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Henry C. Kessler Jr.

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VENDEE'S RIGHT OF ACTION IN SALES OF DEFECTIVE
FOOD AND DRINK, ETC.
PENNSYLVANIA CASES CLASSIFIED

HENRY C. KESSLER, JR.*

One of the outstanding developments of our century has been the enormous increase in the manufacture for resale of all kinds of food products and wearing apparel. Out of this increased business has grown a great amount of litigation based on injuries sustained by the consumer. The courts have been called upon to define the standards of care required of these manufacturers and compounders in the light of new problems. The law of negligence and the law of sales have had to be re-examined with a view to the end to be attained—justice to both the business man and the public. A standard of care has had to be set which would protect the consumer from the careless, the indifferent or even the unscrupulous producer. These had to be made to realize that if they desired to supply the public with products which were capable of injuring, they had to maintain certain standards to avoid just such injury. On the other hand there were the rights of the legitimate business man to be protected as well, for the fostering of business is of benefit to the community and society.

In the field of foods, drinks, wearing apparel and similar articles the law has developed most interestingly. The growth is indicated by the necessity, in the early years of the century, for the Uniform Sales Act, although some legislative attempt to meet the problem had been made much earlier in some jurisdictions.¹ Some confusion is not unusual in the development of principles when they are being applied to expanding situations. One of the most perplexing problems which confronted the courts of Pennsylvania concerned the proper mode of bringing suit in these cases. Should the action be in *trespass* for negligence or *assumpsit* for breach of the implied warranty of wholesomeness? That this question still causes some concern today is evident from an examination of the cases.² Much of the confusion has, however, been cleared away in this state by the appellate court decisions, which have consistently gone into detail to clarify the matter. In 1931 the Superior Court was moved to note that:³

"There is considerable confusion in the decisions as to the theory of the liability in this class of cases. Some of them hold that an action is based upon negligence alone; others that it may be founded on an implied warranty."

*Catholic University of America, A. B. 1935, LL. B. 1937. Member Bar: Pennsylvania Supreme Court; York County (Pa.) Courts; U. S. District (M. D. Pa.) Court; author "Effect of Contributory Negligence of One of Several Co-Beneficiaries," 44 Dickinson L. Rev. 31 (1939).

¹In Pennsylvania this effort is represented by the Act of May 4, 1889, P. L. 87.

²For example, see *Gillott v. Harwitz-Solomn*, 37 Lack. Jur. 65 (1936); *Kuntz v. Pepsi-Cola Co.*, 89 P. L. J. 558 (1940).

³*Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 518; 156 A. 537, 538 (1931).

The court concluded that while "undoubtedly, an action in tort could have been brought . . . an action on the implied warranty of fitness in a sale of food or beverage may likewise be brought."⁴

The purpose of this paper is to review the Pennsylvania decisions involving actions growing out of sales of food, beverage, wearing apparel, etc., and in view of these decisions to classify them, and to set forth the rights and liabilities of the parties in the light of the developments thus far attained by the law. That the law is still in the development stage in this interesting field is at once apparent from a study of the cases.⁵

THE PLEADINGS

As indicated by the *Nock* case,⁶ the action in these cases may be in trespass for negligence or it may be in assumpsit for breach of the implied warranties imposed by the Sales Act.⁷ But this is not to say that always and in all cases involving food, drink or wearing apparel, and similar articles, this rule is applicable. It is governed by whom plaintiff is suing. For in some *important* instances there is no tort liability flowing from such sales, as for example, in a sale by the retailer of an article in its original container, of which doctrine more will be said later in this article. As against the manufacturer or compounder the suit may be in either trespass or assumpsit, but as against the immediate vendor, not the maker of the article, trespass will not be maintainable. In the latter situation plaintiff should sue the manufacturer. Even if the suit is brought in assumpsit, no judgment for want of an affidavit of defense may be taken.⁸ This is so because the nature of the evidence will be tortious, for the action on the warranties is really a "mixed" one since the damages sustained are due to negligence in improperly making the article. The pleadings should contain a brief, concise statement of the grounds of the cause, but it is not incumbent on the plaintiff to specify the object which caused his injury if he does not know what it was, as for example, where he swallowed it.⁹

Is there privity of contract sufficient to support an action by the consumer as against the manufacturer? In the *Nock* case,¹⁰ the Superior Court holds that the warranties do run to the consumer who has no opportunity to examine the goods for himself before purchase. In such cases he, "in effect, represents to each purchaser that the contents thereof are wholesome and suitable for the purpose for which they are sold, and the common law doctrine of *caveat emptor* does not prevail. If the purchaser is without opportunity to examine for himself, as when

⁴*Ibid.*

⁵*Ebbert v. Phila. Electric Co.*, 330 Pa. 257, 198 A. 323 (1938); *Barrett v. S. S. Kresge Co.*, 144 Pa. Super. 516, 19 A. (2d) 502 (1941).

⁶*Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 522; 156 A. 537, 539 (1931).

⁷Act of May 19, 1915, P. L. 543, Sec. 15; 69 P. S. 124 etc.

⁸*Bilk v. Abbotts Dairies*, 147 Pa. Super. 39, 23 A. (2d) 342 (1941); *Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 156 A. 537 (1931).

