IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Sarosha Mandika Wijeratne,
No. 11, Esther Avenue,
Park Road, Colombo 05.

PLAINTIFF

Vs.

SC Appeal 117/2016

WP/HCCA/COL/06/2009(F)

DC Colombo Case No.
23926/MR

Colombo Municipal Council,
Town Hall,
Colombo 07.

DEFENDANT

AND BETWEEN

Colombo Municipal Council,
Town Hall,
Colombo 07.

DEFENDANT-APPELLANT

Vs.

Sarosha Mandika Wijeratne,
No. 11, Esther Avenue,
Park Road, Colombo 05.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Colombo Municipal Council,

No. 11, Esther Avenue,

Park Road, Colombo 05.

DEFENDANT-APPELLANT-APPELLANT

J.M. Bhadranie Jayawardhana,

Municipal Commissioner,

Colombo Municipal Council,

Town Hall, Colombo 07.

Vs.

Sarosha Mandika Wijeratne,

No. 11, Esther Avenue,

Park Road, Colombo 05.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: **S. THURAIRAJA, PC, J.**

A. L. SHIRAN GOONERATNE, J. AND

JANAK DE SILVA, J

COUNSEL: Priyal Wijayaweera, PC with Senani Dayaratne and Anushka Hewapathirana for the Defendant-Appellant-Appellant.

Ikram Mohamed, PC with Charitha Jayawickrema for the Plaintiff-Respondent-Respondent instructed by Mallawarachchi Associates.

WRITTEN SUBMISSIONS: Plaintiff-Respondent-Respondent on 22nd June 2017 and 30th April 2024

Defendant-Appellant-Petitioner on 24th July 2017 and 29th April 2024

ARGUED ON: 11th March 2024

DECIDED ON: 21st February 2025

THURAIRAJA, PC, J.

1. The case stems from the misfortune the Plaintiff-Respondent-Respondent (hereinafter the 'Plaintiff) had to endure in the wee hours of the 23rd morning of August 1999, when he, a vascular surgeon and a professor of Surgery at the Colombo Medical Faculty, had set off to the General Hospital of Colombo in a rush having been summoned for emergency surgery at around 3 a.m.

2. As he drove down the familiar Havelock Road, he had collided with an island in the centre of that road newly constructed by the Defendant-Appellant-Appellant (hereinafter the 'Defendant'), Colombo Municipal Council. In a twisted turn of fate, the Plaintiff was then rushed to the General Hospital for treatment, having suffered serious injuries, particularly to his spine. The injury to his spine was described as permanent—and such would naturally be a great hindrance to any surgeon in their profession.

3. The permanence of the injury is well established by the medical reports presented before the District Court as well as by the testimony of Dr. Vasantha Perera, Consultant Orthopaedic, who treated the Plaintiff when he was admitted to the Hospital.

4. The Plaintiff states that he was warded for treatment at the Hospital for five days. He states that thereafter he was with a POP cast for a period of two months and a removable brace for a further period of two months. He had then gone to England for two years on

sabbatical leave and had done research work as he could not stand and do surgeries for a long period at a stretch.

5. Following the accident, the Plaintiff had instituted action before the District Court of Colombo by plaint dated 19th November 1999 against the Colombo Municipal Council for the negligence on their part claiming, *inter alia,* Rs. 10 million in compensation. He states that the injuries caused to him are such that they would affect him throughout his life. He claims the damage so caused to be incalculable in financial terms, and that Rs. 10 million would not begin to remedy the permanent injury caused to him.

6. The Plaintiff further claims that he conducted surgeries in several private hospitals and that he could not do such surgeries for a period of two years, resulting in a loss of income. He further states that he had to spend Rs. 150,000/- to repair his vehicle. While he has provided documentary proof of the expenses incurred to repair the vehicle, no evidence has been submitted as to his income.

7. By Judgment dated 26th January 2009, the District Court of Colombo, having found in favour of the Plaintiff, has granted all relief prayed for by the Plaintiff. Aggrieved by this judgment, the Defendant Municipal Council had appealed to the High Court of Civil Appeal.

8. The case before this Court is an Appeal preferred by the Defendant-Appellant-Appellant seeking to set aside the Judgment of the High Court of Civil Appeal holden in Colombo dated 30th March 2016, which upheld the aforementioned Judgment of the District Court of Colombo.

QUESTIONS OF LAW

9. Leave to appeal has been granted on the following questions of law:

   i. *Has the Civil Appellate High Court of Colombo erred in law in failing to follow and/or apply the legal principles and/or the relevant case law cited by the Defendant with regard to the applicability of the rule of Res Ipsa Loquitur?*

   ii. *Has the Civil Appellate High Court of Colombo erred in law by awarding damages to the Plaintiff whereas the Plaintiff has failed to give proper details of income and expense incurred in a systemic way to enable a court of law to grant damages?*

   iii. *Has the Civil Appellate High Court of Colombo erred in law by holding that the defendant was negligent because of the plaintiff's version was that he did not know as to how the accident took place? [sic]*

   iv. *Has the Civil Appellate High Court of Colombo erred in law by awarding damage to the vehicle of the plaintiff, whereas he had been compensated more than his claim sought in the plaint by the Insurance Company?*

FIRST QUESTION OF LAW

10. The Defendant Council avers, under the first question of law, that the learned judges of the High Court of Civil Appeal have erred in failing to follow the principles and precedent submitted by them with regard to the principle of *res ipsa loquitur*.

11. The judgment of the District Court makes no mention of *res ipsa loquitur*. In this context, it is perplexing as to why a defendant-appellant would make any submissions regarding the same in the first place.

12. Moreover, as the Plaintiff points out, both the initial written submissions of the Defendant-Appellant dated 11th July 2013[1] and the additional written submissions of the Defendant-Appellant dated 17th February 2016[2] before the High Court of Civil Appeal, in fact, make no reference to the principle of *res ipsa loquitur* and do not contain any authorities in that regard.

13. For this reason alone, the first question of law has to be answered in the negative, as there has been no material on *res ipsa loquitur* placed before the High Court of Civil Appeal to consider in this regard. Despite this, I see it pertinent to consider the operation of *res ipsa loquitur* succinctly, as the term appears in the judgment of the High Court of Civil Appeal—albeit briefly.

