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Res ipsa loquitur still speaks

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Res ipsa loquitur still speaks.

Kevin Williams

In *George v Eagle Air Services Ltd* [2009] UKHL 21 the Judicial Committee of the Privy Council found in favour of an unrepresented widow and her five children by relying on the device of *res ipsa loquitur*.

Her common law husband, who had worked as an aircraft mechanic for the respondents, was killed, along with the pilot, when one of the company's light aircraft crashed at the end of a flight from St Lucia to Union Island in the Caribbean. Pilot error was alleged to be the cause. The defence simply denied negligence. No positive case to explain the crash was advanced, beyond asserting that the plane had been 'airworthy' when it took off. However, the defence did claim that the deceased had been travelling on a 'gratuitous ride which was never sanctioned or authorised' and that, insofar as the fatal crash might be attributable to the aircraft having been mishandled or flown otherwise than in accordance with normal safe procedures, the pilot was 'acting outside the course of his employment'. These allegations, which any self-respecting pupil would blush to put, even on behalf of a Lloyds insurer, were peremptorily dismissed by the Board as 'misconceived' and 'patently unsustainable' [at 14], respectively.

Following the crash, an air accident investigation was promptly conducted and an official report produced within five weeks; but, after much procedural wrangling, the trial judge refused to admit it into evidence. This left Mrs George, when asked about her case for negligence, being able to say in the witness box only that, not having been there, she did not know what had caused the crash, though 'I had a dead body back'. Whilst this might be heard as the classic plea of a *res ipsa* claimant, at the end of a trial process that extraordinarily seems to have dragged on across a five year period, the judge rejected her claim for want of 'any evidence...as to how the accident...occurred.' That decision was upheld by the Court of Appeal of the Eastern Caribbean, but without referring to the skeleton submitted by (the now unrepresented) Mrs George asking 'whether the doctrine of *Res Ipsa Loquitur* applies'.

In an admirably, if surprisingly short opinion, Lord Mance speaking for the Board held that it did. 'This was the respondents' aircraft, their flight and their pilot. Aircraft, even small aircraft, do not usually crash' so that it was 'not unreasonable to place on them the burden of producing an explanation which is at least consistent with absence of fault on their part.' Given that the respondents had 'never attempted to suggest any explanation of the accident or any reason preventing them giving an explanation', the Board concluded that they had 'failed to displace the inference of negligence which...results from the crash itself' [at 13].

The sole authority referred to was *Higginbotham v Mobil Oil Corporation* 545 F 2d 422 (5th Cir, 1977), cited in Shawcross and Beaumont's *Air Law*. Having first noted an earlier reluctance to apply *res ipsa* to air crashes, the authors cite the US Federal Court of Appeals to the effect that modern developments in design, technology, pilot training, navigational aids and so forth, had combined to give air travel an estimable safety record, so that crashes

ought nowadays to be regarded as occurrences that do not ordinarily happen in the absence of fault by someone connected with the manufacture or operation of the aircraft.

So, despite having succeeded in keeping out the air accident report, which presumably might well have explained the likely cause(s) of the accident, the respondents' high risk strategy of putting the claimant to the proof by flatly denying any fault and refusing to offer any explanation rightly failed.

The decision is to be welcomed, notwithstanding that on two previous occasions the imminent demise of *res ipsa* across the common law world has been predicted in this Review (see M. McInnes (1998) 114 LQR 547 and C. Witting (2001) 117 LQR 392). It is significant that despite the Supreme Court of Canada appearing to have read the last rites over *res ipsa* in *Fontaine v British Columbia (Official Administrator)* [1998] 1 SCR 424 (discussed by McInnes), Professor Klar continues to devote almost twenty pages to a discussion of the 'maxim' on the perfectly proper ground that how claimants may prove negligence by the use of circumstantial evidence continues to be crucial (see L. Klar, *Tort Law*, 3rd edition, 2003, pp. 505-524). Indeed, Mackenzie JA in *Marchuk v Swede Creek Contracting Ltd* (1998) 116 BCAC 318 is cited by Klar (at p. 524) as saying that 'while the Supreme Court was critical of the Latin maxim, the underlying principles...were not modified'.

Some may be disappointed that the Privy Council did not engage in a more detailed analysis concerning precisely when *res ipsa* operates and how. *George v Eagle Air Services*, however, takes for granted its continued desirability, at least so far as concerns personal injury accident victims and their dependants. It implicitly accepts that the policy justifications for it include disparity of knowledge and the legitimacy of putting pressure on those who are in the best position to know to advance their explanation. It also reasserts the now orthodox position concerning *res ipsa*'s procedural effect, which was set out in another decision of the Privy Council, *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298. Rather than shifting the *legal* burden of proof (as happens, for example, where s. 11 of the Civil Evidence Act 1968 is successfully invoked, see *Wauchope v Mordecai* [1970] 1 WLR 317), once *res ipsa* is engaged only an *inference* of negligence is raised (Cf. P. Atiyah 'Res Ipsa Loquitur in England and Australia' (1972) 35 MLR 337). Witting (at 393) rightly suggests that any inference must encompass both an implied breach of duty and that the breach caused the claimant's damage. However, unlike other types of claim where circumstantial evidence is in issue, such claimants need not point to any specific failure said to have caused their harm. By definition, they are unable to show how or why the accident happened so that courts are being invited to estimate the probability that some unspecified and perhaps unknowable negligence is responsible. Accordingly, if a defendant is to escape liability to pay damages, he must discharge what has variously been called a forensic, evidentiary, or secondary obligation by offering an equally compelling explanation that is consistent with no fault on his part or on the part of those for whom he is responsible. It has been observed that the practical difference between a formal reversal of the burden of proof and the generation of a mere inference may frequently be imperceptible to the eye of the ordinary litigator.

McInnes (at 550) has gone so far as to argue that *res ipsa* is superfluous, though this is only the case, as he appears to concede, if we accept a minimalist view, namely, that depending on

the circumstances the *res* may raise inferences varying from the downright improbable to the virtually conclusive. Yet when we say that its application raises a prima facie case, we surely mean that in the absence of plausible rebuttal evidence, which may be direct or circumstantial, though it must be more than just speculation or simple conjecture, the mere fact of the occurrence implies that the court is entitled to treat the defendant as culpably at fault. Mumbling has no place here. Either the thing speaks for itself or it does not.

Provided we are clear about its effect, and reject as a canard the idea that *res ipsa* is a covert means by which to impose a stricter (even strict) standard of care on defendants, it is perhaps simply a matter of taste whether this device for helping claimants to prove their case is described as a ‘convenient formula’, as Morris LJ did in *Roe v Minister of Health* [1954] 2 QB 66, at 87, or as a ‘doctrine’, as Clerk and Lindsell continue to do (19th edition, 2006, para. 8-151). As a distinguished American academic has observed, whether it is permissible to speak of *res ipsa* as a doctrine is a ‘truly minor dispute’ (see D. B. Dobbs, *The Law of Torts*, 2000, p. 370).

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