IS THE FOOD MANUFACTURER AN INSURER OF THE WHOLESOMENESS OF HIS PRODUCT?

The recent West Virginia cases of Webb v. Brown & Williamson Tobacco Co.,1 Parr v. Coca Cola Bottling Works of Charleston,2 and Blevins v. Raleigh Coca Cola Bottling Works3 adopted for this state the generally-recognized doctrine that a manufacturer who puts products designed for human consumption on the market in original sealed packages owes a duty directly to the consumer to see that such products are free from harmful defects and deleterious substances which may cause injury.4 Our court in these cases predicated liability on the theory of negligence of the manufacturer in the preparation of its product. Plaintiff’s case was made out in each instance by aid of the res ipsa loquitur doctrine.5 As pointed out by Judge Kenna in his separate concurring opinion in the Webb case, and confirmed by an examination of the authorities6 there is wide diversity of opinion as to the theories upon which such liability is founded and manifest confusion in the practical application of such theories in a given case.

This note proposes to adopt as its main thesis consideration of the question of the degree of the manufacturer’s responsibility under the doctrine enunciated above; and the further question of how that duty may best be given legal expression. This will necessarily require brief analysis of the historical background, the ultimate end sought by the courts, and the prevailing formulas in terms of which courts state the result.

Soon after the English case of Winterbottom v. Wright7 exceptions began to be made to the rule there announced that a manufacturer is not liable for injuries resulting from his negligence in the preparation of his products to other than the person or persons with whom he contracted. The first of these was in the case of articles inherently or imminently dangerous to human life.8 Shortly, this relaxation of the rule was extended to include articles

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1 2 S. E. (2d) 898 (W. Va. 1939).
2 3 S. E. (2d) 499 (W. Va. 1939).
3 3 S. E. (2d) 627 (W. Va. 1939).
4 Note (1922) 17 A. L. R. 688; Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S. W. (2d) 612 (1932).
5 For a good discussion of the doctrine of res ipsa loquitur as applied to these cases see Note (1935) 23 Ky. L. J. 534.
6 For a collection of the cases see Note (1937) 111 A. L. R. 1239.
which, while not in their nature imminently dangerous, become so if negligently prepared. Gradually this latter exception came to embrace foods and beverages designed for human consumption and put on the market in original sealed packages or bottles.

The fundamental basis of the doctrine undoubtedly arose out of the policy of protecting the public health, and may be traced back to the early date of 1266 in England. There the medieval Statute of Pillory and Tumbrel and the Assize of Bread and Ale ordained "that none shall sell corrupt victuals". It was also laid down broadly by Blackstone "that in contracts for provisions it is always implied that they be wholesome, and if they be not the same remedy (damage for deceit) may be had." The vast increase in the sale of manufactured products which has taken place within the last half century has motivated the courts to go the limit in giving this same principle copious expression in our cases.

Despite this manifest tendency to favor the consumer there is clear lack of unanimity in the formulas employed to reach that end. However, two main theories emerge as a basis for adjudication of most claims: (1) negligence of the manufacturer in the preparation of the product with recovery in tort, and (2) implied warranty that the article is fit for human consumption with recovery in contract.

Since the doctrine had its origin in the substantive law of negligence, quite naturally most courts state the result in those cases.

