ZASLOW v. KROENERT
Supreme Court of California
29 Cal.2d 541, 176 P.2d 1 (1946)

[Plaintiff and defendant received title to a house as tenants in common. A dispute over ownership arose, and defendant and her agent took possession of the house and changed the locks on the doors. They removed plaintiff's furniture and put it in storage, after notifying plaintiff that they would do so if he did not remove it from the house. Plaintiff brought an action for conversion of the furniture, and was given judgment for its full value. Defendant appeals.]

EDMONDS, Justice.

. . . . Stated generally, "conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." . . . The liability of one in possession of real property for the conversion of personal property which he finds upon it, depends, in most cases, upon a determination of whether the conduct of the defendant indicates an assumption of control or ownership over the goods. It is clear that, under some circumstances, refusal of one in possession of real property to permit, upon demand, the owner of chattels which were left there to remove his goods, constitutes conversion. . . . And if the possessor of the real estate appropriates the chattels to his own use in obvious defiance of the owner's rights, he is liable to the owner for the conversion of them. . . .

However, every failure to deliver is not such a serious interference with the owner's dominion that the defendant should be required to pay the full value of the goods. . . . And the act of taking possession of a building and locking it does not, of itself, constitute a conversion of the personal property therein. Nor does the permission of the possessor of the realty by which personal property is allowed to remain upon the premises make him liable for the goods. . . . To establish a conversion, it is incumbent upon the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.

Thus, in *Poor v. Oakman*, [104 Mass. 309], a person rightfully took possession of a building and put a new lock on the door. He knew that the owner of some furniture then in the building had a key to the old lock. It was held that, in the absence of any evidence tending to prove a claim to the furniture, or any act which hindered the owner from removing it, as the contest was for the possession of the building, the possessor of the real estate was not liable for conversion of the furniture. . . .

In the present case, the court found only that Mrs. Kroenert and Chapman "took and carried away all the personal property and effects" of Zaslow, such taking being without his consent, express or implied. Admittedly, what Chapman did in this regard was to place the goods in storage: there is no evidence tending to prove that either he or Mrs. Kroenert otherwise exerted any dominion over Zaslow's personal property in denial of or inconsistent with his rights. If, upon demand for the return of the chattels, they had prevented the removal of the goods, such acts would have constituted evidence of a conversion. But here the controversy between the parties concerned the occupancy of the house; no demand was made for the return of the personal property. While there is no evidence showing any conduct amounting to conversion, there is proof that Chapman, as the agent of Mrs. Kroenert, acted as custodian of the goods, recognizing Zaslow's complete title and right to them. The defendants did not use the goods. About a month and one-half after Mrs. Kroenert, by Chapman, took possession of the realty, she stated in a letter either received by or shown to Zaslow, that he could secure possession of his personal property by applying at the attorney's office. Zaslow neither said nor did anything in response thereto.

Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. . . . As Zaslow was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, Chapman's act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, Zaslow is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use. But as the evidence shows $3,500 as the highest value placed upon the goods and it is undisputed that they were not damaged while in storage for about four months, the amount awarded by the judgment has no support in the evidence.

For these reasons, the judgment is reversed with directions to the trial court to redetermine the amount of damages caused by the ouster and the trespass to the personal property.

RUSSELL-VAUGHN FORD, INC. v. ROUSE
Supreme Court of Alabama.
281 Ala. 567, 206 So.2d 371 (1968).

[Plaintiff went to the place of business to discuss trading his Falcon for a new Ford. Following an initial inquiry, plaintiff returned to Russell-Vaughn Ford with his wife and children, and finally a third time, with a friend. On this last occasion, a salesman asked him for the keys to his Falcon and he turned them over while inspecting new cars. The defendant had increased the difference between the price of the new car and the trade-in originally offered for plaintiff's car, and plaintiff declined to trade on this basis. He asked for his keys to be returned and all of the employees denied knowing where they were. Despite his frequent demands, the employees laughed at him as if the entire matter was a "big joke." Plaintiff called the police department, and after the policeman arrived, one of the salesmen threw the keys to plaintiff "with the statement that he was a cry baby" and that "they just wanted to see him cry a while." The plaintiff sued the company and two salesmen for conversion of his Falcon; the jury returned a general verdict for $5000; and defendants appealed.]

SIMPSON, Justice. . . . The appellants have made several assignments of error. Initially it is argued that the facts of this case do not make out a case of conversion. It is argued that the conversion if at all, as a conversion of the keys to the automobile, not of the automobile itself. It is further contended that there was not under the case here presented a conversion at all. We are not persuaded that the law of Alabama supports this proposition. As noted in *Long- Lewis Hardware Co. v. Abston*, 235 Ala. 599, 180 So. 261:

"It has been held by this court that 'the fact of conversion does not necessarily import an acquisition of property in the defendant.' *Howton v. Mathias*, 197 Ala. 457, 73 So. 92, 95. The conversion may consist, not only in an appropriation of the property to one's own use, but in its destruction, *or in exercising dominion over it in exclusion or defiance of plaintiff's right.*". . .

It is not contended that the plaintiff here had no right to demand the return of the keys to his automobile. Rather, the appellants seem to be arguing that there was no conversion which the law will recognize under the facts of this case because the defendants did not commit sufficient acts to amount to a conversion. We cannot agree. A remarkable admission in this regard was elicited by the plaintiff in examining one of

the witnesses for the defense. It seems that according to salesman for Russell-Vaughn Ford, Inc. it is a rather usual practice in the automobile business to "lose keys" to cars belonging to potential customers. We see nothing in our cases which requires in a conversion case that the plaintiff prove that the defendant appropriated the property to his own use; rather, as noted in the cases referred to above, it is enough that he show that the defendant exercised dominion over it in exclusion or defiance of the right of the plaintiff. We think that has been done here. The jury so found and we cannot concur that a case for conversion has not been made on these facts.

