**13/08; [2008] VSC 23**

**SUPREME COURT OF VICTORIA**

# *METROLINK VICTORIA PTY LTD v AUSPRO LOGISTICS PTY LTD*

**Kaye J**

**6, 12 February 2008 — (2008) 49 MVR 350**

**CIVIL PROCEEDINGS – NEGLIGENCE – COLLISION BETWEEN TRUCK AND BRIDGE – EMPLOYEE OF TRAMWAY ISOLATED POWERLINES UNDER BRIDGE – AS A RESULT A NUMBER OF TRAMS HAD TO BE DIVERTED TO OTHER ROUTES – CLAIM BY TRAMWAY OPERATOR FOR DAMAGES BY WAY OF LOSS FOR OPERATIONAL PENALTIES – SUBMISSION OF 'NO CASE' – TEST TO BE APPLIED – FINDING BY MAGISTRATE AGAINST TRAMWAY OPERATOR – TEST APPLIED AS IF MAGISTRATE WERE REACHING A FINAL DECISION IN THE CASE – WHETHER MAGISTRATE APPLIED THE WRONG TEST – DOCTRINE OF *RES IPSA LOQUITUR* - MEANING OF – FINDING BY MAGISTRATE THAT DOCTRINE DID NOT APPLY – WHETHER MAGISTRATE IN ERROR.**

A driver of a truck owned by ALP/L collided with a bridge. Employees of M. – which operates a tram network – attended the scene and isolated powerlines under the bridge. No damage had been occasioned to the powerlines or any property owned by M. However, as a result of the isolation of the powerlines, a number of trams on various routes had to be diverted. Consequently, M. incurred operational performance penalties payable by it to a third party under a franchise agreement. M. sued ALP/L for damages for interruption to its services and other incidental damages alleged to have been caused by the accident. At the hearing, and at the conclusion of evidence on behalf of M., ALP/L submitted that there was no case to answer. M. submitted that the Court could accept that negligence could be inferred according to the doctrine of *res ipsa loquitur*. The Magistrate reserved the decision and, in dismissing the claim, ultimately found that M. had failed to prove negligence by ALP/L. The Magistrate, in applying the test applicable to determination of the final outcome of the case rather than a no case submission, refused to infer negligence according to the doctrine of *res ipsa loquitur*. Upon appeal—

**HELD: Appeal dismissed.**

**1. When a 'no case' submission is made, the role of the Magistrate is to determine whether, on the evidence found by the Magistrate at the conclusion of the plaintiff's case, the Magistrate could — not would — find in favour of the plaintiff on the cause of action relied on by the plaintiff. In determining the 'no case' submission, the Magistrate applied reasoning which would have been applicable if determining the final outcome of the case, that is, whether the plaintiff established its cause of action on the balance of probabilities.**

**2. The phrase *res ipsa loquitur* does not encapsulate an independent legal doctrine or principle of law but describes a particular process of reasoning which may be adopted by a court in certain circumstances where the plaintiff seeks to establish negligence on behalf of a defendant.**

**3. The question which the magistrate was required to answer in the present case, on hearing the 'no case' submission, was whether M. had adduced evidence as to the happening of an accident, as a result of which M. had suffered damage, which a tribunal of fact could (not necessarily would) conclude was of such a kind that it does not ordinarily occur without negligence. In other words, was there sufficient evidence before the magistrate as to the happening of the accident which would have left it open to the magistrate to legitimately conclude that the accident was of such a kind that it would not have ordinarily occurred without negligence on behalf of ALP/L's driver? As M. failed to adduce any sufficient evidence upon which the Magistrate was entitled to rely upon the process of reasoning known as *res ipsa loquitur*, if the Magistrate had applied the correct test in considering the 'no case' submission, the Magistrate would have nevertheless concluded that there was no case to answer.**

