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No Liability for Not Issuing Pointless Warning, Court Rules

Much like trees in a forest, warnings must be heard to matter, a California appellate court seemed to say in a recent opinion.

Ruling against two plumbers burned when a little-known problem led to a serious gas explosion, the court held that even if the defendant Gas Company had put out a warning about the obscure danger, the plumbers never would have learned of it. Therefore, if a warning had been issued, it wouldn't have made any difference.

"The lack of evidence that the Gas Company's failure to issue a warning was the cause of the accident precludes recovery by plaintiffs," the court held. *Huitt v. Southern California Gas Co.*

The plumbers had been brought in by a school to fix numerous problems, including a water heater's pilot light that had gone out. They first thing they did was open the pilot valve to bleed out what seemed to be excess air in the gas line.

They thought it was air because it had no odor. Unfortunately, what filled the enclosed water heater closet turned out to be natural gas, which exploded when a plumber lit the pilot.

The ultimate cause of the problem was new steel pipes carrying the gas to the heater. Until they have been sufficiently "seasoned" or "pickled," new steel pipes leech the smelly chemical "odorant" always added to natural gas to give gas its tell-tale warning stench.

A jury found the Gas Company should have put out a warning about "odor fade" from new steel pipes. The jury awarded each plaintiff more than $1.3 million in compensatory damages and $5 million in punitive damages.

But the appellate court said that the jury was wrong and that the company's failure to warn had not caused the plumbers' injuries.

The plumbers argued "that causation is a matter of common sense" and that the jury could have inferred that a warning would have prevented the accident.

"Plaintiffs' arguments confuse knowledge with causation," the appellate court countered. While it is probably true the plumbers would have acted differently had they known about steel pipes and odor fade, there is no proof a warning would have succeeded in giving them that knowledge, the court said.

"A warning that never reached plaintiffs would not have changed the events that occurred on the day of the accident."

The Gas Company couldn't attach a warning label to the natural gas itself. The water heater's installation manual did warn about odor fade a bit, but according to plaintiffs' own experts, experienced plumbers wouldn't need to read the installation manual just to re-light the pilot.

"Therefore, if a warning is required it must be delivered in some other form. So, how can the Gas Company effectively warn consumers and tradesmen about odor fade?" the court asked. "This is a question plaintiffs did not answer in the trial court, and have not answered in this court."

In fact, they managed to do the opposite, the court said. Although information about odor fade was widely available on the Internet and elsewhere, the plaintiffs and their experts hadn't heard of it before.

Their ignorance showed "that other sources of information about odor fade were ineffective to bring the issue to the plumbing industry," the court said. "It is pure speculation to assert that a warning issued by the Gas Company would have succeeded where numerous cases and other sources failed."

Under California law, a plaintiff must prove a defendant's failure to warn was a substantial factor in causing the plaintiff's injury. "The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings," the court held.

Broken Diner Stool Speaks for Itself — Even Though Muted

In law, when things speak for themselves, they need to be listened to. How much attention they deserve, however, can depend on the circumstances.

A November decision from a California appellate court, about an injury accident in a casual restaurant, shows both the power and the limitations of the legal doctrine known as res ipsa loquitur.

The Latin phrase means "the thing speaks for itself." It usually refers to a situation or occurrence that caused an injury to one person that could only have happened through the negligence of someone else. The classic example is the sponge found inside a former surgery patient, which only could have gotten in the patient's belly because a careless surgeon forgot it there.

In the new case, a man sat down on a counter stool at an IHOP restaurant, leaned against the stool's back and promptly crashed to the floor when the stool seat snapped off its post.

In his lawsuit against the IHOP franchise owner, he argued res ipsa loquitur. *Howe v. Seven Forty Two Company Inc.* The only reason the seat would break free of the post was negligence by restaurant management in taking care of its far from brand-new stools.

But the restaurant responded with evidence that it wasn't negligent because it performed monthly inspections of its stools and of the screws that hold seats to the posts. The trial court agreed, rejected the res ipsa argument and threw the case out on a summary judgment motion.

The appellate court said the trial court was only a little bit right.

Under California's version of res ipsa, Evidence Code Section 646, if a plaintiff presents circumstantial evidence that demonstrates an accident most likely was caused by the defendant's negligence — that is, shows a thing speaking for itself — then the plaintiff scores a "presumption" that negligence caused the accident.

The burden to produce further evidence then shifts over to the defendant, who can present evidence that counters the presumption of negligence. If he succeeds, "the presumption is out of the case — it 'disappears,'" the court said.

That's what the restaurant did here, and the trial court was right to that point. "[T]he presumption of negligence established by … res ipsa loquitur disappears upon the introduction of evidence tending to rebut the presumed fact," the appellate court said.

Nevertheless, the court continued, "the plaintiff is still entitled to rely on the logic of the underlying common law inference of negligence if the evidence supports it."

Although the "presumptive effect" of the res ipsa loquitur doctrine has vanished, the plaintiff hasn't necessarily lost completely. He can still "introduce actual evidence that would show that the defendant is negligent and that such negligence was the proximate cause of the accident," the court said.

The evidentiary burden just shifts back to the plaintiff. "In other words, the plaintiff is permitted to proceed in those cases, but must do so without aid of the presumption," the court explained.

Firm News

As we approach the one year anniversary of **The Rodolff Law Firm, APC**, we are pleased to report that the firm has experienced a very successful first year. We would like to thank our clients for providing us the opportunity to serve you.

This year has seen us serve clients in a wide variety of matters, including personal injury litigation involving premises liability, product liability and automobile accidents. We have had particular success this year in minimizing litigation costs through effective settlements. If you have any questions about these or other matters, please contact us. We would be happy to serve you.

Barry L. Rodolff

The founder and president of The Rodolff Law Firm, APC, Barry L. Rodolff, is a highly experienced lawyer who has been assisting clients faced with civil litigation for more than two decades. Mr. Rodolff developed his skills with two well-respected defense firms, Schell & Delamer, and Haight, Brown & Bonesteel. He also worked in-house at Travelers Insurance Company, representing a variety of insured companies in many types of litigation. His clients have ranged from small businesses to multinational corporations. Mr. Rodolff brings extensive experience and knowledge in the defense of litigation involving premises liability, business, product liability, personal injury, employment, construction defect, and intentional torts.