

**SUPREME COURT OF NIGERIA**  
16TH APRIL, 2004. SC. 3/2000  
**CORAM:- LL. KUTIGI, A.I. KATSINA-ALU, U.A. KALGO, A.O.**  
**EJIWUNMI, D.O. EDOZIE, JSC**

1. ROYAL ADE NIGERIA LIMITED  
2. DAVID ADEGOKE ..... APPELLANTS  
(TRADING UNDER THE NAME AND  
STYLE OF DAVID ADEGOKE ENTERPRISES)  
AND  
NATIONAL OIL AND CHEMICAL ..... RESPONDENT  
MARKETING COMPANY PLC.

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TORTS - Negligence - Damages - Three things plaintiff must prove - To be entitled to damages (H1)

TORTS - Equitable maxims - Res ipsa loquitur - Negligence - When the maxim may operate (H2)

EVIDENCE - Appeals - Reevaluating the evidence unto reaching a different conclusion - Was properly done by lower court (H3)

TORTS - Negligence - Fire Accident - Res ipsa loquitur plea - Existence of evidence - That excused respondent from negligence - Has defeated the claim for damages (H4)

**FACTS**

Before the Lagos High Court the plaintiffs/appellants filed an action against the defendants/respondents. Plaintiffs claimed for the replacement of their Mercedes Benz Petrol Tanker which was completely burnt down through the alleged negligence and or breach of duty of care of the defendants, its servants or agents. The fire incident occurred at Ipokia Idiroko petrol station of the respondent. Upon arrival, the driver of the appellants' Mercedes Tanker as has always been the practice,

positioned the vehicle at the delivery point and handed it over to the respondent's petrol attendants on duty. The driver withdrew to one side of the petrol station for the unloading of the fuel to be finished.

In the process, the Mercedes Tanker caught fire. The driver jumped in and drove it out of the petrol station where it was totally consumed by fire. The appellants' case was based on the fact that it was the negligence of the respondent that caused the fire incident. They relied on *res ipsa loquitur maxim*. The trial court found in favour of the appellants. Respondent's appeal to the Court of Appeal was upheld. Being dissatisfied, appellants have now appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*"(i) Whether the Court of Appeal was correct in holding on the evidence adduced by the respondent, that the respondent discharged the burden of proof placed on it by the doctrine of Res Ipsa Loquitur (see appellant's issue 3.01).*

*(ii) Whether the Court of Appeal was right in holding that the appellants did not plead the position of the vent pipe and if the answer is no, whether a miscarriage of justice was occasioned by that holding?*

*(iii) Whether the Court of appeal rightly held that the learned trial judge failed to properly evaluate or adequately evaluate the evidence led before him."*

**HELD** (Unanimously dismissing the appeal per lead judgment of **EJI-WUNMI JSC**)

### ***Negligence - Damages***

1. It is my view that before the liability of the respondents to pay damages for the tort of negligence can be established, three things have to be proved by the appellants. They are (1) that the respondents failed to exercise due care; (2) that the respondents owed to the appellants a duty to exercise due care, and (3) that the respondents' failure was the cause of the injury in the proper sense of that term. (p. 791 D)

### ***Equitable maxims - Res ipsa loquitur***

2. I think it is thus clear that this approach to a claim in negligence comes

into operation (1) on proof of the happening of an unexplained occurrence. (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and (3) the circumstances point to the negligence in question being that of the defendant rather than that of any other person. See also *Barkway v. South Wales Transport Co. Ltd.* [1950] 1 All E.R. 392 at 395. (p. 795 E)

### ***EVIDENCE - Appeals***

3. I think that the court below was right not only in re-evaluating the evidence but reached the right conclusion when it overruled the trial judge in this regard. In agreeing with the court below, I am aware that an Appellate Court should ordinarily be wary to set aside the findings of a trial court which had the opportunity of seeing and hearing the witness. But where, as in this case, the trial court who saw and heard the witnesses failed to raise the proper inferences upon the facts presented to it, then the Appellate Court ought to and justifiably too overturn such erroneous conclusion reached by the trial court. (p. 797 E)

### ***Fire Accident - Res ipsa loquitur plea***

4. It is apparent on the evidence led in this appeal that the appellants did not prove negligence in any of the servants of the respondents that caused the accident. In so far as anything was proved; it was that there was fire during the off-loading of petrol from the petrol tanker. Indeed that is why by pleading *res ipsa loquitur* it was sought to fasten liability on the respondents by the occurrence of the fire as the respondents were wholly in charge of off-loading of the petrol tanker. No further evidence was made available as the cause of the fire. On the other hand, the evidence given by the respondents as to what happened to their knowledge has been found to have sufficiently excused themselves from any liability for the damages caused to the appellants' petrol tanker as a result of the fire.

