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PROCEDURE — THEORIES OF RECOVERY IN THE PACKAGED FOOD CASES

Plaintiff, employed at Fort Monroe, requested a fellow employee to bring her an uncapped bottle of Coca-Cola from a vending machine in a nearby building. After taking one drink, plaintiff became ill due to a decomposed snail or slug in the liquid. Evidence showed that defendant company delivered bottled drinks to a central warehouse on the Post about twice a week. The vending machines were filled from the stock in this warehouse by employees of the Post Exchange. The jury awarded plaintiff $2,500 damages, the trial court instructing that "they may infer negligence from the fact that the foreign substance was found in the bottle, and the law does not require the plaintiff to show the particular dereliction." On appeal, *held,* reversed. The instruction deprived defendant of the defense that the foreign substance may have gotten into the bottle after it left defendant's hands. The inference of negligence should have been predicated upon a finding that the bottle was not tampered with after it left the custody of defendant and that the obnoxious substance was in the bottle when defendant parted with possession of it. *Newport News Coca-Cola Bottling Co. v. Babb,* 190 Va. 360, 57 S. E. 2d 41, (1950).

One of the most prolific sources of appeal has been that line of cases dealing with injuries sustained by consumers of food containing obnoxious foreign matter. After many years of litigation the various jurisdictions remain in hopeless conflict, and the parties in interest must remain unsure within their jurisdiction of the rules upon which they may depend. In some cases the purchaser from an independent retailer has been allowed to recover from the manufacturer of packaged goods on the theory of breach of an implied warranty of wholesomeness.[1] Many others hold that in such circumstances there can be no recovery since there is no privity of contact between the consumer and the manufacturer and thus no implied warranty as to quality.[2] Where this view prevails, it has not been changed by the Uniform Sales Act.[3] The majority view does not allow recovery from the retailer on a warranty theory where packaged or bottled goods have been sold unless the retailer has expressly warranted them, since the purchaser is deemed not to have relied on the skill or knowledge of his seller.[4] Some courts, drawing a distinction between warranty of fitness for a particular purpose and an implied warranty of wholesomeness, allow recovery on the latter theory.[5] In the jurisdictions refusing recovery on the grounds of breach of implied warranty, resort must be had to the theory of negligence. While the manufacturer of an article may

not be ordinarily liable for injuries resulting from its use to those with whom it has had no contractual relations, there is a well recognized exception in the case of injuries suffered from eating food preparations intended for human consumption, and a recovery in tort will be allowed.[6]

Where the package or bottle has not been tampered with before coming into the hands of the injured party, some courts hold the doctrine of res ipsa loquitur should be applied,[7] while others resist its application.[8] Where it is applied, it is a substantial aid to a plaintiff's case, since it is often held that the doctrine is not overcome by evidence that modern methods of packaging and inspection have been utilized and a high degree of care exercised by the manufacturer.[9]

Evolution of the problem in Virginia has brought some final answers from the Supreme Court of Appeals but several situations remain without a definitive rule from that court. Since actions may be joined only where they are of the same nature, it has been conclusively settled that causes of action in tort may not be joined with causes of action in assumpsit. Even though each count may be perfect in itself, if there is such a misjoinder, the declaration is bad on general demurrer.[10] However, in one case it has been held harmless error to overrule the demurrer and subsequently honor defendant's motion to strike the evidence relating to tort and not contract.[11] If the plaintiff, forced at the outset to choose between theories of negligence and warranty, chooses the latter, he finds himself strictly confined. It is well settled in Virginia that any implied warranty runs only to the immediate purchaser. The purchaser from a retailer cannot thus sue the manufacturer, nor can the injured party sue either the retailer or the manufacturer where the food in question was purchased by another not clearly shown to be his agent at the time of purchase.[12] Where the plaintiff sues the retailer for breach of implied warranty, he has been allowed to collect if the food was not bottled or packaged.[14] The cases raise the inference that there will be no contractual liability in the case of bottled or packaged goods where the buyer has not relied on the skill of the retailer,[15] although strangely the court has never directly ruled on the issue.

