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Opinion of Supreme Court, Filed July 3,
1929.

NEW JERSEY SUPREME COURT.

#411 AND #412 JANUARY TERM, 1929. 10

CHARLES J. TAYLOR, Respondent, vs. HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Appellant.	20
SUSIE TAYLOR, Respondent, vs. HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Appellant.	30

Submitted, January Term, 1929. Decided
June, 1929.

On appeal from Second District Court of
Jersey City.

For appellant, Samuel Harber.

For respondents, Levitan, Levitan & Auerbach.

Before: Justices Trenchard, Kalisch and
Lloyd. 40

Opinion of Supreme Court, Filed July 3, 1929

Per CURIAM:

10 The question presented on these appeals is whether the proofs established by the plaintiff in the trial below justified the application of the doctrine of *res ipsa loquitur*. The actions were to recover damages for injuries received by Susie Taylor, one of the plaintiffs, from the explosion of a bottle containing vichy which had been sold and delivered to the plaintiff's employer by the defendant-appellant. While not the manufacturer of the vichy, the defendant was engaged in the bottling business, and as part of such business had filled the bottle which on the occasion in question exploded.

20 The plaintiff's proofs established this and nothing more. At the conclusion of the plaintiff's case, the defendant moved for a non-suit and on the ground, among others, that there was no proof of negligence in the defendant or his servant. The motion was denied and the defendant then offered proofs tending to show that the bottle used was purchased from a reputable manufacturer and that proper care was used in the bottling of its contents. At the 30 conclusion of the entire case the defendant moved the Court for the direction of a verdict in his favor. This also the Court denied. From the judgments entered defendant appeals.

The grounds of appeal are that the rulings on these motions were erroneous and that the charge to the jury was prejudicial to the defendant. It is sufficient to say with respect to the 40 instructions that no specific part of the charge

Opinion of Supreme Court, Filed July 3, 1929

was brought to the attention of the Court by exception, and it is not, therefore, before us.

The refusal of the motions for nonsuit and the motions for the direction of verdicts for the defendant were properly refused. The defendant as a bottler was obliged to use reasonable care in the filling of the bottle of vichy. With the exercise of reasonable care it is obvious that an explosion such as here occurred does not ordinarily result. This being true, we think the rule of *res ipsa loquitur* applied and that it was permissible for the jury to infer from the occurrence of the explosion want of such reasonable care. The proofs presented by the defendant did not remove the cases from the consideration of that body. Hughes vs. Atlantic City R. R., 85 N. J. L. 212. 10 20

The judgments are affirmed.

30

40

Order of Affirmance, Filed July 11, 1929.

NEW JERSEY SUPREME COURT.

Between

10 CHARLES J. TAYLOR,
Respondent,
vs.

HARRY BERNER, trading under
the firm name of Mutual
Mineral Water Works,
Appellant.

20 On appeal from the District Court.

30 This cause having been duly argued at the
January Term, 1929, of this court, by John
W. Ockford, of counsel for the appellant, Harry
Berner, trading under the firm name of Mutual
Mineral Water Works, and Levitan & Levitan,
Abraham Levitan, of counsel for the respond-
ent, and the Court having considered the same,
and finding no error in the record or proceed-
ings in the District Court.

It is thereupon, on this 11th day of July,
1929, Ordered and adjudged that the judgment
of the District Court, removed by the appeal
in this cause, be affirmed with costs; and that the
record be remitted to the District Court to be
proceeded with in accordance with this judgment
and the practice of said court.

Enter, July 11, 1929.

40 On motion of

LEVITAN & LEVITAN,
Attorneys for Respondent.
ABRAHAM LEVITAN,
Of Counsel.

Order of Affirmance, Filed July 11, 1929.

NEW JERSEY SUPREME COURT.

Between

<p style="text-align: center;">SUSIE TAYLOR, Respondent, vs. HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Appellant.</p>	}	10
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On appeal from the District Court.

This cause having been duly argued at the January Term, 1929, of this court, by John W. Ockford of counsel for the appellant, Harry Berner, trading under the firm name of Mutual Mineral Water Works, and Levitan & Levitan, Abraham Levitan, of counsel for the respondent, and the Court having considered the same, and finding no error in the record or proceedings in the District Court.

It is thereupon, on this 11th day of July, 1929, Ordered and adjudged that the judgment of the District Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the District Court to be proceeded with in accordance with this judgment and the practice of said court.

Enter, July 11th, 1929.

On motion of

LEVITAN & LEVITAN,
Attorneys for Respondent.
ABRAHAM LEVITAN,
Of Counsel.

Notice and Grounds of Appeal, Filed July 25,
1929.

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">CHARLES TAYLOR, Respondent,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Appellant.</p>	}	<p>Notice of Appeal.</p>
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20 To Messrs. Levitan, Levitan & Auerbach, Attor-
neys for Respondent, and To Whom It May
Concern:

Sirs:

Please Take Notice, that the defendant in the
above entitled cause appeals to the Court of
Errors and Appeals in the Last Resort in all
Causes in New Jersey, from the judgment of
affirmance entered in this cause upon the follow-
ing grounds, to wit:

30 1. Because the Supreme Court erred in affirm-
ing the judgment of the Second District Court
of Jersey City, instead of reversing such judg-
ment, in that:

(a) The District Court erred in refusing to
grant defendant's motion for non-suit at the
close of the plaintiff's case.

40 (b) The District Court erred in refusing to
grant the defendant's motion for a direction of
a verdict in favor of the defendant and against
the plaintiff at the close of the case.

*Notice and Grounds of Appeal, Filed July 25,
1929*

(c) The District Court erred in refusing to charge the jury as requested by defendant, that there was no evidence of negligence on the part of the defendant which was the proximate cause of the injuries complained of. 10

(d) The District Court erred in refusing to charge the jury at the defendant's request, that the mere explosion of a siphon bottle was not in itself evidence of negligence on the part of the defendant.

(e) The District Court erred in charging the jury that there was admitted accident and that no doubt the plaintiff was injured. 20

(f) The District Court erred charging the jury that the rule of *res ipsa loquitur* was applicable to the case.

(g) The District Court erred in charging the jury that the case came within the doctrine established in the case of *Hughes v. The Atlantic City & Shore Railroad Co.*

(h) The District Court erred in charging the jury that there was proof that the plaintiff, Charles Taylor was the husband of Susie Taylor. 30

(i) The District Court erred in charging the jury that a siphon bottle is dangerous.

(j) The District Court erred in charging the jury that there should have been a warning.

(k) The District Court erred in charging the jury that a siphon bottle is condemned of public policy. 40

*Notice and Grounds of Appeal, Filed July 25,
1929*

(l) The District Court erred in charging the jury that they might infer negligence.

10 (m) The District Court erred in charging the jury that the burden was upon the defendant to explain the accident.

(n) The District Court erred in charging the jury that the only amount they might give the plaintiff Charles Taylor would be \$140.00.

20 (o) The District Court erred in charging the jury that they should not give a less amount than the full jurisdictional sum, to wit, \$500.00, and that to give less, would be ridiculous.

(p) The District Court erred in charging the jury in referring to the case of Hughes v. The Atlantic City & Shore Railroad Co., without informing the jury as to the exact principle laid down in that case.

30 (q) The District Court erred in charging the jury that there was a burden upon the defendant to explain what he had done in connection with the bottling process.

(r) The District Court erred in refusing to charge the jury that the plaintiff in order to recover, must prove defendant's continued control over the siphon bottle.

40 (s) The District Court erred in refusing to charge the jury that the plaintiff must prove in the first instance, negligence on the part of the defendant.

Respectfully yours,
SAMUEL HARBER,
Attorney for Appellant.
(Defendant in the District Court.)

**Notice and Grounds of Appeal, Filed July 25,
1929.**

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">SUSIE TAYLOR, Respondent, vs. HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Appellant.</p>	}	<p>Notice of Appeal.</p>	10
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To Messrs. Levitan, Levitan & Auerbach, Attorneys for Respondent, and To Whom It May Concern: 20

Sirs:

Please Take Notice, that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the Last Resort in all Causes in New Jersey, from the judgment of affirmance entered in this cause upon the following grounds, to wit:

1. Because the Supreme Court erred in affirming the judgment of the Second District Court of Jersey City, instead of reversing such judgment, in that: 30

(a) The District Court erred in refusing to grant defendant's motion for non-suit at the close of the plaintiff's case.

(b) The District Court erred in refusing to grant the defendant's motion for a direction of a verdict in favor of the defendant and against the plaintiff at the close of the case. 40

*Notice and Grounds of Appeal, Filed July 25,
1929*

10 (c) The District Court erred in refusing to charge the jury as requested by defendant, that there was no evidence of negligence on the part of the defendant which was the proximate cause of the injuries complained of.

(d) The District Court erred in refusing to charge the jury at the defendant's request, that the mere explosion of a siphon bottle was not in itself evidence of negligence on the part of the defendant.

20 (e) The District Court erred in charging the jury that there was admitted accident and that no doubt the plaintiff was injured.

(f) The District Court erred charging the jury that the rule of *res ipsa loquitor* was applicable to the case.

(g) The District Court erred in charging the jury that the case came within the doctrine established in the case of *Hughes v. The Atlantic City & Shore Railroad Co.*

30 (h) The District Court erred in charging the jury that there was proof that the plaintiff Charles Taylor was the husband of Susie Taylor.

(i) The District Court erred in charging the jury that a siphon bottle is dangerous.

(j) The District Court erred in charging the jury that there should have been a warning.

40 (k) The District Court erred in charging the jury that a siphon bottle is condemned of public policy.

*Notice and Grounds of Appeal, Filed July 25,
1929*

(l) The District Court erred in charging the jury that they might infer negligence.

(m) The District Court erred in charging the jury that the burden was upon the defendant to explain the accident. 10

(n) The District Court erred in charging the jury that the only amount they might give the plaintiff Charles Taylor would be \$140.00.

(o) The District Court erred in charging the jury that they should not give a less amount than the full jurisdictional sum, to wit, \$500.00, and that to give less, would be ridiculous. 20

(p) The District Court erred in charging the jury in referring to the case of Hughes v. The Atlantic City & Shore Railroad Co., without informing the jury as to the exact principle laid down in that case.

(q) The District Court erred in charging the jury that there was a burden upon the defendant to explain what he had done in connection with the bottling process. 30

(r) The District Court erred in refusing to charge the jury that the plaintiff in order to recover, must prove defendant's continued control over the siphon bottle.

(s) The District Court erred in refusing to charge the jury that the plaintiff must prove in the first instance, negligence on the part of the defendant. 40

Respectfully yours,
SAMUEL HARBER,
Attorney for Appellant.
(Defendant in the District Court.)

Notice of Appeal.

SECOND DISTRICT COURT OF JERSEY
CITY.

10

CHARLES J. TAYLOR,
Plaintiff,

vs.

HARRY BERNER, trading under
the firm name of Mutual
Mineral Water Works,
Defendant.

}

In Tort.
Notice of
Appeal.

20

To Levitan, Levitan & Auerbach, Attorneys of
Plaintiff, or Charles J. Taylor, plaintiff:

Sir:

30

Take Notice that the defendant, Harry Berner trading under the firm name of Mutual Mineral Water Works, hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of Jersey City rendered in the above-stated action on the fifth day of October, A. D. 1928.

Dated, Oct. 8th, 1928.

SAMUEL HARBER,
Attorney for Defendant.

40

Specifications.

NEW JERSEY SUPREME COURT.

SPECIFICATIONS OF DETERMINATIONS OF THE DISTRICT COURT WITH WHICH APPELLANT IS DISSATISFIED IN POINT OF LAW.

10

CHARLES J. TAYLOR,
Plaintiff-Appellee,

vs.

HARRY BERNER, trading under
the firm name of Mutual
Mineral Water Works,
Defendant-Appellant.

} On Appeal.

20

The following is a specification of determinations of the District Court with which appellant is dissatisfied in point of law:

1. The Court erred in refusing to grant defendant's motion for nonsuit at the close of the plaintiff's case.

30

2. The Court erred in refusing to grant the defendant's motion for a direction of a verdict in favor of the defendant and against the plaintiff at the close of the case.

3. The Court erred in refusing to charge the jury as requested by defendant, that there was no evidence of negligence on the part of the defendant which was the proximate cause of the injuries complained of.

40

4. The Court erred in refusing to charge the

Specifications

jury at defendant's request, that the mere explosion of a siphon bottle was not in itself evidence of negligence on the part of the defendant.

5. The Court erred in charging the jury that there was admitted accident and that no doubt the plaintiff was injured. 10

6. The Court erred charging the jury that the rule of *res ipsa loquitur* was applicable to the case.

7. The Court erred in charging the jury that the case came within the doctrine established in the case of *Hughes v. The Atlantic City & Shore Railroad Co.* 20

8. The Court erred in charging the jury that there was proof that the plaintiff Charles Taylor was the husband of Susie Taylor.

9. The Court erred in charging the jury that a siphon bottle is dangerous.

10. The Court erred in charging the jury that there should have been a warning. 30

11. The Court erred in charging the jury that a siphon bottle is condemned of public policy.

12. The Court erred in charging the jury that they might infer negligence.

13. The Court erred in charging the jury that the burden was upon the defendant to explain the accident. 40

14. The Court erred in charging the jury

Specifications

that the only amount they might give the plaintiff, Charles Taylor, would be \$140.00.

15. The Court erred in charging the jury that they should not give a less amount than the full jurisdictional sum, to wit: \$500.00 and that
10 to give less, would be ridiculous.

16. The Court erred in charging the jury in referring to the case of Hughes v. The Atlantic City & Shore Railroad Co. without informing the jury as to the exact principle laid down in that case.

17. The Court erred in charging the jury that there was a burden upon the defendant to explain what he had done in connection with the
20 bottling process.

18. The Court erred in refusing to charge the jury that the plaintiff in order to recover, must prove defendant's continued control over the siphon bottle.

19. The Court erred in refusing to charge the jury that the plaintiff must prove in the first
30 instance, negligence on the part of the defendant.

SAMUEL HARBER,
Attorney for Defendant-Appellant.

Specifications.

NEW JERSEY SUPREME COURT.

SPECIFICATIONS OF DETERMINATIONS OF THE DISTRICT COURT WITH WHICH APPELLANT IS DISSATISFIED IN POINT OF LAW.

<p style="text-align: center;">SUSIE TAYLOR, Plaintiff-Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Defendant-Appellant.</p>	}	On Appeal.
		10
		20

The following is a specification of determinations of the District Court with which appellant is dissatisfied in point of law:

1. The Court erred in refusing to grant defendant's motion for nonsuit at the close of the plaintiff's case.

2. The Court erred in refusing to grant the defendant's motion for a direction of a verdict in favor of the defendant and against the plaintiff at the close of the case. 30

3. The Court erred in refusing to charge the jury as requested by defendant, that there was no evidence of negligence on the part of the defendant which was the proximate cause of the injuries complained of. 40

4. The Court erred in refusing to charge the

Specifications

jury at defendant's request, that the mere explosion of a siphon bottle was not in itself evidence of negligence on the part of the defendant.

10 5. The Court erred in charging the jury that there was admitted accident and that no doubt the plaintiff was injured.

6. The Court erred charging the jury that the rule of *res ipsa loquitur* was applicable to the case.

20 7. The Court erred in charging the jury that the case came within the doctrine established in the case of *Hughes v. The Atlantic City & Shore Railroad Co.*

8. The Court erred in charging the jury that there was proof that the plaintiff Susie Taylor was the wife of Charles J. Taylor.

9. The Court erred in charging the jury that a siphon bottle is dangerous.

30 10. The Court erred in charging the jury that there should have been a warning.

11. The Court erred in charging the jury that a siphon bottle is condemned of public policy.

12. The Court erred in charging the jury that they might infer negligence.

40 13. The Court erred in charging the jury that the burden was upon the defendant to explain the accident.

14. The Court erred in charging the jury

Specifications

that the only amount they might give the plaintiff Susie Taylor would be \$140.00.

15. The Court erred in charging the jury that they should not give a less amount than the full jurisdictional sum, to wit, \$500.00, and that to give less, would be ridiculous. 10

16. The Court erred in charging the jury in referring to the case of Hughes v. The Atlantic City & Shore Railroad Co., without informing the jury as to the exact principle laid down in that case.

17. The Court erred in charging the jury that there was a burden upon the defendant to explain what he had done in connection with the bottling process. 20

18. The Court erred in refusing to charge the jury that the plaintiff in order to recover, must prove defendant's continued control over the siphon bottle.

19. The Court erred in refusing to charge the jury that the plaintiff must prove in the first instance, negligence on the part of the defendant. 30

SAMUEL HARBER,
Attorney for Defendant-Appellant.

Summons.

(SECOND) DISTRICT COURT SUMMONS.

State of New Jersey,
 County of Hudson, ss:
 City of Jersey City.

- 10 The State of New Jersey, to the Sergeant-at Arms of the Second District Court of the City of Jersey City or to any Constable of said County.

(L. S.)

Summon

- 20 Harry Berner, trading as Mutual Mineral Water Works, to appear before the Second District Court of Jersey City, Myron C. Ernst, Judge to be held at the Court Room, No. 662 Newark Avenue, in said City, on the fourth day of May, One Thousand Nine Hundred and twenty-eight, at ten o'clock in the forenoon, to answer unto Charles J. Taylor, on an action in Tort, Damage Five Hundred Dollars.

- 30 Witness, Myron C. Ernst, Esq., Judge of said (Second) District Court at Jersey City aforesaid, the 27th day of April, in the year One Thousand Nine Hundred and Twenty-eight.

EDWARD J. POYNTON,
 Clerk.

-----,
 Plaintiff's Attorney.

State of Demand.

SECOND DISTRICT COURT OF JERSEY
CITY.

10	CHARLES J. TAYLOR, Plaintiff,	}	In Tort.
	vs.		
	HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Defendant.		

20 Plaintiff demands of the defendant the sum of Five hundred (\$500.00) dollars for that where-
as:

1. On or about the 24th day of December, 1927, defendant was engaged in a business of manufacturing, distributing and selling mineral water under the firm name of Mutual Mineral Water Works.
- 30 2. That on or about the day above mentioned, defendant was engaged in the manufacture, distribution and sale of mineral waters which were put up by him in syphons and sold and delivered by the box to his various customers.
3. On the day above mentioned, plaintiff Charles J. Taylor was the husband of Susie Taylor.
- 40 4. That on or about the 24th day of December, 1927, defendant, his servants and agents delivered at No. 150 W. 55th Street, Borough of Manhattan, State of New York, a certain wooden box containing the said soda water

State of Demand

syphons, manufactured and sold by the defendant.

