

1955

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

Utah Supreme Court

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C. C. Parsons; A. D. Moffat; Calvin A. Behle; Attorneys for Respondent;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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JOHN G. MATIEVITCH,

*Appellant,*

— vs. —

HERCULES POWDER COMPANY,  
a corporation,

*Respondent.*

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**BRIEF OF RESPONDENT**

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JOHN G. MATIEVITCH,

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Case No. 8281

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### BRIEF OF RESPONDENT

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After due consideration of the pleadings, plaintiff's deposition, affidavits filed by both parties, oral arguments and written briefs filed below, Judge Van Cott of the Third Judicial District entered a Summary Judgment dismissing plaintiff's action against the Hercules Powder Company, respondent. Defendant was the manufacturer of the dynamite and blasting caps, the explosion of which had injured plaintiff.

There was no dispute below as to the evidence. Plaintiff concedes in his briefs "that there is no direct evidence to show how the defendant was negligent in the manufacture of the caps and dynamite." The sole issue below, which is the genuine issue here on appeal, is the *legal* question of whether on the basis of plaintiff's own statement of the evidence in this particular case, the doctrine of *res ipsa loquitur* could be invoked to permit inference of defendant's negligence, and so take the case to the jury.

## I.

### STATEMENT OF FACTS

Since the particular facts determine whether as a matter of law the specific occurrence will itself bespeak of negligence, a more detailed reference to the record before the court below than was presented by appellant's brief is deemed essential. In so stating these facts it is to be remembered that the basic question on appeal is the District Court's decision that these facts, favorably construed for plaintiff and absent any genuine issue with respect thereto, as a matter of law required the equivalent of a directed verdict for defendant or the sustaining of a demurrer to plaintiff's complaint if such facts had been properly pleaded, under the old practice. What, then, are these facts?

1. Defendant's manager, L. W. Early, made affidavit as follows (R. 10-11):

3. That said defendant company for many years has and now is engaged in the business of manufacturing explosives, including dynamite and blasting caps. That the dangerous nature of dynamite and particularly of blasting caps is well known. That such products are packed by the defendant in containers marked with warning signs of the dangerous nature of the product. That in each case of dynamite and blasting caps as manufactured and produced by defendant, written warnings and instructions as to use are inserted, a copy of which is attached hereto and by reference is made a part hereof.

4. That such products are sold wholesale by defendant to jobbers or distributors, and in some instances are sold direct to major consumers of such dynamite and blasting caps. That for many years defendant has known that its dynamite and blasting caps had been used by the Portland Cement Company, operator of the Le Grande Quarry in Parley's Canyon, Utah.

5. That said Portland Cement Company was the employer of plaintiff, who was injured at said quarry on the 9th day of January, 1951. That at times said Portland Cement Company has purchased and used the dynamite and blasting caps of manufacturers other than defendant, together with fuses purchased from others. That defendant does not manufacture or sell the fuse which is used to ignite the blasting caps. That the use of dynamite, blasting caps and fuse and the operation and control of the said Le Grande Quarry at all times has been and is under the exclusive direction of said Portland Cement Company as owner and operator thereof.

6. That the inherent nature of blasting caps is such that they will readily detonate or explode unless at all times carefully handled and protected from heat, shock, pressure or contact with rock, metal or other hard substances.

2. Plaintiff's fellow-employee, W. W. Harwood, made affidavit that he knew that the caps and powder being used by plaintiff on the day of the accident (January 9, 1951) were of defendant's manufacture, having been so marked on the containers in the Portland Cement Company's powder house from which the particular caps and powder were removed by plaintiff for use on that day (paragraphs 7 and 10, R. 16).

3. There is no dispute as to these facts; or as to the accident itself. We quote from plaintiff's own deposition, plaintiff being the sole witness as to these facts (deposition pages 1 to 19, R. 24 to 42) :

"JOHN G. MATIEVITCH, plaintiff herein, called as a witness at the instance and request of the defendant, being first duly sworn, testified as follows :

\* \* \*

Q. What year, or about when did you become employed by the Utah Portland Cement Company?

A. Well, sir, it was 1936.



• • •

Q. Now, John, can you describe briefly what your work on the powder would be, in terms that some of us who are not in that work can understand? What would you do?

A. How I had to do it?

Q. Yes. What were your duties?

A. I was a powderman, loading holes.

Q. Can you describe the holes?

A. Well, the drill men drill the holes; then we powdermen load them. Do you want to know how they are loaded?

Q. You wouldn't drill the holes, is that it?

A. One day I would be powderman and two days a drillman; we changed; there were three of us up there.

Q. There were three on the crew, is that right?

A. Yes.

Q. Approximately what are the dimensions of those holes?

A. They varied.

Q. They vary in depth you mean?

A. Yes; some would be different.

Q. Are they drilled by a pneumatic type of drill, or what kind of drill do you use?

A. What we had been using there? All different types of drills up there, 18 inch and there was a three-footer. It depends on the boulder; you have to use your own judgment.

