1964

Selanie Sanone v. J. C. Penney Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

SELANIE SANONE, by and through her Guardian Ad Litem, JOHN G. SANONE,

Plaintiff-Respondent,

v.

J. C. PENNEY COMPANY, a corporation, WESTINGHOUSE ELECTRIC CORPORATION, a corporation, and ELEVATOR SERVICE & SUPPLY COMPANY, a corporation,

Defendants-Appellants

No. 10047

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. A. H. Ellett, Judge

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STATEMENT OF THE KIND OF CASE

This is an action for personal injuries to Selanie Sanone, a minor, occurring on the escalator in the defendant J. C. Penney Store located at 213 South Main Street, Salt Lake City, Utah.

DISPOSITION IN THE LOWER COURT

The defendant J. C. Penney Company was granted leave to make Westinghouse Electric Corporation and Elevator Service & Supply Company, a corporation, parties to this action. After service of summons and the third party complaint alleging negligence and an amendment

thereto alleging breach of contract, the Court, upon motion, dismissed the third party's complaint as amended without prejudice. Thereafter plaintiff amended her complaint, joining Westinghouse Electric Corporation and Elevator Service & Supply Company as defendants. The Court dismissed the defendant Westinghouse Electric Corporation with prejudice and denied defendant Elevator Service & Supply Company's motion to dismiss. Pursuant to a covenant not to sue, the defendant Elevator Service & Supply Company paid the plaintiff $7,000.00, which settlement was approved by the Court. The case was tried to a jury. From the verdict and judgment for the plaintiff in the sum of $12,500.00, the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant J. C. Penney Company seeks a reversal of the judgment and judgment in its favor as a matter of law, and that failing, a reversal of the Court's ruling dismissing its third party complaint against Elevator Service & Supply Company.

STATEMENT OF FACTS

On June 29, 1961, Mrs. John G. Sanone brought her two and one-half year old daughter, Selanie, the plaintiff in this case, to Salt Lake City. They were accompanied by Mrs. Sanone's best girl friend, Mrs. David A. Goodwill, and her minor child. They were going to do some shopping and take the two children to lunch. They arrived in downtown Salt Lake City at approximately 11:00 A.M., and went first to Auerbach's. (R 209-210) They shopped in

Auerbach's, where Mrs. Sanone allowed the little girl to ride the escalator. (R 219) They walked from Auerbach's to J. C. Penney's, where they shopped on the main floor for about fifteen or twenty minutes, and then she went upstairs to the second floor blouse department, riding the escalator and carrying Selanie. They shopped another fifteen or twenty minutes until about noon, or a little after, and then decided to go downstairs. Selanie asked her mother if she could ride the escalator, and Mrs. Sanone said, "Yes", put her down, and took hold of her hand. They were then about ten feet from the escalator, and Mrs. Sanone was holding Selanie's right hand with her left hand. When she got to the escalator she tells what happened:

> "A. I waited for a step to come and had hold of her hand and walked up to the edge and watched her step on, and we stepped on together and started down.
>
> Q. After you stepped on together, were you still holding onto her hand?
>
> A. Oh yes. I had quite a tight hold on it because —helping her to step on.
>
> Q. And where were you looking after you got on the escalator?
>
> A. I looked down as we got on and took hold of the hand and looked straight ahead.
>
> Q. And while you were proceeding down the escalator, tell the court and jury what happened.
>
> A. Well, we had just barely started out, and we were just standing there riding down, and all of a

sudden I felt her pulling down on my hand I thought, and just then she sobbed out, "Mommie, my foot is caught," and I glanced down, and I couldn't see her leg. I could just see the escalator opening up, and I thought her shoe was caught, so I ripped up, pulling her out. Sorry.

Q. And at the time when you pulled her out, Mrs. Sanone, did she scream?

A. Yes.

Q. And then what did you do?

A. I didn't—still didn't know what had happened, and she was sort of standing on one foot. It was all so fast, and I just picked her up into my arms, and then I saw her leg." (R 212-213)

On cross-examination, Mrs. Sanone testified that she did not have any concern in her mind about letting Selanie ride an escalator, nor did she expect any warning sign. (R 219) She couldn't see Selanie's leg when she screamed because of Selanie's two slips and dress. (R 219)

Q. Now, you are acquainted with the fact that there are many escalators in Salt Lake City?

A. Yes, sir.

Q. And would it be fair to say that you have probably ridden all of them?

A. Probably.

Q. Would it also be fair to say that you have taken the little girl on the escalators before in other stores?

A. Occasionally.

Q. Also in J. C. Penney's before, haven't you?

A. I think so.

Q. You have shopped there many times?

A. Yes.

Q. Would you have an estimate of how many?

A. She was—oh, I wouldn't say more than two times. I didn't usually go up there because of the walking. We usually just shopped at Auerbach's.

Q. Did you—had you had the little girl on that particular escalator before?

A. I don't recall any time I ever had.

Q. You could have, couldn't you?

A. I could have, yes.

Q. You had no difficulty previous to this time?

A. No." (R 221-222)

They had been walking around prior to the time the accident occurred, and she had carried Selanie, or they had walked together and held hands. The weather was warm on June 29th, but she had not noticed whether the child's leg had perspired or not. (R 223)

It was approximately 12:30 o'clock p.m. when the accident happened, and Mrs. Sanone ran to the bottom of the escalator screaming for an ambulance, and then went to the L. D. S. Hospital. Selanie had a cut on the outside of her left leg which ran about from the front of the calf down the leg across and in front of the leg to the front side just above the ankle. (R 228)

Right after, at 1:00 o'clock p.m., in response to a call from J. C. Penney Company, Mr. Golden E. Hansen, an employee of the Elevator Service & Supply Company, went to the J. C. Penney store. Mr. Hansen was acquainted with the operation, inspection, and maintenance by his company, Elevator Service & Supply Company, of the J. C. Penney store, and in particular, the escalators. These escalators are inspected and maintenance work done every Monday morning. (R 280) When he arrived the escalator was shut down and he measured every step with his ruler on both sides; he took a flashlight and measured and ran the steps around and measured them again. There was no more clearance than three sixteenths of an inch. He reported to the store that there was no error in clearance on the escalator and told them to go ahead and run it again. (R 280-281)