From the above conclusion, it is manifest that the appeal must fail, as it has not been established that the respondents were guilty of any negligence by their conduct or by the conduct of any of their servants

and or agents. In the result, having failed to establish negligence against the respondents, the claim in damages must also fail. (p. 798 B)

## NOTABLE POINTS OF INTEREST

### B EJIWUNMIJSC

#### 1. *Reliance on plea of negligence and res ipsa loquitur*

It is of course evident from the pleadings that though the appellants pleaded negligence, it is clear that they relied also on the plea of res ipsa loquitur to establish their claim. This method is founded upon the statement of C Erle C.J. in *Scott v. London & St Katherine Docks Co.* 1865 3 H&C, 596, 601.

D “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”. (p. 793 B)

E

#### 2. *Essence of the maxim res ipsa loquitur*

F The maxim of res ipsa loquitur is not a rule of law; it merely describes a state of the evidence from which it was proper to draw an inference of negligence. It is “no more than a rule of evidence affecting onus. It is based on common-sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be with the knowledge of the defendant. However, a plaintiff cannot rely G on the maxim to create a presumption of negligence where there is no evidence of negligence but there exists a possible non-negligence cause of the injury.”

H The essence of the maxim is that an event, which in the ordinary course of things, was more likely than not to be by negligence was by itself evidence of negligence depending of course on the absence of explanation. The doctrine merely shifts the onus on to the defendant. If the facts are sufficiently known or where the defendant gave an explanation,

the doctrine will no longer apply. *Barkway v. South Wales Transport* [1950] 1 All E.R. 392. Reliance on the doctrine of ‘res ipsa’ is thus a confession by the plaintiff that he has not direct and affirmative evidence of the negligence complained of against the defendant but that the surrounding circumstances amply establish such negligence. In relying on *res ipsa loquitur*, a plaintiff merely proves the resultant accident and injury and then asks the court to infer therefrom negligence on the part of the defendant.

*"If there is evidence of how the occurrence took place then an appeal to res ipsa loquitur is misconceived and inappropriate. There again the question of the defendant's negligence must be determined on the available evidence. In other words the doctrine of 'res ipsa loquitur' is not meant to supplement inconclusive evidence of negligence on the part of plaintiff. Rather it is meant to apply where there is no other proof of negligence than the accident itself."* (pp. 794 A, F & 795 C)

#### REPRESENTATION:

DR. HAMED KUSAMOTU FOR THE APPELLANTS

RESPONDENTS NOT REPRESENTED

#### CASES REFERRED TO

- Ibekendu v. Ike* [1993] 6 N.W.L.R. (pt. 299) pp. 287 & 297
- Scott v. London & St. Katherine Docks Co.* [1865] 159 E.R. 665
- Woods v. Duncan* [1946] A.C. 401 at 419 & 459
- Polycarp v. Nnubia* [1992] 1 All N.L.R. (pt. 2) 226 at 232
- Ibekandu v. Ike* [1993] N.W.L.R. (pt. 299) 287 at 297
- Alphonsus Ibeanu & Anor v. Peter Ogbeide & Anor.* [1998] 9 S.C.N.J. 77 at page 79 and 80
- Nwokoro v. Nwosu* [1994] 4 N.W.L.R. (pt. 337) 172 at 175
- Duru v. Nwosu* [1989] 4 N.W.L.R. (pt. 113) 24 at 55
- Buraimoh v. Bamgbose* [1980] 3 N.W.L.R. (pt. 109) 352
- Karimu Olujinle v. Bello Adeagbo* [1988] 2 N.W.L.R. (pt. 75) 238
- Nwabuoqu v. Ottih* [1961] A.N.L.R. (reprint) 507
- Onwuka v. Omogui* [1992] 3 N.W.L.R. (pt. 230) 393 at 415

Management Enterprises Ltd. V. Otusanya [1987] 1 N.S.C.C. 577

Barkway v. South Wales Transport Co. Ltd. [1950] 1 All E.R. 392 at 395

Bolton v. Stone [1951] A.C. 850 at 859

Shell B.P. Petroleum Dev. Co. Nigeria Ltd. V. His Highness Pere Cole the

B Pere of Kumbowei Clan & 6 Ors. [1978] 3 S.C. 183

Soleh Bonch Overseas (Nig.) Ltd. V. Ayodele & Anor [1989] 1 N.W.L.R. (pt. 99) 549

C

### **LEAD JUDGMENT BY EJIWUNMI JSC**

This matter which has now culminated in this court was commenced by the plaintiffs at the High Court of Lagos State, Ikeja Division where by suit No. ID/657/89, they claimed for the replacement of their

D Mercedes Benz Petrol tanker Registration No. LA2219SJ., which was completely burnt down on the 6<sup>th</sup> day of February 1988 through the alleged negligence and/or breach of duty of care of the defendants, their servants or agents. This incident, it was further alleged occurred when E the plaintiffs' petrol taker was discharging the fuel with which it was loaded into the second fuel tank located in the defendant's petrol station at Ipokia, Idiroko in the Egbado local Government Area of Ogun state. Before that event, the defendants had discharged fuel brought by the F plaintiffs' petrol tanker into the first of the fuel tanks at the petrol station.

