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Crying Over the Inferred Existence of Spilled Milk: The Demonstrable Illogic of *Ortega v. Kmart*

Paul K. Hoffman[*] *and Norman L. Geisler*[**]

> If it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic.
>
> —Tweedledee, Alice in Wonderland

Richard Ortega was not an observant fellow. Ordinarily, this shortcoming works against a litigant, but not in his case. Perhaps he was simply lucky enough to hire a very good lawyer or clever enough to actually trick the California Supreme Court. Either way, he more than made up for a lack of perceptive skills by securing a stunning change in the law of storekeeper liability. Stunning, because basic rules of logic were violated by the court when crafting its decision in *Ortega v. Kmart*.[1]

While shopping at Kmart, Mr. Ortega was injured when he slipped and fell.[2] Apparently he did not see the puddle of milk directly in his path.[3] Worse still, he made no inspection or assessment of the milk as he lay there on the floor. Was it cold and fresh? Was it old and stinky? Had it dried around the edges of the puddle or turned into cottage cheese? He didn't notice. Consequently, when Mr. Ortega sued Kmart and brought the claim to trial, no one could say how long the milk had been on the floor.[4] Because Kmart had failed to inspect the store before the accident, the spill, in theory, could have been there a couple hours. But it was equally possible that the milk appeared just seconds before Mr. Ortega fell. Simply put, the length of time the dangerous condition existed was a mystery, and still is.

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[1] Ortega v. Kmart, 36 P.3d 11 (Cal. 2001).

[2] *Id.* at 14.

[3] *Id.*

[4] *Id.*

To the dismay of retailers everywhere, Mr. Ortega's inability to establish the amount of time that the dangerous condition actually existed set the stage for a change in the law of storekeeper liability that literally defies logic. Before *Ortega*, the applicable law was both reasonable and straightforward. Storekeepers were held liable for injuries caused by dangerous conditions only if they had actual knowledge of the condition and failed to clean it up.[5] And if the storekeeper claimed ignorance, the injured customer could satisfy the required element of knowledge by proving that the dangerous condition had existed long enough for a reasonable storekeeper to have discovered and corrected it. This principle of law is known as "constructive knowledge,"[6] and it is eminently sensible. If it is known that a reasonable storekeeper would have discovered and corrected a longstanding dangerous condition, it is certainly reasonable to impute knowledge of the longstanding condition to the storekeeper. So, for example, had Mr. Ortega demonstrated that the puddle of milk had begun to dry and turn to cottage cheese, he would have proven its longstanding existence and thereby imputed knowledge of the condition to Kmart.

But such was not the case. As noted, no one knew how long the milk had been there.[7] Consequently, Kmart had no actual or constructive knowledge that the puddle even existed. And naturally, one must know a spill exists before one can be obligated by law to clean it up. In short, a thing must actually exist before it can be known to exist. And so, under the old rule, Kmart could not be held liable.

We may surmise from the high court's opinion that Mr. Ortega's lawyer responded with an argument along these lines:

> But hold on, we clearly know that the spill actually existed, otherwise my client would not have been injured. The only question is how long the spill was there. And it's Kmart's fault that no one knows since it failed to properly inspect the store. Had it made regular inspections, who knows, it might have found the spill, cleaned it up, and prevented my client's injury.

Arguments of the *woulda-coulda-shoulda* variety ordinarily carry little weight in the courtroom. But not in this case. The California Supreme Court was impressed, so impressed, in fact, that it constructed a rule of law shared by no other state.[8]

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5 RESTATEMENT (SECOND) OF TORTS § 343 (1981).

6 *See, e.g.*, Hatfield v. Levy Bros., 117 P.2d 841, 845–46 (Cal. 1941); Louie v. Hagstrom's Food Stores, 184 P.2d 708, 711 (Cal. Ct. App. 1947).

7 *See supra* note 4 and accompanying text.

8 The *Ortega* court's reasoning, and the rule it yielded, were undeniably unique, though the decision in *Glover v. Montgomery Ward & Co.*, 536 P.2d 401 (Okla. Civ. App.

Ortega v. Kmart was, undoubtedly, an effort by the high court to remedy the perceived inequity of the storekeeper always benefiting—and the customer always suffering—from the parties' lack of information. Surely, some customers may have been injured by long-standing dangerous conditions but were precluded from recovery simply because no one could demonstrate how long the condition had existed. Moreover, storekeepers are often the only source of such information. The specter of storekeepers suppressing such evidence was always a realistic concern.