**KAYE J:**

1. The appellant, Metrolink Victoria Pty Ltd ("Metrolink") conducts the Yarra Trams network pursuant to a franchise agreement with the Director of Public Transport. On 26 May 2006, a truck driven by an employee of the respondent, Auspro Logistics Pty Ltd ("Auspro") collided with the Spencer Street Railway Bridge at the intersection of Spencer Street and Flinders Street, Melbourne. As a consequence, Metrolink commenced proceedings in the Magistrates' Court claiming damages against Auspro for interruption to its services and other incidental damages which it alleged were caused by the accident. The claim came before the magistrate on 25 May 2007. On 6 June 2007,

the learned magistrate delivered a short written judgment, dismissing Metrolink's claim. Metrolink now appeals to this Court against that decision pursuant to s109 of the *Magistrates' Court Act* 1989.

2. The collision between Auspro's vehicle and the railway bridge did not occasion any damage to powerlines or to any physical property of Metrolink. However, at the direction or request of the police who attended the scene, employees of Metrolink isolated the powerlines under the bridge. As a result, a number of trams on various routes serviced by Metrolink were required to be diverted. The main head of damages claimed by Metrolink consisted of an amount of $22,662.97 for operational performance penalties payable by it under the franchise agreement, as a consequence of the delay in the delivery of its services.[1] Metrolink also claimed an amount of $1,718.38 for the cost of Metrolink's employees and vehicle which were required to attend the scene in order to isolate the supply of electricity to the scene for safety purposes.

3. At the proceeding before the magistrate very little evidence was adduced as to the circumstances of the accident. In its defence, Auspro expressly admitted that its vehicle struck the bridge, but denied negligence. The only evidence as to the accident was given by Mr Cameron Twaddle, a linesman employed by Metrolink. Mr Twaddle stated that he was called to the scene at approximately 11.35 am on the day of the accident. When he arrived at 11.40 am, he observed that a truck had hit the bridge at Spencer Street, and that the prime mover and the trailer attached to it had turned over on to their side. There was no damage to the tram trucks which were near the overhead powerlines. Apart from that brief testimony, the balance of the evidence before the magistrate was concerned with proof of the two heads of damages claimed on behalf of Metrolink. At the conclusion of the evidence called on behalf of Metrolink, Auspro's counsel made a "no case" submission. At the urging of counsel for Metrolink, the magistrate put counsel for Auspro to his election to call no evidence. Auspro's counsel made that election and proceeded with his no case submission. After the completion of oral submissions on behalf of both Auspro and Metrolink, the magistrate requested both sides to provide to her written submissions.

4. The written submissions filed on behalf of Auspro were somewhat wider than the submissions made orally before the magistrate. It was submitted on behalf of Auspro:

> 1. That Metrolink had failed to prove negligence by Auspro.
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> 2. That Metrolink had failed to prove that any negligence of Auspro was a cause of the loss and damage claimed by Metrolink. In particular, it was submitted that the interference with Metrolink's tram services arose from Metrolink's action in turning off the power to its own services, and there was no evidence that such a course of action was necessary. Thus, it was submitted that Metrolink's action in turning off the power to its services was a *novus actus interveniens*.
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> 3. That the claim by Metrolink for $22,662.97 for operational performance penalties under the franchise agreement had not been proven, and, in any event, the penalties were too remote, and were not of a type or genus which were reasonably foreseeable on behalf of Auspro.
> 4. That the claim by Metrolink for the cost of its employees and its vehicle for attending the scene had not been proven, and was not recoverable, because it was purely an "internal" cost.

5. On 6 June 2007 the magistrate delivered her written reasons, upholding the first submission advanced on behalf of Auspro. At paragraphs 5 and 6 of her written reasons, her Honour stated:

> "5. The plaintiff bears the onus of proving that the collision and subsequent damage was caused by the negligence of the defendant. No evidence was called to allow the Court to conclude how this event occurred. Instead, the plaintiff urged the Court to accept that negligence can properly be inferred according to the doctrine of *res ipsa loquitur*. From the little I know of the events I am not satisfied I can so infer. It does not take much imagination to envisage circumstances in which a truck could collide with a bridge through no fault of its driver. Another road user could cause such a collision. Perhaps the bridge was incorrectly signed as to its height. Road works may have interfered.
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> 6. The plaintiff focussed its case on proving damages, but has neglected to prove to the Court's satisfaction the act of negligence upon which liability for those damages may flow. Accordingly, I find that the defendant has no case to answer and the complaint is dismissed."

