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A Simple End to Complex Instrumentalities

New Jersey Supreme Court reaffirms application of res ipsa loquitur to product liability cases

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Doctrinal simplicity has been an overriding theme in product liability law even before the 1997 publication of the *Restatement of Torts (Third): Products Liability*. With a few exceptions, discussed below, New Jersey courts have accepted this trend. The latest manifestation of this theme is Justice Barry Albin's opinion in *Jerista v. Murray*, 185 N.J. 175 (2005), in which the Supreme Court reaffirmed the application of res ipsa loquitur (in its *Restatement (Third)* form) to product liability cases. Id. at 198, n. 3.

Jerista involved a malpractice action arising from an attorney's failure to pursue a negligence claim based upon the unexpected closure of a supermarket's automatic door, which injured the plaintiff. The case considered whether res ipsa loquitur doctrine (or its *Restatement* equivalent) would permit an inference "based on common knowledge that automatic doors ordinarily do not malfunction unless negligently maintained by the store owner or

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whether res ipsa inference is preconditioned on expert testimony first explaining the door's mechanics." Id. at 180.

In 1999, the Supreme Court in *Myrlak v. Port Authority of New York and New Jersey*, 157 N.J. 84 (1999), had adopted Section 3 of the *Restatement (Third)* based on a res ipsa loquitur model in a product liability case. Thus, the Court permitted the jury to draw two inferences: "that the harmful incident was caused by a product defect, and that the defect was present when the product left the manufacturer's control." Id. at 104. As Justice James Coleman Jr. noted, this double inference was more consistent with product liability terminology than the single inference of negligence under traditional res ipsa loquitur doctrine.

Jerista quoted *Myrlak's* observation that "Section 3 of the Restatement in a products liability case does precisely what res ipsa loquitur does in a negligence context" 185 N.J. at 198, n. 3, quoting *Myrlak*, 157 N.J. at 106-07. Although *Jerista's* application of the res ipsa doctrine in a negligence case is not identical to *Myrlak's* application of the doctrine in product liability design or manufacturing defect cases, the *Jerista* Court equated the two in its discussion of the need for expert testimony in a "complex instrumentality" case. This requirement had been imposed by the

Appellate Division and unfortunately, had been adopted in some earlier product liability cases. See the *Jerista* discussion, id. at 195-200

The doctrine requiring expert testimony when dealing with a "complex instrumentality" was mistakenly injected into the law in a series of appellate cases. See discussion in Dreier, Keith & Katz, *New Jersey Product Liability and Toxic Tort Law*, (GANN, 2006 ed.) at 246.

For example, two Appellate Division cases mandated expert testimony in product liability cases involving complex instrumentalities. See *Lauder v. Teaneck Ambulance Corp.*, 368 N.J. Super. 320, 331 (App. Div. 2004); *Rocco v. N.J. Transit Rail Operations*, 330 N.J. Super. 341 (App. Div. 2000). Both cases relied on *Jimenez v. GNOCH Corp.*, 286 N.J. Super. 533 (App. Div.), cert. den. 145 N.J. 374 (1996), which had concluded that an expert opinion was necessary before the doctrine of res ipsa loquitur could be applied in a negligence action involving a complex instrumentality. However, *Jimenez* did not consider the use of expert opinion to prove a product defect. Rather, the case involved the alleged negligent maintenance of an escalator. See also *Gore v. Otis Elevator Co.*, 335 N.J. Super. 296, 303 (App. Div. 2000), another negligence case

requiring expert testimony where complex instrumentalities are involved.

Other appellate panels rejected the notion that plaintiffs must always provide expert testimony in *res ipsa loquitur* cases involving a complex instrumentality, concluding that the focus should be on the complexity of the evidence rather than whether a complex instrumentality is involved. *Rosenberg v. Otis Elevator Co.*, 366 N.J. Super. 292, 305-306 (App. Div. 2004). Accord, *Knight v. Essex Plaza*, 377 N.J. Super. 562, 578 (App. Div. 2005). See also *Sabloff v. Yamaha Motor Co., Ltd.*, 59 N.J. 365, 366 (1971). These cases were discussed and their conclusions accepted in *Jerista*.