14. Perusal of the judgment of the High Court of Civil Appeal indicates a single reference to '*res ipsa loquitur*' wherein the learned judge of the High Court of Civil Appeal reasons as follows:

> *"…It is the duty of the defendant to take steps to provide adequate warning of the said construction especially at night and as bringing something of that nature itself is dangerous, the defendant had the burden of proving that it was not negligent in leaving the said construction in the middle of the road without a proper system of warning to drivers.* ***The reason is that the plaintiff's version that he did not know how the accident took place itself is res ipsa loquitur of the fact that the construction laid there causing danger…"***[3]

[1] Produced marked 'P10'

[2] Produced marked 'P13'

[3] Judgment of the High Court of Civil Appeal dated 30th March 2016 in Case No. WP/HCCA/COL/06/2009/F, p. 4 (emphasis added)

15. The first question of law as well as the third question appear to arise out of the part of the judgment emphasised above.

16. This reasoning of the learned High Court Judge is erroneous for several reasons. Firstly, it appears that the learned Judge has used the term '*res ipsa loquitur*' rather casually and informally, without due regard to how the principle should apply. Needless to say, such nonchalant usage of legal nomenclature, especially such terms that carry with it broad meanings, is far from ideal.

17. *Res ipsa loquitur* posits that where a thing is shown to be under the management and control of a defendant, directly or indirectly, and the accident is such that it would not have occurred but for want of care, it leads to a reasonable inference of negligence on the part of a defendant, unless such defendant affords a reasonable explanation.[4]

18. Where the principle is successfully invoked by proof of an occurrence capable of giving rise to the inference, it is no longer practically necessary for a plaintiff to lead evidence proving negligence, for there is no need to prove that which is self-evident. However, where the defendant is able to provide a reasonable explanation to displace the inference, the law once again places emphasis on the proof of negligence.

19. This burden of the defendant, where *res ipsa loquitur* is successfully invoked, to provide a reasonable explanation must not be misperceived as a burden to prove positively that they had not been negligent—This, in my view, is the second error committed by the learned High Court Judge of Civil Appeal.

20. Admittedly, many authorities can be found to advance the position that *res ipsa loquitur* amounts to a presumption or, stronger yet, a rule that shifts the ultimate burden of proof

[4] See *Scott v. London Dock Co.* (1865) 3 H. & C. 596

to the defendant. As a result, much confusion surrounds the question as to how *res ipsa loquitur* affects the burden of proof.

21. Be that as it may, the notion that it amounts to nothing more than a permissible inference—and not a presumption or a shifting of the ultimate burden—finds greater judicial support in early jurisprudence.[5] Such is the better view, in my assessment.

22. **E. B. Wickramanayake** in **The Law of Delict in Ceylon** has the following to say in this regard,

> *"…The operation of this rule [res ipsa loquitur] is not to cast upon the defendant the burden of proving that the damage was not due to his negligence. [See Winnipeg Electric Co. vs. Geel 1932 A. C. 690 where, however, the burden is cast on the defendant by statute.] The burden remains on the plaintiff throughout the case. [Van Wyk vs. Lewis 1924 A.D. at 444; Nande vs. Transvaal Boot and Shoe Manufacturing Co. 1938 A.D. 379] It does however call for a reasonable explanation from the defendants. [Abeyapala vs. Rajapakse 44 N.L.R. 289] "What the defendants have to do here, said Langhton J. [The Kite 1933 P. 154 at 170], is not to prove that their negligence did not cause the accident. What they have to do is to give a reasonable explanation which, if it be accepted, is an explanation showing that it happened without their negligence. They need not go even so far as that because if they give a reasonable explanation which is equally consistent with the accident happening without their negligence or with their negligence they have again shifted the burden of the proof to the plaintiff—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident". [If the defenders can show a way in which the accident may have occurred without negligence, the*

[5] See William L. Prosser, 'The Procedural Effect of Res Ipsa Loquitur' (1936) XX:3 Minnesota Law Review 241, at 244-253

cogency of the fact of the accident by itself disappears and the pursuer Is left where he began, namely, that he has to show negligence. Per Lord Dunedin in Ballard v. North British Railway Co. 1923 S.C.H.L. 43. But the explanation to be of any avail must be based on fact, not fancy. There must be some substantial foundation in fact for the explanation. Per Curlewis J.A. in Hamilton vs. McKinnon 1935 A.D. appendix. See Kuranda vs. Sinclair 1932 W.L.D.I.; Gordon vs. Mathies estate 1933 C.P.D. 353; Hunter vs. Wright (1938) 2 A.E.R. 621]."[6]

23. While I take the view that the learned Judge of the High Court of Civil Appeal has erred to this extent, the first question of law has to be answered in the negative, for the record indicates no material placed by the Defendant before the High Court of Civil Appeal on *res ipsa loquitur* for consideration.

THIRD QUESTION OF LAW

24. The third question of law reads "*Has the Civil Appellate High Court of Colombo erred in law by holding that the defendant was negligent because of the plaintiff's version was that he did not know as to how the accident took place? [sic]*"

25. As adverted to earlier, the learned High Court Judge of Civil Appeal has, in fact, reasoned the very fact that the Plaintiff was unaware of how the accident took place to be indicative of the dangerous nature of the construction. While I am of the view that this constitutes a somewhat unwarranted leap in reasoning, it is not the sole reason the High Court of Civil Appeal has set out in concluding that the Defendant Council had been negligent.

26. The Court has also referred to certain parts of the evidence available on record, which amply establishes that there had not been a proper system of warning in place for the

[6] E.B. Wickramanayake, *The Law of Delict in Ceylon* (Frewin & Co. 1949) at 18-19

safety of drivers. It is on this basis, *inter alia,* that the Court has come to its conclusion.

27. However, several arguments were made on behalf of the Defendant Council made before this Court as well as the High Court of Civil Appeal and the District Court suggesting contributory negligence on the part of the Plaintiff, although the defence of contributory negligence was not specifically raised by the Defendant during the trial.

Contributory Negligence

28. Section 3(1) of the *Law Reform (Contributory Negligence and Joint Wrongdoers) Act, No. 12 of 1968* provides that,

> "
>
> *(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason only of the fault of the claimant, but the* ***damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable*** *having regard to the degree in which the claimant was at fault in relation to the damage.*
>
> *(b) Damage shall, for the purpose of paragraph (a) of this subsection, be regarded as having been caused by a person's fault, notwithstanding the fact that any other person had an opportunity of avoiding the consequences thereof and negligently failed to do so."*

29. This Section, clearly influenced by Section 1 of the *Law Reform (Contributory Negligence) Act 1945* of England, Wales and Scotland, enables courts of law to exercise just and equitable jurisdiction in the apportionment of responsibility and computation of damages. In this just and equitable apportionment of liability, English Courts have conventionally taken cognisance of two factors: relative blameworthiness and the causal

potency of the conduct in question.[7] What is to be followed is a commonsense approach. As Lord Reid opined in ***Jackson v. Murray [2015]***,[8] commenting on the incommensurability of the above factors,

> *"It follows that the apportionment of responsibility is inevitably a somewhat rough and ready exercise (a feature reflected in the judicial preference for round figures), and that a variety of possible answers can legitimately be given. That is consistent with the requirement under section 1(1) to arrive at a result which the court considers "just and equitable"..."*

30. Be that as it may, for my qualms in this case are not with the question of apportionment but with the finding of contributory negligence itself. Before a judge may venture into such assessment, the judge must come to a finding of contributory negligence, for this provision relates not to the law of liability but the law of remedies.[9] Authorities indicate the necessity of contributory negligence being pleaded before it can be considered by a judge.[10] At no point did the Defendant raise the question of contributory negligence in the instant case.

