

## EDIBLES AND POTABLES

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Originally, I was asked to participate in this symposium concerning some aspect of products liability with which I have some familiarity. This I agreed to do. Then I very nearly cancelled my acceptance when the first draft program arrived several months ago in which it was indicated that I was to talk of "Edible and Potable Products Liability Cases." Fortunately, a fellow in my office with a dictionary assured me that edibles and potables were synonymous with food and drink. I like to think that "edibles and potables" was chosen rather than "food and drink" because I am, by experience as well as philosophy, a defendant's man. Since "edibles and potables" were used to describe food and drink back in the days of *caveat emptor*, I assume it was felt that since this was where my philosophy lay, this is where my language would lie as well.

All the participants in this seminar were advised that this was to be a "bread and butter" type of workshop. This caused me to ask why there should be a section on food and drink cases at all. In spite of the name, food and drink cases do not provide bread and butter. They might pay for a month's supply of stationery—if you have a particularly successful case—but no bread and butter. There is a substantial problem in the products case involving food or beverages with respect to getting any real money. There are a number of reasons which might be given for this. The one usually assigned is that food and drink cases are not evocative of very serious injury. Those of us who do defendant's work generally know that this is not a valid reason because we have all paid substantial judgments in other types of cases where there were no serious injuries. The real reason, it seems to me, is that the injuries sustained in the ordinary food and drink cases are common injuries which members of the jury have themselves suffered. Rarely do you get large recoveries from jurors who have suffered the same injuries free of charge. Of course, every once in a while there arises a food case with some potential to it. We have cases which come to us with what is euphemistically known in the trade as "good injuries."

In discussing this type of case, I must, in all fairness, restrict my remarks to that which I know well, to wit, the defendant's side of the case. I suspect that those of you who try plaintiffs' cases might recognize that almost everything that is said about the investigation can be applied fairly successfully to either side of the case. The only difference between the preparation and trial of a food case as opposed

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to the other more esoteric products is in the nature of the technical and scientific information with which you will be concerned. The basic approach is the same. This means that to handle a products liability case you must become an expert in the product and in the technical and scientific background facts and information surrounding that product. In this, there is nothing peculiar about food except that you will be dealing with bacteriology instead of metallurgy or physics or whatever science it is that one deals with in connection with a given product.

The first step in the investigation is at the claimant level. This is a sort of optimistic phrase that we on the defendant's side use to describe those cases that come to us before plaintiff engages an attorney. That is when we have a claimant. If plaintiff engages a lawyer first, then change claimant to plaintiff and the investigation will be handled in a slightly different fashion. The ideal investigation attempts to elicit the details of how the injury occurred, the purchase, the handling, the storage of the product by the plaintiff, the cooking, the utensils used, the stove, the heat, and all these things and more to the greatest degree of accuracy of detail that can be obtained. If you have the scientific information needed in order to approach the trial of the case properly, then it will be easy to recognize the importance of these rather minute details.

As has been frequently pointed out, there is a rule of law generally held that plaintiff must exclude other reasonably probable causes for his illness or injury and, therefore, defendant's counsel is extremely interested in what other foods or beverages the plaintiff ate or drank at *or about the same time* as the alleged offending agent. Particularly in the case of food poisoning, scientifically *post hoc* is not necessarily *propter hoc*. It is very possible to have illness resulting from food eaten at breakfast when symptoms do not develop until after lunch. In the same vein, it is common that persons suffering food poisoning or any kind of stomach disorder tend to blame the entree. I am sure all of you know people who say they will never eat a particular food again because they had it for dinner one night and it made them ill. If the food were, for example, lobster, it will never occur to these folks to say that they also had clam chowder, rolls, butter, salad, and other foods. No, it was lobster that made them ill and they will never eat lobster again. So, too, people frequently blame foods which do not taste just right to them. An interesting fact about food poisoning bacteria is that they do not alter the flavor of food at all. Neither do they alter the looks or the smell. The only advantage that there may be in a condition of spoilage is that the odds are strong that if there is a mis-handling of a product sufficient to permit spoilage bacteria to develop,

there might very well also be food poisoners developing at the same time. However, one does not necessarily follow the other.

