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John J. McKay

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MERCHANTS LIABILITY IN SOUTH CAROLINA FOR INJURIES ON THE PREMISES—AN ANACHRONISM

JOHN J. MCKAY*

Daily life has undergone radical change in the last fifty years. Automobiles are now almost a necessity to normal existence. Even air conditioning is rapidly becoming so. Airplanes and the possibilities of travel, even for short periods of time, to distant and exotic places are part of our culture.

Formerly people grew up in one place, their children and grandchildren lived nearby. Property might have remained in the family for generations. The family home took an extended time to build. The neighbors were all known and, if the town was small, everyone knew everyone else.

The family doctor was a personal friend who probably spent more time out of his office making house calls than in it. People knew the local merchant or grocer and he knew them by name. Items purchased were relatively few and simple and selling was from personal contact rather than mass advertising. The quality of the cloth or suit purchased could normally be evaluated by the husband and the wife who made or mended the clothes. Food was purchased by the item, and probably more often than not produced by a person known to the purchaser. It was not canned, bagged or in frozen food containers. Cloth was wool or cotton or perhaps linen and it was neither chemically produced nor wrinkle resistant. Tools were simple; toys and normally made of wood.

In the last few decades technology has advanced more rapidly than perhaps at any comparable period in history. Living styles have been completely altered. Our great grandparents would be startled and probably unbelieving if they could be transported to the United States in 1971.

The laws, which govern our lives, have changed as our lives have changed. Of course, few laws are universal and the vast majority lack relevance out of their time and place.

In recent years South Carolina laws relating to consumers have

* A.B., J.D., University of South Carolina; partner in the firm of Rainey, Fant & McKay, Greenville, South Carolina.

undergone considerable revision. Some changes have been made by the Legislature. One example is the statute enacted in 1966 abolishing the privity requirement in products cases;¹ another, also appended to the Uniform Commercial Code, is a long-arm statute to facilitate service of process.² Most such changes, however, have been judicial. For example in *Mickle v. Blackmon*,³ our court became a forerunner in the country through the standards it set for automobile manufacturers. There is also *Springfield v. Williams Plumbing and Heating*,⁴ a somewhat confusing opinion which at least one federal court relied upon in refusing to strike a cause of action for strict liability in a products case.⁵

In at least one area of consumer protection though, the South Carolina courts have refused to act. In this area our law is an anachronism both to the conditions of modern life and to the state of our law in other related areas. This is the law of a merchant's liability for personal injuries sustained by a customer on the merchant's premises.

A merchant is, of course, liable for personal injuries to a member of the public by reason of his negligence. Where such injuries occur by reason of a hazard existing in the store itself, however, in this state the injured person must prove that the hazard was either created by the merchant or was one of which he was either actually or constructively aware.

Let us suppose a person goes into a supermarket to shop for the week's groceries. Let us further suppose that person slips and falls on some item of produce left on the floor, or cuts his foot or hand on a piece of glass from a broken bottle formerly containing merchandise, or has a stack of canned goods topple over on him. While he technically has a cause of action against the merchant, he must prove in each case either how the defective condition came about, or that the merchant was aware of it, or that it existed long enough for the merchant to be charged with knowledge. How does the injured person go about this? In most cases he doesn't, because it is an impossible burden of proof.

Perhaps such legal requirements were once fair. When the store was small, the pace slow and the customers known to each other and to the merchant, an injured person could very possibly in the majority

1. S. C. CODE ANN. § 10.2-318 (1966 Supp.).

2. S. C. CODE ANN. § 10.2-803 (1966 Supp.).

3. 252 S.C. 202, 166 S.E.2d 173 (1969).

4. 249 S.C. 130, 153 S.E.2d 184 (1967).

5. *Starnes v. Keller Industries, Inc.*, Civil No. 70-204 (D.S.C., order filed June 10, 1970).

of cases pinpoint the time and nature of the failure. In the same way, even at the present day, such a defect in a normal home can most often be traced back to its source; however, such a requirement has lost any relevance it might once have had in the case of the modern merchant.

