BECKLEY v. SIERRA LEONE BREWERY LIMITED

High Court (Tejan, J.): January 21st, 1972
(Civil Case No. 389/70)

[1] **Evidence—burden of proof—standard of proof—negligence—burden not discharged if plaintiff's evidence shows injury equally consistent with defendant's negligence and other causes:** Where, in an action for negligence, the plaintiff's evidence shows that the injury caused could equally well have been caused by other causes as by the defendant's negligence, he has failed to discharge the burden of proof; so that a plaintiff will fail if he can only establish that the bacteria which caused him gastric disorder were as likely to have been on the bottle containing the product complained of, or on the plaintiff's own hands, as in the product manufactured by the defendant which the plaintiff consumed (page 6, lines 24–34; page 7, lines 7–14).

[2] **Sale of Goods—sale by description—sale in canteen of beer requested by brand name is sale by description within Sale of Goods Act (cap. 225), s.16(2):** The sale of a bottle of beer in a canteen, which has been requested by its brand name by the customer, is a sale by description within the meaning of the Sale of Goods Act (*cap.* 225), s.16(2), so as to give rise to the implication of a condition of merchantable quality (page 5, lines 15–19).

[3] **Tort—manufacturer's liability—duty of care—duty to consumer of product intended for consumption without opportunity of intermediate inspection to take care to exclude presence of noxious element:** The manufacturer of a product intended for consumption and contained in a receptacle which prevents inspection owes a duty to the consumer of the product to take care that there is no noxious element in the product (page 7, lines 24–31).

[4] **Tort—manufacturer's liability—evidence—plaintiff fails to discharge burden if can only establish illness as likely to have been caused by manufacturer's contaminated product as by other causes:** See [1] above.

[5] **Tort—negligence—duty of care—manufacturer of product for consumption without opportunity of intermediate inspection has duty to take care to exclude presence of noxious element:** See [3] above.

[6] **Tort—negligence—evidence—standard of proof—burden not discharged if plaintiff's evidence shows injury equally consistent with defendant's negligence and other causes:** See [1] above.

[7] **Tort—negligence—evidence—whether negligence may be inferred is question of law—whether is to be inferred in the circumstances is question of fact:** Whether negligence may be inferred from the evidence given in a civil case is a question of law which may arise for decision either at the conclusion of the plaintiff's case or at the conclusion of all the evidence; whether it is in fact inferred is a question of fact arising at the conclusion of all the evidence (page 6, lines 9–21).

The plaintiff brought an action against the defendants for damages for illness allegedly suffered as a result of consuming a bottle of beer manufactured by the defendants.

The plaintiff bought the beer from a retail store. She drank three-quarters of it from the neck of the bottle and five or six hours later began to experience abdominal pains. These continued into the night and the following morning the plaintiff was diagnosed as suffering from and was treated for severe gastro-enteritis. The remainder of the beer, which had remained in the open bottle overnight, was examined in the pathology laboratory and found to contain bacteria.

The plaintiff alleged negligence on the part of the defendants and called medical evidence to the effect that her illness had been caused by the bacteria. Both doctors called, however, admitted that the bacteria could be found on the hands or on the bottle itself and one specifically stated that he could not tell whether the beer had been contaminated with bacteria before or after the bottle had been opened. A laboratory superintendent called by the defendants gave evidence that it was uncertain whether the bacteria could survive in the beer by reason of the beer's alcoholic content.

The plaintiff's claim was dismissed.

Cases referred to:

(1) *Donoghue (or McAlister) v. Stevenson*, [1932] A.C. 562; [1932] All E.R. Rep. 1, distinguished.

(2) *Wren v. Holt*, [1903] 1 K.B. 610; (1903), 88 L.T. 282.

Legislation construed:

Sale of Goods Act (Laws of Sierra Leone, 1960, *cap.* 225), s.16(2):
The relevant terms of this sub-section are set out at page 5, lines 7—13.

Marcus-Jones for the plaintiff;
Basma for the defendants.

TEJAN, J.:

The defendants are manufacturers of Star Beer. On or about July 13th, 1970, the plaintiff bought a bottle of Star Beer and consumed three-quarters of the contents. Later in the day, the plaintiff suffered some stomach discomfort, allegedly as a result of her drinking the Star Beer. The plaintiff has now sued the defendants, claiming damages for negligence and injuries suffered.

The plaintiff's case is that on or about July 13th, 1970, she bought from Mr. Shorunkeh Sawyerr at Sawyerr's Canteen, New England, a bottle of Star Beer. She bought it at about 1 p.m. and took it to her office at Radio Sierra Leone, where she opened it and started to drink the beer from the bottle. She took 45 minutes to consume three-quarters of the beer.

