ESCOLA v. COCA COLA BOTTLING CO. OF FRESNO et al.

Civ. 12415.

District Court of Appeal, First District, Division 1, California.
Aug. 3, 1943.

Hearing Granted Sept. 30, 1943.

1. Negligence ⇐27

The test to be applied in determining whether negligence of bottling company was cause of injuries allegedly sustained by employee of retailer when bottle of beverage broke in her hand was whether bottling company had used reasonable care in view of degree of hazard in use of the article.

2. Negligence ⇐121(2)

The rule of "res ipsa loquitur" applies only where the instrumentality at time of accident was under exclusive control of defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

3. Negligence ⇐121(2)

Where there is a division of responsibility in use or management of an instrument which causes injury, and such injury might in equal likelihood have resulted from the separate acts of either one of two or more persons, the "res ipsa loquitur" doctrine cannot be invoked against any one of them.

4. Negligence ⇐121(2)

The "res ipsa loquitur" doctrine applies only when facts proved by plaintiff admit of single inference that accident would not have happened unless defendant had been negligent, although it continues to apply for plaintiff's benefit as against evidence produced by defendant that it may have happened without his negligence.

5. Negligence ⇐121(1)

Where it becomes incumbent on plaintiff to establish negligence other than by application of doctrine of res ipsa loquitur because proof does not show exclusive control of defendant, plaintiff must go all the way with his evidence to prove some act or omission on part of defendant on whom he would pass the responsibility.

6. Negligence ⇐121(3)

In action against bottling company by employee of retailer for injuries claimed to have been suffered by reason of bottle of beverage breaking in her hand, where there was no evidence as to negligence of bottling company in manufacture of bottle, preparation of beverage, or in bottling of product, or as to careful handling by retailer following delivery by distributor, a judgment for plaintiff could not be sustained under "res ipsa loquitur" doctrine.

PETERS, P. J., dissenting.

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Action by Gladys Escola against Coca Cola Bottling Company of Fresno and others for personal injuries claimed to have been suffered by plaintiff by reason of a bottle breaking in her hand. From a judgment in favor of the plaintiff against the named defendant, the named defendant appeals.

Reversed.

H. K. Landram, of Merced, for appellant.

C. Ray Robinson, Willard B. Treadwell, Dean S. Lesher, and Loraine B. Rogers, all of Merced (Belli & Leahy and Melvin M. Belli, all of San Francisco, of counsel), for respondents.

WARD, Justice.

This action is for personal injuries claimed to have been suffered by plaintiff by reason of a bottle breaking in her hand. The defendant, Coca Cola Bottling Company of Fresno, a corporation, appeals from a judgment in her favor following a verdict by a jury. Also named as defendants were Coca Cola Company and the Pacific Coast Coca Cola Bottling Company, both corporations, but the action was dismissed as to them at the trial prior to the introduction of evidence.

The complaint alleged that defendants "were negligent and failed in their duty to the plaintiff by selling to [her] employer bottles containing said beverage [coca cola] which, on account of excessive pressure of gas or by reason of some defect in the bottle was dangerous * * * and likely to explode."

In their opening statement counsel for plaintiff declared: "We are going to * * * rest our case completely on this doctrine we call res ipsa loquitur: The thing speaks for itself. Our theory of the

case is that we have no way of showing any specific act of negligence."

Plaintiff testified that by order of the Industrial Accident Commission she had been paid for partial loss of wages.

At the time of the accident plaintiff was transferring bottles of coca cola from cases delivered at her place of employment to a refrigerator. She testified: "I picked up the case of Coke and set it on a box which contained the ice cream in the Waffle Shop, and I proceeded to take one bottle at a time from the case to put it into the refrigerator. I had put three in the refrigerator when I picked up the fourth one. I had moved about 18 inches when it exploded in my hand." An employee of defendant company answered in the affirmative the following question: "You have found broken bottles of Coca-Cola when you took the cases out of the warehouse, haven't you? Upon testimony as to the injury sustained, and the evidence as above stated, plaintiff rested.

There was no evidence of negligence as alleged in the complaint or otherwise, and, as appears, the doctrine of res ipsa loquitur is not applicable to the facts herein. Defendant moved for a nonsuit. The court denied the motion but suggested that the matter be argued further on a motion for a directed verdict at the conclusion of the case. Such a motion, and also a motion for judgment in favor of defendant notwithstanding the verdict of the jury and also a motion for new trial, were made and denied.

In making its case the defendant introduced evidence showing the methods and the care used in the manufacture and bottling of the beverage. It appears that approved, modern means are used, and that each bottle is inspected four times. A representative of the company which manufactured the bottle involved testified as to the process of its manufacture.

