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October 4, 1957

Dr. Robert A. Kehoe
Kettering Laboratory
University of Cincinnati
Cincinnati, Ohio

Dear Dr. Kehoe:

Re: Martin v. Reynolds

As you may know, Martin secured a rehearing before the entire court of the Ninth Circuit Court of Appeals.

Several of us, feeling that our clients are directly affected by that case, have filed a motion for leave to file brief and a brief amicus curiae in that case.

I am enclosing a copy as I believe you will be interested.

With best regards,

Frank L. Seamans

FLS:ff

Enclosure

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

In the

United States Court of Appeals

For the Ninth Circuit

REYNOLDS METALS COMPANY, *Appellant,* vs. PAULA MARTIN, by and through Arthur H. Lewis, her guardian ad litem, *Appellee.*	No. 14990
REYNOLDS METALS COMPANY, *Appellant,* vs. VERLA MARTIN, *Appellee.*	No. 14991
REYNOLDS METALS COMPANY, *Appellant,* vs. PAUL MARTIN, *Appellee.*	No. 14992

Brief Amicus Curiae

Rehearing en Banc on Appeal from Final Judgments of the District Court for the District of Oregon

I.

BACKGROUND—THE NOVEL AND FAR-REACHING EFFECT ON THE ALUMINUM INDUSTRY OF APPLYING THE RULE OF ABSOLUTE LIABILITY

By way of dictum in the main opinion of the division of this Court in these cases, Judge Denman held that "the

doctrine of *Fletcher v. Rylands*" applied, fixing as absolute the liability of the defendant as an aluminum smelter to any person whom a jury might find to have been injured by fluorides escaping from that long-established, lawful and common industrial process.

Such a rule of law means that all a plaintiff need do to perfect recovery from an industry operating a process involving emission of fluorides is to produce one single doctor who will testify that the plaintiff's ills, real or imaginary, have resulted from defendant's operations. On this evidence alone, according to Judge Denman's dictum, the case will go to the jury with an instruction of absolute liability.

The aluminum industry in the United States is 69 years old. The same identical process involving the necessary use of fluorides has been conducted continuously in this country since 1888. Today, 22 aluminum smelting plants owned by 6 different companies are in operation or under construction with a total annual capacity of 5.3 billion pounds. 25,000 people are directly employed in these smelting plants and 100,000 people are employed by the primary aluminum producers.

There are 7 major aluminum smelting plants in the northwest alone employing approximately 6,000 industrial workers, skilled and unskilled. All 7 of these plants are located in inhabited areas similar in character to the Troutdale plant involved in this case.

The necessity of a strong aluminum industry to national defense is known to all.

Never, prior to this case, in all these 69 years has a claim ever been made or litigated that fluorides from an aluminum smelting plant have caused personal injury to someone living in the neighborhood of such a plant.

Here in the very first case where such an injury is alleged, we have a judicial determination by an appellate court (concededly not necessary to the decision and without any findings by the trial judge supporting such determination) that smelting aluminum is an ultrahazardous activity to which the rule of absolute liability applies.

We earnestly believe this application of the rule of absolute liability is without foundation in fact or in law, and is dictum unnecessary and inappropriate, in the state of the record, to a determination of the present appeals.

II.

ARGUMENT

In the interest of brevity we shall address ourselves to two issues only, whether the rule of *Fletcher v. Rylands* should be applied to aluminum smelting plants (with the related point that on the state of the record in the present appeals there is no occasion for referring to this rule) and whether the doctrine of res ipsa loquitur should be invoked in these cases. We wholeheartedly endorse the other points argued by Appellant, but we feel that they have been very soundly argued in Appellants' briefs so that any other discussion of those points would be superfluous.

A. The Absolute Liability Rule of Fletcher v. Rylands Should Not Be Applied to Aluminum Smelting Plants.

An ultrahazardous activity, one covered by the doctrine of *Fletcher v. Rylands,* is defined in the Restatement of Torts, § 520 as follows:

"An activity is ultrahazardous if it

(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and

(b) is not a matter of common usage."

As stated in comment g. to § 520:

> "In order that an activity may be ultrahazardous it is necessary that it satisfy the conditions stated in both Clauses (a) and (b)."

