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Integrity of the Bottle

By HENRY V. PENNINGTON

One of the most interesting rules in the law of torts in Kentucky is the rule encompassed in the phrase, "Integrity of the Bottle" which first made its appearance in 1950 in the case of East Kentucky Beverage Co. v. Stumbo.¹ The rule was an outgrowth of the adoption by the Kentucky court of a rule found in a Tennessee case.² In the Stumbo case the plaintiff found a contraceptive in his mouth after drinking part of the contents of a popular soft-drink. The Court, through Judge Cammack, stated:³

We do not think the doctrine of res ipsa loquitur (that of presumptive or prima facie negligence) should be extended to cover a situation such as we have before us. As pointed out by the Supreme Court of Tennessee, in the case of Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W. 2d. 721, 171 A.L.R. 1200, a higher degree of proof should be required in the case of a bottled drink to show that there has been no reasonable opportunity to tamper with the bottle or its contents in the interim between the physical control of the bottler and that of the consumer.

Thus, in cases involving foreign matter in soft-drinks the rule was established placing a burden of proof on the consumer bordering on the impossible in the majority of cases.

To enable the reader to view Kentucky's approach to the problem presented in these cases prior to the Stumbo case, a chronological review of past decisions will be presented. The Kentucky Court first faced the problem of foreign matter in soft-drink bottles twenty-four years ago. In the case of Nehi Bottling Co. v. Thomas,⁴ decided in 1930, the drinker of a "grape" complained of its bad taste. Examination of the bottle disclosed something wrapped in foil and shortly thereafter the drinker became vio-

¹ 313 Ky. 66, 290 S.W. 2d. 106 (1950).
³ 290 S.W. 2d. at 107.
⁴ 236 Ky. 684, 33 S.W. 2d. 701 (1930).
lently ill. Analysis of the contents of the bottle and the drinker's stomach disclosed that arsenic trioxide in quantity was present in the bottle. The judgment for the drinker of the "pop" was reversed on appeal because the evidence failed to show that appellant had in fact bottled the drink. The Court went on to state, however, quoting *Quillen v. Skaggs*, that the doctrine of res ipsa loquitur applied in the case:

"Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords *reasonable evidence in the absence of explanation of the defendant*, that the accident arose from want of care. . . . The reason or theory of the doctrine of res ipsa loquitur is based in part upon the consideration that, as *the management and control* of the agency which produced the injury is, under the circumstances to which the doctrine applies, *exclusively vested in the defendant*, plaintiff is not in a position to show the particular circumstances which caused the offending instrumentality to operate to his injury, while defendant, being more favorably situated, possessed the superior knowledge or means of information as to the course of the accident, and should, therefore, be required to produce the evidence in explanation."

The Court explains that Kentucky has chosen the tort theory to apply to these "pop" cases in contrast with the constructive warranty—contract theory employed in some jurisdictions. The reasoning is based on the old theory that the purchaser did not purchase direct from the manufacturer and hence no contract existed between them. Although the Kentucky Court of Appeals has never expressly adopted the rule evolved from the famous *McPherson v. Buick Motor Co.* case it has long been conceded that the manufacturer of bottle drinks is liable for negligence either because the manufactured item was "imminently" or "inherently" dangerous or because the manufacture involved food.
It would appear important at this point to note the contrast the Kentucky law presents in applying the “exclusive control” theory in the “bottle” cases with the application of the theory in a case involving a runaway automobile. Clearly, there are three essential elements required before a case can be brought into the res ipsa loquitur doctrine. They are: 1) the instrumentality must be under the control and management of the defendant; 2) the circumstances, according to common knowledge and experience, must create a clear inference that the accident would not have happened if the defendant had not been negligent; and 3) the plaintiff’s injury must have resulted from the accident. In the automobile case, the defendant had parked on a hill, turned his wheels into a curb, applied his emergency brake and the car had remained in such a position for over thirty minutes before the accident, occasioned by the automobile rolling down a hill and striking the plaintiff. Was the instrumentality under the control and management of the defendant? Definitely not, but the Court held that the case was one within the class in which the doctrine of res ipsa loquitur could be applied. This decision was reached in 1950 and in the same year the Court required a higher degree of proof to show that there was no reasonable opportunity to tamper with a bottle or its contents after it left the physical control of the bottler!