31. Although the Defendant did not so raise contributory negligence, much of their pleading related to the various forms of negligent conduct on the part of the Plaintiff. The Defendant mainly averred that the Plaintiff had driven beyond the speed limit and that the Plaintiff was familiar with the road as well as with the construction of the island. The District Court record indicates that the Plaintiff has been heavily cross-examined in this regard.

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[7] Jackson v Murray [2015] UKSC 5 [15] and [26]

[8] ibid [28]

[9] See James Goudkamp, *Tort Law Defences* (2013 Hart Publishing) 71

[10] See *UBC Bank Plc v. David J Pinder Plc* [1998] CLC 1262 (QBD) [17]

32. According to the Plaintiff's own admission, the accident had occurred on a road very familiar to him. This is apparent from the District Court Proceedings which records as follows:

"ප්‍ර: කොළඹ ජීවත් වන පුරවැසියෙක් විදිහට කොළඹ පාරවල්දන්නවා?

පි: එක පාරක් පමණයි මම පාවිච්චි කරන්නේ.
මම ගමන් කරන්නේ හැවිලොක් පාරේ...

ප්‍ර: දවසට කී පාරක් ඒ පාර පාවිච්චි කරනවාද?

පි: අඩුම වශයෙන් දෙවතාවක් පාවිච්චි කරනවා වැඩිම වශයෙන් 6 වතාවක් පාවිච්චි කරනවා. ඉහල පහල යනවා.

ප්‍ර: ඝට්ටනය සිදුවුන තැන ගැන ඒ ස්ථානය කොහොමද?

පි: ඒ පාර දෙකට බෙදෙන පරිදි තිබුනා. මැද දූපතක් තිබුන බවට මට කිසිම හැඟීමක් තිබුනේ නැත.

[Q: As a citizen living in Colombo, are you familiar with Colombo roads?

A: I only use one road.

I travel the havelock road.

Q: How times per day do you use that road?

A: At least twice a day I use that road at most 6 times. I travel back and forth

Q: About the place where the collision happened, how about that place?

A: That road divides two ways. I had no idea that there was an island in the middle.]"[11]

[11] Proceedings of the District Court Case No. 23926/MR dated 31st August 2004, at pp. 3-4; Appeal Brief, at pp. 69-70 (Approximate translation added)

33. During cross-examination, the Plaintiff has further stated as follows:

> "ප්‍ර: මෙම සිදුවීමට පෙර ඔබ ගමනක් ගියාද?
>
> උ: ඔව්.
>
> ප්‍ර: මෙම ස්ථානයේ තිබූ බාධකය තමා දැක්කාද?
>
> උ: ඔව්.
>
> ප්‍ර: මෙම ස්ථානයෙන් තමා එහා මෙහා යනවා නේද?
>
> උ: ඔව්.
>
> ප්‍ර: පාර මැද දූපතක් පිහිටා තිබෙනවා නේද?
>
> උ: මෙය දූපතක් තිබෙන ස්ථානයක් නොවේ.
>
> *[Q: Did you go anywhere before this incident?*
>
> *A: Yes.*
>
> *Q: Did you see the obstruction at this?*
>
> *A: Yes.*
>
> *Q: You travel back and forth through this place, right?*
>
> *A: Yes.*
>
> *Q: In the middle of the road, there is an island, right?*
>
> *A: This is not a place where there is an island.]*"[12]

34. Evidence of the Defendant Council's District Engineer clearly states that the construction of the centre island took thirteen days, from 01st August to 13th August 1999.[13] Clearly, the Plaintiff would have driven past the construction site as well as the completed centre

[12] Proceedings of the District Court Case No. 23926/MR dated 31st March 2005, at pp. 1; Appeal Brief, at pp. 82 (Approximate translation added)

[13] Proceedings of the District Court Case No. 23926/MR dated 14th January 2008, at pp. 6; Appeal Brief, at pp. 146

island many times. While this itself is not sufficient to draw an inference of negligence on the part of the Plaintiff, it is also clear from his evidence that the Plaintiff had driven above the speed limit under such conditions he himself claimed to be poorly lit.

35. Moreover, the road in question is fourteen meters wide and has four lanes, with two lanes each going in each direction. Had the Plaintiff driven on the left lane, as he ought to, without moving well into the middle lane, he would not have hit the centre island—for the centre island only covered the inward parts of the middle lanes.

36. When all such is said but the term 'contributory negligent' itself, I do not think a judge must necessarily close his mind to any and all fault on the part of those who make the claim. I take the view that, where negligent elements in a Plaintiff's conduct are established by evidence and a defendant has brought the same to the notice of the court, such court may activate the machinery in the 1968 Act and proceed to reduce the damages recoverable as it deems just and equitable.

37. In the case at hand, the part the Plaintiff himself has played in the accident is hardly negligible. A motorist has a duty to observe reasonable care, especially when conditions are such that they could induce mistakes. This, however, does not abrogate the duty of the Defendant Council to take all such measures as may be necessary to give due notice of the structure to those who use the road.

38. As such, I am of the view that, while the conclusions of the learned Judges of the High Court of Civil Appeal and the District that the Defendant had been negligent is not erroneous, they have erred in holding that the Defendant had been solely negligent.

39. Issues Nos. 20 (ඒ), (ඔ) and 21(ඒ) in the District Court judgment are as follows, and they have all been answered in the negative by the District Judge:

"20.අ. එකී ගැටුම වළක්වාලීමට අන්තිම අවස්ථාව තිබුනේ පැමිනිලිකරුටද? [Did the Plaintiff have the last opportunity prevent the said collision?]

ආ. එකී ගැටුම වළක්වාලීමට පැමිණිලිකරු අසමත් වුයේද? [Did the Plaintiff fail to prevent the said collision?]

