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Perhaps the day is not too distant when, certainly, in considering the doctrine of attractive nuisances, New York will join the ranks of those progressive states which subordinate the protection of property interests to personal interests, where serious bodily harm ensues. It is true that with the humane side of the matter the law cannot be concerned, but, in view of transmuted concepts as a result of societal evolution, the law may validly create a legal duty where it otherwise did not exist. Only in this way can the complete body of the Law of Torts, in New York, become "a living manifestation of the institutions of a changing political and economic culture."

HAROLD E. COLLINS.

RES IPSA LOQUITUR AND EXPLODING BOTTLES

The rule of *res ipsa loquitur* [1] has been a source of confusion in many of our modern courts, causing many and diverse definitions of its meaning and purpose.[2] As a result we find that different jurisdictions vary widely in their application of the rule, although it would be safe to say that the rule is now applied in one form or another in every state of the Union. There was a time, though, when the rule was not looked upon quite so favorably and the courts were reluctant to apply it.[3]

Perhaps the best and most oft-quoted definition of the rule was that offered by Chief Justice Erle in 1865: [4] "There must be reasonable evidence of negligence; but where the thing is shown to be under the management 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 the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident was from want of care." Thus, when an accident occurs under the foregoing rule, an inference,[5] and in some jurisdictions a

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[1] Literally, "the thing itself speaks."

[2] "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions." Bond, C.J., dissenting in Potomac Edison Co. v. Johnson, 160 Md. 33, 152 Atl. 633 (1930).

[3] "If that phrase had not been in Latin, nobody would have called it a principle." Lord Shaw in Ballard v. North British R. Co., Sess. Cas., H. L. 43 (1923).

[4] Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 159 Eng. Rep. 665 (Ex. 1865).

[5] Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. ed. 355 (1947); Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504

presumption,[6] arises as to the defendant's negligence. It is considered that the fact of the occurrence of the injury, when viewed in light of the surrounding circumstances permits an inference of culpability on the part of the defendant, makes out a prima facie case for the plaintiff, and presents a question of fact that the defendant must come forward to answer.[7]

The rule of *res ipsa loquitur* is based on probabilities arising out of common experience and the peculiar circumstances of the particular occurrence;[8] it arises from the inherent nature and character of the act causing the injury and from probability as to its cause that may be reasonably inferred from the circumstances of the accident itself. Hence the rule will not apply where direct evidence establishes facts relating to the cause of the injury itself.[9] In those cases to which the rule of *res ipsa loquitur* is applicable it is necessary to distinguish between the rule itself and circumstantial evidence. In the former case there is no evidence, circumstantial or otherwise, of sufficient probative value to show negligence, apart from the postulate that from common experience we know that a certain type of accident does not ordinarily occur in the absence of negligence.[10] Circumstantial evidence points to a specific act of negligence, but in applying the rule of *res ipsa loquitur* we point to no particular failing on the part of the defendant, but merely allege and prove an accident from the happening of which negligence may be inferred.[11] But even should the rule be rejected by the court as not applicable in a particular case, the plaintiff is not precluded from proceeding with his case and proving negligence on the part of the defendant by either circumstantial or direct evidence.

The rule of *res ipsa loquitur* is a rule of procedural, not substantive law.[12] As a rule of evidence it is applied only when evi-

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(1922); Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815 (1913); Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901).

[6] Riecke v. Anheuser-Busch Brewing Ass'n, 206 Mo. App. 246, 227 S. W. 631 (1921); Fitch v. Mason City & C. L. Traction Co., 124 Iowa 665, 100 N. W. 618 (1904).

[7] Johnson v. Herring, 89 Mont. 420, 300 Pac. 535 (1931); Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504 (1922); Sand Springs Park v. Schrader, 82 Okla. 244, 198 Pac. 983 (1921).

[8] Hart v. Emery, Bird, Thayer Dry Goods Co., 233 Mo. App. 312, 118 S. W. 2d 509 (1938); Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504 (1922); *see* Kapros v. Pierce Oil Corporation, 324 Mo. 992, 25 S. W. 2d 777 (1930).

[9] Feiderlein v. Faiella, 54 N. Y. S. 2d 114 (Sup. Ct. 1945); Gray v. Baltimore & Ohio R. R., 24 F. 2d 671 (C. C. A. 7th 1928); Heffter v. Northern States Power Co., 173 Minn. 215, 217 N. W. 102 (1927); O'Rourke v. Marshall Field & Co., 307 Ill. 197, 138 N. E. 625 (1923).

[10] Kapros v. Pierce Oil Corporation, 324 Mo. 992, 25 S. W. 2d 777 (1930); Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020 (1895).

[11] Foltis, Inc. v. City of New York, 287 N. Y. 108, 38 N. E. 2d 455 (1941); Robinson v. Consolidated Gas Co., 194 N. Y. 37, 86 N. E. 805 (1909).