It is the case for the plaintiffs that upon the arrival of their petrol tanker at the Petrol Station of the defendants situated and lying at Ipokia Idiroko in the Egbado Local Government Area of Ogun State on the 6<sup>th</sup> of February 1988, the driver of the petrol tanker as has always been the G practice, positioned the vehicle at the delivery point, and then handed it over into the possession of the defendants through the petrol tanker then withdrew to one side of the petrol station for the unloading of the fuel brought to the station by the petrol tanker. As I have already mentioned, H the petrol tanker then caught fire as it was being off-loaded into the fuel tanker of the defendants. But for the intervention of the driver of the petrol tanker, who jumped into the burning tanker and drove it away from the station, the petrol station and its environs would have been

totally consumed by the fire. Despite the rescue effort of the driver of the tanker, the tanker was completely burnt.

The facts as stated above were not disputed by the defendants. However, what was in dispute and still the main point in this appeal is, what caused the fire, and who was liable for the fire incident. I will later B in this judgment consider the contending arguments of the parties in respect of these questions. However, for the moment it must be noted that the claims of the plaintiffs' found favour with the trial court, which therefore upheld their claims. As the defendants were dissatisfied with that judgment, they appealed to the Court of Appeal (Lagos Division). That C court upheld the appeal in favour of the defendants. As the plaintiffs were not happy with that result they have appealed to this court.

Pursuant thereto grounds of appeal were filed. And in accordance D with the Rules of this court, Briefs of Argument were filed and exchanged.

For the plaintiffs, now the appellants, the following are the issues identified in their brief for the determination of the appeal. They read:

*"3.01 Whether the Court of Appeal having held (page 413) that the doctrine of the res ipsa loquitur applied was right in holding that the E respondent had discharged the burden shifted on it.*

*3.02 Whether the Court of appeal was right in holding that the appellant did not plead the position of the vent pipe and if the answer is no, whether a miscarriage of justice was occasioned by that holding. F*

*3.03. Having rightly held that a party could rely either on the main or alternative claim Ibekendu v. Ike [1993] 6 N.W.L.R. (pt. 299) pp. 287 & 297 Omo, JSC, at page (sic) 410 to 411 of the record, (sic) and held "The damages were pleaded and proved" page 416, whether it G is erroneous of the Court of Appeal to at the same hold". In....allow it.*

*3.04 Whether the Court of Appeal rightly held that the learned trial judge failed to properly evaluate or adequate (sic) evaluate the evidence led before him."*

For the defendants now respondents, three issues were set down H in the respondent's brief for the determination of the appeal. They read thus:

*"(i) Whether the Court of Appeal was correct in holding on the*

*evidence adduced by the respondent, that the respondent discharged the burden of proof placed on it by the doctrine of Res Ipsa Loquitur (see appellant's issue 3.01).*

(ii) *Whether the Court of Appeal was right in holding that the appellants did not plead the position of the vent pipe and if the answer is no, whether a miscarriage of justice was occasioned by that holding?*

(iii) *Whether the Court of appeal rightly held that the learned trial judge failed to properly evaluate or adequately evaluate the evidence led before him."*

A comparative reading of the set of issues quoted above leaves no doubt that the appellants are at one in respect of the three issues identified for the respondents as above, save the correction to issue 3.01. It follows though that the determination of this appeal would be considered along the lines set down by the appellants, save that their issue 3.01 would be as framed in issue (i) in the respondent's brief. Having noted that, it became clear from reading the appellants' brief that the issues were not distinctly argued as might have been expected since the learned counsel for the appellants took the trouble to identify the issues for the determination of the appeal. Be that as it may, it is manifest from the appellants' brief that the thrust of the argument proffered for the appellants appears to be that the appellants had properly pleaded and placed reliance in the alternative on the doctrine of res ipsa loquitur. That as the respondents did not adduce any evidence on negligence against the appellants' plea of res ipsa loquitur, the court below was wrong to have set aside the judgment of the trial court.

Following that contention, is the submission made for the appellants that with the evidence not in dispute that the respondents took over the tanker in order to discharge the fuel it brought into the station before the fire occurred, it is therefore argued for the appellants that it was for the respondents to give an account of how the fire which engulfed the tanker occurred. And also what it was that caused the fire. After referring to the pertinent evidence led by the respondents at the trial, it is then submitted that the appellants failed to give evidence to discharge the burden placed on the respondents, by virtue of the plea of res ipsa loquitur



by the appellants. In support of his submissions, the following cases were referred to in the appellants' brief. *Scott v. London & St. Katherine Docks Co.* [1865] 159 E.R. 665; *Woods v. Duncan* [1946] A.C. 401 at 419 & 459; *Polycarp v. Nnubia* [1992] 1 All N.L.R. (pt. 2) 226 at 232; *Ibekandu v. Ike* [1993] N.W.L.R. (pt. 299) 287 at 297. B

On whether the issue of damages was properly addressed by the court before holding that "*there are no material upon which the judge could make an award*", learned counsel for the appellants in response to that view on the award of damages, submits that that holding of the court below was made in error. In that regard reference was made to page 416 C of the Record of Proceedings., where the court held that damages were pleaded and proved.

