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Res ipsa loquitur rides again: *Kennedy v Mackenzie* considered

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The author considers the recent decision in Kennedy v Mackenzie *[2017] CSOH 118; 2017 G.W.D. 30-486 where the defender was ultimately unable to rebut the inference of negligence which had been raised against her in relation to a fatal road traffic accident.*

Introduction

The doctrine of *res ipsa loquitur* can often be of considerable assistance to a pursuer in a delictual action. Literally translated, the device means "the thing speaks for itself". More loosely, one might offer the formulation that "an occurrence tells its own story." While the pursuer normally bears the onus of proof in a civil case, *res ipsa loquitur* serves to give rise to an inference of negligence against the defender. The doctrine (which is capable of rebuttal by the defender) operates only in limited circumstances. The recent case of *Kennedy v Mackenzie* [2017] CSOH 118 provides an illustration of its application in the context of a fatal road traffic accident. In that case, the defender was ultimately unable to rebut the inference of negligence to which the facts gave rise. Before examining the opinion of Lord Uist in *Kennedy*, it is useful to explore some of the key authorities in which the doctrine has operated and to identify the necessary preconditions for its application. (It is perhaps noteworthy that the use of the term "doctrine" in this context has not attracted universal approval. In *Lloyde v West Midlands Gas Board* [1971] 1 W.L.R. 749, Megaw L.J. doubted whether it was right to describe *res ipsa loquitur* as a "doctrine", stating (at p 755): "I think that it is no more that an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances."

Res ipsa loquitur

"It seems to me that the authorities clearly show that it is for the pursuer in an action founded on negligence to show that the defenders have been negligent, and that their negligence has caused the injury of which the pursuer complains. " So stated Lord Cohen in *Brown v Rolls Royce Ltd* 1960 S.C. (HL) 22 at p 25. An important exception to this statement however arises in circumstances where the doctrine of *res ipsa loquitur* applies. Thus, in *David T Morrison & Co Ltd v ICL Plastics Ltd* 2014 S.C. (U.K.S.C.) 222 Lord Hodge said (at para 98):
"Where the facts give rise to an inference of negligence by the defender, the evidential burden shifts onto the defender to establish facts to negative that inference."
In *Roe v Ministry of Health* [1954] 2 Q.B. 66 Morris L.J. made the following observations about *res ipsa loquitur* (at p 87-88):

"... this convenient and succinct formula possesses no magic qualities: nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying: "I submit that the facts and circumstances which I have proved establish a *prima facie* case of negligence against the defendant.""

In *Ratcliffe v Plymouth and Torbay HA* 1998 P.I.Q.R. P170 Hobhouse L.J. said (at P188-189):

“The essential role of the doctrine of *res ipsa loquitur* is to enable the plaintiff who is not in possession of all the material facts to be able to plead an allegation of negligence in an acceptable form and to force the defendant to respond to it at the peril of having a finding of negligence made against the defendant if the defendant does not make an adequate response.”

Hobhouse L.J. went on to suggest (at P190) “that the expression *res ipsa loquitur* should be dropped from the litigator's vocabulary and replaced by the phrase “a prima facie case.””

It is only in certain limited circumstances that the maxim can operate. It does not apply where the cause of the accident is known. (See, for example, *Black v CB Richard Ellis Management Services Ltd* 2006 Rep L.R. 36.) In *Milne v Townsend* (1892) 19 R 830, Lord Adam stated (at p 836):

“[T]he *res* can only speak so as to throw the inference of fault upon the defender in some cases *where the exact cause of the accident is unexplained.*" (emphasis added).

The leading case is *Scott v London and St Katherine Docks Co.* (1865) 3 H & C 596. The plaintiff, a customs officer, was walking past a warehouse when he was struck by six bags of sugar. The bags were being lowered to the ground by a crane from the warehouse. Erle C.J. set out what is now regarded as the classic exposition of the maxim (at p 667):

“There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.”

It follows that three conditions must be satisfied before the maxim of *res ipsa loquitur* can apply: there must be reasonable evidence of negligence; the circumstances must be under the control of the defender or his employees; and the accident must be of such a type that it does not happen in the absence of negligence. As all of these criteria were satisfied in *Scott*, the maxim did in fact operate in the plaintiff’s favour.

In *Cassidy v Ministry of Health* [1951] 2 K.B. 343 the plaintiff was admitted to hospital to undergo surgery on two stiff fingers. He emerged from surgery with four stiff fingers. He relied successfully on the *res ipsa loquitur* rule. Denning L.J. stated (at p 365) that the plaintiff was entitled to say:

"I went into hospital to be cured of two stiff fingers. I have come out with four stiff fingers and my hand is useless. That should not have happened if due care had been used. Explain it, if you can."

