

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

Directed Research L410

TITLE : THE PROBLEMS OF ADDUCING EVIDENCE TO PROVE FACTS
FOR NEGLIGENCE AND DAMAGE IN PRODUCT LIABILITY CASES

By WEBSTER DICKSON SHABUSALE

COMPUTER NUMBER 77091094

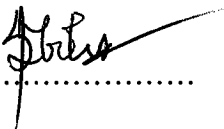
A directed research essay submitted to the School of Law of the University of
Zambia in partial fulfillment of the requirement for the award of the Degree of
Bachelor of Laws (LLB)

UNZA

MARCH 2011

DECLARATION

I, **WEBSTER DICKSON SHABUSALE** ,do declare that this research paper represents my own work and where other people's work has been used due acknowledgements have been made. To the best of my knowledge this paper has not been submitted for any academic awards.



.....

WEBSTER DICKSON SHABUSALE

10/04/2011

.....
DATE

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the obligatory essay prepared under my supervision by

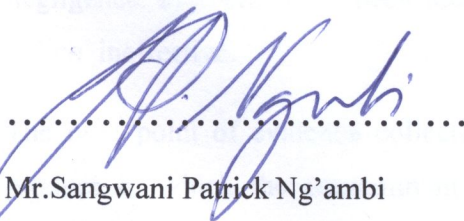
Webster Dickson Shabusale

(Computer number 77091094)

Entitled:

THE PROBLEMS OF ADDUCING EVIDENCE TO PROVE FACTS FOR NEGLIGENCE
AND DAMAGE IN PRODUCT LIABILITY CASES

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the
requirement relating to format as laid down in the regulations governing Directed research


.....

Mr. Sangwani Patrick Ng'ambi

(Supervisor)

11/4/2011
.....

Date

ABSTRACT

The paper examines the problems consumers of adulterated food products who may wish to take legal action encounter in adducing evidence to prove facts of negligence and damage. To be successful negligence and damage must coexist. In this study six points have been identified at which problems have been encountered.

The point of sale is where the sales person hands the product to the consumer. The evidence required is to show that the product was served to the customer in the condition it was produced. The evidence here adds up to prove negligence. Problems at this point have been identified in this study.

The Public Health Department of the Local Authority are empowered by Public Health Act to investigate any case of adulterated food. The evidence collected here is to prove negligence on the part of the manufacturer. The food and drugs Act empowers the Public Analyst to receive from Local Authority and analyse the product and give evidence in court. Problems identified here were that though the Public Analyst is able to identify the contaminant he is unable to identify the food product because of lack of specifications which the Manufacturer does not normally release.

The Police is another area of evidence. Once reported the Police will investigate the case. The Police interview the Manufacturer, the Complainant and the Sales Person at the point of sale. The police do appear in court to give evidence of their findings. The evidence here goes to prove negligence. Problems have been identified in this paper which make the evidence given by the police ineffective.

The next point of evidence collection is the Manufacturer. He is expected to admit that the product in which the contaminant was found was produced by him. It is seen that most Manufacturers will deny that the product was produced by them. Since no one else is able to identify the various products that may be the subject of the complaint this point has been identified as a major drawback in successfully prosecuting the case.

Finally the Medical report from the Doctor is the only piece of evidence from the six points that identifies the damage that the complainant could have suffered. The problem with this evidence was that the Doctor is not able state that the particular food item caused the illness and not some other food consumed earlier.

The problems consumers face in adducing evidence and their effects are analysed in Chapter four of this study. Chapter five gives conclusions and recommendations.

ACKNOWLEDGEMENTS.

I would like to thank my Supervisor, Mr. Sangwani P. Ng'ambi ,Lecturer in the School of Law at the University of Zambia under whom I undertook this research for his patience and guidance.

I would also like to thank Mr. Frackson Mutaka and Mr. Aubrey Mumbi Chirwa, of the Legal Department Zambia Breweries PLC,Lusaka for very useful discussions and provision of material for this study. My special thanks to Mrs. Priscilla Isaac and Mrs. Chisanga Rosaria Lupyana Mutantika for the material provided.

TABLE OF CASES

1. Blyth v Birmingham Waterworks Co[1836]11 ex at p 784
2. Caparo v Dickman [1990] 1 All ER 568
3. Continental Restaurant and Casino v Mercy Aridah Chulu S.C.Z. No 28 /2000
4. Donoghue v Stevenson [1932] All ER Rep 1
5. East Suffolk Rivers Catchment Board v Kent_ [1941] A.C 74
6. Felix Mubita v Zambia Breweries 2004/HP/095(unreported)
7. Gilbert Shipunga and Obed Mwakaboko v Zambia Bottlers 2008/HP/081(unrepoted)
8. Heaven v Pender[1883]11 QB503
9. Henry Hachoongo v Zambia Bottlers Ltd 2008/HP/0058 (unreported)
10. John Mvula v Zambia Breweries 2007/HP/0299 (unreported)
11. Michael Chilufya Sata v Zambia bottlers Limited S. C. Z. 112/2001
12. Patrick Nkhata v Zambia Bottlers 2008/HL/29 unreported
13. Zambian Breweries Plc v Reuben Mwanza SCZ No. 59/2000

LIST OF STATUES

1. Competition and Fair Trading Act, Chapter 417 of the Laws of Zambia
2. Food and Drugs Act, Chapter 303 of the Laws of Zambia
3. Public Health Act ,Chapter 295 of the Laws of Zambia

TABLE OF CONTENTS

Cover Page..... (i)
Declaration..... (ii)
Supervisor’s Signature Page..... (iii)
Abstract..... (iv)
Acknowledgements..... (v)
Table of Cases..... (vii)
List of Statues..... (viii)
Table of Contents..... (ix)

CHAPTER ONE

1.1 Introduction..... (1)
1,2 Statement of the Problem..... (4)
1.3 The research rationale..... (4)
1.4 Methodology of the research (4)
1.5 Sources of information..... (4)
1.6 Meaning of Duty of Care..... (5)
1.7 Meaning of Negligence..... (6)
1.8 Meaning of damage or injury..... (7)

CHAPTER TWO

2.0 Law and procedure in gathering evidence..... (8)
2.1 The Law..... (8)
2.11 Food and Drugs Act..... (8)
2.12 The public Health Act..... (9)
2.13 The Competition and Fair Trading .Act..... (10)
2.2 Judicial Precedence..... (10)

2.3 The Procedure.....	(16)
2.31 Reporting to the Police.....	(16)
2.32 Reporting to the Public Health Department.....	(16)

CHAPTER THREE

3.0 THE PROBLEMS CONSUMERS FACE IN GATHERING EVIDENCE.....	(18)
3.1 Evidence from the point of Sale	(19)
3.2 The Police.....	(20)
3.3 Public Health Department- Health Inspectors.....	(22)
3.4 Food and Drugs Laboratory – Public Analyst.....	(23)
3.5 The Doctor ,The Medical Report.....	(24)
3.6 The Manufacturer.....	(25)

CHAPTER FOUR

4.0 ANALYSIS OF THE PROBLEMS CONSUMERS FACE IN ADDUCING EVIDENCE AND ITS EFFECTS.....	(29)
4.1 From the Point of Sale	(30)
4.2 From the Police.....	(32)
4.3 Public Health Department- Health Inspectors.....	(33)
4.4 Food and Drugs Laboratory – Public Analyst.....	(34)
4.5 The Doctors Medical Report.....	(36)
4.6 The Manufacturer.....	(37)

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS.....	(40)
5.1 The point of Sale.....	(40)

5.2 The Police..... (41)

5.3 Health Inspectors..... (42)

5.4 Public Analyst..... (43)

5.5 The Doctor..... (43)

5.6 The Manufacturer..... (44)

ABSTRACT

The paper examines the problems consumers of adulterated food products who may wish to take legal action encounter in adducing evidence to prove facts of negligence and damage. To be successful negligence and damage must coexist. In this study six points have been identified at which problems have been encountered.

The point of sale is where the sales person hands the product to the consumer. The evidence required is to show that the product was served to the customer in the condition it was produced. The evidence here adds up to prove negligence. Problems at this point have been identified in this study.

The Public Health Department of the Local Authority are empowered by Public Health Act to investigate any case of adulterated food. The evidence collected here is to prove negligence on the part of the manufacturer. The food and drugs Act empowers the Public Analyst to receive from Local Authority and analyse the product and give evidence in court. Problems identified here were that though the Public Analyst is able to identify the contaminant he is unable to identify the food product because of lack of specifications which the Manufacturer does not normally release.

The Police is another area of evidence. Once reported the Police will investigate the case. The Police interview the Manufacturer, the Complainant and the Sales Person at the point of sale. The police do appear in court to give evidence of their findings. The evidence here goes to prove negligence. Problems have been identified in this paper which make the evidence given by the police ineffective.

The next point of evidence collection is the Manufacturer. He is expected to admit that the product in which the contaminant was found was produced by him. It is seen that most Manufacturers will deny that the product was produced by them. Since no one else is able to identify the various products that may be the subject of the complaint this point has been identified as a major drawback in successfully prosecuting the case.

Finally the Medical report from the Doctor is the only piece of evidence from the six points that identifies the damage that the complainant could have suffered. The problem with this evidence was that the Doctor is not able state that the particular food item caused the illness and not some other food consumed earlier.

The problems consumers face in adducing evidence and their effects are analysed in Chapter four of this study. Chapter five gives conclusions and recommendations.

ACKNOWLEDGEMENTS.

I would like to thank my Supervisor, Mr. Sangwani P. Ng'ambi ,Lecturer in the School of Law at the University of Zambia under whom I undertook this research for his patience and guidance.

I would also like to thank Mr. Frackson Mutaka and Mr. Aubrey Mumbi Chirwa, of the Legal Department Zambia Breweries PLC,Lusaka for very useful discussions and provision of material for this study. My special thanks to Mrs. Priscilla Isaac and Mrs. Chisanga Rosaria Lupyana Mutantika for the material provided.

CHAPTER ONE

1.1 INTRODUCTION

The paper examines problems consumers of products especially beer and soft drinks which are adulterated contrary to provisions of the Food and Drugs Act¹ have faced in adducing evidence to prove their cases against the companies concerned in court. They have problems in proving that the manufacturer had duty of care. Consumers also have problems in proving that the Manufacturer was negligent and breached the duty of care. They have difficulty in proving that the damage suffered was a result of the products consumed.

