LAWRENCE COHEN (*Plaintiff*) .....APPELLANT;

AND

COCA-COLA LIMITED (*Defendant*) .....RESPONDENT.

1967

*Jan. 31,
*Feb. 1
May 23

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Negligence—Bottle of carbonated beverage exploding—Sales clerk injured—Duty of manufacturer—Whether manufacturer liable—Civil Code, arts. 1053, 1054, 1238.

The plaintiff was injured by a fragment of glass coming from a bottle of carbonated beverage which exploded spontaneously in his hand as he was about to place it in a cooler in the restaurant where he was employed. The defence was that an accident such as that described by the plaintiff was impossible. The trial judge maintained the action, but his decision was reversed by a majority judgment in the Court of Appeal. The plaintiff appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

The bottler of carbonated beverages owes a duty to furnish containers of sufficient strength to withstand normal distribution and consumer handling. Each case turns upon whether the evidence in that particular case excludes any probable cause of injury except the permissible inference of the defendant's negligence. The trial judge was entitled to draw the inference that the bottle was not mishandled by the defendant's employees until it was picked up by the plaintiff to be placed in the cooler. The evidence which was accepted by the trial judge created a presumption of fact under art. 1238 of the *Civil Code* that the explosion of the bottle was due to a defect for which the defendant was responsible and that the latter failed to rebut that presumption.

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Spence JJ.

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Négligence—Éclatement d'une bouteille de liqueur gazeuse—Blessures à un œil—Devoir du fabricant—Responsabilité du fabricant—Code Civil, arts. 1053, 1054, 1238.

Le demandeur fut blessé par une parcelle de verre provenant d'une bouteille de liqueur gazeuse ayant éclaté spontanément entre ses mains alors qu'il s'apprêtait à la placer dans un réfrigérateur dans le restaurant où il était employé. La défense fut à l'effet qu'un accident tel que décrit par le demandeur était impossible. Le juge au procès a maintenu l'action, mais sa décision fut renversée par un jugement majoritaire en Cour d'appel. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et le jugement de première instance rétabli.

L'embouteilleur de liqueurs gazeuses a le devoir de fournir des récipients ayant une résistance suffisante pour supporter la manipulation normale du distributeur et du consommateur. Chaque cas dépend de la question de savoir si la preuve exclut toute cause probable de dommages, excepté l'inférence admissible de la négligence de la défenderesse. Le juge au procès était justifié de tirer la conclusion que la bouteille n'avait pas été mal manipulée par les employés de la défenderesse jusqu'à ce qu'elle soit ramassée par le demandeur pour être placée dans le réfrigérateur. La preuve qui a été acceptée par le juge au procès créait une présomption de fait en vertu de l'art. 1238 du *Code Civil* à l'effet que l'éclatement de la bouteille était dû à une défectuosité dont la défenderesse était responsable et que cette dernière n'avait pas réussi à repousser cette présomption.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant un jugement du Juge Collins. Appel maintenu.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Collins J. Appeal allowed.

J. J. Spector, Q.C., and *Abraham Cohen*, for the plaintiff, appellant.

A. J. Campbell, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench[1] reversing a judgment of Collins J. in the Superior Court which had condemned respondent to pay to appellant the sum of $8,600.80 with

[1] [1966] Que. Q.B. 813.

interest and costs as damages for injuries sustained on September 4, 1957, and caused by the explosion of a bottle of Coca-Cola.

The facts are fully reviewed in the judgments below and shortly stated they are these. In September 1957 appellant—then a minor—was employed by his father, one Jack Cohen, who operates a restaurant in the City of Montreal, at which Coca-Cola and other soft drinks were sold. Supplies of Coca-Cola were delivered weekly by respondent and when delivered were placed by respondent's employees in the basement of the restaurant premises. In his restaurant, Cohen had a freezer with a capacity of from four hundred to five hundred bottles. From time to time, as Coca-Cola and other soft drinks were required for the purpose of sale, they were brought up in cases from the cellar by employees of the restaurant, and then placed in the freezer.

As to the circumstances under which the appellant was injured the learned trial judge said:

> As the Coca-Cola was required for the purpose of sale, the cases were brought up from the cellar for the purpose of putting the bottles into the freezer. The cellar had a cement floor and cement walls. It was heated by the landlord of the premises but there was no furnace in that part of the cellar in which Coca-Cola was kept. The plaintiff worked for his father in the restaurant. Sometime after 3.00 o'clock in the afternoon of September 4th, 1957, five or six such cases were brought up from the cellar by one of the employees of Jack Cohen. The plaintiff then started to put the bottles one by one out of the cases into the freezer. The first two sections of the freezer were reserved for Coca-Cola bottles, a third section for Seven-Up and Pepsi bottles and a fourth section for miscellaneous bottles. The plaintiff said that he had emptied most of the cases and had put the bottles in the freezer and there only remained about half a case so to empty. He then reached down and picked up a bottle of Coca-Cola with his right hand and was putting it into the freezer when he said the bottle exploded. The result of the explosion was that glass went into his left eye, causing to it the injuries in respect of which damages are now claimed by this action. The plaintiff said that the glass did not cut his face in any other way and the only damage was to his eye. Upon the explosion, he dropped apparently what remained of the bottle in his hand and covered his two eyes to protect himself. He then looked in the mirror and found that his eye was bleeding. He went alone in a taxicab to the Montreal General Hospital where he remained until September 20th.