As early as 1981, the Supreme Court held in a medical malpractice case, *Buckelew v. Grosspard*, 87 N.J. 512, 518 (1981), that in *res ipsa* cases, expert testimony may be used or even may be necessary, to form a part of the foundation for the application of the *res ipsa* doctrine. *Id.* at 525. There often are cases in which a lay jury will not understand that a particular occurrence would not have happened but for some negligence. In such cases, an expert is needed to explain that among those knowledgeable in the field, the occurrence itself bespeaks some negligence, even though the expert may not be able to point out the specific negligence. *Id.* at 527-29. A plaintiff in such a case is still entitled to a *res ipsa loquitur* charge. *Id.* at 528-29.

So, too, in a product liability case. The mere happening of the accident itself may demonstrate that there is some defect in the product. If, however, the operation or make-up of the product is not known to a lay jury, some expert testimony might be necessary to lay a foundation before the inference of an unspecified defect can be drawn. In *Jerista*, however, lay jurors certainly were able to understand how a supermarket door was expected to work as a result of their own experience. As there had been no evidence or allegation of a design or manufacturing defect, the malfunction itself bespoke negligent maintenance. In fact, a very similar case, *Rose v. Port of New York Authority*, 61 N.J. 129 (1972), noted

that the closing of an automatic door on a pedestrian is “unusual and not commonplace...[and] strongly suggests a malfunction which in turn suggests neglect.” *Id.* at 136-37, quoted at 185 N.J. at 194.

In *Rose* as in *Jerista*, the Court determined that it was not the burden of the plaintiff to come forward with proofs concerning the nature of the malfunction, but rather the burden shifted to the defendant for such an explanation. *Rose* at 139; *Jerista* at 194. *Rose* failed to address, however, whether expert testimony was necessary, and the Appellate Division cases cited above found there to be no express holding that expert testimony could be eliminated. See, e.g., *Knight*, 377 N.J. Super. at 572. Thus they concluded that they were free to impose a requirement for expert proof.

The Supreme Court stated clearly that on the *Jerista* facts, “common knowledge is sufficient to entitle plaintiffs to the *res ipsa* inference. We do not see why in an automatic door malfunction case the *res ipsa* inference should be contingent on expert testimony.” *Jerista*, 185 N.J. at 195. After discussing out-of-state cases, the Court determined:

An automatic door may be a highly sophisticated piece of machinery, but it probably does not close on an innocent patron causing injury unless the premises’ owner negligently maintained it. That conclusion can be reached based on common knowledge without resort to expert testimony. A jury does not need an expert to tell it what it already knows. If the premises’ owner, who has exclusive control over the automatic door, has proof that he is not to blame and that another is at fault, he must come forward to rebut the inference. For example, the owner is in the better position to say whether the malfunction was the result of improper inspection or product defect for which others should be answerable.

We disagree with the Appellate Division’s sweeping suggestion in this case that in almost all complex instrumentality cases a *res ipsa* inference will be conditioned on the production of expert testimony...we also cannot agree with the Appellate Division’s determination that “[t]he requirement for expert testimony and complex instrumentality cases results logically from New Jersey law that *res ipsa loquitur* is inapplicable where the injured party fails to exclude other possible causes of the injury.” [Internal citations omitted.]

The source of that misstatement of law was *Jimenez*, supra, a case involving a plaintiff who was thrown backwards on an ascending escalator when the right handrail stopped moving. [internal citation omitted.] *Jerista*, 185 N.J. at 196-98.

The *Jerista* Court then traced *Jimenez* back to an analysis of the landmark case of *Jakubowski v. Minnesota Mining & Mfg.*, 42 N.J. 177 (1964), and noted the Appellate Division’s misapplication of the *Jakubowski* rationale. The Court tied the analysis to the *Buckelew* doctrine, quoted earlier, stating “the question is not whether the instrumentality at issue is complex or simple, but whether based on common knowledge the balance of probability favors negligence, thus rendering fair the drawing of a *res ipsa* inference...Only when the *res ipsa* inference falls outside of the common knowledge of the fact finder and depends on scientific, technical or other specialized knowledge is expert testimony required.” *Jerista*, 185 N.J. at 199. The Court then concluded: “When the average juror can deduce what happened without resort to scientific or technical knowledge, expert testimony is not mandated. The circumstances in this case invited a *res ipsa* inference,

which means that plaintiffs could have made out a prima facie case against Shop Rite....” Id. at 200.

