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Food--*res ipsa loquitur* as Applied to Suits Against the Manufacturer or Preparer of Articles Intended for Human Consumption

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STUDENT NOTES

FOOD—RES IPSA LOQUITUR AS APPLIED TO SUITS AGAINST THE MANUFACTURER OR PREPARER OF ARTICLES INTENDED FOR HUMAN CONSUMPTION.

A mere showing that plaintiff had drunk Coca Cola from a bottle in which a partly decomposed mouse was found, and thereby became violently ill, *held* sufficient to support a judgment for the plaintiff even though defendant's evidence disclosed a practice of most scrupulous care in the bottling of its product. *Coca Cola Bottling Co., of Shelbyville* v. *Creech*.[1]

The rule of this case strikingly illustrates the recent extension of this doctrine far beyond its original confines. When first enunciated and until very recently the doctrine of res ipsa loquitur was strictly limited to cases involving the presence of external physical force such as: the falling of defendant's building into the street[2]; a brick falling on plaintiff from defendant's dilapidated wall[3]; the falling of the pole of a toll gate while plaintiff was passing thereunder[4]. In the following cases its application was denied: plaintiff injured by the bursting of a fly-wheel used by defendant[5]; the bursting of a boiler or engine[6]; or the fall of an elevator[7].

As illustrative of the novelty of its extension to cases involving articles intended for human consumption no mention of such application is found in the great treatises by Wigmore and McKelvey on Evidence, nor by Burdick, Salmond, and Bohlen on the law of Torts.

The reluctance of courts generally to extend this doctrine may be attributed in some measure to their predilection for grounding the manufacturer's liability to the ultimate consumer in contract. As Mr. Burdick puts it in the fourth edition of his work on The Law of Torts at page 515. "Except in such cases as have just been referred to, where the defendant has bound himself by contract to do something safely, or where a valid statute imposes a similar obligation, the phrase, res ipsa loquitur, is rarely to be applied literally." It will be seen in the following discussion that those courts which still follow the contract theory of liability are very loath to extend the doctrine of res ipsa loquitur. However, the modern weight of authority

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[1] 245 Ky. 414, 53 S. W. (2d) 745 (1932).

[2] *Mullen* v. *St. John*, 57 N. Y. 567 (1874).

[3] *Murray* v. *McShane*, 52 Md. 217, 36 Am. Rep. 369 (1879).

[4] *Hyde's Ferry Turnpike Co.* v. *Yates*, 108 Tenn. 428, 67 S. W. 69 (1902)

[5] *Piehl* v. *Albany Ry. Co.*, 162 N. Y. 617, 57 N. E. 1122 (1900).

[6] *Losee* v. *Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623 (1873); *Marshall* v. *Westwood*, 38 N. J. L. 339, 20 Am. Rep. 394 (1876).

[7] *Griffen* v. *Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922 (1901).

is to the effect that such actions are to be grounded in negligence and not in contract.[8]

Massachusetts is the chief exponent of the contract theory of liability. That court while admitting that "apparently the larger number of decisions by courts of this country hold that the liability of the innkeeper and restaurant keeper for furnishing deleterious food rests upon negligence" concludes that in its opinion "the obligation resting upon defendant and accruing to plaintiff arose out of contract."[9] Virginia also follows the contract theory.[10]

The courts are in evident confusion as to the exact significance of the doctrine of res ipsa loquitur as applied to foods. However, a good definition is found in the language of Justice Pitney.[11] "That the facts of the occurrences warrant the inference of negligence not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur where it applies does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance of it is with the plaintiff." As Mr. Wigmore puts it "the risk of jury-doubt is on the plaintiff, but the duty of passing the judge is shifted by presumption of law to defendant."[12]

Confusion and discrepancies of phraseology have arisen as to the sufficiency of this counter evidence. Although it is apparent that to meet a prima facie case one need only offer evidence tending to prove his freedom therefrom, yet where the magic words res ipsa loquitur are used some courts, among them our own, immediately require another type of counter evidence. Here proof of the exercise of highest care is held insufficient. The defendant must explain, must show what caused the injury complained of if not his negligence. The Kentucky Court of Appeals said in the case of *Liggett & Myers Tobacco Co.* v. *Rankin* (supra) a case where a wooly worm was imbedded in a plug of chewing tobacco. "Where the thing which caused the injury complained of is shown to be under the management of defendant or

[8] *Liggett and Myers Tob. Co.* v. *Rankin*, 246 Ky. 65, 54 S. W. (2d) 612 (1932); *Atlanta Coca Cola Bottling Co.* v. *Sinyard*, 45 Ga. App. 272, 164 S. E. 231 (1932); *Davis* v. *VanCamp Packing Co.*, 189 Ia. 775, 176 N. W. 382, 17 A. L. R. 649 (1920); *Corin* v. *Kresge Co.*, 166 Atl. 291 (N. J., 1933); *Merrill* v. *Hodgson*, 88 Conn. 314, 91 Atl. 533 (1914); *Upton* v. *Harrison*, 68 Fed. (2d) 232 (1934); *McCarley* v. *Woods Drug Co.*, 153 So. 446 (Ala. 1934); *Brown Cracker & Candy Co.* v. *Jensen*, 32 S. W. (2d) 227 (Tex. 1930).

