Michaelmas Term
[2020] UKPC 29
Privy Council Appeal No 0056 of 2018

JUDGMENT

The Airport Authority (Appellant) *v* Western Air Ltd (Respondent) (The Bahamas)

From the Court of Appeal of The Bahamas

before

Lord Kerr
Lord Wilson
Lord Carnwath
Lord Briggs
Lady Arden

JUDGMENT GIVEN ON

9 November 2020

Heard on 23 January 2020

Appellant
Stephen Houseman QC
Janet P Fountain
(Instructed by Stephenson Harwood LLP (London))

Respondent
Katherine Deal QC
Hannah Fry
(Instructed by Tynes & Tynes and Sinclair Gibson LLP)

LORD KERR:

1. The Airport Authority, the appellant, is a statutory body in The Bahamas. It was created by the Airport Authority Act 2000. It owns and operates the Lynden Pindling International Airport at Nassau. Western Air Ltd, the respondent, is an airline operator which owned and operated commercial aeroplanes. One of these was a Metro III aircraft, registered number C6-SAQ. It is this aeroplane whose theft is the subject of this appeal.

2. In the early hours of 26 April 2007, the aircraft was stolen. It had been parked at the airport on its selected stand on what was known as Apron 5. This was part of the designated restricted zone. The appellant was required to control access to this zone as the statutory authority for the airport. According to the appellant's security programme, the requirements for control of the restricted areas had been established to prevent unauthorised persons from gaining access and to safeguard aircraft. A system was in place for controlling access to the airside part of the airport. This included securing the perimeter of the airport, providing patrols and designated entry points (known as "gulfs"). The gulfs should have been manned constantly by security guards. Access to Apron 5 should have been gained through gulf 3.

3. During the night of 25/26 April 2007, according to Tamara Winder Sears, a security officer at the airport, no one tried to obtain access to Apron 5 via gulf 3. No one other than mechanics for another airline would have been expected to need to enter that part of the airport in the course of the night, although it was possible for other authorised personnel to be permitted to enter the airside area of the airport.

4. During the night, a security officer heard the propellers of the aircraft start up and saw it emerge from its parking space. Its lights had not been illuminated. The officer informed a supervisor who in turn reported the matter to her supervisor, although that supervisor had recalled that on a number of occasions in the past Western Air aeroplanes had embarked on late flights and she assumed that this was just another instance of that. Nothing was done to impede the take-off of the aircraft.

5. Anyone with a rudimentary mechanical knowledge could easily open the Metro III aircraft and gain access to it. All that was needed was to pull a lever which was easily accessible. The stairs which provided entry to the aircraft were built into the door. They had not been removed on the night of the theft. When the door was opened, therefore, the stairs came down and gave ready access to the interior of the plane.

6. Access to the area where the aircraft had been parked should have been controlled by a manned security booth at gulf 3. As noted, employees of airlines could gain access to parked aircraft by showing an identification card to the appellant's staff who were present in the booth. This access could be obtained at all hours of the day. The two officers who manned the booth on the night that the aircraft was stolen assert that no unauthorised person was admitted.

7. A police investigation into the theft of the plane took place. The officer in charge was Sergeant Paul Lewis. He gave evidence that there were defects in the security fencing around the airport and that it was therefore possible to obtain access to the area where the aircraft was parked without passing through the access points where the security booths were. The manner in which the person who stole the aircraft gained access to it was not established, however.

8. After investigation by the police, an employee of Western Air was identified as the suspect. His name was Terreros. He had been a pilot with Western Air. Mr Terreros had been denied compassionate leave by Western Air a short time before the aircraft's theft. It appears that he may have been aggrieved about that. In any event, he had not been seen in The Bahamas since the plane was stolen and, in a telephone conversation with Sergeant Lewis during the latter's inquiries, he said that he had stolen the plane and that he had flown it to Venezuela. This was the sum of the evidence as to who stole the plane. Although it was received by Adderley J, its admissibility (because of its apparent hearsay nature) is at least questionable. In any event, the identity of the person who stole the plane has never been firmly established.