Modern stores promote an aura of neatness, cleanliness and efficiency.⁶ The normal customer does not consciously anticipate the possibility of being injured in such a store in the same respect that we do not consciously anticipate the possibility that our clothes will suddenly catch fire, that we may be poisoned from some substance in the china that we buy or that we may be injured when some part of our automobile suddenly malfunctions. A merchant in the present day, of course, sells his store as well as his product, and his entire operation is his business.

South Carolina law of premises liability began in 1927 in rather confusing fashion. In *Bradford v. F. W. Woolworth Co.*⁷ the plaintiff claimed she was injured when she fell after slipping in an accumulation of oil left on the defendant's oiled floor. The jury found for the plaintiff and the supreme court affirmed. Chief Justice Watts wrote the principal opinion, in which no other justice concurred. Analogizing from the duty a master owed his servant to provide a safe place to work, Chief Justice Watts held that once an injury was shown to have resulted from an unsafe condition of the store a prima facie case of negligence was made out against the store owner, and the burden of exonerating himself was then cast on the owner. Mr. Justice Blease wrote a concurring opinion, in which justices Carter and Stabler joined, holding that the burden of proof always remained on the plaintiff, but under the facts of that case there was evidence of negligence to go to the jury. Mr. Justice Cothran dissented. He agreed with the three concurring justices on the burden of proof; however, he argued there was no evidence of negligence. He stated that the plaintiff was required to show an unsafe condition resulting from an accumulation of oil on the floor and that

6. The growth of the modern supermarket is one illustration of this change. It has been traced in some detail by Mr. Justice Terrell in *Carl's Markets, Inc. v. Defeo*, 55 So. 2d 182 (Fla. 1952). He describes the indicia of the supermarket which really began as late as 1936, to be the basket cart, self service, volume sales, minimum prices, showmanship, large and frequent turnover, small net profit, unique arrangement, color scheme attraction, Friday and Saturday specials, circus stunts in some places and many other attractions. It makes the best use of color therapy to arrest the attention. It is frequented by hundreds and thousands of customers every day and the mural attractions and food displays are often spectacular and so consuming they break down purchase resistance and encourage impulse buying.

7. 141 S.C. 453, 140 S.E. 105 (1927).

this condition was or should have been known to the store. He did not feel this requisite knowledge was established by the evidence. The store's employee, who was in charge of putting the oil on the floor, did not testify, no reason for this being given in the published opinion. However, there seemed no question that the oil was put on the floor by this employee in the course of his employment. Mr. Justice Cothran seemed to ignore the fact that the store should have been liable in such a case whether or not the oil's presence was later known.

In the second case, *Pope v. Carolina Theater*,⁸ which perhaps is not exactly in point but is often cited, the plaintiff alleged that she was in the defendant's theater when an unknown person released a stench bomb which caused her to become nauseated. As she arose from her seat and started out of the theater, her foot caught in the carpeting and she fell. This was the only testimony at the trial. In appealing a nonsuit, the plaintiff argued that the defendant was the insurer of the safety of its customers. Mr. Justice Cothran, writing for a unanimous court, denied this contention, citing from the concurring opinion in *Bradford*, and held that there was no evidence of any defect in the premises.

In the similar case of *Perry v. Carolina Theater*⁹ the plaintiff claimed that he was injured when bitten by a dog in the defendant's theater. The court held that the presence of the dog in and of itself was not sufficient to establish liability and reiterated its prior position that the owner was not an insurer of the safety of his customers, but going one step further, the court held the doctrine of *res ipsa loquitur*, which did not otherwise apply in South Carolina, would not apply in such cases.

The next real case in this area, *Anderson v. Belk-Robinson Co.*¹⁰ is again strange because of the theory used by the court. There, the plaintiff slipped on an oily substance which was part of a sweeping compound put on the floor by the defendant. The court reasoned that the jury could have inferred by the color of the substance that it had been on the floor a sufficient time for the store employees to have discovered it by a proper inspection, and held that the defendant was

8. 172 S.C. 161, 173 S.E. 305 (1934).