5. The defendant, his servants and agents so carelessly and negligently prepared and manufactured the mineral water so as to cause one of the syphons in the possession of Susie Taylor, wife of the plaintiff to explode causing serious bodily injury to the said Susie Taylor, the wife of the plaintiff. 10

6. The negligence of the defendant consisted in this:

a. The defendant, his servants and agents failed to use reasonable care in the preparation and manufacture of the mineral waters. 20

b. The defendant, his servants and agents prepared same in a dangerous, defective and unsafe condition.

c. Defendant, his servants and agents so carelessly and negligently manufactured mineral waters so as to cause same to be highly over-charged and explosive. 30

6. As the result of said negligence, plaintiff lost the services of his wife and was also obliged to expend a large sum of money for medicine and medical attention.

7. Plaintiff sues for medicine, medical attention and loss of services.

Plaintiff claims total damages in the sum of Five hundred (\$500.00) dollars, together with costs of suit. 40

LEVITAN, LEVITAN & AUERBACH,
Attorneys for Plaintiff.

Summons.

(SECOND) DISTRICT COURT SUMMONS.

State of New Jersey,
 County of Hudson, ss:
 City of Jersey City.

- 10 The State of New Jersey, to the Sergeant-at-Arms of the Second District Court of the City of Jersey City or to any Constable of said County.

(L. S.)

Summon

- 20 Harry Berner, trading as Mutual Mineral Water Works, to appear before the Second District Court of Jersey City, Myron C. Ernst, Judge to be held at the Court Room, No. 662 Newark Avenue, in said City, on the fourth day of May, One Thousand Nine Hundred and twenty-eight, at ten o'clock in the forenoon, to answer unto Susie Taylor, on an action in Tort, Damage Five Hundred Dollars.

- 30 Witness, Myron C. Ernst, Esq., Judge of said (Second) District Court at Jersey City aforesaid, the 27th day of May, in the year One Thousand Nine Hundred and twenty-eight.

EDWARD J. POYNTON,
 Clerk.

.....
 Plaintiff's Attorney.

Summons

ENDORSEMENT ON SUMMONS.

No. 81389.

(SECOND) DISTRICT COURT
of Jersey City

10

Before: Myron C. Ernst, Esq., Judge.

Summons in Tort

<p style="text-align: center;">SUSIE TAYLOR, Plaintiff, vs. HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, 111 33rd St., UC., Defendant.</p>	}	20
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Demand	\$500.00	
Costs	2.10	
Mileage	.40	30

Returnable, May 4th, A. D., 1928.
10 o'clock A. M.

40

State of Demand.

SECOND DISTRICT COURT OF JERSEY
CITY.

10	SUSIE TAYLOR, Plaintiff, vs. HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Defendant.	}	In Tort.
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20 Plaintiff demands of the defendant the sum of Five hundred (\$500.00) dollars for that whereas:

1. On or about the 24th day of December, 1927, defendant was engaged in a business of manufacturing, distributing and selling mineral water under the firm name of Mutual Mineral Water Works.

30 2. That on or about the day above mentioned defendant was engaged in the manufacture, distribution and sale of mineral waters which were put up by him in syphons and sold and delivered by the box to his various customers.

40 3. That on or about the 24th day of December, 1927, defendant his servants and agents delivered at No. 150 W. 55th Street, Borough of Manhattan, State of New York, a certain wooden box containing the said soda water syphons, manufactured and sold by the defendant.

4. The defendant, his servants and agents so carelessly and negligently prepared and manufactured the mineral water so as to cause one

State of Demand

of the syphons in the possession of the plaintiff to explode, causing serious bodily injury to her.

5. The negligence of the defendant consisted in this:

a. The defendant, his servants and agents failed to use reasonable care in the preparation and manufacture of the mineral waters. 10

b. The defendant, his servants and agents prepared same in a dangerous, defective and unsafe condition.

c. Defendant, his servants and agents so carelessly and negligently manufactured mineral waters so as to cause same to be highly over-charged and explosive. 20

5. As the result of said negligence, the glass in which the syphon was contained burst and the parts of broken glass struck the plaintiff with great force and violence upon her leg, tearing and lacerating the muscles of same, and thereby causing her to sustain serious and permanent injury.

6. As the result of the negligence aforesaid, plaintiff sustained severe shock to her entire system, permanent injury to her leg and became sick, sore and disabled. 30

7. As the result of the negligence aforesaid, plaintiff was obliged to expend a large sum of money for medicine and medical attention.

Plaintiff claims damages in the sum of Five hundred (\$500.00) dollars, together with costs of suit. 40

LEVITAN, LEVITAN & AUERBACH,
Attorneys for Plaintiff.

Interrogatories.SECOND DISTRICT COURT OF JERSEY
CITY.

10	SUSIE TAYLOR, Plaintiff, vs. HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Defendant.	}	In Tort. Inter- rogatories.
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To: Susie Taylor, or her attorneys, Levitan,
 Levitan and Auerbach.

20 Dear Madam:

Please Take Notice that you are required to answer under oath within the time required by law the following interrogatories:

1. How long did you have possession of the box, containing the so-called soda water syphons, before anything happened thereto.
- 30 2. In what part of your apartment did you store the said bottles?
3. Describe in what manner the defendant neglected to carefully prepare the mineral water contained in the syphon, which you complain exploded.
4. Do you know what caused the explosion of the said syphon, if any?
- 40 5. How long did you have possession of this syphon bottle before the explosion took place.

Interrogatories

6. Where did you have your syphon bottle at the time of the explosion, if any.
7. What care did you give in the handling of the said syphon bottle?
8. Where were you at the time this syphon bottle exploded? 10
9. Describe what caused the same to explode.
10. Was any of the contents of the bottle extracted prior or at the time of the explosion?
11. Have you possession of this syphon bottle, and if not where is it?
12. What description or marks of identification appeared on said syphon bottle, if any? 20
13. Where did you buy this syphon bottle with its contents? From whom? At what time? Where did you purchase the same, if any?
14. Did you receive any warnings from anybody where to keep these syphons? If so by whom and when? If so, did you follow out these instructions, if any? 30
15. What care did the defendant or his servants fail to observe in the manufacture of this mineral water?
16. How do you know that the said mineral water was explosive?
17. What design had the syphon bottle in question that exploded? Describe in detail all of the marks that appeared thereon 40
18. Was this bottle in question a new syphon bottle or an old one?

Interrogatories

19. What part of the leg were you struck on by the glass, and what part thereof.

20. What permanent injury, if any have you? Describe in detail.

10 21. What did you do to help such injury, if any?

22. Did you have any Dr. attending you, if so, the name and address of the Doctor.

23. How much did you have to pay for services, if any?

24. How much have you spent for medicines?

20 25. How long were you confined to bed, if any?

26. What losses in wages or anything did you sustain? Itemize in detail.

27. Are you entirely cured of such alleged injury, if any, and what seems to be the trouble?

28. Did you know that syphon bottles were dangerous if not handled with care?

30 29. Did you handle the syphon bottle in question with any care?

30. How long have you been using the contents of syphon bottles and how long have you been handling bottles of that type?

Respectfully yours,

SAMUEL HARBER,
Attorney for Defendant.

Answers to Interrogatories.

SECOND DISTRICT COURT OF JERSEY
CITY.

<p style="text-align: center;">SUSIE TAYLOR, Plaintiff, vs. HARRY BERNER, trading under the firm name of Mutual Mineral Water Works, Defendant.</p>	}	<p style="text-align: center;">In Tort. Inter- rogatories.</p>	10
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Susie Taylor, answering the interrogatories herein, being duly sworn, deposes and says:

1. Plaintiff had possession of the box containing the mineral water syphons about 4 or 5 hours.

2. Bottles in the box were stored in the kitchen.

3. That the syphon containing the mineral water manufactured and delivered by the defendant were prepared in a careless, negligent and reckless manner, the same being delivered in an unsafe, dangerous and defective condition, highly overcharged and explosive, which was in violation of law.

4. The unsafe, dangerous and defective condition of the bottle, which was highly overcharged and explosive caused the bottle to explode.

5. Just a few moments.

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30

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Answers to Interrogatories

6. I had a bottle in my right hand.
7. The usual care any person would give.
8. I was in the kitchen of my employer's apartment.
- 10 9. That the syphon containing the mineral water, manufactured by the defendant was in an unsafe, dangerous and defective condition, highly overcharged and explosive, which caused the explosion.
10. No contents of the bottle was extracted prior to the time of the explosion.
- 20 11. The syphon bottle or what was left of it, after the explosion, was thrown out.
12. There were no marks on the bottle that I noticed except the trade-mark of the defendant.
13. My employer, Miss Hilda Ferguson, for about 8 or 9 months prior to my injury, purchased from the defendant the case of syphons of mineral water at an average of once a week.
- 30 14. I never received any warnings from anyone that I always kept the box of syphons in a cool place.
15. That the defendant manufactured the syphons containing the mineral water in an unsafe, dangerous and defective condition, the same being highly overcharged and explosive, which condition caused the explosion.
- 40 16. I certainly know that it was explosive by the way this bottle exploded in my hands, in-

Answers to Interrogatories

juring me so seriously that I am permanently scarred, which was sufficient warning to me that the contents were in a very explosive condition as well as dangerous and unsafe.

17. I believe there was a trade-mark of the defendant on the bottle. 10

18. The syphon bottle was a new one.

19. The muscles of the left leg were struck and severely injured, in that the muscles of leg were torn and lacerated, parts of the muscles torn out leaving permanent scars and a hole in the leg.

20. That as a result of said injury, her leg has become permanently scarred and disfigured, and a hole in the leg. 20

21. I did nothing to help the injury, except first aid and then to call my physician.

22. I was attended by Dr. Marrow of 150 W. 55th Street, Borough of Manhattan, City of New York.

23. My husband paid the sum of \$125 for treatment for my injuries. 30

24. I have spent almost \$100 for medicines, gauzes, bandages, electric treatments and other necessities.

25. I was in bed for 4 weeks and for about 3 weeks walked on crutches.

26. I was earning \$20 per week and could not work for a period of eight weeks. 40

Answers to Interrogatories

27. I am not cured and now suffer pains in the damp weather when my leg swells; I have severe pains.

10 28. I did not know the syphon bottle was dangerous, however, I handled it with care.

29. I exercised the utmost care in handling this syphon bottle.

30. I have not been accustomed to handle the syphon bottles.

SUSIE TAYLOR.

Sworn to before me this
31st day of May, 1928.

20 W. L. S. Langerman,
Commissioner of Deeds,
New York City.

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40

Plaintiff's Witness, Susie Taylor, Direct

Q. For whom are you maid? A. Hilda Ferguson.

Q. Who is she? A. Actress.

Q. How long have you been her maid? A. Seven and one-half years.

10 Q. What does your work consist of? A. Personal maid, theater work and house work.

Q. You take care of her theater work and house work? A. I take care of her clothes and everything.

Q. Do you remember the 24th of December, 1927? A. Yes, I do.

Q. Where were you on that night? A. 150 West 55th Street.

20 Q. In your home? A. No, Miss Ferguson lives there. That is where I work.

Q. That is your home? A. Yes.

Q. Did anything happen to you then? A. Yes. That was the night of the accident.

Q. What time of the night was this? A. Between eight and nine o'clock.

30 Q. Please tell the court and jury just what happened? A. Miss Ferguson asked me for a drink.

Mr. Harber: I object to what she asked her.

Q. Tell us what you did? A. I got her a drink of water which was in the siphon bottle of vichy which had just come that morning.

40 Q. Who brought that vichy? A. The Siphon Mineral Water people where we have always gotten it.

Q. Who was that? A. A Jersey company, The Mineral Water Works, I believe that is the name.

Plaintiff's Witness, Susie Taylor, Direct

Q. Wasn't it the Mutual Mineral Water Works?

Mr. Harber: I object to counsel leading or mentioning names.

Q. How long had you been receiving water from these people? A. We had been receiving it for eight or nine months. 10

Q. Who was it who delivered this water to you? A. I don't know, it was the driver that always delivered it.

Q. Proceed and tell us what happened? A. Miss Ferguson asked me—

Mr. Harber: I object to what she asked. 20

Q. Tell us what you did? A. I was cleaning the apartment, and I went to get Miss Ferguson a glass of water. I had grated ice in the glass. The case of water we always stuck it under the sink.

Q. Where was this case? A. Between the maid's toilet and the window in the kitchen. I reached down to get the bottle out of the case, the case sets flat, and when I take it by the neck in my hands like this, it exploded, I never even straightened up. It made such a loud noise it sounded like a cannon going off. Miss Ferguson ran into the kitchen and I said "this thing has gone off like a cannon." I didn't know I was injured. When I looked down at my leg it was cut wide open. I have a scar, a terrible one. 30

Q. Have you still got the scar on your leg? A. Yes. 40

Plaintiff's Witness, Susie Taylor, Direct

Q. Which leg? A. The left leg.

Q. Will you show the court and jury the scar?

A. I will show the Judge but I don't think the jury should see it.

Q. Suppose you step down here Miss Taylor
10 and show the jury your scar.

(Witness exhibits leg to court and jury.)

Q. What happened to you after you were hurt? A. Miss Ferguson had friends this day. Miss Smith, which is in court today, she took a towel and tied it around my leg. I didn't really know what was happening, I was crying. She summoned a doctor, which was a doctor in
20 the building, Dr. Maro. He comes upstairs and attended my leg. The muscle had been swept up with the blood and glass.

Q. Then what happened? A. I rested there for an hour before they took me home.

Q. When you were taken home what happened? A. I went to bed.

Q. How long were you in bed? A. Four weeks with doctors attendance.

30 Q. Without getting out of bed? A. I had to get out of bed to attend to my needs.

Q. You were home for four weeks? A. Yes.

Q. And then how long were you home after that? A. I was three weeks on crutches.

Q. Were you able to work during these seven weeks? A. No.

Q. How much salary were you earning at the time? A. Twenty dollars a week.

Q. Did you have a doctor? A. Every day.

40 Q. How much did he get?

Plaintiff's Witness, Susie Taylor, Direct

Mr. Harber: I object as to what he got.

The Court: Sustained.

Q. Who paid the doctor?

Mr. Harber: I object.

10

The Court: She can if she wants tell who paid the doctor.

Q. Who paid the doctor? A. My husband.

Q. How many visits did he make?

Mr. Harber: I object to this testimony.

The Court: I will allow it.

Mr. Harber: I will take an exception if your Honor please.

20

Q. How many times did the doctor see you?

A. Once a day. Every day for eight weeks.

Q. Including Sundays? A. Every day.

Q. After that you went back to work? A. After the eight weeks I went back. I answered the telephone and did little things. I was unable to work for quite a while.

Q. When did you again receive your salary?

A. When I was ready to do the work as I could.

30

Q. Did you have any medicines for your foot?

A. I have electric treatments up to now. My leg is numb.

Q. Do you suffer any pain? A. I do in rainy weather.

Q. Did you suffer any pain after you were hurt? A. Yes, I suffer now.

Q. How long did the pain continue? A. My pain never left me.

40

Plaintiffs' Witness, Susie Taylor, Cross

Q. How was it at that time with reference to your condition now? A. Terrible.

Mr. Levitan: That is all.

10 *CROSS-EXAMINATION by Mr. Harber:*

Q. How long did this concern deliver vichy and siphon bottles to this particular home prior to this alleged accident? A. About eight or nine months.

Q. How often? A. Once a week.

Q. Nothing ever happened prior to that? A. Not until that morning.

20 Q. Nothing ever happened to any of these bottles for nine months prior to this alleged accident? A. Not until the morning of that delivery.

Q. Did anything happen before that? A. No.

Q. What time of day was it that the siphon bottles were delivered at this home? A. I could not really tell you. They always came as a rule around noon.

30 Q. Do you or don't you know? A. I don't.

Q. Did you see them deliver these bottles? A. Yes, I have paid the bill every week.

Q. You were the lady who paid the man? A. Yes, every week.

Q. I mean, did you pay him that day for these bottles? A. Yes.

Q. You don't know what time in the morning it was? A. No.

40 Q. Was it before noon or afternoon? A. I really think it was around noon, between twelve and one.

Plaintiffs' Witness, Susie Taylor, Cross

Q. Where was this box of siphon bottles delivered? A. 150 West 55th Street.

Q. In what part of the apartment? A. In the kitchen.

Q. Was it cold that day? A. It was in December. 10

Q. Was it cold, as you recall, was it cold that day? A. Yes.

Q. Do you know whether it was snowing or raining? A. No.

Q. It was cold that day? A. Yes.

Q. Where was this box of siphon bottles placed in the kitchen? A. Under the sink, between the maid's toilet and the window.

Q. Did you put any of these bottles on ice? 20
A. Never, no, I didn't.

Q. You never put any of these bottles on ice? A. No.

Q. You drink the water that way? A. I always put ice in the glass.

Q. You didn't have this particular siphon bottle that day on ice? A. No, always in the box.

Q. This box of siphons, or box, or case of 30
siphon bottles, were in that position between the lavatory and the kitchen? A. No, it was between the sink and the window.

Q. Was this case placed upon the sill of the window? A. No, flat on the floor.

Q. In front of the window or below the window? A. No, between—under the sink between the maid's toilet and the window.

Q. You are sure there is a window there? 40
A. Yes.

Plaintiffs' Witness, Susie Taylor, Cross

Q. Was the window open that day? A. No, we have no heat in the kitchen.

Q. There are no radiators in the kitchen? A. No.

Q. There was no heat in this particular kitchen
10 on this particular day? A. There is a gas stove there—

Q. Was there any heat? A. No.

Q. And this room was that day somewhat chilly, it was cold in that kitchen? A. No, because there is heat in the apartment.

Q. In this particular kitchen was it cold? A. No, because there was heat in the apartment and this warms the kitchen.

Q. Was the window open at any time? A. No.

Q. As I understand it there is a window between this so-called toilet or lavatory and the sink where the box of siphons were located? A. Yes.