In the 1932 case of Coca-Cola Bottling Co. of Shelbyville v. Creech, the plaintiff was allowed to recover when a decomposed mouse was found in a soft-drink after plaintiff had drunk all of the contents. In the statement of facts the Court noted that the evidence of the bottler disclosed the most scrupulous care in bottling its products, so that it would seem impossible for a mouse to get into the bottle. The plaintiff traced the bottle from the time it left the bottler’s hands until it came to her, and then she pointed to the mouse. Is this the forerunner of our present-day rule requiring the plaintiff to prove that no one could have tampered with the bottle from the time it left the bottler until opened by the consumer? The writer submits that this case might, in fact, be the forerunner but further submits that the case was really no

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12 Lewis v. Wolk, 312 Ky. 536, 228 S.W. 2d. 432 (1950), and note Res Ipsa Loquitur as Applied to a Runaway Car, 39 Ky. L.J. 328 (1951).
13 228 S.W. 2d. 432 at 433-434.
14 245 Ky. 414, 53 S.W. 2d. 745 (1932).
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more than a following of the *Thomas* case. A search of the case, however, leaves the correct answer entirely to the reader's speculation as the case is decided chiefly on instructions as to the extent of the injury incurred.

A further interesting note in the *Creech* case is the fact that the Court held that it was not error to exclude evidence of appellant to the effect that it was a common occurrence for soft-drink bottles to be filled with substitutes and the caps taken off and replaced by hand. The interest surrounding the holding rests on the fact that the Court now takes judicial notice of this type evidence concerning tampering with bottles.

Particles of glass were found in a bottle in the case of *Nehi Beverage Co. v. Hall*. The Court merely restated its former position that the consumer may directly sue the bottler even though there was no contractual relation between them. A $1,000 verdict was awarded the plaintiff for perforated intestines.

In the case of *Seale v. Coca-Cola Bottling Works of Lexington, Ky.* we have the first concrete appearance of the term "integrity of the bottle". The trial court recognized the rule of the *Hall* case which in turn had recognized the *Thomas* rule. The trial court set aside a verdict for $5,000 because plaintiff had failed to establish the "integrity of the bottle" from the time it left appellee's plant until it was delivered to the consumer. The Court of Appeals reversed and ordered a new trial, saying:

... we are of the opinion that his (an absent witness) testimony would not have been necessary to establish the integrity of the bottle, since the proof in respect to the sizzling and hissing of the contents of the bottle, and the conditions of the container itself, was sufficient for a jury to conclude it had not been tampered with. ... 20

The Court of Appeals then continued with what the writer submits is a sound and logical statement, namely:

There are times when the law must be content with the proof of reasonable probabilities, and not exact the requirement that evidence in support of a cause be of such char-

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35 *Supra*, note 4.
36 295 Ky. 353, 174 S.W. 2d. 509 (1943).
37 297 Ky. 450, 179 S.W. 2d. 598 (1944).
38 *Supra*, note 17.
39 *Supra*, note 4.
40 179 S.W. 2d. at 599.
acter as to preclude the possibility of finding to the contrary. (Citing Lewis v. Ocean Accident & Guarantee Corp., etc., 224 N.Y. 18, 120 N.E. 56, 7 A.L.R. 1129). If a plaintiff introduces the best evidence of which the case is susceptible at the time of the trial, and it is reasonable to infer the ultimate fact to be proven from the evidence introduced, such showing, in the exigency of the situation, will be sufficient to sustain a finding that the ultimate fact has been established. . . .

This, the writer submits, is a far better solution of the problem in the soft-drink bottle cases than is the present rule. The year 1946 found the Coca-Cola Bottling Works of Lexington, Kentucky involved in another soft-drink bottle case. The integrity of the bottle was satisfactorily proved when plaintiff showed that the retailer bought the bottle from the bottling company in the normal course of trade and that none of the bottles had been opened before the sale took place. The $250 verdict awarded to plaintiff for finding a bee in her drink was set aside as excessive in view of the fact that there was no loss of time from work, no physician was consulted and plaintiff incurred no other expense.

In 1950, in Glasgow v. Reed, the Court upheld a $300 verdict awarded plaintiff for drinking from a soft-drink bottle containing a decomposed mouse.

