

6-1-1949

Application of the Doctrine of Res Ipsa Loquitor to Food Cases

George S. Goodspeed Jr.

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

George S. Goodspeed Jr., *Application of the Doctrine of Res Ipsa Loquitor to Food Cases*, 3 U. Miami L. Rev. 613 (1949)

Available at: <https://repository.law.miami.edu/umlr/vol3/iss4/8>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR TO FOOD CASES

It has long been recognized that the development of modern methods of manufacturing and distributing foodstuffs has made the rule of *caveat emptor* anachronistic in this field.¹ As the industry has grown in size and complexity the need for greater protection of the injured consumer has become increasingly apparent, and attendant upon that growth there has been evolving a theory that the burden of loss resulting from injury caused by unwholesome food should be absorbed as a business cost.² In response to the demands for the relief of the injured consumer and this shift in the social philosophy the courts have been extending the liability of the manufacturers and purveyors steadily.³

In their efforts to develop suitable remedies the majority of the courts prefer to base liability upon negligence in a tort action,⁴ though many courts find liability in contract upon an implied warranty.⁵ Each theory has certain advantages and disadvantages, but for the purpose of this note suffice it to say with respect to the contractual liability that it eliminates the necessity of proving negligence on the part of the defendant;⁶ that it results in absolute liability, negligence being immaterial, which many courts are reluctant to impose in all cases;⁷ and that it requires that the court do violence to the concept of privity of contract whenever the plaintiff did not deal directly with the defendant.⁸ Furthermore, the view still prevails in many jurisdictions that

1. Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314 (1908); Nock v. Coca-Cola Bottling Works of Pittsburgh, 102 Pa. Super. 515, 156 Atl. 537 (1931); Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 6, 86 (1919-20); Comment, *The Decline of Caveat Emptor in the Sale of Food*, 4 FORD. L. REV. 295 (1935).

2. Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COL. L. REV. 335, 357 (1924).

3. PROSSER, TORTS § 83 (1941); Note, *Civil Liability in the Manufacture and Sale of Foods and Beverages*, 92 U. OF PA. L. REV. 306 (1944).

4. Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925) (court reviewed the cases of many jurisdictions); Smith v. Salem Coca-Cola Bottling Co., 92 N. H. 97, 25 A.2d 125 (1942); Minutilla v. Providence Ice Cream Co., 50 R. I. 43, 144 Atl. 884 (1929); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S. W.2d 721 (1942) (court reviewed Tennessee cases).

5. Goetten v. Owl Drug Co., 6 Cal.2d 683, 59 P.2d 142 (1936); Cliett v. Lauderdale Biltmore Corporation, 39 So.2d 476 (Fla. 1949); Patargias v. Coca-Cola Bottling Co. of Chicago, 332 Ill. App. 117, 74 N. E.2d 162 (1947); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407 (1918); McSpedon v. Kunz, 271 N. Y. 131, 2 N. E.2d 513 (1936).

6. Coca-Cola Bottling Works of Greenwood v. Simpson, 158 Miss. 390, 130 So. 479 (1930).

7. Valeri v. Pullman Co., 218 Fed. 519 (S. D. N. Y. 1914); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S. W.2d 721 (1942).

8. Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924) (duty of maker brings him into privity with consumer); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927) (warranty runs with title to food as with title to land); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N. E. 557 (1928) (contract between

restaurateurs cannot be held liable upon an implied warranty, because they do not sell their food but render a service.⁹ Some courts will not apply it to retailers when the food was procured from a reliable source and was sealed, so that it could not have been inspected.¹⁰ Neither the action in tort nor the action in contract is necessarily exclusive, and some courts will permit recovery in either or both.¹¹

In the field of tort liability the requirement of privity has been eliminated where comestibles are concerned by the general recognition that they come within the exception covering articles which, though not inherently dangerous, become so if negligently manufactured, established in the case of *MacPherson v. Buick Motor Co.*¹² This is now well settled.¹³ In the *Restatement of the Law of Torts* the test of foreseeability was adopted to control the scope of the manufacturer's liability, so that the required degree of care will vary with the nature of the injury which might reasonably be anticipated.¹⁴

Plaintiff must, of course, prove directly or circumstantially that he was injured by some unwholesome condition of the food,¹⁵ and then show that the defendant was responsible. Nearly all of the tort actions are based upon negligence on the part of the defendant,¹⁶ and it is incumbent upon the plaintiff to prove the negligence directly, which, though required by some courts,¹⁷

manufacturer and his vendee construed as a third party beneficiary contract for the benefit of the ultimate consumer). Some courts have said that recovery should be allowed on the basis of social justice without regard for the intricacies of the law of sales. *Ketterer v. Armour & Co.*, 200 Fed. 322 (S. D. N. Y. 1912); *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So.2d 313 (1944); *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931 (1915). *Contra*: *Thomason v. Ballard & Ballard Co.*, 208 N. C. 1, 179 S. E. 30 (1935); *Chysky v. Drake Bros. Co.*, 235 N. Y. 468, 139 N. E. 576 (1923).