We believe that the record in this case, and the general conditions in the industry of which this court may take judicial notice, make it clear that *neither* of those conditions exists.

Under the rationale of the Restatement, the hazard to human beings from the industrial activity in question *must be serious, constant and commonly recognized* before the rule of absolute liability will be imposed. Further, the activity *must not be one of common usage*. The Restatement states further in comment g. to § 520:

> "An activity which normally can be safely carried on, or an instrumentality which can ordinarily be safely used if reasonable care is exercised, is not ultrahazardous even though it is carried on or used to gratify some purely personal idiosyncrasy of the actor. On the other hand, even those activities or instrumentalities which cannot be made safe by the utmost precaution and care may be carried on or used without incurring absolute liability if the activity or instrumentality is one which is commonly carried on or used."

Just the reverse is true in the aluminum industry and the other industries using fluorides in their processes. Speaking of the aluminum industry alone, the hazard to human health cannot be said to be serious, constant or commonly recognized, for in 69 years of continuous operations by the same process, only one such case (the case at bar) has ever presented the contention that such a hazard exists. That aluminum smelting is a matter of "common usage" is apparent from the production statistics set forth above, at page 2.

The law of Oregon accepts the rationale of the Restatement of Torts and has determined the rule of *Fletcher v. Rylands* to be synonymous with the rule governing ultrahazardous activities defined in §§ 519 and 520 of the Restatement of Torts: *Bedell v. Goulter,* 199 Or. 344, 261 P.2d 842 (1953).

The determination of the facts necessary to conclude that an activity is ultrahazardous is a matter for the judgment of the court (Restatement of Torts, § 520, comment h.) which means, of course, for the trial judge initially: *Luthringer v. Moore,* 31 Cal. 2d 489, 190 P.2d 1 (1948).

Judge East (the District trial judge) made no such finding. On the contary, Judge East stated in his memorandum opinion: "The Court concluded that the so-called doctrine of absolute liability under the facts of the case was not applicable under the decisions of the Oregon Supreme Court." (C.f., R. 80). Judge East submitted the case to the jury upon the theory of negligence with the aid of the evidentiary rule of *res ipsa loquitur*.

Judge Denman, on no findings and on no facts which appear either in the record or which are subject to judicial notice, reached out and with one swift stroke branded the aluminum industry and all industries involving the use of fluorides, an ultrahazardous activity.

The rationale of the Restatement of Torts is that the unusual rule of absolute liability should be used sparingly in only the clearest of situations, e.g., blasting with dynamite and hauling explosives. We submit that the aluminum industry is not at all like the special situations discussed in the Restatement, but is rather like the automobile described in comment e. of § 520 of the Restatement:

> "Certain activities may be so generally carried on as to be regarded as customary. Thus, automobiles have come into such general use that their operation is a

matter of common usage. This, together with the fact that the risk involved in the careful operation of a carefully maintained automobile is slight, is sufficient to prevent their operation from being an ultrahazardous activity."

The record of the past 69 years shows that the risk of personal injury from an aluminum smelting plant properly designed and properly operated is slight—so slight that only one claim for personal injury has ever been litigated. The rationale of the Restatement of Torts is also the rationale of the cases on this subject, including the Oregon cases, where the rule of absolute liability has been involved.

In *Brown v. Gessler,* 191 Or. 503, 230 P.2d 541 (1951), the Supreme Court of Oregon said at page 513: "Though some courts have apparently done so, nevertheless, we are unwilling to extend the application of the rule [absolute liability] beyond its plain import."

In *Bedell v. Goulter, supra,* the Supreme Court of Oregon followed the Restatement of Torts citing §§ 519 and 520 in invoking the rule of absolute liability to blasting with high explosives.