Returning now to the 1950 Stumbo case in which the Court of Appeals first abolished the application of the doctrine of res ipsa loquitur in these bottle cases and installed the "integrity of the bottle" rule, we find that the Court noted that sugar rationing had been discontinued in the summer of 1947 but that there was still stiff competition between bottlers, all of whom had access to the storeroom where the guilty bottle was stored in the retailer's

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21 Id., at 600.
22 The case of Seale was not to rest, and in 1945 (Coca-Cola Bottling Works of Lexington, Ky., v. Seale, 299 Ky. 409, 185 S.W. 2d. 685, 1945) the case was back in the Court of Appeals on an appeal to set aside the verdict, now reduced to $2,000, gained on the second trial below. The appeal was chiefly concerned with procedural matters concerning absent witnesses and the Court again held the bottler wasn't entitled to a directed verdict.
24 In a humorous opinion, Judge Siler extolled the virtues of the honey bee and stated that the case was mostly "a case of a bee being where it should not be. . . ."
25 Glasgow Coca-Cola Bottling Works v. Reed, 312 Ky. 731, 229 S.W. 2d. 433 (1950).
26 Supra, note 1.
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place of business. The Court further noted that the drink was not opened in the store but was carried home by the victim's daughter and that no doctor was called nor was plaintiff later treated by one for his suffering. Because of the particular circumstances surrounding the case the Court held that the "integrity of the bottle" was of prime importance in the situation presented. Judge Cammack, in his opinion, distinguished it from the Seale case because of the unusual opportunity to tamper with the bottle and from the Reed case on the grounds that the latter case presented a situation where bottles were vended by a machine tended by the bottler's employees.

The Court followed a Tennessee case,27 which has been criticised even in Tennessee,28 requiring a higher degree of care on the part of the defendant to show that there has been no opportunity to tamper with bottles or their contents between the physical control of the bottler and that of the consumer. The Tennessee court29 stated that it must be made to appear, by a clear preponderance of evidence, that there has been no such divided or intervening control of the bottle as to afford any reasonable opportunity for it or its contents to have been tampered with. As stated, when the court talked about "high degree of care" they were talking about the duty of the defendant. The case turned on the fact that the evidence abundantly "shows reasonable opportunity, by accident or design, for substituting or for tampering. . ."30 Yet, strangely enough, our Court has used the case to establish the Kentucky rule.

1953 found two additional soft-drink bottle cases appearing. The first31 merely refers to the second, Ashland Coca-Cola Bottling Co. v. Byrne,32 decided the same day. In the latter case we again find a dead mouse (it was a spider in the other case decided that day) in the bottle. The Court strains hard in the Ashland case to find a set of facts comparable to those in the Stumbo case. The writer submits that the case is not nearly so strong where it is further submitted that the Court was justified in finding what it

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27 Supra, note 2.
28 22 TENN. L.R. 985, at 1000-1004, in which the Tennessee rule is traced.
29 Supra note 2, 158 S.W. at 725.
30 Supra, note 29, at 1209.
31 Paducah Coca-Cola Bottling Co., Inc. v. Reynolds, 258 S.W. 2d. 474 (1953).
32 258 S.W. 2d. 475 (1953).
did from those facts. In the *Ashland* case it would appear that because the clerk was not required to stand guard over the bottles that the bottler was freed of liability.

The drink was purchased in a small grocery and opened and drunk on the premises in the presence of the clerk. In the *Stumbo* case the bottle was taken home by the drinker’s daughter and opened there. The bottle in the *Ashland* case was in a lift-top cooler in the back of the main storeroom and the drinker had selected the bottle himself by going to the cooler and removing it. The facts of the *Stumbo* case do not tell us whether or not a clerk selected the bottle for the drinker’s daughter but it is apparent that he himself did not select it. The retailer in the *Ashland* case replenished his supply of drinks weekly and the evidence in the *Stumbo* case showed that the retailer did not know when he purchased the offensive pop. In the *Ashland* case the soft drinks were stored in a corner of the main storeroom; in the *Stumbo* case they were stored in a storeroom which adjoined the store proper. Yet, the Court said, “The facts in this [Ashland] case, concerning integrity of the bottle, cannot be distinguished from those in *East Kentucky Beverage Co. v. Stumbo.*” It is submitted that the *Stumbo* case is a full departure from the logic displayed in the *Seale* case and is evidence of judicial fiat in an attempt to draw an analogy to a case wherein numerous possibilities for tampering with the bottles existed. The Court, more or less in retrospect, states:

> Human experience has *forced* us to the conclusion that the presence of foreign objects in bottled drinks may in the ordinary course of things be the result of a prank or a deliberate wrongful act equally as well as being the result of negligence on the part of the bottler. . . .”