9. *F. W. Woolworth Co. v. Wilson*, 74 F.2d 439 (C. C. A. 5th 1934); *Lynch v. Hotel Bond Co.*, 117 Conn. 128, 167 Atl. 99 (1933). *Contra*: *Cliett v. Lauderdale Biltmore Corporation*, 39 So.2d 476 (Fla. 1949).

10. *Kroger Grocery Co. v. Llewelling*, 165 Miss. 71, 145 So. 726 (1933); *Pennington v. Cranberry Fuel Co.*, 117 W. Va. 680, 186 S. E. 610 (1936).

11. *Eisenbeiss v. Payne*, 42 Ariz. 262, 25 P.2d 162 (1933); *Goetten v. Owl Drug Co.*, 6 Cal.2d 683, 59 P.2d 142 (1936); *Mix v. Ingersoll Candy Co.*, 6 Cal.2d 674, 59 P.2d 144 (1936) (both); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920); *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924); *Ford v. Waldorf System*, 57 R. I. 131, 188 Atl. 633 (1936) (both). *Contra*: *Minutilla v. Providence Ice Cream Co.*, 50 R. I. 43, 144 Atl. 884 (1929); *Coca-Cola Bottling Works v. Sullivan*, 178 Tenn. 405, 158 S. W.2d 721 (1942).

12. 217 N. Y. 382, 111 N. E. 1050 (1916).

13. *Sullivan v. Manhattan Market Co.*, 251 Mass. 395, 146 N. E. 673 (1925); *Coca-Cola Bottling Works of Columbus v. Petty*, 190 Miss. 631, 200 So. 128 (1941); *Coca-Cola Bottling Works v. Sullivan*, 178 Tenn. 405, 158 S. W.2d 721 (1942). *Compare* *Liggett & Myers Tobacco Co. v. Rankin*, 246 Ky. 65, 54 S. W.2d 612 (1932) (chewing tobacco) *with* *Liggett & Myers Tobacco Co. v. Cannon*, 132 Tenn. 419, 178 S. W. 1009 (1915) (same).

14. *RESTATEMENT, TORTS* § 395, comment *d* (1934).

15. *Bark v. Dixon*, 115 Minn. 172, 131 N. W. 1078 (1911); *Nelson v. West Coast Dairy Co.*, 5 Wash.2d 284, 105 P.2d 76 (1940).

16. Actions upon a false representation or warranty have met with little success. *Albrecht v. Rubinstein*, 63 A.2d 158 (Conn. 1948); *Alpine v. Friend Bros., Inc.*, 244 Mass. 164, 138 N. E. 553 (1923).

17. *Ketterer v. Armour & Co.*, 247 Fed. 921 (C. C. A.2d 1917); *C. C. Hooper Cafe Co. v. Henderson*, 223 Ala. 579, 137 So. 419 (1931); *Moore v. Macon Coca-Cola Bottling Co.*, 180 Ga. 335, 178 S. E. 711 (1935); *Swenson v. Purity Baking Co.*, 183 Minn. 289, 236 N. W. 310 (1931).

is seldom possible, because of the plaintiff's lack of knowledge as to what occurred during the preparation of the food product; or by proof of a violation of a pure food statute, which a few courts regard as negligence as a matter of law;¹⁸ or by circumstantial evidence.

One type of circumstantial evidence¹⁹ which has been much used in these actions in recent years is the doctrine of *res ipsa loquitur*,²⁰ which literally means that "the thing speaks for itself."²¹ In addition to the many courts which apply the doctrine by name²² there are others which appear to have applied it *sub silentio*, or at least a theory analogous thereto, even though some have expressly denied that they were applying the doctrine.²³ This doctrine originated with the case of *Byrne v. Boadle*,²⁴ and it is usually stated by quoting from *Scott v. London & St. Katherine Docks Co.*²⁵ wherein Chief Justice Erle said:

There must be reasonable evidence of negligence. But where the thing is shewn 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 of the defendants, that the accident arose from want of care.