The decision of the trial judge

9. There was a dispute as to whether the Airport Authority had exclusive control of security in the airport. The trial judge, Adderley J, held that it was the sole agency which could provide security. Western Air "was not allowed to provide its own private security" - para 7 of his judgment. This finding was made after hearing evidence from Rex Rolle, president of Western Air, that it was understood, as a result of discussions with various managers of the Airport Authority, that individual tenants/lessees of the stands in the airport could not provide their own security at the airport. Evidence had been given for the Airport Authority that private security had never been requested by Western Air or any other airline at the airport and that, if it had been requested, the Airport Authority would have reviewed the application and tried to facilitate it. The general manager of the airport, Milo Butler, gave evidence that, in his former role as general manager of another airline, private security had been requested and allowed for a period. (Mr Butler was not the manager of the airport at the time of the theft of the aeroplane.)

10. On the basis that the appellant was alone responsible for the safety of the respondent's aircraft, Adderley J had no difficulty in finding that there was a sufficiently proximate relationship between it and the respondent so as to give rise to a duty of care. He examined the three stages described by Lord Hope of Craighead in *Mitchell v Glasgow City Council* [2009] AC 874 and found that each was readily met. The threefold test was described by Lord Hope in para 21 of his speech in that case where, relying on what Lord Bingham of Cornhill had said in *Van Colle v Chief Constable of Hertfordshire Police* [2009] AC 225 he stated that what must be shown was "that harm [done to the claimant] was a reasonably foreseeable consequence of what [the defendant] did or failed to do, that the relationship [between the claimant and the defendant] was one of sufficient proximity, and that in all the circumstances it is fair, just and reasonable to impose a duty of care …". Lord Hope also observed that this test had been applied in *Caparo Industries plc v Dickman* [1990] 2 AC 605 where Lord Bridge of Harwich had emphasised that the application of the threefold test was not limited to the question whether there was a duty at all but was to be applied also to the question whether the situation gave rise to a duty of care of a given scope.

11. Adderley J observed that the scope of the duty had also been addressed by Smith LJ in *Everett v Comojo* [2012] 1 WLR 150, para 26 where she said that "once the possibility of a duty has been established the extent of the duty must be delineated by what is fair, just and reasonable."

12. Applying these authorities, Adderley J held (i) that there was a sufficiently proximate relationship between the appellant and the respondent since only the former could provide the necessary security; (ii) that it was reasonably foreseeable that, without proper security, an aeroplane could be stolen; (iii) that the theft could not have occurred without negligence on the part of the Airport Authority and that the doctrine of *res ipsa loquitur* applied; and (iv) that it was fair, just and reasonable to impose liability on the Authority.

13. The judge also found that, notwithstanding Sergeant Lewis's evidence about Mr Terreros, the identity of the person who had stolen the plane remained unknown.

The judgment of the Court of Appeal

14. John JA (with whom Blackman and Conteh JJA agreed), citing well-known authority (*Watt v Thomas* [1947] AC 484; *Benmax v Austin Motor Co Ltd* [1955] AC 370; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911; *McGraddie v McGraddie* [2013] 1 WLR 2477), recalled that an appellate court should not reverse the findings of a first instance or trial court, save in very limited circumstances. In particular, as John JA observed, in *Piglowska v Piglowski* [1999] 1 WLR 1360, Lord Hoffmann, referring to the advantage that a judge at first instance

enjoyed, suggested that the appellate court should be slow to reverse a trial judge's evaluation of the facts.

15. The Court of Appeal then turned to what John JA described as "the central point", namely, whether a defendant could ever be liable for a criminal act committed on its premises by an act of an independent third party where that act resulted in damage or loss to the claimant.

16. Counsel for the appellant had asserted that there was no general duty on a defendant to prevent others from suffering loss or damage caused by the wrongdoing of a third party unless there had been an assumption of responsibility to the claimant or where there was a special relationship between the claimant and the defendant and the latter had some measure of control over the actions of the third party. John JA observed that no authority had been cited in support of that argument and, although not expressly so stated, it was impliedly rejected by the Court of Appeal.

17. John JA then considered an argument advanced by the appellant to the effect that it was not permissible to find a defendant liable "on the basis of conjecture or speculation". The appellant had relied, in support of that contention, on *Sutch v Burns* [1944] KB 406 and *Sumner v William Henderson & Sons Ltd* [1963] 1 WLR 823. The learned appeal justice stated that neither of these decisions had any relevance to the present case.