Further, appellants argue that there was no conversion since the plaintiff could have called his wife at home, who had another set of keys and thereby gained the ability to move his automobile. We find nothing in our cases which would require the plaintiff to exhaust all possible means of gaining possession of a chattel which is withheld from him by the defendant, after demanding its return. On the contrary, it is the refusal, without legal excuse, to deliver a chattel, which constitutes a conversion. . . .

We find unconvincing the appellants contention that if there were a conversion at all, it was the conversion of the automobile keys, and not of the automobile. In *Compton v. Sims*, [209 Ala. 287, 96. 185], this court sustained a finding that there had been a conversion of cotton where the defendant refused to deliver to the plaintiff "warehouse tickets" which would have enabled him to gain possession of the cotton. The court spoke of the warehouse tickets as a symbol of the cotton and found that the retention of them amounted to a conversion of the cotton. So here, we think that the withholding from the plaintiff after demand of the keys to his automobile, without which he could not move it, amounted to a conversion of the automobile.

. . .

Affirmed.

Restatement (Second) of Torts
§ 222A. What Constitutes Conversion

(1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

(2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:

(a) the extent and duration of the actor's exercise of dominion or control;

(b) the actor's intent to assert a right in fact inconsistent with the other's right of control;

(c) the actor's good faith;

(d) the extent and duration of the resulting interference with the other's right of control;

(e) the harm done to the chattel;

(f) the inconvenience and expense caused to the other.

SOUTHERN COUNTIES ICE CO. v. RKO
United States District Court of Appeals
39 F. Supp. 157 (D.C.S.D. Cal. 1941)

JAMES ALGER FEE, District Judge.

This action was brought to recover for the loss of a building by fire. . . . The cause was tried before the court without a jury.

The facts upon which the parties are in agreement will be stated first. Southern Counties Ice Company is a California corporation which jointly with certain individuals was the assignee of a lease made by the Southern Pacific Company to certain lands from month to month and the owners of a vegetable packing house with equipment which was upon the leased premises. Upon thirty days' notice the owners would be required to move the building under the lease. The owners have assigned all rights to plaintiff.

RKO Radio Pictures, Inc., is a Delaware corporation. The employees of defendant entered the premises above described and began the erection of a set upon the platform of the packing house. They left at about five o'clock in the afternoon and between seven thirty and eight o'clock at night the packing house was destroyed by fire.

Further facts are found in the evidence. The employees of defendant had permission to erect a set in the vicinity but mistook the location and entered and used the packing house. Some employees were smoking while working there. Upon departing some clothing and certain tools were left by these employees in the packing house or on the platform thereof. The defendant, contrary to a well established custom, placed no guard when the employees left. The fire was observed about the time an explosion was heard in the end of the building furthest from the place where defendant's employees had been working, but the flooring was burned through near the door next the set, and there only. The defendant's set was not burned owing to the exertions of the fire department and defendant's employees. Thereafter defendant finished the set and occupied the premises for several days.

Defendant introduced testimony of its employees to the effect that the packing house doors were open, that there were signs that fires had at sometime been built therein on a sheet iron and that some pans which might be used in cooking were hung in a recess on the platform. There was no evidence to show how recent any use of the premises had

been nor was any person seen thereon except the employees of defendant. . . .

The land was under lease to plaintiff. The building thereon may be treated as real property, or by the subsequently developed fiction of constructive severance, as personal property. (a) If these acts be viewed as a trespass to realty then there was dissension under the common law ideas. The recovery of the land and damages for change of condition makes plaintiffs whole. (b) If the building be viewed as a chattel, the dominion exercised by employees of defendant was a conversion. If the articles could be returned undamaged, plaintiffs might not suffer injury. But plaintiffs could not be required to accept a chattel which was damaged after defendant had converted it to its own use. The limits of liability are thus scientifically stated. The use of the language of 'causation' or 'consequence' is inaccurate if this theory be used. . . .

The court finds that defendant entered upon and exercised complete dominion over the leased land and the packing house and continued in possession thereof for several days. This occupancy was without the knowledge or consent of the owners and lessees. The defendant was in good faith and mistook the location of the land. The fire resulted directly from the entry and exercise of dominion by defendant. No other intervening cause was shown by the evidence. . . .

Where one exercises complete dominion over the land or personal property of another, however unwittingly, and during the period of his use thereof a loss or damage occurs, he should be held to act, because of the invasion, at his peril and to be responsible for any loss or damage, even though due to an irresistible or extraordinary force, and even though the event was entirely unexpected. The person so assuming dominion has, for the time at least, taken the place of the owner who normally bears the loss of unexpected happenings.

In decisions which have considered loss by fire where one without right entered the premises of another, it seems to have been universally held that the exercise of care did not affect liability. The language of causation is used but the result of the unlawful use may have been entirely unexpected and unanticipated since no direct proof of the relation of the fire lighted by a trespasser to that which caused the loss, is required. . . .

In the assessment of damages the court has weighed the cost of replacement of the structure, the deterioration and the rental value of the premises during occupancy together with cost of removal. There was no proof of the value of the equipment. The

damages allowed, are in the sum of $2,150.

Findings and judgment may be submitted.

WALLACE v. SHOREHAM HOTEL CORP.

D.C. Municipal Court of Appeals

49 A.2d 81(1946)

HOOD, Associate Judge.

This appeal is from an order dismissing a complaint for failure to state a cause of action. The substance of the complaint is that plaintiff, in company with his wife and four friends, was a guest at the cocktail lounge of defendant's hotel; that, in payment of the check rendered, plaintiff gave the waiter a $20 bill but received change for only $10; that the waiter insisted he had received from plaintiff a $10 bill and stated publicly for all in the lounge to hear: "We have had people try this before"; that in fact plaintiff had tendered a $20 bill, which fact was later admitted by representatives of the hotel and proper change given plaintiff; that the language of the waiter indicated to those present in the lounge that plaintiff was underhanded and of low character and that his demand for change was illegal and comparable to that of a cheat or other person whose reputation for honesty is open to question; that by reason thereof plaintiff was "insulted, humiliated and otherwise embarrassed." The plaintiff sought judgment 'for exemplary or punitive damages' of $3,000.

