06/87

SUPREME COURT OF NEW SOUTH WALES

WATKINS v LOOSEMORE

McInerney J

10 September 1986 — [1986] Aust Torts Reports ¶80-051; (1986) 4 MVR 367

TORT – NEGLIGENCE – MOTOR CYCLIST COLLIDING WITH COW ON ROADWAY – PROPERTY DAMAGED – COW'S PRESENCE ON ROADWAY UNEXPLAINED – WHETHER OWNER OF COW LIABLE – DOCTRINE OF *RES IPSA LOQUITUR* – WHETHER APPLICABLE.

Whilst riding his motor cycle, L. collided with W's cow which had strayed onto the roadway. Subsequently, L. sued W. for property damage. The Magistrate found that the cow's presence on the road was unexplained; that W's fencing on either side of the road in the vicinity of the collision was intact; and that there was no evidence of the cow's having forced its way through the fencing. However, the Magistrate held W. liable on two grounds -

(i) that the fencing must have been inadequate; and

(ii) that if the cow got through the fence by some unexplained means, the doctrine of *res ipsa loquitur* applied. On appeal by W.—

HELD: Appeal allowed.

1. The cow's presence on the road could be due to a number of reasons. As there was no evidence to find that the cow escaped through the fencing, it was not open to the Magistrate to conclude that the fencing was negligently inadequate and the owner liable for damages.

2. The doctrine of *res ipsa loquitur* is no more than a process of logic by which an inference of negligence may be drawn from the circumstances of the occurrence itself where in the ordinary affairs of humankind such an occurrence would be not likely to occur without lack of care on the part of a person in the defendant. In the present case, ordinarily speaking, the cow's presence on the roadway may have been due to some lack of care on the defendant's part. However, in view of the finding that the fencing was adequate and there was a number of reasons why the cow was on the road inconsistent with negligence, the doctrine of *res ipsa loquitur* did not apply.

***GIO (NSW) v Fredrichberg* [1968] HCA 54; (1968) 118 CLR 403; 42 ALJR 198, applied.**

McINERNEY J: [67,952] This is a stated case from a decision of Mr J Williams, Magistrate of the Local Court, who found a verdict and judgment for the respondent (plaintiff) against the appellant (defendant) for $1,187.74 plus costs, witnesses expenses and professional costs in all totalling the sum of $2,833.74. The verdict and judgment arose out of a collision between the respondent's motor vehicle and a cow owned by the appellant on 23 July 1983 at Cootes Crossing on Armidale Road. The proceedings were commenced by way of plaint and ordinary summons and the cause of action was based on negligence of the appellant in allowing his cow to stray on the said road.

The Magistrate in his stated case has set out the facts that he found on which he based his decision and these facts are set out under para. 2 at p 2 of the stated case under the heading "Facts". The learned Magistrate having set out the facts then proceeded to make findings on those facts and those findings are set out at p 4 of the stated case under para. 3 headed "Grounds of Determination". The following findings were made by the Magistrate:

> 3(a) Pursuant to his findings of fact (f) and (g) he found that there was no apparent reason as to why the cow came on to the roadway.
> 3(b) He found that the fact that the cow was on the roadway was indicative of the fencing being inadequate.
> 3(d) He found there was no other explanation given as to how the cow came on to the roadway.
> 3(e) He found that there was difficulty in fencing the area near where the accident occurred because of various watercourses.
> 3(f) He found that if the cow had got through by some other means which were not explained that the doctrine of *res ipsa loquitur* would apply.

The Magistrate in his findings 3(a) referred to his findings of fact in (f) and (g). Finding (f) was as follows:

"That there was no break in the fences on either the eastern or western side of the Armidale Road for a distance of between 300 and 500 yards in the vicinity of where the accident took place." "(g) That there was no fresh hair on the said fencing which could have indicated that a beast had forced its way through the said fence."

The Magistrate further found that the cow had a tendency to be a bit roguish and that some time prior to the accident the cow had been in a paddock on the western side of the roadway. The significance of the latter finding was not referred to by the Magistrate other than the fact that the cow at one time was in that paddock.

The appellant contends that the determination was erroneous and submits there was no evidence of negligence on the part of the appellant. The appellant further submits that the doctrine of *res ipsa loquitur* did not apply in the alternative to these circumstances. In other words it was argued that the fact that the cow was on the roadway was not indicative of the fact that the fencing must have been inadequate.