But the California Court leveled the playing field by ruling that evidence of the lack of an inspection could be used to fill the gap in the customer's case.[9] The gap to be filled was the storekeeper's knowledge of the dangerous condition. Obviously, a storekeeper who is remiss in making safety inspections will have no knowledge of existing dangerous conditions. In one sense, it actually worked to the storekeeper's benefit to refrain from making inspections. Ignorance, it would seem, was not only bliss, but legally advantageous. Addressing the perceived injustice that may befall Mr. Ortega and those similarly situated, the court framed the issue and announced its ruling as follows:

> The question here is: If the plaintiff has no evidence of the source of the dangerous condition or the length of time it existed, may the plaintiff rely solely on the owner's failure to inspect the premises within a reasonable period of time in order to establish an inference that the defective condition existed long enough for a reasonable person exercising ordinary care to have discovered it? We conclude that the evidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it.[10]

1974), was arguably similar in some respects. Like the *Ortega* court, the *Glover* court ruled that constructive notice may be imputed in the absence of evidence establishing the length of time the condition existed. *Id.* at 408–09. But it did so for reasons that are not clearly stated. Moreover, it did not contend that the absence of an inspection permits an inference regarding the actual amount of time the condition existed. *Ortega* is also plainly distinguishable from decisions in a handful of states where, for public policy reasons, the courts shift the burden of proof to the storekeeper regarding the amount of time the condition existed once the plaintiff establishes that the dangerous condition was reasonably predictable or of a type that commonly occurred in the defendant's premises. For example, in both *Bozza v. Vornado*, 200 A.2d 777, 779–81 (N.J. 1964) and *Jasko v. F.W. Woolworth*, 494 P.2d 839, 840–41 (Colo. 1972), the courts held that it was appropriate to require the defendants to come forward with proof that the dangerous condition would occur. The *Ortega* court did not purport to adopt a new burden-shifting policy.

9 *Id.* at 13.

10 *Id.*

Now, under *Ortega*, the undisciplined storekeeper has no hiding place. The lack of an inspection may be presented to a jury as evidence from which they may, by 9-to-12 votes, collectively "infer" a period of time that the dangerous condition is deemed to have actually existed. For example, if there is no evidence of how long the condition actually existed, but there is evidence that no inspection was done for a two-hour period before the accident, the jury may infer that the dangerous condition actually existed the full two hours. Two hours' time is more than enough to impute constructive knowledge of the condition to the storekeeper, and thus the element of notice is satisfied; the gap in the customer's case is filled.

It is important to note that *Ortega* created new law not by modifying the rules of evidence, but by adopting a novel legal fiction. The court did not deem the absence of an inspection to be relevant evidence of the storekeeper's knowledge of the dangerous condition, for it clearly is not. Instead, the Court ruled that where there is no evidence of the length of time the dangerous condition existed, the absence of an inspection may then be used by the jury to "infer" an actual period of time the condition existed and so impute knowledge to the storekeeper.[11] This is a legal fiction, and it precisely fits the definition offered by Black's Law Dictionary:

> An assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates.[12]

Most legal fictions have a rational connection to some established legal principle,[13] but the fiction embraced by the *Ortega* court does not. It is plainly false—and, in that sense, irrational to suggest—that the absence of an inspection constitutes probative evidence from which one can infer the amount of time the uninspected condition actually existed. For what it's worth, it is true that one may logically infer a *range* of time in which the condition could have existed. The inferred range of time will always run from (a) the time of the last known inspection to (b) the moment before the accident occurred. But it is quite impossible to reasonably infer from the absence of an inspection the actual amount of time the dangerous condition in fact existed. To arbitrarily posit its actual existence for two hours simply because it *could* have existed two hours is not a rational inference.

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11 *Ortega*, 36 P.3d at 13.

12 BLACK'S LAW DICTIONARY 913 (8th ed. 2004).

13 For example, the legal fiction of constructive trust is imposed where a wrongdoer has acquired bare legal title to property. The fiction of a trust is rational since the only element missing from an ordinary trust is the amicable intent of the parties. *Id.* at 1547.

The illogic of *Ortega* is all the more troubling when viewed in its full context of constructing a theory for imputing knowledge to a storekeeper. Recall, a storekeeper cannot be held liable in tort without knowledge of the dangerous condition. He is deemed to have knowledge of the condition if it has actually existed for a sufficient period of time.[14] But with *Ortega* we are asked to accept the bootstrapping notion that the dangerous condition is *deemed* to have *actually existed* long enough to *impute* knowledge.[15] Playing with epistemology—what we can know—is a common practice of the judiciary. But monkeying with metaphysics—what really exists—opens up a whole new universe of problems.