The problems are of adducing evidence in proving that the company had a duty of care, That the manufacturer was negligent and that the plaintiff concerned suffered some damage which damage was result of negligence. The consumer must also prove that the product was produced by the company concerned and must show that the damage suffered is a result of the product produced by the company and not any other product consumed prior to that incident.

The procedure being followed in Zambia is that when one consumes a contaminated product they go to the hospital where treatment is given. They may also report to the police. The contaminated product is taken to the Public Health Department of a local Authority for analysis. The local authority examines the product and asks the consumer to go to the manufacturer to confirm that the product concerned is theirs. When this is done the Public Health Department will take the adulterated product to the Food and Drugs Laboratory for analysis by The Public Analyst. A consumer faces a lot of problems in gathering documentary evidence from the Police, the Public Health Department of local Authority, the food and drugs laboratory and Medical report from the clinic or hospital. The Documents collected from these departments and the people who issue the reports are all necessary as evidence in order to prove the case against the Manufacturer.

The local authority or the Police take the samples of the food product which is suspected to have been consumed to the food and drugs Laboratory for analysis. The food and drugs Laboratory is established under the Food and drugs Act². The Report prepared by the Public Analyst is handed over either the Police or the Local Authority as the case may be .The police or local authority

¹ Chapter 303 of the Laws of Zambia

² Chapter 303 of the Laws of Zambia

also prepare their own report and together with Public analyst report they hand the reports to the consumer who may use these reports as evidence in court. Because of the numerous food products that the local authority and Food and Drugs Laboratory handle and because of secrecy in Manufacturing Processes of many manufacturers the local authorities or Public Analyst do not have specification of various products. They do not for certain say that the contaminated product is say Coca cola or Mosi or Castle because they do not have the specifications. As result the report from the Food and Drugs Laboratory though key as evidence in court may not be very helpful to the consumer since it will not specifically mention the product but will in general terms. For contaminated Mosi Lager for example they may just say the contaminated liquid was a lager beer.

The consumer of a contaminated food product gets a medical report from the Hospital or Clinic after treatment. The report from the hospital is necessary to prove damage. However the Doctor may report that the consumer has been treated or hospitalized for diarrhea or vomiting due to food poisoning but may not for certain say that the poisoning was due to that particular food product. This may cause problems in proving the case in court.

The reports from the local authority, police, food and drugs Laboratory and medical report are used in court as evidence to prove negligence and injury suffered by consumer. In the case of *Michael Chilufya Sata v Zambia Bottlers Limited*³ the Supreme Court of Zambia held that “negligence is only actionable if actual damage is proved, there is no right of action to nominal damages”. And in amplifying this holding the Court said “as Lord Reading said in the case of *East Suffolk Rivers Catchment Board v Kent*⁴ negligence alone does not give cause of action, damage alone does not give a cause of action, and the two must coexist. In the case of *Michael Sata*⁵ there was no injury or damage caused because the appellant did not consume the any part of the adulterated Sprite drink.

Therefore the Plaintiff must prove that the Manufacturer had a duty of care. A duty of care is a legal obligation imposed on an individual requiring that they adhere to a standard of reasonable care while performing any acts that could foreseeably harm others. There must be a sufficient

³ S. C. Z. No 112/2001 at p. 15

⁴ [1941] A.C 74

⁵ S. C. Z. No 112/2001

relationship of closeness or proximity between the two people in order for a duty of care to exist. Duty of care is the first element that must be established to proceed with an action in negligence. The plaintiff must be able to show a duty of care imposed by law which the defendant has breached. In order to establish whether a duty of care has been breached the court will look first of all at the standard of care that is expected in the circumstances. The standard of care is determined by looking at what a reasonable person would have done or not done in the same circumstances. Where a defendant has acted in an unreasonable way or their actions fell well below the standard expected they will be found to have breached their duty of care.

The Plaintiff must also gather evidence to prove that the food product in question was produced by the defendant and not another manufacturer. In Zambia the Local authority and Police refer the consumer back to the manufacturer to confirm that the product in question is theirs. This is a problem. The consumer must show that prior to consumption the product was in the form that the manufacturer produced it. In the case of *John Mvula v Zambia Bottlers*⁶ the plaintiff drank a contaminated Fanta drink produced by Zambia Bottlers. The Plaintiff proved negligence and damage but action failed because he failed to show that at the time he consumed the drink it was in the same condition the manufacturer produced it.

Negligence must be proved. The Plaintiff must prove that the manufacturer was negligent in their production process leading to the product served to the customer being adulterated and not meeting expected standards.

The Plaintiff must also prove that as a result of eating or drinking the food concerned they were injured. Proof of injury is contained in a report from the hospital. However many times the Doctor is not able to say for certain that the illness being experienced by plaintiff is as a result of the contaminated drink that was drunk and not due to other food consumed earlier.

⁶ 2007/HP/0299 (unreported)

1.2 STATEMENT OF THE PROBLEM

The problem is of proving facts for negligence and damage or injury. One must prove that the manufacturer produced the product which is not easy to do. And then that the company producing the products had a duty of care. As a result of consumption of this product the plaintiff suffered injury to his health. Injury is shown by way of a Medical report. The problem here is that the Doctor may not in his report say the adulterated food is the cause of the illness.

Negligence and damage must co exist in order for the action to succeed .It has proved to be very difficult to gather all evidence for successful litigation.

1.3 THE RESEARCH RATIONALE

The research examines problems encountered in trying to prove negligence and injury in product liability . The Food and Drugs Act⁷ does not provide for action for damages. The law has developed through case law. The Act should have had these provisions in order to make it easier for consumers to succeed in their cases, proving negligence has been seen to be difficult and proving damage is equally difficult .The requirement to prove negligence and damage at the same time which has developed through case law is even more difficult.

1.4 METHODOLOGY OF THE RESEARCH

A legal centralist approach has been applied in the research. It involves use of legislation, case law and court observations

1.5 SOURCES OF INFORMATION

- i) Text books on Tort and the Law of negligence
- ii) Case Law , cases have been cited in order to elaborate all issues that have been taken into account
- iii) Interviews, As a way of collecting information structured type of interviews have been used.

⁷ Chapter 303 of The Laws of Zambia

iv) Documents, a review of documents on the subject matter was done in order to gather any information that had been written on the subject.

1.6 MEANING OF DUTY OF CARE

Duty of care is defined as a requirement that a person act toward others and the public with watchfulness, attention, caution and prudence that a reasonable person in the circumstances would. If a person's actions do not meet this standard of care, then the acts are considered negligent, and any damages resulting may be claimed in a lawsuit for negligence. Duty of care is a legal obligation imposed on an individual requiring that they adhere to a standard of reasonable care while performing any acts that could foreseeably harm others. It is the first element that must be established to proceed with an action in negligence. The plaintiff must be able to show a duty of care imposed by law which the defendant has breached. In turn, breaching a duty may subject an individual to liability. It is a responsibility or legal obligation of a person or organisation to avoid Acts or omissions which can reasonably be foreseen to likely cause harm to others .For example a duty of care is owed by say an accountant in preparing a firm's accounts or by a manufacturer to consumers for the safety of a product. An individual may be owed a duty of care by another, to ensure that they do not suffer any unreasonable harm or loss. Generally, a duty of care arises where one individual or group undertakes an activity which could reasonably harm another, either physically, mentally, or economically. The notion that an individual may be owed a duty of care by another, despite there being no prior relationship or interaction, was established in the case of *Donoghue v Stevenson*⁸, Here, a duty of care was found to be owed by a manufacturer to an end consumer, for negligence in the production of his goods. Mrs Donoghue's claim for damages for gastroenteritis and nervous shock were allowed. In this case Lord Atkin interpreted the biblical passages to 'love thy neighbour,' as the legal requirement to 'not harm thy neighbour.' He propounded his neighbour principle,

“That you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.”

This principal established general duty that individuals must take reasonable care in their actions or omissions, so as not to cause harm to others proximate to them. It did not matter that Mrs Donoghue was unidentified or unknown to the manufacturer; as the type of harm which occurred was foreseeable through the negligence of the ginger beer manufacturer.

⁸ [1932] All ER Rep 1

1.7 MEANING OF NEGLIGENCE

Negligence is a breach of legal duty to take care which results in damage to the claimant .The concept of negligence assumes that duty exists that negligence can be a breach of that duty and that the breach of that duty can cause damage. In the case of *Blyth v Birmingham Waterworks Co* ⁹ Judge Alderson defined negligence as the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do ,or doing something which a prudent and reasonable man would not do. In the case of *Heaven v Pender* ¹⁰ Judge Brett M.R said that “actionable negligence consists in the neglect of the use of ordinary care and skill towards a person to whom the defendant owes the duty of observing ordinary care and skill” what this means is that every human being owes a duty of care to other fellow human beings and their property as well as all other legal persons such as corporations. When one fails to exercise due care and causes damage or injury he will be liable for negligence.

Negligence is a legal cause of damage if it directly and in natural and continuous sequence produces or contributes substantially to producing damage or injury, so it can reasonably be said that if not for the negligence, the loss, injury or damage would not have occurred. In cases involving allegedly defective, unreasonably dangerous products, the manufacturer may be liable even though it exercised all reasonable care in the design, manufacture and sale of the product in question

In Zambia Claimants in product liability cases especially against beer and soft drinks manufacturers have depended heavily on the principal of *Res ipsa loquitur* . Which means “the thing itself speaks” That the damage was caused by an instrumentality that was under the exclusive control of the defendant. The plaintiff is not required to prove the defendants’ negligence but merely to show that the thing which was under the defendants control caused the injury to him. Thereafter the defendant bears the evidential burden to explain lack of negligence on his part.

⁹ [1836]11 ex at p 784

¹⁰ [1883]11 QB503

1.8 MEANING OF DAMAGE OR INJURY

A plaintiff may not recover unless he can prove that the defendant's breach of duty caused the injury. Even though there is a breach of duty, and some injury caused to the plaintiff, he may not recover unless he can prove that the defendant's breach caused injury. A plaintiff who has consumed an adulterated drink for example can only rely on a legal remedy to the point that he proves that he suffered injury or damage by producing a medical report.

CHAPTER TWO

LAW AND PROCEDURE IN GATHERING EVIDENCE

2.0 INTRODUCTION

In gathering evidence to prove damage and negligence by persons who have consumed adulterated food products the law relied upon is The food and drugs Act¹¹, Public Health Act¹² and Competition and Consumer Protection (CCPC) Act¹³. There is also unwritten procedure which is followed in gathering evidence. This involves reporting to the police for a police report, visiting the council to lodge a complaint and visiting the hospital to obtain a medical report from the Doctor and also a visit to the manufacturer to lodge a complaint and also for the manufacturer to confirm that indeed the product in question was produced by them. In arriving at a decision the courts rely on Judicial precedence. Cases like *Donoghue v Steveson*¹⁴, *Continental Restaurant and Casino v Mercy Aridah Chulu*¹⁵ and *Zambia Bottlers v Michael Chilufya Sata*¹⁶ are relied upon.