Q. You were drilling boulders that had been blasted from the face of the quarry?

A. Yes, the bottom would be covered up; the shovel would dig some of them out and put them on the side for us to drill.

Q. Those are large boulders that had been blasted from the face of the quarry, is that right?

A. Yes; they vary, them boulders.

Q. They are large boulders that have been blasted from the face?

A. Yes, that has been blasted.

Q. Then they have to be broken up, is that right?

A. If they are too big for the crusher.

Q. Is that called secondary blasting?

A. I guess so, yes.

Q. You and your fellow employes would drill the holes and then put in the powder, is that correct?

A. There would be two drills; one day the powderman would be doing the loading; the drillmen wouldn't be doing nothing but just do their drilling.

Q. The depth of those holes would depend on the particular boulder, is that correct?

A. Yes sir.

Q. Then after the drilling then the charge is put in, is that correct?

A. Yes sir.

Q. By the powderman?

A. Yes sir.

Q. How would that be done? Would you describe that?

A. Well, we would fold the blasting cap. (indicating)

Q. Like a fishhook?

A. Yes, until we fold it over. (indicating)

Q. This end? (indicating)

A. Yes, that is, of the blasting cap; then put it in the drill hole.

Q. Then would you put the powder on top of it?

A. You would slit the powder down the side and put it in.

Q. On top of the fuse and the cap?

A. Yes.

Q. Then what is the next step in the operation, tamp it?

A. Yes, tamp it.

Q. As I understand, the fuse is kind of stiff like an electric wire, isn't it?

A. It is stiff.

Q. And a black covered material?

A. Yes sir.

Q. And on the end of that you fasten — it is a copper cap, isn't it?

A. Yes sir.

Q. That is the blasting cap?

A. That is the blasting cap that you crimp on the end of it.

Q. Then you would hook the cap around like a fishhook on the end?

A. Just bend it over like a hook.

Q. Then insert the cap on the bent end down to the bottom of the drill hole, is that correct?

A. Yes sir.

Q. Now, the powder comes in cartridges, doesn't it? What do you call the powder charge?

A. That comes in sticks.

Q. You call it a stick?

A. A stick.

Q. Those are about how long?

A. I would say approximately around eight inches.

Q. The diameter is smaller than the hole so it will fit down in the hole, is that right?

A. Yes sir.

Q. Did I infer you to say you would gouge out the sides so it would fit around the fuse, is that it?

A. What do you mean by "gouge out the sides"?

Q. I don't know; you were telling me as I understood you —

A. I split it and put it in the hole.

Q. When you split it how would that be done?

A. Just slitting each side of it — the stick of powder.

Q. You mean you would break it in two like a pencil?

A. No; slit it down.

Q. What with?

A. A pocket knife.

Q. What would the purpose of that be?

A. So if you tamp it it tamps better.

Q. It loosens it up?

A. Loosens it up so when you put it in there you don't force it or anything.

Q. Then do you tamp it?

A. Yes, tamp it.

Q. How is that done?

A. With a tamping stick.

Q. Is that a wooden stick?

A. Yes sir.

Q. That fits down in the hole; and what does it do, enable you to apply pressure?

A. You don't put much pressure, just a little bit down in there.

Q. To firm it up?

A. To firm it.

Q. You pack it solid, is that right?

A. Yes.

Q. Then I guess you light the fuse and get out of there, is that it?

A. You have to get out.

\* \* \*

Q. Now, on January 9, of 1951, you were working in the quarry, were you not.

A. Yes sir.

\* \* \*

Q. Shortly before the time of the accident do you recall what you were doing?

A. A short time before the accident?

Q. Yes.

A. I was getting my stuff ready to load, getting my primers and powder and all that.

Q. You were getting ready to blast one of these boulders, is that it?

A. Well, we get quite a few of them loaded.

Q. Then you send them off at the same time, is that it?

A. Yes sir.

Q. Then will you just tell us in your own words, as far as you can remember, just what happened?

A. Well, I put my blasting cap—like I told you—folded it, slit my powder down the sides, and put it in the hole; just as I put it in the hole, that's all I could tell; it just exploded.