18. *Donaldson v. Great Atlantic & Pacific Tea Co.*, 186 Ga. 870, 199 S. E. 213 (1938); *Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428 (1909); *Kurth v. Krumme*, 143 Ohio St. 638, 56 N. E.2d 227 (1944); *Gantt v. Columbia Coca-Cola Bottling Works*, 193 S. C. 51, 7 S. E.2d 641 (1940); *Doherty v. S. S. Kresge Co.*, 227 Wis. 661, 278 N. W. 437 (1938). *Contra*: *Cheli v. Cudahy Bros. Co.*, 267 Mich. 690, 255 N. W. 14 (1934); *Howson v. Foster Beef Co.*, 87 N. H. 200, 177 Atl. 656 (1935).

19. PROSSER, TORTS 292 (1941).

20. *E.g.*, *Fisher v. Washington Coca-Cola Bottling Works*, 66 App. D. C. 7, 84 F.2d 261 (1936); *Louis Pizitz Dry Goods Co., v. Waldrop*, 237 Ala. 208, 186 So. 151 (1939); *Southwestern Coca-Cola Bottling Co. v. Northern*, 65 Ariz. 172, 177 P.2d 219 (1947); *Bagre v. Daggett Chocolate Co.*, 126 Conn. 659, 13 A.2d 757 (1940); *Criswell Baking Co. v. Milligan*, 50 S. E.2d 136 (Ga. 1948); *Coca-Cola Bottling Works of Evansville v. Williams*, 111 Ind. App. 502, 37 N. E.2d 702 (1941); *Liggett & Myers Tobacco Co. v. Rankin*, 246 Ky. 65, 54 S. W.2d 612 (1932); *Gunter v. Alexandria Coca-Cola Bottling Co.*, 197 So. 159 (La. App. 1940); *Goldman & Freiman Bottling Co. v. Sindell*, 140 Md. 488, 117 Atl. 866 (1922); *Coca-Cola Bottling Works of Columbus v. Petty*, 190 Miss. 631, 200 So. 128 (1941); *Ritchie v. Sheffield Farms Co.*, 129 Misc. 765, 222 N. Y. S. 724 (N. Y. City Ct. 1927); *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, 269 Pa. 114, 145 Atl. 700 (1929); *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S. E.2d 729 (1946).

21. BLACK, LAW DICTIONARY 1539 (3d ed. 1933).

22. *E.g.*, cases in note 20 *supra*.

23. *E.g.*, *Kraft-Phenix Cheese Corp. v. Spelce*, 195 Ark. 407, 113 S. W.2d 476 (1938) (prima facie case); *Panza v. Bickford's Inc.*, 129 N. J. L. 50, 28 A.2d 188 (1942) (inference of negligence); *Weiner v. Mager & Throne*, 167 Misc. 338, 3 N. Y. S.2d 918 (N. Y. City Ct. 1938) (inference of negligence); *Hollis v. Armour & Co.*, 190 S. C. 170, 2 S. E.2d 681 (1939) (inference of negligence); *Coca-Cola Bottling Works v. Sullivan*, 178 Tenn. 405, 413, 158 S. W.2d 721, 724 (1942) (The court said that the intermediate appellate court had, with its approval, in previous cases ". . . adopted the rule,—by analogy to, but not in admitted application of, that followed in cases of *res ipsa loquitur* that . . . a prima facie, or presumptive showing of negligence on the part of the defendant is made out by the circumstances. . . ."); *Norfolk Coca-Cola Bottling Works v. Krause*, 162 Va. 107, 173 S. E. 497 (1934) (prima facie case; authorities reviewed).

24. 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

25. 3 H. & C. 596, 159 Eng. Rep. 665, 667 (1865).