21. ඉහත සඳහන් 5(අ) සහ (ආ) වන විසඳනා විත්තිකරුගේ වාසියට විසඳේ නම් [If aforementioned issues 5(අ) and (ආ) are answered in favour of the Defendant][14]

අ. එකී ගැටුම පිළිබඳව පැමිණිලිකරු වගකිව යුතුද? [Is the Plaintiff responsible for the collision?]"

40. Accordingly, I am of the view that Issues Nos. 20 (අ) and (ආ) in the District Court judgment must accordingly be answered in the affirmative, and Issue No. 21(අ) must be answered as 'partially' in the following manner to reflect the above findings.

41. I answer the third question of law in the affirmative, as the reasoning of the High Court of Civil Appeal does not logically warrant the conclusion.

SECOND QUESTION OF LAW

42. The second question of law is whether the High Court of Civil Appeal erred in law by awarding damages when the Plaintiff has failed to give proper details of income and expenses incurred to facilitate the computation of damages.

43. In the instant case, the injuries caused to the Plaintiff and the causal nexus thereof to the Defendant's negligence are established by cogent evidence. However, as the Defendant Council contends, the Plaintiff has not given any evidence as to his income or expenses incurred as a result of the accident.

[14] Issues Nos. 20 (අ) and (ආ) are submitted as Issues Nos. 5 (අ), (ආ) in the D

44. He merely claims that he had been working as a consultant surgeon and a lecturer and that he has not been able to stand and perform surgeries, as he used to, since the accident. These facts were not contradicted by the Defendant.

45. The question we are confronted with, then, is whether it is open for a court to award damages where a plaintiff fails to precisely establish his income and expenses in a systematic manner.

46. The Defendant Council fervently contended before this Court that the plaintiff in an aquilian action has to prove the pecuniary loss and should give proper details of income and expenses. While this had long been the understanding, many exceptions to this conventional position have been recognised in the Roman-Dutch law of today.

47. Yasantha Kodagoda, PC, J. has given a detailed exposition on this in ***C. Karunanayake and Others v. Mannapperuma Mohotti Appuhamilage Thushari Ranga Mannapperuma.***[15] As held therein,

> *"… it is evident that in the original and conventional sense of the Lex Aquilia, damages can be awarded only if the loss suffered by the plaintiff occasioned as a result of the breach of a duty of case by the defendant, had resulted in damnum—that is patrimonial loss and is capable of pecuniary (financial) assessment. It thus seems that the award damages claimable in an Aquilian action is generally confined only to situations where there is a calculable pecuniary loss. The pecuniary loss should be proved by the Plaintiff.*

[15] SC Appeal No. 130/15, SC Minutes of 21st February 2022

However, it is important to noted that, in the Roman-Dutch as it stands today, there are certain well recognized exceptions to the norm that ensuing patrimonial loss must be proved to enable a Court to grant damages. These exceptions are as follows:

(i) Situations where actionable negligence has caused physical injury to the victim resulting in psychological trauma. (See "The Law of Delict" by R.G. McKerron, at page 51) In this situation, notwithstanding the Plaintiff being unable to establish patrimonial loss, he is entitled to general damages due to both the physical injury as well as psychological trauma…"[16]

48. **R. G. McKerron** refers, in his treatise, to three types of damages recoverable in an aquilian action for personal injuries: (1) actual expenditure and pecuniary loss; (2) disfigurement, pain and suffering, and loss of health and amenities of life; and (3) future expenses and loss of earning capacity.[17] He observes therein, with regard to these second and third types, as follows:

"Under the second head, the plaintiff can recover compensation not only for the pain and inconvenience he has already suffered, but also for the pain and inconvenience he will suffer in the future. [Brown v. Bloemfontein Municipality, 1924 O.P.D. 226.] Under this head, too, he is entitled to compensation for shortened expectation of life; for loss of expectation of life is clearly one of the subjective factors to be taken into account in awarding damages for pain and suffering. [See Goldie v. City Council of Johannesburg, 1948 (2) S.A. 913, 923.] …

The damages recoverable under second head cannot be assessed on any arithmetical or logical basis. 'There are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it

[16] (emphasis omitted)

[17] McKerron, *The Law of Delict* (7th edn, Juta & Co. Limited, 1971) at 117-118

possible to express one in terms of the other with any approach to certainty.' [Sandler v. Wholesale Coal Suppliers, Ltd., supra, at 199, per Watermeyer C.J.] The usual method adopted is to take all the circumstances into consideration and award substantially an arbitrary sum. [Oosthuizen v. Thompson, 1919 T.P.D 124, 131. As to the circumstances which may be taken into account, see Radebe v. Hough, 1949 (1) S.A. 380 (A.D.), 385-6.] …

Under the third head, the plaintiff is entitled to compensation for future expenses in connection with the injuries, and, in the case of permanent injury, for loss of future income and prospects. [See Brown v. Bloemfontein Municipality, 1924 O.P.D. 226.] In assessing the amount to be awarded in respect of permanent injury, the court must not attempt to give an absolutely perfect compensation; for many contingencies must be taken into account, rendering exact mathematical calculation impossible. [Rowley v. London & N.W. Ry. (1873) L.R. 8 Ex. 221 at 230, per Brett J. See Sigournay v. Gillbanks, supra.][18]

49. This question has also been very recently addressed by Obeyesekere, J. in ***Konni Arachchige Sriyanthi Samanmali v. Suraweera Arachchige Milton Suraweera***.[19] Having referred to ***Mahipala and Others v. Martin Singho***[20] and ***Gaffoor v. Wilson.***[21] Obeyesekere, J. held that *"…the Court is not justified in refusing to award the plaintiff damages merely because the quantum is difficult of assessment."*[22]

[18] ibid at 114

[19] SC Appeal No. 107/2019, SC Minutes of 02nd August 2024. See also *Jayakody v. Jayasuriya* 2005 (1) Sri L.R. 216; *Fracshida Charlotte v. Jannet Costa v. Others* (2012) B.L.R. (2) 334

[20] [2006] 2 Sri L.R. 272

[21] [1990] 1 Sri L.R. 142

[22] *Konni Arachchige Sriyanthi Samanmali v. Suraweera Arachchige Milton Suraweera* SC Appeal No. 107/2019, SC Minutes of 02nd August 2024, at 15

50. ***Mahipala and Others v. Martin Singho***[23] involved a case where the plaintiff who was riding a bicycle was run over by a vehicle of the Sri Lanka Army, causing lifelong injuries. With regard to the calculation of damages for such physical injuries, Wimalachandra, J. for the Court of Appeal, referring to McKerron, opined that,