[67,953] The learned Magistrate's findings in 3(b) indicate that the fact that the cow was on the roadway in the light of the facts found by him permitted him to draw a conclusion that the fencing must have been inadequate and that fact established negligence against the defendant. In my view there is nothing in the facts found by the learned Magistrate that would entitle him to draw that conclusion. His specific findings were that there was no break in the fencing with no indication of an animal forcing its way through the fence. The fencing he found consisted of three strands of barbed wire and one plain, the wire was rusting and it was an old fence and that further there were problems in fencing the area adjacent to the bridges at Cootandarri Creek because of the watercourse. The Magistrate did not find that the fence in the area of the watercourse was inadequate, resulting from the difficulty in fencing that area.

It is my view that there was nothing in those findings made by the learned Magistrate that would entitle him to draw a conclusion that the fencing was therefore inadequate. The Magistrate has reasoned that because there was no break in the fence and no evidence of the beast forcing its way through the fence that therefore the fence was inadequate in some respect. He concluded it appears that the cow must have escaped in some manner unexplained through the fence and therefore in some explained manner the fencing must have been inadequate to retain the cow. There is no evidence that it escaped through the fence.

The fact that a cow was on the roadway could mean it was there with or without the negligence of the owner. It may have escaped by the act of a stranger, for example, by some person leaving a gate open or not properly closing a gate or for some other reason. Although there was no evidence of gates in the area it is likely there were gates in the vicinity to enable the stock to be moved from one paddock to another and across the road. I conclude therefore on the findings of the Magistrate there was no evidence on which he could conclude that the cow escaped through the fence and that therefore the fence was inadequate.

The Magistrate then having made a finding that the fencing was inadequate made a further finding that if the cow got through by some other means which were not explained then the doctrine of *res ipsa loquitur* would apply. His finding of *res ipsa loquitur* was made on the basis that the inadequate fencing apparently was not the cause of the escape of the cow.

The question of the doctrine of *res ipsa loquitur* in Australia was considered in *Government Insurance Office of New South Wales v Fredrichberg* [1968] HCA 54; (1968) 118 CLR 403; 42 ALJR 198. The then Chief Justice, Sir Garfield Barwick, analysed the Australian application of the doctrine. At p413 of the above case he stated that the doctrine was no more than a process of logic by which an inference of negligence may be drawn from the circumstances of the occurrence itself where in the ordinary affairs of mankind such an occurrence would be not likely to occur without lack of care on the part of a person in the position of the defendant.

On the facts as found by the Magistrate, the appellant's cow would not be on the roadway in the ordinary experience of mankind without lack of care on the part of the appellant. This finding is based on the occurrence itself and what inference could be drawn from it in the light of the facts as found by the Magistrate.

I am of the opinion that no such inference can be drawn. The facts found by the learned Magistrate in this circumstance are based on the fact that the fencing was adequate and therefore the cow was on the road through some other lack of care on the part of the appellant. There could be a number of reasons why the cow was on the roadway inconsistent with negligence. It is my view that an inference cannot be drawn from the occurrence itself in the circumstances found by the learned Magistrate that there was evidence of negligence on the part of the appellant.

I am in accord with what was said by Erle CJ in *Cox v Burbidge* [1863] EngR 116; 13 CBNS 430 at 433; 32 LJCP 89; 143 ER 171 where the Chief Justice had this to say:

> "I am also of opinion that so much of the argument as has been addressed to us on the part of the plaintiff as assumes the action to be founded upon the negligence of the owner of the horse in allowing it to be upon the road unattended, is not tenable. To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal duty from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the **[67,954]** defendant from which an action would lie by the plaintiff. The simple fact found, is, that the horse was on the highway. He may have been there without any negligence of the owner: he might have been put there by a stranger or he might have escaped from some enclosed place without the owner's knowledge. To entitle a plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of the duty owed to the plaintiff."

In the circumstances therefore I find that there was no evidence of the appellant's negligence. The answer to the stated case therefore is "Yes".

In this matter Mr Segal for the respondent tendered some depositions and sought to argue matters that were referred to outside the stated case and urged me to take those matters into account in determining this issue. I am of the opinion that I should not do so and I refer to *Whale v Tonkins & Ors*, Court of Appeal, 14 February 1984 where Mr Justice Hutley said:

> "It is not in my opinion, proper to go outside the Stated Case without formal proceedings being taken to correct the Stated Case. That involves taking the Stated Case to the Magistrate. The settlement of a Stated Case requires all the care and attention which is given to the settlement of elaborate conveyances. No Stated Case should come to any court without the most careful scrutiny of every line and every concurrence of all persons involved in its text".

In the circumstances I refuse to consider any matters not referred to in the stated case.