Every Oregon case cited in the Appellees' brief involves application of the rule of absolute liability to activities as to which *there was no dispute that a serious hazard or danger was present.*

We respectfully submit that this Court, sitting as another court of the state, as it does in diversity cases, should not take the path which the state supreme court has refused to tread. The rule of absolute liability invoked in Judge Denman's opinion is absolutely without precedent in Oregon or elsewhere and is contrary to the trend of the Oregon decisions as expressed by the Supreme Court of that state in the quotation from *Brown v. Gessler, supra.*

Not only is the presence of a serious hazard or danger to human beings around aluminum smelting plants disputed in this case, such an alleged hazard simply does not in fact exist. This is demonstrated by the following brief references to scientific common knowledge relating to low level exposure to fluorine in various forms:

(1) Report to the English Privy Council by the Medical Research Council (Memorandum No. 22), "A Study of the Hazard to Man and Animals near Fort William, Scotland" (H. M. Stationery Office 1949).* In this study of a Scottish aluminum smelting plant, which was referred to by the plaintiff at the trial (R. 467-489), the following appears in the conclusions at page 95: "* * * clinical examination of a small number of residents in the neighborhood of the factory has shown no sign of injury to health."

(2) Bulletin 537, United States Department of the Interior, Bureau of Mines (United States Government Printing Office 1954),* a bibliography on "Air Pollution," refers on page 124 to a paper delivered by E. J. Largent at the First National Air Pollution Symposium (1949) entitled "Effects of Fluorides on Man and Animals," and makes the following statement: "Any human discomfort or impairment of human health will not occur as the result of any general pollution of the air with compounds derived from present normal industrial operations."

(3) Public Health Bulletin No. 306 of the Public Health Service, Federal Security Agency (1949) entitled "Air Pollution in Donora, Pa." (1949).* In the Donora case, among other things, the charge was made that the people in the area were exposed to a hazard from industrial fluorides. The following conclusion appears on page 65:

*Copies of extracts from these publications, containing these matters of scientific common knowledge, which the Court should consider before establishing by dictum in these cases a rule wholly without support in the record and entirely inconsistent with the theory of the cases, have been delivered to the Clerk for the convenience of the Court.

"3. Quantitative analyses of human and animal bones for fluoride showed that amounts stored in the skeletal structures were within normal limits which fails to demonstrate an abnormal exposure by inhalation or ingestion."

(4) In a publication dated March 6, 1957, entitled "Our Children's Teeth"* and submitted to the Mayor and Board of Estimate of the City of New York, are to be found the statements of one medical and scientific expert after another, all to the effect that fluorides in low concentrations (such as are present around aluminum and other industrial plants) present no hazard to man. Among the scientists quoted to this effect are:

Frank J. McClure, Ph.D.
Senior Nutritionist
National Institutes of Health;

Nicholas C. Leone, M.D., M.P.H., Ph.G.
Chief, Medical Investigation
National Institute of Dental Research;

Thomas L. Hagan, D.D.S., M.P.H.
Assistant to the Chief Dental Officer
U. S. Public Health Service;

Edward R. Schlesinger, M.D., M.P.H.
Associate Director
New York State Division of Medical Services.

(5) In Public Health Report, Volume 69, Number 10, October, 1954, entitled "Medical Aspects of Excessive Fluoride In a Water Supply"* by members of the Staff of the National Institute of Dental Research, National Institutes of Health, Public Health Service, a report is made on a

*Copies of extracts from these publications have been delivered to the Clerk for the convenience of the Court.

ten-year study of 116 persons in Bartlett, Texas, where the drinking water contains about eight parts per million of fluorine, and 121 persons in Cameron, Texas, where the drinking water contains four parts per million fluorine. Significantly, the authors state the following regarding the effects of ingesting eight parts per million of fluorine over a long period of time (which is a higher concentration of fluorine over a longer period of time than was present around the Troutdale plant or around any industrial plants with reasonable controls):

"No clinically significant physiological or functional effects resulted from prolonged ingestion of water containing excessive fluoride, except for dental fluorosis."

Claims have been made by farmers that livestock (entirely different from human beings) grazing near aluminum smelting plants have been injured. Following is a brief quotation from two such cases tried in the District Courts of the United States, in one of which the finding was for the farmer and in the other the finding was for the Company.

In *William M. Fraser and Marie Fraser v. Aluminum Company of America* in the District Court of the United States for the Western District of Washington, Southern Division, Civil No. 1223 (unreported), Judge Leavy made the following finding of fact:

"26. The manufacture of aluminum at the defendant's Vancouver plant is of fundamental importance to the economy, not only of the area surrounding said plant, but of the entire United States, and is essential to the achievement of the national defense program. The defendant acted reasonably in the selection of the site for its Vancouver plant. The plant is suitably situated for the manufacture of aluminum and the defendant has expended large sums of money in its

construction and improvement and it is a permanent facility."