Appellant does not attack the sufficiency of defendant's evidence as to the exercise of due care in the manufacture of the container, the preparation of the beverage, or in the "bottling" of the product; but suggests that the use of "so many inspectors conclusively showed the recognition of the dangerous character of the instrumentality and of the possibility of a defective bottle sneaking by." Many instrumentalities, such as automobiles, airplanes, heating contrivances, electrical supplies, drugs, inflammable liquids, beverages, etc., may be dangerous if imperfectly manufactured or improperly used; but in this age such articles are considered necessities of life. If the manufacturer, in addition to liability for breach of an express or implied warranty, is to be held financially responsible not only for inexpert preparation or manufacture, but for improper use by the general public, he then becomes an insurer. In such a situation, manufacturing as a practical business could not be successfully carried on until the process of manufacture had reached such perfection as to make the product "foolproof."

[1] Reasonable care in view of the degree of hazard in the use of the article is the rule applied. The Supreme Court of this state recently approved that rule. In Gerber v. Faber, 54 Cal.App.2d 674, 680, 129 P.2d 485, 488, the court said: "In a case involving a question of negligence in the manufacture of a chair, the court in Sheward v. Virtue, 1942, 20 Cal.2d [410, at 414], 126 P.2d 345, 347, said: 'The appropriate standard of care applicable to the facts of the present case is expressed in O'Rourke v. Day & Night Water Heater Co., Ltd., supra (31 Cal.App. 2d 364 [366], 88 P.2d 191), to the effect that if the defective condition of the part could have been disclosed by reasonable inspection and tests, and such inspection and tests had been omitted, the defendant has been negligent. In Smith v. Peerless Glass Co., Inc., 259 N. Y. 292, 181 N.E. 576, it was held that reasonable care consisted of making the inspections and tests during the course of manufacture and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article.' This rule is the one under which defendant's conduct is to be examined for negligence."

The difficulty in attempting to affirm the present judgment is that the reviewing court is not presented with any evidence of negligence on defendant's part, or even testimony tending to contradict the evidence of the defendant respecting its method of manufacture and the care used by it throughout the entire process presented under the res ipsa loquitur rule imposed upon it at the trial, or any dereliction of duty in the preparation or manufacture of the product. To hold defendant responsible it is necessary to surmise that a

defective bottle "sneaked by" without proper test or inspection, and to adopt a special res ipsa loquitur rule covering carbonated beverages without applying it generally to other articles, or to hold that the breaking of bottles in a manufacturing plant, warehouse, or on way to point of delivery, prior to the time when the maker ceases to have exclusive control is notice to him of defective manufacture and resulting hazard. This reasoning is not applicable to the present case as it assumes that which is in doubt, namely, a negligent act which caused the breaking. There is no evidence in the present case that the breakage of bottles in the warehouse was caused by "explosion," and no evidence of "improper charging." The plaintiff herein referred to the breaking as an explosion, but described its sound as a "loud pop" similar to the breaking of an "electric light bulb."

There is expert testimony, based upon a description of the manner in which the bottle broke, that the breakage could have been due to some external blow and not from internal pressure or thermal change. This evidence is uncontradicted. On cross-examination the attack was rather that the witness had testified for the Coca Cola and other companies in other cases.

