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Durward S. Jones

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A long line of North Carolina decisions has made it clear that for a customer to recover from a store proprietor for injuries sustained from a fall on a slippery and dangerous floor, he must establish either of these elements of actionable negligence:[1] (1) that the dangerous condition was created by the defendant, or (2) that this condition had existed for such a length of time that he knew, or in the exercise of ordinary care should have known of its existence.[2]

It is clear that negligence is not required to be shown by direct evidence, but may be inferred from the facts and attendant circumstances.[3] So long as the negligence of defendant may be inferred as a reasonable probability,[4] the case cannot be withdrawn from the jury.[5] In past cases of this class where plaintiffs were allowed recovery, however, there was direct evidence establishing proof of these elements.[6] To illustrate, in *Bowden v. Kress & Co.*[7] there was evidence showing that the defendant oiled his floors every Saturday night; evidence of-

[1] In addition to the elements listed in the text which concern the breach of the defendant's duty to the plaintiff, there must, of course, be established a duty owed to the plaintiff by the defendant, and that the breach of that duty was the proximate cause of the injury. However, this comment will be concerned only with the elements establishing the breach of the defendant's duty, since they are the controversial ones in Lee v. Green & Co., 236 N. C. 83, 72 S. E. 2d 33 (1952).

[2] Harris v. Montgomery Ward & Co., 230 N. C. 485, 58 S. E. 2d 536 (1949); Pratt v. Great A. & P. Tea Co., 218 N. C. 732, 12 S. E. 2d 242 (1940); King v. Thackers, Inc., 207 N. C. 869, 178 S. E. 95 (1935). For a collection of these cases see Harris v. Montgomery Ward & Co., *supra*.

[3] Wyrick v. Ballard & Ballard Co., 224 N. C. 301, 29 S. E. 2d 900 (1944); Etheridge v. Etheridge, 222 N. C. 616, 24 S. E. 2d 477 (1943); Corum v. R. J. Reynolds Tobacco Co., 205 N. C. 213, 171 S. E. 78 (1933); Lynch v. Carolina Tel. & Tel. Co., 204 N. C. 252, 167 S. E. 847 (1933); Rainey v. Virginia and Carolina Southern Ry., 168 N. C. 570, 84 S. E. 851 (1915).

[4] "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury." Mount Olive Manufacturing Co. v. Atlantic Coast Line R. R., 233 N. C. 661, 670, 65 S. E. 2d 379, 386 (1951).

[5] Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. 2d 246 (1945); Mitchell v. Melts, 220 N. C. 793, 18 S. E. 2d 406 (1942) and cases cited therein.

As Chief Justice Stacy said in State v. Johnson, 199 N. C. 429, 431, 154 S. E. 730, 731 (1930) " . . . if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury."

Determining the sufficiency of the evidence is a matter of law. Tysinger v. Coble Dairy Products, *supra;* Mitchell v. Melts, *supra*; Mills v. Moore, 219 N. C. 25, 30, 12 S. E. 2d 661, 663 (1941).

[6] Anderson v. Reidsville Amusement Co., 213 N. C. 130, 195 S. E. 386 (1938); Parker v. Great A. & P. Tea Co., 201 N. C. 691, 161 S. E. 209 (1931); Bowden v. S. H. Kress & Co., 198 N. C. 559, 152 S. E. 625 (1930). See Harris v. Montgomery Ward & Co., 230 N. C. 485, 53 S. E. 2d 536 (1949); and Brown v. Montgomery Ward & Co., 217 N. C. 368, 8 S. E. 2d 199 (1940) where judgments were reversed on other grounds.

[7] 198 N. C. 559, 152 S. E. 625 (1930).

fered by the defendant in *Parker v. Tea Co.*[8] tended to show that he oiled the floor on Saturday night and that the plaintiff fell on Monday morning; and in *Anderson v. Amusement Co.*[9] defendant's witness testified that the defendant used liquid floor wax on the linoleum. In previous decisions where the plaintiff did not offer direct evidence to prove either the creation of the dangerous condition by the defendant or his knowledge of its existence, the North Carolina Court apparently did not see fit to say that the jury could reasonably infer that the defendant was negligent, and judgments as of nonsuit were accordingly affirmed.[10] Undoubtedly the reason is that the particular facts of these cases would not substantiate, as a reasonable probability, the inference that the defendant created the slippery condition, or that he knew or should have known of such condition.[11]

In view of these prior decisions, our Supreme Court, in the recent case of *Lee v. Green & Co.*,[12] took a liberal step in allowing the plaintiff to carry her case to the jury. The plaintiff testified that she slipped and fell in the aisle of defendant's store on a place that was "dark, greasy, and slippery looking."[13] Other testimony, given by plaintiff's husband, showed that the floor was examined immediately after the fall; that it was greasy all the way across; that the oil was fresh at some places and dry at others; and that the place where plaintiff fell was slick.[14] With no other evidence offered, the court held four to three, in reversing a judgment as of nonsuit, that the existence of the necessary elements of actionable negligence could reasonably be inferred from the whole of the evidence, which was sufficient to make a prima facie case for the jury.

