

CHAPTER SIX
LIABILITY NOT BASED ON CONDUCT

6.3. PRODUCT LIABILITY

6.3.1. NATIONAL LAWS

6.3.1.C. ENGLISH LAW

Court of Appeal
Carroll v. Fearon

6.E.32.

PROOF OF NEGLIGENCE IN PRODUCT LIABILITY CASES

Defective tyre

Negligence can be established by using inferences of fact; if the plaintiff succeeds in proving that the product suffered from a manufacturing defect, it is for the manufacturer to explain how that could happen without its fault.

Facts: In May 1987, Mr. Fearon had acquired a used Ford Cortina (which had travelled around 125,000 km). On 9 July 1988, as he was driving it along a motorway, the tread suddenly stripped off the nearside rear tyre. Mr. Fearon lost control of the car, which slipped through to the other side of the motorway, where it collided with the plaintiff's car. The plaintiff and his family all suffered serious injuries. The plaintiff sued, among others, the manufacturer of the tyre the tread of which came off, arguing that there was negligence in that the tyre was defective.

Held: The court of first instance allowed the claim. The Court of Appeal upheld the judgment of the court of first instance.

Judgment: JUDGE LJ:¹ "After a prolonged hearing the judge rejected the assertion that the tyre had been misused and concluded that the manufacturing process had been defective. There was overwhelming evidence to support this conclusion..."

[The defendant argued] that the judgment had proceeded on an impermissible process of reasoning by drawing attention to the observation of Lord Macmillan in *Donoghue v. Stevenson* [1932] AC 562 at 622.²

¹ Nourse and Auld LJJ concurring.

² *Supra*, Chapter I, 1.E.23.

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‘There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maximum *res ipsa loquitur*. Negligence must be both averred and proved.’

To deal with this observation attention was drawn by... the parties to a large number of authorities. In my judgment however the relevant principles are clear. Taken out of context Lord Macmillan’s observation is liable to be misunderstood. In what was then perceived (and is still recognised) as a dramatic development of the tort of negligence Lord Macmillan was seeking to underline that his support for this development did not extend to the creation of a tort of strict liability. In a claim based on product liability negligence had to be proved by the plaintiff. Given that liability would not be established where there was the reasonable possibility of intermediate examination (in the phrase used by Lord Atkin when the principle was first enunciated) he was warning against any misapplication of *res ipsa loquitur*.

Res ipsa loquitur is not a principle of substantive law. These three words are used to encapsulate a common sense reasoning process which is no more or less profound for being expressed in Latin. In any given case either the thing, the facts, speak for themselves, or they do not...

It is somewhat alarming that in response to the submission by [the defendant], and in accordance with modern practice, so many authorities were cited as an aid to understanding the application of common sense. Provided the principle is understood the citation of decisions where the court on particular facts decided that *res ipsa loquitur* did or did not apply, or expressed the same concept using different language, is not helpful. Indeed I very much doubt whether *res ipsa loquitur* is ever susceptible to refined argument and detailed analysis of authority.

Returning to Lord Macmillan’s observation, it was not suggested that the extension of the law of negligence to product liability changed any principle of evidence. He did not expressly or by implication suggest that this manifestation of the tort carried with it the requirement that the court should cease to exercise its common sense reasoning process. He himself approached the presence of the undetected snail in the bottle in *Donoghue v. Stevenson* as prima facie evidence of negligence: hence the principle in *Grant v. Australian Knitting Mills* [1936] AC 85 that the appellant is not required to lay his finger on the exact person in all the chain who was responsible, or specify what he did wrong. Negligence is found as a matter of inference from the existence of the defect taken in connection with all the known circumstances... Moreover in an appropriate product liability case the particular individual responsible for the defect in the product need not be identified nor indeed need the particular act of negligence be specified [references omitted].

The concept of the duty of care and the problems associated with it have led the House of Lords on numerous occasions in the last decade to consider the proper ambit and development of the law of negligence. Ultimately however in the vast majority of cases, of which this is one, negligence remains a question of fact to be decided in the light of the available evidence.