[2-5] The present case is quite similar factually, and in respect of the points urged by plaintiff on appeal, to that of Gerber v. Faber, supra, pages 685, 686 of 54 Cal.App.2d, page 491 of 129 P.2d, where the court said: "The definition of res ipsa loquitur as a rule of law, quoted in Hill v. Pacific Gas & Electric Co., 1913, 22 Cal.App. 788, 790, 136 P. 492, from the opinion in San Juan Light & Transit Co. v. Requena, 224 U.S. 89, 99, 32 S.Ct. 399, 56 L.Ed. 680, emphasizes that the rule applies only where the instrumentality at the time of the accident was under the exclusive control of the defendant, and that is the interpretation of the doctrine which has been applied by our courts without exception. Where there is a division of responsibility in the use or management of the instrument which causes the injury, and such injury might in equal likelihood have resulted from the separate act or acts of either one of two or more persons, the res ipsa loquitur doctrine cannot be invoked against any one of them. Speidel v. Lacer, 1934, 2 Cal.App.2d 528, 38 P.2d 477; White v. Spreckels, 1909, 10 Cal.App. 287, 101 P. 920, 923. The res ipsa loquitur doctrine applies only when the facts proved by the plaintiff admit of the single inference that the accident would not have happened unless the defendant had been negligent, although it continues to apply for plaintiff's benefit as against evidence produced by defendant that it may have happened without his negligence. Lejeune v. General Petroleum Corp., 1932, 128 Cal.App. 404, 18 P.2d 429; see, also, cases collected in 19 Cal.Jur. 708 and 10-Yr. Supplement. When, therefore, it becomes incumbent upon plaintiff to establish negligence other than by application of the doctrine of res ipsa loquitur, because the proof does not show exclusive control in the defendant, he must go all the way with his evidence and prove some act or omission on the part of the defendant or defendants upon whom he would fasten responsibility. A contrary rule would upset many settled rules of evidence in negligence cases." Plaintiff claims "certain decidedly distinguishable" facts in the present case from those in the Gerber case. The only differences are that defendant herein is a bottler and distributor; in the Gerber case the court found that defendant was a manufacturer, maker, bottler, keeper, maintainer, distributor and seller. Here the bottle was delivered several days before the accident; in the Gerber case it may have been on the truck for a week. Here, again, an employee was injured; in the Gerber case, a customer. In one case the beverage was coca cola; in the other, root beer. The claimed factual discrepancies are inconsequential in determining the identical legal questions.

There are a number of decisions wherein the court held that it was proper to invoke the rule of res ipsa loquitur to the facts of those cases, but, as appears in the Gerber case, the rule there followed is not the general rule in California. In the Gerber case the court considered the conflicting authorities, and the conclusion therein is adopted as the conclusion in this case. The citations appearing the Gerber case are the same as in this, with a few exceptions, notably Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 and Macres v. Coca-Cola Bottling Co., 290 Mich. 567, 287 N.W. 922. These cases based upon different facts have not changed our views as to the correctness of the decision in the Gerber case.

[6] The Gerber opinion demonstrates exhaustive research and careful consideration, and the conclusion reached should not

be repudiated in the present case, based upon similar facts, and identical in that in both cases there was no testimony offered of careful handling by the "retailer" following delivery by the distributor. Respondent's suggestion to the contrary is merely surmise. The retailer did not know when the case was delivered and so testified, and respondent did not present any evidence as to such "care" and did not offer any instruction upon that theory. There is no evidence upon this subject up to the time she placed the case of coca cola upon the box which contained the ice cream and began transferring the bottles to the refrigerator. That the application of res ipsa loquitur to the facts herein "would be an unwarranted extension of that doctrine is readily apparent." Gerber v. Faber, supra, 54 Cal.App.2d page 684, 129 P.2d page 491.

The judgment is reversed.

KNIGHT, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

The defendant bottled and placed in circulation coco-cola, a carbonated beverage. The defendant delivered several cases of that beverage to the restaurant where plaintiff was employed. The defendant's driver placed those cases behind, and underneath, the counter of the restaurant. The cases remained in that same spot for a little over two days. While plaintiff was carefully removing the bottles from the case and placing them in the refrigerator one of the bottles exploded, causing a deep cut over five inches long and one and one-half inches deep on plaintiff's hand. The evidence shows that plaintiff handled the bottle carefully, and did not hit the bottle against any object while removing it from the case. The majority opinion holds that the doctrine of res ipsa loquitur is not applicable to such a factual situation. The exact basis of that holding is not clear. Fear is expressed that a contrary ruling would make the bottler an "insurer." The fact that no implied warranty is involved is mentioned, and some emphasis is placed upon the fact that the exploding bottle had been out of the "control" of defendant for over two days. None of these factors, in my opinion, is controlling. Logic, reason and authority compel the conclusion that such a factual situation requires the application of the res ipsa loquitur doctrine.

There is no magic in the phrase "res ipsa loquitur." It is simply one phase of the law of circumstantial evidence. 20 Minn.L.Rev. 241; 22 Cornell Law Quarterly, 39. All that is meant is that on the face of the accident there is no plausible explanation for its cause, of which plaintiff reasonably could be expected to have knowledge, except some negligent conduct on defendant's part. Therefore, it is only fair that negligence will be inferred, and that the duty of going forward with the evidence to rebut that inference should rest on defendant. The doctrine simply raises an inference of negligence on the part of defendant. Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533; Dowd v. Atlas T. & A. Service, 187 Cal. 523, 202 P. 870; Atkinson v. United Railroads of S. F., 71 Cal.App. 82, 234 P. 863; Crooks v. White, 107 Cal. App. 304, 290 P. 497; Even v. Pickwick Stages System, 109 Cal.App. 636, 293 P. 700; Hilson v. Pacific G. & E. Co., 131 Cal.App. 427, 21 P.2d 662; Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 80 P. 2d 185, 1016. The burden of proof is not shifted. Osgood v. Los Angeles, etc., Co., 137 Cal. 280, 70 P. 169, 92 Am.St.Rep. 171; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164; Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 P. 359, Ann. Cas.1913D, 908; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Seitzman v. Srere Corp., 116 Cal.App. 674, 3 P.2d 58; see collection of cases 12 Cal.L.Rev. 138.