In *Arvidson v. Reynolds Metals Company,* 125 F. Supp. 481 (W.D. Wash., S.D. 1954) (affirmed upon the opinion of the district court, 236 F.2d 224), the trial judge referred to the "lawful and important character of defendant's operations" (p. 483) and reached the following conclusions (p. 486):

> "I have reached the following basic conclusions on the factual issues of the case: Plaintiffs have not sustained the burden of producing a preponderance of credible evidence to establish (a) fluorine content in the forage on their lands in amounts above non-toxic limits; (b) substantial fluorine content in forage attributable to effluence from defendant's plants; or (c) that plaintiffs' lands or cattle sustained fluorine damage in particulars and amounts that can be determined with reasonable or any certainty."

B. In Any Event, on the State of the Record in the Present Cases, It Is Inappropriate and Unnecessary to Apply the Absolute Liability Rule.

When the state of the record in the present cases is analyzed, it is clear that Judge Denman's application of the absolute liability rule of *Fletcher v. Rylands* is dictum and that the record neither requires nor warrants its application. That this is so is substantiated by the following:

(1) At the close of the evidence the defendant made a motion for a directed verdict (R. 1862-3), which the trial judge denied in a considered opinion. *Martin v. Reynolds Metals Company,* 135 F. Supp. 379 (1952). The concluding and decisive paragraph of this opinion is also in the record (R. 1864). In this opinion the trial judge discussed the question as to whether under Oregon law the cases were controlled by negligence rules or by what he termed the "so-

called doctrine of *Rylands v. Fletcher* or the strict liability and ultrahazardous condition theories of liability" (135 F. Supp. 380). He concluded that negligence rules were controlling, declaring:

> "* * * the matter will be submitted to the jury on the theory of negligence if any, and the lack of ordinary due care and caution on the part of the defendant with the aid in favor of the plaintiff of the rule of res ipsa loquitur * * *" (135 F. Supp. 382; see also R. 1864)

(2) Consistent with this declaration of the basic and controlling principles of law which the trial judge deemed controlling, the jury was instructed on negligence rather than absolute liability principles. Thus, the jury was told that "these three law actions are based upon what is generally referred to, as alleged negligence on the part of the defendant * * *" (R. 1874); that the plaintiffs contended "that the defendant negligently and carelessly continued to release or permit to escape the dangerous, poisonous fluoride compounds * * *" (R. 1875); and that the defendant claimed that its "plant was not operated negligently * * *" (R. 1876). The trial judge then went on to give instructions defining "negligence" (R. 1876-7), and instructed the jury with respect to the duty of the operator of an aluminum reduction plant "not to be negligent in the course of such operations to such parties or persons in the vicinity, thereof." (R. 1877). The jury was instructed with respect to "the degree of care, caution and vigilance required by law" (R. 1877-8), and was further instructed that it was the burden of plaintiffs to establish that "such negligence, if any, must be the proximate cause of the alleged injury * * *" (R. 1878).

After instructing the jury that plaintiffs had the burden of proving (1) "negligence on the part of the defendant"

and (2) that "such negligence, if any, was the proximate cause of the injuries complained of * * *" (R. 1879), the trial judge went on to say that in determining whether plaintiffs had met this burden of proof "they are entitled to, and you must consider, the rule or doctrine of the law of negligence, generally referred to as res ipsa loquitur * * *" (R. 1879). Then the trial judge gave extensive instructions to the jury explaining this doctrine (R. 1879-1880). The trial judge cautioned the jury that the plaintiffs' burden of proving negligence by a preponderance of evidence was not changed by the doctrine of res ipsa loquitur and that it remained plaintiffs' burden to establish negligence by a preponderance of the evidence (R. 1880-1). In his concluding instructions on this aspect of the cases, the trial judge again reiterated the necessity of a finding "that the defendant was negligent" and that such negligence "was the proximate cause of the injuries complained of" in order to find verdicts in favor of plaintiffs (R. 1884-5).

