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Res Ipsa Loquitur - Application to Exploding Bottle Cases

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Res ipsa loquitur—Application to exploding-bottle cases—Plaintiff was employed as a waitress in a store to which defendant sold and delivered Coca Cola. As plaintiff reached for a bottle to serve a customer, it exploded and caused injury to her hand. Lower court found for the defendant. *Held:* Reversed. The *res ipsa loquitur* doctrine could be applied in the court's charge to the jury upon the theory that the defendant had control of the bottle at the time of the alleged negligent act although not at the time of the accident. However, the plaintiff would have to prove first that the condition of the bottle or container had not been changed after it left defendant's possession, that the plaintiff had handled the bottle carefully, and that the injury was not due to any voluntary action on her part. *Johnson v. Coca Cola Bottling Co. of Willmar, 51 N.W. 2d 573 (Minn., 1952).*

The doctrine of *res ipsa loquitur* is well established in American courts.[1] It was first declared by Chief Justice Erle in *Scott v. London Dock Co.*:[2]

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management and control 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 management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Chief Justice Erle's statement of the doctrine does not lend itself easily to the needs of an injured plaintiff in most exploding-bottle cases because the requirement of "control" has been interpreted to mean that the defendant owned, operated, and maintained, or controlled and was exclusively responsible for the management and maintenance of, the thing doing the damage.[3] The efforts by the courts to apply the doctrine to such cases has given rise to the modern or liberal interpretation of the rule, of which the decision in the principal case is a typical example.

The term "control," as defined by the liberal rule, means that the defndant had control of the physical cause of the injury, not at the time of the injury, but at the time of the alleged negligent act.[4] This view, first declared in *Payne v. Rome Coca Cola Bottling Co.*,[5] has extended

[1] IX Wigmore, Evidence §2509, N. 3 (3rd ed. 1940); Carpenter, *The Doctrine of Res Ipsa Loquitur* (1934) 1 U. OF CHI. L. REV. 519; PROSSER, TORTS (1941) 295.

[2] 3 H & C 596 (1865).

[3] WIGMORE, *supra*, note 1; Winfree v. Coca Cola Bottling Works, 19 Tenn. App. 144, 83 S.W. 2d 903 (1935; Naumann v. Wehle Brewing Co., 127 Conn. 44, 15 A. 2d 181 (1940).

[4] Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497, 39 A.L.R. 1001, (1925); Macres v. Coca Cola Bottling Co., Inc., 290 Mich. 567, 827 N.W. 922 (1939).

[5] 10 Ga. App. 762, 73 S.E. 1087 (1912).

the meaning of the term "control" in order that the doctrine might be made available to an otherwise thwarted plaintiff, for in the great majority of cases, the bottle has passed out of the control of the defendant before the injury occurs.

This modern extension of the term "control" contains a fundamental error in logic in that it beggs the question. Unless the physical cause of the explosion were known, it could not be said that the defendant had contrŏl at the time of the negligent act, for it was not possible to know whether an act of the defendant caused it. In this way, a physical cause for which the defendant would be liable is being inferred when there are other causes just as reasonable for which defendant would not be held liable (e.g., a latent defect, an unavoidable accident, or an unknown external force). If it were not an act on the part of the defendant that gave rise to the physical cause of the explosion, it could not have happened while in his possession and control. Thus, by using in the premises the thing to be proved (i.e. the conclusion), the circle is completely formed.

The only way to avoid this error in logic is to say that from the mere fact of the explosion itself negligence must necessarily and absolutely be inferred. And that is precisely the reasoning of the liberal courts.[6] By necessarily inferring negligence from the mere happening of the explosion, as an unusual occurrence, the liberal courts have located the fault by allowing all handlers prior to and including the plaintiff to show that they have not caused the explosion since it left the control of the defendant.[7] By excluding all other possible inferences as to the cause of the explosion, including the possible negligence of the plaintiff and other non-actionable causes, they have literally "pinned" liability on the defendant by applying the *res ipsa loquitur* rule.

It is at once apparent that this is an unwarranted extension of that doctrine for it was intended to be used only when negligence is the only inference which can be drawn from the accident.[8] In a case where management and control of the instrumentality are divided between two or among several persons, plaintiff, by proving due care on the part of all but the single defendant, should not then be allowed to invoke the *res ipsa loquitur* rule which would not have had application in the first place.[9] Such an application of the rule has the effect of making the bottler or manufacturer an insurer of his products notwithstanding the

[6] *Ibid.* at 1088. "The bottle exploded. Inferentially someone was negligent."
[7] Principal case, 51 N.W. 2d 573; Payne v. Rome Coca Cola Bottling Co., supra, note 5.
[8] Chennal v. Palmer B. Co., 117 Ga. 106, 43 S.E. 443 (1903).
[9] Gerber v. Faber, 54 Cal. App. 2d 674, 129 P. 2d 485 (1942).
[10] Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P. 2d 436 (1944), (Dissenting opinion). "It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence."

insistence of the courts that liability is upon the grounds of negligence.[10]

However, as has been intimated, there is another conservative view,[11] announced in the leading case of *Slack v. Premier-Pabst Corp.*,[12] where it was held that the doctrine of *res ipsa loquitur* "is not applied except where the transaction was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and the result is so unaccountable that the defendant's negligence as a proximate cause of injury is the only fair inference to be drawn from the circumstances."