If this fundamentally simple rule be applied to the facts of this case, what is the result? The defendant bottled the coca-cola in question and distributed it to his customers for a profit. The defendant had exclusive control of the mixing and bottling process, and had exclusive control of the particular bottle in question until it was delivered in a case furnished by defendant to the restaurant in question. The employee of defendant carefully placed the case behind, and underneath, a counter. The case remained there for a little over two days. The evidence shows that plaintiff carefully lifted the case and carefully removed the bottle. Nevertheless, the bottle exploded. After the bottle left the physical possession of defendant nothing was done to it that would cause it to explode. But it did explode. That does not occur unless someone was negligent. Either the bottle was defective, or the bottle was overcharged, or both. The bottle could

not have become defective after it was delivered and before it exploded. Are these circumstances not sufficient to raise an inference that defendant must have been negligent either in supplying a defective bottle or in overcharging it, or both? The burden of going forward with the evidence to rebut the inference in fairness should rest on defendant. The sufficiency of that explanation rested with the jury.

It is no obstacle to the application of this doctrine that there was no contractual relationship between plaintiff and defendant. It is now too well settled to require discussion that a manufacturer of any product is liable to third persons for negligence in the manufacture of his product if that product is of such a nature that negligence in its manufacture may cause it to become dangerous and cause injury to third persons. § 395, Restatement of the Law of Torts; Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N.E. 454, 17 A.L.R. 672; Heckel v. Ford Motor Co., 101 N.J. L. 385, 128 A. 242, 39 A.L.R. 992; 63 A.L. R. 340; Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 105 A.L.R. 1502; Chanin v. Chevrolet Motor Co., 7 Cir., 89 F.2d 889, 111 A. L.R. 1239; Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013; Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481; Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345; O'Rourke v. Day & Night W. H. Co., 31 Cal.App.2d 364, 88 P.2d 191; Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440. This does not make the manufacturer an "insurer." It simply means that he is liable for negligence to third persons not in a contractual relationship to him.

An inference of negligence cannot arise unless the defendant had "control" of the instrumentality causing the injury. But that "control" does not necessarily mean physical possession. Thus, to give an elementary example, if a foreign substance in a can of beans causes injury to a third person, it could not reasonably be contended that the doctrine of res ipsa loquitur did not apply although the can of beans may have been out of the possession of the canner for an appreciable length of time. In the instant case the bottler had exclusive control until the case of coca-cola was placed under the counter. From the evidence, it is a reasonable inference that no one touched that case until plaintiff started to place the bottles in the refrigerator. Thus, we are faced with a situation where the jury reasonably could find, and impliedly did so in the present case, that after the defendant surrendered physical possession of the case of bottles, no one touched them prior to the plaintiff's careful handling in placing them in the refrigerator. This evidence of non-accessibility and careful handling after leaving defendant's possession leaves the case in the same situation as if the bottle had exploded while still in defendant's possession.

There are many cases dealing with the problem of whether the doctrine of res ipsa loquitur is applicable to the explosion of a bottle of carbonated beverage after the bottle has left the possession of the bottler. Where the only evidence is that the bottle exploded, some cases do hold that the doctrine is not applicable. See annotation 4 A.L.R. 1094. But where there is not only evidence of the fact that the bottle exploded, but also evidence that the bottle was carefully handled after it left the physical possession of the bottler, the weight of authority, quantitatively and qualitatively, seems to be that whatever the rule may be as to ordinary beverages, the doctrine applies to carbonated beverages. See cases collected 8 A.L.R. 500; 39 A.L.R. 1006; 56 A.L.R. 593. Some of the more recent cases holding that the doctrine is applicable where there is evidence of an explosion of a carbonated beverage, plus evidence of careful handling after it left the possession of the bottler, are: Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601; Ortego v. Nehi Bottling Co., La.App., 6 So.2d 674, 677; Lanza v. De Ridder Coca Cola Bottling Co., La.App., 3 So.2d 217; Auzene v. Gulf Public Service Co., La.App., 188 So. 512; Stolle v. Anheuser-Busch, 307 Mo. 520, 271 S.W. 497, 39 A. L.R. 1001; Benkendorfer v. Garrett, Tex. Civ.App., 143 S.W.2d 1020; Macon Coca-Cola Bottling Co. v. Crane, 55 Ga.App. 573, 190 S.E. 879; MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 29 A.2d 868; Macres v. Coca-Cola Bottling Co., 290 Mich. 567, 287 N.W. 922; Healey v. Trodd, 124 N.J.L. 64, 11 A.2d 88, affirming 122 N.J. L. 603, 7 A.2d 640; Middlesboro Coca-Cola Bottling Works v. Campbell, 179 Va. 693, 20 S.E.2d 479; Ashkenazi v. Nehi Bottling Co., 217 N.C. 552, 8 S.E.2d 818; Georgia-Alabama Coca-Cola Bottling Co. v. White, 55 Ga.App. 706, 191 S.E. 265; Atlanta Co-