If a variance in the measurement and clearance in the side panel up to three eighths of an inch were found, that would have been reported to the company. On July 10, Mr. Hansen and four or five men adjusted the particular escalator. (R 285-286) Mr. Hansen never made a recommendation to anybody that his company go back and do the work. When one stands at the bottom or walks up the escalator or walks down it or moves with it, one can not see three sixteenths of an inch. (R 287-288)

Mr. William L. Collins, the State Elevator Inspector for Industrial Commission of Utah, made an inspection of the escalator on July 6, 1961. (R 255-256) The American Standard Safety Code for Elevators, Dumb Waiters, and Escalators, 1960 edition, published by the American

Society of Mechanical Engineers is followed by Mr. Collins, and Section 802.3c reads as follows:

> * * * "802.3c Clearance Between Balustrades and Steps. The clearance on either side of the steps between the steps and the adjacent skirt guard shall be not more than three sixteenths inch, and the sum of the clearance on both sides shall be not more than one quarter inch." (R 259 and Ex. P-5)

Mr. Collins made his inspection with a ruler in three or four places. (R 259-260) He found the escalator to be within three eighths of an inch to three sixteenths of an inch. This varied in between up and down the full length of the escalator and on both sides. He made a recommendation that the clearance be reduced to the code-required maximum. The measurement on the south side of the escalator was not over three sixteenths of an inch and it could have been less but not more. He used a Lufkin ruler and the clearance on the north side varied only as much as the thickness of the rule marking. This variance comes over a period of years or wearing. (R 268-269) The clearance present is effected by people bumping the skirts or objects getting caught in the side, or there are several things that can effect the clearance and it is a gradual matter. (R 260-261) There are four escalators in the J. C. Penney store, and Mr. Collins examined all of them. He made regular inspections of all escalators. A special amount of skill and knowledge is required for the installation, repair and maintenance of escalators customarily, by elevator service companies employed and hired by the stores to maintain regular inspections. (R 270-271)

The court took defendant's motions for dismissal at the close of the plaintiff's case under advisement. (R 273)

Mr. Harold G. Smith, Manager of the J. C. Penney store, testified that the store has a regular contractual relationship with Elevator Service & Supply Company for repair, maintenance and inspection of the escalators. The contract provides for an inspection, repair and maintenance over-all once a week. A voucher is sent in weekly when the work is completed, and J. C. Penney Company relied entirely upon Elevator Service & Supply Company for recommendations, repair and maintenance. (R 273-277)

A lubricant is used on the vertical side of the escalator adjacent to the steps to make it slick, not so that a person's leg or part of their body might slide along instead of being caught in it. (R 278) This is to give it a slipping motion rather than a grab. (R 262) The lubricant used is "Slip It", and had been put on that escalator in connection with the every Monday morning service. (R 282)

The court took the motion of the defendant J. C. Penney Company for a directed verdict under advisement.

ARGUMENT

I

THE JURY FOUND IN FAVOR OF THE DEFENDANT ON THE ISSUE OF THE EXISTENCE OF ANY DEFECT WHICH MIGHT HAVE CONSTITUTED NEGLIGENCE AND THE COURT ERRED

IN ALLOWING THE DOCTRINE OF RES IPSA LOQUITUR TO APPLY.

The Court gave a Special Verdict to the jury in addition to the General Instructions. Instruction Number 14 of the General Instructions was Instruction Number 17.30 taken from Jury Instruction Forms for Utah entitled, "Res Ipsa Loquitur Doctrine Defined," except for one material difference. The court instructed the jury as follows:

> "No 14. Our law recognizes the doctrine known as res ipsa loquitur, which means the thing speaks for itself. By reason of it, under certain circumstances, one who is injured may hold another person responsible without showing the exact conduct of the other party. The doctrine of law may be applied only under special circumstances, they being as follows:
>
> First, that some instrumentality which proximately caused injury to the plaintiff was in the possession of and under the exclusive control of the defendant at the time and cause of injury was set in motion and that it appears that the injury resulted from some act or omission incident to the defendant's management of such instrumentality.
>
> Second, that the incident was one of such a nature as does not happen in the ordinary course of things if those who have control of the instrument use ordinary care.
>
> Gentlemen, come here just a minute, will you.
>
> (Court and counsel confer at the bench).

> THE COURT: I will have to correct that last sentence and say second, that the incident was one of such a nature as does not happen in the ordinary course of things if those who have control of the instrument use the highest degree of care.
>
> Third, that the circumstances surrounding the causing of the occurrence were such that plaintiff is not in a position to know what specific conduct was the cause, whereas the defendant may reasonably be expected to know and be able to explain the cause of the incident.
>
> If you find all of the above conditions to exist, they give rise to an inference that the defendant was negligent, which inference will support a verdict for the plaintiff in the absence of any showing that offsets such inference." (R 300-301)

The requirement placed upon the defendant to use the highest degree of care immediately differentiates this case from the usual res ipsa loquitur case. The court then followed all of the General Instructions, with the Special Verdict, and instructed the jurors as follows:

> "Gentlemen of the Jury, the answers to the following questions are in dispute. You are directed to answer each question if you can do so by a preponderance of the evidence in this case. If you find the evidence on any proposition to be so evenly balanced that you are unable to say by a preponderance of the evidence what the true answer is, then you should write for your answer the phrase 'No preponderance.' "(R 303)

This directive in the manner in which to answer the questions was somewhat unusual, but in accordance with

the court's directive, the jury answered question No. 2 relating to specific negligence of the defendant as alleged by the plaintiff, by writing "No preponderance" and this question was signed by all of the jurors without exception. That question read:

> "Question No. 2: Immediately prior to the time when Selanie Sanone was injured, was the escalator in the defendant's store being operated with a clearance between the moving steps and the skirt on one side of a greater width than 3/16 of an inch or with a combined clearance on both sides of a distance greater than 1/4 inch between the moving steps and the two skirts? Answer. Those jurors agreeing please sign." (R 304)

Thereafter, the court submitted Questions Number 5 and 6, which read as follows:

> "Question No. 5: Was the accident and injury sustained by plaintiff of such a nature that it would not ordinarily have occurred in the absence of negligence on the part of defendant? Answer. Those jurors agreeing please sign.
>
> Question No. 6: Has the defendant explained the happening of the accident so as to avoid the inference, if any, of negligence under the doctrine of res ipsa loquitur? Answer. Those jurors agreeing please sign." (R 304)

Seven jurors answered Question Number 5 "No", and all eight jurors answered Question Number 6 "No". Of great importance in this case is the discussion by the court regarding this Special Verdict after the jury had returned.