2.1 THE LAW

These three Acts provide as follows:

2.11 FOOD AND DRUGS ACT

Section 3. Any person who sells any food that-

(a) has in or upon it any poisonous or harmful substance; or

(b) consists in whole or in part of any filthy, putrid, rotten, decomposed or diseased substance or foreign matter, or is otherwise unfit for human consumption; or

¹¹ Chapter 303 of the Laws of Zambia

¹² Chapter 295 of the Laws of Zambia

¹³ Act No 24 of 2010

¹⁴ [1932] ALL ER Rep 1

¹⁵ S.C.Z. No 28 /2000

¹⁶ S.C.Z. No 1 /2003

(c) is adulterated;

shall be guilty of an offence.

2.12 THE PUBLIC HEALTH ACT ¹⁷

Section 79 of the Act states that no person shall sell or expose for sale or bring into Zambia or into any market or have in his possession without reasonable excuse any food in an unwholesome state or unfit for use and any medical officer of health, veterinary officer, sanitary inspector or police above the rank of Sub inspector may seize any such food. The district secretary on the recommendation of Medical Officer of Health may order it destroyed or to be disposed of as to prevent it being used as food

Section 80 provides that any Medical Officer of Health, or other person duly authorised by the Local Authority in writing, may, at any time between the hours of 6 a.m. and 6 p.m., enter any shop or premises used for the sale or preparation for sale, or for the storage of food, to inspect and examine any food found therein which he shall have reason to believe is intended to be used as human food, and should such food appear to such officer to be unfit for such use, he may seize the same, and any Administrative Officer may order it to be disposed of as in the foregoing section. The proof that such food was not exposed or deposited for any such purpose shall rest with the person charged.

Section 81 provides that Any person in whose possession there shall be found any food liable to seizure under sections seventy-nine and eighty shall further be liable to a penalty not exceeding three thousand penalty units or to imprisonment for a period not exceeding six months, or to both.

¹⁷ Chapter 295 of the Laws of Zambia

2.13 THE COMPETITION AND FAIR TRADING ACT.¹⁸

Section 12 of the Act deals with consumer protection. Anyone selling contaminated food may be prosecuted under this Act .

The three Acts mentioned above do not provide for Civil Action , They provide for criminal sanctions in case of breach. The case of *Donoghue v Stepheson*¹⁹ has been used as an authority in establishing a duty of care in civil cases.

2.2 JUDICIAL PRECEDENCE

The idea of individuals owing strangers a duty of care where beforehand such duties were only found from contractual arrangements developed at common law, throughout the 20th century. Its origins can be found in the case of *Donoghue v Stevenson*²⁰, where a woman succeeded in establishing a manufacturer of ginger beer owed her a duty of care, because they had produced the ginger beer negligently. A duty of care arises where one individual or group undertakes an activity which could reasonably harm another, either physically, mentally, or economically. She sued Stevenson, though there was no relationship of contract, as the friend had made the payment. Since there was no contract the doctrine of privity prevented a direct action against the manufacturer.

The facts of the case were that On 9th April 1929 Mrs. Mary M'Alister Donoghue brought an action against David Stevenson Aerated Water Manufacturer Paisley, in which she claimed £500 as damages for injuries sustained by her through drinking ginger beer which had been manufactured by the defendant.

Mrs. Donoghue and her friend went to a shop, Wellmeadow Café, in Paisley, Scotland where the friend purchased ginger for Mrs. Donoghue to drink. Mrs. Donoghue had no direct or indirect claim against the manufacturer based on contractual obligations because she did not purchase the Ginger beer. As there was no contract the doctrine of privity of contract prevented a direct action against the manufacturer. The ginger beer was contained in an opaque bottle that prevented the contents from being viewed clearly. Mrs. Donoghue consumed some of the product after which

¹⁸ Chapter 417 of the Laws of Zambia

¹⁹ [1932] All ER Rep 1

²⁰ [1932] All ER Rep 1

the decomposed remains of a snail emerged from the bottle when the remaining ginger beer was poured into her glass. She sought damages against the manufacturer, Stevenson, from the resulting nervous shock and gastro-enteritis, which she claimed was caused through the incident. The trial judge found that the plaintiff could bring an action. The Court of Appeal overturned this decision. The plaintiff appealed to the House of Lords.

Lord Atkin interpreted the biblical passages to love thy neighbour, as the legal requirement to 'not harm thy neighbour.' He then went on to define neighbour as :

“Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.”

The issue of law before the House of Lords was whether the defendant, Stevenson, owed Mrs. Donoghue a duty of care. Dicta of Lord Atkin:

“The complainant has to show that he has been injured by the breach of duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury”. For a moral wrong to have a practical effect in law it must be limited to taking reasonable care to avoid acts or omissions which can reasonably foreseen would be likely to injure a neighbour. A neighbour was defined by lord Atkin as a person so closely connected with and directly affected by my act (or omission) that I should have had them in mind when I committed the act (or omission). Lord Atkin went on to state that it would be a grave defect in the law if a consumer could not claim in circumstances such as a manufacturer negligently mixing poison into a drink. Lord Atkin Stated what is called the neighbor principle as follows:

There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. ... The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.”

Lord Atkin's speech established a neighbour principle, or a general duty that individuals must take reasonable care in their actions or omissions, so as not to cause harm to others proximate to them. It did not matter that Mrs Donoghue was unidentified or unknown to the manufacturer; as the type of harm which occurred was foreseeable through the negligence of the ginger beer manufacturer.

Reasonably foreseeable harm must be compensated. Here, a duty of care was found to be owed by a manufacturer to an end consumer, for negligence in the production of his goods. Mrs Donoghue's claim for damages for gastroenteritis and nervous shock were allowed,

In England the more recent case of *Caparo v Dickman*²¹ introduced a threefold test for a duty of care. Harm must be (1) reasonably foreseeable (2) there must be a relationship of proximity between the plaintiff and defendant and (3) it must be fair, just and reasonable to impose liability. However, these act as guidelines for the courts in establishing a duty of care; much of the principle is still at the discretion of judges.

In Zambia the Three Acts mentioned above do not provide for Civil Action , They provide for criminal sanctions in case of breach. The case of *Donoghue v Stepheson* has been used as an authority in establishing a duty of care in civil cases.

However even though there is breach of duty, and the cause of some injury to the plaintiff, a plaintiff may not recover unless he can prove that the defendant's breach caused the injury.

In *East Suffolk Rivers Catchment Board v Kent*²² Lord Reading, C.J. said that Negligence alone does give a cause of action, damage alone does not give a cause of action; the two must co-exist. For one to succeed therefore they must prove that there was negligence and that the negligence caused the damage.

In *Michael Chilufya Sata MP v Zambia Bottlers Limited*²³ The appellant could not recover because he failed to satisfy the requirement that negligence and damage must co exist. In this case the appellant had purchased a case of soft drink, Sprite, from a retailer. The drink was manufactured and bottled by the Respondent company Zambia Bottlers Limited. The appellant and his children drunk some of the drinks. In one of the bottles containing drink, before it was opened, the appellant and his children noticed a dead cockroach. The bottle was not opened and therefore they did not consume the drink.

Mr. Sata subsequently took action against the Respondent Company in the High Court arguing that he and his children had suffered personal injury and nausea as a result of the dead cockroach

²¹ [1990] 1 All ER 568

²² [1940] UKHL 3

²³ S.C.Z. No 1 /2003

in the bottle. In his action, Mr. Sata was claiming damages for personal injuries, damages for breach of statutory duty by the Respondent under section 3 (b) of the Food and Drugs Act²⁴, and other reliefs. The High Court found in favour of the Respondent Company. The Appellant being dissatisfied with that decision of the court, he appealed.

The Supreme Court held that:

(i) For a plaintiff to succeed in an action for negligence in these circumstances that plaintiff must actually have consumed the adulterated drink or food wholly or partially and in consequence of which that plaintiff must suffer injury.

(ii) There was no injury or damage caused to the appellant by the adulterated drink as he did not consume it. There was no injury or damage caused to the Appellant by the adulterated drink as he did not consume any part of it. Even the medical practitioner called by the Appellant in the court below admitted that no treatment was prescribed for the Appellant and his children for the nausea caused by the sight of a dead cockroach in an unopened bottle of sprite. The appeal was dismissed.

The Supreme Court reemphasized the importance of the holding In *East Suffolk Rivers Catchment Board v Kent*²⁵ where it was said that Negligence alone does give a cause of action, damage alone does not give a cause of action; the two must co-exist.

The supreme Court also pointed out that the only remedies for breach of section 3(b) of the Food and Drugs Act²⁶ are criminal sanctions there is no provision for recovery of damages in civil suits.

In *Donoghue*²⁷ the Plaintiff had partially consumed the adulterated ginger beer and the sight of the dead snail caused her shock and she also had a bout of gastro enteritis which necessitated her being hospitalized. Similarly, In the *Zambian case of Continental Restaurant and Casino v Mercy*

²⁴ Chapter 303 of the Laws of Zambia

²⁵ [1940] UKHL 3

²⁶ Chapter 303 of the Laws of Zambia

²⁷ [1932] ALL ER REP 1

Arida Chulu²⁸ the Plaintiff, a Magistrate, was on 22nd July 1998 invited for lunch by the Chief Administrator at polo grill, a restaurant run and owned by continental restaurant and Casino. At the Restaurant the plaintiff was served with some mushroom soup. While the plaintiff was taking her soup she felt something hard and rough in her mouth which she mistook for a piece of mushroom but after she pulled it out from her mouth she noticed that what she thought was a piece of mushroom was in fact a cockroach with its wings and legs intact. The plaintiff failed to continue with her lunch, she alerted one of the defendant's waiters, one of the Management staff apologized to her and offered her fresh food to cook at home but she refused. The plaintiff also testified that she had since that incident continued to suffer from nausea. The plaintiff subsequently sued the defendant company for damages.