Between the hours of 6 p.m. and 7 p.m. on the same day, the plaintiff experienced stomach ache which she at first treated lightly. Between the hours of 9 p.m. and 10 p.m. she started to have severe pains. She then went to bed. The next morning, she went to the hospital and at 10 a.m. she saw Dr. Luke in his surgery. Dr. Luke then asked her to produce the remaining beer. She then went to her office and collected the bottle and brought it to Dr. Luke, who sent her to the pathologist with the remaining beer. Dr. Luke also asked her to take a sample of her stools to the pathologist. After the beer had been examined and analysed, Dr. Luke told her that the beer contained germs.

In his evidence, Dr. Luke said that when he saw the plaintiff at the Connaught Hospital, she complained of severe abdominal pain, vomiting, frequent stools and weakness. When he examined her, he found that she was tender in the abdomen. He treated her, and when she brought the remaining beer he sent it to the laboratory for examination. Dr. Luke then went on to say: "I formed the opinion that she suffered from acute gastro-enteritis because of what was found in the remaining beer." In answer to Mr. Basma, Dr. Luke said that worms were found in the stool. He agreed with defence counsel that the kind of germ could be found not only in someone's stomach but also on his fingers. In answer to a further question from Mr. Basma, Dr. Luke said: "It is possible that if somebody had the germs on his or her finger tips, and if that person should be drinking beer from a bottle or a glass, the bottle or glass could be infected. The bottle had been opened when she brought it to me."

Mr. Shorunkeh Sawyerr next gave evidence for the plaintiff. He said that on July 13th, 1970, he sold a pint of beer to the plaintiff, and that he got the beer from G.B. Ollivant and that the beer was the product of the defendants. On July 14th, 1970, the witness learnt from some employees that the plaintiff had been upset after she had drunk the beer she bought from him. The witness said that he had never before had a complaint in respect of Star Beer he sold.

Dr. Aubee was called by the plaintiff. Dr. Aubee said that according to Exhibit A, which is the report on the examination of the beer, a certain specimen was sent to his department for examination. The witness did not examine the specimen. It was examined by one Mr. Marcus Jones, a laboratory superintendent. The witness signed Mr. Marcus Jones's finding without checking it. According to Exhibit A, Dr. Aubee said that some bacteria was found in the beer and that two types of staphylococci were found but culture of the specimen yielded one kind of bacteria. The witness went on to say that he did not normally expect to find bacteria in beer.

Under cross-examination, the witness gave the following answer:

> "It is possible for bacteria to live in beer. It is possible for bacteria to be transmitted into a bottle if the lips touch the bottle, such as when beer is drunk from a bottle. It is possible to have bacteria on fingers. It is usual for persons to have bacteria in the stomach."

The witness further said that "a liquid exposed to nature is likely to be contaminated with bacteria after the bottle has been opened. If I find bacteria in beer, I cannot tell whether the beer was contaminated before or after the bottle has been opened." In answer to questions put by the court, the doctor admitted that a person suffering from worms occasionally vomits.

Mr. Marcus Jones, the laboratory superintendent, gave evidence for the defendants. According to this witness, he examined certain liquid which was in a Star Beer bottle. He discovered in the liquid a kind of bacteria which was a very common type of bacteria and which could be found almost anywhere. The bacteria found in the liquid by the witness was the kind that was normally separated from the stomach. The witness went on to say: "The kind of bacteria found does not survive in beer except if they are in great quantity. Beer has alcohol."

In answer to Dr. Marcus-Jones, Mr. Marcus Jones said the contents of the bottle appeared to be stale beer. The witness went on to say:

> "Bacteria can be found in the stomachs of sick and healthy people. Yeast is used in the preparation of beer. Yeast is a form of bacteria. Bacteria could live on bacteria. I am not sure whether the bacteria I found could survive in yeast. 'Positive cocci' is a loose term which does not mean anything to any person outside the medical profession. It is some kind

of bacteria expected to be found in the culture. Culture is to grow the bacteria to enable the bacteria to be seen by the naked eye."

The question to be determined first is whether the sale of a bottle of Star Beer to the plaintiff falls under the Sale of Goods Act (*cap.* 225). Section 16(2) of the Act provides that —

"where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. . . ."

This is the same as the English Sale of Goods Act, 1893, s.14(2).

The fact that the plaintiff asked for "Star Beer" and not generally "beer" is in my view a sale by description within the meaning of s.16(2) of the Act. The plaintiff asked for beer of a specific description and, being a sale by description, there was an implied warranty that the beer should be of merchantable quality. The beer sold to the plaintiff, by reason of the presence of bacteria in it, was not of merchantable quality.