"THE COURT: Mr. Upchurch, have all of the questions now been answered by the jurors?

MR. UPCHURCH: Yes, Your Honor.

THE COURT: And have you signed at the bottom as the Foreman?

MR. UPCHURCH: Yes, sir.

THE COURT: Let the sheriff pass it to me, please.

(Special verdict given to the Court.)

THE COURT: Gentlemen, I will read the questions to you.

"Question No. 1: As shown by a preponderance of the evidence in this case, what amount of money would fairly and adequately recompense Selanie Sanone for any and all injury and damage which she sustained as a result of the injury received while riding on defendant's escalator?"

The answer is "$12,500", and that is signed by all eight jurors.

"Question No. 2: Immediately prior to the time when Selanie Sanone was injured, was the escalator in the defendant's store being operated with a clearance between the moving steps and the skirt on one side of a greater width than 3/16 of an inch or with a combined clearance on both sides of a distance greater than 1/4 inch between the moving steps and the two skirts?"

Gentlemen, you haven't signed the answer. You don't write "No preponderance" if you are

not in agreement that the evidence does not preponderate. If you are unable to agree on the answer, don't put that in. If some of you think it was and some wasn't, you are not agreed that the evidence does not preponderate. One thinks it preponderates one way, and one thinks another, so if—I am not sure by this answer. If you are all of the opinion or if six of you are of the opinion that this evidence just doesn't warrant you in finding one way or the other, then those who agree with that ought to sign. None of you have signed. Can you take care of it in the jury box, or do you need to retire on this?

MR. UPCHURCH: No, sir, I think we can take care of it here.

THE COURT: Sheriff, would you pass it back to the foreman. Do you need something to put that on to write with?

(Jurors sign special verdict).

THE COURT: The answer to question No. 2 as read was that there was no preponderance of the evidence one way or the other. That is signed by Vernon L. Upchurch, Mark C. Wheeler, Gothard Johnson, John Fife, Roy Jensen, Clarence Lemmon, D. V. Anderson, and J. W. Dunstone.

"Question No. 3: If so" — and they say "No preponderance," so you wouldn't really need to answer Question No. 3 because you say you couldn't answer that. If you answer it, if you did find that it was greater than 3/16, then you should have answered 3 and 4, but 3 and 4 answers can be ignored because it wasn't so that it is more than

3/16 of an inch. You weren't able to say it was, so you don't need to tell me about the rest of it.

"Question No. 5: Was the accident and injury sustained by plaintiff of such nature that it would not ordinarily have occurred in the absence of negligence on the part of defendant?" The answer is "No," this was not such an injury that would not have occurred except in the absence of negligence. That is signed seven, seven jurors. Let's see. Who didn't sign that? Yes. Mr. Wheeler. You did not agree that this was such an accident that would not have happened except in the case of negligence [sic]. You thought there ought to be some negligence for this to happen. All right.

"Question No. 6: Has the defendant explained the happening of the accident so as to avoid the inference, if any, of negligence under the doctrine of res ipsa loquitur?" The answer is "No," he hasn't explained it, but you didn't find there was any negligence there. You didn't say that this would have happened except for negligence, and so by saying he hasn't explained it, he does not have to explain it unless there was negligence. This answer of "No" is signed by all eight jurors, and the verdict is signed by the foreman.

Now, Gentlemen, if this was your verdict as I have read it and if it is still your verdict, I want you to show by the raising of your hand as to Question No. 1, the amount of damages which this little girl sustained was $12,500. If that was your verdict when you left your room and is now your verdict, please raise your hand. All hands are up.

As to Question No. 2, "Immediately prior to the time when Selanie Sanone was injured, was the

escalator in the defendant's store being operated with a clearance between the moving steps and the skirt on one side of a greater width than 3/16 of an inch or with a combined clearance on both sides of a distance greater than 1/4 inch between the moving steps and the two skirts," if you are unable to say from this evidence whether that is true or not true, raise your hand, those who say that they were unable to say. I don't see all the hands up. That is what you said by this verdict. You have written "No preponderance" and have signed it. You can write "No preponderance" only in case you are unable to say whether that space was more than 3/16 or not more than 3/16 on one side or more than a quarter on both sides or not more than a quarter. If you are unable to say, if that is still your verdict, please raise your hand. That's all hands but one. Mr. Anderson, your hand is not up on that, I take it.

MR. ANDERSON: Yes, sir.

THE COURT: It was up by the side of your ear. I don't know whether you were scratching your head. All hands are then up on this.

The other 3 and 4 wouldn't be needed to answer since we don't know whether it was more or less than the lawful distance.

As to 5, your verdict tells me that this accident was of such a nature that — was the accident and injury of such a nature that it would not ordinarily have occurred in the absence of negligence. This wasn't very artfully drawn, but you have said, "No." By that answer your verdict tells me that this accident was the type that could have occurred

without any negligence being present. If that was your verdict when you left the jury room and is your verdict now, raise your hand.

MR. UPCHURCH: May I say something?

THE COURT: Yes.

MR. UPCHURCH: We had a little misunderstanding on that.

THE COURT: It isn't too clear.

MR. UPCHURCH: It was a little —

THE COURT: Let me explain, and you may then tell me if you want to discuss this or change your verdict. *If this accident was the kind that could have occurred without any negligence, you would write "No." If this accident is the kind that would not have occurred except for negligence, you ought to write "Yes" because that is what my question was, was the accident of such a nature that it would not have occurred unless there was negligence.*

MR. WHEELER: It also states "absence of negligence."