In the present appeal *res ipsa loquitur* is not in point. This tyre burst many years after it had left the factory and had been regularly used. In such circumstances its failure might have resulted from any one of a number of possible causes, including, for example, misuse or abuse, or inadequate repair of earlier damage. However once it was established that the tyre disintegrated because of an identified fault in the course of its manufacture the judge had to decide whether this fault was the result of negligence at Dunlop’s factory. He did not have to

identify any individual or group of employees or the acts or omissions which resulted in inadequate rubber penetration of the cords. If the manufacturing process had worked as intended this defect should not have been present.

Dealing with the point very generally Dunlop was not to be held liable in negligence for damage resulting from a defect which could not have been avoided or detected by reasonable precautions before the product left the factory, or where the problem was caused by a reputable supplier providing unsatisfactory materials which remained undetected by reasonable quality control within the factory. Any such evidence, if it existed, was peculiarly within the knowledge and control of the manufacturer. None of the other parties could possibly have produced evidence about conditions in Dunlop's factory at the date when the tyre was manufactured, that is in 1981. Nothing asserted in the pleadings alerted them to the possibility that criticisms of the suppliers might be relevant, nor did discovery reveal the names of the suppliers of cord and rubber.

In the result there was no evidence on which Dunlop could base an argument that the proved manufacturing defect in the tyre might not have been due to their negligence. Theoretical possibilities may have abounded. However the judge could not be expected to hunt through the evidence seeking for an explanation exculpating the manufacturer which the manufacturer had not elected to advance for himself, or be subjected to criticism for failing to find it. In the end he had to make a finding of fact based on the evidence actually available to him."

Note

The annotated case has been included in order to illustrate that the common law of England, as far as tort liability for manufactured products is concerned, has not changed much since the 1930s, when the previous annotated case, *Grant v. Australian Knitting Mills*, was decided by the Privy Council.

Much like *Donoghue v. Stevenson*³ and *Grant v. Australian Knitting Mills*, the annotated case concerns a manufacturing defect. The plaintiff was faced with the evidentiary difficulties typical of product liability cases, in that it was difficult to prove that the accident occurred because the manufacturer had been at fault in the production of the tyre which exploded and led to the accident. More specifically, the tyre had travelled quite a distance, and it was difficult then to sort out the various possible causes for its failure. The manufacturer argued that, because of the time lapse, the plaintiff could not rely on inferences, including the maxim *res ipsa loquitur*. Indeed, that maxim, which is generally held to mean that negligence can be inferred when the injury is of the kind that would typically not occur unless there was negligence,⁴ was of little help to the plaintiff, given the time lapse between the manufacture of the car and the accident. The

³ Ibid.

⁴ See Markesinis and Deakin at 160-2 and Rogers at 139-45. Both authors caution against exaggerating the importance of the maxim, which is no more than a common sense proposition and does not reverse the burden of proof.

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manufacturer, relying on a quotation from Lord Macmillan in *Donoghue v. Stevenson*, drew from it the conclusion that the plaintiff had to present a full proof of negligence (ie showing exactly how the manufacturer was at fault).

The Court of Appeal expressed its disapproval with the way in which the parties had treated the maxim *res ipsa loquitur* as a rule of substantive law, and restated that the assessment of the evidence was to be carried out with common sense. Even if *res ipsa loquitur* would not suit the facts of the case, the court was entitled to rule on the basis of other inferences of fact. In the annotated case, the plaintiff had shown that the tyre actually suffered from a manufacturing defect which caused the tread to slip off. From that point on, it was for Dunlop to establish how that could have happened without negligence on its part, and especially how the defect could have escaped its quality control, since the evidence fell within the sphere of control of the manufacturer.⁵

The annotated case thus shows once more that English courts refuse to be bound by hard and fast evidentiary rules in the realm of product liability, relying instead on inferences to be drawn on the basis of common sense in the light of the facts of each case.⁶

⁵ It is worth noting how the Court of Appeal reasons along similar lines as the BGH in the famous *Fowl pest* case, *supra*, **6.G.24**.

⁶ See also Markesinis and Deakin at 552.