[9] *Friends* v. *Childs Dining Hall*, 231 Mass. 65, 120 N. E. 407 (1918).

[10] *Norfolk Coca Cola Bottling Co.* v. *Krausse*, 173 S. E. 497 (Va. 1934).

[11] *Sweeney* v. *Erving*, 228 U. S. 233, 240, 57 L. Ed. 815 (1914).

[12] Wigmore, Pocket Code of Evidence, Section 2062.

his servants and the accident is such as in the ordinary course of things does not happen if those who have the management or control use proper care, it affords reasonable evidence in absence of *explanation* (italics our own) of the defendant that the accident arose from want of care." In the principal case defendant's evidence disclosed a practice of most scrupulous care, still it was held insufficient to counteract plaintiff's prima facie case. Likewise a Pennsylvania court has said[13]: "It is a case where the accident proves its own negligent cause and the jury would be permitted to infer negligence, as the court below instructed it, from the fact that ground glass had been found in the bottom of the bottle. The particular dereliction is not shown, nor was it necessary. The negligent act is demonstrated by showing glass in the bottom of the bottle." In accord with this view of the res ipsa loquitur doctrine are also the decisions of Georgia[14] and Mississippi.[15]

Another view more harmonious with Mr. Wigmore's concept of the doctrine is that followed in: Rhode Island[16]; California[17]; New Jersey[18]; Iowa[19]; Louisiana[20]; New York[21]; and in England[22]. This view is best stated by the Rhode Island court.[16] "If a person is injured by a food product in the original package in which it was put up by the maker and that in that package was a substance which was harmful or injurious to the human body and he shows that to the satisfaction of the jury then a presumption arises that the manufacturer of that product was negligent in its manufacture." The court goes on to say that this presumption is defeated by proof of absence of negligence.

This probably represents the majority view and, as pointed out is believed to be more consonant with the true meaning of res ipsa loquitur than the view obtaining in Kentucky.

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[13] *Rozumailski* v. *Phila. Coca Cola Co.*, 296 Pa. 114, 145 Atl. 700, 701 (1929) in acc. *Madden* v. *Grt. Atl. & Pac. Tea Co.*, 106 Pa. Sup. Ct. 474, 162 Atl. 687 (1932) (dead mouse in package of tea.)

[14] *Slaughter* v. *Atlanta Coca Cola Co.*, 172 S. E. 723 (1934) (caustic matter in Coca Cola); *Atlanta Coca Cola Co.* v. *Sinyard* (supra).

[15] *Pillars* v. *R. J. Reynolds Tob. Co.*, 117 Miss. 490, 78 So. 365 (1918) (human toe in chewing tobacco).

[16] *Minutilla* v. *Providence Ice Cream Co.*, 50 R. I. 143, 144 Atl. 884 (1929) (glass in ice cream).

[17] *Stell* v. *Townsend-Calif. Glace Fruit Co.*, 28 Pac. (2d) 1077 (1934) (spoiled fish).

[18] *Carbone* v. *Calif. Pack. Co.*, 169 Atl. 866 (1934) (medicated bandage in can of peaches.); *Cassini* v. *Curtis Candy Co.*, 172 Atl. 519 (1934) (worm in bar of candy).

[19] *Davis* v. *VanCamp Pack. Co.*, (supra) (harmful substance in beans).

[20] *Costello* v. *Cafeteria Co.*, 18 La. App. 40, 135 So. 245 (1931).

[21] *Ternay* v. *Ward Bak. Co.*, 167 N. Y. Supp. 562 (1917) (glass in bread); *Freeman* v. *Schultz Bread Co.*, 163 N. Y. Supp. 396 (1916) (nail in bread).

[22] *Chaproniere* v. *Mason*, 21 Times L. Rep. 633 (1905) (stone in bun).

The federal courts[23], Tennessee[24], and Virginia[25] give such evidence presumptive force in the absence of any opposing evidence but this presumption is dissipated immediately on the presentation of counter evidence. Tennessee has, foolishly it seems, refused to extend it to cover such things as chewing tobacco, holding that it is to be applied only to food.[26]

Massachusetts[27]. North Carolina[28], Minnesota,[29] Alabama,[30] and Illinois[31] have refused to extend the doctrine to articles intended for human consumption. The view of these courts is that a mere showing that injury happened to plaintiff as a result of the deleterious character of the article raises no presumption of negligence on the part of one who prepared or manufactured the article and is insufficient to take the case to the jury.

