferred position in relation to the decision by the jury of that question. I quite realize that it may be attractive to the mind to conclude that, because the jury is allowed to draw an inference of negligence from the occurrence for the reason that they are at liberty to think that it was not likely to occur without a want of care on the part of the defendant, the inference of negligence must be drawn by them if the ground upon which it may be drawn is not displaced by other evidence explaining the occurrence. That line of thought seems to me to have found favour with English Courts and to have resulted in the creation by the decisions of those Courts of a presumption of fact in favour of a plaintiff in such circumstances. But this Court has been unable to accept such reasoning and the law is otherwise in Australia. In my opinion, the jury are not bound either to conclude that such an occurrence was unlikely to occur without negligence on the part of a person in the defendant's position or to draw the inference that it did in fact occur in the case before them because of the negligence of the defendant. All that has happened, in my opinion, at the point in the hearing of a case at which the judge rules that there is evidence of negligence on the part of the defendant furnished by the occurrence itself is that the judge is satisfied that a jury would be entitled to conclude that such an occurrence in the ordinary affairs of mankind is not likely to occur without negligence on the part of a person in the situation of the defendant. For the rest, it is a question for the jury whether they think the occurrence unlikely in this sense and, if so, whether in the particular case they will be satisfied that there was in fact relevant negligence. (at p414)

17. We are not concerned in this case with the effect of any explanation of the occurrence which the defendant is able to give and as to the appropriate directions then to be given. What we are concerned with in this case is the quesiton whether after it has been decided that there is evidence to go to the jury and there is no question of an explanation, the jury must be told not merely that on the evidence they may find against the defendant on the issue of liability without identifying any particular act of negligence but that the reason why they are at liberty so to find is because, in the ordinary affairs of mankind, the occurrence is not likely to occur without negligence on the part of the defendant. In my opinion, in general, the trial judge is not bound to explain to the jury the reason why he has ruled that there is evidence on which they may find a verdict for the plaintiff. To tell them that in the Court's opinion such an occurrence is unlikely to occur without relevant negligence would be an error for it is their opinion of what is likely or unlikely which is of consequence at that stage of the trial. If it is a case where the occurrence itself provides the evidence of negligence, they will usually as men of the world recognize that the occurrence itself speaks of the likelihood of negligence if that is the fact. But of course there may be cases in which the nature of the occurrence, because of its complexity or of some other feature, makes it necessary for the jury to be given a direction such as I shall later mention. But the present is not a case of that kind. Here, there being neither complexity in the occurrence nor any attempted explanation of it, a direction that the jury can find for the plaintiff although they are not able to identify the particular act or acts of negligence which caused or contributed to the impact is, in my opinion, a sufficient direction. (at p415)

18. But, in my opinion, there can be no objection to the judge informing the jury that they may take the view that the occurrence was not likely to have taken place without some negligence on the part

of the defendant, provided he properly identifies for them what was relevantly the occurrence and the facts in relation to it of which they should be satisfied, and makes it plain that though they may think that in the ordinary affairs of men such an occurrence is not likely to occur without negligence upon the part of a person in the place of the defendant, they must yet be satisfied in their minds that more probably than not the defendant was in fact negligent and that his negligence, even though they cannot identify the particular negligent act or omission, caused the plaintiff's injuries. As I have said, there may be cases in which these directions are not only permissible but, for the reasons above mentioned, necessary. I should mention in passing that my references to the defendant in the preceding paragraphs include, in cases where the defendant did not do the act or make the omission which is said to be in breach of duty, the person for whose acts or omissions the defendant is liable. (at p415)

19. Thus there is, in my opinion, no room for counsel, as was claimed in this case, to discuss with the jury "the doctrine of res ipsa and its effects". Counsel can of course attempt to persuade the jury that, using their general knowledge of affairs, they should conclude that the occurrence because of its nature and circumstances was in all probability due to the defendant's negligence and in that connexion to urge that in point of fact they should take the view that the circumstances of the occurrence speak for themselves in that regard. (at p415)

