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the person before whom the deposition may be taken.[27] It could supervise the taking of a deposition, or order that it be taken before a master or some particular person.[28]

It would be possible for a court to give undue emphasis to the protective orders, and in doing so, it might unduly hamper the use of the discovery process. But the protective orders will undoubtedly be used for the purpose intended, which is the prevention of abuse of the discovery rules.

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CIVIL LIABILITY FOR UNINTENTIONALLY SHOOTING A PERSON WHILE HUNTING

The use of firearms for hunting wildlife was a matter of necessity and not of sport before the birth of our nation and continued to be so well into the last century. During the Revolutionary War the Continental riflemen displayed the skill which they had attained through hunting to considerable advantage as militia and impressed upon the political thought of our founding fathers the value of a citizenry armed to defend itself against appression. This idea found powerful expression in the Second Amendment of the Constitution of the United States.[1]

Hunting has undergone a drastic change from the days when the rifle was the hunter's daily companion to the twice a year hunter of today. Statistics were not recorded in those early days but a review of the compiled reports available today shows an alarming number of accidents. According to the 1958 Uniform Hunter Casulty Report published by the National Rifle Association there is one reported casualty per 7,800 hunters[2] and in each year since 1950, one casualty in every five or six was fatal.[3] In about half[4] of the reported cases the shooter fired intentionally and managed to hit a human victim; in the other half, the shooter did not intend to fire, but the weapon was nevertheless discharged.[5]

In 1607 the history of cases concerned with the unintentional shooting of a person began with the case of *Weaver v. Ward*.[6] This case is supposed

27. Nahrasoff v. U.S. Rubber Co., 27 F. Supp. 953 (S.D. N.Y. 1939).
28. Hirsch v. Glidden Co., 19 F. Supp. (S.D. N.Y. 1949).

1. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., Amend II.
2. In 1955, according to a National Survey of Fishing and Hunting, close to 12 million persons in the U.S. hunted on at least one day, and a total of over 169 million man-days were spent in hunting.
3. Of the 1,531 cases analyzed 17% were fatal.
4. In 53% of the cases analyzed the weapon was discharged unintentionally.
5. Material from the 1958 Uniform Hunter Casulaty Report, published and copyright by the National Rifle Association. The report includes accident figures from 33 states and 2 Canadian provinces.
6. Hobart 134 (1607).

to mark the departure from the "absolute liability" theory and the beginning of the "fault" concept of liability. But even as late as 1891 the well known case of *Stanley v. Powell*[7] held the defendant not liable either in trespass or case for the accidental shooting of a guide employed by his hunting party. The court, after a careful consideration of the English cases, used the principles of ordinary negligence and did not attempt to impose any stricter standard of care on the defendant. The lapse of time had not convinced that court that "no man shall be excused of a trespass except it may be judged utterly without his fault."[8] The standards of care imposed by courts in more recent cases have, however, tended to become increasingly strict.

The elements used by courts in formulating the standard of care to be applied are illustrated in the following situations. The courts agree a higher degree of care is required in dealing with a dangerous instrumentality than in dealing with ordinary agencies which involve little or no risk.[9] It is well settled that a person who has in his possession or under his control an instrument exceptionally dangerous in character, is bound to take exceptional precautions to prevent injury being done to others.[10] Firearms used in hunting have been classified as dangerous instrumentalities.[11]

The degree of care required in the use or handling of firearms has been variously described by the courts. In the case of *Siefker v. Paysee*,[12] where the defendant turned in the opposite direction from those standing nearby in order to close his gun and the deceased ran in front of the gun in order to get a shot just as the gun accidentaly discharged, the court said:

> Where persons are gunning together, and an accident occurs, the negligence to render one liable, must be in its nature gross. Fault must be shown.[13]

The requirement of a showing of gross negligence was repudiated by the court in *Norman v. Normand*[14] on the grounds that the report of the *Siefker* case does not state the opinion of the court correctly. The court in the latter case asserts that the negligence involved is a failure to use such degree of care as is required of an ordinarily prudent person under the existing circumstances.

