

SUPREME COURT OF NIGERIA
19TH JULY, 1993. SC.281/1989
CORAM:- M. BELLO, A. G. KARIBI-WHYTE, S. M. A.
BELGORE, U. OMO, I. L. KUTIGI, JJSC

SYLVESTER IFEANYI IBEKENDU APPELLANT
AND
SYLVESTER IKE RESPONDENT

COURTS - Trial Court's failure to consider an issue properly raised - where it leads to wrongful dismissal of claim -when appellate court will intervene

EVIDENCE - Negligence - onus of proof on the Plaintiff - where res ipsa loquitor is applicable - stage at which onus shifts to the defendant

EVIDENCE - Serious contradictions in evidence - trial Judge's speculative findings - whether capable of curing the unreliability of such evidence

EVIDENCE - Complaint against admissibility of document - not raised at the proper stage - whether of any substance

PLEADINGS - Res ipsa loquitor - where it can be based on facts pleaded and evidence before the court - whether it must specially be pleaded

RES IPSA LOQUITOR - When the doctrine is applicable - whether failure to prove particulars of negligence - is a bar to application of the doctrine

TORTS - Motor accident - allegation of negligence against the driver - how proved

PRACTICE & PROCEDURE - Alternative claims - whether the court can be shut out from considering an alternative claim - because the main claim failed

FACTS

On the Enugu - Onitsha highway a bus driven by the Appellant collided with the Respondent who was walking by the road side. The Respondent sustained injuries that led to his left leg being amputated during treatment at the hospital. The Respondent claimed against the Appellant & Another jointly and severally before the High Court Enugu, the sum of N50,000.00 being special and general damages for personal injuries occasioned to him by their negligence. The Respondent pleaded that the defendants were joint owners of the vehicle. He also pleaded in the alternative that he will rely on the doctrine of *res ipsa loquitor*. The trial court dismissed the 2nd defendant, held that the liability of the Appellant has not been established and dismissed the claim in its entirety without adverting to the Respondent's plea of *res ipsa loquitor*. The learned trial Judge found that the special damages averred had not been proved, but failed to assess what the general damages would be in case his decision on liability is set aside, contrary to the decision in *Kareem v. Ogunde*.

Respondent's appeal to the Court of Appeal was allowed in part as that court found that there was *prima facie* evidence of negligence, though it upheld the High Court's decision that 2nd defendant is not liable and that the special damages was not proved. It, however, awarded the sum of N35,000.00 to the Respondent as general damages. The Appellant being dissatisfied has now appealed to the Supreme Court for a determination of whether the doctrine of *res ipsa loquitor* was applicable in this case.

HELD (unanimously dismissing the appeal)

1. *Res ipsa loquitor* (the thing speaks for itself) is applicable to actions for injury by negligence where no proof of such negligence is required beyond the accident itself because such accident necessarily involves negligence, (p.84 L35)

2. Normally, the onus of proof of the negligence alleged at the onset lies on the Plaintiff. But where the doctrine of *res ipsa loquitor* is applicable, after Plaintiff had given evidence of how the accident occurred the onus shifts to the defendant to explain why the accident happened, towards showing that the defendant is not at fault, (p.85

3. Res ipsa loquitor need not even be specifically pleaded, provided there are facts pleaded and evidence led before the court on which it can be based. It can also be pleaded in the alternative to particulars of negligence averred, as in the present case. (p.85 L10)

4. Appellant's contention that once particulars of negligence are pleaded and relied upon, the Plaintiff cannot fall back on the doctrine of res ipsa loquitor if he fails to prove the averments in the particulars of negligence pleaded, cannot ex facie be a correct proposition of the law. (p.85 L21)

5. In civil actions, where there is an alternative claim, the Plaintiff can rely either on the main claim or the alternative. Where the main claim fails, however miserably, the court is not shut out but will consider the alternative claim and the Plaintiff can succeed thereon. (p.85 L30)