18. Finally, John JA examined the question of the trial judge's reliance on the doctrine of *res ipsa loquitur*. He cited the well-known passage from *Clerk & Lindsell on Torts*, 17th ed (1995), at para 7-176 (now para 7-203 of the 23rd ed (2020)) where the authors state that this so-called doctrine is no more than a rule of evidence whereby the court may draw an inference of fault where "the nature of the accident" suggests both negligence and the defendant's responsibility. It is merely "a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant." John JA also referred to the celebrated passage from the judgment of Erle CJ in *Scott v St Katherine Docks Co* (1865) 3 H & C 596 where he explained that the doctrine would apply when (1) the occurrence is such that it would not have happened without negligence and (2) the thing that inflicted the damage was under the sole management and control of the defendant, or someone for whom he is responsible or whom he has a right to control. Provided those two conditions are satisfied, then, on a balance of probability, the defendant must have been negligent. On this analysis, John JA found that there was "ample evidence for the judge to find that the doctrine applied" (para 35). The appeal was dismissed.

The appellant's case

19. The appellant claimed that both the trial judge and the Court of Appeal were wrong to find that the Airport Authority's responsibility to provide airport security was sufficient to fulfil the requirement of close proximity so as to give rise to a duty of care at common law. Likewise, this was not enough to satisfy the positive conditions which had to be met in order that the doctrine of *res ipsa loquitur* could be said to apply.

20. The Airport Authority had a limited statutory duty in relation to security at the airport, the appellant claimed. The respondent's original claim that the authority had been in breach of that statutory duty had been dismissed at the outset of the hearing and not renewed. The claim therefore depended on there being a common law duty. In *Stovin v Wise* [1996] AC 923, Lord Hoffmann had stated (at pp 952H-953A) that if a statutory duty did not give rise to a private law right to sue for its breach, it would be unusual if it gave rise to a duty of care at common law. So also, in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, again per Lord Hoffmann at para 23. The type of claim described by Lord Hoffmann as "unusual" was, the appellant claimed, precisely the foundation of the respondent's case here. But the courts below had failed to examine the authorities, including *Stovin* which deprecated such a species of claim.

21. Quite apart from the context of statutory duty, it was, the appellant claimed, generally only appropriate to impose a common law duty of care for failing to prevent harm caused by third parties in certain limited circumstances. Three principal categories had been recognised: (i) where the defendant created the risk of danger that the third party might cause harm to the claimant; (ii) where the third party was under the control or supervision of the defendant; and (iii) where the defendant had assumed a relevant responsibility towards the claimant. None applied here, the appellant argued.

22. If a duty of care on the part of the Airport Authority arose at all, the appellant argued, it did not cover the type of loss which the respondent sustained. The cases cited by the courts below (*Everett v Comojo* - see para 11 above; *Rolle v BH RIU Hotel Ltd* [2012] BHS J No 83; *Maillis v Town Court Ltd* [1989] BHS J No 104) all involved the infliction of personal injury. This was a case of pure economic loss. It was, moreover, a case where the fault alleged was one of omission rather than the active creation of a danger or a state of affairs fashioned by the Airport Authority and, on that account also, the appellant contended, was not actionable.

23. The trial judge had been wrong to find that Western Air was not allowed to provide its own private security for the aircraft, the appellant claimed. It was also argued that he had fallen into error in finding that the aircraft had been stolen by a person whose identity was unknown. The overwhelming burden of the evidence pointed unmistakably

to the thief having been Mr Terreros. Had the judge found that it was he, taking into account that he was an employee of Western Air, a completely different approach to the responsibility of the Airport Authority would have been warranted.

24. On the question of the relevance of the doctrine of *res ipsa loquitur* the appellant argued that as well as the two positive conditions for the application of the doctrine (summarised by the Court of Appeal in para 35 of its judgment) there was a third, negative condition, namely, that there was no evidence as to why or how the occurrence (here the theft of the aircraft) took place. In this case there was such evidence but it was not adverted to by the trial judge or the Court of Appeal.

The respondent's case

25. The respondent contended that the appellant's case depended critically on its challenge to two specific findings of fact made by the trial judge *viz* that the aircraft had been stolen by a person or persons unknown; and that the respondent was not permitted to use its own private security. Both conclusions, the respondent says, were straightforward findings of primary fact.