Q. You went there about eight or nine o'clock to take a bottle out? A. To take it out of the box.

Q. Nothing had happened from noon time
30 until eight or nine o'clock when you went there to take a bottle out? A. No.

Q. When you went to that box did you do anything to the box? A. The case is always in position.

Q. Did you do anything to the box? A. No, I didn't.

Q. You are sure? A. I am.

Q. Didn't you handle the box? A. No, I
40 didn't. The driver put the box there.

Q. Did you handle the box? A. No.

Plaintiffs' Witness, Susie Taylor, Cross

Q. Did you grab the end? A. No, I didn't have to grab the end. It was flat on the floor under the sink.

Q. When you went to get the bottle out did you pull the box away? A. No, I stooped, the case was flat under the sink. I stooped to take the bottle out of the box and as I stooped, I never straightened up, the bottle exploded. 10

Q. What is the height of space between the top bottle and the top of the sink? A. I could not measure.

Q. About how high? A. Something like that (indicating).

Q. How many feet? A. I could not say.

Q. Two, three, or four feet? A. I do not know. 20

Q. You don't know at all? A. No.

Q. You gently went over and took one bottle out? A. Yes, I naturally was careful.

Q. You took the bottle gently? A. Yes.

Q. You put your hand on the siphon, didn't you? A. No, I had to put my hand on the siphon bottle to take it out of the case. I put my hand on the neck of the bottle. 30

Q. There is a handle on there, isn't there? A. That is the top of the siphon where I put my hand.

Q. Did you grab it? A. No, sir.

Q. You grabbed the neck of the bottle? A. I put my hand on it to take it out gently.

Q. On the neck of the bottle? A. To take it out of the case.

Q. You didn't put your hand on that handle, did you? A. No. 40

Plaintiffs' Witness, Susie Taylor, Cross

Q. When you gently took it out you had your hand on the neck of the bottle? A. Yes, hand on the handle.

Q. You took it out gently? A. Yes.

10 Q. You lifted it out this way (indicating) or horizontally? A. I took it up slowly.

Q. Did you touch the sink? A. No, I didn't.

Q. You didn't touch the sink? A. I didn't touch anything.

20 Q. How far did you get this bottle from the case, with your hand upon the neck of the bottle before anything happened? A. I reached to take the bottle out, as I got the bottle just slightly up with my hand on the neck or head it went off like a cannon.

Q. Did you take it out of the case? A. I had to lift it out of the case.

Q. It was entirely out of the case? A. Yes.

Q. How much in height out of the case? A. I don't know, I couldn't tell you that.

30 Q. When it exploded you had your hand on the neck of that bottle, at the time the explosion took place you had the hand on the bottle? A. No.

Q. Did you leave go? A. It left me with enough in my hand.

Q. When this explosion took place you had your hand on the neck of the bottle? A. Yes.

Q. Your hand was not injured? A. No, but my leg was.

Q. I am not asking you that. I am asking you was your hand injured.

40 Mr. Levitan: I object. There is no claim for any injury to the hand.

The Court: Overruled.

Plaintiffs' Witness, Susie Taylor, Cross

Q. Was your hand injured? A. No.

Q. Did you let go the neck of the bottle as it exploded? A. Miss Smith took it out of my hand.

Q. Did you leave go of the neck of the bottle?
A. No.

10

Q. You held onto it? A. Miss Smith took it out of my hand.

Q. Did you hold on? A. Yes.

Q. Part of this bottle was somewhere on the floor and the other part in your hand, that is, the neck of the bottle? A. The bottle was scattered all over the floor.

Q. You had the neck in your hand? A. Yes.

Q. The other part was somewhere on the floor? A. I can't tell you. It nearly scared me to death.

20

Q. Which part of the bottle broke from the siphon? A. I could not tell you, I don't know.

Q. How much glass was on the neck of the bottle? A. I don't know.

Q. Nothing happened to the siphon of that bottle? A. I had it in my hand, the nickel part I had in my hand.

30

Q. Was there any glass on it? A. I don't know, I couldn't tell you.

Q. You can't tell us anything about that? A. No.

Q. Where is this bottle? A. I threw it out.

Q. You threw the bottle out? A. The whole case.

Q. Did you throw this bottle out? A. The whole case.

40

Q. Did you throw this bottle out? A. I didn't throw it out, it was swept up in the kitchen.

Plaintiffs' Witness, Susie Taylor, Cross

Q. Did you throw the siphon of this bottle out? A. I don't know what they did with it.

Q. You knew that was important here if you were injured by this bottle, the parts of the bottle were important? A. I wasn't able to
10 do anything.

Q. You knew it was important to your case? A. I was unable to do anything.

Q. You knew it was important, did you see it before it was thrown out? A. I did.

Q. Did you order it thrown out? A. I certainly did.

Q. Did you order the siphon thrown out which was attached to the bottle? A. I ordered every-
20 thing thrown out.

Q. Did you order the siphon to be thrown out? A. Yes, in the cellar.

Q. You mean to tell this court and jury that you gently put your hand on the neck of the bottle as you said to lift it out and the bottle exploded?

Mr. Levitan: I object to that as a repe-
30 tition.

The Court: I sustain the objection.

Mr. Harber: Exception.

Q. Do you know the name on the bottles? A. I don't know whether there was a name on it or not.

Q. You didn't see any name on the bottle? A. No.

Q. Did you see any name on the siphon? A. No.

40 Q. Do you know the name of the man who

Plaintiffs' Witness, Susie Taylor, Cross

delivered the vichy water there for the last nine months prior to this day? A. No.

Q. Did you ever see a name on the bottle or siphon? A. I never noticed.

Q. You used it often, didn't you? A. Yes.

Q. How often did you use it during the nine months, I mean how often per day? A. That I could not say, maybe two or three or four times a day. 10

Q. During these nine months you never noticed the name on the bottle? A. No.

Q. You don't know whose bottle or whose siphon that was? A. Well, it was the company that always delivered it.

Q. Do you know? A. No. 20

Q. You don't know the name of the company who delivered that siphon or that bottle or that case of bottles? A. The Mineral Water Works.

Q. You did know, didn't you? A. I never noticed, I never looked on the bottle to see what the name was.

Q. How do you know it was the Mineral Water Company? A. Because we always got it from those people. 30

Q. How do you know it was the Mineral Water Company? A. The same boy always delivered it.

Q. How do you know, notwithstanding the fact that the same boy delivered these? A. Because I used to pay him.

Q. Did you ever get a bill? A. No, I paid him at the door. 40

Q. Never got a bill? A. No.

Plaintiffs' Witness, Susie Taylor, Cross

Q. You never saw a truck there? A. The truck was always downstairs, we are upstairs.

Q. You never noticed the name? A. No.

Q. You can't say to whom this bottle belonged? A. Well, it was the same people. We
10 had their telephone number and when I wanted water I called them.

Q. At that time you didn't know whether there was a name on it or not? A. I would telephone when I wanted water.

Q. Did you fall on the floor? A. No, I didn't.

Q. You were hurt on the side of the leg, the left side of the leg? A. Yes, the left side.

20 Q. You were facing this box, when you were taking the bottle out? A. Yes, I had to face it.

Q. You didn't turn from that position up to the time that the bottle exploded, did you? A. No, I didn't.

Q. You were taken home, weren't you? A. Yes, by my husband.

Q. Was there company in that house that night? A. Yes.

30 Q. Did you say there was a party there? A. No, because we were going to work there was no party.

Q. Didn't your mistress have a party there that evening? A. No, she had company.

Q. Several people? A. One lady.

Q. There was quite some drinking going on, wasn't there? A. No, not a bit.

40 Q. How long was the woman there? A. Miss Smith had been there all afternoon, I should say about from four o'clock.

Plaintiffs' Witness, Susie Taylor, Cross

Q. All afternoon and all evening up to the time of the accident? A. Because we were going to work, yes, she was.

Q. She was given her meals? A. Yes.

Q. You were celebrating that night? A. No. 10

Q. You were not celebrating anything at all? A. No, not up to that present time.

Q. After that or before that? A. No.

Q. Were they celebrating before that? A. No.

Q. What time were you taken home? A. I just could not say. I should judge it was between ten and ten thirty.

Q. Did you have a doctor that night? A. Yes. 20

Q. Is he here in court? A. No.

Q. What is his name? A. Dr. Maro.

Q. What is his address? A. 150 West 55th Street, New York City.

Q. And he is the doctor who attended you all this time? A. He is not here now, it is his office hours.

Q. He is not here? A. No. 30

Q. You were getting how much per week? A. Twenty dollars per week.

Q. After you got out of bed, whenever it was, you went back to work for this mistress? A. Yes.

Q. This mistress did without you during the time you were away? A. No, she had a friend of hers in my place.

Q. How long were you actually in bed? A. 40
Four weeks.

Q. What is that? A. Four weeks.

Q. Didn't you testify on direct-examination that you were not confined four weeks, that

Plaintiffs' Witness, Susie Taylor, Cross

you were around the house? A. I had to get up naturally to attend to my wants.

Q. How often did you get up? A. Well, as often as I had to.

10 Q. You stayed in bed for four weeks? And you had nobody to attend you? A. My husband would.

Q. Your husband was home for four weeks? A. My husband is a musician and he was running in and out in his spare time.

Q. Where was he working at that time? A. He is a member of the Clef Club.

20 Q. And he was running in and out? A. Yes, in his spare time.

Q. And you took care of your husband at that time? A. I had a friend come in.

Q. Are those friends here? A. No.

Q. How many friends did you have during that period of time? A. I cannot say exactly.

Q. Well, who were they? A. My personal friends.

30 Q. Who are they, have you the names? Yes, I have the names. Rose Williams for one.

Q. And where does she live? A. 334 West 53rd Street.

Q. How often did she come to see you? A. Ever so often as she could. She was my next door neighbor.

40 Q. Did anybody else come? A. Yes, lots of friends.

Q. Who were these lots of friends? A. I could not tell you.

Q. After the four weeks, you walked on crutches? A. I was on crutches for three weeks.

Plaintiffs' Witness, Susie Taylor, Re-direct

Q. When, after? A. And I was confined to bed strictly for four weeks.

Q. After the four weeks you walked on two crutches for three weeks? A. Yes.

Q. You are sure about that? A. I was sure 10
about the whole thing.

Q. You are sure that you walked on crutches for three weeks after you got out of bed? A. Yes.

Adjourned at 12:45 for recess.

Afternoon Session. 20

CROSS-EXAMINATION by Mr. Harber (cont'd):

Q. You hadn't received any money from your mistress during this time? A. No.

Q. Not a cent? A. No, not the whole time I was ill. 30

Q. You didn't receive anything? A. No.

Q. You are sure about that? A. Yes.

Mr. Harber: That is all.

RE-DIRECT EXAMINATION by Mr. Levitan:

Q. In this kitchen you said there was no radiator in this kitchen at all? A. No, nothing at all but a gas stove that would give heat. 40

Q. How was the temperature in the kitchen

Plaintiffs' Witness, Susie Taylor, Re-direct

on this day? A. You could get heat from the other rooms of the apartment.

Q. Did you look at the name during the time these bottles were received. Did you ever
10 have occasion to see a name on the bottles? A. No, I didn't. I never paid any attention, but I would telephone them and let them know when I would want them to come.

Q. Where would you telephone to? A. I believe the number is Union 4327, I think that is the number.

Q. And who would answer the 'phone? A. A lady.

Q. And what instructions would you give him?
20 A. I would just say, "Would you have the driver deliver vichy to the Ferguson apartment tomorrow?"

Q. How long did they deliver vichy to you?

A. Eight or nine months.

RE-CROSS EXAMINATION by Mr. Harber:

Q. Was that room as warm as the other
30 rooms of the apartment? A. The radiators are in the other part of the house.

Q. Well, about how warm was it? A. It was warm enough, as warm as the other part.

Q. There is a gas heater in that room? A. I use it only when I cook.

Q. Did you cook that day? A. I never do
40 hardly any cooking, just a light breakfast.

Q. You didn't cook anything? A. Just a light breakfast.

Q. Nothing else? A. No.

Q. Did you prepare any meal for the company there that day? A. No.

Q. Didn't you testify she had her meals there? A. Just coffee and toast.

Plaintiffs' Witness, Susie Taylor, Re-direct

Q. Didn't you testify on direct-examination that she had her meals that afternoon? A. I didn't.

Q. She didn't eat anything there? A. In the morning.

Q. In the afternoon? A. No.

Q. Nor in the evening? A. No.

Q. The company was there all day? A. There was no company, just one lady.

Q. She didn't have anything there in the afternoon or in the evening? A. No, they went out to dinner, they never in the house in the evening.

Q. When did they go to dinner? A. That, I don't know.

Q. You can't tell this Court and jury when they went to dinner that evening? A. No.

Q. Had you—do you know when they went to dinner that evening? A. No.

Q. You can't guess any time, any approximate time? A. No.

Q. You mean that? A. Yes.

Q. They went to a dinner prior to this accident, didn't they? A. I suppose they did.

Q. Don't you know? A. I wasn't sure, I was taken ill.

Q. I mean before the accident happened had they gone to dinner? A. No.

Q. How do you know that? A. Because there was nothing prepared.

Q. And that is the only answer you have? A. There was nothing in the house.

Q. There was nothing in the house at all? A. No.

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Plaintiffs' Witness, Susie Taylor, Re-direct

Q. Your mistress had nothing from breakfast up to the time that this happened? A. She only eats two meals a day.

10 Q. So that she had nothing from breakfast until the time the accident happened? A. She had her breakfast.

Q. And did this other lady eat during that time? A. She had toast and coffee with her.

Q. Breakfast? A. I don't know what you would call it.

20 Q. From that time on in the morning up to the evening nothing was eaten by the two of them? A. No, they had toast and coffee and they sent downstairs and had something come up in the afternoon. It was cinnamon toast.

Q. You just testified they had nothing to eat during that time, did they eat something that afternoon or evening or not? A. That afternoon they had cinnamon toast and coffee.

Q. Why didn't you say so?

30 The Court: She said she had toast and coffee.

Q. You had to go into that kitchen very often that day? A. I had my work back and forth.

Q. Did you have so much work in that kitchen that it took you back and forth? A. My things for the other part of the house are in the kitchen.

40 Q. How big is the apartment? A. It is a three-room apartment.

Mr. Levitan: I object to that as incompetent, irrelevant and immaterial.

Plaintiffs' Witness, Susie Taylor, Re-direct

The Court: I will let it stand. She has answered.

By Mr. Levitan:

Q. What time did your mistress have breakfast? 10

Mr. Harber: I object to that, this is not cross-examination. It is entirely immaterial and irrelevant.

Mr. Levitan: I want to show what time an actress has her breakfast.

The Court: I will sustain the objection.

By Juror Number Twelve: 20

Q. Will you kindly demonstrate how you picked up the bottle?

(Witness demonstrates.)

By Mr. Levitan:

Q. I show you an ordinary siphon bottle and ask you if this bottle is the same as the bottle in question? A. Yes, just like that. I went to take the bottle out of the case (indicating), and I never put my hand on that (indicating). If I had gotten it out of the case I would have pressed it and the water would have come out. I never even tried. 30

Q. After the explosion what part was left in your hand? A. This part. Just the top part.

Q. Hold it so the jury can see you. A. (Indicating.) 40

By Mr. Harber:

Q. Are there any pipes under the sink? A. No.

Plaintiffs' Witness, Gertrude Smith, Direct

Q. Was there any pipe leading from the sink? A. No.

Q. No pipes under the sink? A. No.

Q. No pipes for your drain in the sink? A.
10 It is not underneath.

Q. How big is the sink? A. Quite a large one.

Q. And how wide? A. I don't know.

Q. You haven't any idea at all? A. No.

Q. Can't give the jury any idea, and you are sure no pipes drain the sink underneath? A. No, I don't know.

Q. You don't think so, or you don't know,
20 which is it? A. There isn't.

Q. This gas stove, or gas range, was that next to the sink? A. It is over by the kitchen stove.

Juror Number Eight: Did she use her right hand or her left hand?

The Witness: My right hand.

30

GERTRUDE SMITH, sworn for the plaintiff.

Direct-examination by Mr. Levitan:

Q. Where do you reside? A. Heylett, Long Island.

Q. Do you know Miss Taylor, the previous
40 witness on the stand? A. Yes.

Q. How long have you known her? A. About three years.

Plaintiffs' Witness, Gertrude Smith, Direct

Q. Where were you Christmas Eve of last year, 1927? A. In Miss Ferguson's apartment.

Q. What were you doing there? A. Visiting.

Q. Did anything happen there to your recollection? A. Yes, an accident.

10

Q. What time of day? A. Well, I think it was about eight or nine o'clock, between eight or nine o'clock.

Q. Morning or evening? A. Evening.

Q. What brought it to your attention? A. Well, the noise.

Q. Where were you at the time of the explosion? A. Standing in the hall, the hall is right alongside of the kitchen. I was standing there and I heard a terrible explosion. I turned around and I saw Miss Taylor's leg. I saw her leg cut wide open. I immediately rushed to her and grabbed the towel or dish cloth and wrapped it around her.

20

Q. Just describe that leg after the explosion. A. There was a gash in it that long (indicating), laid completely open. I immediately called for a doctor.

30

Q. Who called the doctor? A. Miss Ferguson.

Q. What did you do in the meantime? A. I held the towel on her leg. Miss Ferguson could not get a doctor by telephone, so she ran down eight flight of stairs, in the meantime, her husband was sent for and he came and took her home.

Q. And what were you doing in the kitchen? A. I held Susie's hand, and tried to quiet her down.

40

Q. What happened to the glass and water in the kitchen? A. We didn't think about the

Plaintiffs' Witness, Gertrude Smith, Cross

glass and water, and in the excitement after she had gone home with her husband, I swept it up.

10 Q. Did you look to see the name on the bottle or whose bottles they were? A. I did.

Q. What name did you see on the bottles?
A. The Mineral Water Works.

Q. What name did you see on the bottles?
A. The Mutual Mineral Water Works.

Q. Do you remember the address? A. Union City.

Q. Where is that? A. In Jersey.

20 Mr. Levitan: That's all.

CROSS-EXAMINATION by Mr. Harber:

Q. You came there very often to see Miss Ferguson? A. Yes, very.

Q. And you had occasion to notice the name on the box? A. Yes, I have seen the box there a lot of times.

30 Q. And you noticed the name on the box?
A. I didn't notice it before the accident.

Q. Never before? A. No.

Q. But you noticed this particular box? A. Well, I thought I would look at the box, because I knew it was the fault of the makers.

Q. You made up your mind right then and there that it was the fault of the makers of the vichy, is that right? A. Yes.

40 Q. You mean to say, you looked at the box for the name? A. Yes.

Q. You didn't see this accident except when you were attracted by the noise? A. I was

Plaintiffs' Witness, Gertrude Smith, Cross

standing right there, she was in this position (indicating), with the top of the bottle in her hand.

