

Case Note

Res ipsa loquitor is an inferential reasoning process available to both insurers and claimants

The Supreme Court of NSW provides clarity in [IAG Limited t/a NRMA Insurance v Richards](#) regarding the use of inferences, including the doctrine of *res ipsa loquitor* when determining the issue of fault in motor accident claims.

Principles

1. The insurer bears the burden of proof in establishing that a claimant wholly or mostly caused an accident, especially when determining the continuity of statutory benefits under ss 3.11 and 3.28 of the *Motor Accident Injuries Act* (NSW) ('the Act').
2. The doctrine of *res ipsa loquitor* may be used to infer a claimant's negligence.
3. An inference, or lack thereof, may only be drawn upon consideration of all available and reliable evidence.

Background

Wendy Richards suffered injuries in a motor vehicle accident in July 2020. She had no recollection of the relevant circumstances. The head on collision was caused when Ms Richards' vehicle swerved across the centre lines of the road, into the path of an oncoming vehicle travelling in the opposite direction. Evidence from witnesses ruled out any erratic driving immediately before the accident. There was no evidence of any hazard on the roadway that might have explained the occurrence. The claimant told police she had been prescribed medication that may have brought on a microsleep.

Ms Richards pursued statutory benefits under the *Act*. Entitlement to benefits ceased after the initial 26 week period upon NRMA's determination that Ms Richards was wholly or mostly at fault for the accident.

An Application for Miscellaneous Claims Assessment was determined by the Personal Injury Commission (PIC) where it was found that:

- a) the accident was not caused by another person
- b) the insurer carried the onus of proof in the defence of *res ipsa loquitor* ("the thing speaks for itself") but it was not available in any event
- c) the sudden manoeuvre causing the accident constituted an "*evasive action in the agony of the moment*" and, therefore, the claimant was not negligent

Issues

The issues in dispute before the Supreme Court for decision were:

1. Who has the burden of proof when determining statutory entitlements under sections 3.11 and 3.28 of *the Act*?
2. Does the doctrine of *res ipsa loquitor* apply when determining contributory negligence?
3. Can inferences be drawn in the absence of supporting evidence?

Decision

Burden of Proof

Acting Justice Schmidt, held that the Member was correct in finding that the burden of proof falls on the insurer when seeking to establish that an accident was wholly or mostly caused by the claimant. To find otherwise would be “*both illogical and contrary to the statutory object of the quick, cost effective and just resolution of disputes*”.

Doctrine of *res ipsa loquitor*

The court disagreed with the PIC in the application of this defence stating:

“Res ipsa loquitor is not a distinct, substantive rule of law, but an inferential reasoning process, applied where the plaintiff bears the onus of proof in relation to alleged negligence... In this case it was the insurer who had to prove fault, a concept which under this statutory scheme encompasses negligence and so was, accordingly, also entitled to rely on this inferential reasoning process”

In applying the doctrine to this case, the Court observed:

“Whilst the burden of proof does not alter, the doctrine may permit negligence to be inferred from a fact which is unexplained, in this case, as the member found, what caused Mrs Richards to drive into oncoming traffic as she did. As explained in Schellenberg at [73], when a car runs off the road, that fact alone and unexplained, provides some evidence of negligence”.

It was held that while there was no evidence as to why Ms Richards had veered into the path of oncoming traffic, as per the doctrine, the lack of evidence did not prevent a finding that she was wholly or mostly at fault for the accident.

Inferences

The Court confirmed that consideration must be given to all reliable evidence presented. As noted by the Member, the reasons provided by Ms Richards for her conduct which resulted in the accident, rested upon possibilities where there was no direct evidence supporting her explanations.

Schmidt AJ held that the Member's inference was not reasonable on all available evidence, where there was nothing stipulating that an evasive action by Ms Richards was required. Accordingly, the Member erred in drawing that inference.

Similarly, the insurer's submission that the Member should have inferred, upon available evidence, that Ms Richards had a micro sleep, or that she ceased paying the necessary attention to her driving and therefore caused the accident, was not upheld.

Final Result

The Supreme Court quashed the Member's decision. The matter was remitted to the PIC to be determined, afresh, in accordance with the law.

Why this case is important

This case confirms that motor vehicle insurers bear the burden of proof in determining contributory negligence, particularly in claims for statutory benefits after 26 weeks (sections 3.11 and 3.28 of the Act).

In seeking to establish the existence of contributory negligence, the doctrine of *res ipsa loquitur* may be available. However, should an inference surrounding circumstances of an accident be formed, it *must* be drawn from all available and reliable evidence.

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