9. 180 S.C. 130, 185 S.E. 184 (1936).

10. 192 S.C. 132, 5 S.E.2d 732 (1939). Again, in *Pace v. J. C. Penney & Co.*, 182 S.C. 127, 188 S.E. 659 (1936) the plaintiff claimed she slipped and fell on a slippery substance on the defendant's stairs. The court held she had not sustained her contentions in this regard. In *Bagwell v. McLellan Stores Co.*, 216 S.C. 207, 57 S.E.2d 257 (1949) the plaintiff claimed she slipped on an excessively slick place in the defendant's store, but the court held she had not substantiated her allegations.

therefore liable because of constructive notice. It would again have seemed simple enough for the court to have reasoned that the defendant's employees put the substance on the floor and the defendant was, thereby, liable for the act of these employees in creating the dangerous condition.

In the next two important cases, the applicability in certain instances of this latter theory was made clear; however, no mention was made of the prior inconsistent opinions. In the first,¹¹ a customer spilled salad oil on the floor and the defendant's employees attempted to clean it up. A short while later the area was pronounced safe and customers allowed in. The plaintiff walked through the area and fell on some of the salad oil that was left on the floor. The court held it was a jury question whether the store had exercised due care in the manner in which the cleaning was done or the time allowed for drying before customers were allowed in.

In the second case,¹² the plaintiff fell over some boxes placed in the store by a distributor under the store's direction. Although the verdict for the plaintiff was reversed on other grounds and the case remanded for a new trial, the court stated that it felt there was sufficient evidence of negligence to go to the jury since the defendant had overseen the placement of the boxes.

Surprisingly enough if one discounts *Perry*,¹³ which may not be analogous and where there was no real attempt to come within the framework of existing law, it was not until 1957 that the South Carolina Supreme Court was squarely presented with a case in which an injury was caused to a customer from a condition not shown to have been created by a store or its employees. The various cases, however, had built up a body of what might be termed hornbook law, although they had never really had an appropriate occasion to apply it. Each case had been built upon the other. By quoting these principles they "established" the law, although it had never been necessary for any decision.¹⁴ Whether these principles might have been dicta or not,

11. *Mullinax v. Great Atl. & Pac. Tea Co.*, 221 S.C. 433, 70 S.E.2d 911 (1952).

12. *Richards v. Great Atl. & Pac. Tea Co.*, 226 S.C. 119, 83 S.E.2d 917 (1954).

13. 180 S.C. 130, 185 S.E. 184.

14. This is reiterated in *Hunter v. Dixie Home Stores*, 232 S.C. 139, 143-44, 101 S.E.2d 262, 264-65 (1957) as follows:

In the case of *Anderson v. Belk-Robinson Co.*, 192 S.C. 132, 5 S.E.2d 732, 733, this Court announced the following rule:

"In *Bradford v. F. W. Woolworth Co.*, 141 S.C. 453, 140 S.E. 105, we laid down the rule, deduced from the weight of authority, that a mer-

*Hunter v. Dixie Homes Stores*¹⁵ settled the matter.

In *Hunter* the plaintiff claimed that she slipped on some green beans which were in the aisle of the defendant's store. She had entered the store to purchase a pound of butter. The vegetable bin was between the place where the butter was located and the point where she entered the store. When she entered the store, she saw the defendant's cashier standing near the cash register looking down the aisle which contained the green beans and approximately ten feet from the place the plaintiff fell. The plaintiff also saw another employee working about twenty-five to thirty feet from this area. She walked into the area, slipped on the beans and fell. This constituted the principal evidence for the plaintiff. A verdict in her favor was reversed and a verdict entered for the defendant on the ground that there had been a failure to establish constructive notice of the presence of the beans on the floor. The court in its opinion stressed the fact that the plaintiff had not shown either how the beans got on the floor or how long they had been there before the accident. The court tended to slough over the fact that apparently two store employees could easily have seen the beans if they had cared to look. In fact, apparently one employee was looking toward the area as the plaintiff approached it. There is no mention in the opinion that other customers were in the area and presumably this was not the case. The court did not state the evidence given by the two employees, or even say whether they testified at all.

