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Torts--Res Ipsa Loquitur--Exploding Beverage Bottle (Day v. Grand Union Co., 280 App. Div. 253 (3d Dep't 1952))

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present case, however, the Court of Appeals accepts as well-established the principle that whether or not the park is operated for a profit, the city is acting in a quasi-private or corporate capacity. This seems to limit the force of the dictum in the *Whittaker* case, since liability was imposed despite the fact that no entrance fees were charged at the time the injury occurred.

It appears from this opinion that the court broadened the scope of municipal liability to what is perhaps an unreasonable degree.¹⁷ This decision follows a noticeable, though unfortunate, trend toward an extension of municipal tort liability¹⁸—unfortunate, since it may result in discouraging small and impecunious municipalities from providing recreational facilities. With the tendency toward a decrease in governmental immunity, the ultimate burden upon the taxpayers will be increased, since they will pay not only for the supervision of parks, but also for injuries resulting from a lack of it.



TORTS—RES IPSA LOQUITUR—EXPLODING BEVERAGE BOTTLE.—Plaintiff was injured when a beer bottle, which she had selected from a shelf in defendant's self-service store, exploded in her hands. In an action to recover damages, plaintiff alleged breach of warranty and negligence. The Appellate Division, reversing a dismissal of the complaint, *held* that an inference of negligence arises when a customer is injured by the unexpected dangerous behavior of an article which was hitherto in the exclusive possession of a store owner. *Day v. Grand Union Co.*, 280 App. Div. 253, 113 N. Y. S. 2d 436 (3d Dep't 1952).

Actions for damages for injuries caused by exploding bottles are generally based either on breach of implied warranty or on negligence. The implied warranties—merchantability¹ and fitness for use²—arise only after there has been a contract of sale or transfer of title,³ and may be enforced only by those in privity of contract.⁴

¹⁷ See *Caldwell v. Village of Island Park*, 304 N. Y. 268, 276, 107 N. E. 2d 441, 445 (1952) (dissenting opinion).

¹⁸ See *Duren v. City of Binghamton*, 172 Misc. 580, 583, 15 N. Y. S. 2d 518, 521 (Sup. Ct. 1939), *aff'd*, 258 App. Div. 694, 18 N. Y. S. 2d 518 (3d Dep't), *aff'd*, 283 N. Y. 467, 28 N. E. 2d 918 (1940); see Note, 23 ST. JOHN'S L. REV. 117 (1948).

¹ N. Y. PERS. PROP. LAW § 96(2). "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." UNIFORM SALES ACT § 15(2).

² N. Y. PERS. PROP. LAW § 96(1). "Where the buyer, 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 (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." UNIFORM SALES ACT § 15(1).

³ *Bunday v. Columbus Machine Co.*, 143 Mich. 10, 106 N. W. 397 (1906); *Stearns v. Drake*, 24 R. I. 272, 52 Atl. 1082 (1902); *Naumann v. Wehle Brew-*

No implied warranty is deemed to exist where a bottle explodes in the hands of a customer in a self-service store, since the mere selection of a bottle from a display does not give rise to a contract of sale, nor to a transfer of title in the usual sense.⁵ However, the concurring opinion in the instant case stated that recovery may be had on the warranty theory, since possession of the bottle by a customer who intends to purchase it was felt to be equivalent to a delivery giving rise to a contract of sale.⁶

The aggrieved customer can also proceed on a negligence theory, but as a consequence of this a problem of proof arises. To lessen the plaintiff's concededly difficult burden of establishing negligence, the doctrine of *res ipsa loquitur* is sometimes invoked.⁷ This rule of evidence⁸ permits an inference that the defendant was negligent where the facts indicate that the mishap occurred only because the person in exclusive control⁹ of the injurious instrumentality had failed in some duty.¹⁰

ing Co., 127 Conn. 44, 15 A. 2d 181 (1940); see *Osborn v. Gantz*, 60 N. Y. 540, 543 (1875). See 1 WILLISTON, SALES 464 (Rev. ed. 1948).

⁴ *Campo v. Scofield*, 301 N. Y. 468, 95 N. E. 2d 803 (1950); *Turner v. Edison Storage Battery Co.*, 248 N. Y. 73, 161 N. E. 423 (1928); *Billington v. Pepsi-Cola Bottling Co.*, 106 N. Y. S. 2d 129 (Schenectady Co. Ct. 1951); *Timpson v. Marshal, Meadows & Stewart, Inc.*, 198 Misc. 1034, 101 N. Y. S. 2d 583 (Sup. Ct. 1950); *Commissioners v. Humm*, 48 N. Y. S. 2d 875 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 657, 53 N. Y. S. 2d 461 (1st Dep't), *appeal denied*, 294 N. Y. 777, 61 N. E. 2d 782 (1945).