The vast majority of Virginia cases are brought on the negligence theory. A dealer who sells unwholesome foodstuffs for immediate consumption is responsible in tort for negligence to anyone whose injury could reasonably have been anticipated. This rule allows suit against the manufacturer by the purchaser from a retailer, but it does not allow suit by an injured party who received the food from a purchaser not his agent.[16] It is in those cases

where a cause of action based on negligence exists that the law is uncertain in what it shall require of the plaintiff and defendant on the issues of proof and defense.

The plaintiff must bear the burden of proof of negligence by a preponderance of the evidence.[17] Since he is in no position to know what has gone on in the packaging process, it is often argued that the doctrine of res ipsa loquitur should be applied. A rebuttable inference of negligence should be raised upon a showing that the plaintiff bought the bottle or package, opened it and ate or drank therefrom, and that as the consequence of some deleterious substance therein, was made sick. The court has held that where the above facts are shown, a prima facia case has been made out by the plaintiff which, if not overcome by evidence for the defendant, is sufficient to sustain a verdict for the plaintiff.[18] The prima facia case is rebuttable by showing a high degree of care in the bottling, preparation, and inspection of the product, but such evidence is in conflict with a prima facia case and should go to the jury.[19] Where the manufacturer has shown use of ultra-modern methods of bottling procedure, the Supreme Court of Appeals has nevertheless sustained a verdict for the plaintiff of the grounds that the jury could have reasonably found that the foreign matter was in the bottle at the time it left the plant.[20] Therefore, in the light of known propensity of the jury to hold for the individual as against the bottling company, it would seem that allowing the inference of negligence to arise through the application of the res ipsa doctrine places the manufacturer in effect in the position of an insurer. It is for that reason and because of the obvious opportunities for trumped up suits that the court has been progressively reluctant to allow res ipsa loquitur to operate.

To sustain the applicability of the doctrine of res ipsa loquitur, it is usually said that an act must have occurred which does not ordinarily occur in the absence of negligence. The act must have involved an agent or instrumentality wholly within the control of the defendant. It must not have been due to any contributory act on the part of the plaintiff. It is often said that the true facts must be more accessible to the defendant than to the plaintiff. The Virginia court, seizing upon the second and last of these elements, has held that the doctrine is an evidential presumption sometimes resorted to in the absence of evidence, but that it is not to be applied where evidence is at hand or where the event may have been attributable to causes for which defendant was not responsible.[21] Thus where plaintiff bought two Pepsi-Cola's at the grocer's, opened one at home and drank from it leisurely for 15 minutes, only then discovering a small mouse in the bottle, there could be no pre-

sumption of negligence, since it was not shown that the mouse was in the bottle at the time of purchase.[22] Likewise was the presumption inapplicable in the *Babb* case above, since the decomposed snail might have gotten into the drink while it was capped in the warehouse or while it was being carried uncapped for the distance of 40 yards. It is evident that, as the court has said, "In Virginia, the doctrine, if not entirely abolished, has been limited and restricted to a very material extent."[23]

In other related cases the presumption has been weighed more heavily in favor of the plaintiff. It seems that ordinarily plaintiff will be able to carry his case to the jury upon showing that he was a passenger on a derailed train,[24] that he was injured by fallen wires,[25] that there was an open door on a train through which he somehow fell,[26] or that he is the beneficiary of deceased under an insurance policy where suicide is the defense.[27] But in the case of the injured Coca-Cola drinker, the court seems to demand more than the plaintiff can ordinarily produce. Where, as in the *Babb* case, plaintiff has shown the purchase, the direct course of the bottle to him, and the injury resulting from foreign matter in the bottle, what more can he prove? The court in the *Babb* decision finds this insufficient to raise the presumption of negligence and thereby infers that a motion to strike plaintiff's evidence should be sustained.

On retrial of the *Babb* case, plaintiff will likely be able to do no more than recite the same factual circumstances as before. The trial court must then strike plaintiff's evidence or send it to the jury minus an instruction raising a presumption of negligence. If a judgment for the plaintiff is returned, the logical result would be another appeal raised on the sufficiency of evidence to sustain the verdict. By the *Babb* decision, it is submitted that the court has forced two trials to do the work of one.

While it is generally true that where plaintiff has won the right to deliberation of the jury in this type of case he stands an excellent chance of winning his case, such a result is not too inequitable. It seems far more just to have such a risk borne by the manufacturer as an expense of business than to have an honestly injured consumer peremptorily precluded from recovery by rules of evidence. This does not mean that in highly doubtful cases the motion to strike should not be honored, or that verdicts contrary to good reason cannot be set aside.