In the early part of 1969 the court seemingly put the icing on the defendant's cake in two cases decided less than a month apart.¹⁶

chant who invites the public to his premises is not an insurer of the safety of his patrons, and is therefore not liable for injuries caused by some defect in the premises, in the absence of any evidence tending to show that he or his agents knew or should have known, by the exercise of reasonable diligence, of the defect. This principle was reaffirmed in *Pope v. Carolina Theater*, 172 S.C. 161, 173 S.E. 305; *Perry v. Carolina Theater*, 180 S.C. 130, 185 S.E. 184."

15. 232 S.C. 139, 101 S.E.2d 262; see note 14 *supra*.

16. *Wimberly v. Winn-Dixie, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969); *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969). In the interim the court had decided *Baker v. Clark*, 233 S.C. 20, 103 S.E.2d 395 (1958), where the plaintiff fell on a shellacked or waxed floor. The case, however, was determined on contributory negligence and assumption of the risk rather than initial negligence of the defendant. Another interim case was *Gilliland v. Pearce Motor Co.*, 235 S.C. 268, 111 S.E.2d 521 (1959) where the plaintiff, a laundryman, while delivering uniforms to the defendant's employees, slipped on some grease in the defendant's service area. The decision is generally uninformative as the court affirmed a verdict *N.O.V.* for the defendant, quoting large

In the first of these, *Wimberly v. Winn-Dixie Greenville, Inc.*,¹⁷ the plaintiff fell on some rice left on the floor of the defendant's supermarket. The store had been swept shortly before 8:00 a.m. on the morning in question and the plaintiff fell between 10:00 and 11:00 a.m. Business activity that day had been minimal and there was no testimony that any other customers had walked down the aisle in question prior to the time of the plaintiff's fall. The rice was on the floor in an area of the store other than that in which it was displayed for sale. The floor was a variegated color, a large part of which was white, and upon which rice was difficult to detect. There were four employees in the store, two of whom, the assistant acting manager and the produce manager (whose duty encompassed keeping the floors clean) had been back and forth through the area that morning. The produce manager inspected and patrolled every ten or fifteen minutes examining the floor for items dropped on it. The court in a sharply divided 3-2 decision reversed a verdict for the plaintiff on the ground that there was no evidence of constructive knowledge on the part of the store.

In the second case, *Pennington v. Zayre Corp.*,¹⁸ the plaintiff was injured when she slipped on a plastic bag on the floor of the defendant's store. Two daughters of the plaintiff testified that the bag was of the same type as bags in which blouses were displayed on the adjacent table. They further testified that two or three other bags of the same kind were on the floor near the plaintiff at the time of her fall and that an employee of the store was in the immediate area at the time of the fall. Another shopper testified that she also saw several more plastic bags and that she had noticed such bags on the floor of the store on previous shopping occasions. The court, this time in a unanimous decision, affirmed an involuntary nonsuit on the ground that there was no evidence of constructive notice.

Some six months later, in August of 1969, the court decided *Orr v. Saylor*¹⁹ and at least some indication was given of a possible change in the judicial climate. The decision of Mr. Justice Brailsford followed

excerpts from *Hunter, supra* note 14. There were also a number of federal cases applying South Carolina law. *See, e.g.,* *Joye v. Great Atl. & Pac. Tea Co.*, 405 F.2d 464 (4th Cir. 1968); *H. L. Green Co. v. Bowen*, 223 F.2d 523 (4th Cir. 1955); *Mullen v. Winn-Dixie Stores, Inc.*, 252 F.2d 232 (4th Cir. 1958).