The court in *Welch v. Durand*[15] required extraordinary care to prevent injury to others. In that case the defendant was aiming away from the

7. 1 Q.B. 86 (1891).
8. Weaver v. Ward, Hobart 134 (1607).
9. 38 Am. Jur., Negligence No. 85 (1941); 65 C.J.S., Negligence No. 66 (1950).
10. Ibid.
11. Rudd v. Byrnes, 56 Cal. 636, 105 Pac. 957 (1909); Gibson v. Payne, 76 Ore. 101, 158 Pac. 422 (1916).
12. 115 La. 953, 40 So. 366 (1906).
13. Ibid. Headnote No. 2 by Breaux, Ch.J. of the Court.
14. 65 So.2d 914 (La. App. 1953).
15. 36 Conn. 182 (1905).

plaintiff but the bullet ricocheted and hit the plaintiff. The court said:

> Shooting at a mark is lawful, but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others; and if the act is done where there are objects from which the balls may glance and endanger others the act is wanton, reckless, without due care, and grossly negligent.[16]

Courts have often instructed that such care as is commensurate with the dangerous nature of the firearm is required of the user.[17] This instruction has been used in various circumstances; such as *Rudd v. Byrnes*[18] where the plaintiff, who left his assigned hunting position, was mistaken for a deer by the defendant who fired at an object he saw moving in the underbrush. A slightly different wording was used in *Morgan v. Cox*[19] where the court said that the care should be proportionate to the probability of injury to others.

In *Bahel v. Manning*[20] the defendant was found guilty of negligence when the rifle he had been working on discharged, even after he had worked the lever to extract the cartridges several times and believed the gun to be empty when no further shells were ejected from the magazine. The court said he was not relieved from rosponsibility in snapping the gun when it was pointed at the plaintiff even though, after reassembling it, he honestly believed the gun to be empty. The duty imposed in that case was to exercise the highest or the utmost degree of care when handling firearms in the presence of others so as to avoid the possibility of injury.

This standard of care is carried one step further in cases where the defendant, a storekeeper, has allowed a customer to operate the action of the firearm in the presence of other customers and injury was caused by an accidental discharge of the firearm. The possible negligence of the customer did not insulate the defendant storekeeper who was negligent in creating a dangerous situation.[21]

Thus, it seems that most courts use the general rule of negligence, applied in situations where dangerous instrumentalities are present, in hunting accident cases. They require that exceptional precautions to prevent injury to others be used when one has in his possession or control a dangerous instrument such as a firearm. However, liability for negligence in keeping or using a dangerous instrumentality, as distinguished from the liability incurred in maintaining a nuisance excessively dangerous to life, is not an absolute liability.[22]

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16. Ibid.
17. Hawksley v. Peace, 38 R.I. 544, 96 Atl. 856 (1916).
18. 156 Cal. 636, 105 Pac. 957 (1909).
19. 22 Mo. 373 (1856).
20. 112 Mich. 24, 70 N.W. 327 (1897).
21. Naegele v. Dollen, 158 Neb. 373, 63 N.W.2d 165 (1954); *cf.* Berry v. Harper, 111 S.W.2d 795 (Tex. Civ. App. 1937).
22. 38 Am. Jur. Negligence No. 85 (1941).

Regardless of what standard of care is utilized, courts recognize that the care or precautions which must be used by the defendant to avoid the imputation of actionable fault are those adapted to the dangers peculiar to the situation and the standard utilized must be adapted with these dangers in view.[23]

The normal tort concepts are applied in determining if the standard of care has been violated. Ordinarily it is a question for the jury whether a person has been negligent in the discharge of a firearm to the injury of another.[24] In *Webster v. Seavey*[25] where the plaintiff was shot when mistaken for a deer it was held on appeal that the plaintiff's contributory negligence was also a question for the jury since he was dressed in inconspicuous attire while hunting in the woods. The plaintiff was not allowed to claim that the defendant had the last clear chance merely because he knew the plaintiff did not wear a red cap as was customary among hunters and shot without taking sufficient precautions to determine if his target was actually a deer. The doctrine of last clear chance did not apply since the plaintiff had the same knowledge which the defendant had.

In *Rudd v. Byrnes*,[26] the defendant was declared negligent as a matter of law, when he shot into underbrush at what he thought was a deer without taking time to discover it was actually the plaintiff, another member of the hunting party, who was moving around in violation of the groups' agreement to remain stationary.