. . .

We have found no rule of law imposing on the keeper of a drinking establishment, whether called cocktail lounge, bar, saloon or some other name, a higher degree of civility toward its patrons than is imposed on the operator of a store, a barber shop, a filling station or any other mercantile activity. This dispute over the proper change could have arisen just as easily in any place where one pays for goods or services. Our question, therefore, is whether the customer of a business establishment has a cause of action for humiliation and embarrassment resulting from insulting words or conduct of an employee of the establishment. . . .

The question of the right to recover for humiliation and embarrassment, i. e., mental distress, unaccompanied by physical suffering, resulting from insulting language, unaccompanied by physical force or threats, has been the subject of discussion in a number of legal publications.

[The court reviews several articles arguing in favor of finding a cause of action, but note that they each] would rest liability on the degree of the insult and the extent of

the suffering caused. Ordinarily the gravity of a defendant's conduct and the amount of injury caused are factors in arriving at the *amount* of recovery, and are not determinative of the *right* to recover. Under the rule proposed, however, it would be necessary to hold that not only the extent of recovery, but the existence of the cause of action is dependent on the amount of damage sustained. If one has a cause of action for an insult only when that insult exceeds the trivial and goes beyond all bounds of decency, and only when such insult produces suffering of a genuine, serious and acute nature, then there must be some rules or standards by which a jury before reaching the realm of amount of recovery may first determine the right of recovery. The jury would have to have some instructions to guide them in determining the bounds of decency and some test to apply in distinguishing between trivial and serious. We know of no workable rule and the authorities furnish us none.

In determining the right of recovery would the bounds of decency and the seriousness of the insult be the same in the cocktail room of "an internationally known hostel" as plaintiff asserts the defendant's hotel to be, and a "beer joint" in an unsavory section of the city? Will the seriousness of the insult, and therefore the existence of the cause of action, depend on the social or business standing of either the one giving or receiving the insult? Will the acuteness of plaintiff's suffering, and therefore defendant's liability, depend on the sensitivity of the particular individual? Are all these matters to be left to the "common sense" of the jury, with no rules for their guidance?

Professor Bohlen, in his article entitled "Fifty Years of Torts," 50 Harvard Law Review 725 (1937), while sympathetic toward an extension of liability for mental and emotional disturbance, points out the difficulty of formulating any rule of general application. Unless liability may be made to rest in individual cases, "upon the enormity of the defendant's conduct," he says "it would be difficult to frame a rule which would allow recovery in such case and not put the ordinary man in the position of answering in damages whenever he had not shown what a sympathetic jury might regard as sufficient consideration of the feelings of his neighbor.". . .

. . . "It is safe to predict that whatever relief is to be granted for mental distress will be confined to cases in which the defendants intended to cause it and where the distress is of a sort which the ordinary man regards as very serious.". . .

There are many cases, not subject to classification, touching on the point here in issue. . . . We have found no case which goes so far as to sustain plaintiff's complaint.

One case in our own jurisdiction, *Clark v. Associated Retail Credit Men*, 70 App.D.C. 183, 105 F.2d 62, 66. . . sustained a complaint which charged that the Association by a series of collection letters inflicted upon the plaintiff injuries both mental and physical, for the purpose of collecting a debt. . . .

Although the *Clark* case is distinguishable from the present one, yet there is a statement in the opinion which we think is applicable here. In its preliminary discussion of the law relating to liability for mental distress, unaccompanied by physical injury, the court said:

"The law does not, and doubtless should not, impose a general duty of care to avoid causing mental distress. For the sake of reasonable freedom of action, in our own interest and that of society, we need the privilege of being careless whether we inflict mental distress on our neighbors. It is perhaps less clear that we need the privilege of distressing them intentionally and without excuse. Yet there is, and probably should be, no general principle that mental distress purposely caused is actionable unless justified. Such a principle would raise awkward questions of *de minimis* and of excuse. 'He intentionally hurt my feelings' does not yet sound in tort, though it may in a more civilized time."

. . .

Affirmed.

BENEDICT v. EPPLEY HOTEL CO.
Supreme Court of Nebraska.
65 N.W.2d 224 (1954)

BOSLAUGH, Justice.

This is an action for damages claimed to have been sustained by appellee because of injuries inflicted upon her as a result of negligence of appellant. Appellee had a verdict and judgment. A motion of appellant for a directed verdict at the close of all the evidence was denied. A motion for judgment notwithstanding the verdict and a motion for a new trial were overruled.

Appellee pleaded as a cause of action that: Appellant, a corporation, maintains and operates hotels in Omaha. One of them is the Rome Hotel. Appellant on or about March 5, 1949, operated a bingo game as a part of its activities and as an attraction to induce persons of the city and surrounding territory to the Rome Hotel. The facilities for the game, including the place where it was conducted, the tables, and the chairs, were provided by appellant. The appellee at the invitation of appellant attended the game, procured from an attendant in charge a chair, and occupied it at one of the bingo tables. She sat on the chair for a short time when it collapsed and hurled her to the floor with force and violence, and she sustained numerous and severe permanent injuries. The chair was defective in a respect unknown to appellee. The defect therein caused it to collapse and injure her. It was a folding chair constructed so that when it was not in use the seat could be folded up against the front of the back of the chair. If it was not defective or out of repair it could not and would not collapse or cause injury to a person sitting on it. The appellee invoked the doctrine of res ipsa loquitur. The defenses interposed by appellant were a denial and a plea of contributory negligence of appellee.