17. 252 S.C. 117, 165 S.E.2d 627.

18. 252 S.C. 176, 165 S.E.2d 695.

19. 253 S.C. 155, 169 S.E.2d 396 (1969). There is a later case, *Phillips v. K-Mart*, 254 S.C. 150, 173 S.E.2d 916 (1970), which is largely uninformative. *See also* *Bootle v. Labrasca, Inc.*, 255 S.C. 134, 177 S.E.2d 545 (1970); *cf. Blount v. McCrory Const. Co.*, 254 S.C. 608, 176 S.E.2d 407 (1970).

the traditional lines and reversed a verdict for the plaintiff. On the other hand, the dissent of Acting Associate Justice Weatherford made a striking divergence in cogently arguing for the adoption of *res ipsa loquitur* and the application of that doctrine to such cases. Mr. Justice Brailsford's majority opinion concluded with the following unusual paragraph almost inviting an appeal concerning the points raised in the dissent:

In his able dissent, Mr. Actng Associate Justice Weatherford urges with considerable logic that this court should re-examine its oft stated position with respect to the *res ipsa loquitur* rule. Perhaps, in an appropriate case, we should do so and consider whether we have heretofore, while denying the rule by name, followed it in substance in applying the circumstantial evidence rule. We are not, however, convinced that this case is factually appropriate for this purpose. Furthermore, we have not been requested to re-examine our position on this appeal, and the issue has not been briefed by counsel.²⁰

In *Orr* the facts do not follow the usual pattern in these cases and perhaps the decision is justified without regard to the present state of South Carolina law. Here, the plaintiff's automobile, which she was driving in the rain, became grounded on a cement traffic divider. She walked to the defendant's service station and asked for assistance. An employee of the defendant dislodged the automobile and drove it into the grease bay area of the station where the automobile was then parked over the grease pit. The employee got out of the car and walked around to make a quick inspection of the underside of the car. After he got out, the plaintiff stated she was afraid they would raise the car or "lower" it, so she got out and walked to the front of the car. As she was standing there, she saw grease on the pavement and at the same time slipped on it and fell into the pit.

The plaintiff had been left in a position of safety in the car where certainly the defendant anticipated she would remain, but instead, on her own initiative, she got out and entered an area of the station in which she testified she knew she might expect to encounter grease or oil. It would seem, therefore, that the case might equitably have been decided on the basis of the plaintiff's contributory negligence as a matter of law,²¹ even assuming initial negligence on the defendant's part.

20. 253 S.C. at 185, 169 S.E.2d at 397.

21. See *Bolen v. Strange*, 192 S.C. 284, 6 S.E.2d 466 (1939); *Baker v. Clark*, 233 S.C. 20, 103 S.E.2d 395 (1958).

This then is the present state of South Carolina law in this area.²² Unquestionably there is need for a revision.

South Carolina is, however, not alone in its present position by any means. American Law Reports contains an extensive annotation²³ enumerating cases from all states, the majority of which undoubtedly follow the law as presently stated in South Carolina. There have been numerous attempts by plaintiffs in these other states to escape the harshness of the general law. For example, in one case the plaintiff attempted to establish that the store owner warranted the condition of the store.²⁴ In another, the plaintiff, analogizing his case with that of the products liability cases, attempted to persuade the court to carry over the products liability doctrine of strict liability.²⁵ Both of these attempts were unsuccessful.

The Florida case of *Carl's Markets, Inc. v. Defeo*²⁶ is fascinating and illustrative of the uncertainty and soul searching by at least one modern court to determine a just result in these cases. There the plaintiff entered the defendant's self-service grocery store, which had been swept approximately fifteen minutes before and she was injured when she slipped on a green bean. The bin where beans were displayed had apparently been overfilled. The store had no knowledge that the bean was on the floor prior to the plaintiff's accident, but the case was allowed to go to the jury and a verdict for the plaintiff resulted.