I. PUTTING *ORTEGA* TO THE TEST

The rule in *Ortega* is demonstrably illogical in two respects. First, the rule cannot be applied to real-world facts in a coherent and valid series of truth functional propositions (*e.g.*, *If P then Q; If Q then R; P; therefore R*). Second, when stated as a categorical syllogism, the *Ortega* inference violates what is traditionally identified as the fourth rule of categorical syllogisms: an affirmative conclusion cannot follow from a negative premise.[16] *All men are Mortal; Socrates is a Man; Therefore, Socrates is Mortal*, is a classic example of a sound categorical syllogism. But the rule in *Ortega* is akin to mangling this argument by declaring, *All men are mortal; Angels are not mortal; Socrates is* ***Not*** *an angel; therefore, Socrates is a man.* The conclusion, though true, does not follow from the premises. Given the truth of the first three premises, Socrates could just as well be a puddle of spilled milk. Let us then learn from Mr. Ortega and be careful where we step as we first examine the rule's coherence.

A. The *Ortega* rule is incoherent

Unlike the rule in *Ortega*, the old rule—imputing constructive knowledge of longstanding dangerous conditions—can be stated as a coherent series of truth functional propositions. First, the key terms must be defined:

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14 *See supra* notes 5–6 and accompanying text.

15 *Ortega*, 36 P.3d at 18 (allowing the plaintiff to use circumstantial evidence to prove that the dangerous condition existed for an unreasonable time by providing evidence that an inspection had not been made within a particular period of time prior to the accident, which warranted the inference that the defective condition existed long enough so that a store employee would have discovered it with reasonable care, thereby establishing the constructive knowledge standard).

16 PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 268–69 (5th ed. 1994); MORRIS R. COHEN & ERNEST NAGEL, AN INTRODUCTION TO LOGIC 78–79 (1962).

Let "C" stand for the actual existence of a longstanding dangerous condition

Let "K" stand for the storekeeper's knowledge of the dangerous condition

Let "L" stand for the storekeeper being liable to the injured party.

Having defined these terms, the old rule, presented in symbolic logic, is as follows:

If C then K	or	$C \supset K$
If K then L		$K \supset L$
C, therefore L		$C \therefore L$

The rule is valid since the conclusion follows from the premises. And, arguably, it is also sound (*i.e.*, true) since the premises (given the appropriate facts) are actually true.

By contrast, there is simply no way to coherently state the rule in *Ortega*, since to arrive at the conclusion of an affirmative "C" one must, at some point in the argument, interpose an arbitrary reversal of the initial necessary condition of "not K" (~K). The initial condition of ~K is necessary since it is stated by the Court as the very reason for implementing the rule in *Ortega*. In other words, since we do not know how long the dangerous condition existed we cannot say that the storekeeper had any knowledge of the dangerous condition and, consequently, cannot hold the storekeeper liable for the customer's injuries under the old rule. Remember, the very purpose of the rule in *Ortega* is to arrive at the conclusion that the dangerous condition *actually existed long enough* to impute constructive knowledge.[17] Thus, the beginning point of the analysis is the presumed fact that the storekeeper has no actual or constructive knowledge of the dangerous condition. Accordingly, we must begin to state the rule in *Ortega* by first asserting that "~ K" is true. We must also introduce a new term, the storekeeper's inspection of the premises. So, we will let "I" stand for the storekeeper conducting reasonable inspections of the store. The other terms are as stated in the old rule. Here then is *Ortega*'s formulation of the presumed conditions that lead to the rule:

$$\sim K \supset (\sim I \supset C)$$

$$\sim K$$

$$\therefore \sim I \supset C$$

17 *See supra* notes 5–6 and accompanying text.

In narrative form, the argument for the rule is the following:

> If the storekeeper has no knowledge of the dangerous condition (~K), then, if he did not conduct a reasonable inspection (~I) we may reasonably infer that the dangerous condition actually existed long enough to impute knowledge of its existence (C). We know that the storekeeper had no knowledge (~K); therefore, if the storekeeper did not perform a proper inspection (~I) we may then infer the actual existence of the dangerous condition for a period of time sufficient to impute constructive knowledge (C).

Thus the rule in *Ortega*, simply put, is $\sim I \supset C$, and it is based on the initial condition of ~K.