Q. Was that a full stick of dynamite?

A. It was a full stick.

Q. You had put it in the hole after slitting it — do you slit it?

A. Yes, just down the sides.

Q. You were tamping it?

A. No sir.

Q. How deep was that particular hole?

A. That was approximately around between 8 and 12 inches.

Q. Can you remember anything else that happened in connection with the accident?

A. Just that I put it in that way; it just surprised me.

Q. Had you drilled the hole?

A. No.

Q. Do you remember who drilled the hole?

A. It was one of the drillmen.

Q. Who were the drillmen?

A. Harold Buchanan and Bill Harwood.

Q. They had drilled it and gotten it ready for you, is that right?

A. Yes.

Q. You inserted the cap and the fuse, is that right?

A. Yes.



Q. Did there appear to be anything unusual with respect to either the cap or fuse in appearance?

A. No sir.

Q. And then you slit with a knife the stick of dynamite?

A. Yes.

Q. Did it appear to be normal, as far as you could observe?

A. As far as I could observe it was normal.

Q. Then you put the stick into the hole, is that right?

A. Yes sir.

Q. Are these holes vertical or horizontal?

A. Well, we just drill them straight down.

Q. Just drill them straight down?

A. Yes sir, straight down; just the way your boulders would lay too.

Q. Would it be fair to say in this case you dropped the stick down in the hole?

A. No; I put it in there; I didn't drop it; I just put it in.

Q. You inserted it?

A. Yes.

Q. And then it would drop by gravity I guess the balance of the way, wouldn't it, to the bottom?

A. When you put it in there it just goes down itself.

Q. You recall distinctly that you didn't tamp it, is that correct?

A. Yes sir.

Q. And the explosion occurred right after you had let go of the stick?

A. Just when I put it in and let go; just a big explosion. I have never seen from that day on.

Q. Mr. Matievitch, which hand do you use to put a stick of dynamite in one of these holes?

A. Use my left hand.

Q. Is the right hand holding the fuse?

A. Put it in with your left hand; you use both hands at times.

Q. Is one hand usually holding the fuse in place and the other is inserting the dynamite, is that right?

A. Yes.

Q. Is there a possibility that as you were inserting the dynamite you were pulling on the fuse with your other hand?

A. No; when you put your fuse in you don't mess around with the fuse; you just put the fuse in, then your dynamite.

Q. You hold that steady, is that it?

A. Yes, you pick up the end of the fuse and split the end of it when it is loaded.

Q. I am afraid I don't understand that; I can see how you insert the cap on the end of the fuse, and you are holding it in place, is that right, in the hole?

A. Just fold it and put it in your drill hole, - the cap.

Q. Then with your left hand you insert the stick of dynamite?

A. Yes.

Q. Now, are you sure this was a full stick?

A. Yes sir.

Q. Sometimes you break the stick into a quarter or half, don't you?

A. Yes, it varies in different sizes of your boulders; you can tell by that; it varies in different sizes of boulders; some take a half stick, some a stick; some less than half.

Q. It is your best recollection this was a full stick in this case, is that right?

A. Yes sir.

Q. And you inserted that with your left hand in the hole, is that right?

A. Inserted the powder, yes.

Q. Then, as I understand it, as you let go of the stick of dynamite, the explosion occurred?

A. Yes sir.

Q. Of course, Mr. Matievitch, after an explosion, including this explosion, would there be anything left of the cap or explosive or fuse?

A. Oh no.

Q. Those materials are just completely disintegrated, is that right?

A. Disintegrated with the blast I guess.

Q. Mr. Matievitch, where did you learn how to handle powder and to insert these charges in the drill holes?

A. That was when I went up there to work, up to the quarry; the powder man up there that was on—I was taught.

Q. By your fellow employes?

A. By my fellow employes.

Q. Again, who was in charge of the operation?

A. He is gone; he is Up Above; he died.

Q. What was his name?

A. Bob Rukovina — you mean in charge of us?

Q. Yes.

A. He knew more about it than any of us at that time.

Q. Was he around there at that time?

A. No, he passed away.

Q. But he is the man more than any other who instructed you as to how to work with powder?

A. Yes sir.

Q. Did anyone ever tell you that the safe way to load such a charge was to insert the cap in the top of the stick of dynamite and then to insert the stick of dynamite into the hole?

A. No sir, nobody ever told me that; just what I was taught up there from their other powdermen.

Q. So far as you know the standard way of blasting these boulders was to first insert the cap on the fishhook of the fuse and then the powder, is that right?

A. Yes sir, put your powder in.

Q. Then you tamp, is that right?

A. Yes.

THE WITNESS: Sometimes I don't get you, what you say. You will have to excuse me.

MR. BEHLE: I appreciate that. That is why I want you to feel free to add anything here to the story because we are just trying to find out what happened.

Q. Have you any idea as to what caused this explosion?

A. Just by putting my powder in, and that explosion; that's all I could say on it.

Q. You knew, of course, that explosives are inherently dangerous? I mean they have to be handled carefully; you knew that?

A. Oh yes.

Q. And you don't know of anything on this day that you did that was out of the ordinary?

A. No sir.

Q. In your experience out there had there ever been another unexpected explosion?

A. Well, not the way I had it.

Q. Who had charge of the explosives — the supply?

A. Well, that was left to us; we had the keys, —the powdermen.

Q. You had the keys to the powder room?

A. Yes.

Q. These sticks of dynamite come in cases, don't they?

A. Yes, cases.

Q. Would you unpack those cases?

A. When we go to use the dynamite we would unpack them.

Q. Each case has a set of instructions in it, has it not?

A. Yes sir.

Q. Did you ever read those instructions?

A. Yes sir.

Q. But, again, no one ever told you that it was a dangerous practice to drop the dynamite on top of the fishhook fuse and cap?

A. No sir.

Q. In the years of working up there you never followed the practice of inserting the cap in the stick of dynamite and fastening it on and then putting the stick of dynamite in the hole?

A. Well, they laced powder up there when the holes are a lot deeper, where you have to go quite a ways down, they have always laced that way.