On appeal to the Florida Supreme Court, the matter was originally heard by five of the seven justices. The original opinion, in which four justices concurred and one dissented, reversed the judgment, applying what appears generally to be present South Carolina law. A

22. The latest case is *Anderson v. Winn-Dixie* Civil No. 19296 (S.C., filed Oct. 6, 1971). There the plaintiff slipped on a banana peel in the defendant's supermarket. As he helped her up, the produce manager stated that the store should have had the place cleaned up but they just hadn't gotten around to it. The court in a 3-2 decision reversed a verdict for the plaintiff. The two dissenting justices argued that there was sufficient evidence for the jury. Neither group questioned the "traditional" law.

23. Annot., 61 A.L.R.2d 6 (1956). This and the immediately following related annotations run over two hundred pages. There is, in addition, extensive supplementation.

24. *Thomason v. Great Atl. & Pac. Tea Co.*, 294 F. Supp. 222 (E.D. Va. 1968).

25. *Jones v. Jarvis*, 437 S.W.2d 189 (Ky. 1969).

26. 55 So.2d 182 (Fla. 1951); this case was cited by the plaintiff unsuccessfully in *Wimberly v. Winn-Dixie, Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969); it is referred to in *Orr v. Saylor*, 253 S.C. 155, 169 S.E.2d 396 (1969)(b) (dissenting opinion).

rehearing was granted and the case was heard by all seven justices. The former opinion was negated and the judgment for the plaintiff was affirmed, per curiam *without opinion*, with three justices concurring, one of whom formerly concurred in the prior opinion and then changed sides; the former dissenting justice concurred specially, and three justices dissented and adhered to the prior opinion. A second motion for a rehearing was denied.

The opinion of Mr. Justice Terrell who concurred specially in the final result, is quite interesting both from its discussion of modern supermarket techniques and also with regard to its theory of liability. In general summary, Mr. Justice Terrell stated that reasonable care was without question the rule governing stores and many other business places in the old days; however, those days are gone.

It would be as reasonable, according to Mr. Justice Terrell, to contend that the proprietor of a horse drawn vehicle should be governed by the same rule of care as the proprietor of a motor driven vehicle. The laws must change to promote human progress and should square with the changing social and economic conditions. The operator of any business must be required to use the degree of care commensurate with the kind of danger of the business he is engaged in. He felt that the evidence showed a complete lack of that degree of care, not only in looking after the floors, but also in the construction of the vegetable bins which were over filled at the time of the accident.

From a close reading of this opinion, it would appear that he would impose something close to strict liability on the modern store. Apparently the other justices who voted for affirmance were not willing to go so far and, at the same time, did not feel obliged to state exactly what their position would be.

While Mr. Justice Terrell's position is perhaps an extreme one, it does have merit in enumerating the complete change from the old marketing techniques, under which general law was formulated, to the modern ones.²⁷

The most original opinion of which this writer is aware, however, and possibly the most useful to South Carolina, is that of New Jersey Chief Justice Weintraub in *Wollerman v. Grand Union Stores, Inc.*²⁸

27. See note 6, *supra*.

28. 47 N.J. 426, 221 A.2d 513 (1966).

There the plaintiff was shopping for green peppers in the vegetable section of the defendant's supermarket. She slipped and fell when she stepped on a string bean. Nearby, but not waiting on her, was an employee of the defendant. The evidence did not show how the bean fell to the floor or how long it had been there before the accident. The trial court, relying on general law, dismissed the case on a nonsuit, holding that there was no proof that the defendant either knew the bean was on the floor or that the bean had been there long enough to permit an inference that the defendant knew of it.

The New Jersey Supreme Court reversed in a unanimous opinion. Chief Justice Weintraub stated that someone was negligent, in that vegetable debris carries an obvious risk of injury to a pedestrian. A prudent man would not place it in an aisle or permit it to remain there. He went on to say, that when greens are sold from open bins on a self service basis, there is a likelihood that some will fall or be dropped to the floor. If the operator chooses to sell them this way, he must do what is reasonably necessary to protect the customer from the risk of injury that such a mode of operation is likely to generate; and this whether the risk arises from the act of his employee or of someone else whom he invites to the premises. The operator's vigilance must be commensurate with that risk.