The conditions usually required for the application of the doctrine²⁶ are that the accident must be of a kind which ordinarily does not occur in the absence of negligence by some one; that the accident be caused by an agency or instrumentality within the exclusive control of the defendant; and that there be no contributory negligence on the part of the plaintiff. A further requirement that the evidence as to the explanation of the accident be more accessible to the defendant than to the plaintiff is sometimes added, but Professor Prosser questions its validity and regards it as a make-weight.²⁷

Occurrences which bespeak negligence. The often quoted observation of Chief Justice Cook in *Pillars v. R. J. Reynolds Tobacco Co.*²⁸ that:

We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless.

shows a classic example of the type of occurrence which will satisfy the first requirement, but generally the courts give wide latitude to this requirement. Although there is some diversity of opinion as to what occurrences will warrant an inference or presumption of negligence, it has been held to include such varied situations as insects, rodents, glass, and other foreign matter in beverage bottles;²⁹ wire in cake;³⁰ metal particles in sausages;³¹ a pin and a tooth filling in pieces of candy;³² a bone in canned baby soup;³³ poison in a sack of flour;³⁴ and even to cases where illness resulted from eating the defendant's food though the actual defect was not known except inferentially from the diagnosis that the plaintiff was suffering from food poisoning;³⁵ the plaintiff's case, however, has usually been augmented by proof that others who ate the food suffered the same symptoms. On the other hand, some courts will not go so far.³⁶ While the courts speak in terms of negligence, it would appear that dependent, perhaps, upon the degree of care required of the defendant,³⁷

26. PROSSER, TORTS 295 (1941).

27. *Id.* at 301.

28. 117 Miss. 490, 500, 78 So. 365, 366 (1918).

29. *Cordell v. Macon Coca-Cola Bottling Co.*, 56 Ga. App. 117, 192 S. E. 228 (1937); *Duval v. Coca-Cola Bottling Co.*, 329 Ill. App. 290, 68 N. E.2d 479 (1946); *Coca-Cola Bottling Works of Evansville v. Williams*, 111 Ind. App. 502, 37 N. E.2d 702 (1941); *Seale v. Coca-Cola Bottling Works*, 297 Ky. 450, 179 S. W.2d 598 (1944), *aff'd*, 299 Ky. 409, 185 S. W.2d 685 (1945).

30. *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S. E.2d 729 (1946).

31. *Quinn v. Swift & Co.*, 20 F. Supp. 234 (M. D. Pa. 1937).

32. *Bagre v. Daggett Chocolate Co.*, 126 Conn. 659, 13 A.2d 757 (1940); *Gross v. Loft Inc.*, 121 Conn. 394, 185 Atl. 80 (1936).

33. *Paolinelli v. Dainty Food Mfrs.*, 322 Ill. App. 586, 54 N. E.2d 759 (1944).

34. *Ballard & Ballard Co. v. Jones*, 246 Ala. 478, 21 So.2d 327 (1945).

35. *Louis Pizitz Dry Goods Co. v. Waldrop*, 237 Ala. 208, 186 So. 151 (1939); *Criswell Baking Co. v. Milligan*, 50 S. E.2d 136 (Ga. 1948); *Amabite v. Kramps*, 121 N. J. L. 219, 2 A.2d 178 (Sup. Ct. 1938); *Campbell v. G. C. Murphy Co.*, 122 Pa. Super. 342, 186 Atl. 269 (1936).

36. *Mellace v. John P. Squire Co.*, 306 Mass. 515, 29 N. E.2d 26 (1940); *Lamb v. Boyles*, 192 N. C. 542, 135 S. E. 464 (1926).

37. *Eisenbeiss v. Payne*, 42 Ariz. 262, 25 P.2d 162 (1933) (high degree of care); *Slaughter v. Atlanta Coca-Cola Bottling Co.*, 48 Ga. App. 327, 172 S. E. 723 (1934)

some courts are tending to impose absolute liability despite any showing of care.³⁸ Yet there would seem to be much force to the argument, sometimes advanced, that since the defendant has shown his normal procedure to include precautions which should have made the accident impossible, *a fortiori*, the fact of the occurrence shows that there must have been some negligent failure to observe the precautions.³⁹ A number of courts, however, have shown a great reluctance to infer negligence from the circumstances of an injury of this type,⁴⁰ and in North Carolina an unusual rule has been developed, which requires that the plaintiff show that like products, manufactured under substantially similar conditions, and sold by the defendant at about the same time had a similar defective or deleterious condition in order to raise an inference of negligence.⁴¹

Control of the instrumentality. In food cases the requirement that the instrumentality causing the injury be within the exclusive control of the defendant is generally held to be satisfied if the plaintiff can show, either directly or by an inference arising out of the circumstances, that the negligence must have occurred while the product was under the control of the defendant. In other words, in order to focus the inference of negligence upon the defendant, he must show that the defective or deleterious condition was not created after the product left the defendant's control.⁴² The court in *Coca-Cola Bottling Works v. Sullivan*⁴³ classified the fact situations presented in the cases dealing with the liability of the manufacturer of bottled and packaged food products to an injured consumer in four categories, as follows: (1) those where the bottle or package passes directly from the manufacturer or his agent to the

