

1948

Glendora Jackson v. Arthur Larron Colston and Mary A. Zupo, doing business as Posture-Form Studio : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Willard Hanson; Stewart M. Hanson; Attorneys for Plaintiff and Appellant;

Recommended Citation

Brief of Appellant, *Jackson v. Colston*, No. 7199 (Utah Supreme Court, 1948).
https://digitalcommons.law.byu.edu/uofu_sc1/913

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the
Supreme Court of the State of Utah

GLENDORA JACKSON,

Plaintiff and Appellant,

vs.

ARTHUR LARRON COLSTON and
MARY A. ZUPO, doing business as
POSTURE-FORM STUDIO,

Defendants and Respondents.

Case
No. 7199

APPELLANT'S BRIEF

Appeal from the Third Judicial District Court, in and for
Salt Lake County, Utah

WILLARD HANSON,
STEWART M. HANSON,
*Attorneys for Plaintiff
and Appellant.*

FILED
JUL 26 1948

CLERK, SUPREME COURT, UTAH

ARROW PRESS, SALT LAKE

I N D E X

	Page
CITATION OF AUTHORITIES:	
Davis v. Graves, 250 Ky. 654, 63 S. W. (2d) 803 ..	10
Frescolin v. Puget Sound Traction Co., 90 Wash. 59; 155 P. 395	12
Gavin v. Kluge, 275 Mass. 372; 176 N. E. 193	10
Gray v. McLaughlin, (Ark.) 179 S. W. (2d) 686 ..	10
Higgins v. Byrnes, 274 Ala. App. 440	9
Holcomb v. Magee, 217 Ill. App. 272	10
Johnson v. Marshall, 241 Ill. App. 80	10, 11
Pearson v. Butts, (Iowa) 276 N. W. 65	10
Peterson v. Richards, 73 Utah 59; 272 P. 229	14
Ragin v. Zimmerman, 206 Cal. 723; 276 P. 107 ..	10
Shauvin v. Krupin, 4 Cal. App. (2d) 322; 40 P. (2d) 904	9
Swedin v. Friedman, 9 La. App. 44; 118 S. 787 ..	10
Waddell v. Woods, 158 Kan. 469; 148 P. (2d) 1016; 152 A. L. R. 629	10
Zimmerman v. Auerbach, 81 Utah 554; 17 P. (2d) 251	12, 13, 14
Argument	8-16
Statement of Errors	8
Statement of Facts	2-8

In the Supreme Court of the State of Utah

GLENDORA JACKSON,

Plaintiff and Appellant,

vs.

ARTHUR LARRON COLSTON and
MARY A. ZUPO, doing business as
POSTURE-FORM STUDIO,

Defendants and Respondents.

Case
No. 7199

APPELLANT'S BRIEF

STATEMENT OF FACTS

The defendants, Arthur Larron Colston and Mary A. Zupo, were partners operating a business in the McIntyre Building in Salt Lake City, Utah, under the name and style of Posture-Form Studio (Tr. 18). They held themselves out as being able to assist in tissue rejuvenation, weight reduction, muscle and nerve relaxation, and further, that they could aid and improve the movement and flexibility of joints (Tr. 18). In such business for the purposes indicated they used what is known as an infra-red lamp and also a "depolray" lamp. They charged \$17.50 for thirteen treatments. The first treatment was called a courtesy treatment; it was to demonstrate the kind of treatments given (Tr. 19-207).

Plaintiff went to the defendants because she was over weight and further because she was having trouble with her left ankle, which had been sprained some eight years before.

On March 18, 1946, plaintiff began the regular course of treatments and received them two or three times a week until almost the 15th of April, 1946. She was first placed on what was called table No. 1 (Tr. 210) for a period of 20 minutes. This table had some kind of mechanical action which massaged certain portions of the plaintiff's body. No heat or lamps were applied to plaintiff's body on this table, but she was given inhalations of oxygen. She was then placed on table No. 2 another mechanical contraption which massaged other portions of plaintiff's body. In connection with this table, there was used what was called a "de-polray" lamp (Tr. 211).

The "de-polray" lamp was a fake according to the testimony of "Doctor" Plumb, a witness for the defendants, which generated a very small amount of heat and simply produced a magnet inside of the lamp that could pick up small nails, hairpins, and things of that sort, and the small magnetic force which emanated from the lamp could not possibly have any effect on the human body (Tr. 258).

This lamp was placed about an inch from plaintiff's left ankle and was left on for a period of 10 minutes (Tr. 212). After being on table No. 2 for a period of 10 minutes she was placed on table No. 3, which was another mechanical table and which shook the entire body of the plaintiff. On this table another lamp was used which was placed approximately from 24 to 30 inches from plaintiff's ankle (Tr. 215).

This third table was called "Sea Biscuit," the motion resembling that of the famous running horse of that name. This lamp was larger than the one used in connection with table No. 2. It was called an infra-red lamp and was applied for almost ten minutes.

At about the fifth treatment the plaintiff noticed that her ankle was becoming inflamed, or as she described it, "a flaming area." (P. 74.) The ankle became purplish red and was very painful and she had to go back and forth in a cab. She spoke to the attendant about it who told her, "You always get worse before you get better." (P. 75.) She progressively got worse and in April, the heel broke open and also the toes, the ankle had swollen to about twice the normal size and was very much inflamed and dark looking. They continued to use the lamp which just produced a warm comfortable feeling. In the last treatment received there was a feeling of heat (P. 75).

She showed Mrs. Zupo the ankle and that defendant stated that she would massage it, but plaintiff refused as she was worried about its condition. By the time for the eleventh treatment, about April 15, 1946, her ankle had become so painful and inflamed that she had great difficulty in walking. Towards the latter part of May, 1946, she called a doctor (Tr. 85), who instructed her how to care for the ankle. Other doctors later were also consulted concerning the condition of plaintiff's ankle.

The following testimony of Doctor Ray T. Woolsey and Doctor Alexander might be helpful to the court.

Dr. Ray T. Woolsey, one of the physicians who treated plaintiff, testified that the plaintiff talked with him first over the phone and then came to his office; that she was suffering from a discharging sore near the ankle (Tr. 105); that he examined it and from the examination concluded that she had been burned; that it would require a lot of treatment; that he recommended that she see some surgeon for an operation as he was confining his work to obstetrics and gynecology. He recommended that she keep wet dressings on it and wash the burned area with some mild antiseptic; that there had been a destruction of tissue around the sore spot (Tr. 106); that it did not have the appearance of being a flame burn; that there was nothing to indicate that it was a flame burn. The Doctor then testified:

“Q. Doctor, are you familiar with burns from electricity, from applying electric treatment, and burns of that kind?

A. Not specifically. I know they produce a definite—more or less a charring, not charring—the tissues become white, the circulation is destroyed due to the action of the electric heat on the tissues.

Q. What would you say, in your opinion, whether the electric heat could cause such a burn as you saw?

A. I think so, sir.

Q. And if caused by electric heat, it is usually quite a deep burn, deep into the tissues?

A. Yes, sir.

Q. Did this have that appearance deep in the tissues?

A. Yes, a deep hole in the tissues where it sloughed out, and this hole was a quarter to half of an inch deep then.

Q. And burns of that kind, what would you say as to whether or not in your opinion they are much more difficult to heal than an ordinary burn from flame?

A. There is no way of telling how deep it will go, and when the tissues are destroyed from electric heat of that kind, the tissues usually slough out, and the only thing to do is wait until its sloughs out, until you see what it is, and let the scar tissue fill the hole."

Dr. Alexander who also treated the plaintiff for the burns testified that he first saw her in June of 1947. He testified in part as follows:

"A. And on the left ankle there was a large ulcerated sore, oh, I would say almost the size of a quarter, with two small other ulcerated areas in close association with it, and around the whole ulceration there was a reddened area, it was tender and swollen, and very painful to the touch. And this area, in addition to the area of the sores, was about as large as a dollar.

There seemed to be—there was considerable tenderness along the side of Mrs. Jackson's leg extending almost as far as the knee; she was unable to bear any weight on it without having considerable pain."

* * *

"I inquired very carefully into the history of Mrs. Jackson, she told me she had a series of treatments, electric heat treatments of some sort applied to that ankle and I, after eliminating other possibili-

ties which I didn't find responsible for it, came to the conclusion the only thing that could cause it was the electric treatments she had been subjected to.

Q. And would electric treatments cause such a condition?

A. Yes, if the electric treatment is too strong, too continuous, or if it is applied too frequently when the tissue is not of good nutrition."

The defendants so far as the record shows had no training in medicine or the treatment of injuries or sickness. The testimony of Mary Zupo is very illustrative. She had graduated from the South High school in Salt Lake City, and following her graduation had taken a business course at Henager Business College; she then became an office secretary in an accounting office where she took shorthand and typewriting. From there she went into the "Posture-Form Studio" to give the treatments in question. She had never had any training in medicine. The defendant, Colston, who was not present in court, instructed her how to give treatments and how to use the tables. She became his partner in 1944. She had made a self-study of dietetics, anatomy, and physiology; that for a reducing diet they used a printed pamphlet (Tr. 244).

We are not interested in this appeal as to the extent of plaintiff's injuries. The medical testimony, however, as set forth above is very corroborative of plaintiff's evidence that she suffered from electrical burns. Plaintiff continued to receive medical treatment for her burns from May, 1947, practically to the time of trial. That the lamp on table No.

3 could burn can scarcely be denied. On one occasion, the lamp caused the leather on the table to emit an odor because of the heat (Tr. 80).

In addition to the plaintiff's testimony and the medical testimony, we have the admission by the defendant Zupo that the defendants had burned plaintiff. During the month of August, 1946, plaintiff went to the defendants' place of business and there talked to the defendant Zupo concerning her condition and showed her ankle to her. At that time the defendant Zupo stated that they, the defendants, had burned her (Tr. 89). It is undisputed that the lamps were under the exclusive care of the defendants. None of the patrons were allowed to operate the lamps, and the patrons were not even allowed to get off a table without the aid and assistance of defendants (Tr. 73, 74, 216, 295-298). The defendant Zupo, of course, denied that she told plaintiff that she had been burned. The defendants also produced an electrical engineer, a so called expert, who testified that he believed that the lamps used could not burn anyone.

At the conclusion of all the evidence, the defendants each made a motion for a directed verdict of, "No cause of action," (Tr. 333, 334). The court granted the motion stating, "I am of the opinion that the jury could do nothing more than speculate as to the cause of the injuries that the plaintiff suffered as far as this evidence is concerned." (Tr. 334, 335.)

Within the time allowed by law, the plaintiff duly filed a motion for a new trial which was by the court denied.

A statement of the errors upon which plaintiff relies for a reversal of the judgment of the court below:

1. The Court erred in directing a verdict in favor of the defendants and against the plaintiff.

2. The Court erred in overruling and denying the plaintiff's motion for a new trial.

ARGUMENT

Both of the above referred to specifications of error for the purpose of this argument should be considered together. The sole and only question we are concerned with here is whether or not there was sufficient evidence adduced on the part of the plaintiff to take the case to the jury. We submit that in view of the plaintiff's statement that the defendants admitted that they had burned her and that the doctors who were caring for her were treating her for an electrical burn, and that there was no evidence of the plaintiff ever having been burned, except at the defendants' place of business, that the jury should have been allowed to consider the matter and determine where the truth lay.

The testimony is undisputed that the lamps used by the defendants were under their exclusive care and control and that they were the only ones who operated or attempted to operate them, and that at no time were the lamps operated by the plaintiff; that on each occasion, it was the defendants who placed the lamps upon and over plaintiff's ankles. In view of the undisputed testimony that the lamps were under the exclusive care of the defendants and that a burn would not ordinarily result from the use of the lamps if they were

operated properly, and which in the course of ordinary events would not burn the plaintiff, the doctrine of *res ipsa loquitur* applies.

That the doctrine of *res ipsa loquitur* is applicable to the case at bar is indicated by the following cases applied to similar situations.

In *Shauvin v. Krupin*, 4 Cal. App. (2d) 322, 40 P. (2d) 904, the plaintiff while getting a permanent wave at defendant's beauty shop received a scalp burn. She brought an action against the defendants alleging in general the acts performed by the defendants in the course of their work. The acts constituted the entire operation undertaken by defendants in which plaintiff might have received her injuries and they were all charged to have been done in a negligent manner. In affirming the judgment the court said:

"It is a case in which the application of the *res ipsa loquitur* doctrine is imminently just and proper. The devices used in the process were under the exclusive control of the defendants. The injury was one which in the natural course of things would not have occurred, had the defendants used due care, and plaintiff was therefore entitled to recover, unless the defendant offered a satisfactory explanation to overcome the presumptive evidence of their negligence."

In *Higgins v. Byrnes*, 274 Ala. App. 440, plaintiff went to the defendant's beauty parlor to get a permanent wave. She was burned by the apparatus. The court said that there was no evidence that the apparatus used was defective and that it followed that the injury to plaintiff was caused by the

failure of the defendant's operator to use the necessary precautions to protect plaintiff's scalp, and this failure was negligence.

See also

Pearson v. Butts (Iowa) 276 N. W. 65;
Davis v. Graves, 250 Ky. 654, 63 S. W. (2d) 803;
Swedin v. Friedman, 9 La. App. 44, 118 So. 787;
Gavin v. Kluge, 275 Mass. 372, 176 N. E. 193.

The doctrine of *res ipsa loquitur* has also been held applicable in cases involving the use of X-ray machines and in giving treatments. In this connection, see:

Waddell v. Woods, 158 Kans. 469; 148 P. (2d) 1016, 152 A. L. R. 629.

Also

Gray v. McLaughlin (Ark.) 179 S. W. (2d) 686;
Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107;
Holcombe v. Magee, 217 Ill. App. 272.

The opinion that the doctrine of *res ipsa loquitur* could be invoked in an action where a patient sought recovery for burns allegedly received when being treated by his physician with an X-ray machine was expressed in *Johnson v. Marshall*, 241 Ill. App. 80. There the court said:

"The X-ray was under the exclusive control of the defendant, and there is evidence that the injury to the plaintiff is not a necessary result of a treatment by an X-ray machine. While the evidence is not as conclusive as it might be, yet, we are of the opinion that the testimony is to the effect that the result that followed the use of the X-ray is not a necessary nor the known and usual result which follows an

application of the character made by the use thereof upon the plaintiff. More precisely the doctrine 'res ipsa loquitur' asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation to support a recovery in the absence of any explanation of the defendant tending to show that the injury was not due to his want of care."

In the case at bar, it is admitted and undisputed that the lamps which were used in treating the plaintiff were under the exclusive control of the defendants. Plaintiff testified that the defendant Zupo upon being shown plaintiff's ankle stated that they had burned her and that they were sorry and wanted to know if she would come back to their place of business and see what they could do for her. The defendants, of course, denied that they ever made such a statement to the plaintiff. Whether or not such a statement was made was for the jury to decide. The trial court was of the opinion that the jury could do nothing more than speculate as to the cause of plaintiff's injuries. How the court could reach such a conclusion is difficult to see, in view of plaintiff's testimony, the medical evidence, and the admission of defendant Zupo, and the fact that the doctrine of res ipsa applies in this case.

It is, of course, an elementary proposition of law that liability for an injury cannot be predicated upon conjecture or speculation. It must be based upon actual proof, both of negligence and of a causal relation between that negli-

gence and the injury sustained. The cause of an accident may be said to be speculative when from a consideration of all the facts it is as likely that it happened from one cause as another.

See *Frescoln v. Puget Sound Traction Co.*, 90 Wash. 59, 155 P. 395.

There is no evidence whatsoever in the case at bar to indicate that the plaintiff's injury was from any other cause than the treatment given her by defendants. Where is there any evidence that plaintiff's injury was just as likely due to some other cause than it was the treatment given her by defendants? There is none. There was nothing for the jury to speculate about; it was whether they would believe the testimony offered on behalf of plaintiff or that of defendants.

A case which in principle is on all fours with the case at bar is the case of *Zimmerman v. Auerbach*, 81 Utah 554, 17 P. (2d) 251. This was an action by plaintiff for injuries to her caused by the negligence of defendant's employee in giving a permanent wave. Plaintiff testified in substance that before giving the permanent wave treatment her hair was examined by the operator who asked whether she had ever used anything on her hair, to which she answered, "Yes, I have used some peroxide on the back." The operator stated that they would not take the responsibility of determining what sort of a permanent wave best suited her hair and called the defendant, who after examination said her hair would take any kind of wave that they had in the shop. The operator then proceeded to give her hair a "Duart

Wave" and handed plaintiff a watch with instructions to advise the operator at the end of five minutes after the electric current was applied. After one or two minutes, plaintiff complained of pain and that her head was being burned, and the operator told her that she would have to stand a little heat. Plaintiff again complained of burning, but the operator did not turn off the electric current until the expiration of the five minutes. After the electrical appliances were removed, the hair was discolored, streaked, sticky, brittle and came out when touched. In order to present a respectable appearance plaintiff was compelled to have her hair cut and to wear a wig until it grew out again; that as a result of the treatment plaintiff's scalp was blistered and she became sick and suffered physical pain and mental distress.

The evidence showed that the injury was caused by the use of the wrong chemical solution and the application of heat for a longer time than appropriate for hair which had been treated with a bleach solution. The treatment given was that ordinarily given to natural hair. By the evidence the issue was narrowed to the question of whether plaintiff had told defendant that she had used peroxide in her hair. Defendant's testimony was to the effect that plaintiff was asked if she had used dyes, restoratives or tonics, and that she said that she had not, and that she was then given the treatment applicable to natural hair. This issue was submitted to the jury by appropriate instructions. There was a verdict and judgment for plaintiff.

It was the contention of the appellant that the injury to plaintiff's hair and scalp was as likely to have occurred

from something other than the treatment given by defendant, and thus the jury would have to speculate with respect to how the injury occurred. The court in considering this, concluded that it was for the jury to determine whether or not the defendant had been careless and negligent in the treatment of plaintiff and that it was not speculative.

A reading of that case will indicate a fact situation very similar to the case at bar.

An interesting Utah case which will throw much light on the question involved in this case is the case of *Peterson v. Richards*, 73 Utah 59; 272 Pac. 229. That was an action by plaintiff against defendant to recover damages for injuries sustained by plaintiff during the course of an operation being performed upon her by the defendant. The testimony showed that defendant was performing an abdominal operation on plaintiff. After the operation and while plaintiff was coming out of the anesthetic, she complained of her hand. Upon examination of plaintiff's hand, it was found that the fingers had been smashed. Plaintiff's hand was in perfect condition before entering the operating room. It could have been smashed by the operating table or by the bed upon which plaintiff was placed after leaving the operating room and which was manipulated up and down while she was coming out of the anesthetic.

It was the plaintiff's contention that after she left the hospital and consulted the defendant, that the defendant admitted to her and to her husband that he had injured plaintiff's hand by crushing it in the crevices on the operating table. The defendant denied ever having made such

an admission and demonstrated in court that her hand could not possibly have been injured while on the operating table, but that it was more likely to have happened in the manipulating of the hospital bed. The jury found for the plaintiff. The defendant contended that the only way the jury could find for the plaintiff was to speculate or conjecture as to the cause of the injury. The court stated, however, that the defendant did not by any direct or positive evidence show that plaintiff's hand was injured by manipulating or adjusting the bed, but sought such an inference to be deduced from the facts and circumstances proven by him and from manipulations of the bed before the jury.

That is exactly the situation we have in the case at bar. Here plaintiff testified that the defendant admitted that they had burned her. The defendants sought to prove by an expert that the lamp in question could not possibly burn anyone and thus, by inference, that plaintiff's injuries were from some other cause. In this respect the case at bar is on all fours with the above cited case.

In *Peterson v. Richards* (supra), the court stated that admissions of matters of fact of a party are of such probative effect when adverse or dis-serving, and voluntarily made as to make a prima facie case to the extent of the subject matter of the admission, and to dispense with other proof of the fact so admitted and is sufficient to support a finding of fact resting alone upon such extrajudicial admission of a party.

It should be for the jury to determine whether the defendant made such an admission or not.

We respectfully submit that the court was clearly in error in directing a verdict against the plaintiff. So far as the evidence is concerned, plaintiff had never been burned, or received any other injury to her ankle, other than a break in it several years before. The only time that any heat or other treatment was given to plaintiff's ankle which could possibly have burned the same and injured her was the treatment given her at defendant's place of business.

To say that the jury, if allowed to consider this case would have to speculate as to the cause of plaintiff's injury, is invading the province of the jury.

Respectfully submitted,

WILLARD HANSON,
STEWART M. HANSON,
Attorneys for Appellant.