**The Notice of Appeal**

6. The Notice of Appeal contains six questions of law and six grounds of appeal, which do

no more than mirror the questions of law indicated in the Notice. The grounds of appeal are:

> "1. The learned magistrate erred in law in failing to find that there was a case to answer.
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> 2. The learned magistrate erred in law in failing to find that, in the circumstances of the case, it was open to her to infer negligence.
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> 3. The learned magistrate erred in law in failing to direct herself as to the consequences which flowed from the respondent's failure to call evidence without any or any adequate explanation for such failure.
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> 4. The learned magistrate erred in law in failing to infer that the subject incident was caused by the negligence of the respondent.
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> 5. The learned magistrate erred in law in that she found that the respondent had no case to answer when there was material before her on which inferences of negligence could be drawn.
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> 6. The learned magistrate erred in law in finding that the doctrine of *res ipsa loquitur* did not apply in the absence of an explanation by the appellant that met all other possible circumstances."

**Submissions**

7. Mr J Brett, who appeared on behalf of Metrolink, grouped together grounds 1, 2 and 5 in submitting that the learned magistrate erred in failing to distinguish properly between the test to be applied on a no case submission, and the test to be applied in determining the final outcome of the case. Mr Brett submitted that, in essence, the test on a no case submission is whether there is evidence on which the Court could find in favour of the plaintiff. On the other hand, in determining the final outcome of the case, the appropriate test is whether the Court is satisfied on the balance of probabilities as to the allegations made by the plaintiff. Mr Brett submitted that, in paragraph 6 of her Honour's reasons, the magistrate, in determining the no case submission, applied the test which would be applicable to the ultimate determination of the outcome of the case. Mr Brett further submitted that there was, as a matter of law, evidence on which a court could find in favour of the plaintiff. Thus, he submitted that her Honour should have rejected the no case submission. Having done so, the magistrate would then have been entitled to apply the principle stated by the High Court in *Jones v Dunkel*,[2] in light of the failure of the defendant to call any evidence, in drawing inferences in favour of the plaintiff from the evidence which was before the magistrate. In support of grounds 3, 4 and 6 Mr Brett submitted that, in postulating potential circumstances which might explain why the truck collided with the bridge through no fault of the driver, the magistrate misapplied the process of reasoning described by the doctrine *res ipsa loquitur*. In support of that submission Mr Brett relied on the decisions of the New South Wales Court of Appeal in *Macerola v Government Insurance Office (NSW)*[3] and *Schumacher v The Nominal Defendant & Anor.*[4]

8. In response, Mr Purvis, who appeared on behalf of the respondent, submitted that the magistrate did not fail to apply the appropriate test applicable to the task which was before her. Mr Purvis submitted that the magistrate did not find in favour of the defendant on a no case submission. Rather, the evidence having been completed, the magistrate found that the plaintiff had failed to prove negligence on behalf of the defendant. Thus, he submitted that the magistrate was expressing her ultimate finding in the case, and was not ruling on the no case submission. Mr Purvis further submitted that the plaintiff had failed to put any evidence before the magistrate as to the happening of the accident. The evidence went no further than to prove that a vehicle driven by an employee of the defendant had collided with the bridge. There was no evidence as to what part of the vehicle came into contact with what part of the bridge. Mr Purvis submitted that that evidence was insufficient to ground a process of reasoning by application of the maxim *res ipsa loquitur*. He therefore submitted that the magistrate was correct to refuse to draw an inference of negligence against the defendant.