But there is a proviso that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. In the present case, the plaintiff bought the beer and took it to her office. There was an opportunity for inspection of the beer, but the defect in the beer, I think, could not be discovered by inspection. In the case of *Wren* v. *Holt* (2), the defendant kept a beer house in which the beer supplied to customers, for consumption on the premises, was that of a particular firm of brewers only. This fact was known to the plaintiff, who frequented the beer house for the purpose of buying the beer of that firm. The beer contained arsenic, by reason of which the health of the plaintiff was injured. In an action to recover damages for breach of warranty, it was held that the beer was bought by description, and that, as examination by the buyer would not have revealed the defect, the defendant was liable on an implied warranty that the beer was of merchantable quality.

But in the present case, the beer contained a very common type of bacteria which, according to Dr. Luke, Dr. Aubee and Mr. Marcus Jones, could have got into the beer in a variety of ways,

such as by drinking from the bottle with the lips touching the bottle, or from the tips of the fingers, or even upon the mere opening of the bottle.

The next question therefore is, how did the bacteria get into the beer? With regard to the burden of proof of negligence, *Charlesworth on Negligence*, 3rd ed., at 33 (1956) says that —

> "in an action for negligence, as in every other action, it is for the plaintiff to give evidence of the facts on which he bases his claim to the redress which he seeks from the court. His evidence may consist of facts proved or admitted, and after it is concluded two questions arise, (1) whether on that evidence, negligence may be reasonably inferred, and (2) whether, assuming it may be reasonably inferred, it is in fact inferred (*Metropolitan Ry.* v. *Jackson* (1877) 3 App. Cas. 193, 197, *per* Lord Cairns). These two questions do not necessarily arise for decision at the same time. The first question usually arises at the conclusion of the plaintiff's case, although it may also arise at the conclusion of the whole of the evidence, and is a question of law. The second question arises at the conclusion of the whole of the evidence, and is a question of fact (*Ryder* v. *Wombwell* (1868) L.R. 4 Ex. 32, *per* Willes, J. . . .)." And see *Charlesworth*, *ibid.*, at 23.

At p. 35 of the same edition, Charlesworth wrote:

> "If the plaintiff's evidence is equally consistent with negligence on the part of the defendant as with other causes, there is no evidence of negligence, and judgment cannot be given against the defendant. 'The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end, he leaves the case in even scales, and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed' (Lord Wensleydale in *Morgan* v. *Sim* (1857) 11 Moo. P.C. 307, 312)."

[The learned judge then reviewed the events which took place between the time of the purchase of the beer and the time the contents were examined in the laboratory. He continued:]

It should be noted that during all this period, the bottle was left unattended in her office. Moreover, the plaintiff herself said that she was drinking straight from the bottle. In a case of this kind,

the burden is on the plaintiff to prove negligence. The plaintiff must show that the party against whom she complains was in the wrong. And according to *Charlesworth*, she must not leave her case in even scales. There is also the evidence of Dr. Luke and Dr. Aubee to which I have already referred.

In the light of the evidence of the plaintiff herself and the evidence of Dr. Luke and Dr. Aubee, can it be said that the plaintiff has established that it was through the negligence of the manufacturer that the bacteria got into the bottle? I think that the plaintiff has completely failed to establish that the bacteria could have got into the bottle in no other way other than through the negligence of the defendants. The evidence does not even leave the case, according to *Charlesworth*, "in even scales".

Assuming that the plaintiff has established by evidence that the defendants were negligent, does the case fall within the rule of *Donoghue (or McAlister)* v. *Stevenson* (1)? The main issue of this case is whether manufacturers of goods owe a duty to customers to take care. The appellant, on August 26th, 1928, drank a bottle of ginger-beer, manufactured by the respondent. The bottle contained the decomposed remains of a snail, which were not, and could not be, detected until a greater part of the contents of the bottle had been consumed. The appellant alleged that she suffered from shock and gastro-enteritis. The basis of the decision was that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to the appellant as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty and was consequently liable for any damage caused by such neglect. The majority of the judges held that the respondent owed a duty to take care to the appellant.

It should be noted that in *Donoghue* v. *Stevenson*, the question of negligence was not determined. The fact that a decomposed snail was found in the ginger-beer was accepted, and the sole question determined was whether the manufacturers owed a duty to take care to the consumer.

In the present case, the plaintiff has failed to satisfy me that the defendants were negligent and that the bacteria got into the bottle through the negligence of the defendants. In the circumstances, I dismiss the plaintiff's claim with costs to be taxed and paid by the plaintiff.

Suit dismissed.