Q. How far was she bending down? A. I could not say.

10

Q. You say you saw her with the bottle in her hand. A. She was bending over, she wasn't standing up straight.

Q. When you saw her, she was in a bending position? A. Yes, sir, with the bottle in her hand like this (indicating).

Q. With the bottle in her hand? A. Yes.

Q. The neck of the bottle? A. Yes.

Q. She hadn't moved right or left at the time you heard the explosion, you didn't see her lift the bottle out of the box? A. I just turned around—

20

Q. I am asking you whether you saw her lift the bottle out of the box. A. I just turned around.

Q. You didn't see her lift the bottle out of the box? A. No.

Q. You don't know what she did with the bottle up to the time you saw her in that condition? A. From the position she was in, and the box lying on the floor, she must have picked the bottle out of the box like that (indicating).

30

Q. How far was she in this position from the box? A. Not very far.

Q. About how far? A. Like that.

Q. How high is the sink from the floor? A. I don't know.

40

Q. Can't you give the jury some approximate idea? A. About this (indicating).

Plaintiffs' Witness, Gertrude Smith, Cross

Q. Was this box right underneath the sink, completely? A. Yes.

Q. It wasn't moved at all? A. No.

Q. Do you know how wide the sink is? A.
10 About this (indicating).

Q. Would you say she had her hand underneath the sink in that position (indicating)? A. No.

Q. Did she have it away from the sink? A. The sink is as wide as the box that the bottles come in.

Q. Indicate to the jury just how wide the sink is. A. (Witness demonstrates.)

20 Q. It has double faucets? A. Yes.

Q. There is a big drain there, isn't there? A. No, a very small one.

Q. You are sure it was not large? A. No, it was not large.

Q. Her hand wasn't cut, was it? A. No.

Q. When you came there the glass was all over the floor? A. Yes.

Q. Was she holding the neck of the bottle?
30 A. Yes.

Q. You were standing in the hall, weren't you? A. Yes.

Q. Were you conversing with anybody at the time? A. No.

Q. Did you hear her mistress ask for vichy water? A. Yes.

Q. How long was Miss Taylor gone before
40 this happened after she was told to bring vichy water, how much time had elapsed between the time Miss Ferguson told her to bring vichy water and the time that happened? A. Probably fifteen minutes.

Plaintiffs' Witness, Gertrude Smith, Cross

Q. And for fifteen minutes you were in the hall? A. Yes.

Q. So you don't know what may have happened during the fifteen minutes? A. I was standing in the hall. I was paying no attention to the kitchen. 10

Q. You couldn't see in the kitchen? A. You can look in the kitchen from the hall.

Q. Were you looking into the kitchen during these fifteen minutes? A. No.

Q. The only thing you knew, you heard an explosion and you went in there? A. I turned to see it.

Q. How far away were you when you turned around to see it? A. Probably like that (indicating). 20

Juror Number Two: The plaintiff says she was injured on the left leg. She testified she took the bottle with the right hand. Can the witness tell me the relative position of the hand to the left leg?

30

By the Court:

Q. You came in just as the explosion happened, you said, what position was she in when you first saw her immediately after the accident? A. She was bending over.

Juror Number Two: Is that the way she was?

The Witness: Yes.

40

Plaintiffs' Witness, Hilda Ferguson, Direct

HILDA FERGUSON, sworn for the plaintiff:

Direct-examination by Mr. Levitan:

10 Q. Where did you live on the 24th of December, 1927? A. 150 West 55th Street.

Q. Where do you live now? A. 150 West 55th Street.

Q. Do you know of Miss Susie Taylor? A. Yes, she is my maid.

Q. How long has she been your maid? A. Well, about seven and a half years.

Q. What does she do for you? A. She is my personal maid.

20 Q. She attends to you at home? A. Yes, and in the theater.

Q. What is your business or profession? A. Actress.

Q. Do you recall the 24th of December, 1927? A. Very well.

Q. Can you recall anything happening to Susie on that night? A. Yes, an accident.

30 Q. Just tell the Court and jury what you know about that happening. A. I was standing in the kitchen, and I heard a terrible explosion. I turned around and Susie's leg was laid wide open. I immediately rushed for a doctor and asked her what was the matter. I saw blood, and I was so excited I didn't know what to do. I ran down eight flights of stairs, called the doctor to fix her up, and sent her home.

40 Q. How much wages were you paying Susie at this time? A. Twenty dollars a week.

Q. Did you pay her while she was away? A. No.

Plaintiffs' Witness, Hilda Ferguson, Cross

Q. How long was Susie away? A. Seven weeks.

Q. Did you have any other maid in her place?
A. Oh, yes, I had to.

Q. Do you know who her doctor was? A. 10
Dr. Maro in the building.

Q. Who paid the doctor, do you know? A.
Susie's husband.

Q. Do you know how much she was paid?

Mr. Harber: I object to that as immaterial and irrelevant.

The Court: Sustained.

Q. Do you know how many times the doctor 20
visited Susie? A. Every day.

Q. When did you first know about this bottle exploding? A. I heard a terrible noise, it sounded like a cannon.

CROSS-EXAMINATION by Mr. Harber:

Q. Did you go to visit your maid every day while she was sick? A. No, I didn't have 30
time.

Q. How many visits did you make to see her?
A. Well, I could not say.

Q. One? A. I could not say.

Q. Did you make any? A. Yes, quite a few.

Q. You can't tell us the number of times?
A. No.

Q. You know that the Doctor visited her every day? A. Yes. 40

Q. You were told that? A. Yes.

Q. Miss Taylor told you that? A. Well, the

Plaintiffs' Witness, Hilda Ferguson, Cross

Doctor lives in the same building. I saw him quite frequently.

Q. You were told that, weren't you? A. Yes, the Doctor told me.

10 Q. You don't know that of your own knowledge? A. I didn't see him go there.

Q. Where were you at the time of this terrible explosion? A. Standing in the kitchen.

Q. Whereabouts in the kitchen? A. It is a very small kitchen. I was standing near the table.

Q. Were you facing the same way Miss Taylor was? A. No.

20 Q. How far away was this from the sink? A. From about here to the first juror.

Q. And that is the distance you were away from the sink? A. Yes.

Q. How big is this kitchen, by the way? A. I don't know.

Q. Don't you know the dimensions of it? A. No.

30 Q. Very small kitchen, wasn't it? A. I have been used to a larger house.

Q. It is a very small kitchen? A. In my mind it is.

Q. You say you were away from where you are now to this juror in distance from the sink? A. Yes.

Q. You were seated at the table, were you? A. No, I was standing.

Q. With your back to the maid? A. Yes.

40 Q. Who else was there? A. Miss Smith was standing in the hallway.

Q. Was she facing you? A. Standing there.

Plaintiffs' Witness, Hilda Ferguson, Cross

Q. Were you conversing? A. Yes.

Q. This was a terrible explosion? A. A dreadful.

Q. And the glass flew all over, didn't it? A. Yes. 10

Q. You didn't get hurt by the glass? A. It struck my leg, and scratched me.

Q. When the glass struck you? A. Yes, it did.

Q. Where did it strike you? A. On my in-step, I had no stockings on, it scratched my in-step a little.

Q. You were not hurt in the accident, were you? A. No, I wasn't. 20

Q. Your leg was not scratched by reason of this glass, was it? A. Yes, it was.

Q. Did you see the position of your maid at any time? A. No, I heard her scream get a doctor, that is all I remember.

Q. You asked her to give you vichy water, didn't you? A. Yes.

Q. From the time that you asked her to get you vichy water until the happening of this accident, how much time had elapsed? A. Just a few minutes, I could not say. 30

Q. How many, about? A. I could not say.

Q. You can't give us any idea? A. No.

Q. Was it a minute? A. More than that.

Q. Two minutes? A. I could not say.

Q. Was it five minutes? A. I don't know.

Q. Was this kitchen warm at that time? A. Well, that I don't know. I would not notice those things. 40

Q. You would not notice those things, you would not know it at this time? A. No.

Plaintiffs' Witness, Hilda Ferguson, Cross

Q. You didn't see her bend down for this bottle, did you? A. No.

Q. You didn't see any part of this accident, except you heard a noise of the explosion? A. I was there arranging something.

Q. When this explosion took place, you were all excited? A. Certainly.

Q. You ran down for the doctor? A. Of course.

Q. You didn't see anything else, to speak of? A. No, only her leg laid wide open.

Q. Didn't you notice her position immediately after the explosion? A. She was holding her leg, that is all I recall. I saw blood and I rushed for the doctor.

Q. Was she bending over? A. I could not say.

Q. Was she standing? A. I don't know.

Q. What was her position at all? A. I don't know.

Q. How do you know her leg was cut? A. I saw blood.

Q. Is that all? A. Yes, that's all.

Q. You didn't see the actual wound or cut in the leg? A. Yes.

Q. When, at the time the explosion happened? A. When I turned after the explosion.

Q. When you turned around, did you see her position? A. I didn't no.

Q. You don't know whether she was standing or laying on the floor? A. She was holding her leg, the rest I don't know.

Q. You paid particular attention to the cut in the leg? A. Yes, that is all that was necessary when I saw blood.

Plaintiffs' Witness, Hilda Ferguson, Cross

Q. You didn't see her in position? A. No.

Q. You didn't notice anything, until you knew there was a cut in the leg? A. Yes.

Q. You don't know what position she was in?
A. No.

10

Q. You didn't see anything in her hand? A. Yes, she was holding the top of the bottle.

Q. Now, Miss Ferguson, knowing as you do that you saw a cut in her leg and the bottle in her hand, can you tell us the position of the lady? A. We sat her in the chair immediately.

Q. You don't know her position? A. No.

Q. When you sat her down, did she have ahold of the neck of the bottle? A. We took it out of her hand.

20

Q. While she was sitting? A. Then we realized what had happened.

Mr. Harber: That is all.

Mr. Levitan: If the court please Dr. Maro promised to be here, but I have not seen him, and I will close without the doctor. The plaintiff rests.

30

Mr. Harber: I move a nonsuit on the ground that there is no proof in this case as to the negligence of either the defendant, or his alleged agent or servant. On the further ground that there is no evidence to prove any duty existing between these plaintiffs or plaintiff and the defendant and this alleged accident, with reference to the happening of this accident as testified to.

40

On further ground that there is no proof sufficient to warrant the case to go

Defendant's Witness, Charles Heller, Direct

10 to the jury, and on the ground that there is no proof as to whether this bottle in question was the property of the defendant, or his alleged servant, no proof that they exercised control over this bottle and no proof of any cause, proximate cause, that in the way contributed to show that these defendants are concerned with the happening of the alleged accident. Those are my grounds for nonsuit.

The Court: The motion is denied.

20 Mr. Harber: I will take an exception if your Honor please.

(Counsel for the defendant opens to the jury.)

CHARLES HELLER, sworn:

30 *Direct-examination by Mr. Harber:*

Q. What is your name? A. Charles Heller.

Q. What is your business? A. Manufacturer of siphon bottles, heads, supplies.

Q. Mr. Heller, will you please talk a little louder so all the jury can hear you. How long have you been in that business? A. I have been connected with one firm, who manufacture siphon heads for thirty-eight years.

40 Q. Have you manufactured bottles, siphon, similar to the one exhibited here? A. The heads only. We mount them.

Defendant's Witness, Charles Heller, Direct

Q. You manufactured it for yourself? A. The heads.

Q. You have been in that business during all these thirty-seven years? A. Yes.

Q. None other? A. No.

10

Q. What firm are you connected with? A. Koscherak Siphon Bottle Works.

Q. How long have you been associated or connected with them? A. Thirty-eight years.

Q. What office do you hold there? A. Vice-president and prior to that for eighteen years superintendent of manufacturing.

Q. Do you sell siphon bottles and siphons to the defendant? A. We do.

20

Q. The Mutual Mineral Water Works? A. Yes, sir.

Q. How long have you been manufacturing those heads, bottles, for that concern? A. Why, we have been serving the Mutual up to I should say twenty years.

Q. What is the process in the making of what we call a siphon bottle? A. The glasses—

30

Mr. Levitan: I object to that as too general and too vague and I don't think it is pertinent to the issue at this time.

The Court: I think there is an inference there for the jury to draw as to the negligence. I do not know what the defense is, but I think he has the right to explain anything that goes to explain his case in the happening of these acts. Let us mark this bottle here as Exhibit P-1 being of the same type of bottle.

40

Defendant's Witness, Charles Heller, Direct

Q. I show you plaintiff's Exhibit P-1 which is the siphon bottle and ask you can you tell who that was manufactured by.

10 The Court: I don't think that would make any difference.

Q. What is the process used in your concern in the making of such bottle similar to this, marked P-1? A. The bottles are received in crates, carted to the factory, which is on Park Avenue, Hoboken, and put into a test. Every bottle is tested before it is lettered or mounted.

20 The Court: When you speak of mounting, you mean the top, the cap, made of lead?

The Witness: That is of composition.

The Court: The glass inner tube is that in it when the bottle is tested?

The Witness: That is a separate part altogether.

30 The Court: When it is tested, it is just the bottle without the top or glass tube in the bottle?

The Witness: Yes.

40 Q. Proceed. A. (Continuing.) The bottles are emerged into water after that. After that they are placed under a nozzle. The testing machine has three heads, and the bottle is placed under one of these nozzles. Hydrostatic or what is commonly known as hydraulic air is pumped into it and the gauge which indicates the amount of air that this bottle is tested under would be 350 pounds. Then the air is released, and the bottle is found to be fit for mounting and for shipment.

Defendant's Witness, Charles Heller, Direct

The Court: The bottle holds up to 350 pounds?

The Witness: Yes, the final capacity.

The Court: That is the test?

The Witness: Yes.

Q. Was that the test applied to the bottles that were sold and delivered to the defendant? 10

A. All bottles are subjected to that test.

Q. And the bottles delivered to the Mutual were given that test also? A. Absolutely.

Q. You have seen the defendant's plant, haven't you? A. I have.

Q. How often? A. I am there once a week regularly, sometimes twice.

Q. During these twenty years? A. Absolutely. 20

Q. Do you know the machinery that he uses for the making and the filling of these siphon bottles with vichy? A. I do.

Q. Will you describe that machinery to the Court and the jury? A. Seltzer, commonly known as vichy or carbonated water, has to be carbonated or agitated, in a drum. These drums in this particular instance revolve and are driven by motor. The gas enters one side and that admits the admission of water in through the other side. Where the gas enters through the pipe from the gas cylinder, there is a gauge or regulator, which regulates the amount of pressure that the bottler issues or injects into the bottle. The average pressure put into it is from 150 to 175 pounds. On the carbonator will be found another gauge, this gauge indicates the pressure on the carbonator, as well as on the regulator. The carbonator is also equipped with a regulator, or rather a valve, a safety valve, 30
40

Defendant's Witness, Charles Heller, Direct

and at any time the pressure would go over 200 pounds, this valve would open up and blow out the gas or excess pressure. Seltzer water is sometimes even carbonated up to 200 pounds, but should it go over this the safety valve will work. On the other hand, should the drum, or gas cylinder, work faster or the valve screw down, it would not permit it. The gas, Co-2, or carbonated acid, is used in the manufacture of the water, and naturally if the compression forced through the pipe leading from the regulator to the carbonator is excessive, no more gas would enter through it.

20 Q. This description that you have given is about the defendant's plant that you have seen?
A. That is the plant. He has an Irving Carbonator.

Q. Using the defendant's plant as you describe it, gauged as you say it is, up to a certain degree or certain pressure, what would happen to the bottle if the pressure went over that gauge, over the amount limited by the gauge?

30 The Court: What would happen if it went over 350 degrees?
(No answer.)

40 Q. What would happen in this particular case if the gauge was set at 150 or 175, what would happen to the bottle in case the vichy or pressure went over that amount, limited? A. You couldn't put that amount in the bottle, first of all. The safety valve would blow off and shut it, or the bottle would burst in the cage.

Defendant's Witness, Charles Heller, Direct

Q. Did you ever see a bottle of vichy filled to 350 pounds in defendant's place of business?

A. Never.

Q. You worked on this machine yourself? A. I did.

10

Q. You have seen how it is gauged? A. I did.

Q. Have you ever seen it ever go over 150 or 200? A. No.

Q. From your experience of so many years in that business, you no doubt would know what would be the cause or causes in case a bottle exploded? A. I naturally would.

Q. Would you tell the Court and jury what, after the bottle is delivered for use, that is with the contents, would be the element that would cause an explosion of any such bottle?

20

Mr. Levitan: I object on the ground it has not the proper foundation.

The Court: I will allow it. He may ask him the element.

A. There are several causes of siphon bottles after it has been filled under ordinary pressure of 150 or 175 pounds to break even if it doesn't break in the cage. After it is delivered to the consumer one would be a sudden change of temperature. The siphon bottle is very often taken and delivered to the customers, the consumer taking that bottle and placing it on a window sill, outside in the winter months, and taking the bottle when it is ready for use, instead of taking the bottle as it should be taken by the lever or by the head, it is generally taken this way (indicating) thereby the warmth

30

40

Defendant's Witness, Charles Heller, Cross

of the hand would naturally cause the gas to expand in the bottle causing the bottle to break.

10 Other times the bottle even under ordinary atmospheric pressure in the room, taken out of the ice box, or out of the box, if hit on an object, a hard object, thereby fracturing the outer skin of the glass it would cause the bottle to break. Those different elements, different conditions will arise.

Q. You have heard this witness, Miss Taylor, testify this morning, didn't you? A. I did.

20 Q. From the manner in which she testified in the way she took this bottle up out of the box would the explosion be due to the contents contained in that bottle as manufactured by the manufacturer? A. No.

Mr. Harber: That is all.

CROSS-EXAMINATION by Mr. Levitan:

30 Q. What was your last answer? A. I could not say under those conditions as described.

Q. Suppose the bottle was overcharged. A. It could not have been overcharged.

Q. Why not? A. Because it would break under pressure or the safety valve would blow off on the carbonator.

Q. If the pressure was just put in slowly into the bottle. A. It is always put in slowly.

40 Q. An explosion is usually caused by the sudden change or increase in pressure? A. Explosion is caused by an overdose, or by a fracture of the glass, before it is filled.

Q. Would it be possible to charge the bottle

Defendant's Witness, Charles Heller, Cross

slowly, and carefully, and that glass hold that overcharge for a certain time, and then explode later? A. It could not. You could not put any more in the bottle than it would hold. The bottle would not hold any more than two and one-half ounces, the contents of the bottle. You could not fill it beyond that. 10

Q. The glass in the bottles run to the same standard, do they? A. They are all alike.

Q. Every bottle turned out, will hold a certain amount of pressure, and no more? A. What size. These bottles are 28 ounces, if that is what you have reference to.