ca-Cola Bottling Co. v. Danneman, 25 Ga. App. 43, 102 S.E. 542.

The theory of these cases is that the bottler has put into circulation for public consumption a beverage which, if negligently concocted, or, if negligently placed in a defective bottle, becomes an inherently dangerous substance in the nature of a potential explosive; that when such a bottle explodes someone must have been negligent; that where the direct or circumstantial evidence excludes everyone but the bottler he should have the burden of explaining the occurrence; that under such circumstances the doctrine of res ipsa loquitur is applicable.

The majority opinion places great reliance on the case of Gerber v. Faber, 54 Cal. App.2d 674, 129 P.2d 485 (no hearing asked in the Supreme Court). In that case the bottler of root beer sold the same to an independent distributor, who sold to the proprietor of a store. The plaintiff was injured when the bottle exploded while he was removing it from the refrigerator, to which all customers had access. It was held that the doctrine of res ipsa loquitur was not applicable. The exact basis of the court's decision was that the bottler had parted with possession and control of the bottle when he sold to the independent distributor; that the bottle in question may have been on the distributor's truck for a week; that there was no evidence of careful handling by the distributor or by the retailer. Under such circumstances it would be improper to infer that the bottler was negligent to the exclusion of the distributor and retailer, and, therefore, the doctrine is not applicable. These thoughts are expressed in the following language (54 Cal.App.2d at page 686, 129 P.2d at page 491): "It is clear that plaintiff's accident may have resulted from some cause other than any negligence on the part of defendant. It appeared from the testimony of the distributor Weinberger that the bottle which exploded in plaintiff's hand may have been on his truck for a week. There was no evidence that the bottle had been carefully handled during that time or during the process of its delivery to defendant Faber nor by the latter or his employees when it was placed in the cooler. In addition to all of this, there is the admitted fact that Faber's customers were allowed to help themselves from the cooler, and it does not appear how frequently that was done nor the manner in which it was done. The law does not impose liability upon one party in favor of another upon suspicion or mere supposition. Plaintiff had the opportunity and the only opportunity to prove, if it were a fact, that the glass contained a flaw and his evidence, as we have seen, failed completely in that respect. The res ipsa loquitur doctrine cannot be applied so as to raise an inference that the bottle was cracked while in defendant's possession, to the exclusion of the inference that it may have been cracked thereafter. As we have stated, it retained its pressure up to the time when it was handled by plaintiff and it is at least as reasonable to infer that it was cracked after it left defendant's warehouse as to infer that it was cracked before. If it was carefully bottled and handled by defendant and was cracked thereafter, defendant would not be guilty of negligence and the res ipsa loquitur doctrine would cease to be applicable from the time the bottle passed from defendant's exclusive control."

With this ground of the decision I agree. Such holding in no way is applicable to the facts of the instant case where the missing element of evidence of careful handling after leaving the possession of the bottler was supplied.

It must be conceded, however, that there is dicta in the opinion to the effect that in the absence of evidence of many other explosions known to the bottler and occurring at or about the same time, the doctrine of res ipsa loquitur is not applicable even if there were evidence of careful handling after the bottle left the possession of the bottler. That dicta, in my opinion, is erroneous, is contrary to the many well-reasoned cases above cited, violates logic and reason, and should not be followed.

Defendant places much emphasis on the testimony of its experts relating to the care used in the bottling process to discover defective bottles and to prevent overcharging. According to those witnesses it would be highly improbable for a defective bottle to slip by the inspectors. But this bottle did slip by, and it did explode. The weight to be given to defendant's testimony on this point was obviously for the jury.

In my opinion the judgment should be affirmed.