> *"…By their very nature various forms of non- patrimonial loss such as pain and suffering or loss of the amenities of life are difficult to translate into monetary terms with precision. So it is not unusual to assess together as one sum the computation of damages for pain and suffering and loss of amenities of life. In awarding a lump sum as damages when the wrong complained of constitutes personal injuries, it is difficult to assess damages on a logical basis…"*

51. In ***Gaffoor v. Wilson***, a case where a mother claimed damages for the loss of financial support arising out of the death of her son in a motor vehicle accident, Amerasinghe, J. held with regard to the absence of actuarial evidence that,[24]

> *"… For although the formulation of a successful claim for prospective damages or the rebuttal of an extravagantly large one is never a simple exercise in actuarial mathematics … such evidence would have been invaluable especially in assessing how much capital should be paid to the plaintiff to enable her to have a fixed sum per month for life. The absence of actuarial evidence does not absolve me from the duty of assessing damages. I must do the best I can."*[25]

52. The case of ***De Silva v. Gunawardena***,[26] involved, much like the instant case, a surgeon who suffered permanent injuries from a motor accident. The plaintiff had suffered various

[23] [2006] 2 Sri L.R. 272

[24] [1990] 1 Sri L.R. 142

[25] (Notes omitted)

[26] 66 NLR 385

injuries to his hand, which impaired his ability to conduct surgeries. With regard to the factors which must be taken into account, Sansoni, J. (as His Lordship then was) opined as follows:

> *"The plaintiff is a doctor in Government Service who has practised his profession from 1943, and was 39 years old when this accident occurred. He has carried out different kinds of operations as a Surgeon, although he has not specialised in any branch. He stated in evidence that it was his intention to retire from Government Service and start a private practice in his home town of Kalutara. As a result of the permanent disability he now suffers from, he will be handicapped and his practice is bound to suffer, because his patients will know about his disability.*
>
> *The only question is the quantum of damages that should be awarded…*
>
> *I do not see why the Plaintiff should not be compensated for the loss of his freedom to choose a new way of exercising his profession. He is handicapped to the extent that he cannot do all the work a Surgeon should be able to do. His power to earn is, to this extent, impaired. He is not bound to continue in Government Service: If he had been, of course, the quantum of damages would be almost trivial. He has lost the right, which he formally had, of earning his living in the best way possible."*[27]

53. As can be seen, while actuarial evidence is most certainly helpful, the absence of which should not absolve the Court from arriving at a reasonable assessment.[28] Therefore, I am of the view that learned Judges of the High Court of Civil Appeal have not erred in awarding damages in the absence of evidence as to the Plaintiff's income and expenses

[27] ibid 388

[28] See UL Abdul Majeed, *A Modern Treatise on The Law of Delict (Tort)* (2017) 391

he incurred as a result of the accident. The second question of law is answered in the negative.

54. Moreover, given the Plaintiff's age at the time of the accident—40 years approximately[29]—the fact that he was a consultant surgeon, career prospects which would have been hindered as a result of his injuries, and the loss of potential income as well as the pain and suffering that would result therefrom, the amount of Rs. 10 million as compensation is not excessive. However, this must be adjusted in line with the finding of contributory negligence.

FOURTH QUESTION OF LAW

55. The fourth question is whether the High Court of Civil Appeal erred in granting Rs. 150,000/- to the Plaintiff for the damage to his vehicle when he has recovered Rs. 350,000 from his insurer.

56. The contention of the learned President's Counsel on behalf of the Plaintiff was that the Defendant's liability does not cease in law by any payment received by the Plaintiff on any insurance policy he has obtained.

57. In support of this, he submitted the case of ***Thavathurai v. Rochai***[30] where Sansoni, J. (as His Lordship then was) held as follows:

> *Now the law has always been that a defendant cannot diminish the damages by showing that the plaintiff has obtained compensation for the injury under a policy of insurance-see 23 Halsbury (2nd edition) page 726. This rule has stood for nearly 200 years and has never been doubted. But it is submitted that a different view should*

[29] Proceedings before the District Court of Colombo dated 31st August 2004 indicates his age as 45

[30] 60 NLR 488

now be taken in view of the decision of the House of Lords in British Transport Commissions v. Gourley [(1956) A.C. 185.]

It was decided there that in assessing damages, in an action for personal injuries. For the loss of actual or prospective earnings, the Court must take account of the plaintiff's net earnings after deduction of tax, and not his gross earnings. The principle applied was that the plaintiff in such a case should be awarded such a sum of money as will put him in the same position as he would have been if he had not sustained the injuries, and it would therefore be wrong to award the plaintiff a sum without regard to the amount of tax for which would be liable.

The case had nothing to do with the other principle that I referred to, "that the defendant cannot claim any benefit from the circumstance that a plaintiff has been insured. There seems to be some uncertainty as to the true basis upon which that principle rests. Pigott B. in Bradburn v. Great Western Railway [(1874) L.R. 10 Ex. 1.] said: "There is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not received that sum of money because of the accident, but because he has made contract providing for this contingency; an accident mist occur to entitled him to it, but it is not the accident but his contract which is the cause of his receiving it".

Another view is that a wrongdoer should not get the benefit of the fortuitous circumstance that the plaintiff was insured, and appropriate to himself the benefit of the premiums paid by the plaintiff to cover accident risks. An editorial note in the Law Quarterly Review, Vol. 72, page 154 says: "The rule concerning insurance is a peculiar one, based on consideration of public policy", and this is also the view of Mr. Mckerron in his book The Law of Delict (5th edition) page 107 where he says: "The

result of the decision is that the plaintiff may sometimes receive double compensation. They are therefore anomalous in that they involve a departure from the rule that damages in the Aquilian action are essentially compensatory. The truth would appear to be that it is impossible to justify the anomaly on purely logical grounds, and that it must be regarded as based on considerations of social policy. The interests of society are sometimes better served by allowing the injured party to recover damages beyond the compensatory measure than by allowing the wrongdoer to benefit by the fact that some other person has discharged his liability. Moreover, the ***effect of refusing to allow recovery in full would be to deprive the third party of any right he might have to claim reimbursement from the injured party by subrogation or cession of action***".[31]

58. Moreover, in ***Mason v. Sainsbury***[32]—the seminal case on the doctrine of subrogation—where an insured claimed from the insurance policy as well as the local authority for the resultant losses from a civic disorder, it was not open for the local authority to resist the plaintiff's claim on the basis that their losses had already been indemnified by the insurer.

59. As such, I am of the view that the Defendant Council in the instant case is not entitled to avoid paying compensation for the damage to the motor vehicle on the basis that such losses have already been indemnified by the Plaintiff's insurance.