The maxim again operated to assist the pursuer in *Devine v Colvilles Ltd* 1969 S.C. (H.L.) 67. There, the pursuer suffered injury when he jumped from a platform following a violent explosion at his workplace. The explosion had occurred in a hose

carrying oxygen. All the conditions for the application of *res ipsa loquitur* were present. Such explosions would not normally happen in the absence of negligence. The hose (the *res*) in which the explosion had occurred was under the defenders' control. The exact cause of the explosion was unknown and although the defenders were able to demonstrate the *likely* cause of the explosion, their explanation did not establish that they were not negligent. The defenders thus failed to rebut the inference of negligence and were found liable.

The maxim operated again in *Mahon v Osborne* [1939] 2 K.B. 14 where a swab was left in a patient's body following abdominal surgery, with the result that he died three months later.

More recently, the maxim was successfully invoked in the Privy Council in *George v Eagle Air Services Ltd and Others* [2009] 1 W.L.R. 2133. The claimant sought damages from the owners and operators of an aircraft following her husband's death in an air crash which she alleged was caused by pilot negligence. The defendants denied the allegations of negligence but advanced no positive case to explain the crash. The Privy Council held that *res ipsa loquitur* applied in the circumstances and the action succeeded. Lord Mance made the following observations (at para 13):

"This was the defendants' aircraft, their flight and their pilot. Aircraft, even small aircraft, do not usually crash, and certainly should not do so. And, if they do, then, especially where the crash is on land as here, it is not unreasonable to suppose that their owner/operators will inform themselves of any unusual causes and not unreasonable to place on them the burden of producing an explanation which is at least consistent with absence of fault on their part. The defendants have in fact never suggested or attempted to suggest any explanation of the accident or any reason preventing them giving an explanation. In the Board's opinion, they have in the result failed to displace the inference of negligence which in the circumstances results from the crash itself."

It is clear from the above discussion that the maxim, *res ipsa loquitur*, has applied in a broad spectrum of contexts. Not all attempts to invoke it have succeeded however. An attempt to invoke the doctrine failed in *McQueen v Glasgow Garden Festival* 1995 S.L.T. 211. There, a spectator at a fireworks display suffered injury when she was struck by part of a steel launching tube which fragmented when a firework exploded inside it. In a subsequent action against the company responsible for the management of the display, it was accepted that the explosion had been caused by a defect within the firework which had caused it to explode on the ground rather than while airborne. The pursuer attempted to establish fault against the defenders on the basis of *res ipsa loquitur.* She alleged that the explosion of the firework under the management of the company was the *res* demonstrating fault. The Lord Ordinary (Cullen) held that the defect in the firework was latent. There were no facts showing that the company knew or ought to have known that there was a risk of the device for the lifting charge or the delay mechanism being defective. The fact of the explosion was not, therefore, indicative of fault on the part of the company. It was instead indicative of fault on the part of the manufacturer.

Rebuttal of the inference

The inference of negligence raised by the application of *res ipsa loquitur* is capable of being displaced or rebutted. Thus, if the defender can establish a way in which the

accident may have occurred without fault on his part, the pursuer is put back into his original position and must demonstrate negligence. In *Ballard v North British Railway Co.* 1923 S.C. (H.L.) 43, Lord Dunedin observed (at p 53) that the question was whether "the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence." He continued (at p 54):
"But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence."

In O'Hara v Central SMT 1941 S.C. 363 the pursuer, who was waiting to alight from an omnibus, fell onto the road and was injured after the omnibus swerved suddenly. She raised an action against the owners of the omnibus, on the grounds of their driver's negligence. The defenders maintained that the driver had been compelled to swerve on account of the fact that a man had run across the road in front of the omnibus. That explanation served to rebut the inference of negligence.

Rebuttal of the inference of negligence was eloquently described by Megaw L.J. in *Lloyde v West Midlands Gas Board* [1971] 1 W.L.R. 749 in the following terms (at p 755):

"The res, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted."

Would the defender in *Kennedy v Mackenzie* be able to rebut the inference of negligence? Is it to that case to which attention is now turned.

Background to the case
The circumstances of the case are tragic. On the evening of 1 August, 2013 the defender was driving a Vauxhall Vectra motor vehicle on the A85 road towards Oban. Her partner, Vincent Kennedy, was a passenger in the front of the vehicle. During the course of the journey, the defender encountered a double or S bend in the road. On the second (or left) bend the car began to skid to the left. The defender steered the car to the right across the road into the eastbound carriageway where she collided with another vehicle. Mr Kennedy and a passenger in the other vehicle were killed. Several members of Mr Kennedy's family sought damages from the defender on the basis that the accident was caused by her negligence.

Proof on liability
The case came before Lord Uist for proof on liability. Counsel for the defender accepted that the onus rested on the defender to prove a non-negligent explanation for her loss of control of the vehicle. The defender maintained that she lost control of the vehicle about fifty to sixty metres from the point of impact and that the road surface there was unusually slippery. She maintained that the slippery nature of the road surface was the cause of her loss of control and that she was unable to avoid the accident. At the proof, evidence was led from sixteen witnesses. There was no dispute that the defender had lost control of the vehicle. The issue in dispute was whether the road surface where the defender lost control of the car was unduly slippery and that that constituted the sole cause of the loss of control.

