Donoghue v Stevenson

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Donoghue (or McAlister) v Stevenson, [1932] All ER Rep 1; [1932] AC 562; House of Lords

[1932] A.C. 562

[HOUSE OF LORDS.]

McALISTER (OR DONOGHUE) (PAUPER), APPELLANT;

AND

STEVENSON, RESPONDENT.

1932 May 26.

LORD BUCKMASTER, LORD ATKIN, LORD TOMLIN, LORD THANKERTON, and LORD MACMILLAN.

Negligence - Liability of Manufacturer to ultimate Consumer - Article of Food - Defect likely to cause Injury to Health.

1932. May 26. LORD BUCKMASTER

(read by LORD TOMLIN). My Lords, the facts of this case are simple. On August 26, 1928, the appellant drank a bottle of ginger-beer, manufactured by the respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not, and could not be, detected until the greater part of the contents of the bottle had been consumed. As a result she alleged, and at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro-enteritis. She accordingly instituted the proceedings against the manufacturer which have given rise to this appeal.

The foundation of her case is that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty and is consequently liable for any damage caused by such neglect. After certain amendments, which are now immaterial, the case came before the Lord Ordinary, who rejected the plea in law of the respondent and allowed a proof. His interlocutor was recalled by the Second Division of the Court of Session, from whose judgment this appeal has been brought.

Before examining the merits two comments are desirable:

(1.) That the appellant's case rests solely on the ground of a tort based not on fraud but on negligence; and (2.) that throughout the appeal the case has been argued on the basis, undisputed by the Second Division and never questioned by counsel for the appellant or by any of your Lordships, that the English and the Scots law on the subject are

identical.

It is therefore upon the English law alone that I have considered the matter, and in my opinion it is on the English law alone that in the circumstances we ought to proceed.

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

Now the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration. The law books give no assistance, because the work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express may demand attention; and the ancient books do not assist. I turn, therefore, to the decided cases to see if they can be construed so as to support the appellant's case. One of the earliest is the case of Langridge v. Levy. (2 M. W. 519; 4 M. W. 337.) It is a case often quoted and variously explained. There a man sold a gun which he knew was dangerous for the use of the purchaser's son. The gun exploded in the son's hands, and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Parke B., who, in delivering the judgment of the Court, used these words: "We should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby"; and in Longmeid v. Holliday (6 Ex. 761.) the same eminent judge points out that the earlier case was based on a fraudulent misstatement, and he expressly repudiates the view that it has any wider application. The case of Langridge v. Levy (2 M. W. 519; 4 M. W. 337.), therefore, can be dismissed from consideration with the comment that it is rather surprising it has so often been cited for a proposition it cannot support.

The case of Winterbottom v. Wright (10 M. W. 109.) is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action either in tort or arising out of contract. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the character of a coach to place it in a special category. It may be noted, also, that in this case Alderson B. said (10 M. W. 115.): "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

The general principle of these cases is stated by Lord Sumner in the case of Blacker v. Lake Elliot, Ld. (106 L. T. 533, 536.), in these terms: "The breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B.' when he is injured by reason of the article proving to be defective."

From this general rule there are two well known exceptions: (1.) In the case of an article dangerous in itself; and (2.) where the article not in itself dangerous is in fact dangerous, by reason of some defect or for any other reason, and this is known to the manufacturer. Until the case of George v. Skivington (L. R. 5 Ex. 1.) I know of no further modification of the general rule.

In my view, therefore, the authorities are against the appellant's contention, and, apart from authority, it is difficult to see how any common law proposition can be formulated to support her claim.

In Mullen v. Barr Co. (1929 S. C. 461, 479.), a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this: "In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."

In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this appeal should be dismissed, and I beg to move your Lordships accordingly.

LORD ATKIN.

My Lords, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises. The case has to be determined in accordance with Scots law; but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the laws of Scotland and of England are the same. I speak with little authority on this point, but my own research, such as it is, satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law; and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

At present I content myself with pointing out that in English law there

must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This appears to me to be the doctrine of Heaven v. Pender (11 Q. B. D. 503, 509.), as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in Le Lievre v. Gould. ([1893] 1 Q. B. 491, 497, 504.) Lord Esher says: "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith L.J.: "The decision of Heaven v. Pender (11 Q. B. D. 503, 509.) was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness of "proximity" was intended by Lord Esher is obvious from his own illustration in Heaven v. Pender (11 Q. B. D. 503, 510.) of the application of his doctrine to the sale of goods. "This" (i.e., the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it.