26. Success for the appeal therefore depended uniquely on a positive challenge to concurrent findings of fact. It is well established, the respondent claimed, that the Board will only interfere with such findings in cases of the most extreme and unusual variety - *Devi v Roy* [1946] AC 508 and *Central Bank of Ecuador v Conticorp SA* [2016] BCLC 26.

27. In any event, the respondent pointed out, so far as the first disputed finding was concerned (that the plane was stolen by unknown persons) this is precisely the case that the appellant made on trial. In support of its claim that no connection between the appellant and the person who stole the aircraft had been established, the appellant had emphasised and reiterated that the thief's identity was unknown.

28. As to the second finding, the respondent drew attention to the fact that the appellant had raised no challenge to the evidence of Rex Rolle and that the evidence of Milo Butler was not necessarily inconsistent with what Mr Rolle had said (see para 9 above.) The judge's finding that individual airlines could not decide to provide their own security was unimpeachable.

29. The respondent countered the appellant's argument based on *Stovin v Wise* and *Gorringe v Calderdale* by pointing out that this was not a case where the claimant had relied, in support of its claim for a common law duty of care, on the existence of a "broad public law duty" such as that owed by a local authority on foot of a statutory

provision which, although it imposed obligations on the public authority, did not create a basis of liability based on breach of statutory duty. To paraphrase somewhat the respondent's case on this issue, this was an instance where the statutory requirement to provide security at the airport provided the setting for, not the source of, the common law duty of care. In this connection, the respondent relied on what Lord Hoffmann had said in para 38 of *Gorringe*:

> "… this appeal is concerned only with an attempt to impose upon a local authority a common law duty to act based solely on the existence of a broad public law duty. We are not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty."

30. Once the availability of a private law remedy was established, the correct approach was to follow the three-stage *Caparo* test, the respondent argued. This Adderley J and the Court of Appeal had done.

31. On the question of *res ipsa loquitur*, the respondent submitted that the full three-limb test had been properly identified in the closing submissions by the respondent's counsel to Adderley J and, in view of his findings, the test was amply met. The trial judge and the Court of Appeal were correct to apply the doctrine to this case.

Discussion

(i) The factual findings

32. Mr Butler's evidence in reaction to that of Mr Rolle concerning whether private security would be permitted by the Airport Authority (see para 9 above) constituted, at most, a somewhat oblique and dilute questioning of the latter's evidence. In light of that somewhat diffident challenge to the respondent's claim that it was not possible for Western Air to provide security for its planes, it is entirely unsurprising that Adderley J made the finding which he did on this issue. Reference had been made to the Airport Authority's security programme which was said to implement the recommendations of the International Civil Aviation Organisation and the National Civil Aviation Security Programme. It was suggested that these differentiated the protection of restricted areas from the security of the aircraft and that the "onus of the security of aircraft falls to the aircraft operator". This evidence was before Adderley J, however, and its theoretical distinction between the areas of responsibility of the Airport Authority and Western Air cannot distract from the assessment of where the duty fell as a matter of practical reality.

In the Board's view, the trial judge was perfectly entitled to find as he did on this matter. The effect of his finding, therefore, was that the Airport Authority was solely responsible for ensuring the protection of aeroplanes parked in the airport.

33. The challenge to the judge's finding that the identity of the person or persons who stole the plane remained unknown is likewise untenable. Quite apart from the dubious admissibility of Sergeant Lewis's evidence about his conversation with Mr Terreros, his claim to have been the thief and speculation as to his possible reasons for doing so could not measure up to the standards required for a confident finding. When this consideration is allied to the circumstance that the appellant had positively argued for the finding that the trial judge actually made on this issue, the argument that he was wrong to do so is simply not viable.

34. These conclusions render it unnecessary to consider at any length the well-known authorities referred to by the Court of Appeal and by the respondent about the limited circumstances in which it is appropriate for an appellate court to interfere with actual findings made by a judge at first instance. This case is, *par excellence*, an example of where reticence is called for. To accede to the claim that Adderley J was wrong would require the Board, at least, minutely to re-examine and analyse the evidence and to be prepared to substitute a diametrically opposite conclusion from that reached by the trial judge. Such an undertaking would be entirely contrary to the clear guidance given in the cases to which the Court of Appeal and the respondent referred.

