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Torts--Res Ipsa Loquiter

Wayne T. Bunch

University of Kentucky

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Recent Cases

TORTS-RES IPSA LOQUITUR.—Defendant dairy delivered two bottles of milk to plaintiff. When plaintiff picked up the bottles, one collapsed, permanently injuring his hand. Plaintiff, alleging the accident and the injury, sought damages from defendant dairy company under the doctrine of res ipsa loquitur. Defendant produced evidence that its bottles were carefully inspected in the washing and filling process. The trial court directed a verdict for the defendant, and plaintiff appealed. Held: Affirmed.1 Res ipsa loquitur is not sufficient to take the buyer's case to the jury after the seller shows that it exercised reasonable care in its methods of processing and inspecting its product during the course of manufacture. Rowe v. Oscar Ewing Distributing Co., 357 S.W 2d 882 (Ky. 1962).

Generally, the doctrine of res ipsa loquitur is that in accidents of a certain character, the attendant circumstances may create an inference of negligence sufficient to take the case to the jury. “[W]here the thing which causes the injury is under the control and management of the defendant, and the injury is one that in the usual course of events will not happen without want of due care on the part of the person exercising control or management, there is sufficient evidence, if no explanation is offered by the defendant, to warrant a finding that the injury was due to the defendant’s lack of care.”2

In Kentucky the doctrine of res ipsa loquitur applies where an instrumentality controlled by the defendant causes an injury to the plaintiff under circumstances which, according to the common knowledge and experience of mankind, creates a clear inference of negligence.3 However negligence is not presumed from the mere fact of an accident or injury.4 It is the court's duty to determine whether, as a matter of common knowledge and experience, the accident would not have happened without negligence.5

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1 The court also affirmed on the ground that, since there was no sale of the bottle within the meaning of the Uniform Sales Act, no warrant for fitness or merchantability extended to the bottle. See the comment on the warranty aspect of this case discussed in this issue, infra, p. 774.
3 Lewis v. Wolk, 312 Ky. 536, 228 S.W 2d 432 (1950).
5 "The separate circumstances of each case must be considered and from them it must be first decided whether according to common knowledge and experience (Continued on next page)
In the principal case, the court felt that the defendant had shown the bottles were carefully handled while under the defendant's control; consequently, the cause of the accident was a matter of conjecture. Since the negligence could not be reasonably inferred from the circumstances, the defendant was entitled to a directed verdict. Thus, where the plaintiff relies upon the doctrine of res ipsa loquitur and merely prove injury, and the defendant shows that it exercised due care, then the court will not allow the case to go to the jury. However in an earlier case, Lewis v. Wolk, the court held that a jury might infer negligence notwithstanding the defendant's evidence of due care. The doctrine of res ipsa loquitur is a reflection of probabilities of negligence only, and not of possibilities. In the principal case, the milk bottles broke because of: (1) the defendant's failure to inspect or negligent inspection, (2) the defendant's improper handling after inspection, including rough handling during transportation, (3) the plaintiff's negligent handling, or (4) a defect which was not discoverable by any feasible inspection processes. The defendant's evidence was that its inspection was adequate to disclose any defects sufficient to cause the collapse of the bottle. Thus alternative (4) is ruled out; that is, the alternative that the accident occurred with-

(Footnote continued from preceding page)
of mankind, this accident could not have happened if there had not been negligence. The primary responsibility for this decision rests upon the court. In other words, the doctrine of res ipsa loquitur does not involve the establishment of the ultimate fact by circumstantial evidence or of presumed negligence merely because of the injury. So the first step in connection with its use is to classify the type of accident and decide whether it is of that class containing only those accidents which would not in the ordinary course of things occur without negligence.” Cox v. Wilson, supra note 4, at 84.

6 312 Ky. 536, 228 S.W.2d 432 (1950).

7 In Lewis v. Wolk, supra note 6, at 541, 228 S.W.2d at 435, the court said, “[T]he presumption or inference of negligence is not destroyed by the defendant's evidence tending to show the contrary. This conclusion is inescapable when we consider the very basis of the doctrine. Because the defendant had control of the instrumentality and the accident would not ordinarily have happened without negligence, the very thing itself is positive proof of the defendant's fault. If by denial he may escape a jury determination that the probability speak louder than his testimony, the doctrine loses its fundamental force.” In Vernon v. Gentry, 334 S.W.2d 266, 268 (Ky. 1960), the court said, “We are urged to determine that the explanation of defendant conclusively proves she was not guilty of any act of negligence as a matter of law. To do this would be tantamount to saying that when a defendant denies he was negligent, and presents evidence to that effect, then the court has no alternative but to believe such evidence and refuse to allow the jury to make a determination. It was the proper function of the jury to determine whether defendant satisfactorily rebutted the presumption raised by the happening of the accident.”