⁹*Murphy v. Yuengling Dairies Co.*, 34 D. & C. 355 (1939); *contra*: *Kohr v. Fox Baking Co.*, 31 York L. R. 161 (1917).

¹⁰*Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 521; 156 A. 537, 539 (1931).

he buys a bottle of beverage or a can of food, he has a right to rely upon the assurance of the manufacturer that the contents are fit and wholesome, and it is only just and reasonable to hold him responsible."¹¹ If the action is in trespass, the plaintiff sues on the basis of the negligence which caused him injury. His suit may be against the manufacturer.¹² In actions of this nature it is not necessary that plaintiff specify the particular dereliction which resulted in the harm.¹³ It is necessary that plaintiff aver that the defective food or the bottle containing the foreign substance was sold or delivered by defendant. There must be some relationship between the article sold and the defendant.¹⁴

THE IMMEDIATE VENDOR

Tort Liability:

1. "The original package" doctrine had its origin in Pennsylvania in the case of *West v. Emanuel*.¹⁵ It is one of the more important doctrines formulated by the courts in the conflict between buyer and seller. Under it, one who purchases goods for resale in their original container assumes no tort liability if the goods cause injury to the user.

2. If the goods, though in a sealed package, are in such a condition that the dealer knows, or by his experience as a dealer should know, that they are unwholesome, he may be sued for his own negligence in selling under such conditions.¹⁶

3. If the dealer sells articles, though in their original package, and the user is injured by defects therein which the dealer by a "cursory" inspection could have discovered, he will be liable for breach of duty to exercise the care of a reasonably prudent man under such circumstances.¹⁷

4. If the buyer relies on the seller's "profession of competence and care" in purchasing the article, the vendor will be liable for failure to exercise reasonable care to supply the articles in a "safe condition for use."¹⁸

5. Where the product is manufactured by a third person but the dealer sells it as his own, he will be liable as though he were the manufacturer.¹⁹

¹¹*Ibid.*

¹²*Rozumailski v. Phila. Coca-Cola Bottling Co.*, 296 Pa. 114, 145 A. 700 (1929); *Ebbert v. Phila. Electric Co.*, 330 Pa. 257, 198 A. 323 (1938); *Madden v. Great A. & P. Tea Co.*, 106 Pa. Super. 474, 162 A. 687 (1932).

¹³*Rozumailski v. Phila. Coca-Cola Bottling Co.*, 296 Pa. 114, 145 A. 700 (1929).

¹⁴*Bilk v. Abbotts Dairies*, 147 Pa. Super. 39, 23 A. (2d) 342 (1941).

¹⁵198 Pa. 180, 47 A. 965 (1901).

¹⁶RESTATEMENT OF TORTS, Sec. 402 and commentary thereto.

¹⁷RESTATEMENT OF TORTS, Sec. 399 and Sec. 402. This is not intended to convey the impression that there is a *duty* to make a "cursory" inspection. It means rather that where the seller has some *special* knowledge enabling him to observe a likely harm and fails to communicate this to the buyer, it is negligence on his part and he will be liable if injury results on this account.

¹⁸RESTATEMENT OF TORTS, Sec. 401.

¹⁹RESTATEMENT OF TORTS, Sec. 400.

6. The vendor will be liable for failure to *inspect* goods sold by him other than in original packages, if injury results from such failure.²⁰

Contract Liability:

The immediate vendor will be liable, under Section 15 of the Uniform Sales Act, for breach of the implied warranties of wholesomeness and fitness even though the goods were sold in their original package.²¹ This has been very aptly referred to as the "Achilles heel" of the vendor who relies on the "original package" doctrine to escape liability. A recent decision permits recovery against the dealer, on the warranty, for oyster shells in a sealed can of oysters.²²

Tort Liability—The Manufacturer or Compounder:

1. Under the "original package" doctrine, the manufacturer is liable to the ultimate consumer for injuries caused by defective products.²³

2. If the goods are under the exclusive control of the one who supplies them for resale as where for example, although he is not the actual manufacturer, he packs and seals the goods he will be liable in either trespass or *assumpsit*.²⁴

3. If the manufacturer or compounder negligently puts an article on the market, he may be sued for injuries resultant therefrom, though they were not packed in original containers. Conceivably the action could be against both the manufacturer and the immediate vendor as joint tort-feasors if such were the situation presented.²⁵

4. Where the manufacturer uses due care there is no liability for "latent unsuspected defects."²⁶

5. Purveyors of food, such as restaurants, are liable in trespass for the sale of defective food.²⁷

Contract Liability:

1. An action for breach of the implied warranties will lie against a manufacturer or compounder for defects negligently arising from the manufacture or compounding whereby the purchaser is injured. The warranties are not limited

²⁰Ebbert v. Phila. Electric Co., 330 Pa. 257, 198 A. 323 (1938).

²¹Eldredge, *Vendor's Tort Liability*, 89 U. OF PA. L. REV. 306, 307 (1941).

²²Bonenberger v. Pitt. Mercantile Co., 345 Pa. 559, 28 A. (2d) 913 (1942). This is a case of first impression in Pennsylvania and was decided by a divided court. See 47 DICK. L. REV. 124.

²³West v. Emanuel, 198 Pa. 180, 47 A. 965 (1901); Catani v. Swift & Co., 251 Pa. 52, 95 A. 931 (1915); Rozumailski v. Phila. Coca-Cola Bottling Co., 296 Pa. 114; 145 A. 700 (1929); Elizabeth Arden Inc. v. Brown, 107 F. (2d) 938 (C.C.A. 3d 1938).