⁵ *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N. E. 2d 305 (1946); *Loch v. Confair*, 361 Pa. 158, 63 A. 2d 24 (1949). In the usual grocery store sale, title passes when there is the simultaneous delivery of the goods to the purchaser, and payment of the price to the vendor. 2 WILLISTON, SALES 333 (Rev. ed. 1948).

⁶ See *Day v. Grand Union Co.*, 280 App. Div. 253, 255, 113 N. Y. S. 2d 436, 438 (3d Dep't 1952) (concurring opinion); see Note, *Technical Requirements of Contract in Warranty Recovery*, 41 ILL. L. REV. 676 (1947).

⁷ See Note, 22 ST. JOHN'S L. REV. 128 (1947).

⁸ See, e.g., *Feldman v. Chicago Ry.*, 289 Ill. 25, 124 N. E. 334, 338-9 (1919); *Foltis v. City of New York*, 287 N. Y. 108, 115-116, 38 N. E. 2d 455, 460 (1941); *Judd v. Sams*, 270 App. Div. 981, 62 N. Y. S. 2d 678 (4th Dep't), *aff'd mem.*, 296 N. Y. 801, 71 N. E. 2d 772 (1947).

⁹ *McGillivray v. Great Northern Ry.*, 138 Minn. 278, 164 N. W. 922 (1917); *Murray v. Great A. & P. Co.*, 236 App. Div. 477, 260 N. Y. Supp. 132 (4th Dep't 1932); cf. *Francey v. Rutland R. R.*, 222 N. Y. 482, 119 N. E. 86 (1912).

¹⁰ The classic statement of the doctrine is found in *Scott v. London and St. Katherine Docks Co.*, 3 H. & C. 596, 601, 159 Eng. Rep. 665, 667 (1865); the New York statement of *res ipsa loquitur* is found in *Foltis v. City of New York*, *supra* note 8 at 117, 38 N. E. 2d at 460. See also *Cohn v. United Air Lines Transportation Co.*, 17 F. Supp. 865 (D. Wyo. 1937) (sudden air cur-

Courts have been hesitant to apply *res ipsa loquitur* in exploding bottle cases where the defendant is the manufacturer, since the bottle has left his exclusive control prior to the time of the accident.¹¹ Furthermore, it is highly probable that others have mishandled the container,¹² or that it was subjected to rapid temperature changes.¹³ On the other hand, an inference of negligence has been permitted against the manufacturer where the evidence precluded the possibility of negligent handling by others,¹⁴ or showed that like explosions occurred within a short period of time.¹⁵ Similarly, this theory was applied where the bottles were poorly constructed.¹⁶

Res ipsa loquitur generally is not invoked against the retailer where there is no apparent reason for the bottle's explosion, since the explosion, in itself, does not necessarily indicate that the defendant was careless.¹⁷ Furthermore, it has been said that if, upon reasonable inspection of the bottle before offering it for sale, no defects are discovered, the retailer has discharged the duty of care owed to his customers.¹⁸ Therefore, if a customer is subsequently injured as a result of a latent defect in the article, the retailer is not liable.¹⁹

However, in the case under discussion, an inference of negligence was permitted on mere proof of the explosion of the bottle in the hands of a customer in a self-service store. The Court said that a

rents or air pockets could reasonably explain airplane accident); *Galbraith v. Busch*, 267 N. Y. 230, 196 N. E. 36 (1935) (latent defects in the automobile could reasonably explain the accident).

¹¹ *Slack v. Premier-Pabst Corp.*, 40 Del. 97, 5 A. 2d 516 (1939); *Curley v. Ruppert*, 272 App. Div. 441, 71 N. Y. S. 2d 578 (1st Dep't 1947); see *Dail v. Taylor*, 151 N. C. 284, 66 S. E. 135, 137 (1909); *Winifree v. Coca-Cola Bottling Works*, 191 Tenn. App. 144, 83 S. W. 2d 903, 906 (1935). *But cf.* *Joly v. Jones*, 115 Vt. 174, 55 A. 2d 181, 186 (1947).

¹² *Kees v. Canada Dry Ginger Ale, Inc.*, 225 S. W. 2d 169 (Kan. City Ct. App. 1949).