The trial judge identified issue for determination as to whether the defendant company owed any duty of care to the plaintiff and if so the duty was breached and whether the breach occasioned the plaintiff any damage. After citing the provisions of section 3(b) of the Food and Drugs Act²⁹ the court found that the defendant company owed the plaintiff a duty of care. The court further found that this duty was breached. The court held that the plaintiff suffered damage or injury as a result of having been served with soup containing a cockroach. She was awarded damages.

It was also the same in the case of *Zambian Breweries Plc v Reuben Mwanza*³⁰, where the Plaintiff Rueben Mwanza, on 7th October 1998 bought a bottle of Castle lager at a Bottle Store and the bottle was opened in his presence. He drunk half the contents and then he felt as if he was choking and on examination of the bottle he found that it contained a dead lizard.

He went to see the owner of the Bottle store who advised him to go to Zambia Breweries. At Zambia Breweries he saw a Mr. Nigel Corrigan. Mr. Corrigan is said to have told the plaintiff where he suspected the lizard could dropped into the bottle. Mr. Corrigan took the plaintiff around the plant and pointed out the place where he suspected the lizard to have dropped into the

²⁸ S.C.Z. No 28 /2000

²⁹ Chapter 303 of the Laws of Zambia

³⁰ SCZ No. 59/2000

bottle. He left the beer bottle containing the lizard with Mr. Corrigan. The following day he was offered two crates of beer, a castle T shirt and a Cap but he declined to accept these items opting for money but he was not paid any money. The trial judge found as a fact that Zambian Breweries was negligent in the manufacture of the castle of Castle beer with a dead Lizard in it and awarded the plaintiff damages. The principals laid down in *Donoghue v Stevenson*³¹ were based on the fact that the plaintiff consumed the adulterated drink and suffered injury as a result.

Section 3(b) of the Foods and Drugs Act³² makes it a criminal offence to sell any food or drink which is contaminated with any foreign matter. The Criminal Sanctions for a breach of this section are contained in Section 31 (2) of the Act and these are, in the case of a first offence, a fine not exceeding one thousand penalty points or to imprisonment for a term not exceeding three months, or to both. As mentioned above, it will be observed that the only remedies for a breach of Section 3 (b) of the Food and Drugs Act³³ are criminal sanctions and there is no provision for the recovery of damages in a civil suit. As the learned authors of Charlesworth on Negligence observed at paragraph 1104³⁴:

“It would seem that if the statute has imposed a penalty for its breach but was silent as regards any remedy in civil law for damages there may be a presumption initially that the remedy prescribed by the criminal law is the only remedy”

Further the learned authors go on to point out that unless the statute or regulations provide to the contrary, the burden rests on the Plaintiff to prove on a balance of probabilities that the breach of duty caused or materially contributed to his damage

³¹[1932]ALL ER REP 1

³² Chapter 303 of the Laws of Zambia

³³Chapter 303 of the Laws of Zambia

³⁴ J. Charlesworth, Charlesworth on Negligence, 6th edition – paragraphs 16, 1104, 1105

2.3 THE PROCEDURE

When a customer discovers that he has drunk an adulterated drink or eaten food that is contaminated they will report either to the Police or the local authority's Public Health Department. Whether the consumer has reported to the police or the Local authority. They require that the manufacturer concerned must confirm that the product in question was indeed produced by them. In most cases the confirmation will involve a number of chemical or physical tests which takes more than one day to perform. Also leaves room for tampering with the product.

2.31 REPORTING TO THE POLICE

The Police fill in a Medical report form which the consumers take to the hospital with them as they go to seek medical treatment. The Doctor giving treatment will fill in the medical form. The medical form indicates the damage or injury that the plaintiff may have suffered. The medical report is used by the police in case of injury that leads to death of the complainant. Most of the time the medical report is used by the complainant to show that he suffered injury as result of consuming adulterated food. The police send the complainant to the manufacturer to confirm that the contaminated drink was manufactured by them. The Police have no capacity to ascertain where the product was manufactured as they are not privy to the specification of the products. After that the adulterated food is sent to Food and Drugs Laboratory for the Public Analyst to analyse and ascertain what the contaminant is. The report of the analyst and medical report are used as evidence in court.

2.32 REPORTING TO THE PUBLIC HEALTH DEPARTMENT.

The complainant may instead of Police report to the Public Health Department of the Local Authority. The Local authority will advise the complainant to go to hospital will as the police do. They will also ask the complainant to take the contaminated drink or food to the manufacturer so that they can confirm that the contaminated product is indeed their own. The local authority does not have the specifications. The manufacturer will carry out tests to ascertain that the contaminated food is theirs. Once this is done the adulterated food is sent to the food and drugs laboratory for the public analyst to analyse and identify what the contaminant is. Once the Local

Authority has received the report from the public analyst they give results to the complainant. The complainant can use the report as evidence in court.

As evidence in court the complainant will need to produce the medical report showing injury, He will also need to produce report from the public analyst showing what the contaminant is. The producers of these reports, that is , the Public Analyst, The Doctor , The Health Inspector from the Local Authority and the police must all appear in court in order to be cross examined on the reports they produced.

CHAPTER THREE

3.0 THE PROBLEMS CONSUMERS FACE IN GATHERING EVIDENCE

When a person has consumed a food product that is adulterated and they want to pursue the case in court they must gather evidence to prove their case. They gather evidence to prove that there was negligence in the production processes. They must also gather evidence to prove damage. Damage and Negligence must coexist in order for action to succeed. In order for one to prove damage he has to show that he consumed the product that was manufactured negligently. Proving damage involves showing that the product was consumed and as a result of such consumption the person got injured. To prove negligence attributed to the manufacturer one must show that the product was produced by the manufacturer concerned. It must be shown that the product consumed was before consumption in the state that the manufacturer produced it and was not tampered with. This will involve analysis of the product so that it is proved that its specifications conform to similar products produced by the manufacturer. That is to say specifications must be compared. Specifications of both the product and packaging material are looked at.

To prove injury one needs a medical report completed by the Doctor. The Medical report must show that the complainant's illness was as a result of having consumed the product in question. The Doctor must say in his report specifically that the illness is due to the contaminated food that the consumer took. Normally Doctors' report will just indicate that the patient was treated for diarrhea or gastroenteritis. The report will not say the gastroenteritis was caused by the contaminated Fanta or sprite. In cross examinations defence lawyers will suggest that the illness is caused by some other food that the complainant may have eaten earlier.

There are six points at which evidence for use in court to prove negligence and damage is collected. These are at the Point of sale, from the police investigations, the Public Health Department of a Local Authority, the Public Analyst, the Doctor and from the manufacturer. A number of problems at each stage are encountered in gathering this evidence which is necessary for one to prosecute their case. These points are as follows:

3.1 EVIDENCE AT THE POINT OF SALE

This is a statement from the barman or the waiter. The report from the retailer is important in that there is need to know in what condition the product was before it was handed over to the consumer, in case of bottled beverages it is important to know if the bottle was sealed before it was handed over to the customer. If the bottle is sealed it can be assumed that the state of the product is as it was when it left the factory and therefore any defect that is found in the product is due to negligence of the manufacturer. Any resultant injury therefore can be blamed on the manufacturer. This is a key area in gathering evidence. The problem here is that the sales person may not know for certain that the bottle is sealed, the bottle may appear sealed to the naked eye when in actual fact the bottle may have been opened and foreign object introduced. In case of beer the bar man will say the bottle is sealed when he hears a hiss sound at the time of opening. But it is scientifically proven that a beer bottle that has been opened and sealed later may still give a hiss sound at opening thereby giving a false impression of sealage. This may be a problem to the complainant. The evidence of the bar tender may be doubtful.

The case of *John Mvula v Zambia Breweries*³⁵ shows the importance of evidence at point of sale in Zambian courts. In this case the plaintiff on 26th November 2006 bought a bottle of Coca-Cola from *Mani Kosapo* Grocery Store in *Ng'ombe* Compound in Lusaka. As he was drinking he felt something on his throat. He stopped drinking immediately and examined the contents of the bottle. He discovered that there was some foreign matter in the bottle. He showed the bottle to the owner of the Grocery Store and then the plaintiff went to report the matter to the police who advised him to see the health authorities at the Civic Centre. The health authorities referred the Coca-Cola bottle and its contents to food and drugs laboratory for the public analyst to analyse. The results were that the bottle contained a dead cockroach and fungal growth.

The plaintiff took the report to the defendant. The defendant denied liability. As a result of drinking the adulterated Coca-Cola the plaintiff allegedly fell sick and underwent medical treatment at the University Teaching Hospital for 5 days. The plaintiff claimed damages for negligence against the defendant for manufacturing, bottling, distributing and sale of adulterated drink. The plaintiff also claimed damages for distress and anguish sustained by him for drinking

³⁵ 2007/HP/0299 (unreported)

adulterated drink which contained fungi and a cockroach. The plaintiff claimed that he drunk the Coca-Cola at 1500hr. He further claimed that he had nothing for lunch. The Coca-Cola was the first thing he had taken in that day. When the Health Inspector at The Public Health department of Lusaka city council received the bottle all she did was fill in a form and label the bottle and sent it to food and drugs laboratory for the public analyst to deal.

In his evidence in Court the plaintiff failed to bring the barman to testify. It was held that it was for the plaintiff to prove that the Coca-Cola left the defendants plant in the state that the plaintiff alleges to have found it, that is, with cockroach and fungal growth. The court said the plaintiff did not adduce adequate evidence regarding the sealing of the bottle when he opened it. The plaintiff did not state whether or not the bottle was tightly sealed .This was compounded by the fact that the plaintiff did not call the barman to come to court and confirm that indeed the bottle had not been tampered with. The court was not satisfied that the plaintiff had proved negligence on the part of the defendant. The plaintiffs claim failed with costs to the defendants.

The case of Continental Restaurant and Casino v Mercy Arida Chulu ³⁶ illustrates the importance of a statement at the point of sale. In this case the waiter gave a statement that the adulterated soup was given to the customer in the state in which it was made. The complainant drank some of the soup which contained a cockroach. She showed the soup with a cockroach to the waiter and later the waiter called the Manager who manager apologised . He offered her some food to cook at home. The complainant refused.

3.2 THE POLICE

The police will be the first to receive the customer who comes to them complain of having consumed some contaminated food product. They normally record a statement from the complainant and carry on their own investigations. The police will send the customer to the Manufacturer in order for them to ascertain whether the product was produced by the said manufacturer. The police do not have specifications or means of checking whether the product in question is genuine or not. The police also advise the consumer to go to the hospital with their own Police medical report. The police medical report once completed by the Doctor can be used in a criminal prosecution or civil action as evidence. The police in their investigations may visit

³⁶ 2001 ZR 12

the point of sale. They may interrogate the Barman. They may also visit and interrogate the manufacturer. The results of the police investigations may also be used as evidence to prosecute a case in court. The problem is that the results of the investigations are not availed to the complainant.