²⁴Madden v. Great A. & P. Tea Co., 106 Pa. Super. 474, 162 A. 687 (1932).

²⁵Race v. Manko, 341 Pa. 17, 17 A. (2d) 422 (1941).

²⁶McSorley v. Katz, 53 Pa. Super. 243 (1913); Coralnick v. Abbotts Dairies Milk Co., 337 Pa. 344, 11 A. (2d) 143 (1940).

²⁷West v. Katsafanas, 107 Pa. Super. 118, 162 A. 685 (1932); Levy v. Horn & Hardart Bk. Co., 103 Pa. Super. 282, 157 A. 369 (1931); Campbell v. G. C. Murphy Co., 122 Pa. Super. 342, 186 A. 269 (1936); McCabe v. Penna. R. R. Co., 311 Pa. 229, 166 A. 843 (1933); Martin v. Walgreen Co., 4 Fay. L. J. 10 (1940).

to sales of food or beverage²⁸ but extend as well to wearing apparel²⁹ and to facial lotions³⁰ and similar products.

2. Purveyors of food, such as restaurants, may be sued on the theory of breach of the implied warranties.³¹

3. The non-liability for "latent unsuspected defects" is equally applicable to suits in assumpsit as in trespass.³²

STANDARD OF CARE

A *high degree of care* is required of those engaged in the business of manufacturing, purveying or compounding food, beverage, lotions, etc., "to see that the product is free from foreign or deleterious substances that injuriously affect the user."³³ "All reasonable, scientific and up-to-date methods must be employed to obviate the presence of any such injurious substances, and, even where such methods are employed, where such substances get into the product, whose presence there possibly could be due to that uncertain human quality,—carelessness, somewhere along the line, the manufacturer is responsible to a member of the public injured thereby."³⁴ If the suit is properly maintainable against the immediate vendor, as outlined in the above situations, his duty is the same as that of a manufacturer, that is, a high degree of care is required.

Under the doctrine of the recent case of *Ebbert v. Philadelphia Electric Co.*,³⁵ it would appear that the immediate vendor is under a general duty to inspect before sale articles not sold in the original packages or he will be held accountable for injuries which an inspection could have prevented. The reader is referred to a most informative series of articles on this point where the subject is exhaustively dealt with by Professor Laurence H. Eldredge of the University of Pennsylvania and Professor D. J. Farage of Dickinson School of Law.³⁶ Whether or not, for our purpose the duty under the *Ebbert* case is a new one or one which ought to exist, and the idea of its existence is not negated by the cases, the fact is that there would seem to be such a duty. Mr. Justice Drew, dissenting in the *Ebbert* case, said:³⁷

²⁸Rozumailski v. Phila. Coca-Cola Bottling Co., 296 Pa. 114, 145 A. 700 (1929); West v. Katsafanas, 107 Pa. Super. 118, 162 A. 685 (1932).

²⁹Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 19 A. (2d) 502 (1941).

³⁰McDaniel v. Wildroot Inc., 35 Lack. Jur. 134 (1934).

³¹West v. Katsafanas, 107 Pa. Super. 118, 162 A. 685 (1932).

³²Coralnick v. Abbotts Dairies Milk Co., 337 Pa. 344, 11 A. (2d) 143 (1940).

³³Menaker v. Supplee-Wills-Jones Milk Co., 125 Pa. Super. 76, 189 A. 714 (1937).

³⁴Rozumailski v. Phila. Coca-Cola Bottling Co., 296 Pa. 114, 116, 145 A. 700 (1929).

³⁵330 Pa. 257, 198 A. 323 (1938).

³⁶See Eldredge, *Vendor's Tort Liability*, 89 U. OF PA. L. REV. 306 (1941); Farage, *Must a Vendor Inspect Chattels Before Sale—An Answer*, 45 DICK. L. REV. 159 (1941); *The Reply*, by Professor Eldredge, 45 DICK. L. REV. 269 (1942); *Rejoinder*, by Professor Farage, 45 DICK. L. REV. 282 (1941); also the *Note* by Professor Eldredge following the *Rejoinder*, 45 DICK. L. REV. 291 (1941).

³⁷330 Pa. 257, 270, 198 A. 323, 329 (1938).

"If I read the opinion of the majority correctly, it imposes the duty of inspection upon vendors of all articles not sold in sealed packages, wherever a defect would make the article sold dangerous for use."

BURDEN OF PROOF

While the burden of proof is, of course, on the plaintiff, his is not a heavy one in these cases for he is aided by an *inference* of negligence³⁸ entitling him to go to the jury upon showing the foreign substance and injury therefrom.³⁹ In the *Rozumailski* case, the Supreme Court had the following to say:

"It is a case where the accident proves its own negligent cause, and the jury would be permitted to infer negligence, . . . from the fact that ground glass had been found in the bottom of the bottle. The particular dereliction is not shown, nor was it necessary; the negligent act is demonstrated by showing glass in the bottom of the bottle."

and, in the *Madden* case, the Superior Court stated:

"Even though the defendant offered evidence uncontradicted to show that he was not negligent and made reasonable inspection, and there was no direct contradiction thereof, the plaintiff having shown the presence of the mouse in the tea, it remained for the jury to say whether the explanation offered by defendant indicated the use of proper care."