There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be

mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House.

I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser - namely, by members of his family and his servants, and in some cases his guests. I do not think so in of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

In my opinion several decided cases support the view that in such a case as the present the manufacturer owes a duty to the consumer to be careful.

The last case I need refer to is Bates v. Batey Co., Ld. ([1913] 3 K. B. 351.), where manufacturers of ginger-beer were sued by a plaintiff who had been injured by the bursting of a bottle of ginger-beer bought from a shopkeeper who had obtained it from the manufacturers. The manufacturers had bought the actual bottle from its maker, but were found by the jury to have been negligent in not taking proper means to discover whether the bottle was defective or not. Horridge J. found that a bottle of ginger-beer was not dangerous in itself, but this defective bottle was in fact dangerous; but, as the defendants did not know that it was dangerous, they were not liable, though by the exercise of reasonable care they could have discovered the defect. This case differs from the present only by reason of the fact that it was not the manufacturers of the ginger-beer who caused the defect in the bottle; but, on the assumption that the jury were right in finding a lack of reasonable care in not examining the bottle, I should have come to the conclusion that, as the manufacturers must have contemplated the bottle being handled immediately by the consumer, they owed a duty to him to take care that he should not be injured externally by explosion, just as I think they owed a duty to him to take care that he should not be injured internally by poison or other noxious thing. I do not find it necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to

distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton L.J. in Hodge Sons v. Anglo-American Oil Co. ((1922) 12 Ll. L. Rep. 183, 187.), a case which was ultimately decided on a question of fact. "Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf." The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle.

It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of Cardozo J. in MacPherson v. Buick Motor Co. in the New York Court of Appeals (217 N. Y. 382.), in which he states the principles of the law as I should desire to state them, and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise, prevented the relation between manufacturer and the user of the car being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.

My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

LORD TOMLIN.

My Lords, I have had an opportunity of considering the opinion (which I have already read) prepared by my noble and learned friend, Lord Buckmaster. As the reasoning of that opinion and the conclusions reached therein accord in every respect with my own views, I propose to say only a few words.

First, I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to every one who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. Moreover, the fact that an article of food is sent out in a sealed container can have no relevancy on the question of duty; it is only a factor which may render it easier to bring negligence home to the manufacturer.

Secondly, I desire to say that in my opinion the decision in Winterbottom v. Wright (10 M. W. 109.) is directly in point against the appellant.

The examination of the report makes it, I think, plain (1.) that negligence was alleged and was the basis of the claim, and (2.) that the wide proposition which I have indicated was that for which the plaintiff was contending.

The declaration averred (inter alia) that the defendant "so improperly and negligently conducted himself" that the accident complained of happened.

The plaintiff's counsel said: "Here the declaration alleges the accident to have happened through the defendant's negligence and want of care."

The alarming consequences of accepting the validity of this proposition were pointed out by the defendant's counsel, who said: "For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle."

That the action, which was in case, embraced a cause of action in tort is, I think, implicit in its form, and appears from the concluding sentence of Lord Abinger's judgment, which was in these terms: "By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him."

I will only add to what has been already said by my noble and learned friend, Lord Buckmaster, with regard to the decisions and dicta relied upon by the appellant and the other relevant reported cases, that I am unable to explain how the cases of dangerous articles can have been treated as "exceptions" if the appellant's contention is well founded.

Upon the view which I take of the matter the reported cases - some directly, others impliedly - negative the existence as part of the common law of England of any principle affording support to the appellant's claim, and therefore there is, in my opinion, no material from which it is legitimate for your Lordships House to deduce such a principle.

LORD THANKERTON.

My Lords, in this action the appellant claims reparation from the respondent in respect of illness and other injurious effects resulting from the presence of a decomposed snail in a bottle of ginger-beer,

alleged to have been manufactured by the respondent, and which was partially consumed by her, it having been ordered by a friend on her behalf in a café in Paisley.

