IN THE SUPREME COURT OF SEYCHELLES

RAMAKRISHNA AITHAL **PLAINTIFF**

VERSUS

SEYCHELLES BREWERIES LTD **DEFENDANT**

Civil Side No 52 of 2004

Mr. F. Bonte for the plaintiff
Mr. K.B. Shah for the defendant

JUDGMENT

PERERA J

This is a delictual action in which the plaintiff claims damages for nervous shock and stress allegedly suffered upon discovering a foreign object, *(a decomposed lizard)* inside a botlle of *"Ginger Ale"* purchased from a retailer of the defendant company. It is averred that the said object was observed before opening the bottle to consume. Liability is sought to be established against the defendant company for –

(a) failing to take adequate care and attention in bottling the said soft drink.

(b) failing to check the bottled product.

(c) Failing to clean the bottle adequately before bottling the product.

The plaintiff testified that apart from the botle of "*Ginger Ale",* he purchased some other soft drinks, which were also Seybrew products, from that shop. The glass of the "*Ginger Ale"* bottle *(exhibit P1)* is transparent, and the liquid contents are light brown in colour. Hence the decomposed lizard in it is visible without difficulty. Questioned by Court as to why he did not see the impurities when purchasing the plaintiff stated that the Shopkeeper put everything in a plastic bag and gave him. In his cross-examination, he stated

that the bottle was not opened, and that hence he did not obviously drink the contents. He went to the defendant company with the contaminated bottle, but was offered two bottles of lemonade in replacement, which he refused to accept. He claims Rs.25,000 as damages for shock, mental stress and nervousness, and a further sum of Rs.25,000 as moral damages.

A similar claim arose in the case of ***Felix Camille v. Seychelles Breweries Ltd (Civil Appeal no. 6 of 1996).*** In that case the plaintiff averred that he purchased a bottle of beer manufactured by the defendant company, from a retail shop at Bel Air. Before opening the bottle to consume, he heard a tinkling noise inside, and found a piece of broken glass. He claimed that he suffered "*shock, distress and anxiety".* He took the bottle to the Seychelles Bureau of Standards *(S.B.S)* and obtained a report, which certified that –

> *"The bottle contains a piece of broken glass. On cross examination it was obvious that the bottle had not been opened, which leads to the conclusion that the piece of glass could only have been introduced in the bottle accidentally in the filling process".*

However, the Standards Officer of the S.B.S. who issued that certificate stated in evidence before the Magistrates' Court that he could not conclusively state that the bottle had not been opened before examination by him and that his conclusion was based on a subjective assessment. The Bottling Manager of the defendant company also testified that it was possible for a bottle to be opened and re-corked without detection, by using a sharp object. He also stated that bottles go through 10 stages of cleaning in both upright and inverted positions and hence a foreign object like a splinter of glass could not stick to a bottle. The Learned Magistrate followed the principle laid down in the case of ***Donoghue v. Stevenson (1932) A.C. 562,*** and awarded Rs.2000 as moral damages for shock, distress and anxiety. In ***Donoghue***, the

plaintiff had averred that he suffered injury as a result of consuming part of the contents of a bottle of Ginger beer which had been manufactured by the defendant company, containing the decomposed remains of a snail. That bottle was made of dark opaque glass, so that the plaintiff had no reason or opportunity to suspect that it contained anything but ginger beer. It was therefore averred that it was the duty of the company to provide a safe system of working to prevent impurities to get into their products. The bottle was purchased by a friend of the plaintiff who poured the contents into two tumblers. The pieces of the snail fell into the friend's tumbler. The defendant company averred that even if the snail had got in due to negligent breach of duty on their part, it would have to be a duty established by contract which was owed only to those who were in contractual relations with them, and not to members of the Public who were strangers to the contract under which the Ginger beer was supplied to the plaintiff. The House of Lords, by majority decision upheld the plaintiff's claim.

The case laid the foundation of the Modern English Law of negligence.

However the decision in the Camille case (supra), was set aside by me in appeal on the basis that that case was based on faute under Article 1382 of the Civil Codes and hence the principles laid down in the case of ***Donoughue*** did not apply to an action in delict filed under the Civil Code. In that respect I cited the following passage from Barry Nicholas on "*The French Law of Contract*" *(2nd Edition)* page 171, that –

> *"..... the tort in Donoghue v. Stevenson arose out of, but was nevertheless independent of, a breach of contract with the person who bought the Ginger beer, but we do not express it in those terms. This is mainly because the basis of the action in tort is negligence, and negligence is irrelevant to an action for breach of contract, whereas in French Law, fault is ordinarily the basis of both actions. Moreover the French Law of delict has no*

requirement of a duty of care owed to the plaintiff. The plaintiff has simply to show that the defendant was at fault, and that the damage resulted from that fault".