However, it is incumbent on the plaintiff to prove that the foreign substance was contained in a bottle or container which had been marketed by the defendant company. In the recent case of *Bilk v. Abbotts Dairies*⁴⁰ plaintiff purchased a bottle of milk from the immediate vendor which bottle bore the name of the defendant company. Upon drinking some of the milk he was injured by broken glass contained within the bottle. Plaintiff neither averred nor produced evidence to show that the defendant company sold or supplied the dealer with the bottle of milk purchased by him. The trial court nonsuited him and the Superior Court affirmed this action. The opinion states: "Neither was there any averment or proof by the plaintiff in this case that the defendant had sold and delivered the bottle of milk in question to the dealer from whom plaintiff made the purchase." It is submitted that this case places an undue burden on the plaintiff. Where the manufacturer's name clearly appears on the bottle or cap, as it does in this case, plaintiff ought to be entitled to rely on that and it ought to be sufficient to raise an inference that the product was marketed by the company whose name it bears.

MEASURE OF DAMAGES

It is well established that consequential damages are recoverable for breach of the implied warranty of wholesomeness.⁴¹ Williston states⁴² that where un-

³⁸Watkins v. Prudential Life Ins. Co., 315 Pa. 497, 173 A. 644 (1934).

³⁹Rozumailski v. Phila. Coca-Cola Bottling Co., 296 Pa. 114, 145 Pa. 700 (1929).

⁴⁰*Ibid.* at 118, 145 A. 700, 701 (1929).

⁴¹West v. Katsafanas, 107 Pa. Super. 118, 162 A. 685 (1932).

⁴²SALES (2d Ed. 1924) Sec. 614.

wholesome food is sold to humans under an express or an implied contract the seller is subject "to responsibility for the consequences." The Sales Act⁴³ provides: "The measure of damage for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty." While strictly speaking there is a difference between "direct loss" and "consequential damages" in that the former refers to loss immediately resulting and "consequential" refers to injury indirectly but naturally flowing from a wrongful act⁴⁴ in suits for breach of the implied warranties, the damages are essentially tortious in that the breach results from the negligence of the defendant, and are not such as are fixed or controlled by the contract.

In order to be entitled to damages the plaintiff must establish actual physical injury. "There can be no recovery for injuries resulting from fright, or a nervous shock, unaccompanied by physical injury."⁴⁵ But, if it is shown that the person of plaintiff was violated, there may be a recovery for fright or mental anguish which produces physical illness or other physical disturbance.⁴⁶ Merely showing that a wrong has been perpetrated does not entitle one to money damages. Two things must occur before one has a cause of action, namely, wrong and damage. "... it is the conjunction of damage and wrong that creates a tort and there is no tort if either damage or wrong is wanting."⁴⁷ It would seem that if the action were on the contract and plaintiff proved the breach of warranty, in that the goods were defective (a prima facie case) but could prove no damages, that he would be entitled to contract damages in the absence of satisfactory proof of due care by the defendant." He would, in this instance, be restricted to the price paid for the defective goods.

CLASSIFICATION OF THE CASES

For convenience the following classification of the reported decisions will be used:

- (a) Restaurant cases
- (b) Beverage cases
- (c) Food cases (i. e. for consumption off the premises)
- (d) Wearing apparel cases
- (e) Drugs, cosmetics and lotions
- (f) Household appliances
- (g) Exploding container cases

⁴³Act of May 19, 1915, P. L. 543, 563; 69 P. S. 314.

⁴⁴*Re Soldier's & Sailor's Memorial Bridge*, 308 Pa. 487, 162 A. 309 (1932); *Com. v. Puloka*, 323 Pa. 36, 185 A. 801 (1936).

⁴⁵*Koplin v. L. K. Liggett Co.*, 322 Pa. 333, 335, 185 A. 744 (1936).

⁴⁶*Menaker v. Supplee-Wills-Jones Milk Co.*, 125 Pa. Super. 76, 189 A. 714 (1937).

⁴⁷1 COOLEY ON TORTS (4th Ed. 1932), Sec. 46.