While the decision in the principal case represents the first time our

[8] 201 N. C. 691, 161 S. E. 209 (1931).
[9] 213 N. C. 130, 195 S. E. 386 (1938).
[10] Fanelty v. Rogers Jewelers, Inc., 230 N. C. 694, 55 S. E. 2d 493 (1949); Pratt v. Great A. & P. Tea Co., 218 N. C. 732, 12 S. E. 2d 242 (1940); Fox v. Great A. & P. Tea Co., 209 N. C. 115, 182 S. E. 662 (1935); King v. Thackers, Inc., 207 N. C. 869, 178 S. E. 95 (1935); Cooke v. Great A. & P. Tea Co. and Shepard, 204 N. C. 495, 168 S. E. 679 (1933).
[11] Fanelty v. Rogers Jewelers, Inc., 230 N. C. 694, 55 S. E. 2d 493 (1949) (plaintiff slipped on a slick place at the entrance of the store); Pratt v. Great A. & P. Tea Co., 218 N. C. 732, 12 S. E. 2d 242 (1940) (greasy substance covered only 8 or 10 inches); Fox v. Great A. & P. Tea Co., 209 N. C. 115, 182 S. E. 662 (1935) (plaintiff slipped and fell on a beet in the aisle); Cooke v. Great A. & P. Tea Co., 204 N. C. 495, 168 S. E. 679 (1933) (plaintiff slipped and fell on a banana peeling). *But see* King v. Thackers, Inc., 207 N. C. 869, 178 S. E. 95 (1935) where corn meal was on the floor in the restaurant's kitchen in heavy and light places; the court reaches the same result, but it is the opinion of this writer that the circumstances would have warranted a verdict in favor of the plaintiff.
[12] 236 N. C. 83, 72 S. E. 2d 33 (1952).
[13] *Id.* at 84, 72 S. E. 2d at 34.
[14] Plaintiff also testified that she got oil on her clothing and arm, and that some of the oil went through her hose onto her skin.

Supreme Court has said that a verdict in favor of the plaintiff in this type case would be warranted on the basis of circumstancial evidence, other jurisdictions have, for a number of years, expressed a willingness to go this far.[15] Recognizing that the particular facts of each case are of the utmost importance in determining whether or not that case may go to the jury, there is still a certain personal element involved, for individual judges undoubtedly differ in their attitudes toward the submission of cases to the jury.

The court is careful to point out that while allowing a prima facie case to be established, it is in no sense applying the doctrine of *res ipsa loquitur*.[16] One of the basic requirements for the application of *res ipsa loquitur* is that the instrumentality causing the plaintiff's injury be under the exclusive control or management of the defendant. In the cases of slippery substances on floors, it cannot be said that the defendant is in exclusive control or management of his floor, because members of the public may create the dangerous condition. Consequently, the courts do not resort to the application of that doctrine; rather, they determine whether the creation of the dangerous condition by the defendant is a reasonable inference from the whole of the evidence. In either instance, the plaintiff has his case submitted to the jury. There is this distinction however: Where *res ipsa loquitur* is applicable the plaintiff must show only the physical cause of the accident; where it is not applicable, as in the principal case, the plain-

[15] Plaintiff slipped on an oily puddle at the paint counter in defendant's store. The court said, "There was no direct evidence as to how long the puddle was on the floor but, . . . that fact, like other facts, may be proved by circumstantial as well as by direct evidence. . . . " Ahern v. S. H. Kress & Co., 97 Cal. App. 2d 691, 218 P. 2d 108 (1950).

There was no direct evidence as to how or by whom the decayed fruit substance, on which the plaintiff fell, was placed on the floor. The court said, "In the case at bar there is evidence from which the jury could reasonably infer it was more probable that the condition was created by the defendant." Fox v. Ben Schechter & Co., 57 Ohio App. 275, 13 N. E. 2d 730 (1937).