It is further contended for the appellants that the respondents were well aware that the issue of damages was the main claim of the appellants, but the respondents did not specifically deny the averments made in their Statement of Claim (as amended). Learned counsel for the appellants in urging that the court below was wrong to have failed to follow the pleadings of the appellants in this regard, cited the following cases E *Alphonsus Ibeanu & Anor v. Peter Ogbeide & Anor.* [1998] 9 S.C.N.J. 77 at page 79 and 80; *Nwokoro v. Nwosu* [1994] 4 N.W.L.R. (pt. 337) 172 at 175. He therefore concluded on this aspect of the appeal that the court below erred in its evaluation of the judgment of the trial court and F hence its failure to uphold the judgment of that court.

I have earlier in this judgment referred to the brief of the respondents in response to the contention made for the appellants and which I have stated briefly above. For the respondents, the arguments urged in support of the view that the judgment of the court below be affirmed. G The thrust of the argument advanced for the respondents is directed at showing that the court below was right to have set aside the judgment of the trial court because that court failed to recognize that the evidence led by the respondents clearly exculpated the respondents from any negligence with regard to what caused the fire that engulfed the tanker and H which resulted in total loss by fire. It is further argued for the respondents that the court below was right to have upheld the contention that

the plea of *res ipsa loquitur* was properly pleaded by the appellants. But that plea being a rule of evidence only shifted to the defendants the burden of establishing what caused the fire. That burden, argued the appellants, was not duly discharged by the respondents. Indeed, it is further argued for the respondents that the appellants led no credible evidence to sustain their claim against the respondents. In support of his submission, he referred to some authorities., which included the following: *Duru v. Nwosu* [1989] 4 N.W.L.R. (pt. 113) 24 at 55; *Buraimoh v. Bamgbose* [1980] 3 N.W.L.R. (pt. 109) 352; *Karimu Olujinle v. Bello Adeagbo* [1988] 2 N.W.L.R. (pt. 75) 238; *Nwabuoku v. Ottih* [1961] A.N.L.R. (reprint) 507; *Management Enterprises Ltd. V. Otusanya* [1987] 2 N.W.L.R. (pt. 55) 179; *Onwuka v. Omogui* [1992] 3 N.W.L.R. (pt. 230) 393 at 415.

It is, in my humble view clear that both parties in this appeal have hinged the determination of this appeal upon whether negligence was established or not against the respondents. And in order to determine this question, it is pertinent to consider whether the case came within the principle known as *res ipsa loquitur* as found by the court below. That court in the determination of this question per Musdapher, J.C.A (as he then was) said thus:

“The principle merely shifts the onus of proof which is adequately met by *showing that despite the accident the defendant was not in fact negligent*. See *Onwuka v. Omogui* [1992] 3 N.W.L.R. (pt. 230) 393. But a defendant may not be liable because he could not prove how the accident happened. It is sufficient if he satisfies the court that he was not negligent. See *Wood v. Duncan* [1946] A.C. 401. But where the cause of accident is known the doctrine does not apply. See *Bolton vs. Stone* [1961] A.C. 850. See *Odebunbi vs. Abdullahi* [1997] 2 N.W.L.R. (pt. 489) 526. See *Management Enterprises Ltd. Vs. Otusanya* [1987] 2 N.W.L.R. (pt. 55) 179. *Ibekandu vs. Ike* [1993] 6 N.W.L.R. (pt. 299) 287 at page 297. *Omo. J.S.C., said:*

‘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 vs. Obidife* [1965] N.M.L.R. 113’ It can also be pleaded in the alternative to particulars of negligence averred

as in the present case vide *T.O. Kuti vs. Tugbobo* [1967] N.M.L.R. 419 at 422 where the Federal Supreme Court so held thus:

*‘It will be seen that the plea of res ipsa loquitur is raised in one of two ways: either specifically reciting the Latin Maxim or in the alternative by making it known that the plaintiff intends to rely on the very collusion itself as evidence of negligence.’* B