Respondent's defence was that an accident such as that described by appellant was impossible and in support of that contention it led evidence which was largely a description of the type of bottle used by it, the procedure followed

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in inspecting and filling bottles as well as expert evidence as to what happened when bottles filled with its product were heated, struck with a hammer or banged together.

As I have said, the learned trial judge maintained the action and in doing so he made certain findings. Dealing with the accident itself, he said this:

> In considering this matter, the Court has only the evidence of the plaintiff to base itself on. There were produced no witnesses to the accident (apart from the plaintiff) which is not unusual in cases of this kind. The Court carefully watched the plaintiff in giving evidence. It has come to the conclusion after a very mature deliberation that he told the truth. His evidence seemed quite honest and it did not appear that he attempted to exaggerate the situation in any way. The only evidence before the Court is that the accident happened in the way that the plaintiff said that it did. The only evidence to the contrary is the evidence of the defendant that such an explosion could not have taken place for the reasons above mentioned. It may have been that the bottle was broken by the careless handling of the plaintiff and that fragments of glass so entered his eye. The evidence of the defendant, based on tests made by its expert was that fragments of glass coming from bottles which were broken deliberately by such expert were thrown up to a radius of 18 inches, so that it would be quite possible for the accident to have happened as suggested by the defendant. However the positive evidence was that the plaintiff was injured in the manner described by him. As the Court is not in a position to say that he was not telling the truth and the Defendant was unable to establish otherwise, it must accept as true his evidence as to the manner in which the accident happened.

Many of the bottles containing Coca-Cola distributed by respondent were used over and over again after being returned to the respondent's plant, where they were cleaned and inspected before being refilled. Referring to the evidence led by respondent as to the method of the filling and inspection of bottles, the learned trial judge said:

> It is obvious that the inspection of the defendant to prevent defective bottles from being filled with Coca-Cola was inefficient and it could not possibly detect all the defects. There is no other conclusion to come to but that it would be quite easy for a defective bottle to pass an inspector. The inspection took place before the bottles were filled, so that the bottles went through the subsequent process of filling and capping without inspection, an automatic process requiring the use of machines.

After stating that it was reasonable to infer that it was a defective bottle which resulted in the injury of the appellant, the learned trial judge reached this conclusion:

> On the evidence as a whole the Court finds that the defendant was negligent in not having an inspection system adequate to prevent defective bottles reaching customers. It was the fault of the defendant that the bottle exploded because the bottle provided by the defendant was not strong enough to withstand the pressure of the gas put into it by the defendant.

He was also of opinion that respondent had "la garde juridique" of the bottle within the meaning of art. 1054 of the Civil Code.

The judgment at trial was reversed by the Court of Queen's Bench, Rinfret J. dissenting. The ratio of the majority decision appears to be that appellant's version of the accident required some form of corroboration and that he had failed to discharge the burden of establishing that the bottle of Coca-Cola was not damaged in some way after delivery to the restaurant. With respect I am unable to agree with those findings.

The bottler of carbonated beverages owes a duty to furnish containers of sufficient strength to withstand normal distribution and consumer handling. Little is to be gained by discussing the numerous decided cases involving the explosion of bottles containing such beverages. Each case turns upon whether the evidence in that particular case excludes any probable cause of injury except the permissible inference of the defendant's negligence.

In the present case, boxes each containing twenty-four bottles of Coca-Cola were placed in the basement of the restaurant by employees of the respondent. On the day of the accident, a case containing the bottle which exploded, along with several other cases containing Coca-Cola, was brought up from the basement by a dish-washer employed in the restaurant. The bottles contained in these cases were then placed in the freezer by appellant and were handled only by him. The particular bottle which exploded was taken from the last case to be unloaded. The appellant described the manner in which he took each bottle from the wooden cases and placed it in the freezer. There is no suggestion in his evidence, either in chief or on cross-examination that they were handled in other than the ordinary way. The learned trial judge was entitled to draw the inference that the bottle which exploded was not mishandled from the time it was placed in the basement by respondent's employees until it was picked up by appellant to be placed in the freezer.

In my opinion evidence which was accepted by the learned trial judge created a presumption of fact under art. 1238 of the *Civil Code,* that the explosion of the bottle which caused injury to appellant was due to a defect for which respondent was responsible and that the latter failed

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to rebut that presumption. It follows that I do not find it necessary to express any opinion as to whether appellant was entitled to invoke the presumption of liability under art. 1054 of the *Civil Code*.

As to damages, the amount awarded, while perhaps generous, is not such as to warrant interference by this Court.

I would allow the appeal with costs here and below and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Attorney for the plaintiff, appellant: A. Cohen, Montreal.

Attorneys for the defendant, respondent: Brais, Campbell, Pepper & Durand, Montreal.