According to Chief Justice Weintraub, the hazard could have been caused by carelessness in the manner in which the beans were piled and displayed, or the carelessness of an employee in handling the beans, or the carelessness of an employee in handling the beans, or the carelessness of a patron. As to the first two, the store was chargeable whether or not it was aware of its employee's neglect. If the bean was dropped by a customer, since the customer's carelessness was to be anticipated in the self service operation, the defendant was liable, even without notice of the beans presence on the floor, if he failed to use reasonable measure commensurate with the risk involved to discover them and remove them before they injured the plaintiff.

Overall, the fair probability was that the defendant did less than its duty demanded in one respect or another. This probability, according to Chief Justice Weintraub, is sufficient to permit an inference of negligence, in the absence of evidence that the defendant did all a reasonably prudent person might do in the light of the risk of injury

which the operation entailed. Because of this, he held that it was just to place the onus of producing evidence upon the party, in that case the store, which was possessed of superior knowledge or opportunity for explanation of the causative circumstances.

Even though it was acknowledged that the court's views did not square completely with the standard approach to the problem, the court held:

[t]hat where a substantial risk of injury is implicit in the manner in which a business is conducted, and on the total scene it is fairly probable that the operator is responsible either in creating the hazard or permitting it to arise or to continue, it would be unjust to saddle the plaintiff with the burden of isolating the precise failure. The situation being peculiarly in the 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.²⁹

The adoption of such a doctrine in South Carolina would not make the store the insurer of the safety of its patrons, and while it would be in accord with the principles advocated by Acting Justice Weatherford in *Orr*, it would not require the adoption of *res ipsa loquitur* generally or the application of that doctrine to this type of case. In addition, it would be in accord with prior South Carolina decisions shifting the burden of proof in cases of bailments,³⁰ bank depositor,³¹ passenger-carrier,³² and master-servant.³³ All of these are analogous.

29. 47 N.J. at 430, 221 A.2d at 515. In *Childres v. Gas Lines, Inc.*, 248 S.C. 316, 149 S.E.2d 761 (1966) a traffic sign was left at a construction site by the defendant, supposedly in a safe place off the road. A third party later collided with the sign leaving debris from the sign in the road. The plaintiff, driving a motorcycle, later came by and was injured when his motorcycle collided with the debris. In sustaining a verdict for the plaintiff, the court stated:

When a thing which causes injury is shown to be under the management of the 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 care. 248 S.C. at 323, 149 S.E.2d at 764.

It is frankly difficult to find a distinction between the two statements of law.

30. *Gilliland v. Peters Dry Cleaning Co.*, 195 S.C. 417, 11 S.E.2d 857 (1940).

31. *Carroll v. South Carolina National Bank*, 211 S.C. 406, 45 S.E.2d 729 (1947).

32. *Sutton v. Southern Railway Co.*, 82 S.C. 345, 64 S.E. 401 (1909).

33. For a summary of these cases see *Bradford v. Woolworth Co.*, 141 S.C. 453, 140 S.E. 105 (1927).

If the court shifted the burden of proof in such cases, whether under a doctrine of *res ipsa loquitur* or under the general principles enumerated in *Wollerman*, a great many of the evils of the present system would be eliminated. It would do much to insure that the true facts are brought to light. It would not penalize a store which makes a careful investigation of the accident, the results of which can now be discovered for the plaintiff under state court discovery techniques. In addition, it would do much to prevent conscious or unconscious fraud by the plaintiff. Under the present system a store is encouraged not to find out what happened. On the other hand, a plaintiff, once learning the state of the law, is encouraged to locate a friend or relative who was in the store prior to the accident to establish the length of time the object was on the floor. This friend or relative in all probability did not pay much attention to the floor and is really not in a position to say what the condition of the floor was at the time of the occurrence. After hearing the plaintiff's pitiful tale, that person, feeling sorry for the plaintiff, thinks back and often quite unconsciously "remembers" the plastic bag or the beans being on the floor sometime prior to the accident, when that may well not have been the case. The question mark in the witness's mind then becomes a certainty with the passage of time and the case is decided in the plaintiff's favor through the good faith but quite erroneous testimony of the witness. The store may be powerless to contradict this testimony, having relied on the present state of the law in its favor and the fact that its investigation was geared so that it might plead complete ignorance.