(ordinary and reasonable care); *Armour & Co. v. Leasure*, 177 Md. 393, 9 A.2d 572 (1939) (reasonable degree of care depends upon the circumstances); *Bergantino v. General Baking Co.*, 298 Mass. 106, 9 N. E.2d 521 (1937) (high degree of care); *Amabile v. Kramps*, 121 N. J. L. 219, 2 A.2d 178 (Sup. Ct. 1938) (reasonable care); *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, 296 Pa. 114, 145 Atl. 700 (1929) (high degree of care).

38. *Eisenbeiss v. Payne*, *supra* note 37; *Bagre v. Daggett Chocolate Co.*, 126 Conn. 659, 13 A.2d 757 (1940); *Coca-Cola Bottling Co. of Shelbyville v. Creech*, 245 Ky. 414, 53 S. W.2d 745 (1932); *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, *supra* note 37.

39. *Try-Me Beverage Co. v. Harris*, 217 Ala. 302, 116 So. 147 (1928); *Coca-Cola Bottling Co. v. McBride*, 180 Ark. 193, 20 S. W.2d 862 (1929); *Richenbacher v. California Packing Corp.*, 250 Mass. 198, 145 N. E. 281 (1924).

40. "It is evident that to hold the defendant guilty of negligence in this case would be to base a verdict on speculation instead of the solid basis of proven negligence." *Horn & Hardart v. Lieber*, 25 F.2d 449, 450 (C. C. A. 3d 1928) (tack in strawberries which the defendant showed had been carefully washed); *O'Brien v. Louis K. Liggett Co.*, 255 Mass. 553, 152 N. E. 57 (1926); *Swenson v. Purity Baking Co.*, 183 Minn. 289, 236 N. W. 310 (1931).

41. *Manning v. Harvey C. Hines Co.*, 218 N. C. 779, 10 S. E.2d 727 (1940); *Evans v. Pepsi-Cola Bottling Co.*, 216 N. C. 716, 6 S. E.2d 510 (1940); *Tickle v. Hobgood*, 216 N. C. 221, 4 S. E.2d 444 (1939); *Daniels v. Swift & Co.*, 209 N. C. 567, 183 S. E. 748 (1936) (recovery allowed because of proof of similar occurrence); *Enloe v. Coca-Cola Bottling Co.*, 208 N. C. 305, 180 S. E. 582 (1935).

42. *Eisenbeiss v. Payne*, 42 Ariz. 262, 25 P.2d 162 (1933); *Albany Coca-Cola Bottling Works v. Shiver*, 63 Ga. App. 755, 12 S. E.2d 114 (1940); *Coca-Cola Bottling Works v. Sullivan*, 178 Tenn. 405, 158 S. W.2d. 721 (1942).

43. 178 Tenn. 405, 414, 158 S. W.2d 721, 725 (1942).

consumer, which, of course, can also include food served in a restaurant and other non-packaged foods in the absence of intermediate parties; (2) those where the container is sealed in such a way that the contents could not have been tampered with by intermediate parties, as for example, canned goods; (3) those where foreign matter is embedded in the food in such a manner that it could only have gotten there during the process of manufacturing, this type being well illustrated by a piece of wire embedded in a cake⁴⁴ and a tooth filling in a piece of candy;⁴⁵ and finally, (4) those where the container is one which could have been opened and reclosed by intermediate parties or strangers who might have had access to it after the control of the manufacturer had ended, as might be the case with milk bottles or soft drink bottles like the one in the *Sullivan* case. Generally this possibility of an intervening cause will preclude the application of the doctrine to cases where the food product was not in the manufacturer's original package except in the case of embedded matter.⁴⁶ In the first three types of cases the circumstances clearly warrant an inference or presumption that it was negligence on the part of the defendant which caused the condition of the food, but in cases of the fourth type this court and some others appear to be so intent that ". . . the way should be left open for the innocent to escape"⁴⁷ that they require the plaintiff to prove that there could have been no opportunity for intermeddling without regard to how unlikely or far-fetched the possibility might be.⁴⁸ This would seem to be an undue burden to impose upon the plaintiff, for, although the jury should not be permitted to guess what caused the injury,⁴⁹ it should only be necessary for the plaintiff to exclude reasonably possible causes, the proper test being

. . . whether the circumstances are such as would satisfy a reasonable and well-balanced mind that the accident resulted from the negligence of the defendant. The testimony need not exclude everything which the ingenuity of counsel may suggest as having possibly caused or contributed to the injury.⁵⁰

44. *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S. E.2d 729 (1946).