The problem arises when the rule is applied to real facts. Here is how the rule was applied to the real facts of the *Ortega* case:

$\sim I \supset C$ {the *Ortega* rule}

$C \supset K$ {the old rule}

$K \supset L$

~I {the facts}

$\therefore L$

Notice that in applying the *Ortega* rule one must interpose a reversal of the presumed initial condition of ~K. Through slight of hand, the acknowledged ~K becomes K. Reversing a presumed fact is, of course, logically incoherent. Thus, the rule cannot be coherently applied in the real world.

B. The *Ortega* rule is invalid

Moreover, as noted above, there is no way to apply the rule in *Ortega* under a categorical syllogism without improperly drawing an affirmative conclusion from a negative premise. The legal conclusion of any application of the rule will always be: “Therefore, the dangerous condition actually existed long enough to impute constructive knowledge.” This type of statement is known as a universal affirmative proposition, or a Type A categorical statement. But one of the premises in any syllogism intended to support this conclusion will always be: “The storekeeper did *not* conduct proper inspections.” This is a universal negative proposition, or Type E statement. And the fourth rule of categorical syllogisms provides that no affirmative conclusion can follow from a negative premise. That is, one simply cannot formulate a valid syllogistic argument incorporating a negative premise while drawing a positive

conclusion.[18] And yet, there is no other way of attempting to apply the rule in *Ortega*. Of necessity, one must always assert that the storekeeper did not conduct a safety inspection and, as a result, the jury is then free to conclude that the dangerous condition did actually exist long enough to impute constructive knowledge. Consequently, the rule in *Ortega* is both functionally and inherently illogical.

II. LESSONS FROM *ORTEGA*

There are two lessons to be learned here. The first is that due consideration should be given to incorporating the study of logic in standard law school curricula. Lawyers and law students tend to be natural rhetoricians who instinctively emphasize pathos over logos. But litigating with logos is essential for the stability of the law if not our entire culture. And it is an acquired skill. Accordingly, thinking correctly should be emphasized in the education of lawyers and judges at least as much as arguing effectively.

The second lesson is not a new one: judicial candor is the best policy. It appears that the California Supreme Court was not entirely candid in the way it approached this case and, predictably, got caught in a web of non-sequiturs. The members of the court surely recognized the falsity of their key assertion, "the evidence of defendant's failure to inspect the premises within a reasonable period of time prior to the accident . . . creates a reasonable inference that the dangerous condition existed long enough for it to be discovered by the owner."[19] Though useful in constructing a rule that favors shoppers and encourages storekeepers' diligence, the proposition is plainly false.

Employing an obviously false premise in an argument is not rational. But declaring a desired change in public policy is. Instead of constructing a novel legal argument to support a desired outcome, a straightforward declaration by the court that it wished to join those states that shift the burden of proof to undisciplined storekeepers would have been plainly rational. Anti-business, some might say, but nonetheless rational.

Perhaps the justices embraced the illogic of their new rule for fear of being labeled liberal activists, a moniker imposed, with some justification, upon courts that presumptuously circumvent

18 HURLEY, *supra* note 16, at 268–69; COHEN & NAGEL, *supra* note 16, at 78–79.
19 *Ortega*, 36 P.3d at 18.

the legislative process.[20] But the price they paid was dear. In an ostensible effort to clarify existing law and so avoid the appearance of implementing radical change, the high court damaged its integrity by positing as true something that is not true.[21]

Let us then be certain of this fact. The existence of anything, including spilled milk, cannot be inferred from the absence of an inspection meant to discover that thing. On the other hand, as the aging Justice Holmes once suggested, "the law is what judges say it is."[22] Jurisprudential theories aside, a state supreme court undeniably has the power of judicial fiat. Accordingly, if it does not like the social consequences of a given law—such as the rule that allows storekeepers to escape liability when no one knows how long the dangerous condition actually existed—it should plainly say so and, if so inclined, forthrightly implement the desired change. In other words, either show some backbone or leave social engineering to the legislature. And naturally, in our democratic society, the latter is preferable if not morally obligatory.

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[20] *See, e.g.*, George W. Bush, Governor of Texas, The First Gore-Bush Presidential Debate (Oct. 3, 2000) (transcript available at http://www.debates.org/index.php?page=october-3-2000-transcript).

[21] Using the categorical syllogism argument above, the *Ortega* court created a rule that is against logic. The Court essentially created a legal fiction that "alter[s] how a legal rule operates." *See supra* notes 12, 16 and accompanying text.

[22] Brian East, *Struggling to Fulfill Its Promise: The ADA at 15*, 68 TEX. BAR J. 614, 617 (2005).