60. Accordingly, the fourth and final question of law is answered in the negative.

[31] ibid 489.

[32] (1782) 3 Dougl KB 61

CONCLUSION

61. In line with the answers to the questions of law, the appeal is partially allowed. Had the Defendant been solely negligent, the Plaintiff would have been entitled to damages in the sum of Rs. 10 million as set out in his Plaint.

62. However, as both parties were found to have been negligent to varying degrees, the amount of compensation must be discounted accordingly.

63. The Defendant-Appellant-Appellant is directed to pay the Plaintiff-Respondent-Respondent compensation in the amount of Rs. 06 million for personal injuries and Rs. 150,000/- for damages to the vehicle, together with legal interests thereon.

64. No order as to costs.

Appeal Partially Allowed.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I have had the benefit of reading in draft the judgment proposed to be delivered by my learned brother Thurairaja, PC, J., where he finds that both the Plaintiff-Respondent-Respondent (Plaintiff) and Defendant-Appellant-Appellant (Appellant) were negligent. I respectfully disagree on two grounds.

Firstly, it is trite law that trial proceeds on the issues. In ***Hanaffi v. Nallamma*** **[(1998) 1 Sri.L.R. 73]** it was held that once issues are framed, the case which the court has to hear

and determine becomes crystallised in the issues and the pleadings recede to the background. Contributory negligence is not an issue on which trial proceeded.

In this context, it is apposite to observe that Section 75(d) of the Civil Procedure Code requires every answer to contain a statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence.

In ***Uvais v. Punyawathie*** **[(1993) 2 Sri.L.R. 46]** it was held that Section 75 not only requires a defendant to admit or deny the several averments of the plaint, but also to set out in detail, plainly and concisely the matters of fact and law, and the circumstances of the case upon which he means to rely for his defence. It was held that the alleged absence of an agreement to pay an increased rent was not a fact or circumstance on which the defendant relied for his defence; nor a proposition on which the trial Court found the parties at variance; evidence on that matter was prohibited to the defendant, and superfluous for the plaintiff.

Contributory negligence is a specific defence to an Aquilian action. It must be specifically pleaded and raised as an issue at the trial. There was no plea of contributory negligence in the pleadings and was not an issue on which trial proceeded in this action.

In ***The British Petroleum Co. Ltd v. AG*** **(26 N.L.R. 1 at pages 9-10)** while contributory negligence was briefly entertained, the court regarded it irrelevant as an issue had not been framed and held:

> *"It is suggested, therefore, that he ought to have taken measures to shift; his position, and that by failing to take these measures he was guilty of contributory negligence. I think too much has been made of this point. Even if the Captain did run this risk, it was not his doing so that was the cause of the substantial damage, but, as I have*

> *shown above, the real cause of this damage was the ignorance of the pilots of the existence of the rock.* ***In any case, there was no issue framed alleging contributory negligence on the part of the Captain****."* (emphasis added)

I must make some reference to the Law Reform (Contributory Negligence and Joint Wrongdoers) Act No. 12 of 1968 (Act) as my learned brother Thurairaja, PC, J. refers to Section 3(1) of the Act.

The contribution of the injured party's own conduct to the damage suffered has been a bar to the recovery of damages for centuries, in the tradition of civil as well as in common law.

In classical Roman law, it was not possible to balance the culpable behaviour of the two parties, but only to asses of the culpable behaviour of the wrongdoer. This important characteristic, the all-or-nothing approach, was retained in Justinian law and enforced until the Lex Aquilia lost its penal character, only in early modern times.

In medieval Roman legal scholarship, the contributory negligence of the injured party seems to have been regarded as reproachable misconduct to be sanctioned by a refusal of any claim for damages.

The early position in England and South Africa on the effect of contributory negligence was the same. A plaintiff was barred from recovering damages if the harm they suffered was caused, in whole or in part, by his own negligence.

Both South African and English courts attempted to soften the severity of this rule in cases of slight negligence, using principles such as the 'last opportunity' rule, the 'proximate cause' rule, and the 'moral blameworthiness' rule. However, in both South Africa and England, there was a growing belief that contemporary notions of fairness and justice

called for the removal of these outdated legal provisions, as they no longer aligned with the demands of modern life.

The principle that an injured party who was partly responsible for his own harm could not recover damages in tort would remain the official doctrine in England until the Law Reform (Contributory Negligence) Act of 1945. Section 1 (1) provided the rule that in such cases the claim does not fail but the defence of contributory negligence may apply and if it applies it may lead to a reduction of the amount of damages to be paid. This reduction is based on the respective degrees of the responsibility of the parties. The question to be answered is not only to what extent the behaviour involved was likely to cause the event, but above all what is needed is a balancing of the respective faults by the judge. Ultimately what is decisive is what the court/judge considers to be 'just and equitable'. With the Law Reform (Contributory Negligence) Act of 1945, the contributory negligence rule, with its all-or-nothing approach, and the last opportunity rule became inoperative.

The legislature in South Africa enacted the Apportionment of Damages Act, No. 34 of 1956, which altered the law both in respect of joint liability as well as contributory negligence, and as a result, the law in these two countries is more or less the same, on contributory negligence.

In Ceylon (as it was then known), the position was the same as in England and South Africa. Thus, in ***Ahnolis Hamy v. Alagan*** **(44 N.L.R. 303)** Court held that in an action to recover damages for injury caused to a workman, which was based on the negligence of his employer, the plaintiff is not entitled to succeed, where has himself been guilty of contributory negligence. The take all or leave all approach is also clear from ***Perera v. Charles*** **(49 N.L.R. 39)** where the DC judge had dismissed the action on the ground that the plaintiff had, by sitting with his arm protruding from the bus, being guilty of contributory negligence.

The courts sought to mitigate the harshness of the rule, as was done in England and in South Africa, by the application of such rules as 'last opportunity' and 'proximate cause'.

In several cases the last opportunity rule has been specifically referred to. Under this rule, even if there is negligence on the part of the defendant, in the event the plaintiff has the last opportunity to prevent the damage, the case would be dismissed with no damages granted to the plaintiff. This can be seen in ***Daniel v. Cooray*** **(42 N.L.R. 422)** where the court referred to the last opportunity rule and stated that in cases where the defendant pleads contributory negligence the inquiry resolves itself in an elucidation of the question as to which party, by the exercise of ordinary care, had the last opportunity of preventing the occurrence.

The Act was enacted to address two specific issues, apportionment of damages in cases of joint liability and contributory negligence.

The Act provided *inter alia* that an action shall not be defeated by reason only of the fault of the claimant. The court has the power to apportion the damages as it may deem just and equitable.