In *Patrick Nkhata v Zambia Bottlers*³⁷ on 30th January 2007 the plaintiff bought and consumed a soft drink called sprite a beverage allegedly bottled and manufactured by Zambia Bottlers. The plaintiff claimed that shortly after consumption he felt a foreign object in his mouth that later turned out to be a piece of glass and there about started experiencing abdominal pains. He reported the matter to Livingstone Police at Maramba. The Police handed him a police Medical report and advised him to go to the Hospital.

At the hospital he received medical attention for abdominal pains and went back to the police a few days later who further advised him to go to Zambia bottlers where he saw the Quality Manager Trade. The Quality Manager Trade advised him that he should leave the bottle with him so that they could check the date codes and relate it manufacturing process and also analyse the liquid to see if it really was sprite. The customer left the bottle as advised. He never heard from Zambia Bottlers for some months. Efforts to get results of the analyses failed. He therefore took legal action for negligence and claimed damages from the manufacturer.

The plaintiff outlined particulars of negligence as follows: manufacturing and or bottling a beverage meant for public consumption containing foreign particles injurious to the health of persons. Failing to effectively monitor and remove any foreign particles out of beverage meant for public consumption. Negligence in distributing and supplying a beverage to the general public containing foreign particles. In the alternative the plaintiff promised to rely on the doctrine *Res ipsa loquitur* to establish the defendant company's negligence. The plaintiff claimed to have suffered injury, loss and damage. Particulars of injury and loss were outlined as abdominal pain, mental anguish and distress. The police never accompany the complainant were they send them. In this case the police failed to assist the complainant get back the bottle of sprite which was key evidence in that action. Defence Counsel in cross examination put it to the

³⁷ 2008/HL/29 unreported

Plaintiff that that the grass found in the Sprite drink was introduced after the bottle had been opened. The prosecution lost the case.

3.3 PUBLIC HEALTH DEPARTMENT- HEALTH INSPECTORS

According to section 79 of the Public Health Act no person shall sell or expose for sale or bring into Zambia or into any market or have in his possession without reasonable excuse any food in an unwholesome state or unfit for use and any medical officer of health , veterinary officer ,sanitary inspector or police above the rank of Sub inspector may seize any such food. The district secretary on the recommendation of Medical Officer of Health may order it destroyed or to be disposed of as to prevent it being used as food.

Normally each Local Authority will have health inspectors in their employ. The Health inspectors are empowered under the provisions of the Public Health Act to handle problems of contaminated food. The Local Authority carries on their own investigations by visiting the manufacturer as well as the point of sale. Once the adulterated food has come back from the manufacturer the Health inspector sends the same to the Food and drugs laboratory for the Public Analyst to analyse in order to ascertain what the foreign substance is.

After their investigations the Health inspectors write a report. Most of the time their report is based on the report of the public analyst so that any problems or defects the report of the analyst may have also affects the report from the public health department. The health inspector is also required to appear in court to be cross examined on the report submitted. Their evidence though important is thought to be hearsay since they depend on the public analyst.

3.4 FOOD AND DRUGS LABORATORY – PUBLIC ANALYST

The public analyst receives samples from both the police and public health departments of the Local authorities. The public analyst deals with numerous products including psychotropic substances. He does not have any specifications of any product neither does he have the sophisticated equipment used by manufacturers to analyse and distinguish their products from several others on the market. The public analyst will identify the contaminant. The analyst will not say what the product is that is contaminated because he does not have the specification neither does he have the equipment of measurement. For example he will not say the cockroach was found in castle lager but rather that the foreign object is a cockroach and it was in a brown liquid. Another problem here is that the Police and health inspectors send sample to the Manufacturer to ascertain whether the product is theirs. The time these samples take at the manufacturer is not specified. The samples at times take too long so that by the time the analyst comes to analyse them a lot of time could have elapsed between the time the contaminated food was consumed and the time the analyst receives the samples. This weakens this evidence.

In the case of *Felix Mubita v Zambia Breweries*³⁸, on 2nd August 2004 the plaintiff purchased a bottle of Mosi Lager beer a product allegedly produced by Zambia Breweries from Zambia Sugar Staff Club in Mazabuka. While consuming the beer the plaintiff noticed some foreign matter in the bottle. The foreign matter induced a feeling of severe nausea. The plaintiff then vomited and therefore fell sick and had to be taken to the staff clinic where he was treated for stomach pain and was later put on a one day bed rest. The beer in question was taken for analysis by public analyst and found to contain fungal growths. The plaintiff outlined particulars of negligence as failure to ensure that the Mosi was free from harmful substances or other toxic matter that poses a health risk to the consumer and that the defendant was in breach of a duty of care when it sold the plaintiff beer containing fungal growths. Particulars of damage were outlined as injury to health, the plaintiff was rendered unfit for duty as a result he faced disciplinary charges from his employers with a possibility of being dismissed. This caused a lot of uncertainty, fear and anxiety. The plaintiff also incurred personal expenses on his medication. It was held that it was up to the plaintiff to prove that a duty of care owed had been breached. The plaintiff failed to show that the liquid in the bottle was indeed Mosi lager manufactured by

³⁸ 2004/HP/095(unreported)

the defendant. In this case on cross examination the Public analyst could not confirm that the liquid in which the impurities were found was actually Mosi lager. The public analyst stated that she did not have the equipment to analyse the Mosi completely. She also stated that the specifications of various manufacturers are not given. They are trade secrets which manufacturers will not divulge. This case failed on this point.

3.5 THE DOCTOR, THE MEDICAL REPORT

The doctor receives and treats the patient for vomiting, nausea diarrhea, gastroenteritis or other illness purportedly arising out of consuming contaminated food. The doctor completes a medical report which is used as evidence to prove injury or damage. Ideally the Doctors medical report must say that the patient was treated for such an ailment. The ailment was a result of the food product consumed. In practice this is not what happens. The doctor may be able to diagnose and treat the illness he is not able to say for certain that the cause of the problem is the food that was eaten. Lets assume the complainant consumes contaminated product in the afternoon. The question would be what caused the illness? Is it the contaminated food the complainant has eaten or was it the breakfast or lunch eaten earlier. This is a problem in evidence gathering.

In the case of Gilbert Shipunga and Obed Mwakaboko v Zambia Bottlers ³⁹the plaintiffs bought 3 bottles of Coca-Cola from a shop on Chachacha road in Lusaka, they drunk the Coca-Cola as a mixture of spirits .He drunk two and then realized that the third had a cockroach dangling inside the bottle. The plaintiff complained to the agent and showed him the bottle containing a dead cockroach .The agent referred the plaintiff to Zambia bottlers. The following day the plaintiff went to the clinic for check up due to vomiting experienced after drinking the Coca-Cola which contained cockroach. The plaintiffs claimed his business was put at a standstill due to the sudden illness which lasted for five days. He claimed damages for negligence. The plaintiff was attended to by a Dr. Simukoko who failed to state the cause of the illness was the Coca-Cola the complainant consumed.

³⁹ 2008/HP/081 (unreported)

3.6 THE MANUFACTURER

The Public health Departments and the police send the complainant to the manufacturer so that the manufacturer can ascertain whether the product is indeed theirs. In case of *Zambian Breweries* as an example the procedure is that the customer is received by the Quality Manager Trade who fills in trade complaint forms. The first form is a Quality control form where the Laboratory Manager analyses the bottle and reports on whether the bottle is sealed or not and also analyses the contents in the bottle. The Laboratory manager compares results obtained with the specifications. At this stage he is able to tell whether the product is that of the manufacturer. The second form the Laboratory manager fills in is directed at the packaging department where the bottles are cleaned and product put in the bottle. Each and every bottle that goes out has on it a date code (batch number) which shows the date of manufacture and exact time. The packaging department will investigate the problem and report on it by filling the form provided for by Quality Manager Trade. Both the forms that is, from packaging and Quality control are returned together with the sample to the Quality Manager Trade. The Quality Manager Trade feeds back to the customer. This process can take from a week to even three months. Problem is that the sample will have deteriorated before it reaches the Public Analyst. Another problem is that the documents are never given to the complainant. The Laboratory Manager may admit that the product is theirs on the form after analysis. The Quality Manager Trade who represents the company in court will always deny that the product conforms to their specification and denies liability. Without documents the consumer cannot use this evidence.

The case of *Henry Hachoongo v Zambia Bottlers Ltd*⁴⁰ illustrates the importance of reporting the defect to the manufacturer. The plaintiff on 11th February 2007 bought Fanta from *Sanmako Bakery* at Town Centre Lusaka. Upon consuming about half the contents of the Fanta the plaintiff discovered foreign particles in the bottle. Further examination revealed that the foreign particles were suspended solids. He complained to the shop owner and reduced this complaint in writing. The same was signed by the owner of the shop and the person who served him. The plaintiff alleged he suffered abdominal pain as a result he was hospitalised and diagnosed with food poisoning. He sought medical treatment at University Teaching Hospital where his system was cleaned out. According to the plaintiff the cleaning exercise was very painful. The plaintiff

⁴⁰ 2008/HP/0058 (unreported)

produced in court a university teaching hospital outpatient card. He left the bottle with Lusaka city council Public Health Department who sent the sample to the public analyst. The report of the public analyst was produced in court which report described the foreign matter as suspended solids (particles). As a result the plaintiff claimed to have suffered pain, loss, injury and special damages. The doctor who attended to him failed to show up in court. He was Congolese and spoke French and did not feel comfortable to come to court and also that because as head of the unit he would not come to court. The Doctor who came to represent the Head of the Unit reported that the plaintiff when examined was found to be stable but confused. According to the medical report his abdomen, his respiratory system and his cardiac were normal. There was no diarrhea mentioned. The Doctor thought that the plaintiff had food poisoning which initiated gastric lavage. Lavage was described as a procedure in which a tube is inserted through the nostrils to the stomach in order to introduce fluid to expel the content of the stomach. Although the procedure was done and the contents of the plaintiffs stomach sent to the lab no results were availed to the court.

The defendants claimed that the bottle was not presented to them for examination to check the batch numbers and also ascertain whether the Fanta was manufactured by the defendant.