THE COURT: If it would not have occurred — was the accident and injury sustained of such a nature that it would not ordinarily have occurred in the absence of negligence?" No, it would not have occurred in the absence of negligence. All right, I was the one that was in error, and you gave more careful thought to that than I did. If your verdict then is that this accident was the type that

would not have occurred except for negligence, that is, it would not have occurred unless there was some negligence not known by us *but known to the defendant,* if it was the type of an injury that would not have occurred except there be some kind of negligence, raise your hand if that is your verdict. That is everybody's except one. That is Mr. Wheeler. All right.

Then "Has the defendant explained the happening of the accident so as to avoid the inference, if any, of negligence under the doctrine of res ipsa loquitur?" The answer is "No." That is signed by everybody. If that is still your verdict that this defendant has not explained to you how this matter occurred, raise your hand if that is still your verdict. That's everybody's hand. (Emphasis added)

Well, that changes the situation a little bit." (R 312-317)

The foregoing procedures and the results reached were so unusual that it is difficult to determine just what the jury did or did not understand and what they meant by their verdict. It is submitted that the conclusion could be reached that the jury in effect intended to return a verdict in favor of the defendant on the issue of Res Ipsa Loquitur as it did return a verdict in favor of the defendant on the alleged grounds of negligence. Certainly it is apparent that the court erred in allowing the Doctrine of Res Ipsa Loquitur to support a verdict where the jury found that no alleged defect existed which could have constituted negligence and where the defendant was charged with the highest degree of care.

In giving Special Verdict question No. 5, the court failed to include the necessary elements in that question which were contained in instruction No. 14. Question No. 5 taken alone was misleading and inadequate and did not properly question the jury as to an inference of negligence, exclusive control of the escalator, or whether they knew or should have known of any possible defect existing. To illustrate the particular elements in the rule of Res Ipsa Loquitur we shall discuss each of them in sequence hereafter.

1.

EVEN ASSUMING EXCLUSIVE CONTROL BY THE DEFENDANT IT WOULD NOT APPEAR THAT THE INJURY RESULTED FROM SOME ACT OR OMISSION INCIDENT TO THE DEFENDANT'S MANAGEMENT OF THE ESCALATOR.

It is important in this case to note the relatively minute clearance tolerance here, according to Mr. Collins, "varying only as much as the thickness of the rule marking." (R 268-269) The word "minute" is most appropriate, for if the individual widths of the first four letters of that particular word are measured with a ruler the following approximate measurements will appear: The letter "m" is 1/8 inch wide; each of the letters "n" and "u" is 1/16 inch wide; all three letters "min" measured together are 1/4 inch wide. During the examination of Mr. Collins the court recognized this relatively minute clearance when he was being asked to draw such on a plain piece of paper.

> MR. AADNESEN: I am using it for illustrative purposes, Your Honor, to show the width as such as it would actually appear. I believe I am en-

titled to do that. I will let him draw then if you will, put your dots right on here—put it here—

THE COURT: Well, that pencil is—

MR. AADNESEN: I'm not going to ask him to do it with that.

THE COURT: If you had a fine pen point, I think you could start maybe giving distances, but a point as thick as the pen you are holding in your hand couldn't possibly give any help to the jury. They know what three eighths of an inch is, and I don't know that we can explain it to them any better. (R 267)

The testimony of Mr. Hansen, the repair and maintenance man for Elevator Service & Supply Company, is singularly positive in regard to the clearance measurements, and by their answers to Special Verdict question No. 2, the jury must have believed him. He made his inspection within an hour after the accident occurred.

"Q Other than that. On the day of the 29th of June, 1961, were you called over to the J. C. Penney store?

A Yes.

Q About what time?

A It was right after one o'clock when I got there.

Q I see. Did you go in response to a call from J. C. Penney's?

A Yes.

Q All right. What did you do when you arrived?

A The escalator was shut down, and I went up and measured every step with my ruler on both sides, took a flashlight and measured and run the steps around and measured it again to see that there was no more clearance than three sixteenths.

Q That there was no more clearance than the three sixteenths?

A No.

Q And that was on June 29 —

A June 29.

Q —1961, right after the accident?

A Yes.

Q I see. Did you go back subsequently and do any work on that?

A No, not that I know of.

Q Did you report to the store?

A Yes.

Q And it was your report, was it not, that there was no error in clearance on that elevator?

A Yes.

Q Escalator?

A Yes." (R 280-281)

From all the foregoing and from the jury's determination in favor of the defendant on that question it cannot be said that the injury resulted from some act or omis-

sion incident to the defendant's management of the escalator. In this case we are not considering the "barrel of flour," "lump of coal," "loose bathtub leg" or "falling plaster" cases. The doctrine of Res Ipsa Loquitur may be applied in such cases where a defect is actually found or circumstances and conditions existed which did cause the injury, thus furnishing a basis for an inference. In our case the jury specifically found that no defect of any kind or nature existed which could have caused the injury and no inference may arise where such would be tantamount to pure speculation as to the possible cause of the injury.

In this regard we respectfully point out to the court that injury can occur without negligence such as where a person alights from a streetcar or where a passenger on a train arrives in Salt Lake City with frozen feet. The mere occurrence of an accident alone without the necessary elements of the Res Ipsa Loquitur rule is never sufficient to establish a Res Ipsa Loquitur case since it creates no reasonable inference that anyone, let alone the defendant, has been negligent. See Morrissey v. Union Pac. R. Co., 68 Utah 323, 329, 249 Pac. 1064, 1066 (1926); Wells v. Utah Construction Co., 27 Utah 524, 525, 76 Pac. 560 (1904); Zoccolillo v. Oregon Short Line R. Co., 53 Utah 39, 177 Pac. 201 (1918); Paul v. Salt Lake City R. Co., 34 Utah 1, 95 Pac. 363 (1908). It is only when an injury does not ordinarily happen unless someone has been negligent and where the circumstances are inconsistent with any other theory that an inference of negligence is justified. White v. Pinney, 99 Utah 484, 495, 108 P. 2d. 249, 254 (1940). As stated in "The Res Ipsa Loquitur Doctrine

in Utah", 3 Utah Law Review No. 1, 113, 114: "If, however, the circumstances of the accident causing injury are equally sufficient with a cause which would not be attributable to negligence, the Doctrine of Res Ipsa Loquitur does not apply." See Jenson v. S. H. Kress & Co., 87 Utah 434, 438, 49 P. 2d 958, 960 (1935).