At this point, it might be well to emphasize the importance of obtaining a sample of the offending food. First, this gives you an opportunity to find out if there was anything deleterious about the food. Secondly, if you can get samples of other foods, it gives an opportunity to find out what the real causative agent was. Finally, the sample frequently gives you an opportunity to identify the product as coming from the particular defendant or not. The two most important items about any investigation, as a matter of fact, are the speed with which it is conducted and the obtaining of the sample. I need not explain to you that speed is important because memories are faulty and become more so with the passage of time. It is, therefore, well to get all the information before the ravages of time cause too much damage.

Investigation at the retailer and distributor level, and at the plant level, are designed to obtain an accurate history of the product. This is important in order that we might determine whether there has been any mishandling in the distribution. It is also important in order to lay a proper foundation for technical testimony and qualify any technical expert who will testify to the way things were being done at the manufacturing plant when this particular product was being processed or manufactured. In the food industry generally, and more particularly in the case of perishable foods, very careful and accurate records are available with respect to the receipt of raw materials, and the manufacturing, processing, storage, shipment and transportation of the product.

Finally, there remains the scientific investigation. This investigation complements what has been said before. In the case of food poisoning, it is essential that complete bacteriological analysis be made. In the case of a foreign substance, it is important that the examination be made with an effort to identify the substance. Frequently, if the substance is identified, we can also identify the source. Also, frequently examination of substances develops that the substance involved is not foreign to the product.

This leads us to the aspect of trial or litigation. In this connection, the important area is discovery proceedings. The principal reason why there is a more or less defined area of litigation which is referred to as products liability is that this is the only area of the law of large dimension where the parties to the action are widely apart from one another at the time when the incident which gives rise to the action occurs. For this reason, the discovery proceedings are perhaps more important in products liability litigation than in any other type of case. Neither party was there when the action involved took

place. The plaintiff knows nothing at all about the way in which the product was manufactured, handled, stored or shipped. On the other hand, the defendant knows nothing about the way the injury occurred except insofar as related to him by the plaintiff. So the discovery proceeding is essential in order to get both parties on a level where they are talking about the same thing. And precisely because of the fact that neither has any real knowledge of the actions of the other, minute details become extremely important. The result is that the discovery proceeding is a very detailed and boring examination. You cannot let an expert testify that, "I mounted the tire the same as I always did." You make him go back and say exactly how he did it, what tool he used for this, what tool he used for that—all perfectly common ordinary things. So, too, we must make the plaintiff tell us which spoon she used, how much salt, how much pepper, how long she cooked the product, how hot the oven was, how long the product was out of the refrigerator. Exactly how she cooked it: what did the temperature gauge in the oven say when she put it in, what did it say when she took it out—all are things we must know. They are all essential in order to reconstruct for ourselves and later for a jury the precise history of this product.

The same is true in the case of bottled beverages. Of course, in the bottled beverage cases, we are almost exclusively dealing with foreign substances, where the bottle itself does not cause any harm. In this type of case, it is terribly important to know from the standpoint of both fact and law where this bottle was at all times after it was filled and capped, whether there was an opportunity for someone to take the cap off and tamper with the bottle, whether there was an opportunity for someone in the chain of distribution to leave the bottle unguarded in such a way that it might be reasonable that someone could tamper with the bottle. This will be true where the bottle was in the plaintiff's home and where some child might have had an opportunity to tamper with it. In most jurisdictions, opportunity to tamper is a question of reasonableness, although not in all.