In arriving at the decision the court referred to:

i) The Food and Drugs Act ⁴¹section3(b) which states that “ any person who sells any food that consists in whole or in part of any filthy ,putrid ,rotten, decomposed or deceased substance or foreign matter or is otherwise unfit for human consumption shall be guilty of an offence”

ii) The case of Michael Chilufya Sata v Zambia Bottlers⁴² were the supreme court held that the food and drugs Act makes it a criminal offence to sell any food or drink which is contaminated with any foreign matter and that negligence is only actionable if actual damage is proved. There is no right of action for nominal damages and also that there was no injury or damages caused to the applicant by the adulterated drink as he did not consume any part of it.

⁴¹ Chapter 303 of the Laws of Zambia

⁴² S.C.Z. No 1 /2003

iii) In the case of continental restaurant and casino limited v Chulu⁴³ the court found that a duty of care was owed to the plaintiff by the defendant and had been breached on the strength of provisions of section 3(b) of the food and drugs Act⁴⁴

iv) In Donoghue v Steveson the plaintiff had partially consumed the adulterated ginger beer and the sight of the dead snail caused her to go into shock and she also had a bout of gastro enteritis which necessitated her being hospitalized and

v) The case of Zambia Breweries v Rueben Mwanza ⁴⁵ in which the plaintiff had partially consumed the beer before he saw the lizard. The court also referred to the holding in East Suffolk Rivers catchment Board v Kent⁴⁶ where lord Reading CJ said that negligence alone does not give cause of action, damage alone does not give a cause of action. The two must coexist.

It was held that although the court accepted that defendants, Zambia Bottlers were in the manufacturing and bottling of soft drinks which include Fanta not taking the bottle to the manufacturer by the complainant even after Lusaka city council had examined it was wrong. The defendants were not the only manufacturing and bottling company in Zambia. Taking the bottle to the respondent company would have enabled the company to establish the date of manufacture, the time and expiry date of the drink. It would also have been important for them to establish which batch the Fanta belonged to. This information would have been useful to the court. The case was dismissed.

As the court said in this case it is important for the customer to go back to the manufacturer so that they can confirm that the product was produced by them. In the case of Zambia Breweries v Rueben Mwanza ⁴⁷ the customer visited Zambian Breweries plant at Lusaka after he had partially consumed a castle lager that contained a dead lizard. He met the Quality manager trade. The manager got a statement from the customer and filled in trade complaint form. The manager collected the bottle. Later the manager handed him over to the Technical Director a Mr. Corrigan who admitted that the Castle lager was produced by them and even showed the customer a point

⁴³ 2000 ZR 138

⁴⁴ Chapter 303 of the Laws of Zambia

⁴⁵ 2001 ZR 12

⁴⁶ [1940] UKHL 3

⁴⁷ 2001 ZR 12

where the Lizard could have dropped into the bottle. Mr. Corrigan offered the customer some crates of beer and T shirts. The customer refused and opted for money which was not given. The Technical Director refused to appear in court. The court believed the statement of Rueben Mwanza since the Director was not available to rebut it.

CHAPTER FOUR

ANALYSIS OF THE PROBLEMS CONSUMERS FACE IN ADDUCING EVIDENCE AND ITS EFFECTS

4.0 INTRODUCTION

There are six places at which a person who has consumed a food product that is adulterated and can collect evidence in order to prosecute the case successfully. If they want to pursue the case in court they must gather evidence to prove their case. Evidence is gathered to prove that there was negligence in the production processes. Evidence is also gathered to prove damage. As has been shown above Damage and Negligence must coexist in order for action to succeed. In order for one to prove damage he has to show that he consumed the product that was manufactured negligently. Proving damage involves showing that the product was consumed and as a result of such consumption the person got injured. The plaintiff must be able to show that it is the negligently produced product that caused the injury. To prove negligence attributed to the manufacturer one must show that the product was produced by the manufacturer concerned.

A medical report completed by the Doctor is a key requirement. The Medical report must show that the complainant's illness was as a result of having consumed the product in question. At each point in evidence gathering there are problems that make the evidence not very effective.

There are six points at which evidence for use in court to prove negligence and damage is collected are: at the Point of sale , the police investigations ,the Public Health Department of a Local Authority , the Public Analyst of the ministry of Health, the Doctor and from the Manufacturer.

A number of problems at each stage are encountered in gathering the evidence which is necessary for one to prosecute their case. It is a requirement in Law that in order for one to succeed they must prove negligence. At the same time they must prove damage. In *East Suffolk Rivers Catchment Board v Kent*⁴⁸ Lord Reading CJ said that negligence alone does not give cause of action, damage alone does not give a cause of action. The two must coexist. The fact that the negligence and damage must coexist in order for ones action to succeed makes it extremely difficult for one to succeed in court. When one is gathering evidence they must ensure,

⁴⁸ [1940] UKHL 3

if they are aware that there must be a combination of evidence negligence as well as damage in there evidence.

4.1 FROM THE POINT OF SALE

At the point of sale the evidence gathered is to show that the manufacturer was negligent. Here a statement from the barman or the waiter is collected. This report from the retailer is important in that there is need to know in what condition the product was before it was handed over to the consumer, in case of bottled beverages it is important to know if the bottle was sealed before it was handed over to the customer. If the bottle is sealed it can be assumed that the state of the product is as it was when it left the factory and therefore any defect that is found in the product is due to negligence of the manufacturer. The problem here is that the sales person may not know for certain that the bottle is sealed. When being cross examined they normally don't say for certain that the bottle was sealed thereby leaving some doubt in the mind of a judge. The bottle may appear sealed to the naked eye when in actual fact the bottle may have been opened earlier.

The case of *John Mvula v Zambia Breweries*⁴⁹ shows the importance of evidence at point of sale in Zambian courts. In this case the plaintiff on 26th November 2006 bought a bottle of Coca-Cola from *Mani Kosapo* Grocery store in *Ng'ombe* compound in Lusaka. As he was drinking he felt something on his throat. He stopped drinking immediately and examined the contents of the bottle. He discovered that there was some foreign matter in the bottle. He showed the bottle to the owner of the Grocery Store and then the plaintiff went to report the matter to the Police who advised him to see the health authorities at the Civic Centre. The health authorities referred the Coca-Cola bottle and its contents to food and drugs laboratory for the public analyst to analyse. The results were that the bottle contained a dead cockroach and fungal growth. The plaintiff took the report to the defendant. The defendant denied liability. As a result of drinking the adulterated Coca-Cola the plaintiff allegedly fell sick and underwent medical treatment at the University Teaching Hospital for 5 days. The plaintiff claimed damages for negligence against the defendant for manufacturing, bottling, distributing and sale of adulterated drink. The plaintiff also claimed damages for distress and anguish sustained by him for drinking adulterated drink which contained fungi and a cockroach. The plaintiff claimed that he drunk the Coca-Cola at

⁴⁹ 2007/HP/0299 (unreported)

1500hr. He further claimed that he had nothing for lunch. The Coca-Cola was the first thing he had taken in that day. When the Health Inspector at The Public Health department of Lusaka city council received the bottle all she did was fill in a form and label the bottle and sent it to food and drugs laboratory for the public analyst to deal. The health inspector did no analysis of the bottle. In his evidence in Court the plaintiff failed to bring the barman to testify. It was held that it was for the plaintiff to prove that the Coca-Cola left the defendants plant in the state that the plaintiff alleges to have found it, that is, with cockroach and fungal growth. The court said the plaintiff did not adduce adequate evidence regarding the sealing of the bottle when he opened it. The plaintiff did not state whether or not the bottle was tightly sealed. This was compounded by the fact that the plaintiff did not call the barman to come to court and confirm that indeed the bottle had not been tampered with. The court was not satisfied that the plaintiff had proved negligence on the part of the defendant. The plaintiffs claim failed with costs to the defendants.

It is important for the waiter or barman at the point of sale to state that the product was given to the customer in the same manner that it was manufactured or produced. This evidence goes to prove negligence on the part of the manufacturer. Normally the bartender will be biased towards the manufacturer because they have a longer standing relationship. They would not like to jeopardize the relationship with the manufacturer. They rarely give evidence that is beneficial to the consumer. As a result depending on the point of sales people for the evidence may not be useful. Illustrative of the importance of the point of sale evidence is the case of *Continental Restaurant and Casino v Mercy Arida Chulu*⁵⁰ In this case the waiter gave a statement that the adulterated soup was given to the customer in the state in which it was made. The complainant partially drunk soup which contained a cockroach. She showed the soup with a cockroach to the waiter and later the waiter called the Manager who apologised. He offered her some food to cook at home. The complainant refused. If the waiter's statement had been different the case would probably have been lost. These workers fear losing their jobs as a result this area of evidence collection can be a very big problem.

⁵⁰ 2001 ZR 12

4.2 FROM THE POLICE

The police receive the complainant and they record a statement and fill in a medical report form without really following up the customer. Its fine when the customer is going to the hospital but when they send the customer to the manufacturer they do not accompany the customer. The problem faced here is that there is a lot of delay in ascertaining that the product is theirs (the manufacturers). As a result the adulterated product sample may go missing. The police do not have specifications or means of checking whether the product in question is genuine or not. The police also advise the consumer to go to the hospital with their own Police medical report. The police medical report once completed by the Doctor can be used in a criminal prosecution or civil action as evidence. The police in their investigations are supposed to visit the point of sale. They must also interrogate the Barman. They may also visit and interrogate the Manufacturer. This is rarely done. Their investigation is what they are told by the consumer. The results of the police investigations may also be used as evidence to prosecute a case in court. The problem is that the results of the investigations are not availed to the complainant. The investigation is not complete so the evidence may be very defective and not helpful to the complainant.

In *Patrick Nkhata v Zambia Bottlers*⁵¹ on 30th January 2007 the plaintiff bought and consumed a soft drink called sprite a beverage allegedly bottled and manufactured by Zambia Bottlers. The plaintiff claimed that shortly after consumption he felt a foreign object in his mouth that later turned out to be a piece of glass and there about started experiencing abdominal pains. He reported the matter to the Police in Livingstone at Maramba. The Police handed him a police Medical report and advised him to go to the Hospital. At the hospital he received medical attention for abdominal pains and went back to the police a few days later who further advised him to go to Zambia bottlers where he saw the Quality Manager Trade. The Quality Manager Trade advised him that he should leave the bottle with him so that they could check the date codes and relate it manufacturing process and also analyse the liquid to see if it really was sprite. The customer left the bottle as advised. He never heard from Zambia Bottlers for some months. Efforts to get results of the analyses failed. He therefore took legal action for negligence and claimed damages from the manufacturer. The plaintiff outlined particulars of negligence as follows : manufacturing and or bottling a beverage meant for public consumption containing

⁵¹ 2008/HL/29(unreported)

foreign particles injurious to the health of persons. Failing to effectively monitor and remove any foreign particles out of beverage meant for public consumption. Negligence in distributing and supplying a beverage to the general public containing foreign particles. The plaintiff claimed to have suffered injury, loss and damage. Particulars of injury and loss were outlined as abdominal pain, mental anguish and distress.