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11 One of the earlier cases had this to say: "Among the most fundamental of personal rights, without which man could not live in a state of society, is the right of personal security, including 'the preservation of a man's health from such practices as may prejudice or annoy it'. . . . To assert, therefore, that one living in a state of society organized, as ours is, according to the principles of the common law need not be careful that his acts do not endanger the life or impair the health of his neighbor seems to offend against the fundamentals." Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314, 317 (1908).
12 Perkins, Unwholesome Food as a Source of Liability (1912) 5 IOWA L. BULL. 6. See also 1 WILLISTON, SALES (2d ed. 1924) § 241, note 6.
13 3 BL. COMM. 165.
16 See Note (1937) 111 A. L. R. 1239. For an excellent treatment of the two theories, citing cases, see Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1931).
Negligence in these cases, however, can be established only by the aid of res ipsa loquitur or other evidentiary presumptions. Without going into the technical phases of such presumptions, suffice it to say that a majority of courts treat them as making out a prima facie case for the plaintiff which the defendant manufacturer may rebut by proof of care in the process of preparation. In a minority of states the effect of these presumptions is to shift the burden of proof to the defendant, thus casting on him the burden of showing affirmatively that he was not negligent. But even under the former view as it is applied in these cases, the rule, in effect, is none the less unfavorable to the defendant manufacturer, because in any event the case goes to the jury. Where the duty imposed is less than that of insurer, some degree of negligence must be found. It is obvious that evidence as to what happened in the particular event cannot be presented; instead, the finding must revolve about proof of the general methods employed in the manufacturing processes. So courts consistently achieve the ultimate end, imposition of an insurer's liability, on the principle that the jury could find that the foreign substance was in the package or bottle when issued by the manufacturer from the fact, if it be a fact, that it was present when the plaintiff opened its original seal for consumption.

The whole difficulty is with producing evidence. The results in these cases lead to but one ultimate conclusion — when the consumer proves that he received a product prepared by the defendant in original sealed packages, that therein was a harmful substance, and that from the use of such product he suffered injury, then in the language of the courts, he has made out a prima facie case, and from a practical standpoint an unanswerable one. This seems to be borne out by an observation of Judge Kenna in the Webb case: "It seems that the effect of the court's opinion, based upon what it is said the jury could regard as an insufficient system, inferentially would require the jury to disregard the defendant's proof in order that a recovery be justified." Under this hypoth-

18 Note (1935) 23 Ky. L. J. 534.
19 Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S. W. (2d) 612 (1932).
20 Dr. Pepper Co. v. Brittain, 234 Ala. 548, 176 So. 286 (1937).
22 Id. at 902.
It would seem the defendant must show what, if other than his negligence, caused the injury complained of.

Assuming that the manufacturer establishes by satisfactory proof, as is undoubtedly true in most cases, that he used every known precaution in the exercise of care, how are we consistently to say that the defendant is negligent? Judge Hatcher in dissenting in the Blevins case on the ground that recovery predicated on negligence was not justified where the manufacturer had made an unrefuted showing of the exercise of care in its methods, in effect, voices this same apprehension. In the Webb case, plaintiff hit into some sort of worm embedded in chewing tobacco manufactured by the defendant and sold to her son by a local dealer, with the result that stingers or stickers penetrated her mouth causing injury. The defendant offered the testimony of its superintendent that reasonable precautions were taken to prevent a foreign substance entering or remaining in all tobacco manufactured by it. In holding that a recovery was justified the court made this significant statement: “But the fact remains that, notwithstanding the care exercised by the manufacturer and the possibility that the injury complained of might have resulted from some development not traceable to its acts, a worm or moth did get into the tobacco plug, and from this fact resulting injury was sustained by the consumer.”

There are, then, in these cases two probative elements in conflict; evidence of care, and the presence of a foreign substance in the product. The verdict, then, must necessarily be founded in pure conjecture, and how the jury will decide is obvious.

Reluctant to state the ultimate end in terms of negligence, in view of the clear inconsistency between theory and result, a growing number of courts have substituted what is known as the doctrine of implied warranty. This theory proceeds on the assumption that the manufacturer, as an incident of his business, impliedly warrants that his goods are fit for human consumption. It has merit in making the duty absolute on the manufacturer, and being a less circuitous device. Practical difficulties in applying the theory, however, have caused a majority of courts to reject it.

23 Id. at 900.
27 Note (1934) 4 BROOKLYN L. REV. 93.
First it is to be noted that implied warranty, though having a tort origin, has come to be primarily contractual in nature. Consequently, in the case of a remote vendee there is lacking those required elements of contract which the buyer-seller relation connotes; noticeably, a lack of privity. The Uniform Sales Act because of ambiguity in its warranty sections has not aided much, most courts treating it merely as declaratory of the preexisting common law, with the result that it has had rare, if any, application on the point in question in the cases.