6. In considering the applicability of the doctrine res ipsa loquitor, how the accident took place and other facts of this case clearly raise a prima facie case of negligence which automatically brings the doctrine into place. (p.87 L21)

7. The legal effect of serious contradiction in the Appellant's testimony about the accident is that once it makes the Appellant's evidence extremely unreliable, such evidence cannot be relied upon or acted upon. Thus, the speculative finding or reconciliation embarked upon by the trial Judge does not arise. (p.88 L20)

8. The trial Judge's wrongful dismissal of the Plaintiff's claim was because he failed to consider the issue of res ipsa loquitor which was before him. So the trial Judge failed to draw the only available conclusion, to wit, that the Appellant had failed to give a credible explanation as to why the accident occurred thereby not discharging the presumption of negligence that arose. The Court of Appeal was therefore, correct in holding that the doctrine of res ipsa loquitor is applicable in this case. (p.88 L33)

9. There is no substance in Appellant's counsel's complaint against admission of a document (Exh. 2) seeing that he neither raised objection at the trial court nor did he appeal against it before the Court of Appeal. (p.89 L5)

10. The Principles on which an appellate court acts in interfering with the award of damages are that the appellant must show the trial court made it on a wrong principle of law and or that the award is an entirely wrong estimate. Nothing has been urged to show why the Supreme Court should interfere with the lower court's award damages. (p.90 L9)

REPRESENTATION

J. C. Ifebunandu (with him, A. Ugwonyi), for the Appellant
Cyrus Nunieh, for the Respondent

CASES REFERRED TO:

1. Kareem v. Ogunde (1972) 1 S.C. 182
2. Yakassai v. Incar Motors Ltd (1975) 5 S.C. 107
3. Adejumo v. Ayantegbe (1989) 3 N.W.L.R. (Part 110) 417
4. Daniel Dibiamaka & or v. Prince Osakwe & ors (1989) 5 SCNJ 30
5. Barkway v. South Wales Transport Co. (1950) 1 A.E.R. 392
6. Laurie v. Raglan Building Co. (1942) L.L.R. 24
7. Okeke v. Obidife & 2 ors (1965) N.M.L.R. 113
8. T.O. Kuti & Ors v. Salawu Tugbobo (1967) M.M.L.R. 419
9. Joseph Ashiru v. Benson & or (1965) L.L.R 24
10. The Queen v. Asuquo Ukpung (1961) 1 A.N.L.R. (pt. 4) 629

STATUTES AND RULES REFERRED TO:

1. Evidence Acts 76
2. High Court Rules (1985) order 35 Rule 7

LEAD JUDGMENT BY OMO JSC

On the 17th May, 1993 this appeal was heard and dismissed by this Court. It was then adjourned to the 9th July, 1993 when fuller reasons for the dismissal would be given. I now proceed to do so by delivering this judgment.

The appellant in this case was sued in the High Court of the

then Anambra State (Enugu Judicial Division) jointly with his "brother"- George Ibekendu (as 2nd defendant) by the respondent who claimed against the two defendants, jointly and severally, N50,000.00 special and general damages for personal injuries to the respondent allegedly occasioned by their negligence.

5 This claim arose from a motor accident on the Enugu - Onitsha highway which occurred in July 1979 in which a Toyota Hiace Bus driven by the appellant/1st defendant collided with the respondent, who was walking by the side of the highway. Injuries were inflicted on the left leg of the respondent which crushed mainly the ankle. This
10 resulted in the said leg being amputated at the University of Nigeria Teaching Hospital, Enugu, to which he was taken for treatment.

In his statement of claim filed in the High Court, the respondent pleaded that the defendants were joint-owners of the Bus involved in the accident, and that the 1st respondent was the driver of
15 the vehicle. In addition to pleading the usual particulars of negligence, the respondent also pleaded thereunder as follows:-

"4.....