The police never accompanied the complainant to Zambia Bottlers. In this case the police failed to assist the complainant get back the bottle of sprite which was key evidence in that action. Defence Counsel in cross examination put it to the Plaintiff that that the grass found in the Sprite drink was introduced after the bottle had been opened. The prosecution lost the case.

4.3 PUBLIC HEALTH DEPARTMENT- HEALTH INSPECTORS

Operations of the health department of Local Authorities is within the provisions of the public health Act⁵² which states that no person shall sell or expose for sale or bring into Zambia or into any market or have in his possession without reasonable excuse any food in an unwholesome state or unfit for use and any medical officer of health, veterinary officer, sanitary inspector or police above the rank of Sub inspector may seize any such food. The district secretary on the recommendation of Medical Officer of Health may order it destroyed or to be disposed of as to prevent it being used as food.

Normally each Local Authority will have health inspectors in their employ. The Health inspectors are empowered under the provisions of the Public Health Act to handle problems of contaminated food. In theory the Local Authority carry on their own investigations by visiting the manufacturer as well as the point of sale. In practice this does not happen. The health inspectors rarely visit the manufacturer .They send the consumer alone to the manufacturer to go and get confirmation that the food product was produced by them. Their report will be based on what the customer tells them the manufacturer said. Again once the adulterated food has come back from the manufacturer the Health inspector sends the same to the Food and drugs laboratory for the Public Analyst to analyse in order to ascertain what the foreign substance is.

⁵² Section 79 of the Public Health Act Chapter 295 of the Laws of Zambia

The health inspectors do not do any analysis of their own. Health inspectors write a report based on what the affected individual tells them about confirmation of production by manufacturer and public analyst's report. This is problem because the report will be identical to what public analyst says in his report and any problem in public analyst's report will be same as in healthy inspector's testimony. If at cross examination the evidence of the Public analyst is destroyed so will the evidence of the health inspector.

The health inspectors must do their own investigations by visiting the point of sale and interviewing the people concerned. They should also visit the manufacturer and make their own assessment instead of waiting for a report from the affected person. The health inspectors must also do their own independent analysis of the sample. This way they will produce a report that is independent of the testimony of the customer and the public analyst. Evidence collected this way will be more useful to the customer.

4.4 FOOD AND DRUGS LABORATORY – PUBLIC ANALYST

The Food and Drugs Act⁵³ empowers the Public Analyst to handle all contaminated food products and analyse of samples received. The public analyst receives samples from both the Police and Public Health Departments of the Local authorities. The public analyst does not only deal with food products but also with all other forensic analyses including psychotropic substances. He does not have specifications of any product. He does not have the sophisticated equipment used by manufacturers to analyse and distinguish their products from several others on the market. The public analyst only identifies the contaminant. The analyst does not indicate what the product is that is contaminated because he does not have the equipment of measurement. Most of the laboratory equipment used is very sophisticated and needs training to use. For example he will not say the fungal growth was found in a Coca-Cola. He will say that the that the foreign object is fungal grown found in a black liquid. When at cross examination it is put to the public analyst that the black liquid could have been tea for example the analyst is not able to dispute with scientific evidence. This is a problem for the consumer because it is very easy most of the time for defence counsel to punch holes in the evidence of the Public analyst.

⁵³ Chapter 303 of the Laws of Zambia

Another problem here is that the Police and health inspectors send sample to the analyst very late because first the sample goes to the manufacturer to confirm that they are the manufacturers of the defective product. The time these samples take at the manufacturer is not specified in both the Public health Act and Food and Drugs Act. The samples at times stay too long at the manufacturer so that by the time the analyst comes to analyse them they could have deteriorated. This weakens the evidence and creates a problem for the plaintiff.

The case of Felix Mubita v Zambian Breweries ⁵⁴ failed because on cross examination the Public analyst could not confirm that the liquid in which the impurities were found was actually Mosi lager. The public analyst stated that she did not have the equipment to analyse the Mosi completely. She also stated that the specifications of products of various manufacturers are not given. They are trade secrets which manufacturers will not divulge. She just stated in her report that the contaminant was fungal growth in an alcoholic liquid. This was a case in which on 2nd August 2004 the plaintiff purchased a bottle of Mosi Lager beer a product allegedly produced by Zambia Breweries from Zambia Sugar Staff Club in Mazabuka. While consuming the beer the plaintiff noticed some foreign matter in the bottle. The foreign matter induced a feeling of severe nausea. The plaintiff then vomited and therefore fell sick and had to be taken to the staff clinic where he was treated for stomach pain and was later put on a one day bed rest. The beer in question was taken for analysis by public analyst and found to contain fungal growths.

The plaintiff outlined particulars of negligence as failure to ensure that the Mosi was free from harmful substances or other toxic matter that poses a health risk to the consumer and that the defendant was in breach of a duty of care when it sold the plaintiff beer containing fungal growths. Particulars of damage were outlined as injury to health, the plaintiff was rendered unfit for duty as a result he faced disciplinary charges from his employers with a possibility of being dismissed. This caused a lot of uncertainty, fear and anxiety. The plaintiff also incurred personal expenses on his medication. It was held that it was up to the plaintiff to prove that a duty of care owed had been breached. The plaintiff failed to show that the liquid in the bottle was indeed Mosi lager manufactured by the defendant. This case failed on this point.

⁵⁴ 2004/HP/095(unreported)

4.5 THE DOCTORS MEDICAL REPORT

After treating the patient who has consumed an adulterated product the Doctor will write a medical report. The medical report is a key piece of evidence that proves the type of injury or damage that the complainant could have suffered. The Medical report indicates that the patient was treated for vomiting, nausea, diarrhea, gastroenteritis or other illness. For the medical report to be useful it must say specifically that the cause of the illness is the adulterated food that the complainant drunk. In practice this is not what happens. Most of the time the medical report is not that specific. The doctor is able to diagnose and treat the illness but he is not able to say for certain that the cause of the problem is that particular food that was eaten.

Normally people will eat or drink something outside their homes after they have taken breakfast or lunch at home. The question often asked by defence lawyers is what could have caused the illness? Could it be the contaminated food one ate or the breakfast eaten earlier? This leaves some doubt in the mind of the judge as to the actual cause of the illness. Defence lawyers capitalise on this weakness in the medical report. Even on cross examination the doctor will not for certain say that the cause of the diarrhea say is because of the Fanta that the complainant drunk.

This was seen in the case of Gilbert Shipunga and Obed Mwakaboko v Zambia Bottlers⁵⁵ where in court the Doctor failed to state the cause of the illness. In this case plaintiffs bought 3 bottles of Coca-Cola from a shop on Chachacha road in Lusaka, they drunk the Coca-Cola as a mixture of spirits. They drunk two and then realized that the third had a cockroach inside the bottle. The plaintiff complained to the agent and showed him the bottle containing a dead cockroach. The agent referred the plaintiff to Zambia bottlers. The following day the plaintiff went to the clinic for check up due to vomiting experienced after drinking the Coca cola which contained cockroach. They claimed damages for negligence.

Instead of just physically examining the patient there is need for the Doctor to get a sample from the patient and examine them in the laboratory. Such results are more useful to the complainant.

⁵⁵ 2008/HP/081(unreputed)

4.6 THE MANUFACTURER

After a person has consumed a contaminated food product and reports to the Public health Departments or the Police they send the complainant to the manufacturer so that the manufacturer can ascertain whether the product is indeed theirs. They do not accompany the complainant. They let them go alone to ask the manufacturer to say that they produced the food that caused the problem. In case of *Zambian Breweries* as an example the procedure is that the customer is received by the Quality Manager Trade who fills in trade complaint forms and sends sample for analysis. When results are received from the laboratory the Quality manager Trade calls the customer and informs them of the findings. The laboratory will always give the correct picture to the Quality Manager Trade. The Quality Manager Trade has a choice of telling the customer they produced the beer in question or he can simply say this product does not much our specifications even when it does. The biggest problem at this stage is that the companies never give results of their findings in writing. Its always verbal. Because its verbal when they appear in court the defence will always deny that that they produced the product. They will say that according to their findings the product does not much their specifications. Since the complainant has no documents he cannot challenge that. This makes the plaintiffs case very weak. What makes it worse is that the a public analyst is not able to say after analysis what the product really is because the Public Analyst does not have the type of equipment and the specifications needed. This evidence is not useful to the complainant.

The case of *Henry Hachoongo v Zambia Bottlers Ltd*⁵⁶ was lost by the plaintiff because he did not report back to the manufacturer in order for them to identify their product. Though this case illustrates the importance of reporting the defect to the manufacturer the evidence obtained is not good enough for one to win their case. In this case the plaintiff on 11th February 2007 bought Fanta from *Sanmako Bakery* at Town Centre Lusaka .Upon consuming about half the contents of the Fanta the plaintiff discovered foreign particles in the bottle. Further examination revealed that the foreign particles were suspended solids. He complained to the shop owner and reduced this complaint in writing. The same was signed by the owner of the shop and the person who served him. The plaintiff allegedly suffered abdominal pain and he was hospitalised . He was diagnosed with food poisoning. He sought medical treatment at University Teaching Hospital

⁵⁶ 2008/HP/0058 (unreported)

were his system was cleaned out. According to the plaintiff the cleaning exercise was very painful. The plaintiff produced in court a university teaching hospital outpatient card. He left the bottle with Lusaka city council Public Health Department who sent the sample to the Public Analyst. The report of the Public Analyst was produced in court. The report described the foreign matter as suspended solids (particles). As a result the plaintiff claimed to have suffered pain , loss, injury and special damages.

The doctor who attended to him failed to show up in court. He was Congolese and spoke French and did not feel comfortable to come to court and also that because as head of the unit he would not come to court. The Doctor who came to represent the Head of the Unit reported that the plaintiff when examined was found to be stable but confused. According to the medical report his abdomen ,his respiratory system and his cardial were normal. There was no diarrhea mentioned. The Doctor thought that the plaintiff had food poisoning which initiated gastric lavage. Lavage was described as a procedure in which a tube is inserted through the nostrils to the stomach in order to introduce fluid to expel the content of the stomach. Although the procedure was done and the contents of the plaintiffs stomach sent to the lab no results were availed to the court.