As has been shown there are four distinct views of this doctrine of res ipsa loquitur. Applying these to the facts of the principal case where plaintiff proved only the purchase of a beverage containing a decomposed mouse;—that he, without knowledge, drank therefrom and became violently ill, we shall see what proof is required of defendant to avoid liability under the various rules.

Under the Kentucky rule he must prove not only that he was not negligent but must show in fact what caused the mouse to be in the bottle.

Under the majority rule he must prove that he exercised ordinary care under all of the circumstances.

Under the federal rule he can avoid liability by offering some evidence of the exercise of ordinary care. The presumption in favor of negligence dissolves when such testimony is offered.

Under the Massachusetts rule he need not offer any evidence and is entitled to a directed verdict.

It is submitted that the majority rule is not only sound logically but also reaches a more equitable result. While it excuses the plaintiff from that which from the very nature of the occurrence is likely to

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[23] *Nichols* v. *Cont. Bak. Co.*, 34 Fed. (2d) 141 (1929) (dead cockroach in loaf of bread).

[24] *Merriman* v. *Coca Cola Co.*, 68 S. W. (2d) 149 (1934) (glass in beverage bottle); *Coca Cola Co.* v. *Rowland*, 66 S. W. (2d) 272 (1934) (decomposed mouse in Coca Cola bottle).

[25] *Norfolk Coca Cola Co.* v. *Krausee*, 173 S. E. 497 (1934); *Riggsby* v. *Trillon*, 143 Va. 903, 129 S. E. 493 (1925).

[26] Liggett & Myers Tob. Co., 132 Tenn. 419, 178 S. W. 1009 (1916) (bug pressed into plug of chewing tobacco). See contra *Pillars* v. *R. J. Reynolds Tob. Co.*, (supra).

[27] *Friends* v. *Childs Dining Hall Co.* (supra) (stones in baked beans). *Ash* v. *Childs Dining Hall Co.*, 231 Mass. 86, 120 N. E. 396 (1918) (tack in blueberry pie). but *see Tonsman* v. *Greenglass*, 248 Mass. 275, 142 N. E. 756 (1924).

[28] *Broom* v. *Monroe Coca Cola Co.* 200 N. C. 55, 156 S. E. (1930).

[29] *Swenson* v. *Purity Baking Co.*, 183 Minn. 289, 236 N. W. 310 (1931) (larva of dead flour moth in loaf of bread).

[30] *McCarley* v. *Woods Drug Co.* (supra).

[31] *Sheffer* v. *Willoughby*, 163 Ill. 18, 45 N. E. 253 (1896).

be beyond his knowledge, it also assures the defendant that if he can prove he was not negligent no liability will attach. Both results are desirable.

The Kentucky rule might be criticized in that recovery would be allowed plaintiff in spite of the fact that defendant proved he was not negligent.

The federal rule is soundest of all technically but in actual practice is likely to result in injustice to a plaintiff who might be totally unable to prove the particulars of defendant's negligence after the dissipation of the general presumption.

The Massachusetts rule places plaintiff in a position where, even though the defendant may have been guilty of gross negligence, plaintiff will be denied recovery because he is in no position to prove the particular acts of defendant.

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TRUSTS—THE CREATION OF A TRUST BY THE USE OF PRECATORY WORDS.

At the outset, suffice it to say, that the particular type of trusts dealt with in this brief note are those that are created wholly by testamentary disposition of property, and not those trusts which arise upon a conveyance inter-vivos.

As the foundation of our study a recent decision by the Kentucky Court of Appeals has been chosen, which shall hereinafter be termed the Williams case. *Williams, et al.* v. *Williams' Committee, et al.* 253 Ky. 30 (1934). The will in the *Williams* case contained the following language: "I will to my wife all my property to be hers *absolutely*. It is my desire and I request she will to her people one-half of my property and to my people the other one half". These words were deemed sufficient to constitute a trust. The question now for our consideration is whether the court acted properly in so holding.

To begin, let us consider only the last sentence without regarding the first in which the property is given to the wife *absolutely*. The writer is of the opinion that even in this instance the words are not sufficient to show that the testator intended to create enforceable duties by the use of such *precatory* words. To hold otherwise would reach a result in direct conflict with the modern trend of the courts. However, if such a result had been obtained a century or two ago in an English jurisdiction it would probably have been correct. *Harding* v. *Glyn*, 1 Atk. 469 (1739). Although even prior to this it was stated by the court in *Palmer* v. *Schibb*, 2 Eq. Ca. Abr. 291, pl. 9, where "J. S. devises the residue of his estate to his wife, and desires her to give all her estate at her death to his or her relations" that if testator had desired his wife by his will to give at her death *all the estate which he had devised to her*, to his or her relations, there the estate devised to her ought to go after her death to his and her relations." But,