(c) further or in the alternative the plaintiff will rely on the
20 doctrine of res ipsa loquitur.

After hearing the evidence of the parties the learned trial Judge dismissed the 2nd defendant from the case, holding that there is "no scintilla of evidence" to connect him "with the ownership of the said vehicle" He found, on the evidence before him, that the liability of
25 the 1st defendant (appellant) has not been established and dismissed the claim in its entirety. In this process respondent's plea of res ipsa loquitur was not at all adverted to. On the damages claimed, he found that the special damages averred had not been proved; but failed to
30 assess what the general damages would be should in case his decision on liability is set aside vide *Kareem v. Ogunde* (1972) 1 S.C. 182.

The respondent felt aggrieved by this decision, and therefore appealed to the Court of Appeal.

The Court below reversed the decision of the trial High Court
35 on the main issue of liability. It held that the High Court was in error not to have considered the plea of res ipsa loquitur which was before it. There was prima facie evidence of negligence, and the purported explanation of the appellant is manifestly unreliable, having regard to the damning conflict between it and the contradictory evidence he

gave in the Magistrate Court, in the course of the criminal aspect of this accident. It held that the consequence of this contradiction is that there is no explanation of the accident, and that therefore liability for the accident by the appellant is established. It upheld the decision of the High Court that 2nd defendant is not liable and that evidence of the plaintiff/(respondent) on special damages is very weak and does not constitute proof. It however faulted the trial court for not proceeding to assess general damages in compliance with the often repeated injunctions (decisions) of the appellate courts that trial court should assess damages, bearing in mind always that their decision on the core issue of liability may be reversed on appeal vide *Yakassai v Incar Motors Ltd.* (1975) 5 S.C. 107. Finally the Court of Appeal proceeded to assess general damages and made an award thereunder of N35,000.00. It is against this judgment that the appellant has appealed to this Court.

The three grounds of appeal relied upon in challenging the decision of the Court of Appeal are set out as follows:-

"ERROR IN LAW

The Court of Appeal erred in law in holding that the maxim of *Res Ipsa loquitor* applied in the circumstances of this case when there was no conclusive evidence of the exact scene of the accident to warrant such a presumption.

PARTICULARS

(a) The Court of Appeal held that the defendant's vehicle swerved to collide with the plaintiff "for no apparent reason".

(b) Although this fact was pleaded no such evidence was given by the plaintiff or his witnesses. Pleadings of facts which are denied do not on their own become evidence.

(c) The Court of Appeal held that the defendants vehicle "ran out of control on a highway and veered off the highway to collide with a pedestrian walking on the pedestrian lane or side verge of the road".

(d) There was no evidence that the defendant vehicle ran out of control on the highway and veered off the road either from the plaintiff or any of his witnesses.

(e) There was no consensus between the parties on where the accident happened. No finding of fact on that issue was made by the trial court or the Court of Appeal.

2. ERROR IN LAW

The Court of Appeal erred in law and also misdirected itself on the basis for the assessment of general damages by making use of inadmissible evidence in the plaintiff's case

PARTICULARS

5 (a) The Court of Appeal based its assessment of general damages on Exhibit 2 the Orthopaedic Surgeon's report.

(b) The said exhibit was admitted while neither the appellant nor his "counsel was in court during the proceedings.

10 (c) It was tendered by the plaintiff after his counsel orally applied for an amended statement of claim in court to plead the said report.

(d) No Notice of application for such amendment was brought to the appellant, such amendment of pleadings should not have been
15 allowed in the absence of a party to the suit without notice.

(e) The Court of Appeal had earlier on observed as follows

"the evidence called in support of general damages by which the court can be guided in making assessment is very poor indeed".

20 3. The award of N42,000.00 general damages by the Court of Appeal was excessive, unreasonable, unjustifiable and cannot be supported by any available admissible evidence in the proceedings".