With respect to the remedy, these cases used to be brought on one of three theories. Now they are usually brought on three of three theories: negligence, statutory liability, and breach of implied warranty. In the food area, there isn't much point in arguing about privity of contract in warranty cases, at least not from the standpoint of the manufacturer or packer. In some products, it may be a difficult burden for the plaintiff to prove negligence. However, in food cases, the quantum of proof required by the plaintiff in order to get to the jury is identical whether his action be in negligence, warranty, or breach of a statute. The words used to define the burden of proof may differ

somewhat, and, of course, in a negligence action the defendant has more to talk about in his argument to the jury. However, in his motion addressed to the sufficiency of the evidence at the conclusion of the plaintiff's case, the defendant must address himself to the identical elements of proof upon whichever theory the action may have been brought. The plaintiff must show the defect in defendant's product traceable to the defendant, injury, and causation leading from the defect to the injury. In any of the three types of case, his burden is exactly the same. If he has evidence which tends to prove all of these elements, plaintiff survives the motion and the defendant must go forward. In a negligence case, defendant will prove the manner in which he manufactures his product to be one of not only due care, but of all possible care. He will also prove scientifically, if he can, that this thing could not have happened. In a warranty case, the defendant will prove that in the manufacture of his product he used all possible care. The difference between the two is simply that defendant may not argue to the jury in a warranty case that, since he used due care, he is not liable. However, in the warranty case, defendant can argue to the jury that the care used in the manufacture should convince the jury that the defect alleged could not have been in the product when it left the defendant's possession. Here you have the same evidence but a different argument. The same analysis will stand up if applied to an action for breach of a statutory duty. For this reason, the privity concept with respect to implied warranties is not so important as it might otherwise be.

If you will permit me, let me digress a moment at this point. Over the years and particularly over the past few years, reams have been written about the terrible unfairness of the requirement of privity of contract in cases involving food and drink. A tremendous amount of heat has been generated toward the end of getting rid of this onerous requirement. We might say that the end has been very largely accomplished. Certainly, the privity requirement in warranty cases is dead in over half our jurisdictions and may be dying in several of the others. What has been accomplished by this in the food cases? In what respect has any single plaintiff been aided? In what respect will any plaintiff be aided in a food case because he can sue in warranty instead of negligence?

The ostensible reason for eliminating the requirement of privity was that negligence was too hard to prove. Now, if we read these food cases, we find that negligence does not have to be proved. Proof that there was a defect in the defendant's product at the time it left the defendant's possession and proof that the plaintiff was injured by that defect will take the plaintiff to the jury anywhere in the country.

Some courts allow this on the theory of *res ipsa loquitur*, others rely upon inferences of negligence, others on presumptions. However, in any event, this is all the proof that is required on the issue of negligence. As we said earlier, the proof required in a warranty case is exactly the same. Then why all the agitation to eliminate privity in food cases?

I suggest you look at section 402-a of the Restatement of Torts Second. Section 402-a has been adopted by the American Law Institute and approved. It was originally approved in May of 1961 and at that time it said in substance that a seller of food will be strictly liable in tort to an injured consumer, certain conditions being present. The reporter for the Restatement arrived at this rule in reliance upon all of the cases in the country where the courts had abolished in whole or in part the privity requirement in warranty cases involving food products. In a comment to the section, food was defined to include drugs and all products intended for internal bodily use. There were no cases involving drugs except the *Cutter* cases in California. It is suggested that the *Cutter* cases are not solid support for the proposition that privity is not required in a drug case except in the unusual circumstances of that particular litigation where a vaccine caused the very illness which it was designed to prevent. However, the members of the American Law Institute were not satisfied. They approved section 402-a in 1961 but made some recommendations, as a result of which section 402-a was rewritten and resubmitted in May of 1962. As finally approved, the section no longer mentions food. It now refers to the seller of any article intended for intimate bodily use. Not only have we expanded beyond food, we have also expanded beyond internal. Now we're intimate and external. This presumably, will include clothing, cosmetics, drugs, hair dyes, perhaps even roller skates. One may ask: Where are the cases which form the support for this extension in the Restatement? For all practical purposes, there are not any cases which really support the extension. However, once you accept the proposition that warranty liability is really tort liability, which is the basis for the reporter's conclusion, then the food cases form the support for the whole proposition. That group of legal scholars, whom I call social engineers, use the food cases as a ladder to higher things. The courts in the food cases used to talk about the intimacy of contact and, based upon this, they felt there must be a broader base of liability. This led the courts to abolish the privity requirement. This also led the courts to reduce the standard of proof required for negligence. It now appears that the food cases were merely being used as a stepping-stone for the development of the strict liability in tort. Why tort and not warranty? Well, some courts are still stodgy enough to require notice of a breach of warranty, to

