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Negligence--Res Ipsa Loquitur--Self-Service Stores [*Wollerman v. Grand Union Stores, Inc.*, 221 A.2d 513 (N.J. 1966)]

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mode of limiting and controlling such offensive searches should be implemented to as great an extent as is consonant with society's need for protection against the illegal importation of narcotics.

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NEGLIGENCE — RES IPSA LOQUITUR — SELF-SERVICE STORES

Wollerman v. Grand Union Stores, Inc., 221 A.2d 513 (N.J. 1966).

The plaintiff in a negligence action has traditionally been faced with proving the essential elements of a tort: right, duty, breach, proximate cause, and damage. To alleviate the stringent application of these elements, the doctrine of res ipsa loquitur was adopted, but its success has been limited. In fact, use of the doctrine can sometimes prove futile, as illustrated in the "slip-and-fall" cases involving self-service stores.

In *Wollerman v. Grand Union Stores, Inc.*,[1] the plaintiff, while shopping in a self-service store, slipped on a string bean lying in the aisle. No evidence was introduced to show how the string bean got on the floor or for what period of time it had been there. The trial court, in finding for defendant, said that the plaintiff had not shown sufficient evidence of the defendant's negligence.[2] *Wollerman* eventually reached the New Jersey Supreme Court where the decision was reversed.[3]

Discussing the high standard of care owed to a business invitee, the supreme court determined that in a situation such as this, where the plaintiff would be unable to know whose negligence caused her injury, it would be inequitable to require a showing that the defendant had failed to exercise care commensurate with the risks involved.[4] Although the court did not speak of res ipsa loquitur, there is a strong indication that it used the doctrine. A characteristic result of res ipsa loquitur is that the burden of proof is shifted to the defendant. Evidence that the court has applied the doctrine is found in its statement that "the situation being peculiarly in the

[1] 221 A.2d 513 (N.J. 1966).

[2] *Id.* at 514.

[3] *Ibid.*

[4] *Id.* at 515.

defendant's hands, it is fair to call upon the defendant to explain, if he wishes to avoid an inference by the trier of the facts that the fault probably was his."[5]

If the court has in effect used res ipsa loquitur, it must be realized that this is an extension of its application, because in a majority of the previous cases involving self-service stores one of the necessary elements of the theory — control — has not been found to be possessed by the store owner.[6] The *Wollerman* court seemingly waived the control requirement by reviewing the duty owed to a business invitee and redefining the duty owed by a self-service store owner.[7]

It has long been recognized that a high standard of care must be exercised toward the self-service patron because: (1) the owner enjoys lower operating costs by employing fewer people, thus increasing the danger of substances being left on the floor; (2) the floors are hard and often sticky; (3) there is constant handling of merchandise; (4) the displays often attract attention away from the floors; and (5) there is heavy traffic on the floors and a high probability of goods falling on them.[8] These factors, coupled with the feeling that store owners should anticipate that misplaced goods will find their way to the floor and thereby injure a customer, were said to raise a presumption that the store owner failed to fulfill his duty.[9] The court in essence made the store owner liable for injuries caused by a dangerous condition of which it felt he had actual or constructive knowledge.[10]

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[5] *Ibid.*

[6] *E.g.*, Kahalili v. Rosecliff Realty, Inc., 26 N.J. 595, 141 A.2d 301 (1958).

[7] 221 A.2d at 514-15.

[8] Carrol, *Supermarket Liability: Problems in Proving the Slip-and-Fall Case in Florida*, 18 U. FLA. L. REV. 440, 445 (1965). It should be remembered that these stores are designed to attract the customer's attention to the food and not to the surrounding area. Accordingly, an Ohio court stated: "The customer who enters a store looking at the merchandise that is displayed to attract his attention and interest is not expected or bound to look minutely at the floor for dust upon it unless somebody or something warns him to do so." Bickley v. Sears, Roebuck & Co., 62 Ohio App. 180, 184, 23 N.E.2d 505, 507 (1938).

[9] 221 A.2d at 514-15.

[10] See Jeffries v. Safeway Stores, Inc., 176 Neb. 347, 125 N.W.2d 914 (1964), wherein it was said:

> [T]he storekeeper is ordinarily liable if the condition was created by the storekeeper or his employees. When the condition results from the conduct of the public, a storekeeper can be held subject to liability only for a negligent omission on his part to remove the hazard created after he knows of it, or, by the exercise of reasonable care, should have known of its existence. *Id.* at 351, 125 N.W.2d at 916-17.

See generally PROSSER, TORTS § 61 (3d ed. 1964).

The doctrine of res ipsa loquitur only creates a presumption which will protect the plaintiff from nonsuit or dismissal; it will not make the owner responsible for all that happens in his establishment.[11] Granting that the doctrine should not make the self-service store owner an insurer,[12] there is still the problem of deciding when the storekeeper is liable and what he must do to avoid this liability. It seems fairly certain that he will have to keep his store clean, but how often must he survey the store? There has been some indication that the owner will be held to have constructive notice of the substance's presence in periods as short as twelve to thirty minutes or as long as two hours.[13] A better approach would be to measure his duty in light of the store's traffic. When the store is busy the obligation to observe the aisles would be greater, and when the store is less busy, the floor should be swept each half-hour. Such a vigilance would better secure the customers' safety and would not be an excessive burden on the storekeeper. Moreover, if the owner knows that he may be called upon to show how he operates his establishment, he will be inclined to watch more carefully.

The "deep-pocket" theory is a persuasive argument which can be made in favor of extending to self-service stores the use of res ipsa loquitur. The theory assumes that the store owner can foresee that injuries may occur on his premises, and therefore in anticipation he may obtain insurance to cover his liability, whereas the patron usually lacks such protection. Also involved in the "deep-pocket" theory is the fact that the storekeeper has the opportunity to spread the loss. He may be able to deduct some of the loss as an operating expense, or he may raise the price on certain goods and thereby diffuse the loss in small monetary units among many

[11] The facts of the incident may warrant an inference of negligence, but they do not *compel* this inference; it will call for, but not require, explanation or rebuttal. Sweeney v. Erving, 228 U.S. 233 (1913). In Professor Prosser's opinion the doctrine of res ipsa loquitur does not compel a decision for the plaintiff nor does it require a defendant to refute a presumption. According to Prosser the jury is permitted to draw an inference of negligence but is not compelled to do so. PROSSER, *op. cit. supra* note 10, § 40, at 233. However, some courts have taken the position that the defendant does have the burden of showing that he was not negligent. Anderson v. Marshall Field & Co., 25 Ill. App. 2d 253, 166 N.E.2d 451 (1960). This does not make the defendant an insurer, since a valid defense will rebut the presumption.

[12] *E.g.*, Thompson v. Giant Tiger Corp., 118 N.J.L. 10, 189 Atl. 649 (Ct. Err. & App. 1937); Simpson v. Duffy, 19 N.J. Super. 315, 88 A.2d 230 (App. Div. 1952). See also 39 OHIO JUR. 2D *Negligence* § 63, at 584-85 (1959) where it is stated: "A storekeeper, however, is not an insurer against all accidents and injuries to his patrons while in his store, and the mere fact that a customer fell in the store or other place of business is not sufficient to show negligence on the part of the proprietor." (Footnotes omitted.)

[13] Carrol, *supra* note 8, at 450.