Upon that premise the court below after due consideration of the pleadings and the evidence adduced by the appellants then came to the conclusion that even though they were entitled to plead res ipsa loquitur, the respondents sufficiently gave evidence that they were not guilty of negligence. Before considering what is meant by the plea of res ipsa loquitur as was pleaded by the appellants to this appeal, it is desirable to bear in mind that the object of the claim of the appellants was to recover damages for the loss of their petrol tanker that was engulfed by fire while in the process of discharging petrol into the underground petrol tank at the Ipokia Petrol Station of the respondents. However, **it is my view that before the liability of the respondents to pay damages for the tort of negligence can be established, three things have to be proved by the appellants. They are (1) that the respondents failed to exercise due care; (2) that the respondents owed to the appellants a duty to exercise due care, and (3) that the respondents’ failure was the cause of the injury in the proper sense of that term.** C D E

Now it is manifest from the pleadings and the evidence that the following facts are not in dispute. (1) That the appellants were contractors to the respondents for the supply of Petrol Tankers for the delivery of petrol to the petrol stations of the respondents. (2) That on the fateful day, one of such deliveries was made by the petrol tanker of the appellants at the Ipokia Petrol Station of the respondents. (3) That the petrol tanker was driven into the petrol station by the driver in the employment of the appellants. (4) That in accordance with the practice and contract between the parties, the driver after positioning the tanker for delivery of the petrol it carried, the operatives of the respondents at the petrol station took control of the tanker in order to off-load its contents into the underground tanks of the petrol station. (5) That after one of the underground F G H

tanks had been filled and was to begin with the 2<sup>nd</sup> underground tank, fire suddenly flared from under the petrol tanker. (6) That this fire engulfed the petrol tanker, and that it was the driver of the petrol tanker who quickly jumped into it and drove it away from the vicinity of the petrol station. (7) That in spite of this quick intervention of the driver, the petrol tanker was completely burnt. (8) That as a result, the appellants suffered the total loss of their petrol tanker.

Pursuant thereto, the appellants by their Amended Statement of Claim pleaded at paragraphs 18, 19 & 27 thus:

*“18. Suddenly, the driver heard an alarm, “Fire! Fire! And when he saw that there was fire, he quickly jumped into the vehicle, started the engine and pulled out the petrol tanker from the petrol station though it was engulfed with fire and parked it at a point away from the petrol station.*

*19. By his courageous act, the driver was able to save the petrol station and the whole community of Ipokia from serious fire disaster.*

*27. The defendant’s aforementioned officers were all full of praise for the tanker driver and they all assessed the value of what the driver had saved the defendant at N5,000,000.00 and they all agreed to settle the matter amicably.”*

And the respondents who denied negligence by their own amended Statement of Defence pleaded at paragraphs 12, 13 & 14 thus:

*“12. The defendant denies that it was quality of the alleged or any negligence or breach of duty as alleged in the Amended Statement of Claim or at all or that the incident or mishap was caused by the alleged or any of its servants or agents or at all and every allegation of negligence contained in the Amended Statement of Claim is specifically denied.*

*13. The defendant denies that the said fire was caused by the alleged or any negligence as alleged or at all and that the said fire in all probability began accidentally and the defendant will at the trial rely upon the provisions of the Fires Prevention (metropolis) Act. 1774, a Statute of General Application in force in Nigeria, a received Law.*

*14. Further to the denials of the averments in paragraph 21 and 25 of the Amended Statement of Claim the defendant avers that it did con-*

duct investigations into the mysterious fire incident and by a letter addressed to the 1<sup>st</sup> plaintiff dated 29<sup>th</sup> June, 1988 informed it of the outcome of the same put the 1<sup>st</sup> plaintiff on enquiry about the supposed insurance cover for the vehicle and the product it conveyed. The defendant shall rely on the said letter at the trial of this action.

It is of course evident from the pleadings that though the appellants pleaded negligence, it is clear that they relied also on the plea of res ipsa loquitur to establish their claim. This method is founded upon the statement of Erle C.J. in Scott v. London & St Katherine Docks Co. 1865 3 H&C, 596, 601.

*“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”.*

In order to appreciate further this principle of establishing liability by pleading the plea of res ipsa loquitur in a claim for damages arising from the tort of negligence, I wish to refer to 9<sup>th</sup> Edition of Charlesworth & Percy on Negligence, where at pp. 424-425 the learned authors explained this approach thus:

*“A special application of the principle that there is evidence of negligence if the facts proved are more consistent with negligence on the part of the defendant than with other causes is found in those cases in which the maxim res ipsa loquitur applies. It would not be correct to describe res ipsa loquitur as a “doctrine”* Megaw, L.J. said of it:

‘I think that it is no more than 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’ such cases are where the plaintiff proves the happening of the accident and nothing more. It may be that he cannot prove more but, whether he can or not, he does not proceed to prove any specific act or omission on the part of the defendant. The mere happening of the accident “*speaks for itself*” Since it may be more

consistent with negligence on the part of the defendant than with any other cause. If that is so, the court may find negligence on the part of the defendant, unless he gives a reasonable explanation to show how the accident may have occurred without negligence on his part. The maxim