9. Mr Purvis further submitted that the appellant, Metrolink, is not entitled on appeal to rely on the failure of the defendant/respondent to call evidence from the driver, in support of its submission that, in making the ultimate determination in the case, the magistrate ought to have taken into account the principles of *Jones v Dunkel*. Mr Purvis submitted that the plaintiff had not invoked the principles of *Jones v Dunkel* at the hearing of the proceeding before the magistrate. Further, he submitted that, in any event, those principles were not applicable where, as here,

the defendant had embarked on a no case submission, and in doing so had elected not to call evidence.

**Issues**

10. From the foregoing submissions, it appears that there are two main issues which I need to determine, namely:

> 1. Did the magistrate apply the correct test in determining the application which was before her? That issue involves two questions, namely –
>
> (a) Did the magistrate apply the test applicable to a no case submission, or the test applicable to the final determination of the case?
>
> (b) Was the magistrate determining a no case submission, or, as contended by Mr Purvis, the final outcome of the case?
>
> 2. If the magistrate was purporting to determine the no case submission, and in doing so applied the incorrect test, should the magistrate have upheld or dismissed the application, if she had applied the correct test?

**Test applied by magistrate**

11. There was common ground, on the appeal, that the magistrate, in reaching her decision, applied the test which would have been applicable if she were reaching the final decision in the case, and not deciding the application before her as a no case submission. The argument before me centred on whether the magistrate was, in fact, only determining the no case submission, or whether, in the course of oral and written submissions, the issue which came before the magistrate was not the no case submission, but the final determination of the case.

12. The test, to be applied by a magistrate or judge in determining a "no case" submission at the conclusion of a plaintiff's case, involves a determination whether, on the evidence adduced by the plaintiff, the magistrate or judge could (not "would") find in favour of the plaintiff.[5] That test is distinct from the question to be answered by the Court in determining whether the plaintiff ought to succeed, namely, whether the plaintiff has established its cause of action on the balance of probabilities. Where a judge sits without a jury, the distinction between the test to be applied on a no case submission on the one hand, and in determining the final outcome of the case on the other hand, is not as distinct as that described above. This is particularly so where the credibility of witnesses called by the plaintiff is in issue, at the time at which the no case submission is to be determined. In such cases, as observed by Windeyer J in *Jones v Dunkel*:[6]

> "When there is no jury, the proposition 'no case to answer' may obviously mean far more than, 'is there evidence on which a jury could find for the plaintiff?' It may mean, 'would you, the judge, on the evidence given, find for the plaintiff?'."[7]

13. Nonetheless, the critical point remains that, when a no case submission is made, the role of the judge is to determine whether, on the evidence as found by the judge at the conclusion of the plaintiff's case, the judge could – not would – find in favour of the plaintiff on the cause of action relied on by the plaintiff.

14. As I have stated, it was common ground between counsel that the magistrate did not apply that test in reaching her decision in this case. Rather, Mr Brett submitted, and Mr Purvis accepted, the magistrate applied the test which is applicable to the determination of the final outcome of the case. Mr Purvis submitted that that was so because, at the conclusion of both oral and written submissions, the matter before the magistrate had transformed from a no case submission to submissions in relation to the ultimate outcome of the case.

15. The short reasons for judgment of the magistrate do not make it entirely clear whether her Honour applied the test which is applicable to the ultimate determination of the case, namely whether the plaintiff had proven negligence, or the test applicable to a no-case submission, namely, whether there was evidence before the magistrate on which she could – not would – find in favour of the plaintiff on the issue of negligence. The magistrate did note that the defendant had submitted that it had no case to answer. Her Honour also noted that the plaintiff had urged the Court to accept that negligence could properly be inferred according to the doctrine *res ipsa loquitur*, and that she responded that "from the little I know of the events I am not satisfied I can so infer".[8]

On the other hand, in the balance of her reasons for judgment, the magistrate appeared to apply reasoning which would have been appropriate had her Honour been determining the final outcome of the case. Her Honour postulated potential circumstances in which the truck, through no fault of its own might have collided with the bridge. She then found that the plaintiff had neglected to prove "to the Court's satisfaction" the act of negligence upon which liability for the damages claimed by it ensued. As both counsel have submitted, that process of reasoning appeared to be directed to the determination of the final outcome of the case, and not to the issue of whether there was a case to answer. Although, in my view, the matter is not clear-cut, on balance, and in light of the common ground on the issue, I am prepared to accept that the magistrate, in her decision, applied the test which was applicable to determination of the final outcome of the case, and not to a no-case submission.