Before reviewing the evidence, Lord Uist set out the applicable law. His Lordship stated (at para 4):

“In certain circumstances an inference of negligence arises from the proved facts and it is for the defender to rebut that inference. This is one such case.”

His Lordship proceeded to quote (at para 5) from the judgment of MacKenna J. in *Richley (Henderson) v Faull* [1965] 1 W.L.R. 1454 at p 1457 as follows:

“I, of course, agree that where the defendant’s lorry strikes the plaintiff on the pavement or, as in the present case, moves on to the wrong side of the road into the plaintiff’s path, there is a prima facie case of negligence and that this case is not displaced merely by proof that the defendant’s car skidded. It must be proved that the skid happened without the defendant’s fault. But I respectfully disagree with the statement that the skid by itself is neutral. I think that the unexplained and violent skid is in itself evidence of negligence. It seems hardly consistent to hold that the skid which explained the presence of the defendant’s lorry on the pavement or, as here, on the wrong side of the road, is neutral, but that the defendant must fail unless he proves that this neutral event happened without his default. Whether I am right in this or wrong, the conclusion is the same: the defendant fails if he does not prove that the skid which took him to the wrong place happened without his default.”

In *Smith v Fordyce* [2013] EWCA Civ 320, Toulson L.J. said (at para 61):

“... in order for a claimant to show that an event was caused by the negligence of the defendant, he need not necessarily be able to show precisely how it happened. He may be able to point to a combination of facts which are sufficient, without more, to give rise to a proper inference that the defendant was negligent. A car going off the road is an obvious example. A driver owes a duty to keep his vehicle under proper control. Unexplained failure to do so will justify the inference that the incident was the driver’s fault. In the words of the Latin tag, the matter speaks for itself. In such circumstances the burden rests on the defendant to establish facts from which it is no longer proper for the court to draw the initial inference. To show merely that the car skidded is not sufficient, because a car should not go into a skid without a good explanation.”

The defender in *Kennedy* averred that the SCRIM (i.e. measure of skid resistance) values for the road were deficient. She also averred that Transport Scotland ought to have erected warning signs detailing the slip hazard on the road surface. It was also said that the road was resurfaced about July 2014. The defender claimed that she was driving with due care and attention, that she was not travelling at excessive speed and that she did not carry out excessive braking having regard to the prevailing conditions.

The court heard evidence from Constable David Speir who was involved in investigating the collision as a standard collision investigator. He had conducted skid tests. His conclusion (as recorded by Lord Uist at para 15) was that the defender had “failed to negotiate a gradual left hand bend although the exact reason for this is not known”, but that “in the absence of any vehicle defect, road defect or involvement

with any other vehicle the cause of this must be driver error." Another accident investigator, James McCartney, was also of the opinion that the cause of the accident was driver error. That error induced a skid from which the defender was unable to regain control. The vast weight of evidence indicated that it was not raining at the time of the accident, but that it had been raining earlier and the road surface was damp. Lord Uist observed that it was clear from the evidence that there was no defect in the defender's car or contaminant on the road which could have caused the accident. It was also agreed in a joint minute that the A85 was used by about 5,000 cars a day heading in each direction. There was also evidence that in July 2013 the average daily traffic flow was recorded as 7834, equating to 3917 cars a day in each direction.

Lord Uist stated (at para 27):

"No other vehicle skidded on the left bend on 1 August 2013 causing an accident, there had been no skid at it in the previous six years causing an accident and none after the accident before the road was resurfaced in 2014."

Lord Uist went on to observe that Mr Dickson, a chartered civil engineer, who was led as a witness for the defender, accepted that it was unlikely that the road surface alone was the cause of the accident. His Lordship accepted Mr Dickson's view in this regard. Lord Uist noted further that the police officers who used the stretch of road regularly had never experienced a loss of traction at the left bend. His Lordship continued (at para 27):

"No other driver experienced a skid causing an accident over a period of about seven years. That fact is to me …a very strong indication that, at the time of the accident, the road was not so slippery as to be the sole cause of a vehicle going into a skid there."

Lord Uist concluded (at para 28):

"In these circumstances the defender has failed to discharge the burden upon her of establishing that the cause of the accident was something other than her negligence. It follows that she is liable in damages to the pursuers."

Conclusion

Kennedy v Mackenzie provides a useful illustration of the application of the evidential device commonly known as *res ipsa loquitur*. There may be differences of opinion as to whether *res ipsa loquitur* should be termed a doctrine, maxim or device. One might also, like Hobhouse L.J., even disapprove of the very terminology of *res ipsa loquitur*. What does seem clear, however, is that the maxim continues to play a useful role in civil litigation where the pursuer is unable to establish the precise cause of an accident.