(a) RESTAURANT CASES

In *Levy v. Horn and Hardart Bk. Co.*⁴⁸ the customer suffered a lacerated throat as the result of coughing up a small screw in a cup of coffee. Recovery was had in trespass, in the amount of \$524. *Campbell v. G. C. Murphy Co.*⁴⁹ was an action in trespass for serving a contaminated chicken salad sandwich. Plaintiff received a verdict of \$1000, which was, however, reversed by the appellate court for errors of the trial judge. The Superior Court said: "The circumstances of the present case, we believe, were sufficient to form the basis for an inference by the jury that the sandwich furnished plaintiff was unwholesome." In this case plaintiff, who had only a cup of coffee on the day in question, ate a sandwich at defendant's restaurant and within a half hour thereafter complained of feeling ill. A few hours later a physician who was called diagnosed her illness as food poisoning. It was also shown that a sister who was with plaintiff ate the same thing and became ill simultaneously and in a similar manner. On this testimony an inference of negligence was raised which shifted the burden to defendant to prove due care, the question of whether it had done so being for the jury. The judgment of the trial court was reversed for improperly admitting testimony concerning "admissions" by employees of the defendant, who were without authority to do so. *McCabe v. Pennsylvania R. R.*⁵⁰ is a case where a passenger on defendant's train was served a jelly omelet and sustained cuts and other damage. Investigation revealed that the top of the jelly jar was freshly broken. The verdict of the jury gave plaintiff \$15,000 on which judgment was entered. This was reversed on appeal because of the refusal of the court below to grant a new trial on the basis of after discovered evidence involving inconsistent statements of plaintiff pertinent to the damages he allegedly suffered. *Koplin v. Louis K. Liggett*⁵¹ is a leading case on the element of damages in these situations. There plaintiff noticed a centipede on her spoon with which she was about to partake soup. The sight caused her mental anguish and nausea set in making her ill. Recovery in her trespass action was denied on the doctrine that damages are not recoverable for fright or mental anguish unaccompanied by physical injury. In the now famous case of *West v. Katsafanas*,⁵² the suit was in assumpsit on the implied warranties and resulted in a \$537 verdict for the plaintiff. The judgment was affirmed, the appellate court holding: (a) that in a transaction where one purchases food in a restaurant for consumption a sale takes place and the warranties attach; (b) that the implied warranties were breached by selling plaintiff a pork sandwich which caused her to become ill from food poisoning. *Martin v. Walgreen Co.*⁵³ was in trespass for negligently allowing a water bug to be baked in a meat pie. Plaintiff uncovered

⁴⁸103 Pa. Super. 282, 157 A. 369 (1931).

⁴⁹122 Pa. Super. 342, 186 A. 269 (1936).

⁵⁰311 Pa. 229, 166 A. 843 (1933).

⁵¹322 Pa. 333, 185 A. 744 (1936).

⁵²107 Pa. Super. 118, 162 A. 685 (1932).

⁵³4 Fay. L. J. 10 (1940).

the foreign substance on her plate and noting that the legs were missing became nauseated from the thought that she might have eaten them. There was no proof that she had. In nonsuiting her the trial court held that the case was ruled by the *Koplin* case.

(b) BEVERAGE CASES

The leading case in this category is *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*,⁵⁴ which resulted in a \$3000 judgment for plaintiff for injuries caused by the negligence of the defendant in allowing *ground glass* to be present in a bottle of beverage. In *Nock v. Coca Cola Bottling Works*,⁵⁵ the suit was in trespass for damage done by negligently permitting a worm to be in the bottled beverage. Plaintiff felt the worm, part of which was still in the bottle, crawling on her lips. Illness followed this disturbing observation for which the jury allowed \$500. *Cunningham v. Coca-Cola Works*⁵⁶ was also a case where the negligence consisted of allowing a worm to be present in the bottled beverage. The verdict of \$450 was reduced to \$250 for certain errors of the trial court in allowing the jury to pass on items of damage, some of which were erroneously before it. *Bilk v. Abbott Dairies*⁵⁷ is the case where plaintiff was injured by glass in a bottle of milk but was nonsuited for failure to aver and prove delivery of the particular bottle by defendant company.

(c) FOOD CASES

(Purchased for Consumption Off the Premises.)

In *Madden v. Great A. & P. Tea Co.*⁵⁸ wife plaintiff became ill after drinking some tea purchased in a sealed package from defendant's store. Investigation showed part of a "dead and crushed mouse" in the package. Suit was in trespass and plaintiffs (the husband was also a plaintiff) recovered \$600 for this negligence. In this case the "original package" rule was applicable since defendant exercised exclusive control over the tea from the date of its importation until the sale, and was the packer of the tea. *Menaker v. Supplee-Wills-Jones Milk Co.*⁵⁹ resulted in a verdict for plaintiff for illness caused by negligently permitting part of a dead mouse to be in a can of ice cream. The consumer bit into the cream and discovered the mouse in his mouth. The facts showed that the foreign substance was in the ice cream when it left the manufacturer. *Galda v. Maurer's Dairy Co.*⁶⁰ differed from the *Menaker* case in that there the ice cream was scooped by dipper from a bulk container. The court held in the *Galda* case that the facts did not raise an inference (the court says "presumption") of negligence and plaintiff was

⁵⁴296 Pa. 114, 145 A. 700 (1929).

⁵⁵102 Pa. Super. 515, 156 A. 537 (1931).

⁵⁶83 P. L. J. 439 (1934).

⁵⁷147 Pa. Super. 39, 23 A. (2d) 342 (1942).

⁵⁸106 Pa. Super. 474, 162 A. 687 (1932).

⁵⁹125 Pa. Super. 76, 189 A. 714 (1937).