Therefore, the Act was aimed at addressing the substantive rules governing action for damages arising from a negligent act of the defendant. It was not aimed at amending any procedural rules governing such actions. The procedural rules governing all actions, including the need to specifically plead contributory negligence and raise it as an issue, applies to such actions as well.

In this context, it is apposite to observe that Section 1(1) of the Contributory Negligence Act 1945 is the basis of all pleas of contributory negligence in England & Wales and reads as follows:

> *"Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in responsibility for the damage ...".*

This provision is substantially the same as Section 3(1) of the Act. Nevertheless, it is trite law in England as well that contributory negligence must be pleaded.

Winfield & Jolowicz on Tort [20th Ed. (23-040)] states that ***"[t]he defendant bears the burden of pleading*** and proving that the doctrine of contributory negligence applies".

In ***Maes Finance Ltd and another v. A L Phillips & Co.,*** **[1997 WL 1104736]** it was held as follows:

> *"In principle, in my judgment, there is no reason of law why a contributory negligence plea should not be raised on an assessment of damages. The fact that it operates as a partial defence on quantum is, in my view, no bar. Indeed it is a reason why it is suitable to be raised at the assessment stage.* ***It must, of course, be specially pleaded****."* (emphasis added)

For the foregoing reasons, I hold that Section 3(1) of the Act does not empower the trial judge to apportion damages unless contributory negligence is specifically pleaded and raised as an issue.

Before parting with this issue, I observe that in any event contributory negligence it is not a question of law on which leave was granted. Neither is it a pure question of law.

In the aforesaid circumstances, I hold that contributory negligence cannot be considered in this appeal.

Secondly and in any event, the evidence does not establish negligence on the part of the Defendant. The Plaintiff had the burden of proving negligence on the part of the Defendant. He testified that he did not know how the accident occurred. No other witnesses were called to testify on his behalf to establish the negligence on the part of the Defendant.

Nevertheless, the High Court of Civil Appeal held that the *"Plaintiff's version that he did not know how the accident took place itself is res ipsa loquitor of the fact that the construction laid there causing danger (sic)"*. In view of this conclusion, I must examine the application of that maxim in some detail.

According to Trayner's Latin Maxims, 4th edition, page 553 (Universal Law Publishing Co. Pvt. Ltd., Indian Economy Reprint 2006), the Latin phrase *res ipsa loquitur* means the thing itself speaks or the things done, or the transaction, speaks for itself.

It appears that from ancient times, certain legal systems presumed negligence in particular circumstances. For example, the Roman Law presumed negligence on the part of the defendant in some instances which cast a burden of disproving it on the defendant. See for example Digest 19 2 13 § 6: *"Si fullo vestimenta polienda acceparit, eaque mures roserint, ex loco tenetur: quia debuit ab hoc re cavere"*.

The term *res ipsa loquitur* is said to have been first employed by Cicero in 52 BC in his defence of Milo. (Pro Milone 20.53: *"Res loquitur ipsa, iudices, quae semper valet plurimum. Si haec non gesta audiretis, sed picta videretis, tamen appareret uter esset insidiator, uter nihil cogitaret mali…"*) ("The matter speaks for itself, judges, such always having the greatest validity. If you were not listening to an account of that which has been done, but were looking at a picture thereof, it would nevertheless be clear which of the two was the waylayer and which was considering no evil…").

There is a debate as to whether this maxim is a doctrine or principle. It is referred to as a doctrine in ***Perera v. Amarasinghe (Sub Inspector of Police, Ratnapura)*** **(41 CLW 92 at 93)** and in ***Ravi Kapur v. State of Rajasthan*** **[(2012) 10 SCR 229; 2012 INSC 333]**. However, Shaw L.J. in ***Ballard v. N.B. Ry.*** **[1923 S.C. 43 (H.L.) at 56]** opined that nobody would have called it a principle if the phrase had not been in Latin. In ***Macleod v. Rens*** **[(1997) 3 SA 1039 (F) at 1048]** it was held that this maxim is neither a doctrine nor a principle.

Notwithstanding this academic debate, it can be safely said that the maxim does not relieve the plaintiff of the burden of proving negligence. Neither does it raise any legal presumption in his favour. It applies to the method by which a plaintiff can advance an argument for purposes of establishing a prima facie case to the effect that in the particular circumstances the mere fact that an accident has occurred raises a prima facie factual inference that the defendant was negligent. How cogently those facts speak for themselves will depend on the facts and circumstances of each case [See Macintosh and Norman-Scoble, *Negligence in Delict* (1970) 496; McKerron, *The Law of Delict* (1971) 43; Boberg, *The Law of Delict* (1989) 378ff; Neethling Potgieter and Visser, *Law of Delict* (1994) 141 307].

The fundamental conditions in which the maxim applies is aptly described by Erie C.J. in ***Scott v. London & St. Katherine Dock Co.*** **[(1865) 3 H &C. 596 at 601]** as follows:

> *"There must be reasonable evidence of negligence, but where the things 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 defendant, that the accident arose from want of care."*

The earliest reference to the maxim *res ipsa loquitur* in South African case law seems to be that of ***Gifford v. Table Bay Dock and Breakwater Management Commission* [(1874) 4 Buch 96]**. The relevant facts indicate that the plaintiff in his capacity as Master and Captain in command of a vessel known as *The China* instituted proceedings against the defendants for the recovery of damages after *The China* had been wrecked when it fell off a cradle of a patent slip which had been under the management and control of the defendants at the time. De Villiers C.J. held that as there was evidence in this case of actual negligence, the court did not consider it necessary to deal in detail with the question as to whether the accident which befell *The China* was of such a nature as to raise a presumption of negligence which would result in the casting of the burden of proof on the defendants to repel the presumption.

The court nevertheless answered the question as to the defendants' negligence in the affirmative and after briefly referring to the Roman Law proceeded to discuss the legal position in England and approved of the formulation of the doctrine by Erie C.J., in ***Scott* (supra).**

Subsequently, this locus classicus has been approved and applied in South Africa [See *Packman v. Gibson Bros.* (1887) 4 HCG 410; *Cowell v. Friedman and Co.* (1888) 5 HGC 22; *Block v. Pepys* (1918) WLD 18; *Miller v. Durban Corporation* (1926) NPD 254; *Katz v. Webb* (1930) TPD 700; *Mitchell v. Maison Lisbon* (1937) TPD 13; *Salmons v. Jacoby* (1939) AD 589; *Da Silva v. Frack* (1947) 2 PH O 44 (W); *SAR & H v. General Motors (SA) Ltd.* (1949) 1 PH J 3 (C); *De Bruyn v. Natal Oil Products* Ltd (1952) 1 PH J 1 (N); *Paola v. Hughes (Pty) Ltd*. (1956) 2 SA 587 (E); *Osborne Panama SA v. Shell & BP South African Petroleum Refineries (Pty) Ltd* (1982) 4 SA 890 (G); *Bayer South Africa (Pty) Ltd v. Viljoen* (1990) 2 SA 647 (A); *Monteoli v. Woolworths* (Pty) Ltd. (2000) 4 SA 735 (W); *Webb v. Isaac* (1915) EDL 273; *Coppen v. Impey* (1916) CPD 309; *Allott v. Patterson and Jackson* (1936) SR 221; *S v. Kramer* (1987) 1 SA 887 (W)].

