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# Torts—Liability of Restaurant Owner for Death Resulting from Eating Poisoned Food Under Wrongful Death Statute—Quantum of Proof

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> This is a good example of the uncritical application of general legal doctrine to a tax case. The recitals in the contract as to the removability of the elevators and equipment and as to title were inserted for security reasons. They have no bearing whatever on the determination as to whether the taxpayer is to be treated, for retail sales tax purposes, as the consumer of the cages, cables, shafts, etc. which go into an elevator installation . . . . whatever the solution to be reached, it should not be determined by the niceties of the law of the title.[16]

CHARLES C. ALLEN III

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TORTS—LIABILITY OF RESTAURANT OWNER FOR DEATH RESULTING FROM EATING POISONED FOOD UNDER WRONGFUL DEATH STATUTE—QUANTUM OF PROOF. Plaintiff and her husband became ill two hours after eating a meal of corned beef in the defendant-restaurant. Plaintiff brought suit against the restaurant under the Mississippi wrongful death statute for the death of her husband, who died of ptomaine poisoning eight days after eating the corned beef. The trial judge directed a verdict for the defendant after the close of the plaintiff's evidence. The Supreme Court of Mississippi affirmed the judgement of the trial court, ruling that the plaintiff did not prove a prima facie case of negligence for submission to a jury. The court said that the doctrine of *res ipsa loquitur* could not be applied to food bacteria cases, and that there was no evidence from which a jury could find that the defendant was negligent in preparing the food, or that the defendant's negligence caused the death of the plaintiff's husband. The court further held that there could be no recovery on the basis of a breach of an implied warranty because the warranty did not survive to the wife upon the death of her husband.[1]

There are two theories upon which recovery for injury caused by the presence of a deleterious substance in food may be based: (1) negligence on the part of the dispenser of the food,[2] and (2) breach of an implied warranty.[3] Recovery, of course, may always be had if the plaintiff is able to prove negligence, but because of

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16. Hellerstein, *State and Local Taxation,* 1947 ANNUAL SURVEY OF AMERICAN LAW 321 (1948).

1. Goodwin v. Misticos *et al.,* 42 So.2d. 397 (Miss. 1949).
2. Note, 7 A.L.R.2d 1027 (1949).
3. *Ibid.*

the difficulties encountered in proving negligence in this type of case, a more liberal doctrine has developed whereby the innkeeper is held impliedly to warrant that the food he serves is wholesome and free from deleterious substances.[4]

In the line with this liberal attitude, the Mississippi Supreme Court has held that the dispenser of food impliedly warrants that the food and water he serves are free from deleterious substances.[5] In the principal case, however, the court refused recovery on any implied warranty theory because of a prior Mississippi decision to the effect that such an action was *ex contractu*, that contract actions survive to the executor or administrator and not the widow and that any recovery under the wrongful death statute must be based on a tort to the deceased. Thus, since the breach of warranty was not delictual in its nature, it could not serve as a basis for a recovery under a wrongful death statute.[6] Consequently plaintiff was forced to recover on a negligence theory or not at all.

In negligence actions for injuries resulting from the consumption of deleterious food, three general classifications of the cases may be formulated: (1) those which hold that the sale of deleterious food constitutes a violation of a pure food and drug act, in which case the legal conclusion is either that such conduct constitutes negligence per se, or more properly, that the in-fact violation of such a statute results in absolute civil liability as well as criminal liability;[7] (2) those which hold that the plaintiff makes out a prima facia case of negligence when he offers proof that food procured from the defendant was unwholesome, and that illness resulted therefrom;[8] and (3) those which hold that

4. *Ibid.*

5. Sartin v. Blackwell, 200 Miss. 579, 28 So.2d 222 (1946) (liability for injuries sustained by patron in swallowing broken glass contained in water served to patron is not restricted to that of negligence but may be predicated upon the breach of an implied warranty; a restaurateur's implied warranty is based upon justifiable reliance by the patron upon the skill and judgment of the restaurateur.)

6. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So.2d 791 (1944) (demurrer by defendant sustained on the ground that MISS. CODE §1453 [1942] does not give a cause of action arising *ex contractu* affirmed).

7. 22 AM. JUR. FOOD §100 (1939) note, 7 A.L.R.2d 1040 (1949); Boylston v. Armour & Co., 196 S.C. 1, 12 S.E.2d 34 (1940); Clark Restaurant Co. v. Simmons, 29 Ohio App. 220, 163 N.E. 210 (1927).

8. 22 AM. JUR. FOOD §102 (1939); Panza v. Bickfords Inc. of N.J., 129 N.J.L. 50, 28 A.2d 188 (Ct. Err. & App. 1942) (presence of a metal slug justified an inference of negligence in the preparation of the pie); Rickner v. Ritz Restaurant Co. of Passaic, 13 N.J. Misc. 818, 181 Atl. 398 (Sup. Ct.

the plaintiff makes out a prima facia case of negligence when he offers proof that he consumed deleterious food dispensed by the defendant from which illness resulted (all that is required under the second class of cases above), *and* when he offers affirmative evidence of the defendant's particular acts of negligence in the preparation of the food.[9]

In the instant case, the Mississippi court chose to follow the rule as laid down in the cases of the third classification. The court gave two grounds for its choice: first, since the fact of negligent preparation is capable of direct and demonstrative proof, it cannot be inferred from the fact of unwholesomeness; and second, the fact of causal connection is also capable of direct and demonstrative proof, and cannot be inferred from the fact of unwholesomeness. The court refused to permit the use of the doctrine of *res ipsa loquitur* in proving the fact of negligent preparation of the food, flatly stating that the *res ipsa* doctrine is not applicable to food poisoning cases. However, *res ipsa* has been used in cases where foreign, inanimate objects, such as chipped glass,[10] toothpicks,[11] and a small metal slug,[12] are present in the food. Such an application of the doctrine seems proper because while the food is not in the exclusive control of the defendant at all times when the foreign object could have gotten into the food, nevertheless, the high standard of care imposed on food-dispensers indicates that failure to discover such an object, regardless of its source, would constitute a breach of the defendant's duty of inspection. Thus the exclusive control requirement, so essential in *res ipsa* cases, would be satisfied. But in a case like the principal one, the presence of bacteria in food cannot be discovered except by an inspection by an expert with

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1935); Chisholm v. S. S. Kresge Co., 55 R.I. 422, 182 Atl. 4 (1935); Corin v. S. S. Kresge, 110 N.J.L. 378, 166 Atl. 291 (Ct. Err. & App. 1933) (New Jersey cases hold restaurateur to a duty of reasonable care in the preparation of food and the presence of an injurious foreign substance in such food is held to justify an inference of negligence). Clark Restaurant Co. v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931); George's Restaurant v. Dukes, 216 Ala. 239, 113 So. 53 (1927); Copeland v. Curtis, 136 S.E. 324 (Ga. App. 1926).

9. 22 AM. JUR. FOOD §114-116 (1939); Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N.E. 396 (1918).

10. Clark Restaurant Co. v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931).

11. Black v. Childs Co. of Providence, 58 A.2d 115 (R.I. 1948).

12. Panza v. Bickfords Inc. of New Jersey, 129 N.J.L. 50, 28 A.2d 188 (Ct. Err. & App. 1942).

a microscope. To place such a burden on the dispenser of food would be unreasonable. Thus, there is at least one justifiable distinction between cases applying the doctrine of *res ipsa* and the present case. Since, in the instant case, the presence of the bacteria could not have been reasonably detected, the bacteria might well have been present in the ingredients at the time the defendant received them from the wholesaler. In that event, the defendant would not have had the exclusive control necessary for the application of *res ipsa*. Inasmuch as the presence of bacteria cannot be discerned by a reasonable inspection, and since the bacteria may be present at the time the dispenser receives the food, the doctrine of *res ipsa* should have no general application in cases where the unwholesomeness is due to bacteria in the food.