In addition to the fact that this court adopts the original meaning of the term "control," it has declared that it does not consider the explosion of a bottle of carbonated beverage so unusual as to absolutely infer someone's negligence.[13] In the case of *Stewart v. Crystal Coca Cola Bottling Co.*,[14] examples of other possible inferences were given and approved by the Slack court. There it was pointed out that it was no more reasonable to infer that the defendant's negligence was the proximate cause of the explosion than that it was either (1) a latent defect, (2) an unavoidable accident or, (3) caused by an unknown external force after the defendant had lost control of the bottle.

However, the *Slack* case rule would not, always, deny relief to a plaintiff. It recognized that in some cases circumstantial evidence, for example, tthe explosions of many bottles of the product manufactured by the defendant,[15] might well take the inference of the defendant's negligence out of the realm of mere surmise or conjecture. This circumstantial evidence would not prove negligence, but would supply an inference of negligence in order to make the doctrine of *res ipsa loquitur* applicable.

The Wisconsin Supreme Court has not decided an "exploding bottle" case. It has however, applied the *res ipsa loquitur* rule holding that its application creates a permissible inference of negligence for the jury.[16] Although approving the rule, Wisconsin has not applied it too frequently holding to the principle that the character of the accident, rather than the fact of the of the accident, determines whether the doctrine is applicable. Hence, the courts of Wisconsin have denied its application where no direct evidence of how such an accident occurred is

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[11] For an enumeration of cases holding both views, see the principal case. For an excellent discussion, comparison, and evaluation of both views, see §16 Ins. L.J., 331-42 (1949).

[12] 1 Terry 97, 40 Del. 97, 5 A. 2d 516 (1939).

[13] *Ibid.* at 519. "It will not do, we think, to say that as the bottle exploded, inferentially someone was negligent."

[14] 50 Ariz. 60, 68 P. 2d 592 (1937).

[15] Dail v. Taylor, 151 N.C. 284, 66 S.E. 135 (1909); Coca Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S.W. 718 (1926).

[16] Kaples v. Orth, 61 Wis. 531, 21 N.W. 633 (1884); Klitzske v. Webb, 120 Wis. 254, 97 N.W. 901 (1904); Rost v. Roberts, 180 Wis. 207, 192 N.W. 38 (1923).

shown, and the facts indicate that it may as readily be ascribed to a non-actionable as well as an actionable cause, holding that it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict.[17]

In view of the fact that both the language and the reasoning of the Wisconsin cases in applying or refusing to apply the *res ipsa loquitur* doctrine bear a striking resemblance to that of the *Slack* case,[18] there is good reason to believe that the Wisconsin court may follow the conservative view if called upon in the future to decide an "exploding bottle" case.

However, what the final accepted shape of the rule will be can hardly be predicted. The reasoning of the *Slack* case, requiring "control" to mean that both inspection and user must have been at the time of the injury in the exclusive control of the party charged, and stating that the mere fact that a bottle exploded does not necessarily compel an inference of negligence, would seem to be the more logical law.

Whther its application effects the most desirable results is obviously open to question in view of the modern tendency to extend the rule in order to afford relief to an injured plaintiff rather than to the defendant, who is usually better able to sustain the loss. But the question of who should bear the loss would seem to be one of policy to be decided by tthe legislature rather than by the courts.[19]

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Landlord and Tenant—Right of One to Contribution or Indemnity Against the Other Where a Covenant to Maintain and Repair the Premises is Breached—Action commenced by Hardware Mutual Casualty Co. (subrogeė of insured lessor) against the defendant lessee, to recover contribution of 50% of the amount which plaintiff paid Ione Vorek and her husband in settlement of claims for injuries caused by the negligently defective[1] condition of the entranceways and stairs and which were received by her while in defendant's drug store to purchase merchandise. Defendant appealed from an order overruling demurrer to complaint. *Held:* Affirmed. The complaint has stated sufficient facts to constitute a cause of action for contribution. *Hardware Mutual Casualty Co. v. Rasmussen Drug Co., 261 Wis. 1, 51 N.W. 2d 551 (1952).*

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[17] Hyer v. City of Janesville, 101 Wis. 371, 77 N.W. 729 (1898).

[18] Klein v. Beeten, 169 Wis. 285, 172 N.W. 736 (1919); Jensen v. Jensen, 228 Wis. 77, 279 N.W. 628 (1938); Koehler v. Theinsville State Bank, 245 Wis. 281, 14 N.W. 2d 15 (1944); Wisconsin Telephone Co. v. Matson, 256 Wis. 304 41 N.W. 2d 268 (1950).

[19] Ins. L. J., *supra* note 11.

[1] WIS. STATS. (1949), sec. 101.01, 101.06.