Q. Aren't some bottles thicker and stronger than others? A. No, the thickness of the glass will not help the strength of the glass. 20

Q. You mean to say a bottle only one thirty-second of an inch thick will stand one hundred and fifty degree pressure, the same as a thin bottle? A. No, not one-thirty second of an inch. We are speaking of siphon bottles. Siphons are never less than, I may say, $3/16$ inch.

Q. It is a common thing that one glass bottle will be stronger than another, isn't it? A. Yes, probably. 30

Q. The thicker the glass, the more it will resist? A. No, it will not stand that pressure.

Q. Now what would give you greater resistance in a bottle? A. Not the thickness, the proper annealing would.

Q. Annealing of the glass that is in the manufacture of the bottle? A. Yes. 40

Q. So that a great deal of care must be had by the seltzer water or the vichy water

Defendant's Witness, Charles Heller, Cross

manufacturer not to overcharge the bottles, is that right? A. Yes.

10 Q. All the blame for explosions usually are traced directly to the man who charges the bottles with the carbonated acid, or Co-2? A. No, not to the man but to the condition of the bottle while it is being filled.

Q. So that you state the pressure varies from 150 to 175 pounds? A. The bottles are generally charged up to a certain pressure. The carbonator is set at 150.

Q. Could your man charge it at 140 degrees? A. No, it is not set for that.

20 Q. Can he adjust the regulator? A. The pressure there is exact. He will not touch the regulator so as the seltzer water will be the same way. He sets his pressure at 150 pounds. He can only fill one-half of the bottle at once.

Q. So that there is a vacuum formed then? A. He fills it again.

Q. He has to give the bottle three or four shots? A. Just two shots.

30 Q. How does he fill the bottle between 150 and 175? A. He can fill only to 150, because his regulator is set to that.

Q. What kind of bottles fill at 175? A. The same as is used for the 150. The gauge is set at 175. It all depends on the temperature and the amount of the carbonator he uses.

40 Q. So that some degree of care would be necessary? A. No, the bottles would not have anything to do with that.

Q. What would be the ordinary guard in the maintaining of pressure so that it would not be

Defendant's Witness, Charles Heller, Cross

excessive? A. The regulator regulates this pressure.

Q. You have never seen the regulator on this machine? A. I have filled on it myself, tested bottles on it. I have not seen it since the case came up. 10

Q. You have not seen it since the case came up? A. No.

Q. When did you test bottles? A. I had a man in there doing it. I was doing it myself probably a year ago. During the summer we done it with another man.

Q. You know the bottles are also subject to a great deal of friction on the truck when taken out to be shipped? A. That would not injure the bottles, because the bottles are in boxes. 20

Q. To what would you attribute the explosion in this particular case? A. To my mind, that is the sudden fracture. The bottle must have been hit against some hard object.

Q. Assuming that the bottle was not hit, what would you say was the cause of the explosion? A. If it wasn't hit, the bottle would not break. 30

Q. Assuming it was not fractured you couldn't explain? A. No.

Q. You say one cause of the explosion is the fracture of the bottle or hitting up against a hard substance, what would be another cause of explosion? A. The temperature change.

Q. Well, how much of a change of temperature? A. It all depends on how much the contents—how cold it is. 40

Q. You know it is a very common thing to take vichy bottles in from outside in winter

Defendant's Witness, Charles Heller, Cross

time, half frozen, and put them on the table a very short time before using? A. That is a very dangerous practice.

10 Q. But the temperature of the hand would not cause an explosion? A. Absolutely.

Q. You mean an ordinary bottle, without the water being frozen, just to touch it by hand? A. If the bottle is frozen—

Q. I mean without being frozen. A. If the water is not frozen the temperature of the contents and the temperature of the hand is almost alike.

20 Q. So that touching it by hand could not cause it? A. No.

Q. Assuming that the bottle stands in the kitchen, the temperature of which is the ordinary temperature of an apartment, would the hand touching that be any cause for exploding? A. No.

Q. That would be impossible? A. Yes.

Q. From your experience? A. Yes, that is my experience.

30 Q. Assuming further that in this box there is no object that could have come in contact with the bottle to injure the bottle could it have exploded then by reason of any contact? A. Well, the circumstances would have to tell.

Q. There would have to be another reason for exploding? A. Possibly hitting the other bottle inside. The box is eight inches wide and six inches high.

40 Q. If we eliminate all possible contact of the bottle with any other object, what other reason would attribute to the explosion such as in this case, what other possibility could there be

Defendant's Witness, Charles Heller, Cross

other than an overcharge of carbonic acid or CO₂? A. There could be no overcharge.

Q. What other reason can you give now for the explosion? A. Nothing but the fracture.

Q. Nothing else? A. No. 10

Q. Assuming there is no fracture, what would the cause of the explosion be? A. Well, I would have to know the circumstances.

Q. Have you ever known a bottle to explode standing in the case, in the shipping? A. Yes, I did.

Q. What caused the explosion when the bottle stands still without anybody touching it? A. The temperature. 20

Q. What else, just the temperature? A. That is all I can contribute that to because if the bottle was fractured or imperfect the bottle is broken right in the filling.

Q. Wouldn't it be possible for you to use an imperfect bottle? A. If the bottler fills that imperfect bottle and places it in the box filled, it will break a few minutes after.

Q. Why doesn't it break right away? A. Because sometimes the pressure is lower than 150 degrees or probably whatever causes those things. 30

Q. You just said that the bottler will fill a bottle, let it stand for a few minutes, and after standing the bottle will explode. A. I mean only as far as I know.

Q. Does that happen often in the shop where these bottles are filled every day? A. I don't know how often. 40

Q. So that an operator will fill a bottle, let it stand with the others, five, ten or fifteen minutes,

Defendant's Witness, Charles Heller, Cross

and the bottle will explode? A. It would not take that long.

Q. How long would it take? A. Right after.

Q. You said a few minutes before. A. A minute or two.

Q. Would it take longer than that? A. No, I don't think so.

Q. What would prevent it from exploding in the cage? A. The imperfection of the glass.

Q. It would take a certain time for that glass to get the effect of the pressure of the gas inside before it explodes? A. The bottle being imperfect it is just the same as if you cut a piece of glass with a diamond. It is only cut on the outer skin. When the pressure is issued into the bottle it will take a little time before it works upon it. Sometimes it happens in the cage, sometimes after.

Q. What do you attribute the resistance of these two minutes or so from the time of its admission at the cage? A. To a very slight fracture.

Q. Would you say that if the fracture or imperfection be very slight that it would take a couple of hours? A. I have never seen that.

Q. Assuming that there is an imperfection in a particular bottle and it is put into the machine, how much of an overcharge would it be possible for that bottle to break? A. It is impossible, because the man that fills the bottle, before he fills the bottle, he looks at it.

Q. Assuming he doesn't look at the bottle, before he fills it, would it break then? A. It would, yes.

Defendant's Witness, Anton F. Waltz, Direct

ANTON F. WALTZ, sworn for the defendant:

Direct-examination by Mr. Harber:

Q. Mr. Waltz, what is your business? A. 10
Manufacturer of siphon bottles.

Q. With whom are you connected? A. The
Koscherak Siphon Bottle Works.

Q. How long have you been in that business?
A. Eight and a half years.

Q. Have you managed the manufacturing end
of that business? A. I have.

Q. Does that concern exclusively manufacture
siphon bottles, and filling machines for siphon
bottles? A. Yes. 20

Q. Does your concern, or rather has your
concern during the eight years been manufact-
uring siphon bottles for this defendant? A.
They have.

Q. What is the test used in the making of
siphon bottles which you delivered to the de-
fendant during the eight years you have been
connected with them? A. Testing for what
purpose? 30

Q. For use? A. 350 pounds hydrostatic test.

Q. Tell us how the bottle is manufactured? A.
You must differentiate between the bottle and
the siphon. The bottles are received from the
glass factory by carload carted to our plant and
put into stock. As each order is to be filled
the bottle is brought out of stock. These bottles
would stand a test, or rather put through neces-
sary operations, lettering them and having the
cap inserted and the head after which the bot-
tle is delivered to the consumer. 40

Defendant's Witness, Anton F. Waltz, Direct

Q. You have seen this machine at this plant of the defendant, have you? A. Yes.

Q. Very often? A. No, I would say a half a dozen times.

10 Q. Have you noticed what kind of a machine it is, describe it to the court and jury. A. He has what is commonly known as an Irving Carbonator, which is a drum tight carbonator, which contains an agitator that is used for the carbonation of the water. The water is carbonated by gas being induced into the water. From the carbonator it goes to the siphon filling machine, and the bottle is encased in a steel cage to prevent any injury to the operator should the bottle
20 break, that is a precaution required by law. The bottle is put in there and the lever is turned and the bottle is filled up. Incidentally, I might say the bottles are filled upside down. The bottle is filled, taken out of the machine, and placed in the box.

Q. What safety devices are on the machine?
A. On the carbonator there is a gauge, which
30 shows the pressure going from the carbonator to the filling machine. Between the gas drum and the carbonator there is a gauge, which shows the pressure of the gas leaving the drum. There is also a regulator which is set by the operator at the required pressure, so that no additional pressure above the pressure required for that bottle will pass through the regulator, and the
40 pressure in that way is controlled absolutely before it reaches the carbonator.

Q. What would happen if an attempt was made to overcharge the amount gauged in the

Defendant's Witness, Anton F. Waltz, Direct

bottle? A. If the regulator was tampered with so as to overcharge a valve would go off and the pressure would be shut off.

Q. And then you couldn't safely fill a bottle?

A. No, it would have to pass three safety devices before it could enter the filling machine. 10

Q. If the bottle isn't perfect and put into the filling machine, what would happen to the bottle?

A. The bottle would burst.

Q. So that when a bottle is filled with the contents, it shows that the bottle is a perfect bottle?

A. It shows that the bottle is capable of withstanding the pressure put into it.

Q. These bottles that you delivered to the defendant, what would you say the maximum pressure that the bottles could withstand? A. When they come out of the factory they can withstand 350 pounds pressure, which was 200 pounds over what defendant would fill them at. It gave a margin of safety of over 100 percent. 20

Q. What in your opinion, from your experience, would be the causes of a bottle after its delivery to the consumer for use to explode or burst? A. A fracture for one, an excessive rising temperature for another. 30

Q. Would any other cause be a contributing condition? A. Absolutely not.

Q. You heard the maid of Miss Ferguson testify this morning? A. Yes.

Q. I mean Miss Taylor, the plaintiff? A. I have. 40

Q. From the way that she handled this bottle, could the bottle burst or explode? A. If she handled it as she said, it could not.

Defendant's Witness, Anton F. Waltz, Cross

CROSS-EXAMINATION by Mr. Levitan:

Q. So that there must be some reason for the explosion that is not known at the present time?

10 A. There must have been a contributing cause.

Q. You have seen bottles explode after they have been filled? A. No, I have not. I have seen them break in filling.

Q. Only in filling, never after? A. No.

Q. Never saw a bottle explode by being hit? A. That, I have. I have seen them explode in and around the plant, where we make tests.

20 Q. Your tests showed them to explode by putting too much pressure? A. No, we made exhaustive tests of bottles by filling them at various temperatures, and set them at various temperatures under the various pressures so as to get the reaction to tell what pressure they could withstand.

30 Q. Bottles have been caused to burst in the winter by frost? A. No, sir, a rising temperature? The bottles are filled at 60 degrees, which is an ordinary temperature. If they are filled at 150 pounds pressure, at 60 degrees, and they come in contact with sunlight or other factors, that would—

The Court: At what degree is a bottle like this caused to explode? What heat in the winter and summer?

40 The Witness: I would say in a bottle filled at 150 pound pressure a temperature rise of thirty or forty degrees.

The Court: And so thirty degrees will cause it to explode?

Defendant's Witness, Anton F. Waltz, Cross

The Witness: I believe it would.

The Court: There is no direction what the temperature shall be in the place in which it is kept?

The Witness: No. 10

The Court: That is strictly within the knowledge of you men who make the bottles?

The Witness: No, I believe it is common knowledge that you should not take a cold bottle suddenly, and subject it to a rising temperature.

The Court: I know that, that might be with the bottle not carbonized inside, but where you have a bottle with forced atmosphere in there, and a rising temperature, it would cause a greater explosion than an ordinary bottle without any carbon in it. 20

The Witness: Naturally, a rising temperature increases the pressure in the bottle in direct proportion to its increase.

The Court: So that if these bottles were kept within a rise of twenty degrees, that would eliminate the possibility of explosion by rising temperature? 30

The Witness: Yes.

The Court: From the time it comes from the pressure machine filled and delivered to the customer it goes through many hands, doesn't it?

The Witness: Usually the driver puts it on the truck, and the truckman delivers it to the consumer. 40

The Court: You have no method of knowing what happens in between that time?

The Witness: No.

Defendant's Witness, Samuel Berner, Direct

Q. Any injury on the bottle would not cause it to explode immediately, would it? A. An injury to the bottle would cause it to explode immediately, yes.

10 Q. Otherwise it would not explode later? A. I do not believe so.

Q. You don't know? A. I believe I am qualified to answer that, yes.

Q. Assuming that the bottle is injured that is sufficient to cause it to explode? A. Yes.

Q. And then take this other factor, rising temperature, that would cause a bottle to explode then out of a clear sky? A. Rising temperature would cause a bottle to explode and if
20 that bottle was injured slightly it would explode quicker than a sound bottle.

Q. So that in a case containing a bottle which was injured and the temperature rose to a degree greater than the resistance of the bottle it would explode, while the others would remain intact?

A. That is possible.

30 Mr. Levitan: That is all.

SAMUEL BERNER, sworn for the defendant:

Direct-examination by Mr. Harber:

40 Q. You are Samuel Berner, son of the defendant in this case? A. Yes.

Q. You are working for your father? A. Yes.

Q. How long have you worked for him? A. All my life.

Defendant's Witness, Samuel Berner, Direct

Q. Have you a customer by the name of Ferguson? A. I have.

Q. Is she on your route? A. It was.

Q. Were you the man that made deliveries there of seltzer water? A. Yes, sir.

Q. Did you keep records of them? What day of the week was it that you delivered vichy water to this particular district, including Miss Ferguson's place? A. Every Wednesday.

Q. Did you go there on any other time? A. No, sir.

Q. Did you keep records of the delivery made by you? A. I do.

Q. Have you the delivery sheet with you of the 24th of December, 1927? A. I have.

Q. Will you produce it? A. (Produces paper.)

Q. Is that in your own handwriting? A. Yes, sir.

Q. Was there a delivery on the 24th of December, 1927, to Miss Ferguson's apartment? A. Not on the 24th.

Q. On the many occasions that you delivered stuff to the Ferguson apartment, did you tell the maid, Miss Taylor, anything about the boxes that were delivered there? A. I did, I always told them not to put it so near the heat, that they are liable to break if it got too warm.

Q. Did you give her these warnings? A. I did.

Q. You gave them to all customers? A. Yes.

Q. And you remember your attention being called to an alleged accident on the part of this lady, you remember your attention being called to Miss Taylor's being injured? A. Yes, sir.

Defendant's Witness, Samuel Berner, Cross

Q. Did you go to see her? A. I did.

Q. How soon after you were notified that someone was injured did you go there? A. I went up there the same day.

10 Q. Did you talk to her? A. I did.

Q. What did she say to you and what did you say to her? A. I asked her how it broke. She said she was taking the bottle out of the case to put it on her closet over where the dishes are, and it broke in her hand.

Q. What did you say to her? A. I didn't say anything after that. I asked her where her bottles were, and she said she threw them away.

20 Mr. Harber: That is all.

CROSS-EXAMINATION by Mr. Levitan:

Q. Every time you delivered seltzer to her, you told her not to put them near the heat? A. Not every time.

30 Q. When did you tell her that? A. The first time I delivered a case to her I gave her the warning.

Q. You have been delivering there for about seven or eight months? A. I can't tell you just how long.

Q. It was quite a while, wasn't it? A. Yes.

Q. You warned her the first time you came in there? A. Yes.

Q. And never said anything after that? A. No.

40 Q. You also told her, didn't you—you only warned her once, that is the only time you gave her instructions? A. That is the only time, I think.

Defendant's Witness, Samuel Berner, Cross

Q. The cold weather was on in December? A. I remember it was in the winter. In the summer I didn't deliver to her.

Q. You had been delivering seven or eight months to her? A. I don't know how long it was. It was in the cold weather when I started to deliver there. 10

Q. Didn't you know you were delivering there six, seven or eight months? A. I couldn't tell how long.

Q. How long do you think it was? A. I don't know.

Q. Let me see that record? A. (Handing attorney record.) 20

Q. When did you make this record? A. December 24th, 1927.

Q. You had that originally December 14th and changed it to December 24th. A. Well, that is a mistake on my part.

Q. And the first word December is also some other letter, wasn't it? A. I don't know.

Q. Look at it and see? A. No, sir. 30

Q. What was the letter under the D, December? A. I don't know.

Q. Look at it? A. I don't see anything under the D.

Q. Was there any letter at all under the D there? A. No.

Q. The original number on it was December 14th, wasn't it? A. No, sir. When I write it down I put 14th. It was the 24th. 40

Q. The original number was 1 and you changed it to 2? A. That was a mistake.

Q. It was a 1 first? A. It was.

Defendant's Witness, Peter Diwicki, Cross

Q. So that your dates are so accurate that you make a mistake between December 14th and the 24th, is that right? A. Well, I made a mistake in writing.

10 Mr. Levitan: That is all.

PETER DIWICKI, sworn for the defendant:

Direct-examination by Mr. Harber:

Q. How long have you been working for Mr. Berner? A. Fourteen years.

20 Q. What did you do in his factory? A. I watched the machinery there.

Q. And did you do any filling? A. Yes, sir.

Q. Filling vichy water, is that your work? A. Yes.

Q. What did you do in your filling? A. I set my regulator at 150 pounds, not over.

Q. What else did you do? A. I operate the machine and if I find it over I set it.

30 Q. Is that the method you have been using during the 14 years in this place? A. Yes.

CROSS-EXAMINATION by Mr. Levitan:

Q. Do you read English? A. Why not, I am in this country twenty-two years.

40 Q. Can you read numbers in English? A. Why, certainly.

Q. Who sets this gauge on the machine? A. I do.

Q. Always? A. Always.

Defendant's Witness, Peter Diwicki, Cross

Q. At what number? A. 150.

Q. Never 175? A. No.

Q. It is dangerous at 175? A. It is not dangerous, but we set it at 150, never over.

Q. How often does your valve in the gauge get out of order? A. Never. 10

Q. Never have any trouble fixing it? A. Never.

Q. How many broken bottles do you have? A. Well, I tell you you can't break them. I don't see them in the machine, never broke, while I am working, I never saw anything break.