From these grounds of appeal the appellant, in his brief, distilled three issues for determination, which he set out thus:-

25 *"1. Whether the maxim of Res ipsa loquitur was applicable in this case having regard to the issues joined by the parties in their pleadings and the evidence led.*

*2. Whether a conclusive finding of fact on where the accident accrued was not a pre-condition to the application of the doctrine of
30 Res Ipsa loquitur in a case of this nature.*

3. Whether the Court of Appeal was right in making use of Exhibit 2, a medical report which the respondent tendered by amending his statement of claim without giving notice of such amendment as required by the rules of court to the appellant.

35 *4. Whether there was a denial of fair hearing or miscarriage of justice in admitting Exhibit 2 and or making use of it in assessment of damages in this case.*

5. Was the award of N35,000.00 general damages justified or excessive in the light of the evidence before the trial court and the

observations of the court below."

Before proceeding to consider the issues set out for determination I have to observe that setting these issues down, the appellant proceeded in his brief to argue the grounds of appeal. It has been stated times without number that this is wrong. What parties/counsel are to consider in their briefs are the issues raised and not the grounds of appeal vide *Adejuma v. Ayantegbe* (1989) 3 NWLR (Pt. 110) 417(430); *Daniel Dibiamaka & Ors v. Prince Osakwe & ors* (1986) 3 NWLR (PU07) 101 (1989) 5 S.C.N.J 30 (35). Happily in the present case each of the three grounds filed, form the subject-matter of an issue for determination. No difficulty is therefore presented.

The first issue for determination (which co-incides with the first ground of appeal) contends that the court below erred in law by holding that the doctrine of *res ipsa loquitur* is applicable to the present case, and proceeding to apply same. The first submission is that since the respondent had pleaded particulars of negligence in his pleadings on which he intended to rely, he is bound to succeed or fail by seeking to prove these particulars. He cannot supplement what is an inconclusive evidence/proof of such particulars by falling back on the doctrine of *res ipsa loquitur*. For this submission he cited and relied on *Management Enterprise Limited ors v. Jonathan Otusanya* (1987) 2 NWLR (Pt. 55) 179(1989) 4 S.C. 367.

He further submitted that the respondent had in his pleadings sufficiently given the facts known to him as the cause of the accident and that therefore the plea of *res ipsa loquitur* is "a non-issue" On this he relied on *Barkway v. South Wales Transport Co.* (1950) 1 A.E.R. 392. He referred to the first two particulars in paragraph 4 of the statement of claim as such facts known to the respondent, which he totally failed to lead evidence to prove. All the evidence he led was as to "how the accident happened". He did not succeed in showing why it happened, in conformity with the particulars averred. With regard to the latter, the only evidence led, in the finding of the trial court, is that of excessive speeding which was never pleaded and should never have been received. Appellant was however of the view that some evidence of veering and swerving by the Bus was led by the respondent, but this was contradicted by P.W.2., his co-worker, who was present at the scene and was walking slightly ahead of him. Finally he submitted that the respondent failed to lead credible evidence in sup-

port of his case, as found by the trial court. The Court of Appeal he therefore submitted was wrong *"in filling the gap by having a recourse to an alternative plea of res ipsa loquitur"*.

The respondent's first issue for determination also covers the same issue, and it reads

- 5 (a) Was the Court of Appeal right in finding the appellant negligent based on res ipsa loquitur?

Respondent in his brief raised what is in effect an objection to this ground/issue because according to him it is a ground of mixed
10 law and fact, for which no leave has been obtained. He therefore asks this Court to strike out that ground as incompetent. I do not propose to consider this objection here. I will rather proceed to a consideration of this issue on its merits.

In response to the submission of the appellant, respondent
15 submitted that the decision of the court below that the doctrine of res ipsa loquitur is applicable is correct.