(ii) Duty of care associated with statutory obligations

35. There is unquestionably a strong strain of decided authority to the effect that where a common law duty is asserted on the basis of a claimed breach of a statutory obligation and it is plain that no liability for the tort of breach of statutory duty has been created, it will not avail. This is for the elementary reason that it would be incongruous that a statutory duty which does not create tortious liability for its breach should be the basis for a common law duty which would not otherwise exist.

36. The Airport Authority was created pursuant to section 3 of the 2000 Act. Included in the list of its functions is the duty to provide airport security - section 6(1)(c). Section 21 deals with the various aspects of the duty. It is in these terms:

> "(1) The Authority shall establish and maintain a security department which shall be supervised and managed by the Director of Security.

(2) The Authority shall appoint and employ at such remuneration and on such conditions as it thinks fit persons to be security officers.

(3) Every security officer appointed under subsection (2) shall on appointment make a declaration before a magistrate that he will duly execute the office of a security officer.

(4) Every security officer appointed under subsection (2) shall while on duty at the airport be charged with -

(a) the protection of the airport; and

(b) the maintenance of order at the airport.

(5) The security department maintained under this section shall be under the exclusive control of the Authority, and the Authority shall have power to suspend or terminate the appointment of any of its security officers."

37. It will be seen that there is no express provision for safeguarding of aircraft. Hence the lack of viability for any claim based on an averment of breach of statutory duty. Section 6(1)(c) is in bald, unvarnished terms - a function of the Authority is to provide airport security. It does not specify the nature and scope of the duty. And the provisions of section 21 are ancillary to the unembellished requirement that security be provided. They add nothing to an understanding about the actual means of doing so nor to an insight of the precise aspects which provision of security should entail. But none of this detracts from the unquestioned position that the Airport Authority was responsible for the overall security of the airfield and it is not in the least surprising that the Authority conceived it to be its duty to provide perimeter security and to restrict entry on to the airfield to all but authorised personnel. When one combines those circumstances with the finding of the trial judge that Western Air was not permitted to provide private security for its own aircraft, the conclusion that the Authority was responsible for the safeguarding of the aircraft while it was parked on its stand is inescapable.

38. The line of authority of which *Stovin* and *Gorringe* are prominent examples has two distinct but interrelated strands. First, they deal with instances where the public authority has been invested with the power or a duty to act in a certain area of activity and secondly, the authority is empowered to exercise discretion as to how it will resort to the power or discharge the duty. That is why it is described as a "broad public duty".

In essence, in both cases the complaint was that although the authority had the legal competence to act, it had done nothing. Of necessity, this called for an examination of the policy reasons underlying the decision of the public authority. This was deemed an inappropriate foundation on which to base a claim in negligence.

39. Quite different considerations arise where the public authority has chosen to act but has done so in a negligent way which adversely affects the interests of the claimant. This much is clear from the later passage from Lord Hoffmann's speech in *Gorringe* quoted at para 29 above. The point is put clearly in the judgment of May LJ in *Rice v Secretary of State for Trade and Industry* [2007] ICR 1469 at para 42:

> "There may, however, be relationships, arising out of the existence and exercise of statutory powers or duties, between a public authority and one or more individuals from which the public authority is to be taken to have assumed responsibility to guard against foreseeable injury or loss to the individuals caused by breach of the duty. There is then a sufficient relationship of proximity and it is fair, just and reasonable that a duty of care should be imposed. In order to determine whether the law should impose such a duty, an intense focus on the particular facts and the particular statutory background is necessary."

40. As the respondent put it, the statutory background provided by sections 6 and 21 of the 2000 Act did no more than provide the framework within which the relationship of proximity between the Airport Authority and Western Air was established. The Authority was required to provide airport security. That was its "broad public duty". The respondent's common law claim for negligence is not based on a failure to provide security. To the contrary, it was in the manner in which the security was maintained or, rather, the deficiencies in the way in which it was conducted on which the respondent's claim rests. And as Lord Browne-Wilkinson said in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 736F, where no policy issues arise the validity of the claim should be decided by applying directly the common law of negligence.

