Freetown
March 10, 1963

Ames Ag.P.
Dove-Edwin
J.A.,
Bankole Jones
J.

[COURT OF APPEAL]

SIKKEH MACKIE AND OTHERS . . . . . *Appellants*

v.

MARILYN BIRCH AND OTHERS . . . . . *Respondents*

[Civil Appeal 29/62]

Tort—Negligence—Collision between two automobiles—Res ipsa loquitur—Effect of failure of driver of one automobile to testify.

There was a collision between two automobiles, a Mercedes in which the plaintiffs were riding, and a Jeep in which the defendants were riding. Evidence for the plaintiffs was given by the driver of the Mercedes, while a passenger in the Jeep testified for the defendants. Plaintiffs relied on the doctrine of res ipsa loquitur. The trial judge dismissed the claim, and plaintiffs appealed.

Held, that the doctrine of res ipsa loquitur was not applicable.

The court also said, by way of obiter dictum, that, even if the doctrine had been applicable, the judge could properly have found for the defendants on the basis of the testimony of the passenger in the Jeep.

Rowland E. A. Harding for the appellants.
Alfred H. C. Barlatt for the respondents.

DOVE-EDWIN J.A. On June 8, 1960, there was a collision between two cars moving in opposite directions. One was described as a Mercedes and driven at the time by the second appellant who was the fourth witness in the case and the other was a Jeep driven by the first defendant, Dr. Birch. The vehicles were numbered C.667 and P.R.242 respectively. The collision occurred on the Kamakwie/Makeni Road. Both drivers told a police officer who visited the scene what had happened and he made a plan of the accident, but this plan was useless as it was obviously wrong. A photograph of the two cars as they were when they collided was put in evidence and is of some assistance. Only one witness, the driver of the Mercedes car, gave evidence for the plaintiff, of how the collision occurred. The first defendant, who was driving the Jeep or Landrover, was out of the jurisdiction of the court at the time the case was heard, but a passenger, herself a driver with 10 years' experience, told the court what happened. The plaintiffs relied on res ipsa loquitur and learned counsel argued that it applied in this case.

At the trial, after hearing the evidence, the trial judge disbelieved the second plaintiff's evidence (he was the driver of the Mercedes) and accepted the evidence of the witness for the defence, who was in the Jeep, and dismissed the claim. There are three grounds of appeal—

"(1) that the learned trial judge was wrong in law in holding that there was no evidence adduced by the plaintiffs that the accident from which the first three plaintiffs suffered injuries was caused by the negligence of the first defendant;

"(2) that the learned trial judge was wrong in law in his finding that the evidence of Louisa Sherdam is sufficient to discharge the obligation cast upon the first defendant in law to show how else the vehicle which was under the sole control and and management of the first defendant could have hit the plaintiff's car on their side of the road;

" (3) judgment is unreasonable having regard to the evidence."

The whole of learned counsel's argument in support of the grounds of appeal was based on the presumption that this was res ipsa loquitur.

He says that the fact that the first defendant's car was on the wrong side of the road at the moment of impact was prima facie evidence of negligence and that this raised res ipsa loquitur. This being so, counsel submits that no other person could explain how the defendant's car came to be on the wrong side of the road where the vehicles collided except the first defendant who was the driver of the car, and she did not give evidence. That, he submits, entitles the plaintiffs to succeed " . . . on the principle that whatever explanation is forthcoming from any of the occupants of the car as to why the collision occurred could be no more than conjecture."

It is true that on the day in question the car driven by the first defendant crossed from her proper side of the road to the other side to prevent an accident because the plaintiff's car was heading for a collision as it was being driven on the wrong side of his side of the road. The defence raised this in the statement of defence. The photograph taken after the collision by the police showed clearly that one or the other of the drivers was at fault but did not show that the collision was obviously caused by the negligence of the first defendant or in other words did not " tell its own story." It is my view that this was not a case of res ipsa loquitur at all, and the learned trial judge was right by first finding who was the negligent driver; and he had no difficulty in finding that the driver of the car C.667 was negligent.

I do not think counsel for plaintiffs could be heard to say that the first defendant, the driver of the Jeep, did not give evidence and so, since it was in her peculiar knowledge why she crossed the road, any other evidence must be conjecture. It was well known to him, or it ought to have been, that it was impossible for the first defendant to give evidence since she was away from Sierra Leone.

The record shows that on May 22, 1962, the action was struck out, neither party appearing. It was relisted on the application of plaintiffs on June 27, 1962, and on that day counsel for defendants informed the court that first defendant was away from the country and he wanted an adjournment; the case was adjourned to June 29, 1962, and on that day hearing commenced and on July 2 court visited the locus and the plaintiffs' case was closed. The case was adjourned to July 3, 1962, when the defence was concluded. Judgment was delivered on August 24, 1962. On these facts even if this was res ipsa loquitur the evidence of the witness for the defence who herself was in the Jeep at the time of the collision and a driver of ten years' standing would have been properly received and considered. This must not be taken to mean that I agree with learned counsel's submission that the driver must in every case give evidence otherwise whatever anyone else says must be conjectured.

I think the learned trial judge stated the position of the law quite correctly and was right in dismissing the claim. I would dismiss the appeal.