It is trite stated, *"that where a thing under the management and control of a person causes damage to another thing or person anywhere whatsoever in such circumstances that in the ordinary course
20 of things it will not happen if the person in control exercised reasonable care the accident is prima facie evidence of negligence which, unless rebutted, is sufficient to found negligence in law against the person in control of the thing."*

25 The facts before the trial Judge supported the application of the maxim since how the accident happened raised a prima facie case or negligence, the onus of explaining why, it so happened passing on to the appellant. He cited and relied on *Laurie v. Raglan Building Co. (1942) L.L.R 24*. The trial Court can even find the maxim established in favour of the plaintiff where it was not specifically pleaded
30 vide *Okeke v. Obidife & 2 Ors (1965) NMLR 113*. It is enough that the state of the evidence is such that the maxim can be applied. He faulted appellant for dwelling on evaluation of evidence by the court below, which led to its finding that res ipsa loquitur applied, on the
35 ground that there is no specific ground of appeal questioning the said evaluation. It is however the evaluation of the trial court which is faulty because it failed to give due effect to the unreliability of the evidence of the appellant, having regard to the conflict between his testimony in the Magistrate Court and his evidence before the trial

court. The only conclusion derivable from a proper evaluation is that the appellant failed to offer any explanation for the accident.

"I will begin by observing that the learned trial Judge very much erred by not considering or even referring to the doctrine of *res ipsa loquitur*. This is because it was specifically pleaded by the respondent in paragraph 4(c) of his statement of claim set out earlier. *Res ipsa loquitur* literally means that "the thing speaks for itself". It is applicable to actions for injury by negligence where no proof of such negligence is required beyond the accident itself, which is such as necessarily involves negligence. In *Management Enterprises Ltd v. Otusanya* (1987) 2 NWLR (Pt.55) 179 at page 191. Oputa, J.S.C. states the essence of the maxim to be -

"that an event, which in the ordinary course of things was more likely than not to be caused by negligence was by itself evidence of negligence depending of course on the absence of explanation"

Normally the onus of proof of the negligence alleged at the onset is on the plaintiff, but where this doctrine is applicable, after evidence of how the accident occurred is given by the plaintiff, the onus shifts on the defendant to offer an explanation as to why the accident happened. Such explanation would seek to show that the defendant is not at fault.

As stated earlier the doctrine need not even be specifically pleaded, so long as there are facts pleaded and evidence led before the court on which it can be based vide *Okeke v. Obidife and ors* (1965) NMLR 113. It can also be pleaded in the alternative to particulars of negligence averred, as in the present case vide *T.O. Kuti & ors v. Salawu Tugbobo* (1967) NMLR 419 (422), where the Federal Supreme Court so held thus -

"It will be seen that this plea of *res ipsa loquitur* is raised in one of two ways; either specifically by reciting the Latin maxim or in the alternative by making it known that the plaintiff intends to rely on the very collision itself as evidence of negligence.

In the present case, as stated earlier, it was specifically pleaded. The first and main contention of the appellant however is to the effect that once particulars of negligence are pleaded and therefore relied upon, the plaintiff (respondent) cannot "fall back" on the doctrine of *res ipsa loquitur* if he fails to prove the averments in the particulars of negligence pleaded. For this proposition the case of

Management Enterprises Ltd. & Ors. v. Otusanya (supra) has been relied upon. Ex facie, this cannot be a correct proposition of the law. This is because the doctrine has been pleaded as an alternative to the other particulars of negligence set out. Where there is an alternative claim in civil actions, the plaintiff can rely either on the main claim or
5 the alternative. The Court is not shut out from considering and deciding on the alternative claim because the main claim is not established. The contrary is in fact the case, that is, that if and where the main claim fails, however miserably, the alternative claim will be considered and the plaintiff can succeed thereon. There is indeed a portion of the admirable judgment of Oputa, J.S.C. in the Otusanya case (supra) which, when lifted out of its context, may be held to support the submission of the appellant. After defining the term res ipsa loquitor, stating when it applies, the essence of it, and what must
10 be proved when, it is relied upon, he proceeded to state at page 191 paras E-F thus-

