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The Game's Afoot: The Storekeeper's Heightened Responsibility for Slip and Fall Accidents

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is routine in tort law and the courts are more capable of performing this task than ferreting out illusory psychological distinctions between intellectual and physical gratification present in contractual objects.⁴⁵

Steve M. Marks

THE GAME'S AFOOT: THE STOREKEEPER'S HEIGHTENED RESPONSIBILITY FOR SLIP AND FALL ACCIDENTS

Since World War Two, the American business community has undergone tremendous changes, especially in its retail merchandising system. The small corner store has given way to national chain stores and self-service shopping. The local grocery has turned into a giant supermarket. As always, the law is running hard to keep stride with these changes, trying to maintain an equilibrium between public policy and private interests. In order to keep this balance of interests, our courts have had to redesign the legal relationship between patrons and proprietors. This note examines recent changes in Louisiana law affecting the responsibility of storekeepers for slip and fall injuries sustained in their stores.

Louisiana storekeepers owe an affirmative duty to their patrons to use ordinary or reasonable care¹ to provide safe aisles and passageways by means of clean-up and inspection procedures consistent with the purposes of the store.² While this language has been used consistently by the courts to

delay; whereas a breach of the obligation properly to repair the auto is less a "proximate" cause of inconvenience where the breach is unintentional. In the instant case the court noted at the outset that the damages sought were suffered and that the amount awarded was reasonable, thereby acknowledging the strong tie between the obligation to repair within a reasonable time and the inconvenience suffered because of its breach. See the text at note 14, *supra*.

45. See *Ward v. State Farm Mut. Auto. Ins. Co.*, 539 F.2d 1044 (5th Cir. 1976) (certified question to Louisiana Supreme Court concerning the application of the principle of the instant case to the breach of a contract of insurance).

1. *E.g.*, *Calamari v. Winn Dixie La., Inc.*, 300 So. 2d 653 (La. App. 4th Cir. 1974); *Broussard v. National Food Stores, Inc.*, 233 So. 2d 599 (La. App. 3d Cir. 1970), *aff'd* 258 La. 493, 246 So. 2d 838 (1971); *Lofton v. Travelers Ins. Co.*, 208 So. 2d 739 (La. App. 3d Cir. 1968).

2. *E.g.*, *Tripkovich v. Winn Dixie La., Inc.*, 284 So. 2d 80 (La. App. 4th Cir. 1973), *aff'd* 286 So. 2d 663 (1973); *Fontanille v. Winn Dixie La., Inc.*, 260 So. 2d 71 (La. App. 4th Cir. 1972); *Peters v. Great A. & P. Tea Co.*, 72 So. 2d 562 (La. App. 2d Cir. 1954).

describe a proprietor's duty, the actual scope of that duty received two markedly different interpretations in the courts of appeal.

In *Lofton v. Travelers Insurance Company*,³ the Third Circuit applied a standard that required the plaintiff to establish that the proprietor or one of his employees created or maintained the dangerous condition which caused the injury, or that the storekeeper or employee had actual or constructive knowledge of that condition.⁴ Because the plaintiff usually could not ascertain how long the dangerous condition existed before it caused his injury, he had difficulty proving actual or constructive knowledge on the part of the storekeeper. In making recovery so difficult, the court limited the storekeeper's duty, essentially placing most of the risk of self-service shopping on the plaintiff.⁵

The approach of *Lofton* was in sharp contrast with that taken in *Lang v. Winn Dixie Louisiana, Inc.*,⁶ in which the First Circuit broadly interpreted the duty of care a proprietor owes to his patrons. In *Lang*, under a concept of expanded duty, the storekeeper was held to a standard of care such that the occurrence of the accident gave rise to an inference of negligence. To establish a prima facie case, the plaintiff needed only to show that a hazardous condition existed and that it caused his injury. The defendant then had the burden of exculpation.⁷ In order to meet that burden, the proprietor had to prove that adequate inspection and clean-up procedures were carried out.⁸ *Lang* tended to shift the risk of self-service shopping from the shopper to the proprietor.⁹

3. 208 So. 2d 739 (La. App. 3d Cir.), *cert. denied*, 252 La. 457, 211 So. 2d 327 (1968).

4. *Id.* at 741.