It is within the common knowledge of this court that bare flesh against a moving metal surface and braced or stationary against an adjacent surface can and may well result in a pinching or tearing of the skin and flesh. It is doubtful that any person would find it necessary to actually test the accuracy of the foregoing statement and particularly where an escalator is involved. To illustrate, some pinching would be expected to result if one were to place the flat of one's hand against the skirt or stationary part of the escalator with the lateral surface of the hand against the riser or step of a moving escalator. This would be even more graphically illustrated if the more tender flesh of the leg were applied in the same manner. Should any part of the body so exposed receive injury as a result of this test, the cause could not be said to have been due to an act or omission on the part of the owner of the escalator sufficient to create an inference of negligence. This court can in like manner take judicial knowledge of the fact that thousands of people ride escalators in Salt Lake City daily, and that the accident which occurred in this particular case is not one that would not have occurred except for negligence on the part of the defendant. There is no code or regulation requiring any warning signs or prohibiting children of the tender age of two and one-half years from riding on the escalator and, particularly, stand-

ing on the steps. It is obvious that a child of such age could not read such a sign nor heed any warning, and the parents of such a child can judge the safety and circumstances on the same basis and with the same knowledge that the owner of the escalator could.

The discussion found in The Res Ipsa Loquitur Doctrine in Utah," supra, beginning at page 119 is most appropriate here and merits the court's attention.

> "Thus the possibility suggests itself that these cases, involving the liability of a carrier, which state the res ipsa loquitur doctrine to place the burden of proof upon the defendant, have confused the effect of the doctrine with the rule relating to the special duty of the carrier. There is a strong likelihood that in such an intermingling lies the explanation for the origin of the shift-of-burden-of-proof rule sometimes applied in res ipsa loquitur cases. But be this as it may, it is apparent from the later decisions of the Utah court that any concept which may once have been entertained as to the shifting of the burden of proof to the defendant is now clearly and expressly rejected. Zoccolillo v. Oregon Short Line R. Co., 53 Utah 39, 61, 177 Pac. 201, 210 (1918); see White v. Pinney, 99 Utah 484, 495, 108 P. 2d 249, 254 (1940); Williamson v. Salt Lake & O. Ry Co., 52 Utah 84, 90, 172 Pac. 680, 682 (1918). The burden can be said to shift only in the sense that unless the defendant goes forward with the evidence to show he was not negligent, he runs the risk of the jury finding against him. See White v. Pinney, 99 Utah 484, 495, 108 P. 2d 249, 254 (1940); Passey v. Budge, 85 Utah 37, 50, 38 P. 2d 712, 718 (1934).

"Almost as conclusive is the case against the doctrine giving rise to a presumption in Utah. One lone decision in the past quarter-century speaks of res ipsa loquitur as raising a presumption of negligence; see Curby v. Bennett Glass & Paint Co., 99 Utah 80, 83, 103, P. 2d 657, 659 (1940). One other, decided a few months later, speaks of "this inference, sometimes called a presumption." See White v. Pinney, 99 Utah 484, 495, 108 P. 2d 249, 254 (1940). As early as 1918 the court said, "The principle of res ipsa Loquitur . . . does not relieve plaintiff of the burden of proof . . . or raise any presumption in plaintiff's favor, but simply entitles the jury, . . . as shown by plaintiff's evidence to infer negligence, and to say whether, upon all the evidence, plaintiff has sustained his allegation." Williamson v. Salt Lake & O. Ry. Co., 52 Utah 84, 90, 172 Pac. 680, 682 (1918). Almost unanimously since this time the court has reiterated its acceptance of this proposition. And from the standpoint of logic this would seem to be the correct result, for to hold that the doctrine shifts the burden of proof, or raises a presumption which compels the defendant to go forward with the proof or suffer a directed verdict in all cases, would be to give res ipsa loquitur — a type of circumstantial evidence — greater effect than direct evidence of the same strength could have.

Utah, then, is committed to the view that res ipsa loquitur does nothing more than justify the fact finder to infer negligence; it does not give rise to a presumption; it does not shift the burden of proof, although in practical effect the burden of going forward with the evidence is placed upon the defendant. In meeting this burden the defendant need not show that he exercised every precaution,

> care of skill to prevent the happening of the accident; it is sufficient if he shows that he "used the degree of care commensurate with the dangers which men of prudence would have anticipated under the circumstances." See White v. Pinney, 99 Utah 484, 495, 108 P. 2d 249, 254 (1940). The court has recognized that the inference arising under the rule may and will vary in strength, and that under some circumstances, and in the absence of evidence by the defendant, may be so strong as to compel a finding of negligence. See Jordan v. Coca-Cola Bottling Co. of Utah, 218 P. 2d 660, 663 (Utah 1950); White v. Pinney, 99 Utah 484, 488, 108 P. 2d 249, 251 (1940); Zoccolillo v. Oregon Short Line R. Co., 53 Utah 39, 63, 177 Pac. 201, 211 (1918). On the other hand, an explanation may be so complete and thorough as to bar any reasonable inference of negligence. See White v. Pinney, 99 Utah 484, 488, 108 P. 2d 249, 251 (1940); Passey v. Budge, 85 Utah 37, 50, 38 P. 2d 712, 718 (1934); Baxter v. Snow, 78 Utah 217, 237, 2 P. 2d 257, 265 (1931); Christensen v. Oregon Short Line R. Co., 35 Utah 137, 146, 99 Pac. 676, 680 (1909)." (Footnotes inserted in the body of the text.)

If we consider the evidence in this case on the basis of "circumstantial evidence" we must concede that one thing is missing; namely, a defective condition that could have caused the injury. The plaintiff's lack of evidence and the explanation by the defendant is so complete and thorough as to bar any reasonable inference of negligence.