The Military Order of the Cooties, a branch of the Veterans of Foreign Wars, as one of its activities to raise money, had an arrangement with the Rome Hotel to put on a bingo game therein. The ballroom was usually used but on occasions more than one room was required. An amount was paid to appellant each time the accommodations were used for this purpose. Appellant had supervision of the space used for the game. It furnished the accommodations where the game was played, the tables, the chairs, and all other facilities, but the supplies required in the conduct of the game were not furnished by it. The employees of the hotel set up the tables and arranged the chairs for use of the participants and after the game they dismantled the tables and removed the chairs. A Mr.

Pennington and his helpers, acting for the Military Order of the Cooties, directed the playing of the game. Appellant had a bar adjoining the bingo room or rooms and its employees served beer, mixed drinks, and other beverages as they were desired by persons attending the game. The hotel had a lunch stand and made available to anyone present coffee and sandwiches. These concession rights were reserved exclusively to appellant and it served the public for profit.

The game was scheduled to start at 8 p. m. The mother of appellee, accompanied by a friend, was at the hotel when the game started the evening of March 5, 1949. Appellee arrived there about 9:30 p. m. She paid the charge required to become one of the players, secured a chair from an attendant, took it some distance to one of the bingo tables, and placed it at the table opposite where her mother was seated, sat on the chair, and entered the game. She continued to occupy the chair for about 20 or 30 minutes when, without warning, it collapsed and caused her to suddenly descend onto the floor. She observed nothing unusual about the chair when it was furnished to her or while she was taking it to the table and experienced nothing unusual while she was occupying it before it gave way. She used it for no purpose except to sit on it. It was a folding chair with braces, screws, and bolts to maintain it in proper condition for its intended use. After the accident it was discovered the screws and bolts on one side of the chair were missing from it.

It was the duty of the lobby porter of the hotel to inspect its chairs for defects. He did not testify and there is no proof that he performed this duty. A porter assigned to the housekeeping department was a witness for appellant. He said he sometimes helped other porters set up tables and arrange chairs for banquets and parties. He examined each chair he handled for any defects in it and if he found any he took the defective chair to the carpenter shop of the hotel. He gave no date when he made an inspection of chairs, did not claim that he handled any of the chairs provided and arranged for the bingo game the night appellee was injured, or that he had seen the chair she used that was not in normal condition that night. The other porters who handled the chairs were not produced at the trial. The Military Order of the Cooties had nothing to do with the maintenance, inspection, or repair of the chairs made available by the hotel for the use of persons attending the bingo game. The chair sometime after it had collapsed was taken and delivered by Mr. Pennington to the man who was in charge of the Rome Hotel that night. It was not produced at the trial and no evidence concerning this specific chair or its condition was offered by appellant at the trial.

It is correctly asserted by appellant that an innkeeper is not an insurer against accident and injury to invited persons upon the premises, but he must exercise reasonable care to keep the premises and facilities of the inn reasonably safe for the purposes for which they are to be used by guests and other invitees. Liability arises from failure to exercise reasonable care and prudence in that regard. . . .

Appellee did not allege or attempt to prove specific negligence. She says a chair does not ordinarily collapse when it is sat on by a person if the one responsible for its maintenance and who has its management uses reasonable care to keep it reasonably safe for the purpose of its intended use. She relies upon res ipsa loquitur. This doctrine of the law is that if a thing which causes injury is shown to be under the control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of proper care. That is, the thing shown speaks of the negligence of the defendant. The facts of the occurrence permit, but do not compel, an inference of negligence. . . .

Appellant attempts to avoid the application of the doctrine of res ipsa loquitur to this case by asserting the defect in the chair concerned in the accident was latent and could not have been discovered by reasonable care. It was a folding chair equipped with metal braces fastened to it with screws or bolts so that it could be operated and when not folded up could be safely used as a chair. There is no proof that the braces or fasteners were not exposed to view. It is a reasonable inference that they were and that a casual examination before or at the time the chair was given to appellee to be used by her would have disclosed the defect in the chair because the screws and bolts on one side of the chair were missing and this was learned after it collapsed by merely looking at it. A latent defect in an article of this nature is one that exists in such a way that discovery is impossible by the exercise of reasonable inspection and care. . . . The defect in the chair was not latent.

. . . .

The applicability of the doctrine of res ipsa loquitur to this case is denied by appellant because it asserts that its chair occupied by appellee at the time of the accident was in her exclusive possession and control from the time she got it from a person who had been using it, moved it up to the table, and sat on it, a period of about 30 minutes. Her acts in reference to the chair were limited to transportation of it from where she first

saw it in the hallway connecting the Embassy Room and the ballroom of the Rome Hotel to the table in the latter room where the game was in progress and sitting on it. She occupied the chair as an invitee of appellant. She had no right or duty to examine it for defects. She had a right to assume it was a safe instrumentality for the use she had been invited by appellant to make of it. Appellant had the ownership, possession, and control of the chair under the circumstances of this case and it was obligated to maintain it in a reasonably safe condition for the invited use made of it by the appellee. The fact that the chair when it was being properly used for the purpose for which it was made available gave way permits an inference that it was defective and unsafe and that appellant had not used due care in reference to it.

. . . .

Instructions given the jury are challenged. . . .

The first instruction objected to says if the evidence offered by appellant "fails to rebut the presumption" and if "the presumption is rebutted." There was no previous mention of presumption. The word inference had been used by the court. It was proper if not necessary for the jury to understand that inference and presumption were different things, because of the language "fails to rebut the presumption or destroy the inference." The jury was wholly unaided concerning the meaning of the words "the presumption"as employed by the trial court. The advice to the jury that if the evidence of the defendant "fails to rebut the presumption or destroy the inference, then your verdict will be in favor of the plaintiff" permitted it to understand that appellant was obliged to explain how the accident happened and to overcome by evidence any inference of negligence that arose because of the collapse of the chair. Appellant was not required to explain the cause of the accident or to overcome any inference of negligence. It was privileged but not required when appellee rested her case to go forward with any proof that was available that it had used due care to furnish a safe chair. If appellant submitted no proof it remained a question for the jury to decide whether appellee had shown circumstances sufficient to justify finding negligence on the part of appellant that was the proximate cause of the accident and injury.