5. Later cases relying on the *Lofton* rationale help illustrate how little was required for the storekeeper to prevail in a slip and fall case. For example, in *Frederick v. Winn Dixie La., Inc.*, 227 So. 2d 387 (La. App. 4th Cir. 1969), plaintiff slipped and fell on a grape at a check-out counter that had not been mopped for one hour preceding the accident. The defendant received a favorable judgment because the plaintiff failed to prove how long the grape had been on the floor. The court did not even consider whether failure to keep check-out counters swept was a violation of the proprietor's duty. In *Orgeron v. Home Town Supermarket*, 311 So. 2d 494 (La. App. 4th Cir. 1975), the plaintiff was injured when he slipped on sugar on the aisle floor below the rack where sugar was on display. Although an employee had placed sugar out on the shelves within one hour of the accident and admitted that sugar was often on the floor, the court found that there had not been a violation of the proprietor's duty.

6. 230 So. 2d 383 (La. App. 1st Cir. 1969).

7. *Id.* at 388.

8. *Id.*

9. The standard of care under *Lang* was determined by the nature of the premises, the purpose of the business, and the particular fact situation. *Id.* at 389. For

The Louisiana Supreme Court confronted the issue of the scope of a proprietor's duty in *Kavlich v. Kramer*¹⁰ and *Gonzales v. Winn Dixie*.¹¹ Analyzing the storekeeper's duty in terms of "reasonable care," the court accepted the reasoning of *Lang* as controlling.¹² Once the plaintiff establishes a prima facie case, the burden then "shifts"¹³ to the defendant to go forward with the evidence to exculpate himself from the presumption that he was negligent.¹⁴

The duty of the proprietor to protect his patrons from foreign substances on the floor is still one of reasonable care. Factors determinative of a breach of that duty include the type and volume of merchandise, the type of display, the floor space used for customer service, the nature of customer service and the volume of business.¹⁵ According to the new jurisprudence,

example, in *Phillips v. Great A. & P. Tea Co.*, 256 So. 2d 652 (La. App. 2d Cir. 1972), plaintiff slipped on a piece of fatty meat on the floor by the meat counter. There had been an inspection of that area forty-five minutes before the accident. The court found that this inspection met the standard of reasonable care required of the proprietor and denied recovery to the plaintiff. In *Welch v. Great A. & P. Tea Co.*, 273 So. 2d 876 (La. App. 1st Cir. 1973), plaintiff slipped on a grape. The proprietor had swept the floor within an hour of the accident and had made an inspection just fifteen minutes before the accident. The court found that the storekeeper had not violated his duty of care.

10. 315 So. 2d 282 (La. 1975).

11. 326 So. 2d 486 (La. 1976).

12. 326 So. 2d at 488; 315 So. 2d at 285. The court in *Kavlich* could have found the storekeeper negligent for simply failing to see what was in front of his eyes; instead it relied upon *Lang*. 315 So. 2d at 285.

13. The term "burden of proof" must be understood to encompass two distinct concepts: the risk of non-persuasion and the duty of going forward with the evidence. The risk of non-persuasion falls on the party whose case will fail if after all the evidence has been presented the judge remains in doubt as to the culpability of the other party. In other words, one party always bears the duty of persuading the judge beyond the doubting point. The duty of going forward with the evidence means that a party must produce a certain quantum of evidence before the judge will let a case go to the jury. 9 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT THE COMMON LAW 270-72, 278-84 (3d ed. 1940). In Louisiana, where jury trials in civil cases are rare and a judge is usually the entire tribunal before which a case is decided, the duty of coming forward with the evidence loses some of its meaning. However, in a slip and fall situation it is still the plaintiff who must convince the judge that the storekeeper was negligent (the risk of non-persuasion). Since the decision in *Kavlich*, a slip and fall accident gives rise to an inference of negligence because of the storekeeper's expanded duty. The plaintiff, merely by showing that he slipped and was injured due to a dangerous condition has come forward with enough evidence to establish a prima facie case. At this point the duty of going forward with the evidence shifts to the storekeeper to rebut the plaintiff's case.

14. 326 So. 2d 486, 488 (La. 1976); 315 So. 2d 282, 285 (La. 1975).

15. 326 So. 2d 486, 488 (La. 1976).

the nature of the self-service grocery system heightens the duty to minimize the risk of slip-and-fall accidents by frequent inspections and clean-ups.¹⁶ Apparently the court considers the self-service systems dangerous; and although the danger is not prohibitive, it is sufficient to justify placing a very demanding duty of care upon the storeowner. Correspondingly, the standard of care is so high that the occurrence of the accident forces the proprietor to exculpate himself. The question that logically follows is whether it is possible at all for the storekeeper to exculpate himself.