[12] American Dist. Electric P. Co. v. Seaboard Air L. Ry., 129 Fla. 518, 177 So. 294 (1937); Stewart v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60,

dence is lacking, yet, in itself it does not constitute evidence.[13] It is a rule which permits, but does not compel, a jury to infer negligence; it still remains for the jury to weigh the circumstances peculiar to the occurrence and to say whether or not the defendant was negligent.[14] It permits the jury to weigh the inference against the evidence offered by the defendant in rebuttal thereof.

As a general rule the courts have insisted upon the presence of two circumstances to justify the application of the rule of *res ipsa loquitur:* (1) proof that the instrumentality causing the injury to the plaintiff was in the exclusive possession and control of the defendant and that the plaintiff was free from contributory negligence, and, (2) that the injury was such as in view of the surrounding circumstances would not have happened without legal wrong by the defendant.[15]

Exclusive Control by the Defendant

What bearing does exclusive possession and control of the instrumentality causing the injury have upon the issue when there is involved therein an exploding bottle or other sealed container no longer in the hands of the manufacturer of the bottle or container, or the bottler of its contents? Exclusive possession and control of the instrumentality causing the injury are made part of the rule of *res ipsa loquitur* because the law attempts to hold the defendant liable when, through his negligent operation of the instrumentality, some person is injured. He, the defendant, by exercising exclusive possession and control of the instrumentality causing the injury is in a position best able to explain the occurrence of the accident.[16] In the case of *Curley v. Ruppert,*[17] recently decided in New York, the court held that the rule of *res ipsa loquitur* was not applicable where the defendant had delivered the bottle to the retailer three days prior to the explosion of the bottle which injured an employee of the retailer even though the bottle underwent no change while in the possession of the plaintiff. The bottle, in fact, was handled as would normally be expected, *i.e.,* it was stored in the rear of the store until the re-

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68 P. 2d 952 (1937); Sawyer v. People's Freight Lines, 42 Ariz. 145, 22 P. 2d 1080 (1933); Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504 (1922); Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901).

[13] Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504 (1922).

[14] Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. ed. 355 (1947); Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504 (1922); Ridge v. Norfolk Southern R. R., 167 N. C. 510, 83 S. E. 762 (1914); Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815 (1913); Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901).

[15] Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815 (1913); San Juan Light Co. v. Requena, 224 U. S. 89, 56 L. ed. 680 (1912).

[16] Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 Pac. 39 (1913).

[17] 272 App. Div. 441, 71 N. Y. S. 2d 578 (1st Dep't 1947).

tailer was ready to replenish his stock. The court refused to extend the rule of *res ipsa loquitur* to include those cases wherein the defendant was not in control of the instrumentality causing the injury at the time the injury occurred. Just what bearing the fact of exclusive possession and control at the time of the injury had upon these particular circumstances is hard to divine. Surely, if the bottle had remained in the possession of the defendant it would not have been treated differently. Thus we see that such a dogmatic application of the rule deprives the rule of its very potency; the purpose of the rule is defeated. The rule of *res ipsa loquitur* was originated to give to the plaintiff an opportunity to recover when in all justice he is apparently entitled to it, but remains at a loss to explain the occurrence from which his injury emanates. That particular portion of the rule requiring that exclusive possession and control of the instrumentality causing the injury be in the defendant was included in the rule in order that the defendant, since he controls the injurious instrumentality, may be held responsible for exercising his control negligently; or through his superior knowledge of the accident, by reason of his having control, explain to the court why this accident happened and wherein he is blameless; or show to the satisfaction of the court that he took all reasonable precautions to avoid its happening. In the *Curley* case, this incident of possession and control at the time of the injury is unimportant since the control exercised would have been no different if it had been exercised by the defendant. As illogical as the reasoning in the *Curley* case may be it seems to be followed by a substantial number of the jurisdictions in this country. Fortunately, however, there is a trend in the opposite direction. In the case of *Riecke v. Anheuser-Busch Brewing Ass'n*[18] there was an explosion of a bottle, which, while in the possession and control of the defendant, injured the plaintiff. There was no need in that case to extend the doctrine of *res ipsa loquitur* as is advocated herein, yet the court mentioned the case of *Payne v. Rome Coca-Cola Bottling Co.*[19] as adhering to this extension. Four years later the same jurisdiction decided a case wherein the plaintiff was injured by an exploding bottle which at the time of the injury was in the plaintiff's possession.[20] Therein the court recognized the rule of *res ipsa loquitur* as promulgated in *Riecke v. Anheuser-Busch Brewing Ass'n*[21] and the extension of the doctrine in the case of *Payne v. Rome Coca-Cola Bottling Co.*[22] and as a result made a similar extension of the rule in the case before it. A similar case involving an exploding bottle was decided three years ago in Texas, wherein the court held that the rule of *res ipsa loquitur* would be extended