. . . .

The judgment of the district court should be and it is reversed and the cause is remanded.

Reversed and Remanded.

Status of Entrant Duties Owed

	Artificial Conditions	**Natural Conditions**	**Active Operations**
Undiscovered Trespasser	No duty	No duty	No duty
Discovered or Anticipated Trespasser	Duty to warn of or make safe if nonobvious and *highly* dangerous	No duty	Duty of reasonable care
Infant Trespasser (if presence on land foreseeable)	Duty to warn of or make safe if foreseeable risk outweighs expense of eliminating danger	No duty	No duty (unless child also qualifies as discovered or anticipated trespasser)
Licensee (including social guests)	Duty to warn of or make safe if nonobvious and dangerous	Duty to warn of or make safe if nonobvious and dangerous	Duty of reasonable care

Invitee (e.g., member of public, business visitor)	Duty to make reasonable inspections to discover non-obvious dangerous conditions and warn of or make them safe	Duty to make reasonable inspections to discover non-obvious dangerous conditions and warn of or make them safe	Duty of reasonable care

of animals, new reasons of social policy have been found for the continuance of an old [illegible] with its popular connotation of personal guilt and moral blame, and its more or less arbitrary legal meaning, which will vary with the requirements of social conduct imposed by the law, is of any real assistance in dealing with such questions, except perhaps as a descriptive term.

An entire field of legislation, illustrated by the workers' compensation acts, has been based upon the same principle.

This new policy frequently has found expression where the defendant's activity is unusual and abnormal in the community, and the danger which it threatens to others is unduly great-and particularly where the danger will be great even though the enterprise is conducted with every possible precaution. The basis of liability is the defendant's intentional behavior in exposing those in his vicinity to such a risk. The conduct which is dealt with here occupies something of a middle ground. It is conduct which does not so far depart from social standards as to fall within the traditional boundaries of negligence--usually because the advantages which it offers to the defendant and to the community outweigh even the abnormal *risk;* but which is still so far socially unreasonable that the defendant is not allowed to carry it on without making good any actual harm which it does to his neighbors.

The courts have tended to lay stress upon the fact that the defendant is acting for his own purposes, and is stress upon a benefit or a profit from such activities, and that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim. The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, aid liability is imposed upon the party best able to shoulder it. The defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be so placed. This modern attitude, which is largely a thing of the last four decades, is of course a far cry from the individualistic viewpoint of the common law courts.

While such strict liability often is said to be imposed "without fault," it can scarcely be said that there is less of a moral point of view involved in the rule that one who innocently causes harm should make it good. The traditional analysis regards such a result as something of an exception to more or less well established rules, and says that the defendant is not at "fault" because he has only done a reasonable thing in a reasonable way, and that he is liable notwithstanding. But it my be questioned whether "fault,"

SIEGLER v. KUHLMAN

Supreme Court of Washington. 81 Wash.2d 448, 502 P.2d 1181 (1973)

HALE, Associate Justice.

Seventeen-year-old Carol J. House died in the flames

swimn
stand
finds "fault" in much that

of a gasoline explosion when her car encountered a pool of thousands of gallons of spilled gasoline. She was driving home from her after-school job in the early evening of November 22, 1967, along Capitol Lake Drive in Olympia; it was dark but dry; her car's headlamps were burning. There was a slight impact with some object, a muffled explosion, and then searing flames from gasoline pouring out of an overturned trailer tank engulfed her car. The result of the explosion is clear, but the real causes of what happened will remain something of an eternal mystery.

Aaron L. Kuhlman had been a truck driver for nearly 11 years . . . . That evening of November 22nd, he was scheduled to drive a gasoline truck and trailer unit, fully loaded with gasoline, from Tumwater to Port Angeles. Before leaving the Texaco plant, he inspected the trailer, checking the lights, hitch, air hoses and tires. Finding nothing wrong, he then set out . . . . With all vehicle and trailer running lights on, he drove the truck and trailer onto Interstate Highway 5, . . . took the offramp . . . at the Capitol Lake interchange. Running downgrade on the offramp, he felt a jerk, looked into his left-hand mirror and then his right-hand mirror to see that the trailer lights were not in place. The trailer was still moving but leaning over hard, he observed, onto its right side. The trailer then came loose. Realizing that the tank trailer had disengaged from his tank truck, he stopped the truck without skidding its tires. He got out and ran back to see that the tank trailer had crashed through a chain-link highway fence and had come to rest upside down on Capitol Lake Drive below. He heard a sound, the said, "like somebody kicking an empty fifty-gallon drum and that is when the fire started." The fire spread, he thought, about 100 feet down the road.

. . . . When the trailer landed upside down on Capitol Lake Drive, its lights were out, and it was unilluminated when Carol House's car in one way or another ignited the spilled gasoline.

Carol House was burned to death in the flames. There was no evidence of impact on the vehicle she had drive . . . except that the left front headlight was broken.

Why the tank trailer disengaged and catapulted off the freeway down through a chain-link fence to land upside down on Capitol Lake Drive below remains a mystery. What caused it to separate from the truck towing it, despite many theories offered in explanation, is still an enigma . . . .

The jury apparently found that defendants had met and overcome the charges of

negligence. Defendants presented proof that both the truck . . . and the tank and trailer . . . had been constructed by experienced companies. . . . Defendants presented evidence . . . that the truck and trailer were regularly serviced and repaired . . . . There was evidence obtained at the site of the fire that both of the mainsprings above the tank trailer's front wheels had broken as a result of stress, not fatigue--from a kind of stress that could not be predicated by inspection--and finally that there was no negligence on the driver's part.

. . .