Thus, the Court imparts integrity to a bottle enjoyed by no other inanimate object, and few animate ones, and clothes the bottlers of soft-drinks with protection enjoyed by no other manufacturer of any product. It is creditable, the writer submits, that Justices Duncan and Milliken, in dissent, state that they do not subscribe to the theory that the placing of foreign objects in bottles by pranksters or evildoers is a matter of such common occurrence as

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34 *Supra* note 17.
35 *Supra,* note 17.
36 253 S.W. 2d at 476.
to justify the conclusion that the possibility of that happening must be disproved before the presumption of negligence of the bottler may be applied. These members of the Court follow the *res ipsa loquitur* doctrine, "without qualification" and note that such distinguished jurisdictions as Illinois, Louisiana, Missouri, Texas and Virginia do likewise.36

The latest soft-drink bottle case in Kentucky was *Glasgow Coca-Cola Bottling Works v. Wilson.*37 In the *Wilson* case another dead mouse had invaded another bottle, just as in the *Reed*38 case. The Court again denied the applicability of the doctrine of *res ipsa loquitur* as in the *Stumbo* case.39 Here, or so it would appear, rests the Kentucky rule in these cases.

It is again submitted that our Court in establishing the present rule has placed a burden on the plaintiffs in these cases bordering on the impossible. What plaintiff could establish the "integrity of the bottle" from the time it left the bottling works until opened by him in some business house dispensing soft-drinks? If the situation visualized by the Court in which pranksters and worse run rampant over our state injecting contraceptives, mice, spiders and other equally repugnant foreign matter in our "pop" really exists, then the only safe way to guarantee recovery after drinking a soft-drink diluted with strange contents is to get it directly from the conveyor belt in the bottling works. Then, and only then, can the drinker be assured that the "integrity of the bottle" has been put into disrepute when he gulps a drink of something more than he bargained for.

Attorneys Wilson, Wilson and Clark in the brief prepared in the *Wilson* case comment on the fact that bottlers of soft-drinks have done an excellent job in preventing occurrences such as have

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36 *Supra*, note 35.
37 242 S.W. 2d. 872 (1954). It is interesting that the same attorneys in this case represented the same sides (that is, plaintiff and defendant, respectively) as in the *Reed* case. The same defendant was even present but Wilson and Wilson, Glasgow, represented a different plaintiff. Another dead mouse was present, but the plaintiff lost.
38 *Supra*, note 25.
39 The Court commended Attorneys Wilson, Wilson and Beverly Clark for an able brief and those who have read it will readily agree. Not only is brilliant argument presented but also humor hard to surpass. To give but a touch of the humor, the appellee stated:

"He (the writer) does not believe that the title of the old Irish ditty, "Who Threw the Overalls in Mrs. Murphy's Chowder?" has been changed into the American tragedy of "Who Stuffed the Rodent in My Soda-Pop?""

The writer of this article is most grateful to the brief writers for the opportunity to study it. It has been most helpful in preparing this work.
made their appearance in these cases. They remind us, however, that even in the most spick and span homes, exploiting the latest methods, we are often beset by pests. Then they compare the home with a bottling works where sugar and syrups are the working tools of the trade. The brief writers have gone a long way in exploding the “prankster” theory when they remind that the prankster would probably be deprived of his hard-earned laugh because his intended victim might choose one of several bottles and miss the primed one altogether. The overzealous “competitor” theory is also deflated by the writers when they suggest that every time a wheel comes off a Studebaker truck one might immediately blame Dodge, International, Ford, Diamond T or any number of other competitors.

In summary, it is submitted that our Court has installed a rule impossible to bear by a plaintiff. Surely no person could wish to subject bottlers of soft-drinks to more liability than other manufacturers, but on the other hand few would wish to clothe these people with any more protection than corresponding businesses. Our people will soon lose sight of the justice interwoven into their law when they are faced with a burden of proof requiring them to ride “shotgun” over their soft-drinks from the bottler to the lips. If tighten the law we must, let’s leave enough room for a case to be weighed.

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40 Appellee's Brief, Glasgow Bottling Works v. Wilson, at 13-14.
41 Id., at 15.