give the defendant an opportunity to investigate the facts. That would not be required in tort, of course. All you have to do is sue within the statutory period, which ranges from one to three years. A lot of evidence can be lost in that period of time. Then, too, some courts still recognize limitations of liability in warranty cases, which also would not apply in tort. And, of course, some courts still may require privity of contract. This is the reason why the reporter quite frankly felt that it was better to define the liability in terms of a strict liability in tort.

The most common type of case is that involving foreign substances in food. Certainly this is true as a claim statistic, if not as a litigation statistic. By far the vast majority of foreign substance claims are settled. If inquiry discloses that the product is yours, that it contained a foreign substance, and that there is a reasonable relationship between the damage claimed and the damage done; then the claim is generally settled expeditiously. If the product is in a sealed container, liability against the packer thereof is nearly automatic if the substance is, in fact, foreign. If the substance is natural or, as it is sometimes called, indigenous to the product, then liability is not automatic and in some areas may not attach at all. The rule in many places is that a substance which is natural to the product, such as a bone in chicken pie or a cherry pit in cherry ice cream, gives rise to no liability either in negligence or warranty. On the other hand, some courts adopt a rule of reasonable expectation. This reasonable expectation applies not so much to the plaintiff as to a reasonable consumer.

Where the product is sold other than in a sealed container, plaintiff has a little more burden in getting the liability back to a specific defendant. Where the packer is the defendant, plaintiff will have the burden of showing that the foreign substance was in the product when the packer sold it. Likewise, if the defendant is the retailer, plaintiff must show that the foreign substance was in the product before it left the hands of that retailer. In order to do this, plaintiff has to eliminate the probability that it was inserted into the product subsequent to the time that the defendant relinquished control. Sometimes this may be easily done merely by showing the nature of the substance and the manner in which it was embedded in the product. Other times it may be very difficult. This is substantially the problem in the foreign substance in bottled beverage cases. There are at least three rules being used by various courts around the country, two of them extreme and one reasonable. One extreme view holds that plaintiff must negative the possibility of tampering by third persons. At the other pole some courts hold that the question of tampering is an issue for the defendant to dispose of. If the defendant wants to rely upon the possibility that somebody tampered with his product, then he must come forward and

show affirmatively that there was not only opportunity, but also likelihood, that this was done. The principal difficulty with this rule is that it does a little violence to the concept of burden of proof that normally is in effect in these cases. The rule in the middle ground which appeals is a rule which says that the plaintiff has to negative a reasonable likelihood that the product was tampered with. Actually, this can be done without too much difficulty. Some courts have held, for example, that plaintiff's burden is satisfied when he shows that the cap was removed from the bottle with the ordinary amount of difficulty and that the beverage contained therein still had the normal amount of carbonation.

The court drew from its experience that a carbonated beverage opened for any length of time loses some of its carbonation, and likewise, if the cap is replaced, it will be easy to remove and the carbonation will seep out. In those jurisdictions, at least, this is sufficient proof to raise a question of fact.