In the Court of Appeals, the principal claim of error was directed to the trial court's refusal to give an instruction on res ipsa loquitur, and we think that claim of error well taken. . . . Miles v. St. Regis Paper Co., 77 Wash.2d 828, 467 P.2d 307 (1970). . . . We think, therefore, that plaintiff was entitled to an instruction permitting the jury to infer negligence from the occurrence.

But there exists here an even more impelling basis for liability in this case than its derivation by allowable inference of fact under the res ipsa loquitur doctrine, and that is the proposition of strict liability arising as a matter of law from all of the circumstances of the event.

Strict liability is not a novel concept; it is at least as old as Fletcher v. Rylands, L.R. 1 Ex. 265, 278 (1866), affirmed, House of Lords, 3 H.L. 330 (1868). In that famous case, where water impounded in a reservoir on defendant's property escaped and damaged neighboring coal mines, the landowner who had impounded the water was held liable without proof of fault or negligence. Acknowledging a distinction between the natural and nonnatural use of land, and holding the maintenance of a reservoir to be a nonnatural use, the Court of Exchequer Chamber imposed a rule of strict liability on the landowner. The *ratio decidendi* included adoption of what is now called strict liability, and at page 278 announced, we think, principles which should be applied in the instant case:

> [T]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

All of the Justices in Fletcher v. Rylands, *supra*, did not draw a distinction

between the natural and nonnatural use of land, but such a distinction would, we think, be irrelevant to the transportation of gasoline. The basic principles supporting the Fletcher doctrine, we think, control the transportation of gasoline as freight along the public highways the same as it does the impounding of waters and for largely the same reasons. . . .

In many respects, hauling gasoline as freight is no more unusual, but more dangerous, than collecting water. When gasoline is carried as cargo--as distinguished from fuel for the carrier vehicle--it takes on uniquely hazardous characteristics, as does water impounded in large quantities. Dangerous in itself, gasoline develops even greater potential for harm when carried as freight--extraordinary dangers deriving from sheer quantity, bulk and weight, which enormously multiply its hazardous properties. And the very hazards inhering from the size of the load, its bulk or quantity and its movement along the highways presents another reason for application of the Fletcher v. Rylands, *supra*, rule not present in the impounding of large quantities of water--the likely destruction of cogent evidence from which negligence or want of it may be proved or disproved. It is quite probable that the most important ingredients of proof will be lost in a gasoline explosion and fire. Gasoline is always dangerous whether kept in large or small quantities because of its volatility, inflammability and explosiveness. But when several thousand gallons of it are allowed to spill across a public highway--that is, if, while in transit as freight, it is not kept impounded--the hazards to third persons are so great as to be almost beyond calculation. As a consequence of its escape from impoundment and subsequent explosion and ignition, the evidence in a very high percentage of instances will be destroyed, and the reasons for and causes contributing to its escape will quite likely be lost in the searing flames and explosions.

That this is a sound case for the imposition of a rule of strict liability finds strong support in Professor Cornelius J. Peck's analysis in Negligence and Liability Without Fault in Tort Law, 46 Wash.L.Rev. 225 (1971). Pointing out that strict liability was imposed at common law prior to Fletcher v. Rylands *supra*, that study shows the application of a rule of strict liability in a number of instances, *i.e.*, for harm done by trespassing animals; on a bona fide purchaser of stolen goods to their true owner; on a bailee for the misdelivery of bailed property regardless of his good faith or negligence; and on innkeepers and hotels at common law. But there are other examples of strict liability: The Supreme Court of Minnesota, for example, imposed liability without fault for damage to a dock inflicted by a ship moored there during a storm. Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910).

The rule of strict liability rests not only upon the ultimate idea of rectifying a wrong and putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible, but it also rests on problems of proof:

> One of these common features is that the person harmed would encounter a difficult problem of proof if some other standard of liability were applied. For example, the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred . . . . Moreover, application of such a standard of liability to activities which are not matters of common experience is well-adapted to a jury's limited ability to judge whether proper precautions were observed with such activities.
>
> Problems of proof which might otherwise have been faced by shippers, bailors, or guests at hotels and inns certainly played a significant role in shaping the strict liabilities of carriers, bailees, and innkeepers. Problems of proof in suits against manufacturers for harm done by defective products became more severe as the composition and design of products and the techniques of manufacture became less and less matters of common experience; this was certainly a factor bringing about adoption of a strict liability standard. (Footnote omitted.)

C. Peck, Negligence and Liability Without Fault in Tort Law, 46 Wash.L.Rev. 225, 240 (1971).

. . .

Thus, the reasons for applying a rule of strict liability obtain in this case. We have a situation where a highly flammable, volatile and explosive substance is being carried at a comparatively high rate of speed, in great and dangerous quantities as cargo upon the public highways, subject to all of the hazards of high-speed traffic, multiplied by the great dangers inherent in the volatile and explosive nature of the substance, and multiplied again by the quantity and size of the load. Then we have the added dangers of ignition and explosion generated when a load of this size, that is, about 5,000 gallons of gasoline, breaks its container and, cascading from it, spreads over the highway so as to

release an invisible but highly volatile and explosive vapor above it.

Danger from great quantities of gasoline spilled upon the public highway is extreme and extraordinary, for any spark, flame or appreciable heat is likely to ignite it. The incandescent filaments from a broken automobile headlight, a spark from the heat of a tailpipe, a lighted cigarette in the hands of a driver or passenger, the hot coals from a smoker's pipe or cigar, and the many hot and sparking spots and units of an automobile motor from exhaust to generator could readily ignite the vapor cloud gathered above a highway from 5,000 gallons of spilled gasoline. Any automobile passing through the vapors could readily have produced the flames and explosions which killed the young woman in this case and without the provable intervening negligence of those who loaded and serviced the carrier and the driver who operated it. Even the most prudent and careful motorist, coming unexpectedly and without warning upon this gasoline pool and vapor, could have driven into it and ignited a holocaust without knowledge of the danger and without leaving a trace of what happened to set off the explosion and light the searing flames.