*"If there is evidence of how the occurrence took place then an appeal to res ipsa loquitor is misconceived and inappropriate. There, again the question of the defendant's negligence must be determined
20 on the available evidence. In other words the doctrine of "res ipsa loquitor" is not meant to supplement inconclusive evidence of negligence on the part of a plaintiff. Rather it is meant to apply where there is no other proof of negligence than the accident itself."*

25 In the case now on appeal the plaintiff in paragraphs 5, 6, 7 and 8 of his Statement of Claim gave the details of the negligence he relied on in proof of his case. In paragraph 12 he summarises as follows:-

- 30 "12. Particulars of negligence alleged against both drivers
(a) Failing to give way to steer clear or stop for each other.
(b) Failing to exercise reasonable prudence in the circumstances.
(c) Excessive speeding, having regard to all the circumstance of the case.
(d) Using vehicles which the defendants knew or ought to know
35 were in unsafe and dangerous conditions.
(e) Permitting their vehicles to get out of control.

In the face of the above the doctrine of res ipsa loquitor is out. What is required is proof of the averments made in those paragraphs."

The first and simplest answer to the above statement of the law in

Otusanya's case is that there was in that case no alternative plea of *res ipsa loquitur*, as there is in the case presently on appeal. In such a case therefore the plaintiff is entitled to rely on all the particulars of negligence pleaded, whether in the main or in the alternative. The sub-issue of supplementing what is inconclusive evidence in proof of the first two items on the "particulars of negligence", by reliance on the doctrine of *res ipsa loquitur*, does not arise. The third item on the "particulars of negligence" being a specific plea of *res ipsa loquitur*, the plaintiff (respondent) is entitled to rely on it. In *Edok-Eter Mandillas Ltd v. Daniel Ale & Ors* (1985) 3 NWLR (Pt.11) 43 (47), Pepple J.C.A., did however state the law to be that in setting out particulars of negligence it is inconsistent to state other particulars suggestive of how the accident may have taken place e.g. failing to keep a proper look out and/or to properly control the steering of the vehicle, along with a plea of *res ipsa loquitur*. This is how he put it -

"The next attack was that in the statement of claim, at paragraphs 6 and 14 the appellants are alleged to have been negligent, and the particulars of negligence are given, while in paragraph 15 respondents pleaded that they were relying on *res ipsa loquitur*. This without doubt, is inconsistent, for when a plaintiff knows that the incident of which he complains accrued as the result of the defendant's negligence, the maxim *res ipsa loquitur* will not apply. It only applies when, looking at a set of facts which are unexplained, the natural and reasonable inference to be drawn from them, is that what has happened was due to some act of negligence on the part of the defendant. The plaintiffs having pleaded facts which they say amount to negligence on the part of the defendants and which caused them damage, they cannot have recourse to *res ipsa loquitur*."9d (note: *Italics mine*)

I agree with Uwaifo, J.C.A.'s observation in *Strabag Construction (Nigeria) Ltd v. Ogarekpe* (1991) 1 NWLR (Pt.170) 733 (750, para D) that the above statement of Pepple J.C.A. does not represent what the law is. It must indeed be regarded as made *per incuriam* as it flies fully in the face of the decision of the Supreme Court in *Kuti v. Tugbobo* (supra) The position therefore is that even if the trial court has found that the respondent has not given credible evidence in proof of the first two particulars of negligence pleaded, it is bound to consider the third- *res ipsa loquitur*.