A third group of cases are the food poisoning cases. These are interesting because they are somewhat difficult on both sides. For the plaintiff, it is hard to select one food as a vehicle which caused his illness in the absence of scientific proof to the contrary. It is all right for a plaintiff to come to court and say, "I did not eat anything for three days except this one item of food." This may be enough to get him to the jury, but it probably will not be enough to get him by the jury, because this runs counter to human experience. It is not the same as in a trichinosis case where a plaintiff says he had not eaten pork for a year and will not eat any ever again. This, the jury may accept; but in a food poisoning case where it is necessary to eliminate other foods as possible vehicles, it is a difficult proposition in the absence of scientific proof. Additionally, there is the problem of time. Food poisoning bacteria do not react immediately. And contrary to popular belief, food poisoning does not affect one in gradual worsening of symptoms. This is an explosive type of illness which reacts with very little warning at a very serious level.

The final group of cases involve the very interesting area of trichinosis. Depending upon whom you read, this is either one of the scourges of our civilization or it really is not much of a problem at all. The legal problems in trichinosis are interesting as are the factual problems because, while the symptomatology and the time-table are different from the food poisoning cases, nonetheless the time-table is the key. Trichinosis does not affect one within a short time after eating fresh pork. It has a very delayed symptomatology because of the nature and biological aspects of *trichinae spiralis*, the little parasite that is responsible for all this discussion. After they get inside the system,



it is necessary for them to grow to sexual maturity and to beget their young. Then, it is necessary for the young to mature a little and then get into the blood stream and circulate around, attaching themselves to the voluntary muscles. All of this takes time. As a result, trichinosis cases frequently are brought against the fellow who made the pork that you ate on Sunday when in fact the culprit was the merchant who gave you the hamburger that you ate last Tuesday. These are some of the things that are factually interesting in trichinosis cases. Legally, the law is in a sort of peculiar state. The only thing that most states have in common is that there is generally no liability in common-law negligence for the sale of fresh pork containing live trichinae. There is a conflict in the states as to whether the sale of fresh pork as such containing live trichinae constitutes a violation of the Pure Food Law. As you know, Ohio takes the position that it does; most other states that it does not. There is conflict, too, in the warranty liability in trichinae. New York seems to find liability, whereas many other states take the position that the warranty is only that pork will be fit to eat if properly cooked. Scientifically, if pork is properly cooked, trichinosis is an impossibility.

Obviously, if a pork product is sold as ready-to-eat without further cooking, and contains live trichinae, there will be liability in any one of the three areas—negligence, statute, or warranty—provided, of course, there are facts to sustain this. There is also liability or may be liability in the presence of trichinae in a product which is sold as something other than pork. We all know people who never eat pork and never buy pork, but they buy ground beef from their butcher or the neighborhood supermarket. It then develops that the market where the beef was bought uses the same grinder for pork products and beef products. If it can be established that this is the case and that pork was ground ahead of the beef on a given day, liability may attach even though there was no actual sale of pork as such.

In conclusion, perhaps it might not be amiss for me to add a word about technique. Products liability cases are a battle of the experts. This is certainly true in food cases as it is in all the others. My experience would suggest that when you select an expert, you will be more concerned with his testimony than with his testifying. Never make the mistake of selecting an expert because of his glibness, his articulation, or perhaps his appearance. The most important thing about an expert is that he knows so much about his subject and he testifies so honestly and solidly in the area that the jury is bound to understand that this man speaks from a broad base of knowledge. No amount of skillful cross-examination can budge a man from what he knows to be the truth. This will be equally true whether the expert you select is an

employee of the defendant company or an independent expert. My experience would suggest that juries are not so concerned with accidents as they are with the real solid meat of the honest, unshakeable testimony of a true expert.

One final word about products liability in general and food products liability in particular may be in order. In any given area, the law of products liability is easy to find and fairly simple. What is difficult in a products liability case is the facts. These cases are purely fact cases and they will be won or lost 99 times out of 100 on fact—not on law or technical defenses. I am sure that if you analyze the remarks made by all of the experts participating in this symposium, you will appreciate that each of them has told you: "Get the facts."