

1953

# Stevens-Salt Lake City, Inc. v. Ray Wong et al : Brief of Appellant

Utah Supreme Court

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White, Wright & Arnovitz; Attorneys for Appellant;

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IN THE SUPREME COURT

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STATE OF UTAH

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STEVENS-SALT LAKE CITY,  
INC.

FEB 5 1956

*Appellant,* Clerk, Supreme Court, Salt Lake City.

vs.

Case No. 7920

RAY WONG, JAM LEO and YEE  
TONG HOW, a partnership doing  
business as China Tea Garden,

*Respondents.*

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APPELLANT'S BRIEF

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WHITE, WRIGHT & ARNOVITZ,

*Attorneys for Appellant.*

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IN THE SUPREME COURT  
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STEVENS-SALT LAKE CITY,  
INC.

*Appellant,*

vs.

RAY WONG, JAM LEO and YEE  
TONG HOW, a partnership doing  
business as China Tea Garden,

*Respondents.*

Case No.  
7920

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APPELLANT'S BRIEF

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STATEMENT OF THE CASE

The appellant brought an action against the respondents, alleging that on or about September 22, 1950, the defendants in the course of conducting their restaurant business on the second floor of a building located at 1151½ South Main Street, Salt Lake City, Utah, negligently maintained and operated their drainage and water system thereby causing or permitting large quantities of water to seep through and into the ceiling and walls of plaintiff's ladies apparel store, which store is located on the ground floor of the same building. Due to this inci-

dent, the appellant claimed it was damaged and sought recovery in that action. The appellant further alleged that as a result of the water seepage, large sections of plaintiff's ceiling and wall plaster fell in on October 12, 1950, requiring large expenditures of money on the part of the appellant.

The respondents generally denied any negligence on their part and raised, by way of an affirmative defense, contributory negligence on the part of the appellant.

The court instructed the jury generally on the question of respondents alleged negligence and on the measure of damages awardable if appellant was allowed to recover. The court also instructed the jury as to the meaning and application of the doctrine of *res ipsa loquitur*.

The jury returned a verdict in favor of the defendant-respondents and against the plaintiff-appellant, no cause of action. The appellant herein made a motion for a new trial, which motion was denied. As a result of such denial, this appeal has followed.

The question then presented in this case is as follows: Where, without warning, a store is suddenly damaged, first by water leaking through their ceiling from the floor above them and later through the collapse of said ceiling, may a jury find for the defendants whose failure to act and/or discover the defect in his pipes proximately caused the plaintiff's damages?

### STATEMENT OF FACTS

The respondents in this action, since 1938, have operated as a partnership, a restaurant, known as the China

Tea Garden, located on the second floor of a building located at 115½ South Main Street in Salt Lake City, Utah. The appellant, in this action, has since 1943, operated a ladies apparel store on the ground floor of the before-mentioned building. The appellant is a New York Corporation doing business in Utah as Stevens-Salt Lake City Incorporated.

On September 22, 1950 or thereabouts, Mrs. Sally Peers, Manager of the Stevens' store, discovered that water was running from the ceiling above a portion of the store (Tr. 103). Upon discovery of the leakage, Mrs. Peers notified the respondents above, showing them the leakage and she then ordered that that portion of the ceiling be roped off (Tr. 103 and 104). The entire store was closed during the morning of September 22nd. The roped off portion of the store was closed for the entire day. The afternoon of September 22nd, all the store except the roped off portion was open for business. The roped off department was open for business the next day, September 23rd.

Mrs. Peers testified that water dripped from the ceiling and wall all that day of September 22nd (Tr. 104).

Sometime later, on or about September 25, 1950, a representative of the respondents called on Mrs. Peers at the appellant's place of business. Mrs. Peers was told to have the place "fixed up" at the respondent's expense (Tr. 105). There is no evidence as to this matter with respect to what the respondent's representative meant when he told Mrs. Peers to "fix the place up." Mrs. Peers testified that prior to October 12, 1950, no plaster

fell from the ceiling (Tr. 105).

Mrs. Peers next testified that due to the leakage, the ceiling was badly in need of a paint job and that a painter on two occasions examined the premises with the idea of having the damaged portions painted. Mrs. Peers was told it would be advisable to wait until the ceiling dried to have the painting done (Tr. 105 and Tr. 106). Before the ceiling dried sufficiently to be painted, the ceiling collapsed on October 12, 1950 or thereabouts (Tr. 107).

Mrs. Peers testified that she ordered the store closed on the day the ceiling fell, having been advised, by Mr. Floyd Goodson, Battalion Chief of the Salt Lake Fire Department, that it was not safe to keep the store open. The store remained closed for one week while repairs were being made (Tr. 107).

It is in the record that a substantial amount of merchandise of the appellant was damaged due to both of the before-mentioned incidents. It is also in the record, and need not be mentioned here, that appellant suffered substantial incidental damages due to the two before-mentioned incidents of September 22, 1950 and October 12, 1950.

Mrs. Peers testified that after the portion of the ceiling collapsed, that merchandise which could conveniently be removed was removed to another part of the store. The balance of the merchandise was covered by a heavy curtain so that it would not be further damaged when the ceiling was replastered (Tr. 123).

Mrs. Peers testified that on or about September 23,



1950, she visited the respondents at their place of business. She observed workmen working on the pipes in the respondent's place of business. Apparently, respondents ordered the water shut off as there was no more dripping after September 23rd or thereabouts (Tr. 115).

On stipulation by counsel, a clause in a lease between the owner of the building at 115½ South Main Street in Salt Lake City and the China Tea Garden was admitted in evidence. The clause reads, "And the lessees agree that they will indemnify the occupants of the ground floor of said building for any damage sustained by said occupants by reason of negligence of lessees." (Tr. 133).

Mr. Ray Wong, one of the respondents in this action, testified that on or about September 22, 1950, he was notified of the leakage in Stevens' Store. He testified that he found no water in his place of business. He then ordered the water shut off and at that time, a leak in the pipe was discovered (Tr. 137).

Mr. Wong further testified that the pipe had been installed in 1938, when the China Tea Garden was first opened (Tr. 138).

On cross examination, Mr. Wong testified that he didn't know how long the water had been running before it came through to the downstairs. Mr. Wong testified in substance that it was necessary to take out the wainscoating from the wall before it could be determined that the pipe was leaking (Tr. 140). Mr. Wong further testified that the pipe was flush against the wall, having a wainscoating cover on top of the pipe (Tr. 141).

Mr. Wong's testimony continued as follows:

"Q. Now, when had that wainscoating been put in there?

"A. When we opened up.

"Q. When you first opened up?

"A. Yes.

"Q. You didn't do any work on the pipe or wainscoating since 1938?

"A. No.

"Q. Which was twelve years before?

"A. No." (Tr. 142).

Mrs. Sally Peers, later in the trial, testified that when she visited the respondent's place of business, she saw the pipe which had been responsible for the leakage. She testified that, "The pipe was very corroded and rusty and it was in very bad condition." (Tr. 146).

Mr. Gerald Rosenberg, president of the appellant corporation, in his deposition, testified in great detail as to the extent of the appellants alleged damages, both direct and indirect and incidental due to the two incidents of September 22, 1950 and October 12, 1950 (Tr. 37-102).

### QUESTIONS INVOLVED

Five arguments are relied on in this court as ground for reversal.

1. THE EVIDENCE OF THE DEFENDANTS DID NOT TEND TO NEGATIVE THE INFERENCE OF NEGLIGENCE THAT ARISES FROM THE FACT THAT THE PLUMBING WHICH RELEASED THE WATER FROM OVERHEAD WAS WITHIN THE COMPLETE CONTROL OF THE DEFENDANTS, AND THERE WAS NO EVIDENCE TO JUSTIFY THE VERDICT IN FAVOR OF THE DEFENDANTS.

2. THE VERDICT OF THE JURY IS AGAINST LAW, FOR THE REASON THAT THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD HAVE FOUND THAT THE PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT, BUT EVEN IF THE VERDICT OF THE JURY WAS BASED UPON ANY CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF, THERE WAS NO EVIDENCE WHATEVER IN SUPPORT OF ANY CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF UP TO THE TIME WHEN THE WATER DAMAGE OCCURRED ON SEPTEMBER 22, 1950 AND THEREFORE, AT THE LEAST, THE JURY SHOULD HAVE FOUND FOR THE PLAINTIFF TO THE EXTENT OF THE WATER DAMAGE THAT RESULTED ON THAT DATE.

3. THE VERDICT OF THE JURY IS AGAINST LAW, INASMUCH AS THE JURY DID NOT FOLLOW THE COURT'S INSTRUCTION NO. 6, AND FOUND FOR THE DEFENDANTS, ALTHOUGH THE COURT INSTRUCTED THAT THE DEFENDANTS COULD ONLY OVERCOME THE PRESUMPTION OF NEGLIGENCE IF THEY OFFERED AN EXPLANATION AS TO HOW THE WATER CAME TO ESCAPE WITHOUT THEIR FAULT, AND THE DEFENDANTS DID NOT OFFER SUCH EXPLANATION.

4. THE COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 3, WHICH ASKED THE COURT TO INSTRUCT THE JURY THAT THE DEFENDANTS DID NOT OFFER ANY EVIDENCE THAT THEY DID ANYTHING TO PREVENT THE DAMAGE, TO OVERCOME THE INFERENCE OF NEGLIGENCE RAISED BY THE DOCTRINE OF RES IPSA LOQUITUR.

5. THE COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 4, AND BY SO DOING THE JURY MIGHT HAVE SPECULATED THAT THE NEGLIGENCE WAS CAUSED BY THE ACT OF SOME OTHER PERSON OR PERSONS WHO WERE NOT IN THE CONTROL OF THE DEFENDANTS, AND THUS FOUND FOR THE DEFENDANTS, WHICH THE JURY WOULD

NOT HAVE DONE IF THE JURY HAD BEEN INSTRUCTED THAT IT MUST FIND FOR THE PLAINTIFF IF THE NEGLIGENCE HAD NOT BEEN THAT OF SOME OTHER PERSON OR PERSONS WHO WERE NOT UNDER THE CONTROL OF THE DEFENDANTS.

PLAINTIFF'S REQUESTED INSTRUCTION NO. 4 WAS SUFFICIENTLY DEFINITE TO INVOKE THE DOCTRINE OF STRICT LIABILITY. UNDER THIS DOCTRINE, THE DEFENDANT WAS LIABLE FOR ALL DAMAGES PROXIMATELY CAUSED BY THE LEAKAGE OF THE DEFENDANT'S PIPE.

### ARGUMENT

1. THE EVIDENCE OF THE DEFENDANTS DID NOT TEND TO NEGATIVE THE INFERENCE OF NEGLIGENCE THAT ARISES FROM THE FACT THAT THE PLUMBING WHICH RELEASED THE WATER FROM OVERHEAD WAS WITHIN THE COMPLETE CONTROL OF THE DEFENDANTS, AND THERE WAS NO EVIDENCE TO JUSTIFY THE VERDICT IN FAVOR OF THE DEFENDANTS.

The appellant contends that the respondent in this case adduced no evidence whatever which would either tend to explain why water came to leak through appellant's ceiling without the fault of the respondents or tend to show that respondents were not negligent in allowing the water to seep through appellant's ceiling or discover the leaking water before great damage was done to the appellant.

The record is completely devoid of any evidence which might explain why the leakage occurred without the respondent's fault. The only evidence offered by the respondents which might remotely tend to show they were not negligent is contained in the testimony of one of the respondents, Mr. Wong:

- "Q. How long had that pipe been installed if you know?
- "A. Since we opened.
- "Q. When did you open?
- "A. 1938.
- "Q. Do you know who installed the pipe?
- "A. The guy that used to call •Tracy; I don't know where his shop is now. He used to have a shop at the end of Plumb Alley, I don't know whether die now.
- "Q. Was his name Tracy?
- "A. Casey.
- "Q. Did you understand Casey was a plumber?
- "A. Yes, \* \* \* well, he got a shop in there, a plumbing shop.
- "Q. What kind of materials did Casey use, what kind of pipes did he use putting this in?
- "A. I don't understand about pipe, he fix all the pipe.
- "Q. Was it your understanding what kind of pipe he should use?
- "A. He should use good pipe.
- "Q. And do you know whether he had new pipe or not?
- "A. I don't know; I don't understand pipe.
- "Q. Did you pay for it on the basis that he would use new pipe?
- "A. Well that is what we pay." (Tr. 138-139).
- On the basis of the above testimony alone, can it be

said that the respondents produced at least some evidence to show that they were not negligent? The appellant contends that this evidence standing alone, could not be taken as any evidence to show that respondents were not negligent. At best, all this evidence shows is that when respondents moved into their place of business, water and plumbing pipe was installed. There was no evidence even going to prove the pipe was new when purchased and installed; and there was no evidence whatever going to show what quality the pipe was. There is, however, evidence in the record which shows that from 1938 until the first incident occurred in September of 1950, the pipes were never examined or inspected by anyone (Tr. 142).

The later decisions in this state seem to stand for the proposition that the doctrine of *res ipsa loquitur*, when applicable, gives rise to an inference of negligence on the part of the defendant, which justifies but does not necessarily compel a verdict in favor of the plaintiff. *White v. Pinney*, 99 Utah 484, 102 Pac. 2nd 249; *Jenson v. S. H. Kress & Co.*, 87 Utah 434, 49 Pac. 2nd 958; *Angerman Co. v. Edgemon*, 76 Utah 394, 290 Pac. 169.

The facts in the case at hand presented a *res ipsa loquitur* situation, and the trial court correctly instructed the jury that the doctrine was applicable (Court's Instruction No. 6). Therefore, in this case, the doctrine of *res ipsa loquitur* being applicable, an inference was raised that the defendants were negligent. The defendants, now respondents, offered no evidence in rebuttal to explain why the incidents occurred without their fault,

and they offered no real evidence that they were not negligent in allowing the water to flow and in not discovering the flow before substantial injury was inflicted upon the plaintiff-appellant.

This court has recognized that the inference arising under the maxim *res ipsa loquitur* may and will vary in strength, and that under some circumstances, and especially in the absence of evidence by the defendant, may be so strong as to compel a finding of negligence. *Jordan v. Coca-Cola Bottling Co. of Utah*, 218 Pac. 2nd 660, at page 663 (Utah 1950); *White v. Pinney*, 99 Utah 484, at page 488, 108 Pac. 2nd 249, at page 251; *Zoccolillo v. Oregon Short Line R. Co.*, 53 Utah 39, at page 63, 177 Pac. 201, at page 211; and *Angerman Co. v. Edgemon*, 76 Utah 394, 290 Pac. 169, at page 171. The appellant feels that the inference which arose in this case was so strong that the jury was, as a matter of law, compelled to find in the appellant's favor. Due to the nature of the injury, appellant was unable to show any direct, specific acts of negligence on the part of the respondents. However, the evidence is all in support of the inference that defendants were negligent. There is evidence in the record that respondents never inspected the pipe which caused the mischief since it was installed, some twelve years before (Tr. 140). There is also evidence in the record to show that the pipe in question, when examined, after the first incident of September 22, 1950, was in a dangerous and defective condition (Tr. 146). One of the respondents testified that he was not even sure if the person who was hired to install the pipe was a plumber.

He further testified that he had no idea what kind or quality of pipe was, in fact, installed (Tr. 138-139).

It then appears in this case that the inference of negligence raised by the factual application of the doctrine of *res ipsa loquitur* was strongly supported by all the evidence, which could have possibly been adduced under the circumstances of the case. On the other hand, the respondents, defendants below, brought in no evidence whatever either going to show they were not negligent or going to explain how the injury came about without their fault. Therefore, the appellant now contends that the finding of the jury was against the law and the evidence, and asks that the decision reached in the trial court be reversed upon this ground.

One of the most recent Utah cases which applies the doctrine of *res ipsa loquitur* is *White v. Pinney*, 99 Utah 485, 108 Pac. 2nd 249. In that case, the court instructed the jury that *res ipsa loquitur* was applicable, but refused to instruct the jury that defendant was guilty of negligence as a matter of law. Plaintiff contended that he was entitled to such an instruction where the above doctrine was applicable. The court, in holding the instruction was properly refused said, "This court is committed to the view that the doctrine of *res ipsa loquitur* does not give rise to a legal presumption of negligence but justifies the fact finder to infer negligence."

The court goes on to say, "In certain cases if no explanation of the accident is offered, the situation may forceably impel a finding of negligence." In this case,



plaintiff strictly relied on the doctrine while defendants offered substantial evidence to show they were not negligent. The jury brought in a finding of no cause of action. The court goes on to say, "Or, to put it another way, have defendants successfully overcome the inference of negligence which would have been drawn at the close of plaintiff's evidence so as to render a verdict for defendants the only reasonable one?" Thus, the court in this case says that even though the doctrine gives rise only to an inference of negligence, such inference, though not strong enough to entitle the plaintiff to an instruction that the defendant is guilty of negligence as a matter of law, is strong enough, in certain cases, to compel the jury to find for the plaintiff if the defendant offers no evidence to show his absence from negligence and even compels a jury finding in favor of the plaintiff where only a scintilla of evidence is offered by the defendant to prove his absence from negligence. This last quoted statement, taken with the court's earlier statement that, in certain cases, the doctrine alone may compel a jury finding in favor of the plaintiff, bears out appellant's assignments of error in this case: that the jury finding of no cause of action, was supported by neither the law nor the evidence.

Later in *White v. Pinney*, the court states the law as it now exists in this state. "In cases where the doctrine of *res ipsa loquitur* applies, the inference of negligence applies the want of proof of negligence, and the defendant is under the duty of rebutting this inference of negligence rather than evidence of negligence." Later

in this opinion, the court goes on to say, “\* \* \* And as the facts be more within the knowledge of defendant than of plaintiff, the burden of the evidence, of going forward, is shifted to the defendant to show that he was not guilty of negligence. In bearing this burden the defendant need not show that he used every precaution, care or skill to prevent the happening of the accident. It is sufficient if he shows that he used the degree of care commensurate with the dangers which men of prudence would have anticipated under the circumstances. In the instant case, defendants made a showing sufficient to present a question of fact for the jury.” The case is then authority for the proposition that the doctrine gives rise to an inference of negligence, which the defendant must somehow rebut to even present a question of fact for the jury. If the inference is in no manner rebutted—no evidence being adduced by defendant—it would be reversible error for the trial court to refuse to direct a verdict in the plaintiff’s favor. By the same token, even if a directed verdict is not requested, as no real question of fact is presented for the jury’s deliberation, the jury would be compelled to find for the plaintiff. However, even if the defendant does offer a scintilla of evidence to rebut the inference, it is contended that generally in other cases and specifically in the case at hand, the evidence in rebuttal was so weak that a finding of no cause of action was not supported by the evidence. To this extent, the early cases of *Williamson v. Salt Lake and Oregon Ry. Co.*, 172 Pac. 680 and *Zocolillo v. Oregon Short Line R. Co.*, 177 Pac. 201 were overruled by impli-

cation in *White v. Pinney*. These two early cases held that in most cases where *res ipsa loquitur* was applicable, the jury might completely disregard the inference even where the defendant offered no evidence in rebuttal. This rule has never been supported by the weight of authority of courts throughout the United States. In 38 Am. Jr. 310 at page 1007, the law as it exists in the great majority of jurisdiction in this country is stated as follows: "Conclusiveness of presumption or inference—the presumption or inference of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case which entitles him to a favorable finding unless the defendant introduces evidence to meet and offset its effect."

To the same effect is *Michner v. Hutton et al.*, 265 Pac. 238, a California case. Here the California court says that the maxim *res ipsa loquitur* gives rise to an inference of negligence, which inference may not be disregarded by the jury, but must be weighed against the evidence adduced by the defendant to prove his absence from negligence. Thus, a finding in favor of the defendant must have support in the evidence.

In the above case, the court cites with approval *Housel v. Pacific Electric Ry. Co.*, 139 Pac. 73, a California case, where it is said, "The presumption (or inference) that the injury was caused by the negligence of the carrier, which is raised upon the proof by the plaintiff that he was injured while being carried as a passenger, is itself a fact which the jury must consider in

determining its verdict, and which, in the absence of any other evidence in reference to the negligence, necessitates a verdict in favor of the plaintiff."

In the dissenting opinion in *Curby v. Bennett Glass and Paint Co.*, 99 Utah 80, 103 Pac. 2nd 657, the dissenters, after holding *res ipsa loquitur* to be applicable, say, "It therefore put upon the defendant the duty of explanation." The court then says that defendant's explanation was not sufficient to overcome the inference of negligence raised by the doctrine. "' \* \* To me, that is not a satisfactory explanation, and if resort to the rule of *res ipsa loquitur* is needed, then we should apply it." It is seen that the dissenters in this case felt that the inference raised by the doctrine could not be abandoned at will, and where a finding is returned in favor of the defendant where the maxim does apply, such a finding is subject to reversal unless the finding has at least some evidence in the record to support it. It is submitted that in the case before the bar, the jury's finding in favor of the defendants was in no manner supported by the record.

In *Angerman Co., Inc. v. Edgemon et ux.*, 76 Utah 394, 290 Pac. 169, a case, on its facts, very similar to the case at hand, the trial court instructed the jury that the doctrine of *res ipsa loquitur* was applicable, and the jury found for the plaintiff. As in the case at hand, in the case cited above, the facts made out a case for the application of the doctrine, and the defendants offered no explanation as to how the water came to escape or as to why it was permitted to flow for such a length of time

and in such volume as to find its way down through the plaintiff's ceiling and upon the goods in the plaintiff's store. The court states, "It was still the duty of the defendant to use due care to discover the trouble and to stop the overflow and prevent the water from causing injury to the plaintiff's goods. Whether they used due care or not in this respect was a question of fact for the jury to find from all the facts and circumstances shown in evidence in the case." It follows that in the case at hand, the respondents offered no evidence whatever that they used due care in discovering the trouble to prevent the accident of September 22, 1950, so that the finding of no cause of action had no support in the record and was, for this reason, erroneous. Later in this opinion at page 173, the court implies that where the doctrine applies, and the defendant offers no explanation of how the accident happened without his fault, the inference of defendant's negligence is brought to bear. Then, even if defendant offers evidence of his freedom from negligence, though this creates a question for the jury, the defendant's evidence of freedom from negligence may be so weak and insufficient as to compel a finding favorable to the plaintiff. The appellant contends that this was the situation here, and even if it be conceded that the defendants offered some evidence to show their absence from negligence, such evidence was so weak and insufficient as to make a finding for the defendants opposed to the weight of the evidence.

2. THE VERDICT OF THE JURY IS AGAINST LAW,  
FOR THE REASON THAT THERE WAS NO EVIDENCE

FROM WHICH THE JURY COULD HAVE FOUND THAT THE PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT, BUT EVEN IF THE VERDICT OF THE JURY WAS BASED UPON ANY CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF, THERE WAS NO EVIDENCE WHATEVER IN SUPPORT OF ANY CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF UP TO THE TIME WHEN THE WATER DAMAGE OCCURRED ON SEPTEMBER 22, 1950 AND THEREFORE, AT THE LEAST, THE JURY SHOULD HAVE FOUND FOR THE PLAINTIFF TO THE EXTENT OF THE WATER DAMAGE THAT RESULTED ON THAT DATE.

The appellant first contends that there was not sufficient evidence offered by the respondent from which the jury would be justified in finding that the plaintiff was in any manner or at any time contributorily negligent.

As to any possible contributory negligence on the part of the appellant after the incident of September 22, 1950, leading up to the incident of October 12, 1950, the appellant contends that it was under a duty only to exercise the degree of care that a reasonable person would exercise under similar circumstances, and that the evidence in this case is that no reasonable person could have foreseen that the plaster would fall, and that there is no evidence to sustain a claim of contributory negligence on the part of the appellant. On the other hand, there is evidence in the record going to show that appellant's conduct in the manner was in every sense prudent. Mr. Earl, a plastering contractor, testified that where a ceiling is damaged by water, the usual and customary procedure is not to immediately try to repair it but to wait until it dries to ascertain the damage. This was exactly what the appellant did, but before the

ceiling had dried, it collapsed on October 12, 1950 (Tr. 130). Therefore, a finding by the jury that appellant plaintiff below, was contributorily negligent after the incident of September 22, 1950 was not supported by the record.

If it be conceded that the jury could have reasonably found for the defendants on the basis that plaintiff was contributorily negligent after the incident of September 22, 1950, still there was no evidence anywhere remotely in this case in support of any contributory negligence of the plaintiff up to the time when the water damage occurred on September 22, 1950. It follows that at the very least the jury should have found for the plaintiff to the extent of the water damage that resulted on that date.

3. THE VERDICT OF THE JURY IS AGAINST LAW, INASMUCH AS THE JURY DID NOT FOLLOW THE COURT'S INSTRUCTION NO. 6, AND FOUND FOR THE DEFENDANTS, ALTHOUGH THE COURT INSTRUCTED THAT THE DEFENDANTS COULD ONLY OVERCOME THE PRESUMPTION OF NEGLIGENCE IF THEY OFFERED AN EXPLANATION AS TO HOW THE WATER CAME TO ESCAPE WITHOUT THEIR FAULT, AND THE DEFENDANTS DID NOT OFFER SUCH EXPLANATION.

In *Karren v. Bair*, 63 Utah 344, 225 Pac. 1094, this court said, "Juries may not without reason overturn legal presumptions or arbitrarily disregard positive statements of witnesses." The appellant contends that this was what the jury proceeded to do in the case at hand. For apparently no reason, the jury disregarded the Court's Instruction No. 6 when there was no evidence offered by defendants either going to explain why the

accident happened without their fault or going to show that the defendants were not negligent. Therefore, the finding of the jury of no cause of action was opposed to the Court's Instruction No. 6 and thus was against the law.

In *Knell v. Morris*, 234 Pac. 2nd 1025 at page 1029, the California Court says, "It was the duty of defendant Mac Mar to exercise ordinary care to keep the heater in a reasonably safe condition so that water should not be permitted to escape and cause injury to the property of the occupant of the floor below. This duty was not limited to conditions actually known to be dangerous, but extended also to conditions which might have been found dangerous by the exercise of reasonable care." In this case, the defendant Mac Mar was in the exact same position as the respondents in this case. He was the tenant above the plaintiff, whose goods had been damaged by the seepage of water from a defective pipe. From the rule of this case, it follows that the respondents were under a duty to use due care to keep the pipes in a reasonably safe condition so that water would not be permitted to escape and cause damage to the goods of the tenant below. Whether the respondents used due care or not would ordinarily have been a question for the jury, but here as there was an inference that due care had not been used and as there was some direct evidence tending to show due care was not used and as respondents offered no evidence whatever to show due care was used, any finding by the jury in favor of the respondents was not supported by the evidence.



4. THE COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 3, WHICH ASKED THE COURT TO INSTRUCT THE JURY THAT THE DEFENDANTS DID NOT OFFER ANY EVIDENCE THAT THEY DID ANYTHING TO PREVENT THE DAMAGE, TO OVERCOME THE INFERENCE OF NEGLIGENCE RAISED BY THE DOCTRINE OF RES IPSA LOQUITUR.

As mentioned before, the appellant contends that the respondents offered no evidence whatever either going to show that respondents were not negligent or going to explain how the incidents in question here might have happened without the respondent's fault. The appellant feels that it was entitled to have the jury instructed to the effect that defendants in the lower court produced no evidence which tended to explain how the accidents occurred without their fault and that no evidence was offered by the defendants below tending to show they were not negligent. Even conceding that the jury, in this case, was entitled to reject the inference of negligence entirely (which the appellant does not concede), still the appellant was entitled to have the jury apprised of the fact that defendants below offered no evidence which might tend to rebut the inference.

5. THE COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 4, AND BY SO DOING THE JURY MIGHT HAVE SPECULATED THAT THE NEGLIGENCE WAS CAUSED BY THE ACT OF SOME OTHER PERSON OR PERSONS WHO WERE NOT IN THE CONTROL OF THE DEFENDANTS, AND THUS FOUND FOR THE DEFENDANTS, WHICH THE JURY WOULD NOT HAVE DONE IF THE JURY HAD BEEN INSTRUCTED THAT IT MUST FIND FOR THE PLAINTIFF IF THE NEGLIGENCE HAD NOT BEEN THAT OF SOME OTHER

PERSON OR PERSONS WHO WERE NOT UNDER THE CONTROL OF THE DEFENDANTS.

PLAINTIFF'S REQUESTED INSTRUCTION NO. 4 WAS SUFFICIENTLY DEFINITE TO INVOKE THE DOCTRINE OF STRICT LIABILITY. UNDER THIS DOCTRINE, THE DEFENDANT WAS LIABLE FOR ALL DAMAGES PROXIMATELY CAUSED BY THE LEAKAGE OF THE DEFENDANT'S PIPE.

The appellant contends that the court should have instructed the jury to the effect that there was no evidence in the case which even remotely tended to show that if the accidents were due to the negligence of some party, that they were due to the negligence of any party other than respondents. By failing to give such an instruction, the jury might have felt that they were authorized to speculate that the accident might have been caused by the negligent conduct of some party besides the respondents. As there was no evidence in the case tending to lend weight to such a speculation, the jury would not have been justified in reaching such a conclusion.

The appellant contends that the doctrine of strict liability was applicable to the case at hand. Under this doctrine, the defendants are liable for all damages proximately caused by the defective instrumentality under their control. Appellant's Requested Instruction No. 4 was sufficiently definite to enable appellant to now invoke the doctrine and claim that the failure of the trial court to give the instruction was erroneous due to the application of the doctrine of strict liability.

In 60 A.L.R. 475, the case of *Horace W. Green v.*

*General Petroleum Corporation*, 270 Pac. 952 is discussed and annotated. This case was decided by the California Supreme Court in 1928, and it still remains one of the leading cases in the United States, which deals with the doctrine of strict liability. At page 480 in volume 60 of A.L.R., the California Court says, "Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury might result to another, proceeds and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done." In this case, appellant's oil well had "blown up" and scattered oil and debris all over the land of the respondents. The trial court had given the respondents, plaintiffs below, a directed verdict on the ground that defendants were absolutely liable. The Supreme Court of California, in this case, held that the directed verdict was properly allowed. The court goes on to say, "In our judgment, no other legal construction can be placed upon the operations of the appellant in this case than that, by its deliberate act of boring its well, it understood the burden and responsibility of controlling and confining whatever force or power it uncovered." The appellant contends that the facts in the case at bar made out a case for the application of the doctrine of liability without fault. The respondents, by their act of bringing on to their premises the water and plumbing pipe which caused the

eventual mischief, undertook the burden and responsibility of controlling and confining the water in the pipe which was under high pressure; thus, even if it be conceded that the respondents were not negligent, the appellant was entitled to prevail in the trial court as a matter of law due to the application of the doctrine of liability without fault.

## CONCLUSION

Briefly stated, the appellant feels that the verdict of the jury in favor of the defendants had no support whatever in the record, and the verdict for reasons stated at length in the brief, was opposed to the law as it exists in Utah and throughout the majority of jurisdictions in the United States. The appellant feels that the court and the jury wrongfully construed the inference arising from the application of the maxim *res ipsa loquitur*, and finally the appellant feels that the verdict was opposed to the law because the facts in this case made out a case for the application of the doctrine of liability without fault.

Respectfully submitted,

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