[18] 206 Mo. App. 246, 227 S. W. 631 (1921).
[19] 10 Ga. App. 762, 73 S. E. 1087 (1912).
[20] Stolle v. Anheuser-Busch Brewing Ass'n, 307 Mo. 520, 271 S. W. 497 (1925).
[21] 206 Mo. App. 246, 227 S. W. 631 (1921).
[22] 10 Ga. App. 762, 73 S. E. 1087 (1912).

to include those cases wherein food or drink is sold in sealed containers even though the accident occurs *after* the defendant has delivered up possession and control of the container to the plaintiff.[23] Thus, there is evidence of a gradual turning away from the hard and fast application of the rule of *res ipsa loquitur* and in its stead there is appearing a common-sense evaluation and appraisal of the facts peculiar to each case. Such a common-sense appraisal of circumstances is certainly needed in those cases wherein a manufacturer has delivered up possession and control of a sealed container of food or drink to a consumer followed by an injury to the consumer from the explosion of the manufacturer's product. In almost all of the cases involving exploding bottles the possession and control of the bottle is no longer in the manufacturer or bottler and as a result the plaintiff is many times precluded from recovering a judgment unless it be on the theory of a breach of warranty.

There is no reason, other than precedent—which at times may be the yoke that strangles the law courts—why this logical extension of the rule of *res ipsa loquitur* should not be applied in those states that have adhered to the strict theory that if possession and control are not in the defendant at the time of the injury then the plaintiff may not recover upon the theory of *res ipsa loquitur*. Moreover, sealed containers do not usually undergo an extraneous harmful change between the time that they leave the manufacturer or bottler and the time that they are placed in the hands of a consumer. Due to their condition—their being shut off from the atmosphere by virtue of their processing—sealed containers reach the consumer in substantially the same condition as they were when they left the manufacturer or bottler. Thus the manufacturer's or bottler's control over the container or bottle is still apparent by reason of the condition he has created. Why should it not be proper to assume that though the manufacturer or bottler is not in immediate possession he is, nevertheless, still in control of the product he has placed on the market? In those cases dealing with sealed containers the manufacturer or bottler has control over the condition of the container until some person exercises a different control over it, *i.e.*, a control prejudicial to the condition in which it was marketed. Consequently, it becomes unreasonable and illogical to say that the rule of *res ipsa loquitur* is not applicable when the manufacturer or bottler is not in possession and control at the time of the injury because the defendant, although he does not have possession of the instrumentality causing the injury, he does have control over it since he was the one who placed it in its present condition and offered it to the consumer as such.

Basically, the question resolves itself into this form: Is the defendant to be relieved of all liability concerning his product upon the instant that it is delivered from his possession and control, even

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[23] Honea v. Coca-Cola Bottling Co., 143 Tex. 272, 183 S. W. 2d 968 (1944).

though the instrumentality he has produced or manufactured undergoes no change affecting its condition by those succeeding him in possession and control? In those cases dealing with exploding bottles an affirmative reply to the foregoing query would be untenable. It is true that under our present system of law a plaintiff in such a case would not be precluded from proving a direct act of negligence that caused his injury; nor circumstantial evidence from which defendant's liability might be adduced; nor would he be precluded from obtaining a recovery upon the theory of a breach of warranty. But the injured plaintiff, according to the reasoning and decision in the *Curley* case, would be precluded from proceeding against the defendant under the rule of *res ipsa loquitur*. In all practicability, unless the plaintiff has some proof, direct or circumstantial, tending to show wherein the defendant was negligent, he will not be permitted to recover under any of the foregoing theories of negligence; he will be defeated unless he is allowed to invoke a rule of evidence applicable to the peculiar circumstances—the rule of *res ipsa loquitur*.

The rule of *res ipsa loquitur* should be extended to permit its application to those cases wherein an explosion has occurred *after* the bottle has left the hands of the person sought to be held liable provided that the testimony shows the bottle was (1) not accessible to extraneous harmful forces, and, (2) carefully handled by the plaintiff or any third person who may have moved or touched it.[24]

Defendant's Legal Wrong

The second circumstance necessary to invoke the rule of *res ipsa loquitur* is that the injury must be such as in the ordinary course of things would not have happened if the one having the control of the instrumentality had used proper care.[25] The circumstances surrounding the injury must be such as to show with reasonable probability that the particular accident would not have occurred without legal wrong by the defendant.[26] Perhaps the most logical explanation of this phase of the rule of *res ipsa loquitur* will be found in the dissenting opinion by Justice Van Voorhies in *Curley v. Ruppert:*[27] "It seems to me that the explosion of a beer bottle, which has been kept only for three days under usual conditions in a grocery store, is something which would not occur, in the ordinary course of events, if reasonable care had been employed in the bottling of it. . . . If the bottle was defective in the instant case then . . . the defendant was called upon to make an explanation. If the bottle was not defective, the inference is strengthened that the brewery was negligent

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[24] Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P. 2d 436 (1944).