(3) A review of all of the instructions to the jury (R. 1865-1892) demonstrates that the trial judge remained constant to and consistent with the basic theory which he declared in his opinion, namely, that the cases were controlled by negligence principles, aided by the doctrine of res ipsa loquitur, and not by "the so-called doctrine of *Rylands v. Fletcher* or the strict liability and ultrahazardous condition theories of liability." *No instructions on any of these last-mentioned rules or theories of liability were given to the jury.*

(4) As we have already noted above, there are no findings by the trial judge supporting the application of any such rules or theories, and it goes without saying that there could be none since the trial judge regarded them as inapplicable.

On this state of the record, the holding of Judge Denman that "the doctrine of *Fletcher v. Rylands* also applies" is dictum, pure and simple. That this is so is conceded in so many words by the Appellees in their Brief in Answer to Petition for Rehearing, at page 31:

> "In the opinion of Judge Denman is the statement that, 'We think that the doctrine of Fletcher v. Rylands also applies.' This statement is entirely correct under the Oregon law, *though not strictly necessary to the decision, inasmuch as the trial court had not instructed the jury concerning strict liability but had instructed on the milder rule of res ipsa loquitur.*"

We submit, therefore, that these cases should be decided on the basis of the record made in the trial court. The question now before this Court is whether the verdicts and the judgments entered thereon are supportable on the basis of what was said and done at the trial, rather than on that which was never said nor done because the trial judge refused to say or do it. The theory on which the cases were given to the jury was, to use the very language of the trial judge, "the theory of negligence if any, and the lack of ordinary due care and caution on the part of the defendant with the aid in favor of the plaintiff of the rule of res ipsa loquitur * * *" (135 F. Supp. 382; R. 1864). The Appellant here is the defendant, not the plaintiffs. The issue is whether the theory of liability adopted by the trial court, *negligence with the aid of res ipsa loquitur,* was proper. On the state of the record there is no issue on these appeals with respect to and no occasion for reference to *Fletcher v. Rylands,* or absolute liability, or extrahazardous activities.

C. The Doctrine of Res Ipsa Loquitur Should Not Have Been Invoked in These Cases.

While our principal complaint is against invoking the extreme rule of absolute liability against a long-established industrial process of common usage involving the use of fluorides, particularly in cases which do not on the record raise that question, we also feel that the trial judge had no basis in fact or law for allowing the jury to apply the doctrine of res ipsa loquitur as a substitute for evidence of negligence. In substance, the trial judge's instructions to the jury upon this subject (R. 1880) stated that the mere occurrence of an unexpected mishap which the jury might find to be causally connected to the defendant's plant would make out or present a proximate cause of negligence. Contrary to the judge's charge, the doctrine of res ipsa loquitur cannot be invoked in Oregon to raise an inference of negligence unless the mishap is such as is *commonly associated* with negligence on the part of the person possessing and controlling the instrumentality in question: see, e.g., *Ritchie v. Thomas,* 190 Or. 95, 224 P.2d 543 (1950); *Suko v. Northwestern Ice Co.,* 166 Or. 557, 113 P.2d 209 (1941). A mere freak occurrence or accident, even if found to be causally related to the defendant, creates no liability under *res ipsa loquitur*. Even under that doctrine, negligence cannot be predicated upon circumstances of injury which do not bespeak negligence, or upon mere guesswork and speculation: *Dunning v. Northwestern Electric Co.* (on rehearing), 186 Or. 399, 206 P.2d 1177 (1949).

Indeed, the very unexpectedness of an accident or injury tends to foreclose its foreseeability and hence to disprove negligence. "[N]o one is required to possess prophetic ken, and, since the law makes no unreasonable demands, no one is required to guard against that which he cannot foresee

and which common knowledge does not deem dangerous": *Doherty v. Arcade Hotel,* 170 Or. 374, 390, 134 P.2d 118, 124 (1943).

III.
CONCLUSION

We have presented in this brief, with the hope that it will be of assistance to this Court, a brief consideration of several of the broader questions involved in these cases which affect the aluminum and chemical industries generally. We trust that the Court will not regard our selection of these questions for discussion as an indication that the other points argued by Appellant are not equally sound; to the contrary, we believe them to be so adequately covered in the briefs of Appellant as to require no further argument by us.

On the basis of the foregoing arguments, together with the arguments advanced in Appellant's briefs, the judgments should be reversed.

Respectfully submitted,

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