The case of Moore v. James, 5 Utah 2d 91, 297 P. 2d 221 (1956) aptly illustrates the point raised above. There a guest sought damages for personal injuries caused when

a corner leg of a bath tub in a hotel collapsed. In holding that the court should have instructed on res ipsa loquitur, this court reviewed the evidence: "The bathtub in question was old in style containing four legs which held the bathtub about 4 inches from the floor. The legs were of metal and fit by flange and groove tapered to form a wedge that tightens itself as it is pushed in. A screw and screw insert was on the under or floor side and rear of the leg. The screw was to tighten the tension on the legs and prevent the leg from slipping in and out. After the accident it was discovered that the screw was loose and the leg had slipped out." It was pointed out that a maid had pushed another leg out of its groove once or twice when cleaning under the tub with a mop stick and had pushed it back with her hand and then had reported it to the defendant, George R. James, who promised to fix it. The plaintiff also called two plumbers who testified as to their findings in respect to the lack of screw insert of the bathtub after the accident occurred. "The plumbers' testimony was of little or no help in the causation of the accident without directing an inference of negligence from the "happening of the accident" as allowed by operation of the rule under discussion." This court set forth the rule as follows:

"The rule, when applicable, gives rise to an inference of negligence which carries the plaintiff's case past a nonsuit, and is applicable when: (1) The accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care, (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the

defendant, and (3) the accident happened irrespective of any participation at the time of the plaintiff."

Selanie could have and did suffer injury without any negligence on the part of the defendant and the event could have and did happen regardless of the degree of care of the defendant. To say otherwise in the light of the evidence adduced at the trial is to indulge in speculation and conjecture.

2.

THE UNCONTROVERTED EVIDENCE IS THAT DEFENDANT USED THE HIGHEST DEGREE OF CARE.

The mere occurrence of an unusual or unexplained accident or injury does not warrant the application of the doctrine of res ipsa loquitur. See Charlton v. Lovelace, 173 S.W. 2d 13, 351 Mo. 364 (1943) where the court on page 17 stated:

> "The doctrine is applicable only where the physical cause of the injury and the attendant circumstances indicate such an unusual occurrence that in their very nature they carry a strong inherent probability of negligence and in the light of ordinary experience would presumably not have happened if those who had the management or control exercised proper care. Accordingly the mere occurrence of an unusual or unexplained accident or injury, if not such as necessarily to involve negligence, does not warrant the application of the doctrine, and it has been held that the doctrine does not apply where the act which caused the injury

> was beyond doubt the voluntary and intentional act of some person. Furthermore, the rule cannot be invoked where the existence of negligence is wholly a matter of conjecture, and the circumstances are not proved, but must themselves be presumed.' 45 J.C. p. 1211, s 778; Hart v. Emery, Bird, Thayer Dry Goods Co., 233 Mo.App. 312, 118 S.W. 2d 509, 512."

In *Dombrowskie v. Kresge-Newark, Inc.*, 183, A. 2d 111, 75 N.J. Super. 271 (1962), the plaintiff "described the movement of the escalator as slow and stated that she 'must have gone down about three steps where it really starts to form into a step' when she felt 'a jerk and a vibration of some sort' ". The plaintiff further testified that the motion of the escalator caused her to fall. The court on page 113 stated:

> "The doctrine of *res ipsa loquitur* may not properly be applied to the case at bar because the occurrence as described by plaintiff was not one which in 'itself ordinarily bespeaks negligence.' Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 269, 139 A. 2d 404, 408 (1958).
>
> "An escalator is a moving stairway. Its function involves motion. A 'jerk' or 'vibration' of such instrumentality while in operation, absent some evidence that such jerk or vibration was unusual, is not proof of malfunction. The record before us contains no evidence of malfunction."

Conway v. Boston Elevated Ry. Co., 255 Mass. 571, 152 NE 94 (1926) was an action to recover injuries to a six or seven year old child. The child had testified that

just as she reached the top of the escalator her left hand became caught in the moving belt which she had hold of and as the belt moved around the curve at the top, her fingers were caught between the belt and the wood underneath and her hand was drawn down into the slot and she was unable to pull her fingers out. The court on page 94-95 stated:

> "The doctrine of res ipsa loquitur is not applicable to the present case. There is no description of the mechanism of the escalator or what method, if any, might have been used to tighten the belt if it became loose, so that at no time could there be a space less than three and one-half inches deep. Nor was there any evidence as to how many persons were using the escalator at the time of the accident or what the strain then was upon the belt or whether because of such strain, the space between it and the wood beneath was larger than would ordinarily occur. Nor is there any evidence that the belt, when in good condition, would not wave and make a 'slapping' noise. And there is no evidence of any other accidents from the alleged cause to charge the defendant with notice that the belt in question was defective. In other words, by reason of lack of evidence respecting the mechanism of the escalator, it could not properly be said that in the ordinary experience of mankind the accident would not have happened without fault of the defendant. Hence res ipsa loquitur has no application."

In *Levy v. Kidde Mfg. Co.*, 80 A. 2d 629, 13 N.J. Super. 439 (1951), the court on page 631-32 stated:

"It must be immediately recognized that it requires more than proof of the mere occurrence of an accident to set the rule of *res ipsa loquitur* in operation. Does the proof presented on behalf of the plaintiff in the present case do more than that?

"The phrase *res ipsa loquitur* means 'the thing itself speaks,' but what does the 'thing' say"? Somewhat broadly stated, the 'thing' which speaks is the unusual occurrence, but it must 'speak' of the reasonable probability that the injury sustained by the plaintiff was in all the circumstances due to a dereliction of duty on the part of the defendant. Bahr v. Lombard, 53 N.J.L. 233, 21 A. 190, 23 A. 167 (E.&A. 1890); Noonan v. Great Atlantic & Pacific Tea Co., 104 N.J.L. 136, 139 A. 9, 56 A.L.R. 590 (E.&A. 1927); Dunn v. Hoffman Beverage Co., 126 N.J.L. 556, 20 A. 2d 352 (E.&A. 1941); Kramer v. R. M. Hollingshead Corp., 5 N.J. 386, 392, 75 A. 2d 861 (1950).