Q. But not in your blasting of these boulders?

A. No, they wouldn't do it that way. Sometimes the holes varied; some are deeper you know.

Q. On some of the deeper holes you have laced the powder?

A. That was when you had the long holes, as if you were shooting underground and had three or four feet—(then you) have to lace the powder; couldn't force the cap in a hole like that. We never do force caps anyway, though.

Q. Then, again, the way you have described is the way during all these years you inserted the powder charge into the drill holes of these boulders?

A. That is how they done it all the time when they were drilling boulders; that is how they loaded.

Q. Are you working now?

A. No sir.

Q. Did you tell me how old you were? I think you said thirty-nine.

A. Thirty-nine.

Q. Married?

A. No sir.

MR. BEHLE: Do you have any questions?

MR. RICH: I have no questions.

MR. BEHLE:

Q. Anything more you want to say Mr. Matievitch?

A. That is all I could say.

Q. That tells the story fairly and completely, as best you know?

A. To the best of my knowledge.

MR. BEHLE: Thanks very much, as we appreciate your coming up here.



(Off the record)

MR. BEHLE:

Q. At the time of the explosion do you recall where your tamping stick was?

A. No, I couldn't tell you that.

Q. I thought you said while we were off the record that it was under your left arm.

A. You said after the explosion?

Q. I say at the time of the explosion.

A. It was under my left arm.

Q. Under your left arm?

A. Yes. I thought you meant after the explosion.

Q. So you are sure that you were not tamping at the time of the explosion?

A. Yes sir.

Q. Tamping would have been the next step, is that right?

A. Yes, that would have been the next step after putting the powder in.

Q. Then do you use sand to hold the fuse in place, or just tamp?

A. Just tamp.

Q. These fuses are not electrically operated, are they?

A. No sir.

Q. Do you use a match?

A. Yes, we have a spitter.

Q. That sets off a series?

A. Yes; that keeps spitting your fire out and you touch your ends to it.

Q. Where was Mr. Harwood at the time of the explosion, do you recall?

A. He was there drilling.

Q. Was he one of your crew?

A. He was one of the crew, yes sir.

Q. How big was the boulder, do you recall?

A. I would say approximately between 400 and 500 pounds.

Q. How high would that stand?

A. I couldn't recall how high it stands.

Q. Well about? Would that be the height of a man?

A. Well, that was over there with them others; I couldn't tell how high it would stand.

Q. Would you have to get up on top of it?

A. No, I didn't get on top of it.

Q. Again, you state that it was a full stick?

A. Yes sir.

Q. And that you had not tamped?

A. No sir.

4. The foregoing deposition of plaintiff thus reveals his failure to follow the manufacturer's instruction as to use of the inherently dangerous product. These instructions stated (reference is also made to the illustrations) as follows (R. 13):

**PRIMING:** When blasting caps are used, the proper length of fuse should be cut from the roll and the blasting cap crimped to the fresh cut end of the fuse with a cap crimper, not with a knife or with the teeth. Be sure that the fuse is cut square across and that the end is pushed gently against the explosive material in the blasting cap. Do not twist the fuse inside the cap. The crimp in the blasting cap should be made near the end through which the fuse enters. In wet work, the joint between the fuse and cap should be made thoroughly waterproof.

Punch a hole about the size of a lead pencil either in the end or side of the cartridge, this hole to be a little deeper than the length of the blasting cap. Insert the blasting cap and fasten the fuse securely to the dynamite cartridge to prevent the cap and fuse being pulled out of the dynamite cartridge. Aim to keep the blasting cap axially in the center of the cartridge. See Figs. 1 and 2.

(Illustrations omitted)

## II.

### STATEMENT OF POINTS

1. There was no genuine issue of material fact in this case.

2. *Res ipsa loquitur* does not here apply.

3. Plaintiff was not denied opportunity to present his contentions below.

### III.

#### ARGUMENT

1. There was no genuine issue of material fact in this case.

While the *cause* of plaintiff's accident remains in question, it will be seen from the statement of the record below that the basic facts with respect to what had occurred were simply not in dispute. The real issue below, as well as here, was one of *law* as applied to these undisputed facts.

By this action plaintiff undertook the burden of proof to establish that the defendant was negligent in some respect in connection with the manufacture of a particular one of the hundreds of thousands of blasting caps or dynamite sticks which defendant has produced at its various plants. These caps, packed in bulk with instructions as to use, as well as the dynamite, are distributed throughout the world through wholesale and retail outlets, and far beyond defendant's control.

To meet this burden of proof and in the admitted absence of any evidence, plaintiff in effect urges this court to promulgate a rule of law that in the event of any explosion, the manufacturer of any of the components contributing to the explosion must permit a jury to speculate as to the cause of the accident. This of course is not the law of negligence, but is a doctrine of absolute manufacturer's liability for all practical purposes.

a. In addition to urging this rule of law, discussed hereinafter, plaintiff would support his case by permitting an expression of raw opinion by an alleged "expert" as to cause.