**Was the magistrate deciding the no-case submission or making the final decision?**

16. The question, then, arises whether, as submitted by Mr Purvis, the magistrate was entitled to determine the case as if she were making the final decision in it. In support of that submission, Mr Purvis contended that the written submissions provided to the magistrate went well beyond addressing a no case submission, and were addressed to the final outcome of the case. Thus there was an implied, if not express, transformation of the issue before the magistrate from a no case submission to submissions concerning the ultimate outcome of the case.

17. Having reviewed the transcript and the written submissions, I do not consider that the matter which was to be determined before the magistrate had altered from a no case application to the final determination of the case. Counsel for Auspro clearly commenced his oral submissions with the contention that there was no case to answer. His oral submissions did, in substance, go further than the type of submissions which might be made in respect of such an application, but did not, I consider, alter the type of application which was before the magistrate. Nor did the submissions made by counsel for Metrolink affect the nature of the application. At the conclusion of oral submissions, the magistrate indicated that she would be announcing her decision later that day. Apparently, on the same day, the magistrate's clerk contacted each counsel, and conveyed to them a request by the magistrate that they provide written submissions. Those submissions were exchanged. In those submissions the defendant commenced with the question of the breach of duty. At paragraph 1.2, that section of the defendant's submissions concluded with the sentence: "In common parlance, the plaintiff has not got past first base, and the defendant therefore has no case to answer". Again, the written submissions were broader in substance than might ordinarily be made in respect of a no case submission, but they did not, in my view, alter the circumstance that the matter to be determined by the magistrate was a no case submission. In her written reasons, as I have already stated, the magistrate correctly noted that the defendant had submitted that "it has no case to answer". Her Honour, having found that the plaintiff had failed to prove to the Court's satisfaction negligence on behalf of the defendant, stated that she found " ... that the defendant has no case to answer and the complaint is dismissed". In those circumstances, it is clear that the matter which was to be determined by the magistrate at that stage was the no case submission which had been made on behalf of the defendant, Auspro.

18. It therefore follows that, in determining the no case submission which was then before her, the magistrate applied reasoning which would have been applicable if she had been determining the final outcome of the case, rather than the no case submission. The next question, then, is whether the magistrate would have reached the same or a different conclusion, if her Honour had applied the appropriate test in determining the no case submission.

**Did *res ipsa loquitur* apply to case?**

19. At the hearing before the magistrate, and on appeal, Metrolink relied solely on the reasoning described by the maxim *res ipsa loquitur*, in contending that the magistrate, on the no case submission, should have reached the conclusion that there was evidence on which she was entitled to make a finding of negligence against the defendant. In response, Mr Purvis submitted, both before the magistrate and on appeal, that there was no evidence at all before the magistrate which would have entitled her to apply *res ipsa loquitur*.

20. The phrase *res ipsa loquitur* does not encapsulate an independent legal doctrine or principle of law, but, rather, describes a particular process of reasoning which may be adopted by a court in certain circumstances where a plaintiff seeks to establish negligence on behalf of a

defendant.[9] Essentially, it is invoked where a plaintiff is unable to adduce affirmative evidence as to how or why a particular accident, in consequence of which the plaintiff has suffered injury, has occurred. Where the plaintiff is able to show that he or she has suffered injury as a result of an accident which, in ordinary circumstances, would not have occurred but for negligence on the part of the defendant, the plaintiff is entitled to rely upon the proof of the happening of that accident as evidence of the negligence of the defendant.[10] The proof of that accident does not shift the primary onus of proof from the plaintiff. Indeed, the process of reasoning described by the maxim *res ipsa loquitur* is a process which the Court may, but is not obliged to, employ in a particular case.[11]