In considering the applicability of the doctrine to the facts of this case the first step is to decide whether how the accident took place raises a *prima facie* presumption of negligence. To show that this must be the case, respondent has cited and relied on the cases of (1) *aurie v. Raglan Building Co.* (supra). Where it was held (in England) that if a car being driven on the

road mounts the pavement of a street (which is the equivalent of our sand verge) it is prima facie evidence of negligence on the part of the driver (2) Joseph Ashiru v. Benson & Ors (1965) L.L.R. 24, where a vehicle swerving across and off the road was held to raise a presumption of negligence. In the case on appeal, it is the evidence before the trial court, that the appellant's
5 vehicle (Bus) swerved from its own side of the road, to the other side, ending in a ditch beyond the road. I agree with respondent's counsel that these facts clearly raise a prima facie case of negligence which automatically brings into play the doctrine of res ipsa loquitor. The next step is that the onus shifts on the appellant (defendant) to provide an acceptable/cred-
10 ible explanation to show why it happened. It is agreed by the trial court and the court below that the appellant gave two separate and contradictory explanations of the accident. At his trial, his explanation is that the accident was caused by the respondent and his friend (PW.2) behaving as jay walkers by attempting to cross the highway when his vehicle was too close
15 to them for it to be safe to do so. His swerving action would have resulted in the safety of the respondent but for the fact that he suddenly decided to return to his side of the road. PW.2 who continued on his jay-walking was safe. But earlier, the appellant had testified in the Magistrate Court, in the course of a trial of the criminal aspect of this case, that the accident was
20 caused by his tyre getting burst, as a result of which his "steering deflected to the right side of the road. The situation was compounded by the rain and the fact that he was descending a hill. This earlier version was put to him, along with other incriminating admission. His reply was a complete denial on the one, and an attempted evasion in the other. It is the submis-
25 sion of the respondent that instead of drawing the necessary legal conclusion from these contradictory versions, the trial Judge attempted, suo motu, to reconcile them. After finding that his denials under cross examination, and being confronted with his earlier testimony at the worst render his credibility extremely unreliable. He proceeded to hold that he may well be
30 telling the truth now. Unreliable as his evidence may seem, there are facts as above indicated, which tend to show that his present story could be reasonably true. With due respect to the learned trial Judge the need for such speculative finding or reconciliation does not arise. The legal effect of such contradiction, once it makes the appellant's evidence extremely unre-
35 liable, is that such evidence cannot be relied upon and/or acted upon vide The Queen v. Asuquo Ukpung (1961) 1 SCNLR 53 (1961) 1 A.N.L.R 25 (631); Ogunnaike v. Ojayemi (1987) 1 NWLR (Pt.53) 760 (769). Once this evidence of the appellant (that is, his explanation) is set aside, what is left is the presumption of negligence, which has not been rebutted. The at-

tempt of the learned trial Judge to reconstruct evidence in a vain attempt to show what must have happened has been found unacceptable by the court below. It is enough for me to agree with the objection expressed by that court to what it described as the "general treatment" of the plaintiffs evidence (vide page 135 of the record of proceedings). From his reconstruction/deductions, the trial Judge, came to the conclusion that the respondent had not proved negligence by the appellant "by balance of probabilities" and proceeded to dismiss the plaintiff's claim. He failed to consider doctrine of *res ipsa loquitur* which was before him, and therefore failed to draw the only conclusion available to him, to wit, that the appellant had failed to give a credible explanation as to why the accident occurred and that the presumption of negligence which arose had not been rebutted. I agree therefore with the court below that the doctrine is applicable, and the answer to the first issue raised is therefore in the affirmative. No argument appears to have been urged in support of the second issue as set out. It is therefore deemed abandoned.