"We must view the illustration of the present case as it was portrayed by the evidence offered on behalf of the plaintiff. The representations are that the syphon was well designed and constructed. It was in perfect condition when received by the merchant at some time between 1940 and 1945. It remained in the charge and custody of the merchant until May 28, 1949. But moreover, no defects, structural weaknesses or deficiencies in its manufacture were discoverable in it after the accident. When used in conformity with the accompanying instructions of the manufacturer it operated properly.

* * *

> "Assuredly the creation of a mere opportunity to guess the cause of the mishap is an insufficient basis for the invocation of the rule."

The Circuit Court of Appeals for the 5th Circuit succinctly applied the reasoning behind the exclusion of the doctrine in the case of Williams v. United States, 218 F. 2d 473 (CCA. 5th-1955).

> "In the final analysis, each case seeking to invoke this doctrine must stand or fall upon its own facts. Res ipsa loquitur is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown. The concept presupposes that the defendant, who had exclusive control of the thing causing the injury, has superior knowledge or means of information to that possessed by the plaintiff as to the cause of the accident. *It is not enough that the plaintiff show that the thing which injured him was in the exclusive control of the defendant, he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care.* Oftentimes experience in the particular situation is so uniform and well-established that it is not necessary to prove this by extraneous evidence. However, such is not the case here. We have no knowledge, judicial or otherwise, of what would cause a jet airplane to explode in mid-air while in flight. In the absence, as here, of evidence showing that such an accident would not occur except for negligence, there is no basis for recovery. The trial court should

have granted the government's motion for judgment on this ground."

The defendant followed the established and accepted standard of care for escalator owners. It employed Elevator Service and Supply Company, specialists in the field of inspection, care and maintenance for such instrumentalities. An inspection was made weekly, as well as within an hour after the accident, and no defect was found. This not only precludes an inference that the accident would not have happened had defendant used the highest degree of care, but it is specific, uncontroverted evidence that in all respects it did use such care.

3.

THE CIRCUMSTANCES SURROUNDING THE CAUSE OF THE OCCURRENCE WERE SUCH THAT THE DEFENDANT COULD NOT BE REASONABLY EXPECTED TO KNOW OR BE ABLE TO EXPLAIN THE CAUSE OF THE ACCIDENT.

The physical proportions of Selanie, a two and one-half year old child, the lack of leg covering, the possible dampness or warmth of her leg because of the weather and exercise, together with the relative positioning of her and her leg on the escalator by her mother were as well known to her mother as to the defendant. If all of these circumstances are considered, and since no specific defect could be found in this case, there is no "superior knowledge" aspect on the part of the defendant upon which to ground the doctrine of res ipsa loquitur.

In *Hendershott v. Macy's*, 158 Cal. App. 2d 324, 322 P2d 596 (1958) the plaintiff sued for injuries suffered as a result of a fall on a descending escalator in a department store, when a package she was carrying wedged against the side wall of the escalator and struck her hip, causing her to be thrown backward on the moving steps. The Court held that res ipsa loquitur was not applicable, since the plaintiff knew as much about the cause of the accident as did the defendants. The Court stated on page 598:

> "Res ipsa loquitur would not apply as plaintiff knew as much about the cause of the accident as did defendants. Both plaintiff and her husband testified that the accident was caused by the projecting strip. As said in Billeter v. Rhodes & Jamieson, Ltd., 104 Cal. App. 2d 137, 147, 231 P. 2d 93, 100: 'The doctrine is not applicable to the facts here involved because all the parties knew the facts relating to the injury. They all knew not only how the appellant was injured, but why he was injured —there was insufficient clearance between the fin and the cross brace. Under such circumstances the doctrine should not be applied * * *'.
>
> 'Regardless of this apparent conflict, it is perfectly clear that, where the evidence of how and why the accident occurred is equally open and known to all parties, the doctrine has no application. As was stated in Ybarra v. Spangard, 25 Cal. 2d 486, 490, 154 P. 2d 687, 689, 162 A.L.R. 1258, quoting from Wigmore on Evidence: 'If the doctrine is to continue to serve a useful purpose, we should not forget that 'The particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that

> the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.' "

In *Kataoka v. May Dept. Stores Co.*, 60 Cal. App. 2d 177, 140 P2d 467 (1943) while a customer in a clothing store was talking to a department manager near the foot of a descending escalator her four year old son wandered to the escalator and caught his right hand between the comb plate and the steps passing under it. The court held that the doctrine of res ipsa loquitur was not applicable. The court on page 473-74 stated:

> "The doctrine is likewise not applicable to defendant corporation, but for other reasons. 'The reason for the rule is that ordinarily the one injured is not in a position to know more than that, by some unusual movement of the instrumentality, he was injured, whereas the one who operates the instrumentality should know and be able to explain the precise cause of the accident.' (19 Cal. Jur. 705-707; Alexander v. Wong Yick, (1938) 25 Cal. App. 2d 265, 269, 77 P2d 476.) 'If the evidence affirmatively shows the operator or manager of the instrumentality by means of which the injuries are inflicted has no superior knowledge or by the exercise of reasonable care is unable to secure information regarding the cause of the accident, or the evidence establishes the fact that the complainant possesses all the knowledge or information thereof which is reasonably accessible to the operator of the machine, then the doctrine of res ipsa loquitur has no application.' * * * Here the evidence clearly establishes the immediate cause of the plaintiff's accident. It resulted from the facts that the escalator was in operation and that it was so constructed

> that there was an opening in which plaintiff's fingers could get caught. It did not result from anything about the operation of the escalator, such as the sudden jars or jolts which the operators of moving vehicles have been required, under this doctrine, to explain. Whether defendant corporation was to be held liable for the injuries thus caused depended on the consideration of matters which were as open to investigation by one party as by the other. * * *"

In *Stein v. Powell*, 203 Va. 423, 124 S.E. 2d 889, (1962) the Court on page 891 stated:

> "We agree with the defendant that the doctrine of *res ipsa loquitur* has no application in this case. In order for the doctrine to apply in a given case, the instrument causing the injury must have been in the exclusive possession of the defendant, and the occurrence must have been of such a nature that it can be said with reasonable certainty that the accident would not have occurred in the absence of negligence on the part of the defendant. It must be further shown that the evidence of the cause of the accident is accessible to the defendant and inaccessible to the injured party. Beer Distributors, Inc. v. Winfree, 190 Va. 521, 57 S.E. 2d 902."