The action is based on negligence, and the only question in this appeal is whether, taking the appellant's averments pro veritate, they disclose a case relevant in law so as to entitle her to have them remitted for proof. The Lord Ordinary allowed a proof, but on a reclaiming note for the respondent the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor and dismissed the action, following their decision in the recent cases of Mullen v. Barr Co. and M'Gowan v. Barr Co. (1929 S. C. 461.)

The appellant's case is that the bottle was sealed with a metal cap, and was made of dark opaque glass, which not only excluded access to the contents before consumption, if the contents were to retain their aerated condition, but also excluded the possibility of visual examination of the contents from outside; and that on the side of the bottle there was pasted a label containing the name and address of the respondent, who was the manufacturer. She states that the shopkeeper, who supplied the ginger-beer, opened it and poured some of its contents into a tumbler, which contained some ice-cream, and that she drank some of the contents of the tumbler; that her friend then lifted the bottle and was pouring the remainder of the contents into the tumbler when a snail, which had been, unknown to her, her friend, or the shopkeeper, in the bottle, and was in a state of decomposition, floated out of the bottle.

The duties which the appellant accuses the respondent of having neglected may be summarized as follows: (a) That the ginger-beer was manufactured by the respondent or his servants to be sold as an article of drink to members of the public (including the appellant), and that accordingly it was his duty to exercise the greatest care in order that snails would not get into the bottles, render the ginger-beer dangerous and harmful, and be sold with the ginger-beer; (b) a duty to provide a system of working his business which would not allow snails to get into the sealed bottles, and in particular would not allow the bottles when washed to stand in places to which snails had access; (c) a duty to provide an efficient system of inspection which would prevent snails from getting into the sealed bottles; and (d) a duty to provide clear bottles so as to facilitate the said system of inspection.

My Lords, I am of opinion that the contention of the appellant is sound, and that she has relevantly averred a relationship of duty as between the respondent and herself, as also that her averments of the respondent's neglect of that duty are relevant.

The cases of Mullen and M'Gowan (1929 S. C. 461.), which the learned judges of the Second Division followed in the present case, related to facts similar in every respect except that the foreign matter was a decomposed mouse. In these cases the same Court (Lord Hunter dissenting) held that the manufacturer owed no duty to the consumer. The view of the majority was that the English authorities excluded the existence of such a duty, but Lord Ormidale (1929 S. C. 471.) would otherwise have been prepared to come to a contrary conclusion. Lord Hunter's opinion seems to be in conformity with the view I have expressed above.

My conclusion rests upon the facts averred in this case and would apparently also have applied in the cases of Mullen and M'Gowan (1929 S.

C. 461.), in which, however, there had been a proof before answer, and there was also a question whether the pursuers had proved their averments. I am therefore of opinion that the appeal should be allowed and the case should be remitted for proof, as the pursuer did not ask for an issue.

LORD MACMILLAN.

Where, as in cases like the present, so much depends upon the avenue of approach to the question, it is very easy to take the wrong turning. If you begin with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the manufacturer and so disentitled to sue upon it. There is no contractual relation between the manufacturer and the consumer; and thus the plaintiff, if he is to succeed, is driven to try to bring himself within one or other of the exceptional cases where the strictness of the rule that none but a party to a contract can found on a breach of that contract has been mitigated in the public interest, as it has been in the case of a person who issues a chattel which is inherently dangerous or which he knows to be in a dangerous condition. If, on the other hand, you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer, and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer, and whether he owed a duty to be careful in a question with the party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to the incidental contract of sale becomes irrelevant, and his title to sue the manufacturer is unaffected by that circumstance. The appellant in the present instance asks that her case be approached as a case of delict, not as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been held to be entitled to complain of some defect in the subject-matter of the contract which has caused him harm. The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort.

I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser. .... The principle of Thomas v. Winchester (6 N. Y. 397) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. .... There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be

inferred from the nature of the transaction. .... The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it [the defendant company] was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion."

The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

To descend from these generalities to the circumstances of the present case, I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that, if the appellant establishes her allegations, the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them, and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter, may reasonably be characterized as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent,

when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it.

The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, res ipsa loquitur. Negligence must be both averred and proved. The appellant accepts this burden of proof, and in my opinion she is entitled to have an opportunity of discharging it if she can. I am accordingly of opinion that this appeal should be allowed, the judgment of the Second Division of the Court of Session reversed, and the judgment of the Lord Ordinary restored.

Lords' Journals, May 26, 1932.

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