[16] Lee v. Green & Co., 236 N. C. 83, 85, 72 S. E. 2d 33, 35 (1952). That the doctrine does not apply to cases involving foreign substances on floors is well settled. Harris v. Montgomery Ward & Co., 230 N. C. 485, 486, 53 S. E. 2d 536, 538 (1949); Barnes v. Hotel O'Henry Corporation, 229 N. C. 730, 731, 51 S. E. 2d 180, 181 (1949); Pratt v. Great A. & P. Tea Co., 218 N. C. 732, 733, 12 S. E. 2d 242 (1940); Parker v. Great A. & P. Tea Co., 201 N. C. 691, 692, 161 S. E. 209, 210 (1931); Bowden v. S. H. Kress & Co., 198 N. C. 559, 561, 152 S. E. 625, 626 (1930).

Other jurisdictions likewise hold the doctrine inapplicable to these situations. Montgomery Ward & Co. v. Lamberson, 144 F. 2d 97, 99 (9th Cir. 1944); F. W. Woolworth Co. v. Ney, 239 Ala. 233, 235, 194 So. 667, 669 (1940); Maple v. Manspeaker, 88 Cal. App. 682, 263 P. 1022, 1023 (1928); Powell v. L. Feibleman & Co., 187 So. 130, 131 (La. App. 1939); Coyne v. Mutual Grocery Co., 116 N. J. L. 36, 181 Atl. 314, 315 (1935); Reay v. Montgomery Ward & Co., 154 Pa. Super. 119, 120, 35 A. 2d 558, 559 (1944); Tenbrink v. F. W. Woolworth Co., 153 Atl. 245 (R. I. 1931); Martin v. Miller Bros. Co., 26 Tenn. App. 110, 117, 168 S. W. 2d 187, 190 (1942); Cooper v. Pritchard Motor Co., 128 W. Va. 312, 318, 36 S. E. 2d 405, 408 (1945).

tiff must show circumstances pointing to both the physical and the responsible human cause of the accident.[17]

In the final analysis the principal case neither changes the duty of the proprietor,[18] nor does it lessen the elements to be proved by the plaintiff.[19] However, the case does express a willingness on the part of our court to allow a plaintiff to have either of these necessary elements inferred from convincing circumstancial evidence. There will undoubtedly be many instances where a plaintiff will be unable to obtain direct proof of either of these elements of actionable negligence. He may then offer circumstantial evidence from which one of the elements may be inferred. That is as far as the court has gone in this case. The case does not, as the dissent suggests, support the proposition that a plaintiff may establish a prima facie case merely by proving that there was some slippery substance on the floor where she fell. Each case must be decided on the facts peculiar to it, and there is no question that as past cases of this type are distinguishable on their facts, so is the principal case distinguishable from all others.[20]

DURWARD S. JONES.

Railroads—Abandonments and Partial Discontinuances of Passenger Service—Jurisdiction—Factors in Determining

Since 1916, when railroad mileage in the United States reached its peak,[1] there has been a steady reduction of trackage and service.[2]

[17] For an excellent distinction between circumstantial evidence and *res ipsa loquitur*, see Harris v. Mangum, 183 N. C. 235, 237, 111 S. E. 177, 178 (1922) (quoted in Howard v. Texas Co., 205 N. C. 20, 23, 169 S. E. 832, 834 (1933).

[18] The proprietor is not an insurer, but owes to customers the duty to exercise ordinary care to keep the premises in a reasonably safe condition, and to give warning of unsafe conditions in so far as can be ascertained by reasonable inspection. For a collection of cases so holding see Fanelty v. Rogers Jewelers, Inc., 230 N. C. 694, 699, 55 S. E. 2d 493, 497 (1949).

[19] See note 1 *supra*.

[20] The facts of past cases of this class did not warrant their submission to the jury in the absence of direct evidence; with the possible exception of King v. Thackers, Inc., 207 N. C. 869, 178 S. E. 95 (1935).

[1] In that year there were 435,745 miles of track in operation. See ASSOCIATION OF AMERICAN RAILROADS, RAILROAD TRANSPORTATION, A STATISTICAL RECORD (1951). Miles of track in North Carolina reached a peak of 5,522 in 1920. See ICC, STATISTICS OF RAILROADS IN U. S. (1951).

[2] Statistics on abandonments are available only from 1920, when the ICC was given juristiction over abandonments under the Transportation Act of that year. By 1945 there had been 33,513 abandoned miles of trackage in the United States, 613 of them being in North Carolina. See CHERINGTON, THE REGULATION OF RAILROAD ABANDONMENT 105 (1948). There were five additional abandonments in North Carolina between 1945 and 1948 inclusive, cutting the railroad trackage in the state to 4,554 miles. The figures were derived from individual abandonments in REPORT OF THE NORTH CAROLINA UTILITIES COMMISSION (1945-46, 1947-48). No statistics are available indicating the reduction of trains nationally, although between 1945 and 1948 inclusive, 14 daily passenger trains were discontinued in North Carolina.