21. In essence, a court is entitled to adopt the process of reasoning described by the maxim where the court concludes, first, that the accident by reason of which the plaintiff was injured was of such a kind that it does not ordinarily occur without negligence, secondly, that there is an absence of explanation for the occurrence which caused the injury, and, thirdly, that the instrument or agency which caused the injury to the plaintiff was at the relevant time under the control of the defendant.[12] In *Mummery v Irvings Pty Ltd*,[13] Dixon CJ, Webb, Fullagar and Taylor JJ, in their joint judgment, emphasised the importance of the first condition, to which I have just referred. Their Honours stated:

> "...to overlook or to exclude this requirement might well be thought to produce the result that mere proof of any occurrence causing injury will constitute sufficient proof of negligence in any case where an object which, physically, has caused injury to the plaintiff is under the control and management of the defendant and the actual cause is, therefore, not known to the plaintiff and is, or should be, known to the defendant. The requirement that the accident must be such as in the ordinary course of things does not happen if those who have the management use proper care is of vital importance and fully explains why in such cases *res ipsa loquitur*."

22. The question, therefore, which the magistrate was required to answer, on hearing the no case submission, was whether Metrolink had adduced evidence as to the happening of an accident, as a result of which Metrolink had suffered damage, which a tribunal of fact could (not necessarily would) conclude was of such a kind that it does not ordinarily occur without negligence. In other words, was there sufficient evidence before the magistrate as to the happening of the accident which would have left it open to the magistrate to legitimately conclude that the accident was of such a kind that it would not have ordinarily occurred without negligence on behalf of Auspro's driver?

23. In considering that question, it is important to bear in mind that Metrolink's case was essentially based on an inference.[14] In order to succeed, Metrolink was required, ultimately, to persuade the Magistrates' Court that, in the factual circumstances proven by it, the more probable inference was that the accident was the result of negligence by the driver of Auspro's vehicle.[15] In order to give rise to such an inference, Metrolink was required to prove sufficient facts on which such an inference might be properly based. Otherwise, and in the absence of the proof of such facts, the process of reasoning relied upon by Metrolink would have been no more than guesswork or speculation.

24. As I have stated, Metrolink relied on the proof by it of the happening of an accident which, Metrolink contended, was of a kind that does not ordinarily occur in the absence of negligence by the driver of the vehicle which collided with the bridge. In order to found such an inference, which lay at the heart of that case, Metrolink was obliged to adduce evidence of sufficient facts in order to enable the Court to reach the conclusion that the accident was of a kind which would not ordinarily occur in the absence of negligence by the driver of the truck involved in it. In this context, there was an extraordinary paucity of evidence adduced by Metrolink. Metrolink adduced no evidence as to the actual layout of the scene, such as evidence as to the nature, shape or dimensions of the bridge, or of the road leading to it. Metrolink led no evidence as to what part of the bridge was struck by Auspro's vehicle. Metrolink called no evidence as to what part of the truck collided with the bridge. Thus, Metrolink's case, of necessity, was based on the bald (if not bold) proposition that any collision by any part of any truck with any part of any bridge is an occurrence which would not ordinarily occur without negligence by the driver of such a vehicle.

25. The question, then, is whether Metrolink called sufficient evidence upon which the magistrate should have concluded that, as the tribunal of fact, she could (not necessarily would)