20. In the present case, nothing in the transcript record of the proceedings or in the additional material we received convinces me that the trial judge prevented counsel from doing any of these things, though it is I suppose possible that counsel incorrectly thought that he had. Certainly no exception was taken to the summing up or any protest made by counsel at its conclusion in respect of the matters now claimed to have been wrongly done by the trial judge. (at p415)

21. In my opinion, his Honour's summing up was not merely adequate but in the relevant respects complete: and it does not appear that his Honour improperly restricted the scope of respondent's counsel's address to the jury. It follows that the Supreme Court ought not to have set aside the verdict, and that this appeal should be allowed. (at p416)

KITTO J. I have had an opportunity of reading the judgments prepared by the Chief Justice and Owen J. and I agree with their Honours that the appeal should be allowed. (at p416)

MENZIES J. This appeal troubles me because I cannot be sure that counsel for the plaintiff at the trial did not, in addressing the jury, labour under some inhibition from which he should have felt free. However, as I am satisfied both that there was no misdirection on the part of the learned trial judge, and that there is nothing, either in the record or in the other material put forward on behalf of the appellant, to warrant a conclusion that counsel's difficulty was due to any restriction actually placed upon him by the learned trial judge, I have reached the conclusion that there was no sound ground for setting aside the jury's verdict in favour of the defendant. (at p416)

2. For the foregoing reasons and for the reasons stated by Owen J. in his judgment, which I have had the advantage of reading, I am of the opinion that the appeal should be allowed. (at p416)

WINDEYER J. The essential question of fact in this case was whether the driver of the vehicle in which the plaintiff's husband was killed was negligent, and whether that negligence caused the collision. That question was to be decided by the jury. If the jury were properly directed and nothing occurred which vitiated the trial, their verdict ought not to be disturbed. That they were correctly directed is I think indisputable. But it is said that the case for the plaintiff was in some way

hampered, because, as it was put, counsel did not address the jury on "the doctrine of res ipsa loquitur". It is said that had he not been prevented by the learned trial judge, he would have urged that from the "mere fact of the collision" the jury might infer negligence on the part of the driver of the car in which the deceased man was. To support this criticism of the course and events of the trial a memorandum, as it was called, prepared and verified by the solicitor for the respondent was produced to the Court. I share the misgivings which have been expressed by the Chief Justice and by my brother Owen as to our considering this document. My doubts have been aggravated by my reading the remarks of the Court of Appeal in Thompson v. Andrews (1968) 1 WLR 777; (1968) 2 All ER 419 . However we did receive the document; and I have given careful attention to it. It suggests to me that either it is a somewhat garbled account of what occurred at the trial or that counsel's submissions to his Honour were based on some misapprehensions of law and fact. The memorandum must, of course, be read with the shorthand writer's transcript of what occurred. In so far as counsel put to his Honour that what was called the "doctrine of res ipsa loquitur" shifted the onus of proof, his Honour rightly refused to accept this proposition. In so far as the submission was that the mere fact of a collision without more could found an inference of negligence on the part of the driver of one vehicle rather than the other, the proposition is obviously untenable. There was however more in this case. There was evidence that the car in which the deceased man was travelling swerved, without warning, across the road and into the path of the oncoming vehicle. It was for the jury to consider how far they accepted this evidence, and what inference they would draw from the facts as they found them. His Honour's remarks to counsel during the course of the trial amounted, it seems, only to this: that there was evidence that the collision occurred because the car suddenly swerved in its course; and that, that being so, the jury were not left with the mere fact of a collision; that they had evidence that it occurred because of the swerving of the car; that, if they accepted that as the fact, they must consider whether in all the circumstances they should infer from it negligence on the part of Hannon. His Honour's summing up to the jury put their task clearly before them. Some questions that they asked shewed that they had appreciated their task, and were considering the evidence which they took to bear on the issues they had to try, including matters indicative of the course of the vehicles. They would not, I think, have been aided in their task by being further told by counsel, either in a Latin phrase or in English, that they must consider what inference they should draw from the facts of the occurrence as they found them, and that one view of them would support an inference of negligence on the part of the driver of the car. It was for the jury to consider the evidence, and having come to a conclusion as to the facts to ask themselves what inferences they should draw from them. That they could draw an inference of negligence had been made clear to them. That they were not bound to do so, and that they must determine the issue on the whole of the evidence, was made equally clear. Their verdict was open to them on the evidence. Whether they arrived at it because they were not satisfied that Hannon was in fact the driver of the car, or because they found that he was, but were not satisfied that the collision was the result of negligence on his part, we do not know and need not, indeed must not, speculate. In my opinion the jury's verdict must stand. I have read what has been written by the Chief Justice and Owen J. I have added my remarks only to emphasize my concurrence. (at p418)