[25] Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020 (1895).

[26] Foltis, Inc. v. City of New York, 287 N. Y. 108, 38 N. E. 2d 455 (1941).

[27] 272 App. Div. 441, 445, 71 N. Y. S. 2d 578, 582 (1st Dep't 1947).

in filling it at too high a pressure, or with beer that would develop increased pressure to a dangerous degree after a lapse of three days in a grocery store. In either event, plaintiff has made out a prima facie case." There are certain occurrences which in themselves are indicative of negligence. "All that is required is that reasonable men shall be able to say on the whole it is more likely that there was negligence associated with the cause than that there was not. When no such probabilities in favor of negligence can be found, *res ipsa loquitur* does not apply." [28]

In those cases wherein a bottle explodes and injury results to the plaintiff, and the plaintiff is shown to be handling the bottle with care, an inference of negligence will not be associated with the plaintiff. But is this also true of the manufacturer or bottler? On the contrary it is logical to assume that where an unexplained accident occurs, two people being in control of the instrumentality at different times and one person shown to be without fault, the inference of negligence attaches to the one who has failed to offer an explanation or exonerate himself. Of course the rule of *res ipsa loquitur* does not apply to those cases wherein the injury occurs as a result of an act of God, or wherein the particular defendant is shown to be devoid of blame. Nor does it apply where the inference of culpability is just as strong against the plaintiff as it is against the defendant.

Conclusion

The extension of the rule of *res ipsa loquitur* to those cases wherein an explosion occurs after the sealed container has been delivered to the retailer or the consumer is a much-needed and logical extension of the rule as may be seen from the illogical and impotent reasoning of the majority of the court in the *Curley* case. "All that is necessary is that the defendant have exclusive control of the factors which apparently have caused the accident; and one who supplies a chattel to another may have had sufficient control of its condition although it has passed out of his possession." [29] Moreover, since the rule of *res ipsa loquitur* is basically a common-sense appraisal of circumstances surrounding a particular occurrence, our courts should not lose sight of the fact that the rule is one of probabilities that leaves the question of the defendant's negligence to the jury. The mere fact that the rule is invoked is not an omen that the jury will return a verdict for the plaintiff; the invocation of the rule permits an inference of negligence but it is not mandatory for the jury to find negligence.

The rule of *res ipsa loquitur* is not to be applied to those cases wherein evidence is abundant or plentiful. It is to be applied when evidence is lacking; it is to be applied when the plaintiff, while being

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[28] PROSSER, HANDBOOK OF THE LAW OF TORTS § 43 (1941).
[29] *Ibid.*

free from contributory negligence, has been injured by an instrumentality in the control of the defendant; it is to be applied when the occurrence that causes the injury is unusual and unforeseen. When these circumstances do not exist the rule does not apply. But when they are present the rule of *res ipsa loquitur* is a rule to be applied to enable the plaintiff to establish a prima facie case although he cannot say wherein the defendant was negligent.[30]

WILLIAM A. CAHILL.

MEASURE OF DAMAGES—AGGRAVATION OF PREVIOUS INJURY, DISEASE, DISABILITY OR LATENT WEAKNESS

I. *Introduction*

The law in some of its branches has been able to formulate systems for measuring damages which operate in a more or less mechanical manner. Such is the case, for example, in actions for conversion, breach of contract, misrepresentation and trespass *quare clausum fregit*. However, when the value of human life or its impairment is involved, so many factors enter into the problem, that it is quite impossible to develop any system which would be adaptable to every case and treat each one justly. This is true especially of certain tort actions, among them assault and battery, personal injuries and death by wrongful act. In order to do justice in these cases ". . . such imponderable factors as degree of fault of defendant, foreseeability of results and proximity or remoteness existing between defendant's act and the damages to plaintiff . . ."[1] must be considered, so that it is impossible that the law can work absolutely in this field. Theoretically the measure of damages for personal injuries is the money equivalent of the difference between the injured party's physical condition before and after the injury. Practically, however, many elements are involved. Plaintiff must be compensated, first, for special expenses incurred, then for physical and mental suffering; also for the value of time lost from work and for any lessening in his future ability to work. Besides these factors, it is necessary to

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[30] Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. ed. 355 (1947); Plumb v. Richmond Light & R. R., 233 N. Y. 285, 135 N. E. 504 (1922); San Juan Light Co. v. Requena, 224 U. S. 89, 59 L. ed. 680 (1912).

[1] Bauer, *Fundamental Principles of the Law of Damages in Medico-Legal Cases*, 19 TENN. L. REV. 255, 263 (1946).