Q. How many did you see break in the work? A. None. 20

Q. When did they break, after they stand on the floor? A. No.

Q. When? A. We get new bottles, we test them.

Q. Did you test them? A. No, we get them already. They stand so much.

Q. Once the bottles come in you don't care how much pressure you put into them? A. You put 150 on your gauge and no more. 30

Q. In some bottles the water comes out with a lot of force and in some very weak, what is the reason? A. That depends on how much is on the safety valve.

Q. Sometimes the bottles are overcharged? A. You can't be overcharged because the regulator don't go no further.

Q. How many times do you see the bottle after you put it down from the machine to stand on the floor? A. I don't see it. 40

Q. Never see it? A. No.

Defendant's Witness, Harry Berner, Direct

Q. Never see any bottle broken? A. I examine it when I put it inside and then I don't see it.

10 Q. Who else works in that factory besides you? A. No one else.

Q. Aren't there other people who do work in that place beside you? A. We got lots of workmen, we do different work.

Q. You don't know how many bottles can be broken or chipped until you fill them in the factory? A. You can chip and it makes a loud noise.

20 Q. What do you do with the bottles after you fill them? A. We wash them and put on a nice label.

Q. Do you ever chip them when you are washing and putting the labels on? A. No.

Q. They never got chipped? A. No.

Q. Did you wash them too? A. Yes.

Q. You wash them and fill them too? A. Yes, that is my job.

30 Mr. Levitan: That is all.

HARRY BERNER, sworn:

Direct-examination by Mr. Harber:

Q. You are the defendant and the owner of this plant in question? A. Yes.

40 Q. How long have you been in that business? A. Twenty-seven years.

Q. Have you had any case where a bottle exploded—

Defendant's Witness, Harry Berner, Direct

Mr. Harber: I withdraw that.

Q. Where is your place of business? A. 111—
33rd Street, Union City.

Q. How long have you been located in that
place? A. In the same place seven years. 10

Q. And before that? A. Sixteen years.

Q. Do you work at this trade? A. Since I
was eighteen years old.

Q. What kind of a carbonator have you got,
what kind of a machine have you got, or did
you have on December, 1927? A. I have one
of the latest model machines, a high pressure
machine.

Q. On this machine by way of safety valves, 20
what have you? A. A safety valve and two
gauges, one leading from the gas agitator to the
carbonator and one gauge to the carbonator.

Q. What is done with the bottle before it is
put in the machine for filling? A. Before we
fill siphon bottles we examine to see that there
is no chip. They generally have a chip in the
case and if that is so I instruct my men— 30

Mr. Levitan: I object.

The Court: Sustained.

Q. Have you seen what is done, in your pres-
ence, before the bottle is filled, what is done
with the bottle? A. We examine them.

Q. What is the usual gauge that you use? A.
On the machine for filling we have it gauged for
150 pounds pressure.

Q. Is that the usual degree that you have 40
been using? A. Always.

Mr. Harber: That is all.

Defendant's Witness, Harry Berner, Cross

CROSS-EXAMINATION by Mr. Levitan:

Q. You don't stay in the shop all the time?

A. From seven in the morning until six at night.

10 Q. And you watch every bottle filled, you see every bottle filled up? A. Possibly.

Q. After the bottle is filled you follow it to the washer and see him wash it? A. I don't know.

Q. You stand at the filling machine and watch them fill every bottle? A. I am standing there.

Q. You see every bottle in that shop, you see it being filled? A. Positively.

20 Q. That is all you do? A. Yes.

Q. How many bottles do you fill a day? A. Well, certain days we fill eighty cases and certain times fifty.

Q. How long does it take? A. Twenty cases per hour.

Q. So that if you fill eighty cases it takes four hours, yes? A. Yes.

30 Q. You stand there four hours and see every bottle filled? A. I inspect every bottle as it comes to be filled.

Q. Why do you stay there? A. I examine the bottles.

Q. You are in your office, aren't you? A. No.

Q. Do you stand by your men and do you stand next to him? A. No, sir.

40 Q. How do you know the condition of the bottles? A. I examine it before he checks it up and puts it through the filling machine.

Q. How do you know they don't get chipped? A. They don't because we examine every case.

Defendant's Witness, Harry Berner, Cross

Q. You examine every bottle that is filled?
A. Positively.

Q. When do you do that? A. In the morning, every morning before they go to the filling machine.

10

Q. If you fill twenty cases or two hundred bottles, or eighty cases, which makes eight hundred bottles, you examine every bottle? A. I examine them before they get filled.

Q. You go over these eight hundred bottles every day? A. It depends on how many we fill.

Q. You look at them? A. Yes.

Q. How much time does it take? A. I don't know.

20

Q. Does it take you ten minutes? A. It takes me more than twenty.

Q. Now, how much time does it take you to examine them? A. I don't know. I never watched it. It takes more than a half hour.

Q. How do you examine them in the morning?
A. I take every bottle and see if it is chipped in the shoulder. If it is chipped in the shoulder it will bust. I don't take them out of the box.

30

Q. How are the boxes piled up? A. One on top of the other.

Q. How much time do you spend on each bottle, a minute or so? A. I can't answer that, I don't know exactly.

Q. You don't want the jury to believe that you personally inspect each bottle? A. Positively, it is true.

Q. What does this man Diwickie mean when he says he inspects the bottle too? A. He looked at them too.

40

Q. Why do you look them over then? A. To make sure they are good.

Plaintiff's Witness, Susie Taylor, Cross

Q. You examine every bottle that goes through? A. Yes.

Mr. Levitan: That is all.

Mr. Harber: Defendant rests.

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Rebuttal.

SUSIE TAYLOR, recalled by the plaintiffs:

Direct-examination by Mr. Levitan:

Q. Miss Taylor, do you recognize Samuel
20 Berner, that young man, you saw him on the stand, did he ever say anything to you at any time as to the care, or how to look after the bottles? A. No.

Q. Did he ever mention anything at all? A. No.

Q. How long did he sell you this water? A. Eight or nine months.

Q. Prior to this time? A. Yes.

30

CROSS-EXAMINATION by Mr. Harber:

Q. You know that bottles, siphon bottles, vichy, had to be handled with great care? A. I naturally handled all bottles with care.

Q. Is that right? A. Yes.

Mr. Harber: That is all.

Mr. Harber: I move for a direction of the
40 verdict on the same ground as my previous motion for a nonsuit, if your Honor please.

The Court: Motion denied.

Counsel sums up to the jury.

The Court's Charge.

The Court thereupon charged the jury as follows:

The Court: Gentlemen of the Jury: You have listened attentively to this case, and you know as much about it as I do. You are presumed to know more about the facts than the Court does. My only province is to try to keep you along the clear line of the law as laid down in this case. There is no doubt that the plaintiff, Susie Taylor, did have an accident. That is admitted. There is no doubt that she sustained an injury, that is not denied. There is no doubt that she was laid up for four weeks in her home, and three weeks on crutches. That seems to be the testimony in the case, although you can say whether or not you believe Susie.

So that the case comes down to the following proposition of law:

I think it comes within the doctrine established in the case of *Hughes v. The Atlantic City and Shore Railroad Company*, and there the Court said, in actions for negligence, where the *maximu res ipsa loquitur* applies (that is where something happens which at the time cannot be explained, and which would be within the peculiar province of the defendant to explain), the Trial Judge may hold, if the circumstances are such as will, unexplained, permit the jury to draw an inference of negligence, that that inference is still for the jury, and not for the Court. In other words, the questions in this case are questions of fact. In actions or claims where the *maxim res ipsa loquitur* applies, the most that is required of the defendant is an ex-

The Court's Charge

planation, not exculpation. That means he must explain what he did in the line of the work performed in the bottling, and so forth. Rather than to try to excuse the accident, he must explain what he did in the ordinary course of that business. "The defendant is entitled to a verdict, in case the plaintiff has failed to prove his case by the evidence." I am reading now from the case I mentioned, this particular case.

Now, we come down to the real questions of law. The plaintiff tells you how the accident happened; in other words, she did work as the maid in the place where the woman, Hilda Ferguson, had purchased these bottles, and this woman in the ordinary course of her duties was compelled to take one of these bottles from the case under the sink and serve a drink to her mistress. She says that she did do that, and that in the raising of the bottle out of the box she hadn't struck it against anything, nor had it come in contact with anything else, and she says that when she raised it above the top of the box there was an explosion, and that she was cut very badly along the left limb, as exhibited to the jury.

Now, that might raise an inference from which this jury in this case could say whether there was negligence.

The plaintiff having shown that this bottle exploded, the law then steps in and says that this having happened and the plaintiff having removed any question as to negligence on her part, the happening then requires an explanation on the part of the defendant. So the defendant takes the stand under the law and tells

The Court's Charge

the jury of the manufacture of the bottle and the pressure the bottle will withstand, that is, 350 pounds, and the method employed in placing the vichy or seltzer in conjunction with a substance which would carbonate the water, in other words, a sort of acid which causes an effervescence in the water. Then it is bottled according to a process to withstand 350 pounds weight, and the pressure valves comes only to 175 pounds, and the defendant says that is what they had put into the bottle. In other words, they explain first that this bottle had been tested to that weight or pressure, and then the defendant explains, or tries to explain—I should rather say it is for the jury to say whether they explained or not—in the final analysis the defendants say they had put in the mineral water in this bottle to the pressure of 175 pounds. Now, that is what we might term an explanation of the inference that could be drawn from the plaintiff's case of the happening of the accident. That is the situation in this case. An inference can be drawn by you, gentlemen of the jury, and if you feel that the weight of the evidence is greater (and it must be greater on the part of the plaintiff in the law of negligence), that this woman did take up this bottle and through no neglect of hers it exploded, and that the explanation of the defendant's case does not explain the circumstances of the happening of this act, why, then of course, she would be entitled to recover. In other words, the plaintiff showed the happening of the accident from which the jury can draw an inference that the defendants were negligent in some way in the

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The Court's Charge

filling of this bottle, not the making of the bottle, the filling of the bottle, because the bottles are made by someone else, and it is the filling that, according to all the testimony in the case, would
10 have caused this act of negligence, if it did happen as plaintiff says.

Now, the defendants say that this bottle cannot explode after a certain length of time, even though there is a nick on it, and the only way it might explode would be by the placing of the bottle in such a position or condition that the temperature would rise 40 degrees on the contents of the bottle, or on the glass itself. How-
20 ever, 40 degrees would do it. Now, if that is so it is peculiarly within the knowledge of the defendant company, the defendants in this case, and this woman being on the outside world, could hardly know of such possibilities, although one witness says that he advised her when he first started delivering months ago to keep all these bottles in a certain condition and in a certain temperature; yet the plaintiff says that
30 he did not. If you believe the testimony of that witness, of course, she was apprised of the danger. But if you do not say she was apprised of that danger, and if the change of 40 degrees in a bottle of this type would cause such an accident to happen, and she was injured by it, why, then it would be sending into the outside world something which was dangerous, which would be against public policy, unless there was
40 some warning or appraisal of it or something to lead the purchaser or user or one in whose control it would fall to know that it was dangerous to them.

The Court's Charge

That, of course, is to be judged as between the testimony of the young man, the son of the defendant, who said that he apprised her of the fact, and the testimony of the plaintiff that she did not receive such a warning.

Of course, counsel said something about plaintiff's color. That is ridiculous—the color of a plaintiff who is a citizen of the United States. I know you are too big and too broad-minded, every one of you gentlemen of the jury, to think that a person, because they happen by the accident of birth to be born of a different color, should not secure judgment. That, I know, is out of this case entirely. We are too far advanced and too intelligent in this part of the State of New Jersey to hold anything against any person by reason of race, color or creed. This plaintiff with her testimony stands on the same footing in this court room as does any member of the jury or myself as the Judge. That is out of the case entirely.

Now, if you find that the defendant has explained away the conditions that would have caused this accident, and removed it out of his control by all due processes of the manufacture (and it becomes a question of fact for the jury to decide whether or not he has done that), then, of course, there should be a judgment for the defendant. If, on the other hand, you feel that this woman was injured in this accident, and that the defendant company has not explained the inference of negligence raised by the plaintiff, and that this accident could have happened through some agency of which he has control and that his explanations do not cover that, why

The Court's Charge

then, you can give judgment for the plaintiff. If you do, then you take into consideration the seriousness of this injury, and as I said in the beginning, if you find that the defendant has not explained away the inference then the plain-
10 tiff is entitled to judgment. The injury, according to what she said, and according to the testimony which seems to be uncontradicted, was that she did suffer a very serious injury, and she carried a mark on her leg, which she will carry for the rest of her life, and even though it cannot be seen with her stockings on, she is entitled to have her body in the same condition as when the Almighty God gave it to her from
20 her mother. And for four weeks she claims she was laid up in her home. She admitted she could go in and out of the bed to attend to her wants. For three weeks thereafter she was compelled to go on crutches, a matter of seven weeks in all, and she says that during these seven weeks she suffered pain and had to limp around. You men are familiar with what that means, by reason of your outside experience.
30 Now, for this seven weeks which she says she suffered, you can give her up to the jurisdiction of this court, that is \$500; and surely she is entitled to that if you find she is entitled to judgment at all, she is entitled to a judgment that will pay her substantially for this scar on her limb for the rest of her life, as well as for her pain and suffering. You are gentlemen of the world, and you ought to know what to give, but you cannot give more than \$500, which is the
40 jurisdiction of this court. But you should not give a less amount if you find the defendants

The Court's Charge

were guilty of negligence, or give a verdict that would be ridiculous in comparison to the seven weeks and the wound which the woman has.

In the case of Charles Taylor against the defendant, brought by the husband for the loss of his wife's services, the wife says that she received \$20 a week salary and that she was compelled to lose seven weeks at the rate of \$20 per week, that is in all \$140. There is no testimony as to how much the doctor received so that you cannot give her any medical expenses, because there is nothing to base it upon. There is no figure in the case which shows how much medicine she bought or any kind of figure about how much she spent, so Charles Taylor can only recover in a case of this kind the actual expenses he was put to in taking care of his wife's necessities and the loss of his wife's services, which would be the wages which she earned and to which he would be entitled. 10 20

So that if there is judgment for the plaintiff Charles Taylor against the defendant, it must be based upon the fact that the defendant was negligent in the case of Susie Taylor, the wife, because if Susie Taylor does not recover, then her husband cannot recover in his action. If he does recover he recovers upon the case of Susie Taylor and the only amount you can give him would be up to \$140. If you feel that she did not lose seven weeks and come to the conclusion on all the evidence that it was less, then you base your verdict on \$20 a week for the number of weeks you find she actually lost, not exceeding seven. According to the evidence you may go as high as the total of \$140 30 40

The Court's Charge

provided your minds meet on the actual loss of wages.

I have tried to make this case plain to you gentlemen. It is a difficult matter and it is not the same as the ordinary tort case such as we
10 have every day or automobile accident negligence case where the plaintiff testifies on one side how the accident happened and the defendant testifies how it happened, and it becomes a question for the jury. In a case of this type the law steps in and makes a new rule and requires a different type of evidence on the part of the plaintiff and on the part of the defendant. So that the plaintiff in his or her case produces
20 testimony as to the happening of the accident and then the jury from that testimony draws an inference from the facts given and then the case of the plaintiff rests upon that inference from the actual happening of the accident. Then the defendant comes along and explains what he did, and he explains that everything he did was perfectly proper, and then it resolves itself into a question for the jury as to what actually hap-
30 pened from the inference drawn from the case presented by the plaintiff and from the explanation of the defendant. Then the law steps in and lays down the rules that I read to you in the beginning.

Now, there is one little point that might help you gentlemen get the light as I see it. I know it is very difficult especially for the layman, and also in many cases for lawyers. In actions or claims where the maxim *res ipsa loquitur* applies, the most that is required of the defendant is explanation, not exculpation, as I
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The Court's Charge

explained that before. He must not explain himself away from the happening, he explains what he did and then it is for the jury to say whether he has explained away the inference from the happening of the accident.

And then the case goes on and says: "And 10
if the explanation leaves the minds of the jurors in equipoise, in such case the defendant would be entitled to a verdict, because the plaintiff has failed to prove its case by the weight of the evidence." In other words, if the plaintiff tells his story and the defendant then comes along and tells his side of the story, and if after hearing both sides you feel that neither one outweighs the other, then of course, your verdict 20
should be for the defendant, but when, and if, on the other hand, you listen to the plaintiff's story her side of the case, and then listen to the defendant's explanation, and you think that the plaintiff in her testimony has outweighed the scale as against the defendant, then, of course, she is entitled to recover because the law steps in and says that in cases of negligence and in civil suits of this type and other types, it is the 30
duty of the plaintiffs to prove by a preponderance of the evidence that they are entitled to recover, and, of course, if plaintiff's testimony weighs heavier in any degree or overbalances the defendant's story, then they have sustained the burden of their case and are entitled to a judgment.

I am trying to keep you along the pathway 40
whereby you may determine the law in the case. It is always necessary for the plaintiff to prove its case by a preponderance of the evidence.

The Court's Charge

That does not mean by a greater amount of evidence, but the weight of the evidence sufficient to overbalance the defendant's story in the minds of the jury so that she has proven her case more than the defendant has proven his, and therefore having done that she has borne the burden imposed upon her by the law and is entitled to recover. I have tried to make it plain to you and I am sure that you gentlemen understand the case and will give your verdict accordingly.

Defendant's counsel has requested me to charge you as follows:

1. Where the defendant has explained away the inference of the plaintiff's case, the verdict should be for the defendant.

I so charge.

2. It is the duty of the plaintiff to prove negligence where any presumption is explained away, and there being no rebuttal, the verdict should be for the defendant.

I so charge.

3. Negligence must be the proximate cause, and there is no evidence here of neglect, and under the law a verdict must be for the defendant.

That of course I charge you subject to the testimony in the case.

4. Unless it is proved that the defendant's control continued over this siphon bottle, there should be a verdict for the defendant.

I so charge.

5. The mere happening of an accident does not give the plaintiff a right to recover. Direct

The Court's Charge

proportionate negligence must be proven and if this fails defendant must recover.

Mr. Harber uses different language than I do but I so charge you.