2. I would allow the appeal. (at p418)

OWEN J. This is an appeal by leave from a decision of the Court of Appeal of the Supreme Court of New South Wales ordering a new trial in an action brought under the Compensation to Relatives Act in which the jury returned a verdict for the defendant, the present appellant. (at p418)

2. The plaintiff's husband was killed in an accident which occurred when a Holden motor car in which he was travelling and a semi-trailer came into collision on the Sydney-Melbourne road near

Gunning in the early hours of the morning of 30th November 1963. There were six persons in the Holden car which, it was said, was being driven at the time of the accident by a man named Hannon whose insurer was the appellant. Hannon and three of the passengers in the car were killed. Two other persons who were also in the car were asleep at the time of the collision and were therefore unable to give any evidence as to the circumstances which led to its occurrence. Evidence was, however, given by the driver of a car which was following the Holden car and by the driver of the semi-trailer which was being drvien in the opposite direction to the Holden car that as the two vehicles approached one another the car, which was then proceeding on its correct side of the road, suddenly swerved to the right to its incorrect side and collided with the semi-trailer. (at p418)

3. I have no doubt that if these facts were established, the jury would have been entitled to infer from them that the occurrence of the accident was due to some act of negligence on the part of the driver of the car and this was the view which was taken by their Honours in the Court of Appeal. They considered, however, that the learned trial judge had failed to direct the jury to this effect and they appear to have based this conclusion to some extent at least upon the fact that in the course of a discussion between his Honour and counsel for the plaintiff on a motion by counsel for the defendant for a verdict by direction for the defendant, which took place in the absence of the jury and before counsel began their addresses, his Honour had expressed doubt whether the case was one for the application of the rule of common sense which finds expression in the phrase "res ipsa loquitur". But it seems to me, with all respect, that in considering whether his Honour had adequately dealt with the issue of negligence in the summing up, it is not to the point to inquire whether he was or was not of the opinion that an inference of negligence could be drawn from the fact that the car had, for no apparent reason, suddenly swerved across the road. The question whether the summing up was defective is to be determined by considering its terms and what it would have conveyed to the jury. In dealing with the issue of negligence, what his Honour said was:

> "Now the second issue on this question of liability is whether the car was driven by Hannon negligently in the manner I have defined. In other words, is it shown that Hannon in the circumstances of that night drove the car in a manner in which it would not have been driven by a reasonable man? Now this presents some more general problems, and I will mention them. In many cases the parties go about the determination of this issue by nominating some specific ground of alleged negligence. They might say for example the speed was too high or that there was no proper lookout being kept because the defendant may have admitted that at the time he was not looking or he was talking to somebody beside him, or something like that; and there can be seen in some specific respect a failure to do something which a reasonable man would have done or the doing of something which a reasonable mand would not have done in the circumstances, and that that caused for example his car to run across the road and into another, run across the road in front of some other vehicle. The position here is not quite on those lines. The allegation made here is that the car left its correct side of the road and went on to its incorrect side of the road so as to come into collision with the truck coming from the other direction. The allegation is made that in the circumstances of this case that establishes on the

balance of probabilities negligence on the part of Hannon."