B of *res ipsa loquitur* is not a rule of law; it merely describes a state of the evidence from which it was proper to draw an inference of negligence. It is “*no more than a rule of evidence affecting onus. It is based on common-sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be with the knowledge of the defendant. However, a plaintiff cannot rely on the maxim to create a presumption of negligence where there is no evidence of negligence but there exists a possible non-negligence cause of the injury.*”

D It is also apposite to refer to the case of *Management Enterprises Ltd. V. Otusanya* [1987] 1 N.S.C.C. 577, where this approach was examined by this court including its limitation. For this purpose, I will quote from the judgment of Oputa, J.S.C., who at pages 585-586 said: -

E “*Res ipsa loquitur* means, “*The thing speaks for itself*” This Latin maxim 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 to involve negligence. Thus where a ship in motion collides with a ship at anchor the court will hold that ordinarily such collision do not and will not occur without the negligence of the ship in motion: see *The Batavia* 1845 2 W. Rolf 407. *The Valdis* (1915) 31 T.L.R. 111. *Res ipsa loquitur* is no more than a rule of evidence affecting the onus of proof. The essence of the maxim is that an event, which in the ordinary course of things, was more likely than not to be by negligence was by itself evidence of negligence depending of course on the absence of explanation. The doctrine merely shifts the onus on to the defendant. If the facts are sufficiently known or where the defendant gave an explanation, G the doctrine will no longer apply. *Barkway v. South Wales Transport* [1950] 1 All E.R. 392. Reliance on the doctrine of ‘*res ipsa*’ is thus a confession by the plaintiff that he has not direct and affirmative evidence of the negligence complained of against the defendant but that the sur-

rounding circumstances amply establish such negligence. In relying on res ipsa loquitur, a plaintiff merely proves the resultant accident and injury and then asks the court to infer therefrom negligence on the part of the defendant. The doctrine will not apply where:

(i). The facts proved are equally consistent with accident as with negligence. B

(ii) There is evidence of how the accident happened and the difficulty (as in this case)

arise (sic) merely from an inability to apportion blame between two negligent drivers. If these two drivers are servants of the same master the position may be different: C

Skinner v. L.B. & S.C. Ry (1850) 5 Exch 787.

*“If there is evidence of how the occurrence took place then an appeal to res ipsa loquitur is misconceived and inappropriate. There again the question of the defendant’s negligence must be determined on the available evidence. In other words the doctrine of ‘res ipsa loquitur’ is not meant to supplement inconclusive evidence of negligence on the part of plaintiff. Rather it is meant to apply where there is no other proof of negligence than the accident itself.”* D E

**I think it is thus clear that this approach to a claim in negligence comes into operation (1) on proof of the happening of an unexplained occurrence. (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and (3) the circumstances point to the negligence in question being that of the defendant rather than that of any other person. See also Barkway v. South Wales Transport Co. Ltd. [1950] 1 All E.R. 392 at 395, and Bolton v. Stone [1951] A.C. 850 at 859.** F G

It is therefore from all the above authoritative pronouncement on what the plea of res ipsa loquitur means and the limitations with regard to its application, the appellants have to prove the occurrence of the accident but also that in the happening of the event, the respondents were guilty of negligence. It is no doubt important to remember that the appellants pleaded and gave evidence that fire suddenly engulfed the petrol

tanker while discharging the fuel it was carrying into the underground tanker of the respondents at their Ipokia Petrol Station. It is also admitted by the respondents in their pleadings that the cause of the fire that resulted in the burning of the appellants' tanker was as mysterious as it was unknown. But the learned trial judge made a finding that the respondents were negligent. It does appear from a careful reading of the judgment of the trial court, that the basis of this finding is derivable from the evidence alleging negligence given by the witness for the appellants and accepted by the trial court. In order to appreciate his reasoning on the evidence before him. I will quote him verbatim:

*"His evidence in proof of this runs thus: I told the representatives that the position of the wall fence had been increased and the gas escape pipe has also been removed from the actual position we met it at first and now very near the main station office. This piece of evidence was corroborated by the 1<sup>st</sup> D.W. 2<sup>nd</sup> & 3<sup>rd</sup> D.W."*

The learned trial judge then said: "My question is why was there alterations? And which he proceeded to answer thus:

*"My answer to this after careful consideration xxxxxxxx they were made to cover up certain things in respect of their act in this matter although the defendant did not admit being negligent but it could be inferred from their conduct after the accident which they said 'occurred mysteriously' this conduct which I am talking about is the changing of the vent pipe after the fire accident between the 1<sup>st</sup> inspection and second inspection of April, 1988."*

And later in the judgment, the learned trial judge held that *"the plea of res ipsa loquitur shifts the onus of adducing further (sic) on the defendant to discharge the onus."*