After *Jerista*, there should be no need to distinguish between the two lines of cases discussed above, common sense should prevail. The permitted application of the *Myrlak* principles to “complex instrumentalities” is now apparent from *Jerista* itself.

Note, however, that if there had been evidence of adequate maintenance of the door after it was received from the manufacturer, and there had been a claim of a product defect, a jury might well have been charged that if it believed such maintenance testimony, it could draw an inference that there was a design or manufacturing defect in the door, notwithstanding that it was a “complex instrumentality.” If there had been testimony both ways (i.e., whether there was a product defect or a failure to maintain the door), and the jury had to determine which to believe, the resolution of the issue and the use of *res ipsa* would require a conditional ruling by the court under N.J.R.E. 104(b), with the jury being required to find all other reasonable causes eliminated before the *res ipsa* doctrine could be applied to the remaining theory. Cf., *Anderson v. Somberg*, 67 N.J. 291, cert. denied, 423 U.S. 929 (1975); and *Chin v. St. Barnabas Medical Center*, 160 N.J. 454, 465 (1999), explaining that other causes must be eliminated before *res ipsa* can supply a cause unproven by substantive evidence.

Jerista follows in the tradition of

our Supreme Court’s adoption of the *Restatement (Third)’s* § 2(b) “reasonable alternative design” formulation of the risk/utility analysis, greatly simplifying the seven prong tests articulated in earlier product liability cases. See *Cavanaugh v. Skil Corp.*, 164 N.J. 1, 8-9 (2000), and the cases there cited, as well as several other Appellate Division cases coming to the same conclusion. Other examples abound in which the Court has integrated product liability concepts with related law. From the time of the *Restatement (Second) of Torts* § 402A, product liability law has come to be recognized as an offshoot to general negligence principles, with but a few differences, a proposition quoted in many New Jersey cases. See Dreier, Keefe & Katz, *New Jersey Product Liability and Toxic Tort Law*, at § 1:1.

Because of the nature of the statutory action under the 1987 Product Liability Act and the common law, there must be a focus on three distinct types of defects: manufacturing, design and warning. At least within the design defect and warning defect constructs, however, the overriding theme is the negligence concept of reasonableness of a defendant’s actions. There is a synthesis of negligence principles with those formerly thought to be limited to strict liability claims.

For example, with respect to inadequate warnings, negligence principles are the glue that holds the statutory product liability concepts together. See, N.J.S.A. 2A:58C-4. Rather than make special rules for different

types of products cases, the Court applied a strong presumption of no defect (if there is compliance with the FDA’s regulations), to all drug and medical devices warning cases, not just direct-to-consumer advertising claims. *Perez v. Wyeth Laboratories*, 161 N.J. 1, 24 (1999). The employee protections of *Suter v. SanAngelo Foundry & Mfg. Co.*, 81 N.J. 150, 167 (1979), are applied outside of product cases. See *Tobia v. Cooper Medical Center*, 136 N.J. 335, 341-42 (1994), and *Green v. Sterling Extruder Corp.*, 95 N.J. 263, 272 (1984). The punitive damage provisions originally applicable to product cases, N.J.S.A. 2A:59C-5, and then expanded to all cases by the Supreme Court in *Herman v. Sunshine Chemical Specialties, Inc.*, 133 N.J. 329 (1993), became the foundation of the New Jersey Punitive Damages Act., N.J.S.A. 2A:15-5.9 et seq. The damage considerations explained in *Fosgate v. Corona*, 66 N.J. 268, 272-73 (1974), a medical malpractice case, are applicable (after a running Appellate Division controversy) to products cases. *James v. Bessemer Processing Co.*, 155 N.J. 279, 312-13 (1998). *Myrlak*, discussed above, integrated the *res ipsa* concepts governing product claims with negligence principles.

Jerista fits well within this tradition of building an as seamless as possible web for the law. It is a welcome addition to New Jersey Product Liability law. ■