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Torts--Negligence--Defective Milk Bottle--Liability of Bottler (Smolen v. Grandview Dairy, Inc., 301 N.Y. 265 (1950))

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TORTS—NEGLIGENCE—DEFECTIVE MILK BOTTLE—LIABILITY OF BOTTLER. — A milk bottle fell apart in plaintiff's hand during the performance of ordinary household duties. In an action against defendant dairy, the complaint was dismissed [1] on the ground that there was "no substantial evidence of a causal relation between some act or omission by the defendant in the preparation of the bottle . . . and the injury by its use. . . ." Plaintiff relied on the following evidence to establish a prima facie case: the testimony of an expert witness that (1) a crack was in the bottle prior to its falling apart; (2) such a crack was one typically caused by a thermal shock; (3) the crack could have been discovered by defendant had it used a thermal shock test or an examination by polariscope; and (4) that the crack could not have occurred after the bottle left defendant's control. Defendant's evidence consisted of testimony that: (1) it followed an inspection process similar to that which was accepted by other bottlers in the industry; (2) the crack would have been noticed, during the process of vacuum filling, if it was there at or before that time. *Held,* affirmed. There was no evidence that while the bottle was in defendant's possession it was in any way defective or that the defendant had knowledge or notice of a defect therein. *Smolen v. Grandview Dairy, Inc.,* 301 N. Y. 265, 93 N. E. 2d 839 (1950).

When a defective chattel is being used for its intended purpose and causes an injury, the manufacturer or assembler thereof is liable if he failed to exercise reasonable care to protect parties likely to be injured by it.[2] The burden was upon the plaintiff to establish by a preponderance of evidence that the defendant negligently failed to take reasonable precautions to protect plaintiff from the consequences of a broken bottle. Defendant was bound to use ordinary, customary methods to detect defects from which something more than trivial danger could be foreseen.[3]

The courts apparently apply a different rule to bottles charged with gas and bottled under pressure than to ordinary glass containers such as the one used in the instant case. In the former, evidence that defendant complied with the testing standard ordinarily used by other bottlers is insufficient, standing alone, to absolve him from liability.[4] While in the latter, it would seem from the instant case that it is sufficient [5] in the absence of evidence that: (1) the bottle

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[1] Trial term rendered judgment, in favor of plaintiff, upon verdict of jury, which was reversed on the law and the facts. Smolen v. Grandview Dairy, Inc., 276 App. Div. 854, 93 N. Y. S. 2d 382 (2d Dep't 1949).

[2] It is no longer necessary to prove a privity of contract and the fact that the chattel was inherently dangerous. Under the modern rule of MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916), liability is based on the potentiality of danger caused by negligent workmanship. Rosebrock v. General Elec. Co., 236 N. Y. 227, 140 N. E. 571 (1923).

[3] Smith v. Peerless Glass Co., 259 N. Y. 292, 181 N. E. 576 (1932).

[4] *Ibid.* Saglimbeni v. West End Brewing Co., 274 App. Div. 201, 80 N. Y. S. 2d 635 (3d Dep't 1948), *aff'd,* 298 N. Y. 875, 84 N. E. 2d 638 (1949).

[5] Cullem v. Renken Dairy Co., 247 App. Div. 742, 285 N. Y. Supp. 707 (2d Dep't 1936).

was defective when it first reached defendant's hands and that defendant failed to discover the defect; or, (2) defendant's handling of the bottle caused the defect and that defendant permitted it to go unnoticed. But direct evidence of the above facts is generally unobtainable because of the vast number of bottles generally handled by a person in defendant's position [6] and because such facts if they did exist would be peculiarly within the knowledge of the defendant or his agents. Therefore, the rule is that direct evidence need not be introduced; [7] the plaintiff may rely on circumstantial evidence.[8]

Plaintiff attempted to prove negligence by showing that defendant's method of inspection, although it was the one customarily used in the industry, was not the best and that there were other tests that would have exposed a thermal shock fracture in the bottle. If all of plaintiff's evidence is accepted as true, the instant case is correctly decided since the applicable rule of law under this given set of facts is that defendant merely perform the ordinary tests used by the rest of the industry.[9] Defendant is not bound to use a better method simply because one exists.[10]

The dissent argued that the defendant's negligence is a question of fact for the jury to decide, on the ground that the customary way of doing things may be the negligent way [11] and that the industry should not be protected from liability by a custom which it has developed for its own exemption.[12]

While the majority opinion is logically in accord with *stare decisis,* it is submitted that the dissent is sociologically sound in that it demands that more than a minimum protection be afforded the public.

TORTS — NEGLIGENCE — LAST CLEAR CHANCE. — Plaintiff's intestate, a ten year old boy, accompanied by his twelve year old brother, hitched a ride on defendant's truck. The boys crouched on a step fastened to the right front fender, out of the driver's sight, and held onto a perpendicular rod attached to the body of the truck

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[6] Licari v. Markotos, 110 Misc. 334, 180 N. Y. Supp. 278 (Sup. Ct. 1920).

[7] Saglimbeni v. West End Brewing Co., 274 App. Div. 201, 80 N. Y. S. 2d 635 (3d Dep't 1948), *aff'd,* 298 N. Y. 875, 84 N. E. 2d 638 (1949).

[8] *Ibid.*

[9] Smith v. Peerless Glass Co., 259 N. Y. 292, 181 N. E. 576 (1932); Curley v. Ruppert, 272 App. Div. 441, 71 N. Y. S. 2d 578 (1st Dep't 1947); Luciano v. Morgan, 267 App. Div. 785, 45 N. Y. S. 2d 502 (2d Dep't 1943).

[10] Garthe v. Ruppert, 264 N. Y. 290, 190 N. E. 643 (1934).

[11] Shannahan v. Empire Eng. Corp., 204 N. Y. 543, 98 N. E. 9 (1912); Bennett v. Long Island R. R., 163 N. Y. 1, 57 N. E. 79 (1900).

[12] *Ibid.*