In cases decided under the concept of limited duty,¹⁷ the presence of a foreign substance on the floor for thirty minutes was considered long enough to create constructive knowledge in the storekeeper.¹⁸ Recent Florida cases accepting the expanded duty concept have found negligent a failure to inspect the aisles for just ten minutes.¹⁹ The frequency of aisle inspections, shelf inspections and general store maintenance that will be demanded of a Louisiana storekeeper has yet to be determined. The holding in *Gonzales* at least indicates that because of his high duty of care, the storekeeper will find it difficult to rebut the inference of negligence that arises from an accident in his store.²⁰

Proof by inference is the essential element in the logic of the new slip and fall cases. Consequently, it is unfortunate that the court does not take a more direct approach in its analysis. Presented squarely with the opportunity to determine the applicability of *res ipsa loquitur* in slip and fall situations, the supreme court has been totally ambiguous on this point in its decisions.²¹

The supreme court's ambivalence on the use of *res ipsa loquitur* probably stems from its desire to avoid the misunderstandings so commonly connected with the term. Yet *res ipsa loquitur* is no more than a form of proof by inference.²² In *Larkin v. State Farm Mutual Auto Insurance*

16. *Id.*

17. See text at note 3, *supra*.

18. *E.g.*, *Vogts v. Schwegman Bros. Giant Supermarkets*, 56 So. 2d 177 (La. App. Orl. Cir. 1952).

19. *Miller's Thriftway Stores, Inc. v. Hohnsbeen*, 240 So. 2d 84 (Fla. App. 1st Dist. 1970); *Jenkins v. Brackin*, 171 So. 2d 589 (Fla. App. 2d Dist. 1965).

20. *Gonzales* makes no reference to the required frequency of store inspections. However, the case places on storekeepers an increased duty to minimize risks through frequent inspection. Following *Gonzales*, inspections every fifteen minutes have been deemed inadequate. *Baptiste v. Schwegmann Bros. Giant Supermarket*, 338 So. 2d 1163, 1167 (La. App. 4th Cir. 1976) (Schott, J., concurring).

21. "Neither do we hold the doctrine of *res ipsa loquitur* necessarily applicable to a slip-and-fall injury in a self service grocery store." 326 So. 2d at 489.

22. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 213 (4th ed. 1971) [hereinafter cited as PROSSER]. An inference is a conclusion based on facts or premises, a

Company,²³ the Louisiana Supreme Court acknowledged that *res ipsa loquitur* means only that the circumstances involved in or connected with an accident are of such character as to justify, in the absence of other evidence bearing on the subject, the inference that the accident was due to the negligence of one having control of the thing which caused the injury. The accident gives rise to the inference of negligence because the totality of circumstances surrounding the accident are of such character that unless an explanation can be given, *the only reasonable conclusion is that the accident was due to some omission of the defendant's duty.*

A proprietor's expanded duty permits the application of *res ipsa loquitur* in slip and fall accidents even under traditional criteria.²⁴ Slip and fall accidents normally do not occur in the absence of negligence. The storekeeper is generally responsible for hazardous conditions created in his store.²⁵ Further, knowledge of the true cause of the accident is certainly more accessible to the storekeeper than to the injured shopper.²⁶ Finally, the instrumentality causing the harm is within the control of the defendant. "Control," if not to be misleading, must be interpreted flexibly.²⁷ It should be enough that the defendant has the right or power of control along with the

derivation by implication. Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 71 (1941). See also BLACK'S LAW DICTIONARY 917 (4th ed. 1968). For example, in an automobile accident caused by a tire blowout there are many competing inferences. Perhaps the driver was negligent in not maintaining his tires properly, but perhaps the tire was defective or the driver ran over an object too small to see, such as a nail. *Cox v. Wilson*, 267 S.W.2d 83 (Ky. App. 1954). But, when a woman attending a furniture auction is injured by a live 600-pound steer falling through the ceiling from the room above, the accident clearly gives rise to an inference of negligence. *Guthrie v. Powell*, 178 Kan. 587, 290 P.2d 834 (1955).

23. 233 La. 544, 97 So. 2d 389, 391 (1957).