This is also the case where the evidence surrounding the occurrence has been introduced and submitted to the jury and where the cause of the accident is known. Under such circumstances there can be no application of the doctrine.

In *Day v. National U. S. Radiator Corporation*, 241 La. 288, 128 So. 2d 660 (1961), the Court stated on page 665:

"This doctrine [res ipsa loquitur] is a qualification of the general rule that negligence is not to be presumed but must always be affirmatively proved, and therefore should be sparingly applied, and only in exceptional cases where the demands of justice make that application essential. See Security Insurance Company v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N.W. 2d 127; Nopson v. City of Seattle, 33 Wash. 2d 772, 207 P. 2d 674; 65 C.J.S. Negligence § 220, p. 1031.

"The following is found in 38 Am. Jur. 999, sec. 303, Negligence:

"The doctrine of res ipsa loquitur has no application where all the facts and circumstances appear in evidence. Nothing is then left to inference and the necessity for the doctrine does not exist. Being a rule of necessity, it must be invoked only where evidence is absent and not readily available. It is not to be invoked when the evidence is available, and certainly not when it is actually presented. Nor has it any application where the cause of the accident is known and is not in question.'

"On this point, see also Res Ipsa Loquitur — Availability, 33 A.L.R. 2d 791, 793; Prosser, Handbook on the Law of Torts, p. 214 (1955).

"In Southwestern Gas & Electric Co. v. Deshazo, 199 Ark. 1078, 138 S.W. 2d 397, the Supreme Court of Arkansas refused to use the doctrine of res ipsa loquitur in deciding the case before it and said in explanation that it was committed to the theory that the doctrine cannot be availed of where there is direct evidence as to the precise cause of the accident and all the facts and circumstances

attendant upon the occurrence clearly appear. In such a case, the court stated, nothing is left to inference and no presumption can be indulged.

* * *

"Although the plaintiff was justified in relying on the doctrine of res ipsa loquitur in her petition in this case because she was ignorant of the cause of the boiler explosion which killed her husband, under the above authorities the doctrine should not be used by this court in deciding the suit, nor should it have been relied on by the Court of Appeal or by the district court in finding for petitioner. As shown by the authorities, its applicability is to be determined at the conclusion of the trial. In the instant case all the facts and circumstances leading to the explosion of the boiler are in evidence, the cause of the explosion has been fully established by the evidence and nothing is left to inference."

In Johnson v. West Fargo Manufacturing Company, 95 NW 2d 497, 502 the court said:

"The next point raised by the defendant is that the court erred in instructing the jury on the theory of res ipsa loquitur. The trial court instructed the jury in conformity with our established definition of res ipsa loquitur as set forth in Johnson v. Coca Cola Bottling Co., 235 Minn. 471, 51 N.W. 2d 573. This instruction was correct as an abstract proposition of law. In general the doctrine of res ipsa loquitur permits an inference of negligence from the circumstances of an accident. It is properly applied where the defendant is in control of the situation or instrumentality and the fact of the

accident shows that someone has been negligent. However, it is well established that the doctrine has no application where all of the facts and circumstances appear in evidence, nor has it any application where the cause of the accident is known and is not in question. 38 Am. Jur., Negligence, 303; Heffter v. Northern States Power Co., 173 Minn. 215, 217, 217 N.W. 102, 103; Klingman v. Loew's Inc., 209 Minn. 449, 296 N.W. 528; Cullen v. Pearson, 191 Minn. 136, 253 N.W. 117, 254 N.W. 631; Anderson v. Eastern Minnesota Power Co., 197 Minn. 144, 266 N.W. 702; Johnson v. Bosch, 178 Minn. 363, 227 N.W. 181. In the case before us the evidence fully discloses the facts constituting the alleged negligence which resulted in the fatal injury. The accident resulted because the stop hooks, which were made of 1/4-inch hot rolled steel, were too weak to support the auger tube and therefore gave way allowing the auger arms to collapse. Under the circumstances there is nothing left to inference. The cause of the accident is known and not in question." See also Levy v. D.C. Transit System, Inc., 174 A 2d 731 (1961).

II.

THE COURT SHOULD NOT HAVE DISMISSED THE THIRD PARTY COMPLAINT OF THE DEFENDANT J. C. PENNEY COMPANY AGAINST ELEVATOR SERVICE AND SUPPLY COMPANY.

The defendant employed Elevator Service and Supply Company to inspect, care for and maintain its escalators. This was necessary and in keeping with the duty imposed by the court on the defendant of the highest degree of

care. If Elevator Service and Supply Company was negligent, such negligence was not a defense for the defendant for the court also held that the duty of this defendant was non-delegible. Under all the facts and circumstances of this case, if the verdict is allowed to stand, the responsibility must be that of Elevator Service and Supply Company and not J. C. Penney Company. The only person or persons who could have known or should have known of any defect, deviation, circumstance or condition which could have caused the injury was Elevator Service and Supply Company, and any act or omission upon which a verdict could be grounded was its alone.

If this judgment is affirmed the court should reverse the ruling of the trial court dismissing the third party complaint.

CONCLUSION

The jury having specifically found no defect to exist the court erred in submitting the case to the jury on the doctrine of res ipsa loquitur. First, it did not appear that the injury resulted from some act or omission incident to the defendant's management of the escalator. Second, the incident was not one of such a nature as does not happen in the ordinary course of things and where defendant used the highest degree of care. Third, the circumstance surrounding the causing of the occurrence were such that the defendant could not reasonably be expected to know what the cause was and be able to explain the cause of the incident.

All of the above three conditions are required to give rise to an inference that the defendant was negligent. The evidence adduced by both plaintiff and defendant completely negatives such as a matter of law. To hold otherwise is to make the owner and operator of an escalator an insurer of the safety of the passengers.

The evidence cannot give rise to an inference under the res ipsa loquitur doctrine where all of the facts and circumstances surrounding the accident and in any way relating to any possible defect, act or omission have been specifically presented to the jury.

If any negligence by inference is allowed the defendant Elevator Service and Supply Company is solely responsible therefore.

Respectfully submitted,
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