⁶⁰15 Northumb. L. J. 54 (1941).

nonsuited in her trespass action. *Radvan v. Co-ed Candy Co.*⁶¹ involved an action for injuries sustained from biting into a piece of candy containing ground glass. The plaintiff recovered \$25. *Rozonsky v. Union Bakery*⁶² was an action in trespass for negligently allowing a pin to be encased in a loaf of bread. The verdict of the jury was for the defendant. In *Catani v. Swift & Co.*,⁶³ a leading case, plaintiff recovered \$3000 for the negligence of the company in marketing pork causing sickness from trichinae. This was followed a few years later by the *Tavani* case⁶⁴ which is very similar in its facts but in which the same defendant succeeded in establishing due care and the jury returned a verdict for it. The appellate court held that defendant had produced sufficient evidence of due care to sustain the verdict. *Werner v. Armour Co.*⁶⁵ was an unsuccessful effort to hold defendant liable for injuries sustained from eating liverwurst containing glass. There was no proof that defendant retained control over the article which was not sealed in its original container. The case of *Kierstein v. Cudaby Co.*⁶⁶ was an effort to infer the defendant's negligence from a breach of a Federal penal statute regulating the method of packing meats. Plaintiff was nonsuited. *Quinn v. Swift & Co.*⁶⁷ resulted in a \$560 verdict, the injury being illness produced by eating sausages containing pieces of sharp metal contained in the unbroken skins of the meat. This opinion by Johnson, J., exhaustively reviews the pertinent authorities in all the jurisdictions. *Graham v. Swift & Co.*⁶⁸ was an action in trespass for injuries sustained by eating a product of the defendant containing glass and resulted in a \$500 verdict and judgment. In *Bonenberger v. Pitt. Merchantile Co.*, the Pennsylvania Supreme Court allowed the consumer to recover from the immediate vendor for oyster shells in a can of oysters which when eaten cut the diner's mouth.⁶⁹

(d) WEARING APPAREL

The case of *Checchio v. S. Goldman Sons*⁷⁰ was a suit in trespass against the immediate vendor for injuries allegedly caused by an injurious substance in the leather of slippers resulting in foot poisoning. Plaintiff was nonsuited, the defendant not being the manufacturer of the shoes and selling from regular stock and not being aware of anything to make him suspicious of a defect in the article. One is forced to question the wisdom of bringing this suit in the manner in which it was done. It seems apparent that trespass could have been maintained against the manufacturer, or plaintiff could have proceeded against the dealer on the im-

⁶¹83 P. L. J. 562 (1934).

⁶²83 P. L. J. 378 (1934).

⁶³251 Pa. 52, 95 A. 931 (1915).

⁶⁴262 Pa. 184, 105 A. 55 (1918).

⁶⁵320 Pa. 440, 183 A. 48 (1936).

⁶⁶80 F. (2d) 518 (C.C.A. 3d, 1935).

⁶⁷20 Fed. Suppl. 234 (M.D. Pa. 1937).

⁶⁸83 P. L. J. 642 (1935).

⁶⁹345 Pa. 559, 28 A. (2d) 913 (1942).

⁷⁰8 D. & C. 1 (1926).

plied warranties. This case, however, was tried in 1926, at which time there was considerable confusion in the manner of bringing suits of this nature. In *Barrett v. S. S. Kresge Co.*,⁷¹ a very recent decision, the Superior Court held that there can be no recovery for breach of warranty resulting from a "buyer's individual idiosyncrasy." The case involved the purchase of a cotton dress by plaintiff at defendant's store as the result of wearing which a severe skin irritation was contracted. Defendant showed by competent testimony that the dress contained no substance which would cause injury to the skin of a normal person. The verdict for \$1600 was set aside by the court on motion *non obstante veredicto*, and the Superior Court affirmed this action. The opinion by Baldrige, J., does say, however, that the implied warranties attach to a sale of wearing apparel. "No sound distinction," the Judge writes,⁷² "can probably be logically drawn between a noxious thing taken internally and wearing apparel containing a poisonous dye, meant to be worn next to the skin."⁷³

(e) HOUSEHOLD APPLIANCES

Ebbert v. Philadelphia Electric Co.,⁷⁴ discussed above, was a suit in trespass against the immediate vendor for injuries resulting to the wife plaintiff from a defective washing machine wringer. A verdict thereon for \$1108 was affirmed by the Supreme Court. This is the case above referred to, which would seem to impose a general duty of inspection on vendors of articles sold other than in their original package. Defendant had "warranted" that the device was safe. Mr. Justice Maxey, speaking for the Court, says that the facts of the case do not present a situation where the dealer was "a mere conduit from the manufacturer to the consumer." Pointing out that the dealer had "warranted" the safety of the wringer, Justice Maxey states that he breached a duty which he was paid to perform, the price of the article reflecting this. The Court, through Mr. Justice Maxey, says: "While not differing with the trial court and the Superior Court in basing defendant's liability on breach of warranty, we think an equally solid basis for recovery is *defendant's inadequate performance of the duty of inspection and demonstration.*" (Italics supplied.) Mr. Justice Drew dissents, on the ground that there is no such thing as a duty of inspection on a vendor of articles, imposed by law.⁷⁵ The Justice, after pointing out that he considers the majority opinion as imposing such a duty, writes: "I think the holding goes far beyond the warrant of any satisfactory authority anywhere." The writer of the dissenting opinion further implies that he disagrees with the "creation" of what he feels a "new" duty, for he states: "It seems to me to place an unfair burden on business." In *Barouge v. Frank & Seder, Inc.*⁷⁶ plaintiff recovered a \$1300 verdict, the defendant's negli-

⁷¹144 Pa. Super. 516, 19 A. (2d) 502 (1941).

⁷²*Ibid.* at 520, 19 A. (2d) 502, 503 (1941).

⁷³For cases in other jurisdictions, see 27 A. L. R. 1504; 121 A. L. R. 460.

⁷⁴330 Pa. 257, 268, 198 A. 323, 330 (1938).