45. *Bagre v. Daggett Chocolate Co.*, 126 Conn. 659, 13 A.2d 757 (1940).

46. *Floyd v. Swift & Co.*, 59 Ga. App. 154, 200 S. E. 531 (1938).

47. *Coca-Cola Bottling Works v. Sullivan*, 178 Tenn. 405, 409, 158 S. W.2d 721, 723 (1942).

48. *Jenkins v. Bogalusa Coca-Cola Bottling Co.*, 1 So.2d 426 (La. App. 1941); *Coca-Cola Bottling Works of Columbus v. Petty*, 190 Miss. 631, 200 So.2d 128 (1941); *Coca-Cola Bottling Works v. Sullivan*, *supra* note 47; *Norfolk Coca-Cola Bottling Works v. Krausse*, 162 Va. 107, 173 S. E. 497 (1934); and in an exploding bottle case *Hughs v. Miami Coca-Cola Bottling Co.*, 155 Fla. 299, 19 So.2d 862 (1944). *Contra*: *Coca-Cola Bottling Co. of Southeast Arkansas v. Spurlin*, 199 Ark. 126, 132 S. W.2d 828 (1939); *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924) (denying that this is the test).

49. *Gunter v. Alexandria Coca-Cola Bottling Co.*, 197 So. 159 (La. App. 1940); *Hoback v. Coca-Cola Bottling Works of Nashville*, 20 Tenn. App. 280, 98 S. W.2d 113 (1936).

50. *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, 296 Pa. 114, 119, 145 Atl. 700, 701 (1929); *Albany Coca-Cola Bottling Co. v. Shiver*, 63 Ga. App. 755, 12 S. E.2d 114 (1940).

One court, however, has gone to the other extreme and has shifted to the defendant the burden of proving that the glass which the plaintiff found in the bottle was not there when the bottle left the defendant's control.⁵¹

It is rarely the case that a wholesale or retail dealer is found to have been negligent unless he had some part in the preparation of the food product. When he merely acts as a conduit between the producer and consumer, his only duty to the consumer is to buy from reliable sources, refrain from negligence in handling the goods, and to discover such defects as would be apparent in the exercise of ordinary care. If he discharges this duty, he will not be held liable for an unwholesome condition of the food in an action based on negligence,⁵² except in a jurisdiction where the violation of a pure food statute is regarded as negligence as a matter of law,⁵³ or in those cases wherein the dealer sells the product under his own label.⁵⁴

Contributory negligence. Contributory negligence on the part of the plaintiff is seldom a factor in these cases, and the plaintiff can negative it effectively by showing his conduct to have been such as is common and customary among the general public. The unwholesome or defective condition of the food is rarely apparent to the consumer, and he is not to be expected to be suspicious or unusually careful, so that no contributory negligence as a matter of law was found on the part of plaintiffs who failed to discover glass in Coca-Cola bottles before drinking,⁵⁵ who did not cook pork sufficiently to kill *trichinellae spiralis*,⁵⁶ and who ate metwurst raw, since it is sometimes eaten that way.⁵⁷

Evidence more accessible to defendant. Finally, there is the questionable requirement that the evidence which would explain the accident be more readily accessible to the defendant than to the plaintiff. As a practical matter this is seldom a factor in food cases either, because by the very nature of the circumstances the plaintiff cannot know what occurred in the preparation of the product. Obviously the very *raison d'être* of the doctrine is the plaintiff's inability to allege and prove the specific nature of the defendant's negligence. While it is granted that the defendant may be in a position to know what happened, it would appear that in these cases, he seldom if ever does, and it is because of the defendant's probable responsibility rather than his potential

51. Coca-Cola Bottling Co. of Southeast Arkansas v. Spurlin, 199 Ark. 126, 132 S. W.2d 828 (1939).

52. Kirkland v. Great Atlantic & Pacific Tea Co., 233 Ala. 304, 171 So. 735 (1936); Moree v. Shiver, 63 Ga. App. 761, 12 S. E.2d 118 (1940); Blount v. Houston Coca-Cola Bottling Co., 184 Miss. 69, 185 So. 241 (1939); Lipari v. National Grocery Co., 120 N. J. L. 97, 198 Atl. 393 (1938); RESTATEMENT, TORTS § 402, comment a (1934).