The court further ruled that although there was a basis for an inference that the food was unwholesome when eaten, this inference cannot be the basis for a further inference that the eating of the contaminated corned beef caused the death of the deceased. In its conclusion that the plaintiff did not show that the eating of the food caused the husband's death, the court was strongly influenced by the fact that proof of such causal relationship could have been easily established by a chemical analysis. Some justification for the court's conclusion may be found in the fact that the deceased lived for eight days, six of which were spent in a clinic, after eating the corned beef. It would seem that while the proof of the type desired by the court may be obtained, it has been held in other cases not to be required;[13] and even in the absence of such proof, the inference which the plaintiff asked the court to draw was a most reasonable one under the circumstances. As pointed out in the dissenting opinion, in cases of this sort, as well as in negligence cases generally,[14] the usual rule is that the plaintiff need only produce evidence from which the jury may find an in-fact causal connection between the defendant's conduct and the plaintiff's injury, and it is not incumbent

13. Ogden v. Rosedale Inn, 189 So. 162 (La. App. 1939) (plaintiff was not required to have a chemical analysis made).

14. Palmer v. Rosedale Catering Co., 195 So. 859 (La. App. 1940); Black v. Childs Co. of Providence, 58 A.2d 115 (R.I. 1948); Danker *et al.* v. Fischer Baking Co., 5 N.J. Super. 248, 68 A.2d 774 (1949); Ward Baking Co. v. Frizzino, 27 Ohio App. 475, 161 N.E. 325 (1928) (presence of a needle in the cake bearing the name of Ward Baking Co. is an evidential fact from which negligence may be inferred).

on the plaintiff to exclude all other possible sources of injury.[15]

Assuming that the court was correct in not applying the doctrine of *res ipsa loquitur*, but that the court was incorrect in its strict requirements of proof to establish a causal connection, there still remains the necessity of proving that the defendant was guilty of negligence in preparing and failing to inspect the food. It is submitted that the plaintiff did prove a prima facie case when uncontroverted evidence was introduced which gave rise to an inference of unwholesomeness. Such an inference indicates negligence whether in the inspection or the preparation of the food. To hold that the defendant was not negligent in his inspection does not justify the holders that the defendant was not negligent in the preparation of the food. Clearly, someone was negligent before the plaintiff and her husband ate the food. Although it is true the special requirements for the *res ipsa loquitur* doctrine are not present, the defendant should have been called upon to produce evidence that he used due care in preparing the food, and in inspecting it. Especially is this true in view of the fact that the plaintiff herself noticed that the food did not taste right and did not eat it.[16] If there was something about the food which suggested unwholesomeness to a layman, that would seem to be enough of a basis on which to shift the burden of producing evidence to the defendant, who must be held to have more ability, as well as a greater duty, to detect unwholesomeness in food. Surely the defendant was in a better position to offer evidence as to the care used than was the plaintiff. Defendant should have been called upon to go ahead with that evidence. The defendant was not entitled to a directed verdict, but should have been required to produce evidence as to the care that he used in the preparation of the food. The issues should have been presented to a jury for determination.

JOSEPH A. MURPHY

15. Johnson v. Kanavos, 296 Mass. 373, N.E.2d 434 (1937) (plaintiffs must show that food was probably the cause, but they need not exclude every other possible cause).

16. C. C. Hooper Cafe Co. v. Henderson, 223 Ala. 579, 137 So. 419 (1931); Johnson v. Kanavos, 296 Mass. 373, 6 N.E.2d. 434 (1937); McCarley v. Wood Drugs, Inc., 228 Ala. 226, 153 So. 446 (1934); Lee v. Smith *et al.*, 168 So. 727 (La. App. 1936).