find that the accident was of a kind which does not ordinarily occur in the absence of negligence by the driver of the vehicle which collided with the bridge. In my view, in the entire absence of any evidence, other than the fact of a happening of a collision with a bridge by a truck, there was no evidence on which the magistrate, as the tribunal of fact, might, or was entitled to, reason – other than by way of guesswork or speculation – that the accident so proven was of a kind which ordinarily would not have occurred other than through the negligence of the driver of Auspro's truck. It would and could be no more than speculation to assert, without more, that any collision by any part of any truck with any part of any bridge, is a collision which would not ordinarily occur without negligence on the part of the truck driver. In order that such an assertion be the result of a legitimate process of reasoning, there must be some evidence which could entitle a Court to reason – not guess – that the collision proven by Metrolink was of a kind which would not ordinarily have occurred but for the negligence of the truck driver. Thus, in my view, Metrolink failed to adduce sufficient evidence to form a legitimate basis for the type of reasoning described by the maxim *res ipsa loquitur*. It follows that, on the no case submission, the only conclusion which could have been open to the magistrate was that she would not, as the tribunal of fact, have been entitled to rely on the line of reasoning described by that maxim. In the absence of any other evidence as to the happening of the accident, it follows that the magistrate was bound to find that there was no case to answer on the issue of negligence.

26. In reaching that conclusion, I am mindful that the process of reasoning, described by the maxim *res ipsa loquitur*, is only available where there is an absence of an explanation for the occurrence of the accident, as a result of which the plaintiff suffered injury. Indeed, it was on that point that the High Court held that the plaintiff failed in *Schellenberg v Tunnel Holdings Pty Ltd*.[16] In that case, the evidence showed how it was that the hose which had been attached to the grinder used by the plaintiff became detached from the grinder and struck the plaintiff. Thus, there was an explanation for the happening of the accident, and therefore there was no room for the application of *res ipsa loquitur*. However, there is a distinction between evidence which provides an explanation as to how and why a particular accident occurred, and evidence which proves the happening of an accident of a kind which would not ordinarily occur without negligence. In this case, as I have stated, Metrolink failed to produce any evidence as to the latter, namely, evidence as to the happening of an accident of a kind which does not ordinarily occur in the absence of negligence on behalf of a person in the position of the driver of Auspro's vehicle. Accordingly, as I have concluded, if the magistrate had applied the correct test in considering the no case submission made by the defendant, she would, nonetheless, have been obliged to come to the same conclusion which she ultimately reached, namely that there was no case to answer.

27. Accordingly, notwithstanding that the magistrate may not have not applied the test applicable to a no-case submission in reaching the conclusion that Metrolink's case should be dismissed, the same result would have ensued had the magistrate applied the correct test to that submission. In summary, and at the risk of repetition, Metrolink failed to adduce any sufficient evidence upon which a Court would be entitled to rely upon the process of reasoning known as *res ipsa loquitur*. For those reasons the appeal must fail.

28. Finally, I should briefly note the point made by Mr Brett based on the principles stated by the High Court in *Jones v Dunkel*. Mr Brett accepted that those principles are not applicable in response to a no case submission. He based that concession on the often cited passage from the judgment of Young CJ in *Protean (Holdings)*.[17] However, he further submitted that the principles of *Jones v Dunkel* do apply where the Court is determining the ultimate outcome of a case, notwithstanding that the defendant has been precluded from giving evidence because of an election made in an unsuccessful no case submission. In making that submission, Mr Brett drew my attention to a *dictum* of Nettle JA in *Sarkis & Ors v Deputy Commissioner of Taxation of the Commonwealth of Australia*.[18] In that case Nettle JA observed that, if the Court in determining the ultimate outcome of a case is entitled to draw a *Jones v Dunkel* inference, then it is not logical that the Court is precluded from doing so when determining a no case submission.

29. It is not necessary for me to determine whether a *Jones v Dunkel* inference may be drawn by a court in determining the ultimate outcome of a case where a defendant, having made an unsuccessful no case submission, has elected not to give evidence. In passing, I observe that in *Jones v Dunkel*, the defendant had made such an election, in making an unsuccessful submission for a verdict by direction. As Windeyer J pointed out,[19] in New South Wales, instead of making