In ***Sarah GrandJean v. The Seychelles Breweries Co. Ltd (C.S. 368 of 1996),*** the foreign object found in the bottle of "*Coca Cola*" was also a lizard. The plaintiff, a minor, drank a glass of the drink and suffered stomach ache. She was taken to hospital where she was given a "stomach wash". The medical history form recorded the complaint as *"…….. intestines contaminated. Coca Cola today around 5.30 p.m. contained a lizard*". After the "*stomach wash",* the child was normal.

In that case, I stated that "*although sufficiently cogent evidence* has been adduced by the plaintiff to establish the presence of a decomposed lizard, the burden is on the plaintiff to establish that such foreign body had entered the bottle due to an act, negligence or imprudence on the part of the defendant company in terms of Article 1383(1) of the Civil Code". However noting that the burden on a plaintiff to prove negligence or imprudence on the part of a manufacturer utilizing highly sophisticated machinery, was very heavy, I ruled that while the legal burden of proof continued to remain with the plaintiff, the evidential burden to establish the efficiency of the manufacturing process, which is peculiarly within their knowledge, shifted to the defendant. In that case, the "*Bottling Manager*" testified in detail the various procedures involved in cleaning the bottles, filling the liquid and bottling. The Court was satisfied that there was overwhelming evidence that no foreign object could have entered the bottle during the entire process. As regards the legal burden on the plaintiff, I cited the case of ***Dainels and Daniels v. R. White & Son Ltd and Tarbard (1938) 4. A.E.R. 258,*** in which the plaintiffs suffered a burning sensation in their stomachs after drinking bottled lemonade. The contents after analysis was found to contain 38 grains of carbolic acid. The defendant company adduced evidence of a fool proof system. Lewis J, was satisfied with the level of supervision involved in the process, and stated –

"That method has been described as fool proof, and it seems to me a little difficult to say that if people supply a fool proof method of cleaning, washing and filling bottles, they have not taken all reasonable care to prevent defects in their commodity. The only way in which it might be said that the fool proof machine was not sufficient, was if it could be shown that the people who were working it were so incompetent that they did not give the fool proof machine a chance".

The onus of proof may shift from time to time *as a matter of evidence only*. But the legal burden on the plaintiff, however onerous remains with him. The plaintiff in the present case has only testified that he received a "*shock*" when he saw the impurities inside the bottle. He was apparently relying on the maxim *res ipsa loqitur.* But that maxim does not apply in French Law of delict. In the case of ***Bhuddo v. Hurry (`1958) M.R. 113***, a lorry carrying a load of sugar canes overturned as it went over a rut on the road, and a labourer seated on top of the canes was killed. The Court, dismissing the claim stated "*we are asked to say that the mere fact of the lorry going into the rut and overtaking amounts to imprudent or negligent driving. We cannot do so*". The Court further stated that in French Law" the precise nature of the "*faute*" must be proved and the burden of proving it lies on the plaintiff. Mere conjectures and presumptions are not sufficient".

In the present case even if the Court, on a balance of probabilities would be disposed towards holding that the lizard had been introduced into the bottle during the bottling process, yet, no "*damage*" as envisaged in Article 1382 has not been established. In ***Sarah GrandJean*** (supra), the child suffered a stomach ache and was treated in hospital. In the English case of ***Daniels and Daniels*** (supra) the plaintiffs suffered a burning sensation in their stomachs, after consuming lemonade contaminated with carbolic acid. Although both

claims failed on the ground of liability, *"damage"* or "*harm*" was established. In ***Felix Camille*** (supra), I stated

> *"for a delictual claim, "shock" must be of such a nature that it causes damage to body or mind. Usually, there should be partial or total damage to the nervous system. If the type of "shock" the plaintiff is said to have got, is actionable in law, there would be endless litigation. He would have however been "disappointed" as he claimed, as he was unable to enjoy his drink. But such disappointment is de minimis and hence not actionable in tort".*

The present case also falls into the same category. An ordinary, reasonable person, comes across several incidents and situations which may shock him in his daily life. Not everyone reacts in the same way. The Court does not take into consideration the idiosyncrasies of individuals. The test is the reasonable man. On that basis, the maxim, *de minimis non corat lex (the law does not cure trifles)* applies. As is stated in Broom's Legal Maxims – Page 88, "where some injury is so little for consideration in law, no action will lie for them.

The plaintiff's action is accordingly dismissed, but without costs.

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A. R. PERERA
JUDGE
Dated this 29th day of September 2006