The defendants claimed that the bottle was not presented to them for examination to check the batch numbers and also ascertain whether the Fanta was manufactured by the defendant. As seen from above even when the customer reports back to the manufacturer the evidence is not helpful since the analysis is done in the absence of the customer and no written results are given. It would have been helpful if the Police or the Health inspector accompanied the complainant to the manufacturer. The manufacturer would probably hand over documents of analysis to government officials. The court said in this case it is important for the customer to go back to the manufacturer so that they can confirm that the product was produced by them.

However in *Zambia Breweries v Rueben Mwanza*⁵⁷ the customer was lucky because the Director who took him round when he visited *Zambian Breweries* plant at Lusaka after he had partially consumed a castle lager that contained a dead lizard admitted that the beer was produced by them. He even showed the customer a point where the Lizard could have dropped

⁵⁷ 2001 ZR 12

into the bottle. This evidence was good enough for the customer to prosecute his case especially that the director did not appear in court so that what the plaintiff said was taken as the truth. This is a very rare occurrence because manufacturers almost always deny liability

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

There are problems at each of the points at which a person who has consumed a food product that is adulterated can gather evidence in order to prosecute the case successfully. These problems make the evidence collected not effective. One must prove that he is owed a duty of care. The Food and Drugs Act⁵⁸ places a duty of care on the manufacturer. A breach of that duty results in claim for damages. The evidence collected must prove negligence by the manufacturer concerned and must also prove damage. Negligence and damage must coexist in order for action for damages to succeed.

There are six points at which evidence for use in court to prove negligence and damage is collected. These are: at the Point of sale, the police investigations, the Public Health Department of a Local Authority, the Public Analyst of the Ministry of Health, the Doctor and from the Manufacturer. A number of problems at each stage are encountered in gathering the evidence which is necessary for one to prosecute their case. The fact that the negligence and damage must coexist in order for one's action to succeed makes it extremely difficult for one to succeed in court. When one is gathering evidence they must ensure that there is a combination of evidence of negligence as well as damage.

5.1 AT THE POINT OF SALE

At the point of sale which can be a bar, a shop or restaurant the evidence gathered is to show that the manufacturer was negligent. Here a statement from the barman, the waiter or cashier is collected. The evidence from the retailer is important in that there is need to know in what condition the product was before it was handed over to the consumer. In case of bottled beverages it is important to know if the bottle was sealed before it was handed over to the customer. If the bottle is sealed it can be assumed that the state of the product is as it was when it left the factory and therefore any defect that is found in the product is assumed to be due to negligence of the manufacturer. The problem here is that the sales person may not know for

⁵⁸ Chapter 303 of the Laws of Zambia

certain that the bottle is sealed. When being cross examined they are not confident in their statement that the bottle was sealed thereby leaving some doubt in the mind of a judge. The bottle may appear sealed to the naked eye when in actual fact the bottle may have been opened earlier. The sales person may not give true statement if they think it is going to implicate their master or the manufacturer who may have a long standing good relationship with their master. They also fear for their jobs

The plaintiff must prove that the food product was handed to him in same state that it left the factory. The person at the point of sale must appear in court to give evidence and be cross examined. If this witness is not brought the court may rule the plaintiff did not adduce adequate evidence regarding the sealing of the bottle when he opened it. In case of a bottle the plaintiff must state whether or not the bottle was tightly sealed. The plaintiff must bring the barman to court to testify. The barman must confirm that indeed the bottle had not been tampered with. The court must be satisfied that the plaintiff had proved negligence on the part of the defendant otherwise the plaintiffs claim will fail. Barmen or waiters rarely give evidence that is beneficial to the consumer. Depending on the point of sales people for the evidence may not be useful.

5.2 THE POLICE

The police receive the complaints from members of the public. They record statements and fill in a medical report form. The customer goes to the hospital alone. The police also send the customer to the manufacturer so that the manufacturer can confirm that they produced the defective product. The police do not accompany the customer. The problem faced here is that there is a lot of delay in ascertaining that the product is theirs (the manufacturers). The police in their investigations are supposed to visit the point of sale and interrogate the Barman or cashier. They are also supposed to visit and interrogate the Manufacturer. This is never done. They depend on the information the customer brings back from the trade or the manufacturer. The results of the Police investigations may also be used as evidence to prosecute a case in court. The problem is that the results of the investigations when done are not availed to the complainant. The police are supposed to carry out a thorough investigation. The results of the investigation must be given to the customer before they proceed to court.

5.3 HEALTH INSPECTORS

Public Health Department of Local Authorities handles issues of adulterated food stuff. The Health inspectors are empowered under the provisions of the Public Health Act⁵⁹ to handle problems of contaminated food. Each local authority will have inspectors who are supposed to investigate the issues with the manufacturer as well as the point of sale. The health inspectors also receive the samples and hand them over to the Ministry of Health's Public Analyst.

In theory the health inspectors are supposed to carry out their own investigations by visiting the Manufacturer as well as the point of sale. In practice this does not happen. The health inspectors rarely visit the manufacturer. They send the consumer alone to the manufacturer to go and get confirmation that the food product was produced by them. Their report will be based on what the customer tells them about the manufacturer. Once the adulterated food has come back from the manufacturer the Health Inspector sends the same to the Food and Drugs laboratory for the Public Analyst to analyse in order to ascertain what the foreign substance is. Health inspectors write a report based on what the affected individual tells them about confirmation of production by manufacturer and Public Analyst's report. This is problem because the report will be identical to what Public Analyst says in his report. Any problem in public analyst's report will be same as in healthy inspectors testimony. If at cross examination the evidence of the Public Analyst is destroyed so will the evidence of the Health Inspector.

The Health Inspectors must do their own investigations by visiting the point of sale and interviewing the people concerned. They should also visit the Manufacturer and make their own assessment instead of waiting for a report from the affected person. The Health Inspectors must also do their own independent analysis of the sample. This way they will produce a report that is independent of the testimony of the customer and the Public Analyst. Evidence collected this way will be more useful to the customer

⁵⁹ Chapter 295 of the Laws of Zambia

5.4 PUBLIC ANALYST

The Food and Drugs Act⁶⁰ empowers the Public Analyst to handle all contaminated food products and analyse of samples received. The public analyst receives samples from both the Police and Public Health Departments of the Local authorities. The problem with the results of analysis of the Public Analyst is that the measurement is geared towards finding out what the contaminant is. In cases of adulterated food products it is also important to know what the product is if one has to hold the manufacturer liable. Currently the Public Analyst does not have the necessary knowledge and equipment to identify the various food products. This is a problem because there is need to know that a particular manufacturer produced the product if you are to hold them liable. The public analyst needs to be empowered with equipment and knowledge.

Another problem here is that the Police and Health inspectors send sample to the analyst very late because first the sample goes to the manufacturer to confirm that they are the manufacturers of the defective product. The time these samples take at the manufacturer is not specified in both the Public Health Act⁶¹ and Food and Drugs Act⁶². The samples at times stay too long at the manufacturer so that by the time the analyst comes to analyse them they could have deteriorated. This weakens the evidence and creates a problem for the plaintiff. The Police and Health Inspector must actively take part in the movement of the samples.

5.5 THE DOCTOR, MEDICAL REPORT

One key piece of evidence is collected from the Doctor. This is a medical report. After treating the patient who has consumed an adulterated product the Doctor will write a medical report. The medical report is the evidence that indicates the type of injury or damage that the complainant could have suffered. For a medical report to be useful it must say specifically that the cause of the illness is the adulterated food that the complainant consumed. In practice this is not what happens. In most cases medical report is not that specific. The doctor is able to diagnose and treat the illness but he is not able to say for certain that the cause of the problem is that particular

⁶⁰ Chapter 303 of the laws of Zambia

⁶¹ Chapter 295 of the Laws of Zambia

⁶² Chapter 303 of the Laws of Zambia

food that was eaten. Another problem is that a person may drink or eat an adulterated food product after they have taken breakfast or lunch at their own home. The doctor will not say exactly what caused the illness. This leaves some doubt in the mind of the judge as to the actual cause of the illness. There is need for the doctors to collect samples from the complainant and analyse them in the laboratory. Interpretation of laboratory results may be more useful in court as they will be more specific as to the cause of the illness. Such results may be more useful

5.6 THE MANUFACTURER

Both the police and health inspectors advise customer to go to the manufacturer to confirm that the product was produced by them. They do not accompany the complainant. They let them go alone. The manufacturer analyse the sample and compare with specifications of their product. The biggest problem at this stage is that manufacturers never give results of their findings in writing. It's always verbal. In court the defence will always deny that they produced the product and will deny liability. They will state that according to their findings the product does not conform to their specifications. This makes the plaintiffs case very weak. What makes it worse is that the a public analyst is not able to say after analysis what the product really is because the Public Analyst does not have the type of equipment and the specifications needed. This evidence is not useful to the complainant. The Public Health Act⁶³ and the Food and Drugs Act⁶⁴ needs to be amended so that they compel the Manufacturer to provide results of their analysis in writing.

The whole system of handling of food trade complaints needs to be changed as recommended in order for evidence to be gathered without difficulty to prove negligence and damage when a duty of care is breached.

⁶³ Chapter 295 of the Laws of Zambia

⁶⁴ Chapter 303 of the Laws of Zambia

BIBLIOGRAPHY

BOOKS

1. Charlesworth, J Charlesworth on Negligence(6th Edition) Sweet and Maxwell, 1971
2. Clerk and Lindell ,Torts (16th Edition)Sweet and Maxwell London ,1989
3. Cooke John, Law of Torts(6th Edition)Longman ,London 1998
4. Giliker Paula, Beckwith Silas, Tort(4th Edition) . Sweet and Maxwell , Limited London 2000
5. Harvey Barbara, Cases and commentary on Tort(4th Edition) Pearson Books ,2000
6. Rogers ,E W ,Winfield and Jolowicz on Tort (14th Edition) Sweet and Maxwell , Limited London 1994
7. Weir Tony, A case book on tort (4th Edition) Sweet and Maxwell , Limited London 1979
8. Wright Cecil A Cases on the Law of Torts Butterworth , London , 1958

PUBLICATIONS

1. Chanda C Kabazo, Law of Torts (1st edition),Zambia Open University ,Lusaka ,2005
2. Simbyakula R .N Law of Torts (1st edition),Zambia Open University ,Lusaka ,2005