Stored in commercial quantities, gasoline has been recognized to be a substance of such dangerous characteristics that it invites a rule of strict liability--even where the hazard is contamination to underground water supply and not its more dangerous properties such as its explosiveness and flammability. *See* Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (1969). It is even more appropriate, therefore, to apply this principle to the more highly hazardous act of transporting it as freight upon the freeways and public thoroughfares.

Recently this court, while declining to apply strict liability in a particular case, did acknowledge the suitability of the rule in a proper case. In Pacific Northwest Bell Tel. Co. v. Port of Seattle, 80 Wash.2d 59, 491 P.2d 1037 (1971), we observed that strict liability had its beginning in Fletcher v. Rylands, *supra*, but said that it ought not be applied in a situation where a bursting water main, installed and maintained by the defendant Port of Seattle, damaged plaintiff telephone company's underground wires. There the court divided--not on the basic justice of a rule of strict liability in some cases--but in its application in a particular case to what on its face was a situation of comparatively minor hazards. Both majority and dissenting justices held, however, that the strict liability principles of Fletcher v. Rylands, *supra*, should be given effect in some cases; but the court divided on the question of whether underground water mains there constituted such a case.

The rule of strict liability, when applied to an abnormally dangerous activity, as stated in the Restatement (Second) of Torts §519 (Tent.Draft No. 10, 1964), was adopted as the rule of decision in this state in Pacific Northwest Bell Tel. Co. v. Port of Seattle . . . .

. . .

Contrast, however, the quiet, relatively safe, routine procedure of installing and maintaining and using underground water mains as described in Pacific Northwest Bell v. Port of Seattle, *supra*, with the activity of carrying gasoline as freight in quantities of thousands of gallons at freeway speeds along the public highway and even at lawful lesser speeds through cities and towns and on secondary roads in rural districts. In comparing the quiescence and passive job of maintaining underground water mains with the extremely heightened activity of carrying nearly 5,000 gallons of gasoline by truck, one cannot escape the conclusion that hauling gasoline as cargo is undeniably an abnormally dangerous activity and on its face possesses all of the factors necessary for imposition of strict liability as set forth in the Restatement (Second) of Torts §519 (Tent.Draft No. 10, 1964), above.

. . .

The case is therefore reversed and remanded to the trial court for trial to the jury on the sole issue of damages.

HAMILTON, C.J., FINLEY, ROSELLINI, and HUNTER, JJ., and RYAN, J., pro tem., concur.

ROSELLINI, Associate Justice (concurring)

I agree with the majority that the transporting of highly volatile and flammable substances upon the public highways in commercial quantities and for commercial purposes is an activity which carries with it such a great risk of harm to defenseless users of the highway, if it is not kept contained, that the common-law principles of strict liability should apply. In my opinion, a good reason to apply these principles, which is not mentioned in the majority opinion, is that the commercial transporter can spread the loss among his customers--who benefit from this extrahazardous use of the highways.

Also, if the defect which caused the substance to escape was one of manufacture, the owner is in the best position to hold the manufacturer to account.

I think the opinion should make clear, however, that the owner of the vehicle will be held strictly liable only for damages caused when the flammable or explosive substance is allowed to escape without the apparent intervention of any outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling it. I do not think the majority means to suggest that if another vehicle, negligently driven, collided with the truck in question, the truck owner would be held liable for the damage. But where, as here, there was no outside force which caused the trailer to become detached from the truck, the rule of strict liability should apply.

. . .

HAMILTON, C.J., FINLEY, J., and RYAN, J., pro tem., concur.

ANDERSON V. SOMBERG
The Supreme Court of New Jersey
67 N.J. 291, 338 A.2d 1 (1975)

The opinion of the Court was delivered by PASHMAN, J.

Plaintiff was undergoing a laminectomy, a back operation, performed by defendant Dr. Somberg. During the course of the procedure, the tip or cup of an angulated pituitary rongeur, a forceps-like instrument, broke off while the tool was being manipulated in plaintiff's spinal canal. The surgeon attempted to retrieve the metal but was unable to do so. After repeated failure in that attempt, he terminated the operation. The imbedded fragment caused medical complications and further surgical interventions were required. Plaintiff has suffered significant and permanent physical injury from the rongeur fragment which lodged in his spine.

Plaintiff sued: (1) Dr. Somberg for medical malpractice, alleging that the doctor's negligent action caused the rongeur to break: (2) St. James Hospital, alleging that it negligently furnished Dr. Somberg with a defective surgical instrument; (3) Reinhold-Schumann, Inc. (Reinhold), the medical supply distributor which furnished the defective rongeur to the hospital, on a warranty theory, and (4) Lawton Instrument Company (Lawton), the manufacturer of the rongeur, on a strict liability in tort claim, alleging that the rongeur was a defective product. In short, plaintiff sued all who might have been liable for his injury.

Dr. Somberg testified that he had not examined the rongeur prior to the day of surgery. He inspected it visually when the nurse handed it to him during the operation, and manipulated its handles to make certain it was functional. The doctor stated that he did not twist the instrument, and claimed that the manner in which the instrument was inserted in plaintiff's body precluded the possibility of twisting. He noted the absence of one of the rongeur's cups when he withdrew the instrument from plaintiff's spinal canal, but his efforts to retrieve the fragment proved of no avail.

Dr. Graubard, a general surgeon, testified as an expert witness for plaintiff. He stated that the rongeur was a delicate instrument, a tool not to be "used incorrectly or with excessive force or to be used against hard substances." He claimed that a twisting of the instrument might cause it to break at the cups. Dr. Graubard stated that a "rongeur used properly and not defective would not break."