After referring to the evidence of the driver of the car which was following the Holden car and of the driver of the semi-trailer concerning the course taken by the Holden car, his Honour went on:

"Submissions were made to you on liability primarily on this basis; that all that can be established upon the material available to the parties is as much as you find established from this evidence. Hannon of course did not survive and nor did Fredrichberg, and Gunderson and Simpson know nothing of the circumstances of the accident. You are asked to say whether or not upon that evidence it is established that Hannon drove negligently. To enable you to make that determination you must be in a position to say, and you are asked to say, accordingly whether or not of all the possible explanations that might be given for that movement of the car it is more likley than not that that movement of the car was caused by some failure in care on the part of Hannon. In making that determination you are asked to bring here your own knowledge and experience of the roads and traffic on the roads and so on. It is a question left to four men selected at random from the community to make the decision and you will find negligence established if you consider upon this evidence that that movement
of the car is more likely than not to be explained by some act or motion on the part of Hannon which can be called in the circumstances negligence. It is not necessary in these cases for the plaintiff to prove some specific act of negligence or that the evidence should carry it that far. It is sufficient if, and of course only if, you find upon this evidence that negligence is the more probable explanation for this manoeuvre of the car. I cannot say much more than that without putting the arguments put to you by each counsel so fully this morning and that would only be trespassing on your time and mine. So let me say in conclusion upon this issue of liability the plaintiff succeeds if she shows upon the balance of probabilities that Hannon was the driver and that he was negligent in his driving and that that was the cause of the injury and death of Fredrichberg. If those two issues of fact are proved by the plaintiff, she succeeds. Unless they are proved, she fails. They are issues of fact for your determination. You will observe that I am analysing this question out in accordance with the material that is here and the principles of law applicable. You are required to consider the material that is here, determine
what you find proved, both as to whether Hannon was the driver and if he was, whether he drove negligently and that form of driving caused this accident."

I should add that in the course of the case some question had been raised whether Hannon was driving the car at the relevant time but on this appeal it is unnecessary to consider that issue. (at p420)

4. In my opinion - and with all respect to their Honours in the Court of Appeal - no fault can be found with what the learned trial judge thus put to the jury. They were directed in clear terms that the plaintiff was not bound to prove some specific act of negligence on the part of the driver of the car and that they could, if they thought fit, infer that he had been negligent from, the fact - if they found it to be the fact - that the car had suddenly swerved to its incorrect side of the road. (at p421)

5. For these reasons I am of opinion that, in so far as the order granting a new trial was based upon the conclusion that the summing up was defective, it cannot be supported. (at p421)

6. A further ground upon which the Court of Appeal appears to have based its decision was that the learned trial judge had prevented counsel for the plaintiff from putting to the jury in his address that they could infer negligence on the part of the driver of the car from the fact that it had suddenly swerved across the road. This would necessarily mean that his Honour had refused to allow counsel to direct his address to the very matter which he later put to the jury in his summing up. In the absence of some clear indication to this effect in the transcript record, it is impossible to think that this could have been the case. If it had I would have expected to find in the transcript an objection taken by counsel either before or at the end of the summing up. But no such objection was taken. It is true that, in the course of the argument arising out of the application that a verdict should be directed for the defendant, his Honour had said that he did "not know if this is even a case of res ipsa loquitur" in answer to a submission by counsel for the plaintiff that "the effect of res ipsa is to cast the onus upon the defendant", a proposition which needs only to be stated to be rejected. But whatever his Honour may have thought at that stage of the proceedings, what he said in the course of giving his reasons for refusing to direct a verdict for the defendant seems to me to show plainly what were the limitations which he put upon the subject matter of counsel's addresses. After saying that it was for the jury to decide whether they thought that on a balance of probabilities the collision was due to the negligence of Hannon and that the evidence would enable such an inference to be drawn, he went on:

> "I should make two additional observations. The first is this: the application for a verdict by direction made by the defendant and my decision rejecting it, are not matters for discussion by counsel with the jury. The second observation I make arises from comments made by counsel in the opening of the plaintiff's case to the jury when discussing the law relating to negligence that there is a presumption that a vehicle is not being carefully driven if it goes on to its wrong side of the road and if such is proved there is imposed upon the defendant an obligation to explain this accident. I do not regard these as a correct statement of the law. There is no presumption in law that negligence is established from any limited circumstances in this case and there is no onus or obligation cast by the law upon the defendant of proving any fact or specifically rebutting any such alleged presumption. Do I make myself clear?"

A question to which both counsel replied "Yes". No criticism can be made of these observations. The submissions of counsel for the plaintiff that a presumption of negligence arose from the fact that the car had gone across the road to its incorrect side and that this placed upon the defendant the onus of disproving negligence were entirely unsound and his Honour rightly ruled that they were not to be repeated to the jury. It is said, however, that the transcript does not give a full account of what occurred during the argument on the question whether the jury should be directed to find for the defendant, and an affidavit by the solicitors for the plaintiff was put before us which annexed a memorandum prepared by the deponent in which he set out his recollection of what had taken place and which was said also to be in accord with what counsel who appeared for the plaintiff at the trial remembered of the matter. It does not disclose when the memorandum was prepared; all that is said is that it was sometime between October 1966 when the trial took place and the hearing of the appeal by the Court of Appeal in December 1967. It states that, in the course of the argument,

"The trial judge stated that plaintiff's counsel could not address the jury in the alternative, that is by submitting that the jury was entitled to conclude that the driver had been negligent by means of applying the res ipsa loquitur doctrine, or that if it was not prepared to do this the jury could find that there was some evidence, apart from the mere collision, from which negligence could be inferred. He ruled that the plaintiff's counsel was not entitled to address in the alternative and that he was entitled to address only either on the basis of res ipsa loquitur or on the basis that there was evidence of facts from which specific negligence could be inferred.
"The trial judge then stated that in his view it was not an appropriate case for the application of the doctrine for the reason that there was evidence which, if accepted, could explain the accident, in that there was evidence of the course of the vehicle and the fact that the vehicle swerved and in addition there was other evidence from which specific negligence might be inferred by the jury and he accordingly ruled that the plaintiff's counsel should be precluded from submitting the doctrine and its effect to the jury.
"In accordance with his Honour's ruling, plaintiff's counsel addressed only on the basis that there was certain factual evidence before the jury from which the jury was entitled to infer specific negligence, and he made reference to the matters from which the trial judge had in argument suggested that negligence could be inferred, that is the fact that the driver had been driving for a considerable time, there was some evidence of alcohol having been consumed and it might be that the driver's control of the vehicle had been affected by the fog; plaintiff's counsel at no time addressed the jury on the basis of the doctrine of res ipsa loquitur."

It is, I think, only in very unusual circumstances that an appellate court should have regard to material which does not appear in the transcript of a trial. If a ruling is given by a trial judge in the course of a case and counsel against whom it is given objects to it, he should take his objection and ask that it be noted. Nothing of that kind appears to have been done in the present case. The

memorandum contains what are, to my mind, somewhat conflicting statements and I cannot reconcile it either with the reasons given by his Honour for refusing to direct a verdict for the defendant or with the terms in which he summed up to the jury. I can only think that the deponent's recollection of what had occurred was faulty or that he and counsel for the plaintiff at the trial misunderstood the observations made by his Honour at the close of his reasons for refusing to direct a verdict. I think that, in these circumstances, we should have regard only to the transcript record which sets out those reasons and the terms of the summing up. (at p423)

7. I would therefore allow the appeal. (at p423)

ORDER

Appeal allowed with costs. Judgment and order of the Supreme Court of New South Wales (Court of Appeal Division) set aside and in lieu thereof order that the appeal to that Court be dismissed with costs.

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