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FOOTNOTES

1. Dotham Chero-Cola Bottling Co. v. Weeks, 16 Ala. App. 639, 80 So. 734 (1918); Coca-Cola Bottling Co. v. Smith, Tex. Civ. App., 97 S. W. 2d 761 (1936).

2. Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155, L. R. A. 1916 B 877 (1915); Birmingham Chero-Cola Bottling Co. v. W. G. Clark, 205 Ala. 678, 89 So. 64 (1921).

3. Smith v. Salem Coca-Cola Bottling Co., 92 N. H. 97, 25 A. 2d 125 (1942). **Contra:** Uniform Commercial Code, Sec. 2-318.

4. Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S. E. 610 (1936).

5. Ryan v. Progressive Grocery Stores, Inc., 255 N. Y. 388, 175 N. E. 105 (1931) (construing statute); Wren v. Holt, 1 K. B. 610 (1903). **Cf.** Ward v. Great Atlantic and Pacific Tea Co., 231 Mass. 90, 93, 120 N. E. 225, 226, 5 A. L. R. 242 (1918).

6. Wilson v. J. G. and B. S. Ferguson Co., 214 Mass. 265, 101 N. E. 381 (1913); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S. W. 2d 721 (1942).

7. Atlanta Coca-Cola Bottling Co. v. Sinyard, 45 Ga. App. 272, 164 S. E. 231 (1932).

8. Perry v. Kelford Coca-Cola Bottling Co., 196 N. C. 175, 145 S. E. 14 (1928).

9. Atlanta Coca-Cola Bottling Co. v. Sinyard, 45 Ga. App. 272, 164 S. E. 231 (1932).

10. Kroger Grocery & Baking Co. v. Dunn, 181 Va. 390, 25 S. E. 2d 254 (1943); see BURKS, PLEADING AND PRACTICE, §99 (3rd ed. 1934).

11. Kroger Grocery & Baking Co. v. Dunn, **supra** note 10.

12. Blythe v. Camp Manufacturing Co., 183 Va. 432, 32 S. E. 2d 659 (1945).

13. Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S. E. 94 (1936).

14. Kroger Grocery & Baking Co. v. Dunn, 181 Va. 390, 25 S. E. 2d 254 (1943).

15. See Colonna v. Rosedale Dairy Co., 166 Va. 314, 321, 186 S. E. 94, 97 (1936).

16. **Id.** at 322, 186 S. E. at 98.

17. Blythe v. Camp Manufacturing Co., 183 Va. 432, 32 S. E. 2d 659 (1936).

18. Norfolk Coca-Cola Bottling Works, Inc. v. Krausse, 162 Va. 107, 173 S. E. 497 (1934).

19. Norfolk Coca-Cola Bottling Works, Inc. v. Land, 189 Va. 35, 52 S. E. 2d 85 (1949).

20. Norfolk Coca-Cola Bottling Works, Inc. v. Land, 189 Va. 35, 52 S. E. 2d 85 (1949); Campbell Soup Co. v. Davis, 163 Va. 89, 175 S. E. 734 (1934).

21. Riggsby v. Tritton, 143 Va. 903, 129 S. E. 493 (1925); Seven-Up Bottling Co. v. Gretes, 182 Va. 138, 27 S. E. 2d 925 (1943).

22. Pepsi-Cola Bottling Co. v. McCullero, 189 Va. 89, 52 S. E. 2d 257 (1949).

23. Richmond v. Hood Rubber Products Co., 168 Va. 11, 190 S. E. 95 (1937).

24. Chesapeake and Ohio Ry. Co. v. Tanner, 165 Va. 406, 182 S. E. 239 (1935).

25. Norfolk R. etc. Co. v. Spratley, 103 Va. 379, 49 S. E. 502 (1905); Lynchburg Tel. Co. v. Bokker, 103 Va. 594, 50 S. E. 149 (1905).

26. Watts v. Richmond, F. & P. Ry., 189 Va. 258, 52 S. E. 2d 129 (1949).

27. Life Insurance Co. v. Brockman, 173 Va. 86, 3 S. E. 2d 480 (1939). **But cf.** Harless v. Atlantic Life Ins. Co., 186 Va. 826, 44 S. E. 2d 430 (1947).