⁷⁵*Ibid.* at 270, 198 A. 323, 332 (1938).

⁷⁶35 Lack. Jur. 134, 22 D. & C. 287 (1934).

gence consisting of supplying a visibly defective bed and subsequently assuring plaintiff of its safety. The bed collapsed the first time it was used and plaintiff was hurt when she was thrown to the floor. *Lundy v. Devitt*⁷⁷ involved a ladder which fell when the plaintiff stepped on it in defendant's store. The Court set aside a verdict for the plaintiff on the ground that there was insufficient evidence to establish that the ladder was defective or unsafe. The question of plaintiff's contributory negligence was also involved.

(f) DRUGS, COSMETICS AND LOTIONS

West v. Emanuel,⁷⁸ the origin of the "original package" doctrine in Pennsylvania, was an action for wrongful death against a druggist from whom decedent had purchased a package of headache powder. Death followed shortly after some of the powder had been taken. Plaintiff was nonsuited, which action was affirmed by the Supreme Court, which stated: "The druggist was not required to analyze the contents of each bottle or package he receives." *McDaniel v. Wildroot Co.*⁷⁹ resulted in a recovery for injury to the head from using defendant's tonic, the suit being on the implied warranty. *Elizabeth Arden Inc. v. Brown*⁸⁰ was an action against both the compounder and the immediate vendor of a lotion. The latter was held to come under the "original package" doctrine and as to him a nonsuit was entered for that reason. The manufacturer was held not liable because plaintiff had not shown any negligence inasmuch as the lotion was not proven unsafe for use and did not contain the elements it was alleged to contain by plaintiff.⁸¹

(g) EXPLODING CONTAINERS

The first of the cases of this type is *McSorley v. Katz*,⁸² in which the lid "or something" flew off a can of molasses when plaintiff was opening it and injured her in the face and eye. Suit was against the grocer for breach of warranty. Plaintiff was denied recovery on the doctrine of "latent, unsuspected defects." *Sweeney v. Blue Anchor Beverage Co.*⁸³ was brought by the storekeeper against the compounder and bottler. She had purchased the bottles in a case which she had placed on the floor. While turning to wait on a customer, plaintiff's dress "caught" on one of the bottles, which was projected to the floor where it exploded, and plaintiff was injured by the flying glass. Plaintiff alleged that the company

⁷⁷28 Del. Co. Rep. 210 (1938).

⁷⁸198 Pa. 180, 47 A. 965 (1901).

⁷⁹35 Lack. Jur. 134, 22 D. & C. 287 (1934).

⁸⁰107 F. (2d) 938 (C.C.A. 3d, 1939).

⁸¹See *Henderson v. National Drug Co.*, 343 Pa. 601, 23 A. (2d) 743 (1942), holding that the plaintiff had failed to prove that the injury was due to the extract manufactured by defendant where abscesses formed after injection by the physician. The liability of the physician was established, however, where he used the substance and same needle with knowledge of harm resulting to others from this identical method of treatment.

⁸²53 Pa. Super. 243 (1913).

⁸³325 Pa. 216, 186 A. 331 (1937).

was negligent in putting too great an amount of pressure in the bottles and also that the bottles were defective. In affirming a nonsuit, the Supreme Court agreed that plaintiff had failed to show any want of due care on defendant's part especially in view of the fact that it was her careless act in knocking the bottle down that brought on the explosion. No other bottle burst and there was nothing to show that without the force supplied inadvertently by plaintiff that it would have exploded. In the recent case of *Coralnick v. Abbotts Dairies*⁸⁴ the principle of non-liability for "latent and unsuspected" defects was again applied. In this case plaintiff, a grocer, was engaged in putting milk which he had received shortly before, into his refrigerator when the bottle he was holding suddenly burst, injuring him. The company did not manufacture the bottle. The Supreme Court, in affirming a nonsuit, stated:

"The limit of its (defendant's) duty was to provide against defects discernible upon reasonable inspection and to handle the bottles with reasonable care."

Plaintiff was unable to show that defendant had failed in any of these duties but contended that the doctrine of *res ipsa loquitur* was applicable. In denying this the court points out that defendant did not make the bottles and the condition causing the accident could not be said to be one over which it exercised exclusive control.⁸⁵

The case of *Kuntz v. Pepsi-Cola Co.*⁸⁶ recently decided by the Allegheny County Common Pleas Court, is in some degree an unusual one. There plaintiff storekeeper was about to open a bottle for a customer but before she had applied any force it exploded and she was injured by the shattered glass. The verdict was for plaintiff which was allowed to stand by the court on motion for judgment n. o. v. The court found it necessary to distinguish the three cases cited, under this heading, holding the *Coralnick* case distinguished by reason of the fact that in the instant case defendant admitted knowledge that its bottles had burst in the past although testifying that it had changed its bottles and used one demonstrated as better capable of withstanding pressure. It is submitted that this was testimony of due care, which was the "limit of its duty."⁸⁷ Although the suit was an action in assumpsit on the breach of implied warranties, it is submitted that the question was properly one for the jury, although it is difficult to reconcile the court's discussion of the doctrine of *res ipsa loquitur*. Nowhere in the case is there any discussion of what warranty the plaintiff is suing on. If the case be deemed an action in negligence, as it seems to have been on trial, perhaps the manner in which suit was brought will not be fatal to the plaintiff. But it is to be noted that there

⁸⁴337 Pa. 344, 11 A. (2d) 143 (1940).