6. The mere explosion of a siphon bottle is not negligence. I have charged you very thoroughly on that. 10

Mr. Harber: I take the following exceptions to your Honor's charge.

The charge of the court on the admission of the fact that there is an admitted accident, and no doubt that the plaintiff was injured, is erroneous and not based upon the testimony in the case.

The law of *res ipsa loquitur* and the case cited by the court to wit: Hughes against the Atlantic City and Shore Railroad Company, is not applicable. That rule does not apply in this case, and the entire charge relative to that principal of law is erroneous. 20

The charge of the court on what overcomes an inference is imperfect and it is not a clear citation of the law to the jury.

There is no proof that the other plaintiff, Charles Taylor, was the husband of Susie Taylor, and not a scintilla of evidence as to his case, and the court's charge in his case is based upon no facts, and is erroneous. 30

The charge of the court relative to the warning, and the fact that a siphon bottle is dangerous and is against public policy is not proper, and prejudices the minds of the jury, and is not the law in the case. 40

The inference of negligence charged by the

The Court's Charge

court, that must be explained away by the defendant, and everything with reference thereto, is not clear and is error.

10 The comments of the court are so improper that they prejudice the minds of the jury, and have taken away the right of the jury to pass upon the facts.

The charge to the jury that you ought to know what to give to the plaintiff, not less than \$500 and not to give a verdict that would be ridiculous, is contrary to the law, prejudices the minds of the jury, and is not the law.

20 The charge of the court upon the question of loss of salary of \$140 to be recovered by Charles Taylor, the husband, is not based upon any evidence in this case, and he is not entitled to recover.

The charge of the court that in a case of this kind the type of evidence on the part of the plaintiff and on the part of the defendant is different from any other case of negligence, is not the law.

30 The charge of the court on the explanation of the weight of the evidence and on the scale of the evidence is not the law in the case.

(The jury returned with a verdict in favor of the plaintiff, Susie Taylor for \$500; and for the husband, Charles Taylor, \$70.)

Defendant's Requests.

1. Where the defendant has explained away the inference of the plaintiff's case, the verdict should be for the defendant.

2. It is the duty of the plaintiff to prove negligence where any presumption is explained away, and there being no rebuttal, the verdict should be for the defendant. 10

3. Negligence must be the proximate cause and there is no evidence here of neglect, and under the law a verdict must be for the defendant.

4. Unless it is proved that the defendant's control continued over this siphon bottle, there should be a verdict for the defendant.

5. The mere happening of an accident does not give the plaintiff a right to recover. Direct proportionate negligence must be proven and if this fails defendant must recover. 20

6. The mere explosion of a siphon bottle is not negligence.

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Judge's Certificate.SECOND DISTRICT COURT OF JERSEY
CITY.

10

SUSIE TAYLOR,	}
Plaintiff,	

vs.

HARRY BERNER,	}
Defendant.	

Certificate

20

I, Myron C. Ernst, Judge of the Second District Court of Jersey City, do hereby certify the foregoing to be the transcript of the testimony made by the designated stenographer in this case, and I further certify the said transcript as the state of the case to be used on the hearing of the appeal taken herein from the judgment rendered.

Dated, October 31st, 1928.

30

MYRON C. ERNST,
Judge of Second District
Court of Jersey City.

40

Judge's Certificate.SECOND DISTRICT COURT OF JERSEY
CITY.

CHARLES J. TAYLOR,
Plaintiff,

vs.

HARRY BERNER,
Defendant.

10

Certificate

I, Myron C. Ernst, Judge of the Second District Court of Jersey City do hereby certify the foregoing to be the transcript of the testimony made by the designated stenographer in this case, and I further certify the said transcript as the state of the case to be used on the hearing of the appeal taken herein from the judgment rendered.

20

Dated, October 31st, 1928.

MYRON C. ERNST,
Judge of the Second District
Court of Jersey City.

30

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Clerk's Transcript of Judgment and Record.

State of New Jersey,
Hudson County, ss:
City of Jersey City,

SECOND DISTRICT COURT OF JERSEY
CITY.

Before: Myron C. Ernst, Esq., Judge.

10 No. 81388
CHARLES J. TAYLOR,
Plaintiff,
vs.
HARRY BERNER, trading as Mu-
tual Mineral Water Works,
Defendant.

In Tort. Demand \$
Levitan & Levitan Plff's Att'y.
Samuel Harber Deft's Att'y.

20 Cost City Al.
Summons and copy \$1.50
Service and return \$1.00
Mileage

A summons was issued tested April 27th, 1928 returnable March 4th, 1928, at ten o'clock in the forenoon. The Constable or Sergeant-at-Arms returned the summons as follows, viz: I served the within summons 192 of the defendant, by reading the same to h and delivering to h a copy thereof. The defendant Harry Berner could not be found and I served the within summons on him the 28th day of April, 1928, by leaving a copy thereof at his usual place of abode in presence of a person of his family over the age of four teen years who I informed of the contents thereof.

JOHN G. ANDES,
Constable.

30 Subpoenas
Service of subpoenas
Witness fees
Papers filed

Trial fee 1.50

40 Summoning Jury
Swearing Jury

Jury fee

\$3.00

Plaintiff demand was filed April 27th, 1928 March 4th, 1928, this cause was called for trial at ten o'clock in the forenoon and continued to October 5th, 1928. The deft. demanded a jury A Venire was issued October A. D. 1928 returnable October 5th, 1928, at 11 o'clock in

Clerk's Transcript of Judgment and Record

	1.00	
	4.00	
Attorney's fee	3.50	
	7.50	
Chg. \$2.50		
Oct. 1, 1928		
Venire	.50	
Service "	1.50	
October 17th, 1928		
Notice of Appeal filed		
October 19th, 1928,		
appeal bond filed.		
October 19th, 1928,		
Order extending	1.00	
time to settle state		
of case to Novem-		
ber 15th, 1928.		
October 22, 1928, copy of rec-		
ord mailed to Samuel Harber,		
Atty.		
Transcript		
Execution		
Service and return		

the forenoon, to Andrew J. Mellor, Sergeant-at-Arms. October 5th, 1928, the plaintiff appeared and the defendant appeared and the trial of the cause was proceeded with as follows:

Said Sergeant-at-Arms returned said Venire with the following jurors summoned, viz: Carl J. Retting, Eugene Hicks, George W. Witt, Conrad Phister, Charles J. Morris, Jr., Henry Coodes, Frederick N. Hopp, William V. Gibson, William DeGroff, William E. Bennett and Mortimer VanBuren who were severally sworn according to law. On the part of the plaintiff, Susie Taylor, Gertrude Smith and Hilda Ferguson were sworn and testified. 10

On the part of the defendant W. S. Cole was sworn as stenographer. Charles Heller, Anton F. Walz, Samuel Berner, Peter Devicki and Harry Berner were sworn and testified. 20

The Sergeant-at-Arms was sworn to attend said Jury who retired and after deliberation return and say that they find a verdict in favor of the plaintiff Charles J. Taylor and against Harry Berner, trading as Mutual Mineral Water Works, defendant, and assess the damages at Seventy Dollars. Whereupon it is on this Fifth day of October, A. D. 1928, by this Court considered and adjudged that said Charles J. Taylor plaintiff recover against said Harry Berner, trading as Mutual Mineral Water Works, defendant, the sum of Seventy Dollars and no cents, damages, and seven dollars and fifty cents costs of suit. 30

A. D. 192 execution was issued to Constable or Sergeant-at-Arms A. D. 192 who returned the said execution as follows, viz: I return the within writ this A. D. 192 . 40

I do hereby certify that the foregoing is a true copy of the record in the above stated cause.

EDWARD J. POYNTON,
Clerk.

Clerk's Transcript of Judgment and Record.

State of New Jersey,
Hudson County, ss:
City of Jersey City,

SECOND DISTRICT COURT OF JERSEY
CITY.

Before: Myron C. Ernst, Esq., Judge.

10 No. 81389
SUSIE TAYLOR,
Plaintiff,
vs.
HARRY BERNER, trading as Mu-
tual Mineral Water Works,
Defendant.

In Tort. Demand \$
Levitan & Levitan Plff's Att'y.
Samuel Harber Deft's Att'y.

20 Cost City Al.
Summons, and Copy \$1.50
Service and return \$1.00
Mileage

A summons was issued tested April 27th, 1928, returnable May 4th, 1928, at ten o'clock in the forenoon. The Constable or Sergeant-at-Arms returned the summons as follows, viz: I served the within summons 192 , on the defendant by reading the same to h and delivering to h a copy thereof. The defendant Harry Berner could not be found and I served the within summons on him on the 28th day of April, 1928, by leaving a copy thereof at his usual place of abode in presence of a person of his family over the age of fourteen years who I informed of the contents thereof.

JOHN G. ANDES,
Constable.

30 Subpoenas
Service of Subpoenas
Witness fees
Papers filed
Trial fee 1.50
Venire

40 Summoning Jury
Swearing Jury

3.00
1.00

W. S. Cole was sworn as stenographer. Plaintiff demand was filed April 27th, A. D. 1928. May 4th, 1928, this cause was called for trial at ten o'clock in the forenoon and

Clerk's Transcript of Judgment and Record

Attending jury _____
 4.00
 Attorney's fees 25.00

 \$29.00

Chg. \$2.50
 October 17th, 1928,
 notice of appeal
 filed. October 19th,
 1928, appeal bond
 filed. October 19th,
 1928, Order ex-
 tending time to
 settle State of Case
 filed to Nov. 15th,
 1928. \$1.00

October 22, 1928,
 copy of record
 mailed to Samuel
 Harber, Atty.

Transcript

Execution

Service and return.

continued to March 5th, 1928. The Deft. de-
 manded a jury. A venire was issued return-
 able A. D. 192 at o'clock
 in the noon to Constable or Sergeant
 at Arms. Oct. 5th, A. D. 1928, the plaintiff
 appeared and the defendant appeared and the
 trial of the case was proceeded with as fol-
 lows: Said Sergeant-at-Arms returned said ve-
 nire with the following jurors summoned, viz:
 This case was tried with case No. 81388. On
 the part of the Plaintiff Susie Taylor, Gertrude
 Smith and Hilda Furgerson were sworn and
 testified.

On the part of the Defendant Charles Heller,
 Anton F. Walz, Samuel Berner, Peter Devicki
 and Harry Berner were sworn and testified.

The Sergeant-at-Arms was sworn to attend
 said jury who retired and after deliveration,
 return and say that they find a verdict in fa-
 vor of the plaintiff, Susie Taylor and against
 the defendant, Harry Berner, trading as Mutual
 Mineral Water Works and assess damages at
 Five Hundred Dollars.

Whereupon it is on this Fifth day of October,
 A. D. 1928, by this Court considered and ad-
 judged that said Susie Taylor, plaintiff, recover
 against said Harry Berner, trading as Mutual
 Mineral Water Works, defendant, the sum of
 Five Hundred Dollars and no cents, damages,
 and twenty-nine Dollars and no cents, costs of
 suit. A. D. 192 execution was issued to

Constable or Sergeant-at-Arms
 A. D. 192 , who returned the said execution
 as follows, viz: I return the within
 writ this A. D. 192 .

I do hereby certify that foregoing is a true
 copy of the record in the above stated cause.

EDWARD J. POYNTON,
 Clerk.

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111

New Jersey Court of Errors and Appeals

CHARLES J. TAYLOR,
Plaintiff-Respondent,

vs.

HARRY BERNER, trading under the
firm name of MUTUAL MINERAL
WATER WORKS,
Defendant-Appellant.

SUSIE TAYLOR,
Plaintiff-Respondent,

vs.

HARRY BERNER, trading under the
firm name of MUTUAL MINERAL
WATER WORKS,
Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement of Facts.

Briefly, the facts herein are as follows:

This is the defendant-appellant's appeal from an affirmance in the Supreme Court. The verdicts were for \$500 for Susie Taylor and \$70 for Charles J. Taylor, the husband, in the Second District Court of Jersey City.

On the 24th day of December, 1927, the plaintiff Susie Taylor was employed as a maid at an apartment in New York City. On that day, at about 8:30 p. m., while in the act of picking up a bottle of vichy which had been sold and delivered to her employer by the defendant-appellant (who was the

bottler of said vichy), the bottle exploded, and she was injured by the explosion.

The plaintiff Susie Taylor sued for damages for personal injuries resulting from the negligence of the defendant-appellant and the plaintiff Charles J. Taylor, the husband of Susie Taylor, sued for loss of services and medical expenses incurred by reason thereof. By consent of counsel, both were tried, and are here argued together.

POINT I.

The doctrine of *res ipsa loquitur* was correctly applied.

In the case of *Fanshawe v. Rawlins*, 98 Atl. 439 (E. & A. 1916), Mr. Justice Terhune speaking for this Court, says on page 440, quoting *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. Rep. 416, as follows:

“The general rule in actions of negligence is that the mere proof of an ‘accident’ * * * does not raise any presumption of negligence; but in the application of this rule it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*, the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that raises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.”

Mumma v. Easton, 73 N. J. Law 653 (E & A. 1905);

Hughes v. Atlantic City & S. R. Co., 89
Atl. 769.

In *Hughes v. Atlantic City & S. R. Co.*, 89 Atl. 769, Mr. Justice Swayze, speaking for this Court, says on page 770, talking about the doctrine of *res ipsa loquitur*:

“In cases where the maxim applies, * * * hold that the circumstances are such as will, unexplained, permit the jury to draw the inference of negligence; but that inference is still one for the jury and not for the court. They may not believe the witnesses; the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do; they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and, in any event, they may render a verdict for the defendant. This is within their province, even when there is no explanation by the defendant. When there is such explanation it is for the jury to decide, just as in the ordinary case of whatever kind, what the actual facts are, and what inference should be drawn therefrom.”

On appeal, the upper Court reversed the judgment not because the doctrine did not apply, but because the doctrine had been inaccurately applied. The Court saying on page 771:

“For the failure to submit to the jury the question of defendant’s negligence upon the whole case, the judgment must be reversed to the end that a *venire de novo* may issue.”

Turning to the facts in the case *sub judice* we find the following course of procedure, viz., delivery of identical bottles of soda water and vichy, which vichy and soda water were bottled by the

defendant (Case, pages 60 and 78) to the residence in which the plaintiff, Susie Taylor, worked over a period of time (Case, page 30), the control and knowledge of the gases therein wholly in the hands of the defendant-appellant, and on the day in question the plaintiff, Susie Taylor, exercising due care (Case, pages 33 and 34) being severely injured by the explosion of the bottle in her hand. This fact, in accordance with the authorities above cited, empowered the Trial Court to permit and instruct the jury that they might draw therefrom an inference of negligence. The Court so informed the jury, being careful to leave the ultimate question of negligence for them to decide.

Case, page 86, wherein the Trial Court said, speaking of the explosion of the bottle in Susie Taylor's hand,

“Now, that might raise an inference from which this jury in this case could say whether there was negligence.”

And again at page 87, Case, the Trial Court, referring to the method of bottling the vichy, says:

“An inference can be drawn by you, gentlemen of the jury, and if you feel that the weight of evidence is greater (and it must be greater on the part of the plaintiff in the law of negligence) that this woman did take up this bottle and through no neglect of hers, it exploded, and that the explanation of the defendant's case does not explain the circumstances of the happening of this act, why, then of course she would be entitled to recover. In other words, the plaintiff showed the happening of the accident from which the jury can draw an inference that the defendants were negligent in some way in the filling of this bottle, not in the making of the bottle, the filling of the bottle, because the bottles are made by someone else, and it is the filling

that, according to all the testimony in this case, would have caused this act of negligence, if it did happen as plaintiff says.”

In the recent case of *Noonan vs. Great Atlantic & Pacific Tea Co.*, 139 Atl. page 9 (E. & A.—1927), the Court, in deciding the liability of the defendant, where a bottle of ginger ale exploded in the store of the Atlantic & Pacific Tea Co. while being placed in a container for the plaintiff, says that the doctrine of *res ipsa loquitur* was inapplicable to the facts in that case; but it is most strongly urged that in that case the Court took cognizance of the fact that the bottle of ginger ale which exploded in that case, was not the product of the defendant-appellant. Certainly a different situation would have arisen had the ginger ale been a product of the defendant-appellant as the situation is in the instant case. For then the control of the bottling, knowledge of the gases, pressure, etc., contained in the ginger ale, would have been in the hands of the defendant-appellant which state of facts would most certainly have brought the case within the doctrine of “*res ipsa loquitur*”. There the A. & P. were selling agents merely. Here the defendant was the bottler.

It is therefore respectfully urged that the case *sub judice* falls directly within the rule of *res ipsa loquitur*, as laid down in the analogous case of *Hughes vs. Atlantic City S. R. Co.*, and seems to be on all fours with the decision in that case with the added advantage in the instant case of the bottling, knowledge of the gases, pressure, etc., in the control of the defendant-appellant.

Defendant-appellant in his brief cites the case of *Bahr vs. Lombard*, 53 N. J. L. 233, to support his contention that the charge of the lower Court erroneously led the jury to believe the cause of the explosion and that the defendant was in some

unexplained way negligent, and that it was not necessary for the plaintiff to prove negligence, and that negligence might be inferred without any proof. This is not so. What the Court did say in its charge, following the law laid down in the Hughes case, was that an inference of negligence might be inferred by the jury from the facts in the case (Case, page 86):

“Now they might raise an inference from which the jury in this case could say whether there was negligence.”

There was sufficient testimony in the case as to the method of bottling the vichy, and it was for the jury to decide whether or not they would draw an inference of negligence from this testimony.

Garrison, J., in discussing the doctrine of *res ipsa loquitur*, on page 238 in the Bahr case above cited, says:

“There is a class of cases in which there has been no direct evidence of any particular act of negligence beyond the mere fact that something unusual has happened which caused the injury. In such cases each will depend upon its own fact. With this understanding, that where a certain course of action has been pursued by any person without injury to others, and he, upon changing that course, injures another, the thing unexplained speaks for itself, that such person has been negligent; or, if something unusual happens, with respect to the defendant’s property, or something over which he has control, which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant’s act, the occurrence, being unusual, is said to speak for itself that such act was negligent.”

And so in the case *sub judice*, where the defendant-appellant had been delivering these bottles of

vichy over a period of time, when one day a bottle exploded in the plaintiff-respondent's hand, it was a question of fact for the jury to say whether in the first instance an inference of negligence arose, and, secondly, whether or not it had been explained away.