53. See note 18 *supra*.

54. Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932); Slavin v. Leggett & Co., 114 N. J. L. 421, 177 Atl. 120 (1935); RESTATEMENT, TORTS § 400 (1934).

55. Albany Coca-Cola Bottling Co. v. Shiver, 63 Ga. App. 755, 12 S. E.2d 114 (1940); Davis v. Williams, 58 Ga. App. 274, 198 S. E. 357 (1938).

56. Arena v. John P. Squire Co., 321 Mass. 423, 73 N. E.2d 836 (1947).

57. Kurth v. Krumme, 143 Ohio St. 638, 56 N. E.2d 227 (1944).

knowledge that the plaintiff is given the benefit of the doctrine.⁵⁸ It is interesting to observe how these cases support the criticism of Professor Prosser that ". . . it cannot be supposed that the inference ever would be defeated by a showing that the defendant knew nothing about what had happened . . ." ⁵⁹ for the defendant is almost invariably reduced to proving the exercise of care generally, since he does not know the circumstances attendant upon the preparation of the particular article of food which was defective. Adherence to this requirement has led some courts to hold that the plaintiff cannot have the benefit of the doctrine if he has alleged specific negligence on the part of the defendant,⁶⁰ but usually the plaintiff can make use of it if he has also charged the defendant with negligence generally.⁶¹

Procedural effect. There has been much disagreement among American courts and writers as to the procedural effect which the doctrine of *res ipsa loquitur* should be accorded,⁶² but, in general, the courts follow one or the other of two theories. Under either it serves in lieu of evidence to enable the plaintiff to escape a dismissal or involuntary non-suit and get his case before the jury. The view of the majority seems to be that it gives rise to a mere permissible inference of negligence, which the jury will weigh in the light of all the evidence to decide the probabilities of the matter.⁶³ This view is usually expressed by quoting from the opinion of Mr. Justice Pitney in *Sweeney v. Erving*:⁶⁴

In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference: that they furnish circumstantial 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

58. "If the defendant showed itself to be free from negligence, it was not incumbent on it to show what was the cause of the damage. . . . Its failure to show what was the cause would not create liability against it." *H. J. Heinz Co. v. Fortson*, 62 Ga. App. 130, 135, 8 S. E.2d 443, 446 (1940).

59. PROSSER, TORTS 301 (1941).

60. "Presumptions," as happily stated by a scholarly counselor, *ore tenus*, in another case, "may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." *Mackowik v. Kansas City, St. J. & C. B. R. Co.*, 196 Mo. 550, 94 S. W. 256, 262 (1906).

61. *Honea v. Coca-Cola Bottling Co.*, 143 Tex. 272, 183 S. W.2d 968 (1944) (exploding bottle). See Note, 160 A. L. R. 1450 (1946).

62. *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S. E.2d 729 (1946); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936). See the discussion between Professors Carpenter and Prosser in Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 SO. CALIF. L. REV. 166 (1937); Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 *id.* at 459; Carpenter, *Res Ipsa Loquitur: A Rejoinder to Professor Prosser*, 10 *id.* at 467.

63. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, *supra* at 245. See Note, 167 A. L. R. 658, 664, 665 (1947).

64. 288 U. S. 233, 240 (1913).

the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.

In theory the defendant need not offer evidence to gain a favorable verdict, but generally there is an attempt to show great care in the preparation of the product, and sometimes this factor overcomes the inference of negligence, but it is unusual for evidence of the defendant's method of preparation to suffice.⁶⁵ However, many courts say that the doctrine gives rise to a presumption of negligence which must be overcome by the defendant,⁶⁶ but it is uncertain to what extent this is an inadvertent use of the term. Frequently "presumption" and "inference" have been used interchangeably and apparently synonymously,⁶⁷ and only a few courts have consciously distinguished the terms.⁶⁸ The use of a true presumption, of course, puts the defendant at a great disadvantage and will almost invariably result in absolute liability, because all the defendant can show is the care which he customarily uses, and this is virtually never sufficient to rebut the presumption. Professor Prosser traces this view to early cases involving carriers in which a more or less conscious policy of requiring the defendant to explain the accident or pay was adopted, but he points out that its effect is ". . . to give to circumstantial evidence a greater effect than any direct evidence could have."⁶⁹