While perhaps a considerable number of the present directed verdicts in favor of the defendant would be prevented,³⁴ it is submitted that our law was not established for decisions by judges but rather by juries. If the evidence for the plaintiff is weak and that for the defendant is strong, our system of justice presupposes that the jury will find for the defendant. While at one time it was felt that a jury would always find against a corporation in favor of an individual, it is doubted that this theory is entitled to as much credence in modern times as perhaps it once was.

The plaintiff would still have to prove, of course, that he sustained

34. Our court has held that a presumption of negligence may be destroyed in certain circumstances by a showing of due care plainly and indisputably. *Craig v. Clearwater Mfg. Co.*, 189 S.C. 176, 200 S.E. 765 (1938).

an injury proximately resulting from an object in the defendant's store which should not have been where it was, and which was hazardous to customers.³⁵ Even assuming negligence, there would always be the question of the plaintiff's contributory negligence³⁶ or his assumption of the risk.³⁷

Although Acting Justice Weatherford in *Orr*³⁸ argues for the adoption and application of *res ipsa loquitur* which the court may or may not be inclined to do, his statements with regard to the state of present law in this matter merit careful thought by future South Carolina courts:

My concern is that South Carolina presently is following an inconsistent, double standard. Human rights are involved as well as property rights. I cannot see that an invitee who sustains personal injury on premises beyond his management and control is any more able to prove the negligence of the owner than a customer who delivers his clothing to a laundry where they are damaged or his property to a warehouse where it is damaged. Yet there are strong presumptions which aid in the recovery of the property damage and none which aid in recovery for human damage. . . .

The law cannot remain immutable any more than life and its service to society depends on its ability to meet the challenges of change. For example, the law of products liability is moving in the direction of strict liability to the consumer, as I think it should, and away from privity, implied warranty and negligent manufacture. The law of negligence, too, must take note of the patron in the super store of today, the patient under medical care with intricate devices in a highly specialized age, the passenger in the airplane, the victim of explosions and a myriad of other complex areas of life.³⁹

35. See *Humphries v. McCrory—McLellan Stores Corp.*, 358 F.2d 901 (4th Cir. 1966) in which the court, applying South Carolina law, reversed a verdict for the plaintiff and held that the defendant which maintained the entrance to its store with a hole in the threshold to receive a bolt from the door, was not negligent since there was no foreseeable risk of harm to a customer who subsequently fell when her high heel went in the hole.

36. *Bolen v. Strange*, 192 S.C. 284, 6 S.Em2d 466 (1939). See also *Rikard v. J. C. Penny Co.*, 233 F. Supp. 133 (E.D.S.C. 1964).

37. *Baker v. Clark*, 233 S.C. 20, 103 S.E.2d 395 (1958). The court recently made clear that the doctrine of assumption of the risk could apply where there is no contractual relationship between the plaintiff and the defendant. *Canady v. Movtschink Beer Distributors, Inc.*, 255 S.C. 119, 177 S.E.2d 475 (1970). Of course a defendant cannot invite a plaintiff into a space not dangerous in itself but from which it is dangerous to exit, and when the plaintiff discovers the danger after arriving, claim assumption of the risk in leaving. See *Griffin v. Demeyian*, 350 Mass. 47, 213 N.E.2d 384 (1965).

38. 253 S.C. 155, 169 S.E.2d 396 (1969).

39. 253 S.C. at 167-68, 169 S.E.2d at 402.