Defendant-appellant says in his brief that the charge of the Trial Court in the Noonan case was much fairer to the defendant than the charge in the case at bar, but we respectfully urge that, as above stated, the point on which the Noonan case hinged was that the bottle of ginger ale in that case was not a product of the defendant-appellant. Had it been so, most certainly a different situation would have arisen.

In the case at bar the lower Court's charge was not prejudicial in the fact that the Court instructed the jury that they might infer the negligence, because, as laid down in the Hughes case and in the Mumma case, the Court may instruct the jury that in the absence of direct evidence they may from the unusual occurrence draw an inference of negligence, and therefore we respectfully submit that the doctrine does apply and there was no error in charging that it did.

POINT II.

The charge of the Court was proper and did not usurp the functions of the jury.

In no instance can the charge of the Court be said to encroach on the province of the jury, but on the other hand presents both sides of the question fairly and impartially, giving his impression of the evidence to the jury, but leaving the final determination of the question of the negligence to them.

In Case, pages 86 and 87, after giving the jury the defendant's story, the Court says:

“An inference can be drawn by you, gentlemen of the jury, and if you feel that the weight of the evidence is greater (and it must be greater on the part of the plaintiff in the law of negligence) that this woman did take up this bottle and through no neglect of hers it exploded, and that the explanation of the defendant's case does not explain the circumstances of the happening of this act, why, then of course she would be entitled to recover.”

And again (Case, page 89) the Court presents to the jury the defendant's side, saying:

“Now if you find that the defendant has explained away the conditions that would have caused this accident and removed it out of his control by all due processes of the manufacture (and it becomes a question of fact for the jury to decide whether or not he has done that), then, of course, there should be a judgment for the defendant.”

POINT III.

The Supreme Court did take up and dispose of defendant's exception to the charge in its “Supreme Court Opinion” although not considering such exceptions by number.

There is no rule requiring consideration by the Court of objections by number or consecutively. Even if this were error it would be harmless because not prejudicial to defendant.

Conclusion.

In view of the facts in the case being primarily a question of fact for the jury, and bearing in

mind that the defendant himself controlled the bottling of the vichy and soda water and that the lower Court presents to the jury the proposition that the plaintiff had the burden of establishing her case by a preponderance of the evidence, and properly left the question of negligence to the jury; it is respectfully urged that the judgment in favor of the plaintiff, Susie Taylor, and the judgment in favor of her husband, Charles J. Taylor, both being according to law, should be affirmed.

Respectfully submitted,

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Of Counsel.

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New Jersey Court of Errors and Appeals

CHARLES J. TAYLOR,
Plaintiff-Respondent,

vs.

HARRY BERNER, trading under
the firm name of MUTUAL MIN-
ERAL WATER WORKS,

Defendant-Appellant.

SUSIE TAYLOR,
Plaintiff-Respondent,

vs.

HARRY BERNER, trading under
the firm name of MUTUAL MIN-
ERAL WATER WORKS,

Defendant-Appellant.

On Appeal
from
New Jersey
Supreme
Court.

BRIEF FOR DEFENDANTS- APPELLANTS

Statement

Both of the above cases are in this court on appeal from judgments of affirmance in the New Jersey Supreme Court.

The trials were had before Judge Ernst and a jury, in the Second District Court of Jersey City on October 5th, 1928. The testimony was taken stenographically and is printed in full in the State of Case on pages 35 to 96, both inclusive.

Facts

The plaintiff, Susie Taylor, was employed as a maid at an apartment in New York City, where an accident occurred in December 24th, 1927. The plaintiff, Susie Taylor, made claim for damages for personal injuries resulting from the alleged negligence of the defendant. The plaintiff, Charles Taylor, sued for medical expenses and loss of services by reason of the injuries said to have been sustained by his wife, the plaintiff, Susie Taylor. The plaintiffs claim that the injuries resulted from the explosion of a siphon bottle of vichy while it was being handled by the plaintiff, Susie Taylor.

The defendant was not the manufacturer of the siphon bottle, but was engaged in the bottling business and filled the bottle with vichy. The actual cause of the bottle exploding was not shown nor was there any proof of negligence on the part of the defendant, as charged in the States of Demand or otherwise, but the plaintiffs rested their case and the cases were sent to the jury upon the theory *res ipsa loquitur*.

Grounds of Appeal

1. The Supreme Court erroneously refused to reverse the judgment entered in the Second District Court of Jersey City against the defendant-appellant on the ground that the charge to the jury by the District Court was erroneous, illegal and prejudicial to the defendant-appellant.
2. The New Jersey Supreme Court erroneously affirmed the Second District Court in refusing to grant the motion of defendant-appellant for a non-suit at the close of plaintiffs' cases.
3. The New Jersey Supreme Court erroneously affirmed the Second District Court in refusing to

grant the motion of defendant-appellant for the direction of a verdict in his favor and against both plaintiffs at the close of plaintiffs' cases.

APPELLANT'S CONTENTIONS

(a) The doctrine of *res ipsa loquitur* did not apply because the bottle went off while being handled and did not explode of its own accord without any intervening agency.

(b) The Court charged the jury how much damages to award and otherwise usurped the jury's province.

(c) The Supreme Court overlooked the plain and definite exceptions to the charge and did not pass on the same.

Argument

I.

The judgments in favor of plaintiff-respondents should be reversed, because the charge to the jury was erroneous and prejudicial and unfair to the defendant-appellant.

The Court charged the jury as follows:

(Case p. 102, lines 28 to p. 103, line 3.)

"You men are familiar with what that means, by reason of your outside experience. Now, for this seven weeks which she says she suffered, you can give her up to the jurisdiction of this Court, that is \$500; and surely she is entitled to that if you find she is entitled to judgment at all, she is entitled to a judgment that will pay her substantially for this scar on her limb for the rest of her life, as well as for her pain and suffering. You are gentlemen of the world and you ought to know what to give,

but you cannot give more than \$500, which is the jurisdiction of this Court. But you should not give a less amount if you find the defendants were guilty of negligence or give a verdict that would be ridiculous in comparison to the seven weeks and the wound which the woman has.”

A proper exception was taken on the trial to this portion of the charge (Case p. 108, lines 12 to 17).

By the foregoing the trial court in charging the jury, usurped the powers of the jury and in effect directed the jury to find the amount of damages in favor of plaintiff. The charge such as was given in this case is reversible error.

Center Garage Co. vs. Columbia Ins. Co.,
96 L. 456.

Another portion of the charge which was unfair and prejudicial to defendant-appellant is the following:

(Case p. 102 lines 10 to 20.)

“The injury, according to what she said, and according to the testimony which seems to be uncontradicted, was that she did suffer a very serious injury, and she carried a mark on her leg, which she will carry for the rest of her life, and even though it cannot be seen with her stockings on, she is entitled to have her body in the same condition as when the Almighty God gave it to her from her mother.”

This part of the charge was excepted to by trial counsel. (Case p. 108 lines 8 to 11.)

This statement by the Court was quite unwarranted and could not help but excite the passions

and prejudices of the jury. It is an elementary principle that the Trial Court in commenting upon the facts of the case should not do so in a manner that might inflame the jury.

The Court charged the jury as follows, with respect to recovery of plaintiff, Charles Taylor:

((Case p. 103 lines 4 to p. 104 line 2.)

"In the case of Charles Taylor against the defendant brought by the husband for the loss of his wife's services, the wife says that she received \$20 a week salary and that she was compelled to lose seven weeks at the rate of \$20 per week, that is in all \$140. There is no figure in the case which shows how much medicine she bought or any kind of figure about how much she spent, so Charles Taylor can only recover in a case of this kind the actual expenses he has put to in taking care of his wife's necessities and the loss of his wife's services, which would be the wages which she earned and to which he would be entitled.

"So that if there is judgment for the plaintiff Charles Taylor against the defendant it must be based upon the fact that the defendant was negligent in the case of Susie Taylor, the wife, because if Susie Taylor does not recover, then her husband cannot recover in his action. If he does recover he recovers upon the case of Susie Taylor and the amount you can give him would be up to \$140. If you feel that she did not lose seven weeks and come to the conclusion on all the evidence that it was less, then you base your verdict on \$20 a week for the number of weeks you find she actually lost, not exceeding seven.

According to the evidence you may go as high as the total \$140, provided your minds meet on the actual loss of wages."

This part of the Court's charge was properly excepted to by trial counsel. (Case p. 108 lines 18 to 22.)

The law in this State is well established that in an injury to a wife, the husband is entitled to recovery for loss of consortium and medical expenses. No citations in support of this proposition need be given. In this case there is no proof that Charles Taylor was the husband of defendant; there is no proof as to the amount of money expended by either plaintiff for medical services or medicine; there is no proof of loss of consortium; there is no proof that Susie Taylor gave her wages to him, and furthermore, it is not the law that a husband is entitled to his wife's wages. By statute both in New Jersey and in New York, wages earned by a married woman are her sole and separate property, as though she were single. In this connection it is also evident that the Court usurped the functions of the jury and told the jury the amount to be paid to the husband.

A reading of the charge shows that the trial judge tried to apply the doctrine of *res ipsa loquitur* to this case. In explaining the law involved, there is no question but that the minds of the jury were confused, because the explanation of this doctrine and the law by the trial court is very confusing, and is not at all clear. Again, with respect to the law, the Court says (Case p. 104 lines 3 to 18):

"I have tried to make this case plain to you gentlemen. It is a difficult matter and it is not the same as the ordinary tort case, such as we have every day, or automobile

accident negligence case where the plaintiff testifies on one side how the accident happened and the defendant testifies how it happened, and it becomes a question for the jury. In a case of this type the law steps in and makes a new rule and requires a different type of evidence on the part of the plaintiff and on the part of the defendant.”

This portion of the charge was properly excepted to. (Case p. 108 lines 23 to 28.)

The Supreme Court in deciding the appeals said that the charge of the Trial Court was not properly excepted to, and was not before the Supreme Court to be considered on the appeals. In this the Supreme Court was in error. The exceptions of trial counsel to the charge of the Court are fully set forth in the State of the Case, page 107, line 12 to bottom of page 108. The Supreme Court evidently overlooked the exceptions to the charge, which were in proper form and timely made.

Kneip vs. New York, etc., R. R. Co., 102 N. J. L. 374 S. C., 131 Atl. 886, holds that the trial judge has the right to make such comments on the testimony as he thinks necessary, so long as he leaves the jury to determine the facts and to draw their own conclusions therefrom.

To like effect are:

Merlinger vs. Lambert, 26 N. J. L. 806.

Foley vs. Laughlin, 60 N. J. L. 464.

Camden, etc., R. R. Co. vs. Williams, 61 N. J. L. 646.

While the law to be found in the decisions of the above cases permits the trial judge to comment on the facts by inference, the courts hold

that the trial judge must not tell the jury what facts to find and what decisions to make.

The Court of Errors and Appeals in *Lindley vs. O'Reilly*, 46 N. J. L. 352, reversed the judgment of the New Jersey Supreme Court because of an erroneous expression of opinion by the trial judge in his charge to the jury. From the opinion in this case we take the following:

“The errors assigned in this case are to certain parts of the judge’s charge and his refusal to charge as requested by the defendant’s counsel. I think there was error in one of those matters. The suit is an action of ejectment. One of the defences was a claim of title by adverse possession for twenty years. While the general statement of the law on that subject, in the charge is correct, there is a statement in regard to the proof which was very likely to mislead the jury, to the prejudice of the defendant. It is this: ‘I do not see, under the law, how you can find that there was adverse possession for any part of this lane, except the part where these posts were actually placed or the land used in connection with them.’”

The following are some of the many cases in which our courts have held that a trial judge may not assume as a fact that which is disputed, and, by his charge or otherwise, withdraw any such matter from the consideration of the jurors thus affecting their determinations:

Crosby vs. Wells, 73 N. J. L. 790.

Betts vs. Francis, 30 N. J. L. 153.

Citizens Co. vs. Doying, 55 N. J. L. 569.

Center Garage Co. vs. Columbia Insurance Co., 96 N. J. L. 456 S. C., 115 Atl. 401,

was decided by the Court of Errors and Appeals and reversed the judgment of the New Jersey Supreme Court, because the trial court instructed the jury that the loss sustained by the plaintiff was \$1300. It was held that the amount, if any, payable to the plaintiff, was a matter to be decided by the jury from the proof in the case. The charge was erroneous because it assumed the amount.

II.

The court should have granted defendant's motion for a nonsuit or direction of a verdict as no negligence was shown on the part of the defendant, and the doctrine of *res ipsa loquitur* does not apply.

The trial court applied the doctrine of *res ipsa loquitur* to this case. This doctrine does not apply because there is no proof in the case that the bottle exploded by itself. There is no evidence whatsoever that the bottle was defective in construction, or that it was improperly filled. The only testimony in the case is that the bottle was picked up by the plaintiff, Susie Taylor, and exploded. It may be argued that her negligent handling of the bottle caused the explosion. In cases where the doctrine of *res ipsa loquitur* is invoked, no intervening agency, no act on the part of the plaintiff contributed to set in motion the instrumentality which caused the accident. There was no handling by the injured of the article which caused the accident. Plaintiffs offered no evidence in this case that the bottle would have exploded and caused the injury if it had remained standing in its box.

Bahr v. Lombard, 53 N. J. L., 238, is as good a case on the doctrine of *res ipsa loquitur* as can be found in this State. It was decided by this court,

and the principle as defined in the case, has been often cited and followed in later cases. The facts in the Bahr case are quite similar to those in the case to be decided here. In the Bahr case the plaintiff was working for defendants in their oil refining business, and was injured while at work upon his employers' premises by the explosion of a pipe, which was conducting crude oil to refining stills. It was held that the defendants, although responsible for the pipe and the presence of oil in the pipe, were not negligent by reason of the explosion, which did not of itself constitute negligence. The court held that the doctrine of *res ipsa loquitur* did not apply.

In the opinion of Mr. Justice Garrison, we find the following:

“In the present case, giving to the plaintiff's testimony its fullest significance, the only inculpatory circumstance is that an explosion occurred which injured the plaintiff while he was at work upon the defendants' premises. The case, therefore, presents in the most direct manner the question whether proof of the occurrence of an accident raises a presumption of negligence.

“The principle is quite institutional that whenever a right of action springs from the conduct of a defendant the plaintiff must present proof of the facts necessary to the recovery which he seeks. * * *

“Inasmuch as the plaintiff's proofs are silent as to the conduct of the defendants personally or through their agents, either before or during the accident, and from the further consideration that there is no proof of any of the circumstances preceding, attending or following the explosion from

which its cause or location could be ascertained, it is evident that if the defendants were required to offer testimony in their defense, it was not because the proofs pointed to any unusual conduct upon their part, but because the plaintiff had presented a case in which all of the relevant facts were so exclusively within the knowledge and control of the defendants that the law imposed upon them duty of offering explanatory, if not exculpatory testimony. The existence of such a rule is among the unsettled matters of the law, being asserted in guarded terms in some jurisdictions and emphatically denied in others. In the present case it is not necessary to discuss either the existence of such a doctrine or its harmony with the accepted canons of proof, for the reason that its application in any event, must depend upon whether the party invoking it has adduced all of the testimony reasonably within his power; for it is in such cases only that the rule in question is applied by those who maintain its soundness. Thus, for instance, Mr. Best, speaking of this rule, confines it to cases where the question is of such a character as from its very nature almost all the evidence which could be adduced on the subject must lie in the possession of one of the parties.

“In any aspect of the law, therefore, it must be conceded that unless a plaintiff has presented the testimony which was reasonably within his power, he can derive no benefit from the proposed doctrine. * * *

“In fine, facts could have been presented which, if they spoke of the defendants’ negligence, would have called for a defense;

or circumstances have been detailed showing that plaintiff had exhausted the sources of evidence open to him; and was therefore entitled to the consideration of the court in calling upon the defendants for explanatory evidence. In the present case neither was done. The facts showed simply that the plaintiff was injured, while the circumstances pointed conclusively to the possession by him of a mass of undisclosed testimony highly pertinent to the gravamen of his action. If this plaintiff, upon the meager proof thus offered, is entitled to go to the jury, then in such cases, all that any plaintiff need show, no matter what his actual knowledge of the facts may be, is that he was injured by some unusual occurrence while at work for his employer. This is not the law. On the contrary, when the plaintiff's case shows that he has not produced material evidence clearly within his reach the mere proof by him of the occurrence of an accident by which he was injured, does not raise a presumption of negligence which the defendant can be called upon to rebut. A judgment of non-suit ordered in such a case will not be disturbed."

Applying the above rule to the facts in this case, plaintiffs should have been nonsuited, because they showed only the explosion of the bottle without any negligence on the part of defendants. They had possession and control of the exploded bottle. They could have produced it to prove that the bottle was not strong enough to hold the contents, or that the top of the bottle was not properly placed thereon; or that the siphon or some other part of the bottle was defective. Instead of that,

the only proof was that there was an explosion which of itself does not constitute negligence.

In a recent case, *Noonan v. Great Atlantic & Pacific Tea Company*, 104 N. J. L. 136 S. C., 139 Atl. 9, this court adopted the rule as laid down in the Bahr case.

We quote the following from the opinion of Mr. Justice Lloyd. Referring to the Bahr case the court says:

“The case has been many times cited with approval both in this and other jurisdictions and is the settled law of this State. Tested by it, wherein do the facts in the present case bespeak negligence? The conditions here are not unlike those in the case cited. In this case it was an explosion of a bottle of ordinary merchandise; in the Bahr case it was the explosion of a pipe conducting crude oil to refining stills. In the latter the defendant was responsible both for the pipe and the presence of oil in the pipe, but it was held that the explosion did not of itself bespeak negligence.”

In the Noonan case the court decided that some negligent act on the part of the defendant would have to be shown; the mere explosion of the bottle standing by itself was insufficient.

Heckel v. Ford Motor Co., 101 N. J. L. 385 S. C. 128 Atl. 242 was decided by this court, and held that the manufacturer of appliances was guilty of negligence because of defects in its manufacture. A recovery was allowed against the manufacturer but the plaintiff proved in addition to an explosion which caused the injury, that the article which caused the explosion was defectively manufactured. There was

testimony to show that the trap door pulley was defective. There was testimony to show a dark or blank space designating the old defect against a bright or white portion showing the fresh break. The court says "a breaking or bursting of the pulley *coupled with evidence of a defect* therein calls upon the defendant to show what care it had used in its manufacture."

In this case there were *no other facts* coupled with the explosion of the bottle of vichy to prove negligence on the part of defendant, and therefore plaintiff should have been nonsuited, or a verdict directed in favor of defendant.

It is respectfully submitted that judgment in these cases be reversed for the reasons above stated.

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