The conclusion reached by the learned trial judge upon the evidence before him fell for consideration before the court below as the respondents being the appellants before that court, argued that the conclusion of the learned trial judge that they were guilty of negligence was arrived at erroneously. In its consideration of this issue raised before that court with regard to the conduct attributed to the respondents i.e. changing of the vent pipe after the fire incident from which the learned judge



inferred negligence, Musdapher, J.C.A. (as he then was) said:

*“This piece of vital evidence was not pleaded or relied upon by the respondent. Now it is elementary and settled that neither the judge nor the parties are permitted to go outside the pleading relied upon by the parties. In an action based on the tort of negligence a plaintiff to succeed must in addition to pleading and establishing the particulars of negligence relied on state and establish the duty of care owed to him by the defendant the facts upon which this duty is founded and the branch of that duty. See Umudge vs. Shell B.P. Petroleum C. Ltd. [1975] 11 S.C. 155; Keys vs. U.B.A. Ltd. [1997] 1 N.W.L.R. (pt. 481) 251. The issue whether or not a party had conducted himself negligently is a question of fact and the evidence led and not a matter of law. See Umar vs. Ahunga [1997] All N.L.R. 747.”*

I have had the opportunity of reading the evidence on the printed record. The respondent gave copious evidence of what they did before commencing with the discharge of the fuel brought into the respondent's station by the appellants' tanker. Though their evidence was not accepted by the trial judge, the court below considered the evidence, re-evaluating same and reached the conclusion that the trial judge was palpably wrong not to have accepted the evidence of the respondents. **I think that the court below was right not only in re-evaluating the evidence but reached the right conclusion when it overruled the trial judge in this regard. In agreeing with the court below, I am aware that an Appellate Court should ordinarily be wary to set aside the findings of a trial court which had the opportunity of seeing and hearing the witness. But where, as in this case, the trial court who saw and heard the witnesses failed to raise the proper inferences upon the facts presented to it, then the Appellate Court ought to and justifiably too overturn such erroneous conclusion reached by the trial court.** See Shell B.P. Petroleum Dev. Co. Nigeria Ltd. V. His Highness Pere Cole the Pere of Kumbowei Clan & 6 Ors. [1978] 3 S.C. 183; Soleh Bonch Overseas (Nig.) Ltd. V. Ayodele & Anor [1989] 1 N.W.L.R. (pt. 99) 549.

Now, having regard to the conclusion I have reached with regard

to the evidence and the principles discussed above, the question then as I see it, is not, does the accident of itself point to the negligence of the respondents, but, is it right on the evidence to find the respondents liable or guilty of negligence?

B Before concluding it is pertinent to observe that this case was fought against the respondents on their alleged negligence. But can the company be found liable in negligence without establishing that the tortious liability of the respondents depends on the proof of the negligence of their servants. **It is apparent on the evidence led in this appeal that the appellants did not prove negligence in any of the servants of the respondents that caused the accident. In so far as anything was proved; it was that there was fire during the off-loading of petrol from the petrol tanker. Indeed that is why by pleading res ipsa loquitur it was sought to fasten liability on the respondents by the occurrence of the fire as the respondents were wholly in charge of off-loading of the petrol tanker. No further evidence was made available as the cause of the fire. On the other hand, the evidence given by the respondents as to what happened to their knowledge has been found to have sufficiently excused themselves from any liability for the damages caused to the appellants' petrol tanker as a result of the fire.**

F From the above conclusion, it is manifest that the appeal must fail, as it has not been established that the respondents were guilty of any negligence by their conduct or by the conduct of any of their servants and or agents. In the result, having failed to establish negligence against the respondents, the claim in damages must also fail. I therefore uphold the judgment of the court below and award costs in the sum of N10,000.00.

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H **KUTIGIJSC**

I have had the privilege of reading in advance the judgment just rendered by my learned brother, Ejiwunmi, JSC he has adequately dealt with all the relevant issues in this appeal. I agree with the conclusion to

dismiss the appeal and uphold the judgment of the Court of Appeal with N10,000.00 costs against the appellants.

**KATSINA-ALU JSC**

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I have had the advantage of reading in draft the judgment delivered by my learned brother, Ejiwunmi, JSC in this appeal. I entirely agree with it and for the reasons he gives. I too, dismiss the appeal and affirm the decision of the Court of Appeal. I abide by the order for cost.

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**KALGO JSC**

I have read in advance the judgment just delivered by my learned brother, Ejiwunmi, JSC. I fully agree with him that there is no merit in the appeal and it ought to be dismissed. The substantive issue considered in the appeal is the application of the doctrine of res ipsa loquitur as it affects the conduct of the respondent in the transaction so as to prove negligence on its part. My Lord, Ejiwunmi, JSC has dealt with this issue so extensively and fully that I do not have anything useful to add thereon. I adopt all his reasoning and conclusions in the judgment as mine. I dismiss the appeal and affirm the decision of the Court of Appeal. I award N10,000.00 costs to the respondent.