Courts taking this minority view resort to novel legal fictions to get around the privity requirement. Some explain that the warranty runs with the article sold, much in the nature of a covenant running with the land, and inures to the benefit of the consumer; others say there is a representation by the manufacturer directly to the consumer through the medium of modern advertising methods, and still others assert that the consumer is a third party beneficiary of the implied contract between the manufacturer and his immediate vendor. A few decisions go so far as to disregard privity altogether; one saying that if privity of contract is essential, "such exists in the consciousness and understanding of all right thinking persons;" and another puts it on the ground of "social justice". Though admittedly preferable to the negligence approach, to create in this class of cases an exception to the doctrine of privity is hardly justified if more direct formulas suggest themselves.

The real question underlying all this is, have the courts arrived today at the belief that the manufacturer of food products should be held as an insurer? If that stage, in effect, has been reached, a more direct approach to the problem of giving legal

28 1 WILLISTON, SALES (2d ed. 1924) § 195.
29 Crigger v. Coca Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915). See also 1 WILLISTON, SALES (2d ed. 1924) § 244a.
30 Perkins, Unwholesome Food as a Source of Liability (1919) 5 IOWA L. BULL. 86, 104.
32 Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). See Madouros v. Kansas City Coca Cola Bottling Co., 230 Mo. App. 275, 90 S. W. (2d) 445 (1936) which asserts that by the weight of authority a suit of this character cannot be based upon a breach of implied warranty.
33 Coca Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).
34 Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).
37 Coca Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 470 (1930).
expression to such inner conviction is highly desirable. Despite a growing trend in that direction, courts in general stop short of that result, and prefer instead to warp established legalistic expressions almost beyond recognition. There are those that assert that under the negligence theory a means is left open for the innocent to escape. There is also a hesitancy growing out of the belief that to go all the way might, conceivably, result in an increase in spurious claims. But probably foremost in impeding an almost inevitable result is the reluctance of courts to lay down arbitrary standards of conduct on any individual or group.

On the contrary, there is apparent a more than ordinary policy bespeaking clarification of the law in this respect. The tendency more and more to provide food products in original sealed packages which precludes the consumer judging for himself as to their fitness, the increasingly impersonal character of the buyer-seller relation, and the present-day tendency for the local merchant to lose his business autonomy, all lend almost unanswerable support to this hypothesis. There is actually no blame on either side except such as results from social and economic factors; but the potential forces of harm exhibited by improperly prepared food products abide irrespective of blame. Social justice would seem to require that the loss be imposed on the one better able to spread it, for it is likely that in business practice provisions are already being made to negative any such loss by charging it to production costs. In view of the ease with which he may protect himself, the expense and inconvenience of trials made long and complicated by outmoded legal machinery, and the difficulty of producing evidence, the manufacturer is not to be prejudiced unduly by a new approach that definitely clinches responsibility. In contrast, such a step is more than desirable in view of the doctrine in some states, including West Virginia, denying recovery by the consumer against his immediate vendor in this type of case.

After all, the true bases for, and the motivating forces behind these decisions are not questions of negligence or of warranty, but rather that the results are based primarily upon the exigencies

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40 See Harris, Liability Without Fault (1932) 6 Tulane L. Rev. 337.
of social justice as concerned with the relative positions of the parties to the cases. It is submitted, therefore, that our courts should extend to this class of cases the principle of liability without fault, imposed in analogous situations in our law.\textsuperscript{43} An alternative may be found in legislation\textsuperscript{44} which it is not within the province of this note to discuss, but which invites the attention of legislative bodies throughout the country.

D. R. K.

\textsuperscript{43} Marquet v. La Duke, 96 Mich. 596, 55 N. W. 1006 (1896).

\textsuperscript{44} An expression of the desirability of appropriate legislation is found in Judge Kenna's opinion in the Webb case.