Attention is invited to the details of Rudelich's gratuitous conclusion as an old powderman that this particular accident, occurring in a hazardous occupation where any number of factors may have caused the accident, was due to faulty manufacture. A reading of this affidavit (R. 20 to 22) discloses not only the incompetence of the powderman to express an opinion as to *manufacture*, but that its use is simply fantastic as a substitute for competent factual evidence of negligent manufacture. We are even left to speculate as to whether the negligent manufacture was as to the blasting cap, or as to the dynamite.

The affidavit is the equivalent of plaintiff's in a motor vehicle case expressing his raw personal opinion that he was not negligent, but that the defendant was.

Of course these are the very matters which the trier of the facts is to determine, assuming competent evidence raises a dispute of fact which requires determination.

It will be noted that Rudelich's affidavit avers nothing whatsoever with respect to any "special knowledge, skill, experience or training" in the *manufacture* of explosives, as required by Rule 402 of the Model Code of Evidence. This rule merely re-states the well settled law; and since the fact at issue was defendant's alleged negligence in the manufacture of its products, the rejection by the lower court of this affidavit was obviously understandable. Rule 56 (e) requires such affidavits to "set forth such facts as would be admissible in evidence", and also establish that affiant was "competent to testify to the matters stated therein." Accordingly, the conclusions of such affidavit, although under oath, are worth no more than the bare assertion by counsel in the complaint, under his professional certificate, that the explosion was due to defendant's negligence. Neither per se is the equivalent of the evidence necessary to support such a charge; and the burden of establishing these charges by competent evidence rests upon plaintiff, not defendant.

b. Nor can an issue raised in the pleadings be sufficient to raise a genuine issue of fact for the purposes of the summary judgment procedure, when the evidence is set forth under oath in competent affidavit or deposition form. Plaintiff's contention (page 8) that an issue in the pleadings per se constitutes a genuine issue would

of course destroy the efficacy of motions under Rule 56 and defeat the purpose of the procedure. *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469, 473; Rule 56, note subdivision (e) page 50, May 8, 1954 Report of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States.

If there *is* a genuine issue of fact, admittedly the motion for summary judgment should be denied. *Young v. Felornia*, ..... Utah ....., 244 P. 2d 862; although the order pursuant to section (d) of Rule 56 should proceed to cover appropriate pretrial matters.

c. Nor, as plaintiff contends (page 9), are theories the equivalent of the competent evidence necessary to create genuine fact issues. Plaintiff is still free to present and argue whatever theories were proper below under the *facts*. His trouble is the absence of facts to support his averment, first, that defendant negligently manufactured a product, and secondly, that this negligence in manufacture was the proximate cause of plaintiff's injuries. Of course if such negligence and causation are proved, there would be liability under the rules quoted by plaintiff from the Restatement in 2 Torts A.L.I. § § 388 et seq.

In this connection it might be well to reiterate that *negligence in manufacture* is here the basis of plaintiff's cause of action. It is not breach of warranty, as in *Park*



v. Moorman, or negligence in warning as to use, which was the cause of action in the Hopkins case and in other cases relied upon in plaintiff's brief.

- - -

Counsel appears to misconstrue or misunderstand the function of the summary judgment procedure, which is designed for situations such as this where competent evidence as to the material facts is either lacking, or is not in dispute. In either case, there remains nothing for the trier of facts to determine, since there is no issue as to the material facts. With the expedition afforded by the summary judgment procedure, the legal questions can be determined without the delay, expense and inconvenience otherwise resulting in calling the case for trial, impaneling a jury, permitting witnesses such as plaintiff to testify, and then determining the matter on a proper motion for a directed verdict.

The genuine issue in this case still remains the *legal* one of whether or not *res ipsa loquitur* could be invoked as a rule of law under the undisputed facts of this accident. If so, admittedly a jury question would be presented; if not, the summary judgment was proper, for otherwise no genuine issue of fact was in this case.



## 2. *Res ipsa loquitur* does not here apply.

No one here questions the propriety of the court's extension of the doctrine of *res ipsa loquitur* to fact-situations of a modern world. This is the strength of the common law.

a. One may not under certain conditions expect a properly manufactured and installed water pipe to burst, a new tire to explode upon inflation, or a bottle of beverage to explode, without the probability of negligence on the part of the manufacturer or producer, any more than we would expect electricity to cause damage to a pedestrian or a street lamp to fall upon him, etc., etc., without the probability of negligence on the part of the persons in control of these various instrumentalities.

Throughout all such fact-situations, and as said by courts and text writers everywhere, for the occurrence itself to bespeak of negligence on the part of those in control, the accident must be the kind that ordinarily does not occur in the absence of negligence; and the accident must be caused by an agency or instrumentality still within the exclusive practical control of the party charged with negligence. The basis of the doctrine and quotations from cases and the texts with respect to its application to a particular case have been reiterated time and time again by this court; e.g., *Jordan v. Coca Cola Bottling Co.*, 117 Utah 578, 218 P 2d 660.

In sharp contrast to fact-situations where the doctrine has been applied as a matter of law to raise an inference of negligence, is the situation pertaining to the

blasting cap. In its very nature it is inherently explosive; its use is not in the control of the manufacturer. News stories over the years unfortunately have been and still are replete with reports of boys injured while trespassing and playing with caps, and of accidents from explosives to workmen such as plaintiff. The reported causes are almost invariably carelessness on the part of persons handling these sensitive caps, rather than negligence in their production. The instrumentalities exploded, just as they were designed to do.