In *Oliver v. Miles*[27] where it was impossible to say which one of two bird hunters, both shooting over a road, actually shot the plaintiff, who was traveling on the road, the court held them jointly liable for the injury. In *Summers v. Tice*[28] a similar result was reached with the additional fact that in that case the plaintiff, a member of the hunting party, was visible to both defendants before they fired.

The doctrine of res ipsa loquitur has been applied in a number of cases involving accidental injury with a firearm while hunting although the court does not refer to the doctrine by name.[29] In *Atchinson v. Dullam*[30] the court said:

> Firearms are not usually discharged without the intervention of some human agency. A presumption, therefore, almost conclusive in its character, is raised, that when such weapons are discharged while in the possession and control of another, the firing is caused either by design, carelessness or inadvertence upon his part.[31]

23. Gibson v. Payne, 79 Ore. 101, 154 Pac. 422 (1916).
24. Morgan v. Cox, 22 Mo. 373 (1856); accord, Annear v. Swartz, 46 Okla. 98, 148 Pac. 706 (1915).
25. 83 N.H. 60, 138 Atl. 541 (1927).
26. 156 Cal. 636, 105 Pac. 957 (1909).
27. 44 Miss. 858, 110 So. 666 (1926).
28. 33 Cal.2d 80, 199 P.2d 1 (1948).
29. Annear v. Swartz, 46 Okla. 98, 148 Pac. 706 (1915); 56 Am. Jur., Weapons No. 26, n.18.5 (Cum. Supp. 1958).
30. 16 Ill. App. 42 (1884).
31. Ibid.

It appears that many courts tend to lighten the plaintiff's burden of proof in their instructions to the jury by means such as the establishment of presumptions concerning the use of firearms and the shifting of the burden of proof to the defendant by allowing the plaintiff to base his case on evidence sufficient only to support a case under the doctrine of res ipsa loquitur.

An increasingly severe attitude in the courts, concerning hunting accidents, coupled with broader and more particularized criminal statutes,[32] concerned with negligence, have caused more and more hunting accidents to be the subject of criminal rather than civil liability in recent years.[33] Civil liability suits on the other hand have decreased because the record of unsuccessful defendants in such cases has prompted a greater number of out of court settlements. We may conclude that it is desirable that strict liability should be imposed upon the hunter in his use of firearms because, as Harris says in his article *Liability Without Fault*:

> The best way to secure proper care and caution in present day society is to throw the risk of damage upon the person who chooses to act.[34]

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ARE THERE INDIVIDUAL PROPERTY RIGHTS IN CLOUDS?

Technical advances in weather control and particularly that phase known as rain-making have posed many new and interesting problems for the lawyer as well as for the scientist.[1] The former is confronted with such problems as whether or not individual rights have been affected by the prevention of rain, excessive rain, accidents arising out of hazardous highways, and destruction of crops as a result of man's interference with natural rain fall. Unfortunately the attorney will find no reported cases to help him with such problems.

One recent case, *Southwest Weather Research, Inc. v. Rounsaville, Texas*[2] has, however, raised the unique question of a property owner's right to the clouds over his land. The plaintiffs, ranchers residing in a west Texas county, were granted a temporary injunction against owners and

32. Variously termed (depending upon the jurisdiction) as negligent homicide, involuntary manslaughter, second degree manslaughter, or manslaughter arising from an act of culpable negligence.

33. The treatment of these subjects by the American Law Reports Series indicate a trend. Civil liability has not been the subject of an annotation since 1928 (53 A.L.R. 1205) but the 1929 annotation on criminal liability (63 A.L.R. 1232) has benn superceded by a new annotation as late as 1952 (23 A.L.R.2d 1402). The fact that both the anotations on criminal liability are later than the one on civil liability indicate that the field of criminal liability for hunting accidents is growing and that a greater number of cases worthy of note are found in that field.

34. Harris, Liability Without Fault, 6 Tulane L. Rev. 337, 368 (1932).

1. Weather Under Control, Fortune Magazine (Feb. 1948).

2. 320 S.W.2d 211 (Tex. Civ. App. 1958).