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**EDOZIE JSC**

I had the preview of the leading judgment just read by my learned brother, Ejiwunmi, JSC, and I am in complete agreement that the appeal is devoid of merit and should be dismissed.

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The main question agitated by learned counsel for the parties is whether the court below was right in holding that the defendant/respondent discharged the burden of proof placed on it by the doctrine of *Res Ipsa loquitur*. Literally, the Latin maxim means – the thing speaks for itself. It means that there is evidence of negligence if the facts proved are more consistent with negligence on the part of the defendant than with

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other. The maxim comes into operation: (1) on proof of the happening of an unexplained occurrence; (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and (3) the circumstances point to the negligence in question being that of the defendant rather than that of any other person. When the maxim applies, it merely raises a presumption of negligence in question being that of the defendant rather than that of any other person. When the maxim applies, it merely raises a presumption of negligence against the defendant but the presumption is a rebuttable one. When a prima facie case of negligence against the defendant has been established under the doctrine of *res ipsa loquitur*, the defendant can rebut that case by proving that he was not negligent even though he cannot prove how the accident happened: See *Woods v. Duncam* [1946] A.C. 401; *Walsh v. Holst & Co. Lt.* [1958] 1 W.L.R. 800.

In the case of *Onwuka v. Omogui* [1992] 3 N.W.L.R. (pt. 230) 383 at p. 415 this court restated the application of the maxim of *Res Ipsa Loquitur* thus:

*“The doctrine of res ipsa loquitur means that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than other causes and that in such a case, the mere fact of the accident is prima facie evidence of such negligence. In such a case, the burden of proof is on the defendant to explain and to show that it occurred without fault on his part. The principle only shifts the onus of proof, which is adequately met by showing that despite the collusion, the defendant was not in fact negligent. He is not to be held liable because he cannot prove exactly how the accident happened: it is sufficient if he satisfies the court that he personally was not negligent: See *Woods v. Duncan* [1946] A.C. 401.”*

In the instant case, the plaintiffs/appellants in paragraph 27 of their Amended Statement of Claim as an alternative to the particulars of negligence pleaded and relied in establishing their claim on the plea of *res ipsa loquitur* when they averred thus-

*“The 1<sup>st</sup> plaintiff will further rely upon facts as evidence of negligence on the part of the defendant, its servants or agents that at the*

*material time the petrol tanker and its contents were under the control and management of the defendant, its servants or agents when the petrol was ignited and burnt down the petrol tanker.”*

The defendant/respondent in paragraph 20 of its Amended Statement of Defence denied negligence through either its servant or agents alleging that it fully complied with all the safety guidelines as provided in the document titled “*Standard Product Receipt Procedures*”, It called witnesses to substantiate its denial and in evaluating the evidence of the witnesses, the court below at pages 412 and 413 of the record held:

*“The appellant’s (herein respondent’s) witnesses at the scene claimed they took all the necessary precautions against fire, no one knows (sic) how the fire started. It claimed that fire started mysteriously.”*

.....  
The doctrine of res ipsa loquitur merely shifts the burden of proof on a defendant. A defendant may escape liability by showing that he was not at fault or the accident occurred not through any of his negligence or carelessness. In the instant case, there was evidence unchallenged and uncontradicted that no one knew how the, fire started, that the appellant (respondent) was not negligent or careless in the discharge of the petrol. All the necessary safety precautions necessary (sic) were taken before the discharge commenced and that the fire started from the hook of the hose of the vehicle underneath it .....

The learned trial judge did not consider all these pieces of evidence. Had he done so, he might have come to the conclusion that the appellant (respondent) had discharged the burden placed upon it by the doctrine. The doctrine of res ipsa loquitur is a rule of evidence and not a rule of law. It only raises a presumption, which can be rebutted by showing that despite the mishap, the defendant was not at fault. It is common place that where a trial judge has failed to properly evaluate the evidence adduced before him, an appeal court may be free to draw its own inferences from the facts: see *Fatoyinbo v. Williams* [1956] S.C.N.L.R. 274; *Mogaji v. Odofin* (supra), *Musa v. Yerima* [1997] 7 N.W.L.R. (pt. 511) 27. I accordingly hold that the appellant (respondent) had discharge the burden placed on it by showing that it was not negligent. I further hold

on the fact, though the doctrine of res ipsa loquitur applied, the appellant (respondent) has discharged the burden shifted on it. ....”

I am of the view that the court below adequately evaluated the evidence as it was entitled to in the circumstances and applied correct legal principles in adjudging the respondent not liable in negligence as it had discharged the burden placed on it by the doctrine of Res Ipsa Loquitur.

It is for the foregoing and the more detailed reasons contained in the leading judgment that I too, dismiss the appeal with costs as made in the said judgment.

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