Despite the exhortations of many writers⁷⁰ most of the courts resist the attempts to persuade them to commit themselves to the imposition, by the use of the implied warranty theory or otherwise, of an insurer's liability upon those who prepare and sell foodstuffs, preferring, instead, the action in tort in which negligence can be shown by inferences or presumptions under or apart from the doctrine of *res ipsa loquitur*.⁷¹ A perusal of the cases might lead one to believe that, in effect, absolute liability is approached, if not reached, under the doctrine; but that is one of the beauties of this method of handling these cases. The plaintiff's burden of proof is not hard to carry, and the natural sympathies of the court and jury aid to make the recovery virtually assured if the plaintiff has a valid case. Yet there remains a greater flexibility than under

65. *H. J. Heinz Co. v. Fortson*, 62 Ga. App. 130, 8 S. E.2d 443 (1940); *Rogers v. Coca-Cola Bottling Co.*, 156 S. W.2d 325 (Tex. Civ. App. 1941). Compare *Coca-Cola Bottling Co. v. Davidson*, 193 Ark. 825, 102 S. W.2d 833 (1937).

66. *Southwestern Coca-Cola Bottling Co. v. Northern*, 65 Ariz. 172, 177 P.2d 219 (1947); *Coca-Cola Bottling Co. v. Langston*, 198 Ark. 49, 127 S. W. 263 (1939); *Seale v. Coca-Cola Bottling Works*, 297 Ky. 450, 179 S. W.2d 598 (1944), *aff'd*, 299 Ky. 409, 185 S. W.2d 685 (1945); *Hill v. Louisiana Coca-Cola Bottling Co.*, 170 So. 45 (La. App. 1936).

67. *E.g.*, see note 65 *supra*.

68. *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S. E.2d 729 (1946). See Note, 167 A. L. R. 658 (1947).

69. PROSSER, TORTS 305-6 (1941).

70. *E.g.*, Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 6, 86 (1919-20); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Comment, *The Decline of Caveat Emptor in the Sale of Food*, 4 FORD. L. REV. 295 (1935).

71. See note 4 *supra*.

the implied warranty theory, so that there can be better adaptation to the facts of each individual case. There is probably no better summation of the opinion opposed to absolute liability than that expressed by Judge Augustus N. Hand, when in the case of *Valeri v. Pullman*⁷² he stated:

My own feeling is that protection to the public lies not so much in extending the absolute liability of individuals, as in regulating lines of business in which the public has particular interest in such a way as reasonably to insure its safety. In other words, pure food laws, and rigorous inspection of meats, canning factories, and other sources of food supply, would seem to me a much more effective way of protecting the public than by the imposition of the liability of an insurer upon those who furnish food. The former method corrects the evil at its source. The latter method only imposes an obligation in cases which ex hypothesi cannot be guarded against by the individual by the exercise of due care. . . . I am inclined to think that the imposition of such an obligation would tend to lead in the long run to the prosecution of unfounded claims, rather than to the protection of individuals or the public.

Since that decision there has been much progress under the pure food laws, and when one considers the vast quantities of foods and beverages which are sold on the markets today, and how rarely any of it proves to be deleterious, it would appear obvious that the preparers and distributors of foodstuffs do indeed exercise all necessary care in their customary activities. When some particular item of food or drink does turn out to be unwholesome, possibly but not necessarily due to the negligence of the party or parties singled out as the defendants, it would seem that in justice liability should depend upon fault (unless it is to be declared that it is public policy to require the liability of an insurer by statute as in the case of workmen's compensation). A reading of any considerable number of the cases cannot help but leave one with a feeling of scepticism as to the bona fides of many cases, particularly some of those involving bottled beverages, and this sort of thing is sure to be encouraged by the opportunity of easy recovery. Under the implied warranty theory the negligence of the defendant is immaterial, so that the plaintiff has only to introduce evidence, which the defendant cannot contest, as to an occurrence of which he has no knowledge, a situation which invites the fabrication of evidence, while if the action is based upon negligence, the defendant can at least attempt, sometimes with success, to show that he was free from negligence.

GEORGE S. GOODSPED, JR.

72. 218 Fed. 519, 521 (S. D. N. Y. 1914).