The deposition of the operating room supervisor of defendant hospital, Sister Carmen Joseph, was read into the record. She was responsible for visually examining and sterilizing all instruments prior to surgery. The rongeur in question was used about five times a year, and had been used about 20 times before this operation. She did not know who had taken out the rongeur for this operation; she had not worked the day of plaintiff's operation.

The hospital's purchasing agent testified that the rongeur had been purchased from the distributor, Reinhold, about four years prior to plaintiff's surgery and was received in a box bearing the name of the manufacturer, Lawton. The owner of Reinhold testified that the rongeur was not a stock item and had to be specially ordered from Lawton upon receipt of the hospital purchase order. The box was opened at Reinhold's warehouse, to verify that it was a rongeur and it was then forwarded to the hospital.

Defendant Lawton called a metallurgist, a Mr. John Carroll, as an expert witness. He testified that an examination of the broken rongeur revealed neither structural defect nor faulty workmanship. He said that the examination (conducted at an optical magnification 500 times normal size) revealed a secondary crack near the main crack but he could not suggest how or when that crack formed. Mr. Carroll offered an opinion as to the cause of the instrument's breaking: the instrument had been strained, he said, probably because of an improper "twisting" of the tool. The strain, however, could have been cumulative, over the course of several operations, and the instrument could conceivably have been cracked when handed to Dr. Somberg and broken in its normal use.

In short, when all the evidence had been presented, theories for the cause of the rongeur's breaking included the possible negligence of Dr. Somberg in using the instrument, or the possibility that the surgeon had used a defective instrument, attributable to a the manufacturer, the distributor, the hospital or all of them.

The first jury returned a finding of no cause as to each defendant. On appeal, the entire Appellate panel concurred in an order for a new trial because on the facts, it was clear that at least one of the parties was liable. The Appellate panel ordered remand. Certification was granted. 63 N.J. 586 (1973).

The position adopted by the Appellate Division majority is correct: at the close of all the evidence in this case, it is apparent that at least one of the defendants is liable for plaintiff's injury; no alternative theory of liability is reasonable. Since each of the defendants had a legal obligation to plaintiff, the jury should have been instructed that

the failure of any defendant to prove his nonculpability would trigger liability and that at least one would be liable. A no cause of action verdict against all primary and third-party defendants is unacceptable and a miscarriage of justice sufficient to require a new trial. R. 2:10-1.

In the ordinary case, the law will not assist an innocent plaintiff at the expense of an innocent defendant. However, in the type of case we consider here, where an unconscious or helpless patient suffers an admitted mishap not reasonably foreseeable and unrelated to the scope of the surgery (such as cases where foreign objects are left in the body of the patient), those who had custody of the patient, and who owed him a duty of care as to medical treatment, or not to furnish a defective instrument for use in such treatment can be called to account for their default. They must prove their nonculpability, or else risk liability for the injuries suffered.

This case resembles the ordinary medical malpractice foreign-objects case, where the patient is sewn up with a surgical tool or sponge inside him. In those cases, res ipsa loquitur is used to make out a prima facie case. . . . . The rule of evidence we set forth here does not represent the doctrine of res ipsa loquitur, traditionally understood. Res ipsa loquitur is ordinarily impressed only where the injury more probably than not has resulted from negligence of the defendant and defendant was in exclusive control of the instrument. The doctrine has been expanded to include multiple defendants, e.g., Ybarra v. Spangard, although this expansion has been criticized. . . . Res ipsa loquitur has also been expanded to embrace cases where the negligence cause was not the only possibility, but where alternate theories of liability also accounted for the possible cause. That is the situation in this case, where we find negligence, strict liability in tort and breach of warranty all advanced as possible theories of liability. In such cases, defendants are required to come forward and give their evidence. The latter development represents a substantial deviation from earlier conceptions of res ipsa loquitur and has more accurately been called "akin to res ipsa loquitur."

Defendants are required to make: "an affirmative showing [1] of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown," Bourguignon v. Peninsular Ry. (1919).

The imposition of the burden of proof upon multiple defendants, even though only one could have caused the injury, is no novelty to the law, as where all defendants have been clearly negligent. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). As against multiple defendants where there is no evidence as to where culpability lies, the rule is not generally available, according to Prosser, because it might impose an equal hardship on an innocent defendant as on an innocent plaintiff. Prosser notes exceptional special cases, as where defendant owes a special responsibility to plaintiff, and in those instances the burden of proof can in fact be shifted to defendants. The facts of this case disclose just such a special responsibility, and require a shifting of the burden of proof to defendants.

We hold that in a situation like this, the burden of proof in fact does shift to defendants. All those in custody of that patient or who owed him a duty, as here, the manufacturer and the distributor, should be called forward and should be made to prove their freedom from liability.

Further, we note that at the close of all the evidence, no reasonable suggestion had been offered that the occurrence could have arisen because of plaintiff's contributory negligence, or some act of nature; that is, there was no explanation for the occurrence in the case save for negligence or defect on the part of someone connected with the manufacture, handling, or use of the instrument. (Any such proof would be acceptable to negative plaintiff's prima facie case.) Since all parties had been joined who could reasonably have been connected with that negligence or defect, it was clear that one of those parties was liable, and at least one could not succeed in his proofs.

Almost by definition, one or more of the defendants are liable. Identifying the responsible party is merely a matter of elimination. To instruct the jury that it must return a verdict against one or more of the defendants is simply requiring it to determine upon the evidence which defendants, if any, have exculpated themselves.

Involvement by any person other than the defendants actually before the court below has never been asserted as anything other than pure and undisguised speculation. None of the defendants introduced any evidence to actually support the claim of responsibility by other persons; they made no effort to join additional parties. It would be exceedingly unjust to deny plaintiff compensation simply because an imaginative defendant can conceive of other possible parties. A wholly faultless plaintiff should not fail in his cause of action by reason of defendants who have it within their power to prove nonculpability but do not do so.

The judgment of the Appellate Division is hereby affirmed, and the cause remanded for trial upon instructions consonant with this opinion.