I find much merit in the following principles expounded by Kroon, J. in ***Stacey v. Kent*** **[(1995) 3 SA 344 at 352]** on the application of the maxim *res ipsa loquitur*:

(1) The rule gives rise to an inference, not a presumption, of negligence.

(2) The court is not compelled to draw the inference. At the end of the case, the enquiry is where, on all the evidence, the balance of probabilities lies.

(3) If it is substantially in favour of the party bearing the *onus* on the pleadings, he succeeds; if not he fails.

(4) Once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary. He must tell the remainder of the story, or take the risk of judgment being given against him.

(5) How far the defendant's evidence needs to go to displace the inference of negligence arising from proof of the occurrence depends upon the facts of the particular case.

(6) Mere theories, or hypothetical suggestions will not avail the defendant. His explanation must have some substantial foundation in fact and the evidence produced must be sufficient to destroy the probability of negligence inferred to be present prior to the testimony adduced by him. There is, however, no *onus* on the defendant to establish the correctness of his explanation on a balance of probabilities.

(7) The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility.

Our courts have also applied this maxim. [See *Safenaumma v. Siddick* (37 N.L.R. 25); *Perera v. Amarasinghe (Sub Inspector of Police, Ratnapura)* (supra); *Kalansuriya v. Johoran* (48 N.L.R. 400); *The Trustees of Fraser Memorial Nursing Home v. Olney* (45 N.L.R. 73)*; Wije Bus Co. Ltd. v. Soysa* (50 N.L.R. 350)*; Cabral v. Alberatne* (57 N.L.R. 368); *Subawickrema v. Samaranayake* (1992) 1 Sri.L.R. 142; *Punchi Singho v. Bogala Graphite Co. Ltd.* (73 N.L.R. 66), *Dhammika Perera v. Nalinda Priyadharshana* [(2013) 1 Sri.L.R. 155].

For example, in ***Kalansuriya v. Johoran*** **(supra)** the accused was driving a lorry, and the evidence showed that the lorry left the road, went a distance of fifty feet and injured a person standing eight feet away from the edge of the road. It was held that there was prima facie evidence of negligence casting upon the accused the onus of proving that there was no negligence.

This maxim clearly has no application where the cause of the accident is known. As was held in ***Barkway v. South Wales Transport Co. Ltd.*** **[(1950) 1 All E.R. 392 (HL) at 394-5]** where the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not [See *Administrator Natal v. Stanley Motors* (1960) 1 SA 690 (A) at 700].

In this context, I note that one of the admissions recorded at the trial is that parties admit the accident mentioned in the plaint. According to the plaint, the cause of the accident was an island that had been constructed on the middle of the Havelock Road. It appears that this island had been constructed as there had been a fatal accident at the place about one week prior to the date of the incident.

The evidence led on behalf of the Defendant establishes that the width of the Havelock Road at the place of the accident was 46 feet. It was divided into four lanes, two lanes each way. The construction which was on the middle of the road was about 3 feet in width,

with about 1 ½ feet jutting out onto each side. Thus, the road was around 21 ½ feet wide each way.

In these circumstances, I have no hesitation in rejecting application of the maxim *res ipsa loquitur* to the facts and circumstances of this case. The High Court of Civil Appeal appears to have ventured on a speculative exercise in holding that this maxim applies to the facts and circumstances of this action. It is of vital importance to appreciate the difference between an inference and conjecture or speculation in the application of this maxim. In ***Caswell v. Powell Duffryn Associated Collieries*** **[(1940) AC 152 at 169]** Lord Wright provides the following instructive exposition of the difference between an inference and speculation or conjecture:

> *"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive, proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture".*

On the contrary, the Plaintiff must explain how the Defendant can be held to be negligent when the Plaintiff had clearly driven the car close to the middle of the road where an island had been constructed when he had about a 21 feet wide road to drive his car on a road which was empty of any vehicular traffic at about 3 a.m. in the morning. The Plaintiff admitted that the road was wide at the place of the accident.

This by itself will not establish the negligence of the Plaintiff. However, as my learned brother Thurairaja, J. observes, the Plaintiff was admittedly driving over the speed limit. The very fact that the Plaintiff was driving his vehicle above the speed limit close to the

middle of the road coupled with the fact that there was a single white line in the middle of the road near the place of the accident justifies an inference of negligence on his part. The island was constructed in the middle of a pedestrian crossing. The Plaintiff admitted that he drives very often on this road and had observed the construction prior to the day of the accident.

The Plaintiff contended that the yellow beacon lights near the construction were not operating and that the area should have been illuminated for the users of the road to know of the existence of the said island which is an obstruction to the users of the road.

However, this overlooks the fact that the Defendant had the benefit of the lights of the car driven by him. Unlike a hole in the middle of the road which may cause difficulty in identifying in the absence of any warning, an island constructed on the middle of a road providing motorists about 21 feet wide road to travel on coupled with the admission of the Plaintiff that he had observed the construction prior to the day of the accident imputes negligence on the part of the Plaintiff.

For the foregoing reasons, I answer question of law No. iii in the affirmative and hold that the accident took place due to the negligence on the part of the Plaintiff for having driven his vehicle over the speed limit without a proper lookout.

I part with this judgment with some anguish. The Plaintiff was responding to an urgent call to attend to a patient in a critical condition. He was undoubtedly seeking to give effect to the Hippocratic oath he was obliged to act upon. Unfortunately, he met with an accident in the process and suffered serious injury.

Nevertheless, court is not exercising just and equitable jurisdiction. It must determine the case by applying the law according to the facts and circumstances of the case.

Appeal allowed. The judgments of the District Court of Colombo dated 26.01.2008 and the High Court of Civil Appeal dated 30.03.2016 are hereby set aside. The action is dismissed.

Parties shall bear their costs.

JUDGE OF THE SUPREME COURT

A. L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT