

1955

# John G. Matievitch v. Hercules Power Co. : Brief of Appellant

Utah Supreme Court

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Lothaire R. Rich; Attorney for Appellant;

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# In the Supreme Court of the State of Utah

JOHN G. MATIEVITCH,

*Appellant,*

vs.

HERCULES POWDER CO.,  
a corporation,

*Respondent.*

Case No. 8281

## BRIEF OF APPELLANT

FILED  
FEB 10 1955

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# TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	3
STATEMENT OF POINTS .....	6
The Court Erred in Granting the Motion for Summary Judgment in the Following Particulars.....	6
ARGUMENT .....	7
1. There Was a Disputed Fact as to the Negligence of the Defendant Which Should Have Been Allowed to go to the Jury .....	7
2. There Was Direct Expert Opinion Evidence Shown in the Affidavit by Qualified Witnesses to Support the Disputed Facts .....	10
3. The Facts and Contentions of the Plaintiff, if True, Created a Prima Facie Case and the Court Erred by Not Allowing the Plaintiff to Prove it by Circumstantial Evidence and the Jury Decide the Question.....	11
4. That Even if the Plaintiff Could Not Prove His Case By Direct or Circumstantial Evidence, the Case Still Should Be Tried and Permitted to go to the Jury on the Theory of Res Ipsa Loquitur.....	16

## CASES CITED

Baker vs. Goodrich, 252 Pac. 2d 24 .....	20, 21
Begnaud vs. White, 170 F. 2d 323 .....	10
Boston & Main R. R. Co. vs. Jesionowski, 329 U. S. 452.....	22
Burr vs. Sheridan Williams Paint Co., 258 Pac. 2d 58.....	27
Chemical Foundation vs. Universal Cyclops, 2 F.R.D. 283..	8

	Page
Escola vs. Coca Cola Bottling Co., 150 Pac. 2d 436.....	21
Flint Explosion Co. vs. Edwards, 66 S.E. 2nd 368.....	26
Gore vs. Multnomah Hotel, 224 Pac. 2d 552.....	24
Hopkins vs. E. I. Dupont Ne Mours, 199 Fed. 2d 930 .....	11, 13, 14, 15, 24
Jordan vs. Coca Cola Bottling Co., 218 Pac. 2d 660.....	17
Lincoln Electric Co. vs. Knox, 56 Fed. Supp. 308.....	8
Maize vs. Atlantic Refining Co., 352 Pa. 51.....	13
Morris vs. E. I. Dupont Ne Mours, 109 S. W. 1222....	11, 13, 15
Park vs. Moorman Mfg Co., 241 Pac. 2d 914.....	12
Ryan vs. Broderick, 59 F. Supp. ....	9
Saprito vs. Purex, 255 Pac. 2d 7 .....	23
Stevens, Salt Lake City Inc. vs. Wong, 259 Pac. 2d 586.....	19
Zentz vs. Coca Cola Bottling Co., 247 Pac. 2d 344 .....	23

## TEXTS CITED

American Law Institute Restatement of Torts, Volume 2	
Section 392, Page 1064.....	24
Sec. 395, Page 1073 .....	25
Sec. 395, Page 1074 and Page 1075.....	25
American Jurisprudence, Vol. 20, Section 271, Evidence....	12
California Law Review, Vol. 37, 183 and 201.....	22
Shain, Res Ipsa Loquitur, Pages 260, 261, 263.....	28
Page 275 .....	29
United States Code Annotated, Vol. 28, Rule 56.....	8, 9
Note 4	
Page 164	
Page 165	
Page 166	
Utah Rules of Civil Procedure, Rule 56 .....	8, 10

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This was an action brought as a result of a premature explosion in blasting by the use of caps and dynamite. That prior to the time of trial the counsel for the defendant moved for summary judgment, which judgment was granted by the District Court and from which summary judgment (R. 45) the plaintiff now appeals.

The plaintiff was employed at the time of the explosion as a powder man by the Utah Portland Cement Company in

their LeGrand quarry in Parley's Canyon in Salt Lake Count, Utah, (R. 26 and R. 15).

On January 9, 1951, the date of the explosion, the plaintiff was preparing the charges which broke up the rocks which had been blasted from the quarry, by loading powder in the holes drilled in the rocks (R. 29). The plaintiff had placed a cap and a stick of dynamite in the hole prepared by the drillers, who had preceeded him, and before he had completed the process, in fact, just as he put the dynamite in the hole, which hole was eight to twelve inches deep, the dynamite being eight inches long, the cap and dynamite blew up (R. 36). The plaintiff was horribly injured, being blinded in both eyes, having one arm blown off just below the wrist, one arm lacerated and cut, and both legs injured.

The plaintiff had worked for the Portland Cement Company in the quarry from 1936 to 1942 (R. 25). He started working for the Company again in 1949 and was working for them until the accident occurred (R. 26). The plaintiff had worked with the powder men from 1936 to 1942 and part of the time as powder man himself and from July 1949 to January 9, 1951 had worked as powder man and drilled with the powder crew (R. 27).

At the time of the explosion, the plaintiff was using caps and dynamite furnished to the Utah Portland Cement Company by the Hercules Powder Company (R. 1, 11, and 16) and loaded the particular hole with the cap and dynamite in exactly the same manner which he had always done and which, in his many years at the quarry, had been done by all

other powder men (R. 16) and in accordance with instructions given him by his supervisors and persons training him.

On numerous and sundry occasions representatives of the Hercules Powder Company had watched the plaintiff and other powder men load holes in exactly the same manner as the hole was loaded on January 9, 1951, and had never disapproved of the method, questioned it, or asked them to change in any way (R. 16 and R. 36).

The plaintiff prepared the caps himself and opened the original package containing the dynamite and the powder caps and they were both in the original packages, still sealed as they came from the manufacturer. The plaintiff had read all of the cautions in times past and knew the contents thereof set forth in the packages of powder and caps as shown at R. 14 and had not on this morning done anything which he was warned against, but had followed his usual procedure.

At the time the motion for summary judgment was made the counsel for the plaintiff conceded that there was no direct evidence as to the composition of the cap and dynamite as all the evidence was destroyed in the explosion and that it would be impossible to prove from the powder and cap itself the negligence or the failure of the defendant to manufacture the caps and dynamite in a safe and satisfactory manner.

The plaintiff stated that he was relying on indirect evidence and circumstances to prove the negligence of the defendant company and the theory of *res ipsa loquitur* to support his position. Two affidavits were filed by powder men other than the plaintiff (see Rudelick and Harwood affidavits (R. 15 &



20) who had worked in this particular rock quarry, one of them having been a powder man for many years, and having been trained by the government in the proper manner of handling powder (R. 20) From the affidavits and other evidence it was clear that the plaintiff had done nothing himself to cause the explosion. Louis Rudelich, as an expert, stated that it was his opinion that the only possible cause of the explosion of the dynamite and cap in this particular case would be that the cap and/or the dynamite was defectively manufactured (R. 22).

In spite of the direct expert opinion evidence the court held that there had to be direct evidence to show the negligence of the defendant and granted the summary judgment.

The counsel for the plaintiff stated that other evidence would be introduced showing the acts of the plaintiff could not have caused the explosion and evidence to show that caps or dynamite manufactured in the usual manner and standard could not be made to explode under the circumstances in this case.

In considering this case, it should be kept in mind that the full case of the plaintiff has definitely not been put on and all of the proof and evidence are certainly not in, but as the evidence to be presented was rather indirect, the court allowed the motion for summary judgment.

## STATEMENT OF POINTS RELIED UPON

THE COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT IN THE FOLLOWING PARTICULARS:



1. There was a disputed fact as to the negligence of the defendant which should have been allowed to go to the jury.

2. There was direct expert opinion evidence shown in the affidavit by qualified witnesses to support the disputed facts.

3. The facts and contentions of the plaintiff, if true, created a prima facie case and the court erred by not allowing the plaintiff to prove it by circumstantial evidence and let the jury decide the question.

4. That even if the plaintiff could not prove his case by direct or circumstantial evidence, the case still should be tried and permitted to go to the jury on the theory of *res ipsa loquitur*.

## ARGUMENT

### POINT NO. 1

THERE WAS A DISPUTED FACT AS TO THE NEGLIGENCE OF THE DEFENDANT WHICH SHOULD HAVE BEEN ALLOWED TO GO TO THE JURY.

It is a well known fact and recognized beyond argument that in all cases where there is a disputed fact that the case should be permitted to go to the jury for the jury to decide.

In a motion for summary judgment it is the law that all the evidence, pleadings, and affidavits of the party opposing the motion for summary judgment should be construed in a light most favorable to the party so opposing. It would seem

that this had not been done in this particular case or the motion would have been denied.

In the instant case there was a direct dispute in the alleged negligence as it was alleged in complaint (R. 1, 2, and 3) and denied in the answer (R. 7, 18, and 19). Inasmuch as the dispute in the pleadings is clear, it would leave the decision to be based on the feight of the evidence which will be discussed further.

The motion for summary judgment was made under the Utah Rules of Civil Procedure, Rule 56, which is practically an exact take off on the U. S. Rule of Civil Procedure for summary judgments, also numbered Rule 56. A study of the U. S. Rule supports the contentions of the plaintiff herein. This is set forth in the United States Code Annotated, Vol. 28, Rule 56, Note 4 and the following: Lincoln Electric Company vs. Knox (1944) 56 Federal Supplement 308:

"This rule was never intended to throw on the court the burden of determining a case involving a delicate question of the law, complicated and controverted facts, without an adequate and proper hearing."

It further states in Chemical Foundation vs. Universal Cyclops (1942) 2 F.R.D. 283:

"It was not the intention of this rule relating to Summary Judgment that a case should be tried by Affidavit as a substitute for trial in the usual way in open court where the right of cross-examination exists."

Page 14 of the above cited volume states:

"A summary judgment should never be given until the facts are clear and undisputed, and if there is *any*

(emphasis supplied) controversy on a factual question judgment should be withheld until proof is made.”

U.S.C.A. Vol. 28, Rule 56, Note 9, Page 155 states:

“Under this rule, summary judgment is authorized only where it affirmatively appears from the pleadings, depositions, affidavits, and admissions on file that except as to the amount of damages there is no genuine issue as to any material fact and that the mover is entitled to judgment as a matter of law.”

Citing from the same Rule, *Ryan vs. Broderick*, 56 Federal Supplement, 189 (1945) states:

“A motion for summary judgment cannot be made a substitute for a trial either before a court or a jury, and a plaintiff who states a cause of action which entitle him to a trial by jury is entitled to have his case tried in that way and cannot be compelled to submit his evidence in the form of affidavits in resistance to a motion for summary judgment.”

It would seem very clear from the above citations that the District Judge had erred in granting the motion for summary judgment as there is no question as to the dispute in the record and there is absolutely nothing in the record to show the actual cause of the explosion, and the jury should be entitled to find the real cause. The only thing in opposition to the plaintiff's theory that the defendant was negligent in manufacture was the very nebulous statement that dynamite is dangerous and should be handled carefully.

It is still going to have to be decided just exactly what did happen to cause the accident. The plaintiff's theories and the defendant's other theories have not been placed in evidence.

It would seem that the court by its ruling is compelling or will compel each and every plaintiff to present all of his evidence in the form of depositions or affidavits so that everything could be examined before the trial, contrary to the general intent and interpretation of Rule 56, and that the trial court has passed judgment prematurely. This is supported by *Begnaud vs. White* (1948) 170 F. 2d 323:

“The Trial Judge should be slow in passing upon the motion for Summary Judgment which would deprive party of right to trial by jury where the material fact is disputed.”

To allow the ruling to stand in the present case would practically do away with trials except in cases where there is actual direct evidence of eye witnesses.

## POINT NO. II

THERE WAS DIRECT OPINION EVIDENCE SHOWN IN THE AFFIDAVIT BY QUALIFIED WITNESSES TO SUPPORT THE DISPUTED FACT.

The court erred in ignoring the opinion evidence of Louis Rudelich, who was qualified as an expert as shown by his affidavit. Instead of assuming that the explosion was the result of a defective cap or dynamite as the court was bound to do in considering the motion, the court entirely ignored the opinion evidence of Louis Rudelich, who seems to have been the most qualified of any person shown in the record to say what caused the accident. The direct conclusion of Mr. Rudelich is that

the explosion could not have been caused by anything except defective materials furnished by the defendant (R. 22).

It is such a well established fact under the law that experts are allowed to express their opinion even though they cannot testify directly as to the actual occurrence, that it would seem to be specious to argue the point. However, it seems to have been ignored in this instance. From the record in a number of powder cases which have been reported, opinion evidence was used in similar situations where the actual evidence was just as nebulous and indirect as it is in the present case.

This was true in the case of *Morris vs. E. I. Dupont Ne Mours*, (1937) 109 S. W. 1222, and *Hopkins vs. E. I. Dupont Ne Mours*, (1952) 199 Fed. 2d 930. In this latter case, opinion evidence of an expert was clearly allowed both for the plaintiff and the defendant, and the court, from its opinion, very clearly recognized the expert opinion of a man trained by practical experience over the years, such as is the case with Mr. Rudelich. This case will be cited further.

From the above it would seem clear that without any further evidence, except the statement of Mr. Rudelich, this motion should have been denied.

### POINT III

THAT THE FACTS AND CONTENTIONS OF THE PLAINTIFF, IF TRUE, CREATED A PRIMA FACIE CASE AND THE COURT ERRED BY NOT ALLOWING THE PLAINTIFF TO PROVE IT BY CIRCUMSTANTIAL EVIDENCE AND THE JURY DECIDE THE QUESTION.

The court erred in not allowing the plaintiff to prove his contentions by the use of circumstantial evidence. With respect to circumstantial evidence as proof of a fact, attention is called to Volume 20, Am. Jur., Section 271:

"The competency of circumstantial evidence is not open to question, provided it is the *best evidence* which the nature of the case admits, or its use is not prevented by a binding contractual provision which excludes use of circumstantial evidence arises either from the nature of the inquiry or the failure of direct proof, considerable latitude is allowed in the reception of circumstantial evidence. No evidence should be excluded of any fact or circumstance connected with the principal transaction in dispute from which an inference as to the truth of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. However, a fact is admissible as a basis of an inference only where the desired inference is of an interference only where the desired inference is a probable or natural explanation of the fact and a more probable and natural one than other explanations, if any.

The attorney for the plaintiff calls attention to the case of *Park vs. Moorman Manufacturing Company* (1952) 241 Pac. 2nd, 914, which was tried by this attorney. That was a case of chickens dying from use of feed, and in that case there was absolutely no direct evidence to show that the manufacturer was negligent in the manufacturing of the feed, and it was admitted that the feed which was purported to have caused the death had no deleterious or poisonous substances and was constituted exactly as represented by the manufacturer, and that the feed in and of itself could not kill the chickens.



During the course of the trial, there were many other reasons shown why the death of the chickens involved could have been the result of numerous and sundry other factors and illnesses rather than the feed in question. However, it was submitted to the jury and even though there was no direct evidence, judgment was obtained and was unanimously upheld by the Utah Supreme Court in 1952. The case is being reported and annotated in the A. L. R., second series.

With respect to circumstantial evidence and its proof it comes very close to involving the theory of *res ipsa loquitur*, as *res ipsa loquitur* is based somewhat on circumstances and inferences.

However, the Pennsylvania case of *Hopkins vs. E. I. Dupont Ne Mours*, 199 Fed. 2d 930, was based strictly on circumstantial evidence, and the doctrine of *res ipsa loquitur* was not considered, as the court of Pennsylvania has previously held that *res ipsa loquitur* does not apply in explosion cases.

In this case, the plaintiff's husband was drilling bore holes about six feet deep which were to be filled with dynamite, and at the time of the filling, another drill was operating within five feet of the hole. Defendant's expert testified that the explosion was caused by heat and/or vibration from the drilling in the adjacent hole. The court cited *Maize vs. Atlantic Refining Co.*, 352 Pa. 51, stating that the *Maize* case stands for the proposition that one who supplies an instrumentality for the use by others and who knows or should know that the foreseeable use is dangerous for human life unless certain precautions are taken and who realize or should realize that



the probable user will not recognize the danger is under a duty to warn of such danger and to advise the proper precautions.

Quoting the Hopkins vs. Ne Mours case, the court stated, the defendants

“ . . . attempted to parry the thrust of the Maize case by saying it is inapplicable here. Defendant tells us that everybody knows that dynamite is dangerous and there is no need to warn against the obvious, but the plaintiff's theory does not go to the generally dangerous character of the dynamite.”

Says everyone should know that dynamite should not be thrown in the fire, but construction workers don't know that heat or vibration of drilling will cause an explosion and should be warned of the danger. The case further shows that the defendant was warned by publishing the safety list of 63 “don'ts” (apparently the same 63 “don'ts” as shown in the affidavit of L. W. Early, R. 13) and that item No. 21 warns against loading the final charge in a sprung hole until it is cooled off. The court said, however, there was no warning about the new hole. The defendant claimed there was no competent proof by the plaintiff as to the actual happening and no proof of negligence from the mere happening of the event, but the court stated:

“PROOF TO A DEGREE OF MATHEMATICAL PRECISION IS NOT REQUIRED.” (Emphasis supplied.)

And it further states:

“That it is not the rule that circumstantial evidence need exclude everything which the ingenuity of counsel may suggest as having caused or contributed to death.”

In the Hopkins vs. Ne Mours case, the lower court had found in favor of the defendant, based on lack of direct evidence, but the Federal Court reversed it and found for the plaintiff.

In the Morris vs. E. I. Dupont Ne Mours (previously cited) the drill holes were in clay and the holes were four feet deep and were loaded by pushing the dynamite and cap in with the tamping stick and there was a premature explosion.

In the trial of this case, the judgment was given to the defendant, based on what was later admitted to be erroneous instructions to the jury. However, in arguing the case, to the Appellate Court, the defendant contended that it did not make any difference whether or not the instructions were erroneous, as the plaintiff had not made out a submissible case, and consequently the correctness or incorrectness of the instructions would have no bearing on the liability of the defendant. The Court agreed that the plaintiff would have no claim if a submissible case had not been made. The defendant further contended that the cause of the premature explosion was strictly a matter of *circumstantial evidence* and *conjecture* (emphasis supplied) and that there was no direct evidence to show the real cause of the explosion. The Court held that there was circumstantial evidence and that a number of inferences might be drawn as to the cause of the explosion but that even though several inferences might be drawn, the plaintiff had made out a submissible case and the *inferences* could be *concentrated* (emphasis supplied) and become basis for final liability. The case was reversed and remanded.

From the foregoing cases and the rules set forth therein,

it would seem clear that the plaintiff should be allowed to show all of the surrounding circumstances and facts concerning the actual explosion and the defendant be allowed to show any circumstances or theory which they have which might explain the explosion and then permit the jury to determine the actual cause of the accident.

To refuse to permit the jury to determine these facts was error and the motion for summary judgment should have been denied.

#### POINT NO. IV

THAT EVEN IF THE PLAINTIFF COULD NOT PROVE HIS CASE BY DIRECT OR CIRCUMSTANTIAL EVIDENCE, THE CASE SHOULD BE TRIED AND PERMITTED TO GO TO THE JURY ON THE THEORY OF RES IPSA LOQUITUR.

The theory of res ipsa loquitur—meaning the thing speaks for itself—has been applied in numerous explosion cases similar in nature to the case at hand and should have been applied in this case. If res ipsa loquitur is allowed in this case, the plaintiff would only be required to show that he was free from negligence in the handling of the caps and dynamite. After it was shown that he was free from negligence, the jury could infer that there had been negligence on the part of the manufacturer from the fact of the explosion itself.

In the early application of the doctrine, a number of jurisdictions established the theory that the defendant, at the time of the accident had to have an actual physical control of the

object which caused the injury. These cases are practically universally outmoded in the present trend, which will be seen from the cases cited and the rules set forth therein. It is now almost universally recognized that if the manufacturer, the defendant, was negligent even though the particular item which caused the injury passed through many hands if the item was not changed but remained in the same state as when it left the control of the manufacturer and the plaintiff does nothing to contribute to the accident, then the theory of *res ipsa loquitur* applies.

Utah recognizes the *res ipsa loquitur* theory as is clearly shown in the cases decided by the Supreme Court. The defendant relied on the case of *Jordan vs. Coca Cola Bottling Company*, (Utah 1950) 218 Pac. 2d 660, to support its position. In this case the injury arose from the alleged swallowing of a fly in a bottle of Coca Cola which was served out of a dispensing machine in Magna. The court very clearly recognized the theory of *res ipsa loquitur* and set forth the responsibility of the manufacturer to third persons who were injured by their products. The court stated that there were four classes of packaged items, the first being where the packaged articles pass directly from the manufacturer to the consumer, and the second classification being where the package or bottle comes to the consumer so sealed as food and drink in cans, or otherwise so constructed that its contents reached the consumer without possibility of change by intermediate parties. The court stated:

“In both cases the facts clearly justify the application of the *res ipsa loquitur* doctrine, that the thing speaks for itself.”

The Court very clearly recognized that the instrumentality causing the injury did not need to be in the actual physical control of the defendant. The Court classified the instrumentalities into four classes, one of which was a manufactured product which was in the original package and there was no opportunity for interference with the product before the ultimate consumption by the injured person. Then the instant case of the Coca Cola bottle, where the evidence showed there was a very strong and likely possibility of interference with the product between the time of the manufacture and the time of the actual consumption.

In this particular case, the Court stated that the evidence showed almost overwhelmingly that a fly could not leave the manufacturing plant of the defendant in the bottle after the inspection was made. There was also evidence that the cork on the bottle could be removed and a fly placed in the bottle without detection. Based on this evidence, the Court stated that there was not enough inference of negligence to allow the theory of *res ipsa loquitur* to apply.

This was a 3-2 decision and the dissenting opinion set forth that it was straining probability too far to state that a fly had been put in after the bottle had left the plant as set forth by the majority.

Applying these doctrines to the case at bar, the evidence will show that the powder and the caps were both in the original package and were opened at the time the charges were made and used the same day, and that there was no opportunity for tampering in the mean time. Hence, it would

come under the theory that it was in the original package doctrine of *res ipsa loquitur*.

The Utah Supreme Court also recognized the doctrine of *res ipsa loquitur* in the case of *Stevens, Salt Lake City Incorporated vs. Wong*, 259 Pac. 2d, 586. That was a suit to recover for the injury caused by a leaking water pipe. The plaintiff applied the theory of *res ipsa loquitur* for a leaking water pipe which had been placed in the building 12 years previously, which according to common knowledge, should have lasted the life of the building, but did not and caused a leak and damage. The cause was submitted to the jury on the theory of *res ipsa loquitur* and the jury found no cause of action. The plaintiff appealed on the ground that the plaintiff was entitled to a judgment, as a matter of law, based on the theory of *res ipsa loquitur* that without satisfactory explanation there was negligence.

The Supreme Court held that *res ipsa loquitur* allows the fact finder to *infer* negligence from the happening of the event and in the absence of explanation might, in some instances, compel the finding of negligence, but stated that the plaintiff was not entitled to judgment as matter of law from the mere happening of the event. The concurring opinion said that the circumstantial evidence of the negligence might be highly persuasive and impelling but did not feel that the Court should go so far as to say that in any case the fact finder should be compelled to find negligence.

There have been a number of explosion cases in which the *res ipsa loquitur* doctrine was applied. Typical are explosions of bottled soda water, explosions of Purex cleaning

fluid, explosions of liquid preparations by paint companies, powder explosion cases, and even tire explosion cases.

Probably one of the leading explosion cases setting forth the doctrine in a very full and complete manner is the case of *Baker vs. Goodrich* (Cal. 1953) 252 Pac. 2d 24. In this case, a tire exploded after it had been placed on a rim by an employee of B. F. Goodrich. This case was originally decided in favor of the defendant, but was reversed on appeal. The Court set forth three standards for testing the theory of *res ipsa loquitur*:

- “1. The accident must be the kind that ordinarily does not occur in the absence of someone’s negligence.
2. It must not have been due to any voluntary action or contribution on the part of the plaintiff.
3. It must be caused by an agency or instrumentality within the exclusive control of the defendant.”

Applying these theories to the present case, we find that the explosion was definitely premature and could not have happened unless someone was negligent, nor the kind that ordinarily happens in the absence of someone’s negligence (R. 16 & 39). The question of fact to be determined is as to whose negligence was the cause?

With respect to the second item, there is no question that the instrumentality, the cap and the dynamite, was out of the physical control of the defendant at the time of the explosion, so we must examine the cases to see whether or not this precludes recovery as contended by the defendants in this case.

The Court, in *Baker vs. B. F. Goodrich*, states:



“The requirement that the instrumentality in question must have been within the exclusive control of the defendant before the doctrine of *res ipsa loquitur* is applicable does not require proof of such control by defendant at the *time of the accident*, but control *at the time of the negligent act is sufficient under certain circumstances.*” (Emphasis supplied.)

The court further stated that whether or not the manufacturer's evidence was sufficient to rebut the inference of negligence arising from the application of the doctrine of *res ipsa loquitur* was for the jury and the District Court would not undertake such a determination.

In this case the Court quoted from *Escola vs. Coca Cola Bottling Company*, (Cal. 1944) 150 Pac. 2d. In the *Escola* case, a bottle of Coca Cola blew up in a woman's hand, severely cutting her. She proved that there was no negligence on her part in handling the bottle and rested after announcing to the court that being unable to show any specific acts of negligence she relied completely on the doctrine of *res ipsa loquitur*.

The court stated:

“Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the *more logical view*, (emphasis supplied) however, the doctrine may be applied on the theory that the *defendant had control at the time of the alleged negligent act although not at the time of the accident* (emphasis supplied), provided plaintiff first proves the condition of the instrumentality had not been changed after it left the defendant's possession.”

In suits for explosion of bottled soda water the application of *res ipsa loquitur* theory seems to be invoked by such a weight of authority as to be almost universal in application.

In the *Baker vs. Goodrich* case, the court also cited article "*Res Ipsa Loquitur in California*," 37 *California Law Review*, 183 and 201, as follows:

"The plaintiff's mere possession of chattel which injures him does not prevent a *res ipsa loquitur* case where it is made clear that he had done nothing abnormal and has used the thing only for the purposes for which it was intended. The plaintiff need only tell enough of what he did and how the accident happened to permit the conclusion that the fault was not his. Again, he has the burden of proof by a mere preponderance of the evidence and even though the question of his own contribution is left in doubt, *res ipsa loquitur* may still be applied under the instruction to the jury."

The Court also quoted from the Supreme Court of the United States in the case of the *Boston & Maine Railroad Company vs. Jesionowski*, 329 U. S. 452:

"We cannot agree, that *res ipsa loquitur* thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operation, even though it was proved that his operations of the things under his control did not cause the accident. This viewpoint unduly restricts the power of the Jury, and in this case, the Jury's right to draw inference from the evidence to support a verdict and the sufficiency of that evidence to support a verdict. A conceptualistic doctrine of *res ipsa loquitur*

has never been used by this Court to reduce the Jury's power to draw inferences from the facts. Such an interpretation unduly narrows the doctrine as this Court applies it."

In the *Zentz vs. Coca Cola Bottling Company*, 247 Pac. 2d 344, *res ipsa loquitur* was permitted. This was a case of injury received from an exploding bottle of Coca Cola where the plaintiff obtained a judgment below and it was affirmed and was based on the explosion of a bottle of Coca Cola and consequent injury. The Court stated:

"The fact that the accident occurred some time after the defendant relinquished control of the instrumentality which caused the accident does not preclude the doctrine of *res ipsa loquitur*, provided there is evidence that the instrumentality has not been improperly handled by the plaintiff or some third person, or its condition otherwise changed, after control was relinquished by the defendant; but it must appear that the defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for the plaintiff's injury.

"A person may properly rely upon the doctrine of *res ipsa loquitur* even though he has participated in events leading to the accident if the evidence excludes him as a responsible cause."

In the case of *Saprito vs. Purex* (Cal. 1953) 255 Pac. 2d 7, the doctrine of *res ipsa loquitur* was applied. This was a case of an exploding bottle of purex cleaner, an injury being sustained from the explosion. In this case, the bottle had a special pressure release and a special warning to keep in a cool place, but the court upheld that the evidence that the bottle was not damaged or had been mistreated, permitted

the invoking of the doctrine of *res ipsa loquitur* and stated the fact of the mere explosion under the circumstances was sufficient to support the judgment of negligence.

The plaintiff also calls attention to the *Hopkins vs. E. I. Dupont Ne Mours* case (previously cited) which was upheld purely on the basis of circumstantial evidence. However, the separate opinion of the concurring judge was that they might just as well have gone off on the theory of *res ipsa loquitur*.

With further respect to the control of the instrumentality, the Court in an Oregon case in 1950 of *Gore vs. Multnomah Hotel*, 224 Pac. 2d 552, set forth the proposition that under the doctrine of *res ipsa loquitur*, the plaintiff's mere possession of a chattel injuring him does not prevent a *res ipsa loquitur* case where it is clear that he has done nothing abnormal and has used the thing only for the purpose for which it was intended.

In the argument in the District Court, the counsel for the defendant argued that the manufacturer should not be liable for items which have left its control and traveled through so many different hands. This, of course, has already been shown not to excuse the manufacturer. However, the manufacturer is specifically shown to have responsibility to third persons. This is set forth in the American Law Institute Restatement of Torts, Volume 2, Section 392-398, covers the responsibility of a manufacturer to third persons, calling attention to Section 392, Page 1064, states:

#### Chattel Dangerous For Intended Use

"One who supplies another directly or through a third person, a chattle to be used for the supplier's

business purposes is subject to liability to those for whose use the chattel is supplied for bodily harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied

- a. if the supplier has failed to exercise reasonable care to make the chattel safe for which it is supplied, or
- b. the supplier fails to give to those whom he should expect to use the chattel the information required and the accident is due to the failure to exercise reasonable care to discover its dangerous character or condition.”

Also Section 395, Page 1073:

### Negligent Manufacture

“A manufacturer who fails to exercise reasonable care in the manufacture or chattel, which unless carefully made he should recognize as involving an unreasonable risk causing substantial bodily harm to those who use it for the purpose for which it was manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it was manufactured.” (See also 1074 and 1075).

From this it is seen that the manufacturer is definitely liable to third persons who use the manufactured article and the more dangerous the article is likely to be in its ultimate use, the more care is required in the manufacture of the article, and contrary to the argument of counsel for defendant, those who handle the article do not assume the risk of any negligence of the manufacturer. The only assumption of risk in a dangerous

occupation is the assumption of normal hazards and not for any negligent manufacture or defective equipment, but only those risks which are inherent at all times.

This theory is supported by *Flint Explosion Company vs. Edwards*, 66 S. E. 2d 368. This is a case of premature explosion of dynamite in the lighting of a fuse. In this case, it was sent back for a re-trial because the complaint was duplicitous in that plaintiff was pleading both ordinary negligence and wanton negligence. However, the Court said in that case:

“A manufacturer or seller of an article which is inherently and imminently dangerous to life, to health or becomes dangerous thereto when applied to its intended use in the usual and customary manner is liable to the buyer or third persons for injuries sustained without his fault as a natural and proximate result of negligence in the manufacture.

What constitutes due care by a manufacturer or dealer in manufacture or sale of articles which are inherently dangerous to human life or become dangerous thereto when applied to their intended use in the usual and customary manner varies with the danger inherent therein and a greater measure of care is necessary in dealing with explosives than ordinary products.

In an action against the manufacturer or seller of dynamite and caps and allegedly defective fuse, for injuries to the buyer as a result of premature explosion, said defendants exercised due care, whether the manufacturer exercised measure of care adopted by explosives industry generally and fixed by general trade custom in regulating and supervising personnel in the sale and distribution and use of explosives, and even, whether failure to do so was negligence, were fact questions for the Jury.”



In the case of *Burr vs. Sherwin-Williams Company*, (Cal. 1953) 258 Pac. 2d 58, the theory of *res ipsa loquitur* was applied. The Court stated:

“The manufacture of an article which is inherent or imminently dangerous or which although not dangerous in itself becomes so when applied to its intended use in the usual and customary manner is liable to any third person whether the purchaser or a third person who without fault on his part sustains an injury which is the natural and proximate result of negligence in the manufacture of the article, if the injury might have reasonably been anticipated.”

In the powder explosion case, the defendant has tried to distinguish this from the other explosions cited on the theory that the dynamite was manufactured to explode and that it did exactly what it was supposed to do.

However, it would seem that this could be no excuse or reason for not applying the doctrine, or reason for the excusing of a premature explosion as the powder is definitely dangerous and therefore the manufacturer has that much higher degree of responsibility placed upon him on it to see that the product is manufactured and only explode under the conditions for which it is manufactured and on no other occasion.

It would seem to the plaintiff that if there was any assumption of risk in an explosion, the assumption of risk would be on the part of the manufacturer, as the manufacturer has chosen to make his living in a business where there is some danger and it should not be excused from its negligence just because someone else had also chosen to work with powder.



In research, counsel has been unable to find any place or any case where the manufacturer or supplier has been excused from negligence in the manufacture of any article, no matter what its use was intended to be.

There is a growing need and tendency for the broader application of the doctrine of *res ipsa loquitur* as shown in the volume, "Res Ipsa Loquitur—Presumptions and Burden of Proof" by Mark Shain. Quoting from Page 260 it states:

"In these days of intensified and diversified industrialism and mechanics, the presumption *res ipsa loquitur*, judiciously applied, is an invaluable medium and means for the lessening of litigation, saving expense to litigants and reducing the duration of trials."

And from Page 261:

"Plain common sense tells us that risks and injuries in every walk of life, which will concern all members of society, except the one hundred per cent recluse or hermit, must increase."

Also on page 263:

"When something breaks or explodes or seems to go berserk, and injures, maims or kills a few or many employees, patrons or others who are exposed to danger without fault on their part, and who have no possible means of either knowing or proving what caused the calamity,—why should not that ownership and management which assumed responsibility and which, by every rule or reason, right, logic and equity, must know or be able to ascertain the true cause, be required to assume the burden of proof to explain and exculpate itself for negligence?"

Again, why should not the manufacturer or distributor of prepared foods or medicine which contain

deliterious or poisonous substances—or manufacturer of explosives—(the words “or manufacturer of explosives” were inserted by counsel to point up the particular situation), or the person who permits a heavy object to drop from his upper window on a passer by, be required to establish, be a preponderance of the evidence, his freedom from negligence?”

Mr. Shain further states on Page 275:

“It is arbitrary, provincial and archaic to cling to the rule that the doctrine and principal of *res ipsa loquitur* may be invoked in passenger-carrier cases, only, and that, regardless of how completely the circumstances of a falling object, or a master and servant case, or of those involving food poisoning, defective machinery, or any one of almost innumerable other situations wherein state courts have found that the facts and surrounding conditions showed a typical *res ipsa* case, the eyes of the highest court in the land are closed and its ears are deaf to the appeal of the injured party for relief through that doctrine. To so hold in effect denies to all classes except one a protection of the law accorded to that one.”

As there has not been a case decided by the Supreme Court of the State of Utah on explosions, although the counsel is advised there is a tire explosion case pending, it would seem the application of the doctrine in this case could be very far reaching if the court fails to apply the theory of *res ipsa loquitur*. It would seem that all persons who were injured by explosions where there can be no direct evidence would be precluded from all recovery. This would include any hunter who has a shell explode in his hand while he was handling it in an ordinary and normal fashion, any powder man who is injured no matter how negligent the manufacturer was

in the manufacture of the actual articles, and all the bottle cases.

It would seem to counsel, as Mr. Shain points out, that this would be an unnecessary restriction and would impede progress and deny rights to parties injured.

The cases hold that it is not necessary to show by evidence and preclude all possibility of an intervening cause, but only that it is reasonably certain that there has been no tampering or change of the instrumentality between the time of the possession of the defendant and the time of the accident.

It would seem clear that the fact that the defendant was manufacturing dynamite and caps to be used by third persons, knowing the very danger of the use, is required to use more than ordinary care to inspect all of the materials supplied and to actually supply goods which are safe in every respect, when used in the ordinary manner for the purpose for which goods were manufactured. Here the evidence does show and will show that the dynamite and cap was used in the regular ordinary manner, in a manner known and approved by the defendant, for the purpose for which it was manufactured.

In applying the doctrine as set forth in the latter cases of *res ipsa loquitur*, it would seem clear:

1. That the plaintiff is entitled to have the evidence heard as to all the circumstances and facts surrounding the accident and submitted to the jury for its determination of actual facts.

2. That the plaintiff, if he can reasonably prove that there has been no change in the powder and dynamite in the instant

case from the time that it left the factory until the time of the explosion and that nothing that he has done contributed or was the proximate cause of the accident, the plaintiff is entitled to invoke the theory of *res ipsa loquitur*, and the jury allowed to determine negligence.

3. That is from all the evidence there can be a number of explanations even though based on inference and circumstantial evidence that the jury is entitled to consider all of the possible explanations and determine which, if any, of the possible explanations was the cause of the accident, and state the ultimate liability.

## CONCLUSION

The appellant respectfully represents to the Honorable Court that the summary judgment of the lower court was given in error and that the plaintiff should be allowed to place his evidence before the jury and have the jury determine the facts of the case and this Court should reverse and remand the case for that purpose.

Respectfully submitted,

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