24. (1) The accident is the kind that does not ordinarily occur in the absence of negligence, (2) the injury was caused by an agency or instrumentality within the actual or constructive control of the defendant, (3) evidence of the full cause of the accident is more readily accessible to the defendant. Comment, *Problems of Proof: The Function and Application of Res Ipsa Loquitur in Louisiana*, 25 LA. L. REV. 748, 750 (1965).

25. The storekeeper has the duty to keep the aisles, passageways and floors in a reasonably safe condition. This duty extends to every hazard which creates an unreasonable risk of foreseeable harm to his store invitees. See, e.g., *Broussard v. National Food Stores, Inc.*, 233 So. 2d 599, 601 (La. App. 3d Cir. 1970). Thus the hazardous condition on the floor that causes the slip and fall accident is normally attributable to a breach of the storekeeper's duty.

26. 326 So. 2d at 488.

27. PROSSER at 221. See Comment, *Problems of Proof: The Functions and Application of Res Ipsa Loquitur in Louisiana*, 25 LA. L. REV. 748, 750 (1965).

opportunity and responsibility to exercise control.²⁸ The cases recognize that in a self-service system customers are apt to drop objects on the floor and that customers are invited to serve themselves and to handle the merchandise.²⁹ In allowing recovery under the rationale of *Kavlich* and *Gonzales* the court is placing the responsibility for damages caused by the foreseeable misconduct of other patrons on the storekeeper.³⁰ Thus the requirement of control has been met because the court finds that the cause of the accident is such that the defendant is responsible for the negligence connected with it.³¹

The court has not expressly applied *res ipsa loquitur* in any of the new cases either under the traditional criteria or under the *Larkin*³² standard. Nevertheless, it seems that the court has applied *res ipsa loquitur* but refused to label it as such, which may add to the very confusion sought to be eliminated. Until the court pretermins the issue by unequivocally stating that *res ipsa loquitur* is (or is not) applicable in slip and fall situations, plaintiffs and defendants will continue to be perplexed as to their legal strategies.

Self-service systems require customers to look at the shelves in order to locate the goods they wish to purchase.³³ In fact, the merchandise is set out so as to entice shoppers to focus their attention upon the displays rather than the floor.³⁴ Is the patron whose attention has been attracted to the displays contributorily negligent because he fails to observe an object in his path on the floor? The cases indicate instead that the storekeeper will not be able to escape liability by claiming that the shopper should have watched his step, when in fact it was the storekeeper who created the distraction.³⁵ The patron has the "right to presume" that the aisles and passageways will be free from hazardous conditions in light of the storekeeper's intent and knowledge that

28. See note 25, *supra*.

29. 326 So. 2d at 488.

30. This is not a revolutionary legal concept. See *The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Torts*, 26 LA. L. REV. 510, 523 (1966).

31. *Gonzales* refers to Prosser on this point. 326 So. 2d at 488. See PROSSER at 221, 349. See, *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Torts*, 25 LA. L. REV. 334 (1965).

32. See text at note 23, *supra*.

33. 315 So. 2d at 284.

34. *Lofton v. Travelers Ins. Co.*, 208 So. 2d 739, 743 (La. App. 3d Cir. 1968).

35. *Ferrington v. McDaniel*, 336 So. 2d 796, 798 (La. 1976); *Gonzales v. Winn Dixie La., Inc.*, 326 So. 2d 486, 489 (La. 1976); see also *Guy v. Kroger Co.*, 204 So. 2d 790 (La. App. 2d Cir. 1967); *Dever v. George Theriot's, Inc.*, 159 So. 2d 602 (La. App. 3d Cir. 1964). The court may also be compensating for the absence of comparative negligence in Louisiana. See *Malone, Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 68-69 (1945).

the customer will devote his attention to the displayed merchandise.³⁶

No doubt, modern self-service supermarkets are better able to bear the costs of shopping accidents than were the small grocery stores they have replaced. But the court may have overlooked the benefits that make the self-service system worthwhile, such as lower prices, faster service and a greater selection of goods. Ultimately, the class of persons the court attempted to protect, consumers, may not benefit from the new jurisprudence for the cost of the storekeeper's expanded duty will be reflected in higher priced merchandise.

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36. *Wittaker v. Schwegmann Bros. Giant Supermarkets*, 334 So. 2d 756, 757 (La. App. 4th Cir. 1976).