¹³ See *Stewart v. Crystal Coca-Cola Bottling Co.*, 50 Ariz. 60, 68 P. 2d 952, 956 (1937); *Wheeler v. Laurel Bottling Works*, 111 Miss. 442, 71 So. 743, 744 (1916). The change, of course, must be a sudden raising of the temperature, since lowering it would reduce pressure in the bottle. See *Bubble Up Bottling Co. v. Lewis*, 163 S. W. 2d 875, 880 (Tex. Civ. App. 1942).

¹⁴ *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 73 S. E. 1087 (1912); *Bradley v. Conway Springs Bottling Co.*, 154 Kan. 282, 118 P. 2d 601 (1941).

¹⁵ *Shelton v. Coca-Cola Bottling Co.*, 214 Ky. 118, 282 S. W. 778 (1926); *Dail v. Taylor*, 151 N. C. 284, 66 S. E. 135 (1909).

¹⁶ *Willey v. Mynderse*, 165 App. Div. 620, 151 N. Y. Supp. 280 (3d Dep't 1915).

¹⁷ *Noonan v. Great A. & P. Co.*, 104 N. J. L. 136, 139 Atl. 9 (1927); *Burnham v. Lincoln*, 225 Mass. 408, 114 N. E. 715 (1917); *Bruckel v. Milhau's Son*, 116 App. Div. 832, 102 N. Y. Supp. 395 (2d Dep't 1907); *Glaser v. Sietz*, 35 Misc. 341, 71 N. Y. Supp. 942 (Sup. Ct. 1901) (*res ipsa loquitur* not specifically mentioned in the last three cases).

¹⁸ See *Bruckel v. Milhau's Son*, *supra* note 17 at 837-838, 102 N. Y. Supp. at 399; see *PROSSER, TORTS* 684 (1941); *RESTATEMENT, TORTS* §§ 401, 402 (1948 Supp.).

¹⁹ See note 17 *supra*.

defendant could not assume that he need make no explanation for the injury on his premises, nor could he avoid liability by relying on his trust in the manufacturer, or on the absence of a contract with the customer.²⁰

The Court apparently realized the plaintiff's difficulty in establishing his *prima facie* case in these situations, and extended the doctrine of *res ipsa loquitur* in an attempt to achieve an equitable result. As a result, a customer stands a better chance of getting compensated for his injuries; but, by the same token, a heavier burden is cast upon the retailer. The local grocer, under this rule, has a greater duty to inspect articles purchased for resale, a duty so strict that, perhaps, he has become an insurer of the safety of those who enter his store.



UNINCORPORATED ASSOCIATIONS—LABOR UNIONS—LIABILITY FOR DEFAMATION.—Plaintiff brought an action against defendants individually and in their representative capacities as officers of a labor union (the latter action pursuant to statute),¹ for damages resulting from the publication of libelous material in the union newspaper. The complaint did not allege that the individual members of the union had authorized the tort. The lower court denied a motion to dismiss the complaint against the defendants as individuals, but granted the motion to dismiss it as against defendants in their representative capacities. The Court of Appeals affirmed, and *held* that the statute is procedural in nature and does not change the substantive liability of the individual members which must be shown before the action may be brought against the association officers. *Martin v. Curran*, 303 N. Y. 276, 101 N. E. 2d 683 (1951).

Courts have long taken cognizance of the common law rule that an unincorporated association has no legal existence apart from that of its members,² and, in the absence of a statute to the contrary, cannot be sued as a separate entity.³ Its tort liability, therefore, is predi-

²⁰ *Day v. Grand Union Co.*, 280 App. Div. 253, 255, 113 N. Y. S. 2d 436, 438 (3d Dep't 1952).

¹ N. Y. GEN. ASS'N LAW § 13.

² See *Karges Furniture Co. v. Amalgamated W.L.U. No. 131*, 165 Ind. 421, 75 N. E. 877, 878 (1905); *St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37*, 94 Minn. 351, 102 N. W. 725, 727 (1905); see Fahy, *The Union in Court*, 37 ILL. BAR J. 203 (1949).

³ *St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37*, *supra* note 2; see *Saxer v. Democratic County Committee of Erie Co.*, 161 Misc. 35, 37, 291 N. Y. Supp. 18, 21 (Sup. Ct. 1936); *Williams v. United Mine Workers of America*, 294 Ky. 520, 172 S. W. 2d 202, 204 (1943), *aff'd*, 298 Ky. 117, 182 S. W. 2d 237 (1944); *Pearson v. Anderburg*, 28 Utah 495, 80 Pac. 307, 309 (1905).