Society's remedy—admittedly as inadequate in one sense to the injured as are monetary damages in any personal injury case, is the coverage apart from negligence of workmen's compensation laws, plus safety laws and inspections to prevent such tragedies as occurred to plaintiff in the course of his employment.

b. Here the record is silent concerning not only the manufacture of this particular cap and dynamite by defendant, but also as to the progress of these products from the point of manufacture and packing in cases and boxes with instructions. We pick up the trail long after, when plaintiff is reported to have selected the particular cap and dynamite stick from the powderhouse of the employer.

We *do* know that plaintiff *alone* was in control of the operation. It was plaintiff who placed the blasting materials in the particular drill hole. Also we know that

unfortunately the plaintiff was not following the manufacturer's explicit instructions as to priming the charge. His method of loading reminds one of another old hard-rock miner's practice: crimping the blasting cap onto the fuses with his teeth. The reasons for abandonment of both practices—tooth-crimping, and dropping the dynamite stick down the drill hole on top of the previously inserted cap and fuse—are the same: sad experience with the older and more primitive methods simply resulted in too many accidents of the very type which occurred in this case.

It matters not that in plaintiff's opinion (R. 38) or in the instructions of his old-time teacher Rukovina (R. 37) or that in the opinion of "expert" Rudelich (R. 21), the practice of first inserting the cap on its fishhook fuse could be done without causing an explosion. Experience had demonstrated—at least to others—that to permit contact of the sensitive detonator against the hard-rock substances of the drill holes *might* and probably here did cause an accident.

If anything, the fact-situation which we have in this case bespeaks of plaintiff's *own* negligence as the person in control, carelessly failing to follow instruction issued by the manufacturer as to the particular products; and not that defendant was negligent in the manufacture of a product which exploded in the course of the very work for which the product was designed, and in a manner of use for which warning was given.

c. That *res ipsa loquitur* does not apply to fact-situations pertaining to explosion of dynamite caps in cases comparable to plaintiff's, are the following:

### 35 C.J.S. § 11—EXPLOSIVES:

\* \* \*

The mere explosion of dynamite caps carries with it no presumption of negligence on the part of the manufacturer or seller, and the injured person has the burden of proving that the manufacturer or seller was guilty of the negligence charged, particularly where such explosive is not under the exclusive control of defendant. Similarly, in an action against the manufacturer of a powder fuse for injuries resulting to a purchaser from a delayed explosion, plaintiff has the burden of proving defendant's negligence. However, in a minor plaintiff's action based on defendant's unlawful sale of a torpedo to him, he is not required to prove that the torpedo contained a dangerous and explosive substance, within the statute.

See also 22 Am. Jur., Explosions and Explosives, §§ 73 and 95.

*Sierocinski v. E. I. DuPont de Nemours & Co.*, 118 F. 2d 531, was a dynamite cap case where the explosion occurred upon crimping. There the United States Court of Appeals affirmed the District Court below, which refused to apply *res ipsa loquitur* in the following words:

\* \* \*

\* \* \* Here, the defendant was not in control of the instrumentality which inflicted the injury. The custody and manner of using the cap was in the exclusive control of the plaintiff. While the defendant's manufacture of the cap was admitted, what the circumstances of its storage and care had been from the time it left the defendant's possession until the plaintiff's employer purchased it was not traced. Proof of manufacture was not sufficient to impute continued control to the defendant. See *Zahniser et al v. Pennsylvania Torpedo Co., Ltd.*, 190 Pa. 350, 353, 42 A. 707. In fact, the plaintiff's proof did not exclude the possibility of intervening fault (occurring between the time the Magnesia Company received the cap and the time the plaintiff took it from the storage magazine for use) for which the defendant would not be responsible. What the Supreme Court of Pennsylvania said in *Rucinski v. Cohn*, 297 Pa. 105, 115, 146 A. 445, 448, where the defendant was out of control of the instrumentality, is apposite here, "it would extend the rule of responsibility to unwarranted lengths and make it virtually that of *res ipsa loquitur* to sustain a recovery under the facts as here shown."

It will be remembered that plaintiff's failure to follow the manufacturer's instructions as to method of priming might here speculatively have been the cause of the accident. The *Sierocinski* case above is also pertinent in this connection, the court saying:

But even if the evidence warranted a finding that the defendant's original control had been unbroken down to the time of the accident, neither

the rule of *res ipsa loquitur* nor the doctrine of exclusive control was available to the plaintiff. There is evidence in the plaintiff's case from which it could be reasonably inferred that the accident happened in a manner for which the defendant was not blameable. One of the plaintiff's witnesses, who was 50 to 75 feet from the scene at the time of the accident, testified that there were two explosions. Another witness, who came to the scene immediately after the accident, testified to finding the crimpers undamaged lying on the top of the "Day magazine" and also some cut fuses; that he found three fuses with exploded caps and a like number with unexploded caps hanging on nearby bushes; that physical evidences of the explosion were found on the ground 9 feet from the "day magazine"; and that the plaintiff had then said that he had had seven or eight fuse caps in his hand just prior to the accident. The plaintiff himself testified that the great toe of his left foot was blown off although protected by a heavy working shoe and that he also suffered injuries to his legs, chest, arms, throat and face. In these circumstances, an inference that the accident was precipitated by the plaintiff's stepping upon a cap while bending over to recover some dropped caps would not have been unreasonable. The matter for consideration in this connection is not the choosing of one inference against another. Credibility is not for the court. *The thing of importance is that an inference exculpating the defendant from guilt could also be reasonably drawn from the evidence. That, of itself, is sufficient to prevent the application of res ipsa loquitur or the doctrine of exclusive control.* As was said in *Coralnick v. Abbotts Dairies*, 337 Pa. 344, 345, 11 A. 2d 143, 144, "There being causes apparent, other than those within defendant's control, to which the accident might with equal fair-



ness be attributed, the doctrine of *res ipsa loquitur* does not apply.” And, the same has been said as to the inapplicability of the doctrine of exclusive control. *Zahniser et al v. Pennsylvania Torpedo Co., Ltd.*, supra, 190 Pa. at page 353, 42 A. 707. See also *Norris v. Philadelphia Electric Co.*, supra, 334 Pa. at page 165, 5 A. 2d 114, and *Clark v. Pennsylvania Power & Light Co.*, 336 Pa. 75, 80, 6 A. 2d 892.

Finally, the Federal Court opinion had this to say with respect to alleged breach of warranty:

The appellee argues on this appeal, apparently for the first time, that the judgment may be sustained on the basis of a breach of warranty by the defendant. Aside from no relation having been shown to support a warranty by the defendant in favor of the plaintiff, the case was pleaded, tried and submitted on the ground of alleged negligence. The plaintiff having failed to sustain the burden of proving negligence either directly or circumstantially, the defendant was entitled to an affirmance of its request for a directed verdict.

This court has had occasion to deal with faulty operation of fuse cases in the appeal of *Buhler v. Maddison*, 105 Utah 39, 140 P. 2d 933. We quote as follows:

\*\*\* Plaintiff continued to use the same fuse. On July 2, 1941, he placed a charge of dynamite in a hole in the tunnel to which he attached the primer—a piece of fuse about 14 inches in length with the cap attached. He lighted the fuse and he and Kay then retired a safe distance and waited

from 5 to 8 minutes for the charge to explode, but hearing no explosion, he believed the fuse had stopped burning before reaching the cap and the dynamite. He entered the cross-cut which constituted the approach to the tunnel to pick up a length of fuse to make a new primer, when the charge exploded, hurling rocks and dirt, causing facial injuries and the loss of his left eye, as well as body bruises.

\*\*\*

To recover under any theory of common law negligence, the evidence must be sufficient to reasonably justify the jury in finding that defendant was guilty of negligence which proximately caused plaintiff's injuries, and that plaintiff was not guilty of contributory negligence, and that he did not assume the risk here involved. The only negligence alleged is that defendant furnished plaintiff with defective fuse. Plaintiff concedes that he discovered that the fuse had been wet and that it was slow burning, when he first came to the Lone Pine claims, and that he conducted experiments which demonstrated that certain parts burned more slowly than others; also that at times the fuse burned out before the fire reached the charge, although he had only 3 or 4 "missed holes" or shots. However, in each case when a charge failed to explode prior to the time of the accident, he waited from 15 to 20 minutes before going into the tunnel to set a new primer. He also admitted he was aware of the safety regulations of both Utah and Nevada which forbid going into a tunnel or other area where a charge has been set until 45 minutes after the time when it normally should have exploded. In this case he waited only 5 to 8 minutes, and went into a place of known danger where a substantial charge of dynamite had been



connected with a fuse which he left burning. He knew the fuse was defective in that there was delayed burning, and that in any event a state safety regulation prohibited any approach of said danger zone for 45 minutes. Even if the employer was guilty of negligence in furnishing such slow-burning fuse, it would be unreasonable to find that plaintiff was not guilty of contributory negligence under such circumstances. Thus, under the common law doctrine of negligence and contributory negligence, plaintiff cannot recover.

Ensign-Bickford Co. v. Reeves, 95 F. 2d 190, is another fuse case. In holding that a directed verdict should have been sustained for want of substantial testimony for the plaintiff, the United States Court of Appeals said:

The use of such fuse as is here in question is to convey fire to the charge of explosive slowly and in approximately measurable time, allowing the workmen opportunity to retire to a safe distance. The fuse is not itself dangerous to life or limb and one who manufactures and sells such fuse is not an insurer of the product. Cf. *Amason v. Ford Motor Co.*, 5 Cir., 80 F. 2d 265. The law requires him to use care in making it and inspecting it which is commensurate with the dangers involved in its intended use. *Davlin v. Henry Ford & Son*, 6 Cir., 20 F. 2d 317; *Dupont De Nemours & Co. v. Baridon*, 8 Cir., 73 F. 2d 26; *Favo v. Remington Arms Co.*, 67 App. Div. 414, 73 N.Y.S. 788. But absent any showing that his machinery, materials, designs or methods were faulty or that he had failed to use proper care, he cannot be held

liable for such an occurrence as the plaintiff has described in his testimony. If it be assumed that the plaintiff's testimony as to how the accident happened was true, and if it be further assumed that there was one very small piece out of the many millions of feet of defendant's fuse which had the defect of hanging fire for 15 minutes and then conveying the spark to the powder charge, such facts are not in themselves sufficient to convict defendant of actionable negligence toward the plaintiff. The burden of proof was upon the plaintiff to establish that the defendant was guilty of some lack of due care, that it did something or failed to do something which prudence forbade or required and which was the proximate cause of the injuries.

\*\*\*

We think the cases cited are not applicable to the facts in this case. Whether actionable negligence is shown must always depend upon the circumstances of the particular case. It must be determined from the peculiar facts whether taking that view of the evidence most favorable to the plaintiff it can be fairly inferred that the defendant has put out a dangerously defective article as a result of the lack of due care on its part. In the cases cited there was sufficient proof of negligence. Here such proof was lacking even if it be assumed that a powder gap in the fuse was the cause of a delayed explosion which injured the plaintiff.

**3. Plaintiff was not denied opportunity to present his contentions below.**

It is simply not true, as appellant now suggests to the court in his brief (pp. 6, 9, 10) that he was denied the opportunity to raise a genuine issue of fact before the court below.

Plaintiff's deposition was taken May 19, 1954 (R. 24-44). There was full opportunity to cross examine, and plaintiff said the deposition told the story "fairly and completely," to the best of his knowledge. (R. 40) Defendant filed its Motion for Summary Judgment supported by the Early affidavit and this deposition on June 7, 1954 (R. 8 to 13). Plaintiff filed his own affidavit on June 17th (R. 15 to 17). Oral argument was held June 18, 1954 (R. 14). Plaintiff filed further affidavits August 21st (R. 20-22). Written briefs were submitted, and the court made its decision October 1, 1954 (R. 45).

While plaintiff designated the entire record below to be brought before this court (R. 47), there has been omitted the oral argument and the briefs, from which it would be painfully clear that counsel was permitted every opportunity to present his contentions and to raise any material issue of fact that might genuinely and honestly exist.

However, the record before the court is nevertheless clear on this point. Plaintiff cannot now assert that he

was foreclosed from properly presenting his case below. For the purposes of the Motion for Summary Judgment it is obvious that ample opportunity was afforded him so to do. The only issue properly before this court is the legal question of whether the court committed error by entering summary judgment on the state of the record as the parties made it below in connection with defendant's motion.

Plaintiff's true position, and the drastic proposal he is making to this court, is succinctly stated on pages 28 and 29 of his brief when he poses this question: "Again, why should not the \* \* \* manufacturer of explosives \* \* \* be required to establish, *by a preponderance of the evidence*, his freedom from negligence?"

Among the many answers to this radical proposal are these:

a. Plaintiff, entirely apart from any theory of negligence, has already been compensated by his employer under the Workmen's Compensation Act for the injuries he incurred in the course of his employment.

b. Under the Anglo-American system of justice, from time immemorial it has been left to the accuser to

prove his charges. Why not also change to the Continental system of requiring the accused in a criminal case to disprove charges against him?

c. *Res Ipsa Loquitur* is the common law doctrine designed to assist a plaintiff in meeting his burden of proof in circumstances where experience under the particular facts indicates both the probability of negligence on the part of the defendant, and where defendant in control is in the position reasonably to assume the burden of going forward with the evidence as to just what was the cause of the accident, if indeed it was not due to his own negligence. This doctrine with all its adaptability to modern life in proper cases has been thought just and fair to all concerned, by raising as a matter of law the inference of defendant's negligence *when plaintiff has proceeded to establish the facts requisite to the creation of such inference as a matter of law.*

d. Such a radical departure from our system of law as plaintiff suggests should at least come by legislative action rather than by judicial revolution.

e. As a practical matter the proposal amounts to a rule of absolute liability. Properly presented with conflicting evidence, by and large the jury is still the best

medium we know to sit and weigh out the truth. Plaintiff's proposal, however, in essence does not involve determination of facts, but of liability, placing a premium on appeal to the emotions.

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At least absolute liability would avoid what amounts to a speculative guess by the jury.

Also at this point we invite the court's attention to the fact that the record below is silent in connection with two matters which plaintiff's brief asserts were before the court:

a. On page 5 plaintiff states that "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."

b. Counsel states that evidence would "show that caps or dynamite manufactured in the usual manner and standard could not be made to explode under the circumstances in this case. (Brief page 6)

This simply is not the record before the court below.

## IV.

### CONCLUSION

Since the evidence below was not in dispute, and the facts in this case were not such as to bespeak of negligence on the part of defendant as the manufacturer of the particular blasting cap and dynamite handled by plaintiff, it is respectfully submitted that Summary Judgment of no cause of action was properly made and entered in this cause.

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