a submission for verdict by direction (in which case the defendant was required to elect not to give evidence), the defendant could, alternatively, have preserved his right to call evidence by asking for a non-suit. However, and in any event, even if – contrary to the views of Young CJ in *Protean (Holdings)* – a *Jones v Dunkel* inference were available to assist the plaintiff on the no case submission, it would have been of no assistance to the plaintiff in the present case. It is trite that the failure of a defendant to give evidence may not be used by a plaintiff to fill gaps in the plaintiff's case.[20] In the present case, for the reasons I have already stated, the plaintiff failed to adduce any evidence which could form an appropriate foundation for the line of reasoning described as *res ipsa loquitur*. Thus, there was no case to answer. The question did not arise as to whether the Court, ultimately, could or should draw an inference from particular facts proven; rather, and at a point anterior to that, the plaintiff had failed to adduce sufficient facts upon which to base the type of inferential reasoning known as *res ipsa loquitur*.

30. It follows that, for the reasons I have set out above, the appeal must be dismissed.

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[1] Cf *Metrolink Victoria Pty Ltd v Inglis* [2008] VSC 10; (2008) 49 MVR 331 (Smith J).
[2] [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR.
[3] (1990) 11 MVR 575.
[4] [1996] NSWSC 230.
[5] See for example *Metropolitan Railway Company v Jackson* (1877) 3 AC 193, 207-208 (Lord Blackburn); *Protean (Holdings) Limited (Receivers and Managers Appointed) & Ors v American Home Assurance Co* [1985] VicRp 18; [1985] VR 187, 215 (Young CJ), 236 (Fullagar J), 239-40 (Tadgell J).
[6] [1959] HCA 8; (1959) 101 CLR 298, 330 - 331.
[7] See also *Protean (Holdings)* [1985] VicRp 18; [1985] VR 187, 236 (Fullagar J).
[8] Emphasis added.
[9] See *Franklin v Victorian Railways Commissioners* [1959] HCA 48; (1959) 101 CLR 197, 201 (Dixon CJ); 33 ALJR 258.
[10] *Mummery v Irvings Pty Ltd* [1956] HCA 45; (1956) 96 CLR 99; [1956] ALR 795; *Anchor Products Ltd v Hedges* [1966] HCA 70*;* (1966) 115 CLR 493; [1967] ALR 421; 40 ALJR 330; *Nominal Defendant v Haslbauer* [1967] HCA 14; (1967) 117 CLR 448; 41 ALJR 1.
[11] *Schellenberg v Tunnel Holdings Pty Ltd* [2000] HCA 18; (2000) 200 CLR 121, [111] (pages 163 to 4) (Kirby J); (2000) 170 ALR 594; (2000) 74 ALJR 743; [2000] Aust Torts Reports 81-553; (2000) 21 Leg Rep 18.
[12] *Ibid,* [25] and following (Gleeson CJ and McHugh J).
[13] [1956] HCA 45; (1956) 96 CLR 99, 116; [1956] ALR 795.
[14] *Nominal Defendant v Haslbauer* [1967] HCA 14; (1967) 117 CLR 448, 452 (Barwick CJ), 462 (Kirby J); 41 ALJR 1; *Lafranchi v Transport Accident Commission* (2006) 14 VR 356, 371 [55] (Maxwell P, Neave JA).
[15] *Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR 470, 480 - 481 (Williams, Webb and Taylor JJ); *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298, 309-10 (Menzies J), 319 (Windeyer J); [1959] ALR 367; 32 ALJR.
[16] [2000] HCA 18; (2000) 200 CLR 121, see esp. at [27-38] (Gleeson CJ and McHugh J), [116] (Kirby J); (2000) 170 ALR 594; (2000) 74 ALJR 743; [2000] Aust Torts Reports 81-553; (2000) 21 Leg Rep 18.
[17] [1985] VicRp 18; [1985] VR 187, 215.
[18] [2005] VSCA 67 at [17].
[19] [1959] HCA 8; (1959) 101 CLR 298, 331-2; [1959] ALR 367; 32 ALJR.
[20] *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298, 313 (Menzies J); [1959] ALR 367; 32 ALJR; *O'Donnell v Reichard* [1975] VicRp 89 [1975] VR 916, 920 (Gillard J); *Tyne v Rutherford* (1963) 36 ALJR 333.

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