⁸⁵*Norris v. Phila. Electric Co.*, 334 Pa. 161, 5 A. (2d) 114 (1939).

⁸⁶89 P. L. J. 558 (1940).

⁸⁷*Coralnick v. Abbotts Dairies Milk Co.*, 337 Pa. 344, 11 A. (2d) 143 (1940).

are no Pennsylvania cases holding that the warranty of merchantability extends to the container. A very similar case arose in Illinois and it was there held that the container is not included in the warranty of merchantability.⁸⁸

DOCTRINE OF BAXTER V. FORD MOTOR CO.

No discussion of this kind would be complete without some mention of the now famous case of *Baxter v. Ford Motor Co.*⁸⁹ Plaintiff had purchased a new car, relying on the representations of the dealer that the car was equipped with a shatter-proof windshield. To "demonstrate" this the dealer had shown the plaintiff advertising matter supplied by the manufacturer in which this claim was made. While riding in the car a pebble flew against the windshield which immediately shattered, injuring plaintiff. He brought suit for breach of warranty. On trial *no negligence* on the part of the Ford Company was shown but it was shown that plaintiff could not have purchased a better windshield. The trial judge nonsuited plaintiff on the theory that there was no privity to support the action. This was reversed by the Supreme Court of Washington which permitted recovery. The Court compared the case with the situation where a member of the public is injured because a manufacturer of drugs has wrongly labelled a bottle. Perhaps, however, the *gist* of the decision is to be ascertained by the following excerpt from the opinion:

"Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit a manufacturer of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; *and then, because there is no privity* (italics supplied) existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily discernible."

Social expediency, then, would seem to be the real answer to the *Baxter* case, and whether we are in accord with this policy or not, it must be conceded that it does present a fascinating legal problem. It is almost impossible to "classify" the case into the usual channels, and we join with Professor Paul A. Leidy in wondering if the Washington Court has not "created" a new tort.⁹⁰ We cannot opine what the Pennsylvania courts will do if a similar problem comes before them. But our courts have shown a reluctance to "create" new causes of action, as for example defamation by radio against the originator of the defaming program.⁹¹

⁸⁸*Crandall v. Stop & Shop*, 288 Ill. App. 543; 6 N. E. (2d) 685 (1937).

⁸⁹168 Wash. 456, 12 P. (2d) 409 (1932); 15 P. (2d) 1118 (1932); 179 Wash. 123, 35 P. (2d) 1090 (1934).

⁹⁰Leidy, *Another New Tort?*, 38 MICHIGAN L. REV. 964 (1940); 7 CURRENT LEGAL THOUGHT 168 (1940).

⁹¹*Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A. (2d) 302 (1930).

"BALANCING THE EQUITIES"

One wonders if new problems can always be answered by old principles. Perhaps, as society becomes more and more mechanized old principles may sometimes have to be discarded in favor of new ones. It is, of course, a step to be taken most cautiously lest injury be done those who, in good faith, rely on established modes of conduct. Lord Coke's famous and oft' quoted, "The known certainty of the law is the safety of all" is a principle well worth preserving wherever it can be done without doing some greater harm. The equities in favor of the vendor must be carefully balanced against those in favor of the public. We have attempted in this paper to show how the Courts of Pennsylvania have been doing that very thing by reviewing the reported decisions. This "balancing of the equities" is the peculiar duty of the courts, especially the appellate tribunals, for it is of the very essence of the judicial function. Decisions, for example, like the *Emanuel* case,⁹² the *Rozumailski* case,⁹³ the *West* case,⁹⁴ the *Nock* case,⁹⁵ the *Ebbert* case,⁹⁶ the *Catani* case,⁹⁷ the *Coralnick* case,⁹⁸ the *Barrett* case,⁹⁹ are tremendously far reaching in their effect. Every manufacturer, wholesaler, retailer and every consumer of these foods or drinks or wearing apparel or similar products is materially concerned.

The public today is served with better and more wholesome food and drink and no small part of the credit for this belongs to the courts which have defined and insisted upon the maintenance of high standards which the compounder must meet. It is not only in the recovery had by an injured plaintiff that the courts wield their power for good. It is in the norms set up by them that our real benefit comes. The decisions set the required standard of conduct, they are beacons of light to the manufacturer and protective shelters for the consumer. It is by meeting these requirements on the part of business that public confidence is attained and increased sales merited. The legitimate business man gains while the business charlatan is driven off. Verily, we may say, in humble thanksgiving, "God save the Commonwealth and the Honorable Court."

York, Pa.

HENRY C. KESSLER, JR.

⁹²198 Pa. 180, 47 A. 965 (1901).

⁹³296 Pa. 114, 145 A. 700 (1929).

⁹⁴107 Pa. Super. 118, 162 A. 685 (1932).

⁹⁵102 Pa. Super. 515, 156 A. 537 (1931).

⁹⁶330 Pa. 257, 198 A. 323 (1938).

⁹⁷251 Pa. 52, 95 A. 931 (1915).

⁹⁸337 Pa. 344, 11 A. (2d) 143 (1940).

⁹⁹144 Pa. Super. 516, 19 A. (2d) 502 (1941).