8 But see Jafee, Res Ipsa Loquitur Vindicated, 1 Buffalo L. Rev. 1 (1951-1952).

9 Rowe v. Oscar Ewing Distributing Co., 357 S.W.2d 882, 883 (Ky. 1962),
out negligence on someone’s part is precluded from consideration. Alternatives (1) and (2) would require the submission of the case to the jury. Therefore, since the case did not go to the jury, the court must simply have disbelieved the plaintiff’s evidence of due care under alternative (3). But it is improper for the court to direct a verdict upon its disbelief of testimony.

The reason for the doctrine is that where the control of the thing which caused the injury is exclusively in the defendant, it is within his power to produce evidence of the actual cause, which the plaintiff is unable to produce. But if the defendant, in producing his evidence, can overcome the inference of negligence, he is entitled to a directed verdict; otherwise the question is for the jury.

The result in the principal case seems consistent with the court’s "integrity of the bottle" doctrine. This doctrine, applied predominantly in cases involving foreign objects in the bottle requires the plaintiff to prove that no third party could have tampered with the bottle. It is virtually impossible for a plaintiff to prove this. The unfair result of the court's reluctance to impose liability in such bottle cases can be seen by an examination of case law.

Is this a case in which the court directed the verdict for the defendant because it disbelieved the plaintiff's evidence? If so, the court clearly exceeded its judicial authority. Or, is this a case where

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10 In Paducah Coca-Cola Bottling Co. v. Harms, 316 S.W 2d 128 (Ky. 1958), a bottle exploded and destroyed the plaintiff's eye. The plaintiff introduced expert testimony that the explosion was caused by internal pressure; defendant introduced expert testimony that the explosion was due to an external impact. Here the chances of the bottle breaking during the plaintiff's handling were much greater than the principal case, and yet the court used the defendant's evidence of careful inspection methods against the defendant, believed the plaintiff, and held that the evidence raised a question for the jury.

11 In Elliot v. Drury's Adm'x, 304 Ky. 93, 96, 200 S.W 2d 141, 143 (1947), the court held: "The direction of a verdict for a defending party is not authorized unless, after admitting the testimony offered by the closing party and after admitting every reasonable inference to be deduced from the facts proven to be true, the cause of the accident is then and thereupon unsupported by legal evidence. However much of the evidence of a defending party, the latter is still entitled to have the jury pass upon the issue of his case, assuming that the latter has nevertheless produced evidence of probative value in support of such case." The court cited seven cases to support this holding.

13 Vernon v. Gentry, 334 S.W. 2d 288 (Ky. 1960); Black Mountain Corp. v. Partin's Adm r, 243 Ky. 791, 49 S.W 2d 1014 (1933).
14 Lewis v. Wolk, 312 Ky. 536, 228 S.W 2d 432 (1950).
16 Ibid.
the court reached its verdict because the instrumentality was a bottle? If so, it is another application of the court's "integrity of the bottle" doctrine, thus perpetuating a manifestly unjust line of authority.

*Wayne T Bunch*

**COMMERCIAL LAW—IMPLIED WARRANTIES—PASSAGE OF TITLE.—** Defendant dairy delivered bottles of milk to the home of plaintiff who received severe injuries when one of the bottles collapsed in his hand. Plaintiff alleged: (1) that the defendant dairy was negligent in its manufacturing processes; and (2) that an implied warranty of fitness or merchantability extended to the bottle, that this warranty was breached, and that the defendant was liable for special damages. This comment discusses the holding and reasoning of the court on the warranty issue; the negligence issue, *i.e.*, res ipsa loquitur, is discussed *supra* p. 771.

Evidence at the trial tended to show that the object for sale between plaintiff and defendant was milk and that the bottle was merely lent to plaintiff as an incidental service in connection with the sale. The trial court directed a verdict for the defendant. *Held:* Affirmed. Since there is no sale of the bottle no warranty of fitness or merchantability extends to it. *Rowe v. Oscar Ewing Distributing Co.,* 357 S.W. 2d 882 (Ky. 1962).

As plaintiff's injuries occurred in 1959, this case is governed by the Uniform Sales Act,*¹* which was replaced in 1960 by the Uniform Commercial Code.²* Plaintiff relied on section 15 of the Sales Act which provides in part:

*(1) Where the buyers, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment there is an implied warranty that the goods shall be reasonably fit for such purpose.*

*(2) Where the goods are bought by description from a seller who deals in goods of that description there is an implied warranty that the goods shall be of merchantable quality.*³

It seems that if plaintiff had received injuries from impurities in the milk itself, either of the above subsections, taken with the special damages section of the Sales Act,*⁴* would have given plaintiff a basis

¹ *Ky. Acts ch. 148 (1928).*
² *Ky. Rev. Stat. ch. 355 (1960) [Hereinafter cited as KRS] [The Uniform Commercial Code is hereinafter referred to as Code in the text].
³ *Ky. Acts ch. 148, at 487 (1928).*
⁴ *Ky. Acts ch. 148, at 514 (1928).*