The third and fourth issues also cover the second ground of appeal. The complaint against the admission of Exhibit 2 is really confined to its user by the court below in its assessment of damages, because it has been stated in the course of his submission by the appellant that the trial court did not make use of Exhibit 2. The reasons for the complaint are two. The first is that the amendment of the pleadings which let in Exhibit 2 into the pleadings was made in the absence in court of the appellant and his counsel, and so they were not heard on the merits of the application. Secondly, that it was wrongly admitted because no adequate explanation of the absence of the maker thereof was made by the respondent. It should therefore not be given any probative value. The respondent in his brief has given a complete answer to the complaint here in paragraphs 20 and 21 of his brief which is set out verbatim as follows:-

"20. On ground 2, the orthopaedic surgeon's report was received in evidence in the trial court and marked Exhibit 2. The appellant above did not appeal to the court below against the admission of the said report in evidence. He cannot make its admissibility a ground of appeal to this court. In any case it does not lie in the mouth of a party who with his counsel chose to be absent without excuse when proceedings in his case are going on to complain of the course the proceeding took in his absence. The 2nd defendant in the suit who was sued jointly and severally with the appellant took part in the proceedings and did not oppose the admission in evidence of the said report.

21. Moreover sufficient foundation in law was laid for the admis-

sion of the report by the evidence of the respondent recorded in lines 21-27 of page 32 (which was not challenged in cross-examination by the appellant's counsel when she joined the proceedings nor rebutted by other evidence). Section 90(1) of the Evidence Act allows the tendering in evidence of the report when the maker was shown not to be available to give evidence.
 5 *Neither Section 76 of the Evidence Act nor Order XXXV Rule 7 of the High Court Rules in force on the 16th day of April, 1985, when the report was admitted in evidence on which the appellant relied on page 11 of his brief for the belated opposition to the admission of Exhibit 2 is relevant. "*

There is therefore no substance in the complaint here and the an-
 10 swer to Issues 3 and 4 are Yes and No respectively.

Issue 5 complains that the damages awarded are excessive. Even though the appellant in his brief correctly stated the general damages awarded by the court below to be N35,000.00, as against the figure of N42,000.00 erroneously set out in his notice/grounds of appeal, respondent's counsel
 15 stuck surprisingly to this erroneous figure as representing what the court below awarded. Nothing has been urged to show why this Court should interfere with the award of damages made by the court below. The principles on which an appellate court acts in interfering with the award of damages by a trial court have been often stated. They are trite, and briefly
 20 stated are, that the appellant must show that the trial court proceeded on a wrong principle of law in making the award and/or that the award is an entirely wrong estimate vide *Agaba v. Otubusin* (1961) 2 SCNLR 13 All (1961), NLR 299; *S. Obere v. Board of Management Eku Baptist Hospital* (1978) 6 -7 S.C.

25 15. None of these principles have been violated here. In view of the injuries of the respondent, and the degree of disability it has occasioned, the award is justified and the answer to Issue 5 is in the affirmative.

It is for these reasons that this appeal has been dismissed with costs to the respondent assessed at N1,000 only.

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BELLO CJN

On the 17th of May, 1993. I dismissed and affirmed the judgment of the Court of Appeal with costs. I stated that I would give
 35 reasons today.

I have read the lead reasons for judgment delivered by my learned brother, Uche Omo, J.S.C in advance. I adopt the reasons given by him.

KARIBI-WHYTE JSC

I Summarily dismissed this appeal and affirmed the judgment of the Court on May 17, 1993. I indicated I will give my reasons for so doing today. 5

I have read the judgment of my learned brother Uche Omo J.S.C. in this appeal. His reasoning accords so completely with my views that I do not consider it necessary to say more than adopt them as mine. 10

BELGORE JSC

I had the privilege of reading in advance the lead Reasons for judgment prepared by my learned brother, Uche Omo, J.S.C. and I agree that this appeal only merits dismissal. For the reasons fully ad- 15
umbrated in the said reasons for judgment, I also dismissed this ap-
peal on 17th day of May 1993.

KUTIGI JSC

On 17th May 1993 this appeal was heard and dismissed by the Court. It was adjourned to today for full reasons for the dismissal to be given. I read before now the Reasons for Judgment just deliv- 25
ered by my learned brother Omo, J.S.C. I agree with him and adopt
the reasons as mine.

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