41. It was therefore open to - indeed incumbent upon - Adderley J and the Court of Appeal to apply the threefold test adumbrated in *Mitchell, Van Colle* and *Caparo* (referred to in para 10 above). In the Board's view, there was ample material on which to conclude that each of the elements of the test was satisfied.

42. The proximity of relationship between the Airport Authority and Western Air is readily established: the former was responsible for security at the airport; it was aware that the latter's plane would be parked airside; in light of the judge's finding, it must be

considered also to have been aware that Western Air could not (and did not) provide private security for the safeguarding of the plane; in consequence, it ought to have been conscious that it was the sole agency into whose care the safety of the aeroplane fell. The respondent was therefore uniquely dependent on the appellant to ensure the safeguarding of its property. This was more than sufficient to establish the requisite proximity of relationship.

43. The foreseeability of harm was likewise readily established. Although the theft of an aircraft is a highly unusual occurrence, the exact nature of harm need not be precisely foreseen. It is enough that the possibility of harm to unguarded aircraft was to be anticipated. The very existence of a perimeter fence, restricted access to the airfield and the provision of patrols are all testament to the ready foreseeability of the occurrence.

44. There is no difficulty, therefore, in bringing the circumstances within the first and third categories of case outlined by the appellant (set out in para 21 above) whereby a defendant can be held liable to a claimant for harm caused by a third party. The appellant had created the risk of danger that the third party might cause harm to the claimant by reason of the defects in the system of security at the airport; and it had assumed a relevant responsibility towards the respondent by dint of its being the sole agency which had the means to provide adequate protection for the aircraft.

45. These circumstances also underpin the conclusion that it was fair and reasonable that the appellant be held liable. It was uniquely placed to provide the necessary protections. It had excluded the respondent from the possibility of undertaking this task. It must have been well aware that it fell to it alone to make sure that the aircraft within its property were safe. The mere fact that the aeroplane was stolen shows that the security system was deficient. It is entirely fair, just and reasonable that it be held liable for its loss.

Economic loss and liability for omissions

46. The appellant submitted that the authorities relied on by the Court of Appeal in support of the notion that a defendant could be liable to a claimant for damage caused by a third party were confined to instances where there had been deliberate infliction of injury by the third party on the claimant. This may be so but there is nothing in principle to distinguish that type of case from the present. Both are examples of cases where there was a failure on the part of the defendant to take reasonable steps to prevent the incidence of harm to the claimant.

47. This is not a case of "pure economic loss" on the part of the respondent in the sense in which that phrase is conventionally used. It is not a case which is confined, for

instance, to a loss of income or profits. The respondent lost a valuable asset. There is nothing in the authorities to exclude recovery for this type of loss.

48. Likewise, the circumstance that this case can be characterised as one where the loss stemmed from omissions by the appellant rather than any action on its part cannot provide an exemption from liability. As Lord Browne-Wilkinson observed in *X v Bedfordshire County Council* these claims are to be adjudicated upon applying the ordinary rules applicable to the common law of negligence. Those rules apply equally to negligent omissions as they do to actions which are lawfully remiss.

Res ipsa loquitur

49. In the Board's view, there was ample material on which it might have been found that there was evidence of fault on the part of the appellant, without resort to the doctrine of *res ipsa loquitur*. Sergeant Lewis had given evidence that the perimeter fence was not wholly secure. It is clear that the thief had gained access to the aeroplane without his entry to the airfield having been recorded and despite the movement of the aircraft having been detected and reported to two supervisors, no action was taken to prevent its taking off.

50. In any event, all three elements of the doctrine of *res ipsa loquitur* were drawn to the attention of the trial judge and, although he referred only to the first two of these, it is to be assumed that he had all three in mind when concluding that the doctrine applied.

51. Quite apart from this, any careful examination of the circumstances of the theft admits of no other conclusion than that the three requirements were present. The theft of the aeroplane was an unexplained occurrence; it would not have happened in the ordinary course of things without negligence on the part of someone other than the respondent; and the circumstances pointed unmistakably to the negligence in question being that of the appellant, rather than any other person or agency. There was nothing untoward about the application of the doctrine by the trial judge nor its endorsement by the Court of Appeal.

Conclusions

52. None of the appellant's arguments has succeeded. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed.