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CYPRUS WINE ASSOCIATION LTD. v. THEODOSSIS GEORGHIOU

[TRIANTAFYLLIDES, STAVRINIDES, HADJIANASTASSIOU, JJ.]

CYPRUS WINE ASSOCIATION LTD.,
Appellants-Defendants,

v.

THEODOSSIS GEORGHIOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 4679).

Negligence—Dangerous goods—Manufacturer's liability and duty of care to consumer and ultimate purchaser—Principle of proximity—Principles applicable laid down in Donoghue's *case* (infra)*—Consumer injured by cork of wine container which flung off and injured his left eye—Failure of consumer to prove, on the balance of probabilities, that manufacturers (appellants-defendants) were in fact negligent—On the contrary, the manufacturers established by positive evidence that they had taken all reasonable care in the matter—Injury to consumer (plaintiff-respondent) not reasonably forseeable—Cork flying off as it dit in this case very remote possibility—Other causes to which accident might be attributed but not connected with manufacturers—Onus of proof to establish on the balance of probabilities negligence, lies squarely on the plaintiff—Findings made by the trial Court and inferences drawn therefrom unsatisfactory—Appeal allowed—Judgment of trial Court set aside.*

Appeal—Findings of fact—Inferences—Findings of fact as to liability depending largely on inferences—Court of Appeal in as good a position as the trial Court to decide the issues.

Inferences—Findings of fact—Appeal—See supra.

This is an appeal by the defendants against the judgment of the District Court of Limassol adjudging them to pay to the plaintiff (now respondent) £1,147 by way of special and general damages for the loss of his left eye due to the defendants' (now appellants') negligence.

The salient facts of the case are as follows :

On February 7, 1966, the respondent (plaintiff) bought from the co-operative society of his village a demijohn containing about four okes of white sweet wine of the appellants' (defendants') manufacture. It would appear that this demijohn

reached the co-operative society of the village early in January 1966, through a salesman employed by a firm at Paphos to distribute, *inter alia*, products of the appellants (defendants). There is nothing on record to show when the demijohn in question left the factory of the appellants in Limassol and reached the Paphos firm, and for how long, and how, it remained stored there before it was sold by the said salesman to the co-operative society of the respondent's village.

The demijohn was covered with raffia and was sealed with a cork, the top of which is made of hard plastic ; and the upper part of the neck of the demijohn was covered by a plastic ring which has been described as a " viscring ".

While, in the evening of February 7, 1966, the respondent, who is a forty-six years old farmer was trying to open the demijohn by cutting with his clasp-knife the viscring, the cork suddenly flew into, and seriously injured, his left eye, which as a result, had to be, and was extracted on February 28, 1966

The wine in the demijohn was later examined by Mr. E., an oenologist in the Oenological Department of the Government. He found it to be a little cloudy due to slight fermentation. The trial Court found that " due to the fact that the wine contained in the demijohn fermented, the cork when the viscring was removed flung off and hit the left eye of the plaintiff ;" and that " if the wine is pasteurized and it is sealed properly and it is air-proof, therefore excluding the entrance of any micro-organism into the container, the possibility of the wine being fermented is excluded ". As regards the law governing the matter, the trial Court relied on the English common law principle expounded in the case of *M' Alister (or Donoghue)* v. *Stevenson* [1932] A.C. 562 and proceeded to quoted the classic dictum of Lord Atkin in that case (at page 599). The trial Court stated, further, that in a case in which liability was to be based on the principle of the *Donoghue* case (*supra*) there " must be evidence of negligence though slight evidence may suffice ".

After analysing and criticising the findings of fact made by the trial Court and the inferences drawn therefrom, allowing the appeal and setting aside the judgment appealed from the Court :—

Held, (1). The finding of liability on the part of the appellants-defendants, as made by the trial Court does not seem to be warranted by the material before the Court and by a proper application thereto of the law.

(2) It would not be correct in law to say that in a case of this nature negligence may be established in a less cogent manner than in any other case in which negligence is the cause of action. Negligence has to be established on the balance of probabilities when the case is looked upon as a whole.

(3) Regarding the duty and degree of care to be taken by manufacturers, the principle is that the duty owed by the manufacturers to the consumer is not to ensure that their goods are perfect, but merely to take reasonable care to see that no injury is done to the consumer or ultimate purchaser.

(4) *After analysing the evidence and criticising the view taken by the trial Court and the inferences they have drawn therefrom :*

We have reached the conclusion that the finding of the trial Court as to the liability of the appellants-defendants is unsatisfactory and cannot be allowed to stand ; and in a case of this nature, when the finding as to liability depends largely on inferences, this Court is in as good a position to decide the matter as the trial Court (see, *inter alia*, *Nearchou* v. *Papaefstathiou* (reported in this Part at p. 109 *ante*) where earlier precedents are referred to).

(5) We are of the opinion that not only has the respondent-plaintiff failed to prove, on the balance of probabilities, that the appellants-defendants were negligent, but that the appellants adduced positive evidence which showed that, on the contrary, they had taken all reasonable precautions—indeed evidence which, if given the weight due to it, excludes the possibility of the appellants having been negligent. The position in the present case is much the same as that in *Daniels and Daniels* v. *R. White and Sons, Ltd., and Tarbard* [1938] 4 All E.R. 258 where in spite of the fact that carbolic acid was found in a bottle of lemonade the Court found that the plaintiff had failed to prove negligence and that the work at the factory of the manufacturers had been carried out in a proper manner.

(6) In our opinion, and in the light of the minimal possibility of fermentation, the appellants-defendants, as reasonable people, were not at fault for not foreseeing a very remote possibility that the cork of the demijohn in question could fly off as it did, and cause injury.

Appeal allowed. No order as to costs either for the trial or for the appeal.

Cases referred to :

Imam v. *Papacostas* (1968) 1 C.L.R. 207 ;

Nearchou v. *Papaefstathiou* (reported in this Part at p. 109 *ante* ;

M' Alister (or Donoghue) v. *Stevenson* [1932] A.C. 562 at p. 599 per Lord Atkin ;

Grant v. *Australian Knitting Mills, Ltd.* [1936] A.C. 85 : at p. 97 per Lord Wright ;

Evans v. *Triplex Safety Glass Co. Ltd.* [1936] 1 All E.R. 283 at p. 285 per Porter, J. ;

Sharpe v. *E. T. Sweeting and Son, Ltd.* [1963] 2 All E.R. 455 at p. 458 per Nield, J. ;

Clay v. *A. J. Crump and Sons Ltd. and Others* [1964] 1 Q.B. 533 at p. 558 per Ormerod L.J. ;

Daniels and Daniels v. *R. White and Sons, Ltd., and Tarbard* [1938] 4 All E.R. 258 ;

Simmons v. *Bovis, Ltd. and Another* [1956] 1 All E.R. 736 at p. 742 per Barry, J.

Heaven v. *Pender* [1883] 11 Q.B.D. 503 at pp. 509, 510 ;

Le Lievre and Another v. *Gould* [1893] 1 Q.B. 491 at pp. 497 and 504;

Mason v. *Williams and Williams Ltd. and Thomas Tuston and Sons Ltd.* [1955] 1 All E.R. 808 ;

Lockart v. *Barr* (1943) S.C. (H.L.) 1 ; The English and Empire Digest Vol. 36, at p. 88 para 522 ;

Benmax v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

Appeal and Cross-Appeal.

Appeal and cross-appeal against the judgment of the District Court of Limassol (Malachtos, P.D.C. and Loris, D.J.) dated the 25th November, 1967 (Action No. 806/66) whereby the defendants were ordered to pay to the plaintiff the sum of £1,417.100 mils by way of special and general damages for the loss of his left eye due to the defendant's negligence.

P. L. Cacoyiannis, for the appellant.

A. Anastassiades with *A. Lemis*, for the respondent.

Cur. adv. vult.

The following judgments were read :

TRIANTAFYLLIDES, J.: This is an appeal by the appellants-defendants against the judgment of a Full District Court

at Limassol, in civil action No.806/66, by virtue of which they were ordered to pay to the respondent-plaintiff £1,417.100 mils, by way of special and general damages, for the loss of his left eye, which was attributed by the trial Court, to negligent conduct on the part of the appellants.

The salient facts of the case are as follows :

On the 7th February, 1966, the respondent bought from the co-operative society of his village a demijohn containing white sweet wine.

As far as the history of this demijohn can be traced back, on the evidence before us, it appears that it reached the co-operative society of the village in the first half of January, 1966, through a salesman employed by a firm at Paphos to distribute, *inter alia*, products of the appellants. There is nothing on record to show when the demijohn in question left the factory of the appellants in Limassol and reached the Paphos firm, and for how long, and how, it remained stored there before it was sold by the said salesman to the co-operative society of the respondent's village.

The demijohn, which contained about four okes of wine, was covered with raffia and was sealed with a cork, the top of which is made of hard plastic ; and the upper part of the neck of the demijohn was covered by a plastic ring which has been described as a " viscring ".

While, in the evening of the 7th February, 1966, the respondent, who is a forty-six years old farmer, was trying to open the demijohn by cutting with his clasp-knife the viscring, the cork suddenly flew into, and seriously injured, his left eye.

He was taken, on the same night, to a Limassol eye-specialist and, eventually, all other less drastic treatment having failed and there existing the danger of affliction of his right eye, too, due to " sympathetic ophthalmia ", the left eye of the respondent had to be, and was, extracted on the 28th February, 1966.

The wine in the demijohn was later examined by Mr. Michalakis Elia, an oenologist in the Oenological Department of the Government. He found it to be a little cloudy due to slight fermentation, which, as he explained, was caused by micro-organisms, *viz.* saccharomyces, converting the sugar content of the wine into alcohol and a gas, carbon dioxide (CO^2).

The Court found " that due to the fact that the wine contained in the demijohn in question fermented the cork when the viscring was removed flung off and hit the plaintiff "—respondent—" in the left eye ". If further found that the demijohn " reached the plaintiff in the form in which it left the manufacturers ", the appellants, and " that fermentation of the wine was in existence at the time it left the factory or developed between the time it left the factory and the time it reached the ultimate consumer ", the respondent.

In deciding that the appellants were liable the trial Court referred, first, regarding the technical aspect, to the evidence of Mr. Pandias Constantinides (a qualified chemist and oenologist employed as technical manager of the appellants, and a witness called by them) who, as stated in the judgment, " whilst excluding the possibility of the wine being fermented at the time of leaving the factory, he did not exclude the possibility of the wine being fermented later on as pasteurization "—(a process which is described elsewhere in this judgment)—" although it can kill all micro-organisms, cannot kill the spores, which spores create the micro-organisms in the wine which in their turn create fermentation ". Then, the Court proceeded to observe that Mr. Elia " stated clearly that if the wine is pasteurized and it is sealed properly and it is air-proof, therefore excluding the entrance of any micro-organisms into the container the possibility of the wine being fermented is excluded. We must say that we accept the evidence of this witness on this point ". No reasons at all were given by the Court for taking such a view, and it went on to add, only, that " on the evidence as we have accepted it and on the principle of *Donoghue* v. *Stevenson* to which we have referred earlier on we find that the first defendant "—the appellants— " is liable to the plaintiff " ; the second defendant was the co-operative society from which, as aforesaid, the respondent bought the demijohn in question, but the action as against the society was dismissed.

It is not very clear to me what was the actual finding of the trial Court regarding the cause of the fermentation : Did it reject the statement of Mr. Constantinides that pasteurization kills the micro-organisms, but not the spores also? It seems that the Court, on the evidence of Mr. Elia, thought either that micro-organisms must have entered the demijohn after it was sealed (thus impliedly rejecting the possibility of spores), which are not killed by pasteurization, developing into micro-organisms which cause the

fermentation, without any other micro-organisms having entered from the outside) or that the term micro-organisms, as used by Mr. Elia, included spores and that, therefore, the pasteurization had not been carried out properly, otherwise they would have been killed too and fermentation could not have taken place.

As regards the law governing the matter, the trial Court relied on the English common law principle expoundep in the case of *M'Alister (or Donoghue)* v. *Stevenson* [1932] A.C. 562 and proceeded to quote the classic dictum of Lord Atkin in that case (at p. 599) to the effect that—

> " a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

The Court stated, further, that in a case in which liability was to be based on the principle of the *Donoghue* case (*supra*) there " must be evidence of negligence though slight evidence may suffice " ; and it seems that it relied in this respect on the case of *Grant* v. *Australian Knitting Mills, Ltd.* [1936] A.C. 85.

I do not think that it would be correct in law to say that in a case of this nature negligence is required to be established in a less cogent manner than in any other case in which negligence is the cause of action. It may well be that in a particular case no single piece of evidence is sufficient by itself to establish negligence, but negligence has still to be established on the balance of probabilities when the case is looked upon as a whole. As Lord Wright has put it in the *Grant* case (*supra*, at p. 96) :

> " Mathematical, or strict logical, demonstration is generally impossible : Juries are in practice told that they must act on such reasonable balance of probabilities as would suffice to determine a reasonable man to take a decision in the grave affairs of life. Pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a conclusion ".

In a case such as the one before us the plaintiff must prove that the manufacturer was in fact negligent ; Lord Macmillan in his judgment (at p. 622) in the *Donoghue* case stressed that " negligence must be both averred and proved ".

In *Evans* v. *Triplex Safety Glass Co. Ltd.* [1936] 1 All E.R. 283 an action was brought against manufacturers in respect of a windscreen of a car which had cracked and disintegrated ; Porter, J. said the following in his judgment (at p. 285).

> " The result is that the plaintiff must show negligence on the part of the defendants as there is no breach of warranty as in contract. The plaintiff has therefore framed his case on *M'Alister (or Donoghue)* v. *Stevenson*. In that case the Court by a majority of three judges to two held that the defendants had been guilty of negligence and I am bound by that decision which makes it clear that an action may be brought in tort against a manufacturer for negligence by an ultimate consumer . . . . . The plaintiff must prove negligence . . . . . " ; and (at p. 287) :—" I do not find any negligence proved against the defendants and I give the defendants judgment . . . . . ".

In *Sharpe* v. *E. T. Sweeting & Son, Ltd.* [1963] 2 All E.R. 455, Nield, J. stated in his judgment (at p. 458) :

> " The central issue between the parties here is whether or no the principles laid down in the case of *Donoghue (or M'Alister)* v. *Stevenson* are applicable to the facts of the present case. It must, however, be considered whether, assuming that such principles are applicable, the plaintiff has shown on the balance of probabilities that the defendants, owing a duty to take care to the plaintiff, failed in that duty and were by their servants or agents negligent so as to cause the injuries suffered by the plaintiff ".

In *Clay* v. *A. J. Crump & Sons Ltd. and Others* [1964] 1 Q.B. 533, Ormerod L.J. said in his judgment (at p. 558) :

> " The doctrine which was first formulated by Brett M.R. in *Heaven* v. *Pender* and adopted by Lord Atkin in *Donoghue* v. *Stevenson* is what has been called the doctrine of proximity. This appears to mean that the plaintiff must satisfy the Court that his injuries have been caused by the negligence of the defendant ".

Regarding the degree of care to be taken by the manufacturer of an article, it is stated in Clerk & Lindsell on Torts,

13th ed., para. 890, at p. 498 that : " . . . . .if the defendant can prove that he has taken all reasonable care, he is not liable, for he has not then been negligent. It has been said in this connection that a manufacturer can escape liability if he can establish a ' foolproof ' process of manufacture. It might be thought that if the system was indeed foolproof no defect would have developed in the goods, but if it had so developed, then the system cannot be foolproof. What the statement means is that the very nature of the defect, such as the presence of an irritant in underwear, may of itself raise a presumption of negligence in the manufacturer, but if proof is forthcoming that the system was as near perfect as human ingenuity could make it, the manufacturer has proved that he has not been negligent ". In support of this proposition reference is made to *Daniels and Daniels* v. *R. White* & *Sons, Ltd., and Tarbard* [1938] 4 All E.R. 258, where it was held that the duty owed by the manufacturers to the consumer was not to ensure that their goods were perfect, but merely to take reasonable care to see that no injury was done to the consumer or ultimate purchaser.

I revert now to the finding of liability on the part of the appellants, as made by the trial Court, in order to determine whether it was warranted by the material before the Court and by a proper application thereto of the law :

As stated, the trial Court relied, in a decisive manner, on the evidence of the Government oenologist, Mr. Elia, who was called by the respondent. He is an expert, but an expert whose knowledge is based on laboratory work and studies and is not backed sufficiently by practical experience in the industrial field. According to his own admission, he has never been, actually, employed by a wine manufacturing concern; he has only worked in wine factories, in Australia, for training purposes, during a period of six months ; and he was, at the time when he gave evidence, engaged in making experimentally new kinds of wines in very small quantities. It is, perhaps, useful to quote the following parts of his evidence :

Question : But even in wine you have no experience you said.

Answer : But it is my subject, I studied on it.

Question : Not in practice.

Answer : No practical experience, I have not got much.

Question : You did not work in wines as Mr. Pandias (Constantinides).

Answer : I have not.

Question : He is more experienced.

Answer : He must be as far as wine manufacture is concerned.

This witness has agreed that one of the best methods for ensuring the stability of wines is pasteurization—the one used by the appellants—and that it is widely applied by the big wine factories in Cyprus. He described pasteurization as a method by means of which the wine comes into contact, in a specially made machine, with heated plates. He said that all sweet wines can ferment ; they do not usually ferment but they can ferment under special or abnormal circumstances. When he was asked whether wines can ferment even though they have been pasteurized, he replied, as already stated, that if after pasteurization the container is sealed properly and it is air-proof, therefore excluding the entrance of any micro-organisms into it, he would exclude the possibility of fermentation. He conceded, however, that he had no experience in pasteurizing wines and that he spoke about this process from what he had " learned at College ".

On the other hand, the appellant's witness Mr. Constantinides stated that he had been engaged in the manufacture of wines since 1938 and that he had worked with different wine manufacturers, not only the appellants.

He described the measures that are taken to prevent fermentation of sweet wines manufactured by the appellants ; the basic one being pasteurization.

He, further, told the trial Court that in addition to such measures there are being carried out monthly examinations of the wines in the cisterns ; and, also, that the wine is examined every time when it is put in demijohns or other containers.

This witness was cross-examined at length by respondent's counsel. It was put to him that further steps ought to have been taken to prevent fermentation, or, at least, measures should have been adopted to guard against such an injury as the one suffered by the respondent, either by means of better securing of the cork or through an appropriate warning being placed on demijohns ; but it does not appear that it was suggested to him, in a clearcut

manner, that either the pasteurization was not carried out properly or that the method of filling the demijohns and sealing them left open the possibility of contamination.

As already mentioned, this witness explained that though pasteurization can kill the micro-organisms it does not kill the spores from which micro-organisms develop. He said that fermentation may occur if the wine is exposed to favourable temperature or a great length of time intervenes between its being placed in a container and its consumption ; he, also, pointed out that the way of handling and storing of wine containers is quite an important consideration, because when a container is placed in a standing position this " permits air to penetrate as the cork gets dry ".

He admitted that, indeed, demijohns filled with wine are occasionally returned to the factory of the appellants, for various reasons, including fermentation, but the percentage of returns, for all reasons, is very small, under 1%.

In my view when one considers his evidence—and he was not found by the trial Court not to be a credible witness—he is bound to be left with the impression that all reasonably necessary precautions were being taken, by the appellants, at the material time.

There was another expert witness, who was called by the appellants : Mr. Georghios Rologhis. He is a qualified chemist and oenologist and was employed by another wine manufacturing concern in Limassol, KEO, for over thirty years. He testified that this company, of which he became eventually the technical manager, was placing wines in demijohns such as the one involved in this case and they were corked and sealed in the same manner ; there being no wire to hold the cork in place and no warning on the demijohn to the effect that care should be taken in opening it.

He supported the scientific evidence given by Mr. Constantinides *viz.* that pasteurization kills all micro-organisms, but it does not kill spores. He agreed that " notwithstanding the exercise of the best care and attention the possibility cannot be excluded of sweet wine which has been placed in a demijohn in perfectly good condition and fit and sound in every respect, in very rare cases, when such wine remains in a corked demijohn for a long time and/or in a warm place for a considerable time, becoming fermented due to micro-organisms inherent in wines which are unavoidably developed due to the nature of the sweet

wine itself" ; and that "this is very well known to all consumers and sellers of wine and to the public in general". These were averments pleaded by the appellants, in their statement of defence, and they were put to the witness, who agreed that they were correct.

He went on to say that there had been occasions, when demijohns, and even barrels, had been returned as fermented, even though the wine in the container from which the wine was taken out and put in the market remained intact and sound, because the conditions under which the wine that went out was kept were different. He explained that wine is like a living organism ; temperature affects it and so does the sudden change of the weather ; he added that it is always better to place containers of wine on their side so that the cork will always be kept wet and will not allow air to get in.

He concluded his evidence by stating that assuming that all precautions are taken before the wine leaves the factory for the market, it is impossible to be 100% sure that the wine will not be fermented.

The trial Court did not say how it viewed the evidence of this witness ; in fact it did not refer to it at all.

In the light of all the foregoing I have reached the conclusion that the finding of the trial Court as to the liability of the appellants is unsatisfactory and cannot be allowed to stand ; and, in a case of this nature, when the finding as to liability depends largely on inference, this Court is in as good a position to decide the matter as the trial Court (see *inter alia Nearchou* v. *Papaefstathiou* (reported in this Part at p. 109 *ante*) where earlier precedents are referred to).

It seems to me that the trial Court did not pay sufficient attention to the extent of the onus of proof cast on the respondent to establish that he was injured through the negligence of the appellants ; and that, in effect, it presumed such negligence without sufficient cause for so doing.

It was clearly led into a wrong approach by the evidence of Mr. Elia, especially by his doctrinaire assertions that if pasteurization was properly carried out then all the micro-organisms—(including presumably spores)—would have been killed and the possibility, later, of fermentation would, thus, be excluded ; and, as stated, the Court has given no good reason as to why it preferred his evidence to that of Mr. Constantinides, which was supported by that of Mr. Rologhis, whose evidence the Court unfortunately overlooked.

Had the court placed due weight on the evidence of the latter, a thing which it obviously did not do, it would have reached the conclusion, as I have done, that it could not find for the respondent.

I am of the opinion that not only has the respondent failed to prove, on the balance of probabilities, that the appellants were negligent, but that the appellants have adduced positive evidence which showed that, on the contrary, they had taken all reasonable precautions—indeed evidence which, if given the weight due to it, excludes the possibility of the appellants having been negligent. The position in the present case is much the same as that in the *Daniels* case (supra) where in spite of the fact that carbolic acid was found in a bottle of lemonade the Court found that the plaintiff had failed to prove negligence and held that the work at the factory of the manufacturers had been carried out in a proper manner.

It seems, moreover, that the trial Court, although it found that fermentation of the wine in the demijohn bought by the respondent could have taken place after it had left the factory of the appellants, lost sight of the other, already mentioned, possibilities which could have led to fermentation without any fault of the appellants. As stated by Lord Macmillan in the *Donoghue* case (at p. 622) :

> " I can readily concieve that where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious, for which the manufacturer could not in any view be held to be to blame."

From the evidence referred to in this judgment it is clear, as in the *Evans* case (*supra*), that there were other possible causes to which the defect found by the ultimate consumer—the respondent—might be attributed, while, on the other hand, the manufacturers—the appellants—have shown that they had taken all reasonable care ; in such a situation, as in the *Evans* case, the respondent could not be properly found to have discharged the onus cast on him to prove that the manufacturers had been negligent.

It is correct that the appellants knew of the possibility of the wine becoming fermented in certain eventualities. But such possibility was really mininal, less than 1%. So, I find no merit in the submission of counsel for the respondent that the cork had to be fastened by wire, as with champagne bottles, or that there should be a warning on the

demijohn about the possibility of fermentation. It can certainly not be said that the injury to the respondent was reasonably foreseeable. As stated in evidence by Mr. Rologhis he had never heard of a cork flying off and causing harm.

In his judgment in *Simmons* v. *Bovis, Ltd. and Another* [1956] 1 All E.R. 736 Barry, J. stated (at p. 742) :

> " As was pointed out, and I think quite rightly, any liability on the part of those two men must be founded the doctrine enunciated in *M' Alister (or Donoghue)* v. *Stevenson.* I think that their duty, if any, to the plaintiff depends on the answer to one single question : As reasonable people ought Mr. Allan or Mr. Brotherdale " —two of the employees of the defendants— " or both, to have foreseen that there was a reasonable probability that some person in the position of the plaintiff . . might step on to the platform if he were not expressly warned against so doing ? "

In my opinion, and in the light of the minimal possibility of fermentation, the appellants, as reasonable people, were not at fault for not foreseeing a very remote possibility that the cork of the demijohn could fly off, as it did, and cause injury.

Lord Wright in delivering the judgment of the Privy Council in the *Grant* case said (at p. 97) :

> " No doubt this case depends in the last resort on inferences to be drawn from the evidence, though on much of the detailed evidence the trial Judge had the advantage of seeing and hearing the witnesses. The plaintiff must prove his case, but there is an onus on the defendant who, on appeal, contends that a judgment should be upset : he has to show that it is wrong."

In the present case I am satisfied, for the reasons which I have set out in my judgment, that the appellants have shown that the judgment of the trial Court, by means of which they were ordered to pay damages for negligence to the respondent, is wrong.

It has, therefore, to be ordered that this appeal be allowed and that the decision of the trial Court and the order as to costs made by it be set aside. It follows that the cross-appeal, by the respondent, regarding the amount of damages awarded by the Court, should fail and it is dismissed.

Regarding costs, in all the circumstances of this case, I would make no order as to costs, either for the trial or for the appeal.

STAVRINIDES, J.: I agree.

HADJIANASTASSIOU, J.: I agree. But because the present case is of some general importance, affecting, as it undoubtedly does, the whole wine industry, I propose adding a few words of my own in order to explain the reasons and the considerations which led me reach this result.

On February 7, 1966, the plaintiff, Theodossis Georghiou, bought from the Co-operative Society of his village a demijohn full of sweet white wine. This demijohn was covered with raffia and was sealed with a cork, the top of which was made of hard plastic and its upper part was covered by a viscring. The defendants, the Cyprus Wine Association, Ltd., of Limassol are manufacturers of wines and spirits.

On the same evening, the plaintiff who apparently wanted to have some wine, tried to open this demijohn by cutting the viscring with a clasp-knife, when suddenly the cork flung off and injured seriously his left eye. Unfortunately, as a result of this injury, his left eye was extracted after an operation by an eye specialist in Limassol, on February 28.

It appears that the wine in that demijohn was examined by Mr. Elias, subsequently, an oenologist in the oenological department of the Government, on February 15, 1966. He found it to be a little cloudy due to slight fermentation, which was caused because of certain micro-organisms, *viz*: saccharamyces, which convert the sugar contents of the wine into alcohol and gas carbon dioxyde (CO^2).

As to how the accident to the plaintiff occurred, the trial Court reached the conclusion that due to the fact that the wine contained in the demijohn in question was fermented, the cork when the viscring was removed, flung off and hit the plaintiff in the left eye with sufficient force that resulted in the injury described by Dr. Vassiliou.

On April 20, 1966, the plaintiff brought an action against the present appellants defendants and ex defendants, the Co-operative Store Society Ltd., claiming personal damages against them. This action was based on negligence and/or breach of statutory duty.

After a long trial which started on May 9, 1967 and was concluded on June 12, 1967, the trial Court delivered its

reserved judgement on November 25, 1967, relying on the principle enunciated in *Donoghue* v. *Stevenson* [1932] All E.R. Rep. 1, and also in *Grant* v. *Australian Knitting Mills, Ltd.*, [1935] All E.R. Rep. 209. They had this to say at p.108 : " It is clear from the evidence adduced that the demijohn in question with its contents reached the plaintiff in the form in which it left the manufacturers. It is also clear that fermentation of the wine was in existence at the time it left the factory or developed between the time it left the factory and the time it reached the ultimate consumer."

Pausing here for a moment I would like to make this observation, *viz*:, that the trial Court has made no clear finding as to whether the fermentation of the wine was in existence before it left the factory of the first defendants. Because, had this been the only finding of the court I might have been persuaded to take a different view with regard to the question of liability of the manufacturers, particularly so, in order to exclude the possibility of the wine having its condition altered by lapse of time.

Later on they said :

> " Mr. Pandias Constantinides, a qualified chemist and oenologist, who is the Technical Manager of Defendant No. 1, in giving evidence as D.W. 2, whilst excluding the possibility of the wine being fermented at the time of leaving the factory, he did not exclude the possibility of the wine being fermented later on as pasteurization, although it can kill all micro-organisms, cannot kill the spores, which spores create the micro-organisms in the wine which in their turn create fermentation.
>
> On the other hand, P.W. 2, Michalakis Elia stated clearly that if the wine is pasteurised and it is sealed properly and it is air proof, therefore excluding the entrance of any micro-organisms into the container the possibility of the wine being fermented is excluded. We must say that we accept the evidence of this witness on this point.
>
> On the evidence as we have accepted it and on the principle of *Donoghue* v. *Stevenson* to which we have referred earlier on, we find that the first defendant is liable to the plaintiff."

Now there is no doubt, that until the decision in *Donoghue's* case, *supra*, there was still little authority to the effect that the supplier of a chattel was liable for defects of which he ought

to know ; and at the same time the list of instances of liability was proving inadequate, particularly so, in view of the mass-production of chattels, and the growth of complex systems of marketing, which resulted in the eventual user rarely being able to establish knowledge of a defect on the part of anybody and in his not being in contractual relationship with the maker, for there would be numerous intermediaries through whose hands the goods had subsequently passed.

It is of course constructive to add, that the concept of duty in negligence is a comparatively modern one, but is now so firmly rooted that there can be no doubt that actions in negligence must fail where duty is not established. But one has to remember also that the law was developed in an empirical manner, by decisions that in some particular circumstances there was a duty and that in others there was none. Then the attempt to rationalize the earlier cases was first made in *Heaven* v. *Pender* [1883] 11 Q.B.D. 503, at p. 509, which produced this formula :" . . . whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

Then, in 1932, an important and now much more frequently cited rationalization is the famous dictum of Lord Atkin, in the *Donoghue* case, at page 11 : " The rule that you are to love your neighbour becomes in law : You must not injure your neighbour, and the lawyers' 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 which are called in question. This appears to me to be the doctrine of *Heaven* v. *Pender* as laid down by Lord Esher, when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith, L.J., in *Le Lievre and Another* v. *Gould*. Lord Esher, M.R., says : [1893] 1 Q.B. 491 at p. 497 : ' That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them.

If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.'

So A. L. Smith, L.J., says : [1893] 1 Q.B. at p. 504 : ' The decision of *Heaven* v. *Pender* was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken damage might be done by the one to the other'."

Lord Atkin goes on at page 12 : " I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness or ' proximity ' was intended by Lord Esher is obvious from his own illustration in *Heaven* v. *Pender* (11 Q.B.D. at p. 510) of the application of his doctrine to the sale of goods."

Then in concluding his speech His Lordship said at p. 20:" . . . a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care".

Although it is realized that it would be very difficult for a plaintiff to prove by direct evidence negligence and causation against a manufacturer, yet Lord Macmillan said in the same case, at page 31 : " The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim *res ipsa loquitur*. Negligence must be both averred and proved.".

Then the matter was clarified in *Grant* v. *Australian Knitting Mills, Ltd.* (supra). In this case the plaintiff was concerned to prove that the dermatitis contacted by him was caused by the presence of invisible excess sulphites in underwear purchased by him and made by the defendants. It was explained that the test was whether, on the balance of probabilities, it was a reasonable inference to be drawn from the evidence that the harm was so caused.

Lord Wright, delivering the opinion of the Privy Council had this to say at page 216 : " But when the position of the manufacturers is considered, different questions arise ; there is no privity of contract between the appellant and the manufacturers ; between them the liability, if any, must be in tort, and the gist of the cause of action is negligence. The facts set out in the foregoing show in their Lordships' judgment negligence in manufacture. According to the evidence, the method of manufacture was correct ; the danger of excess sulphites being left was recognised and was guarded against ; the process was intended to be fool-proof. If excess sulphites were left in the garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances ; even if the manufacturers could by apt evidence have rebutted that inference they have not done so."

In the Scottish case, *Lockart* v. *Barr*, (1943), S.C. (H.L.) 1,—unfortunately I was not able to find the full report,—and I propose quoting from the English Empire Digest, Vol. 36, at p. 88, para. 522 : " The purchaser of a bottle of aerated water from a retailer was injured by drinking its contents, which were contaminated with phenol. No visual examination by the retailer or by the purchaser could have revealed its presence. In an action of damages brought by the purchaser against the manufacturer the Second Division held that the purchaser was entitled to damages :—Held : It was necessary for the pursuer to prove exactly how it came about that phenol was present in the bottle in a quantity sufficient to injure the pursuer."

In *Evans* v. *Triplex Safety Glass Co. Ltd.* [1936] 1 All E.R. 283, the plaintiff bought a motor car fitted with a " Triplex Toughened Safety Glass " windscreen, of the defendants' manufacture. When the car was being used, about a year after the date of purchase, the windscreen

suddenly and for no apparent reason broke into many fragments and injured the occupants of the car. Held : In these circumstances the manufacturers were not liable in damages, for the following reasons :—

(i) The lapse of time between the purchase of the car and the occurrence of the accident ;

(ii) The possibility that the glass may have been strained when screwed into its frame ;

(iii) The opportunity for examination by the intermediate seller ; and

(iv) The breaking of the glass may have been caused by something other than a defect in manufacture.

Porter J., had this to say at page 286 : " In this case I do not think that I ought to infer negligence on the part of the defendants. If I take Professor Low's evidence, I ought not to draw the induction that there has been negligence, because this glass disintegrates without negligence on the part of anyone."

Later on he says : " In this case I cannot draw the inference that the cause of disintegration was the faulty manufacture. It is true that the human element may fail and then the manufacturers would be liable for negligence of their employee, but then that was not proved in this case."

Further down he goes on : " He has not desplaced sufficiently the balance of probabilities in this case. I think that this glass is reasonably safe and possibly more safe than other glasses. One cannot help seeing that in all these cases, one has to look with considerable care. One has to consider the question of time . . . . "

And at p. 287 he says : " Here are a number of causes which might have caused desintegration. I do not find any negligence proved against the defendants and I give the defendants judgment with costs."

In *Daniels* & *Daniels* v. *White* & *Sons, Ltd., and Tarbard* [1938] 4 All E.R. 258, where the contents of a lemonade bottle purchased and consumed by one of the plaintiffs, included a large element of carbolic acid, presumably from the washing plant of the defendants manufacturers. Both plaintiffs in suing the manufacturers relied upon the doctrine enunciated in *M'Alister* v. *Stevenson*. It was found as a fact that the manufacturers, by adopting a fool-proof

process and by carrying out that process under proper supervision, had taken reasonable care to see that there was in the lemonade no defect which would injure the plaintiffs. Held : The duty owed by the manufacturers to the consumer was not to ensure that their goods were perfect, but merely to take reasonable care to see that no injury was done to the consumer or ultimate purchaser and this duty they had completely fulfilled.

Lewis, J., had this to say, at page 261 : " I have to remember that the duty owed to the consumer, or the ultimate purchaser, by the manufacturer is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect that is likely to cause such injury."

Later on he says : " That method has been described as fool-proof, and it seems to me a little difficult to say that, if people supply a fool-proof method of cleaning, washing and filling bottles, they have not taken all reasonable care to prevent defects in their commodity. The only way in which it might be said that the fool-proof machine was not sufficient was if it could be shown that the people who were working it were so incompetent that they did not give the fool-proof machine a chance. It is pointed out quite rightly by Mr. Busse that the question of supervision comes in " (See also Clerk & Lindsell on Torts, 13th edn. at p. 498, para. 890).

In *Mason* v. *Williams & Williams, Ltd., and Thomas Turton & Sons, Ltd.*, [1955] 1 All E.R. 808, the Plaintiff's eye was injured by a splinter of metal which flew off a coal chisel which he was using at his work ; the cause of the accident was that the head of the chisel was dangerously hard. The chisel had been manufactured by the second defendants and had been supplied by them direct to the plaintiff's employers, the first defendants, who had issued it to the plaintiff.

Finnemore, J. had this to say at p. 810 : " I appreciate that I am faced with another problem, as was indicated in the case of *M'Alister (or Donoghue)* v. *Stevenson*, that *res ipsa loquitur* does not apply and that the Court has to be satisfied, and therefore the plaintiff has got to prove, that there was negligence on the part of the manufacturers. Of course, that cannot be proved normally by saying that on such and such a date such and such a workman did this, that or the other. I think that when you have eliminated anything happening

in this case at the employer's factory, whether, as is undisputed, this chisel came direct from the manufacturers—and when it came from the manufacturers the head was too hard and that undue hardness could have been produced only while it was being manufactured by them, and could have been produced by someone there either carelessly or deliberately to make a harder and more durable head—that is really as far as any plaintiff can be expected to take his case. What the plaintiff says here is : 'This is your chisel, you made it and I used it as you made it, in the condition in which you made it, in the way you intended me to use it, and you never relied on any intermediate examination; therefore I have discharged the onus of proof by saying that this trouble must have happened through some act in the manufacture of this chisel in your factory, and that was either careless or deliberate, and in either event it was a breach of duty towards me, a person whom you contemplated would use this article which you made, in the way you intended it to be used.'"

Having reviewed some of the authorities, I shall now proceed to examine whether the decision of the trial Court both with regard to the factual position as well as the legal principles do come within the principle of *Donoghue's* case.

On the question whether or not the appellants were guilty of want of reasonable care, counsel for the appellants has contended that the respondent has failed to adduce sufficient evidence to show that the appellants were guilty of negligence and moreover—counsel argued—the trial Court has erred in not weighing properly the evidence of the two witnesses, Mr. Constantinides and Mr. Rologhis, and has preferred and accepted the arbitrary evidence of Mr. Elia.

I would like to recall that the learned trial Judges who heard Mr. Elia, Mr. Constantinides and Mr. Rologhis, in the box said that they accepted and preferred the evidence of Mr. Elia to that of Mr. Constantinides, but said nothing about the evidence of Mr. Rologhis. They accepted Mr. Elia's evidence when he said : " If the wine is pasteurized and it is sealed properly, and it is air-proof and excluding the entrance of any micro-organisms into the container, the possibility of the wine being fermented is excluded ". The evidence of course of Mr. Constantinides on this point is that whilst excluding the possibility of the wine being fermented at the time of leaving the factory, he did not exclude the possibility of the wine being fermented later on, on pasteurization and furthermore, stated although it

can kil all micro-organisms it cannot kill the spores which spores create fermentation. On this point I would like to point out that the evidence of this witness has been corroborated by Mr. Rologhis.

Now I have read the whole of Mr. Elia's evidence in the transcript as well as the evidence of Mr. Constantinides and Mr. Rologhis, and in my judgment, when one reads the whole of it through, one comes to the view that Mr. Elia was a most unsatisfactory witness being an inexperienced person compared to the other two witnesses, particularly with regard to the pasteurization of wines. Therefore, if it had been for me to decide, I would have decided that Mr. Constantinides who was a very experienced person, was right in his view that pasteurization can kill all micro-organisms but cannot kill the spores which create the micro-organisms in the wine, and which in their turn create fermentation. Moreover, this witness, has further explained that it is from these spores that the micro-organisms grow in favourable temperature or because of the great length of time between the manufacture of the wine and its consumption.

Of course, my difficulty is that I have to remind myself that a Court of appeal, is not entitled to distrub findings of fact made by the trial Judge which depend to any appreciable extent in whole or in part upon his opinion of the demeanour of witnessses whom he has seen and heard and the Court of appeal has not, unless it is completely satisfied that the judge was wrong. It is not enough that it has doubts—even great doubts—as to the correctness of the judge's finding. It must be convinced that he was wrong.

I have given the matter serious consideration and I have reached the conclusion, in view of the material before me, that the judgment of the court was wrong. It is clear, in my view, that although the trial Court had the advantage of seeing and hearing the witnesses in the box, neverthelss, the Court does not say in its judgment in terms that it considered Mr. Elia to be in all respects a witness of truth. Moreover, in view of the fact that Mr. Elia admitted that he had no practical experience in the wine industry, and as no doubt, this case depends in the last resort on inferences to be drawn from the evidence, though the trial Court had the advantage of hearing and seeing the witnesses, I have reached the view that an appellate court is generally in as good a position to evaluate the evidence as the trial judge. I would, therefore, set aside the judgment of the court on

the facts. See *Benmax* v. *Austin Motor Co., Ltd.*, [1955] A.C. 370, H.L.; also *Imam* v. *Papacostas* (1968) 1 C.L.R. 207 and the recent case of *Nearchou* v. *Papaefstathiou* (reported in this Part at p. 109 ante, at p. 114).

But with regard to the legal position, with due respect to the learned trial Judge's approach, I find myself in disagreement because nowhere is to be found in the *Grant's* case the proposition that " there must be evidence of negligence though slight evidence may suffice ". It appears to me that the trial Court misdirected itself as to the legal effect of that case; because in the *Grant's* case there was an express finding that the manufacturers had not produced evidence rebutting the inference of negligence. I would repeat that in that case Lord Wright has never suggested as a propositon of law—as the trial Court had put it and no doubt has acted upon it—that in a case of this nature slight evidence may suffice. I think however, that this passage from the judgment of Lord Wright would make the position clear : " Counsel for the respondents quite rightly emphasized how crucial it would have been for the appellant's case to prove by positive evidence that in fact the garments which the appellant wore contained an excess of free sulphites. He contended that the appellant's case involved arguing in a circle ; his argument, he said, was that the garments must have caused the dermatitis because they contained excess sulphites, and must have contained excess sulphites because they caused the disease ; but nought, he said, added to nought still is no more than nought. This, however, does not do justice either to the process of reasoning by way of probable inference which has to do so much in human affairs or to the mature of circumstantial evidence in law Courts. Mathematical or strict logical, demonstration is generally impossible : juries are in practice told that they must act on such reasonable balance of probabilities as would suffice to determine a reasonable man to take a decision in the grave affairs of life. Pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a conclusion ". (See page 213 of the report).

For the reasons I have endeavoured to explain I have reached the view that the trial Court has also misdirected itself even as to the burden of proof, which was on the respondent to show that the method of manufacture of the wine was not correct and that his personal injuries were caused through the negligence of the appellants. It is true of course that negligence is found as a matter of inference

from all the facts, but the trial Court has failed to evaluate properly such facts. Therefore, I would be prepared to say, that even assuming that the respondents had managed to show that the appellants as a matter of inference were negligent, then I am sure in my mind that the manufacturers have adduced reliable evidence to rebut the inference of negligence. In any event I would be prepared to state that in adopting the principle enunciated in the *Grant* case (*supra*) then again it is clear that on the question of reasonable balance of probabilities the respondents have not succeeded in proving a case of negligence against the appellants. But counsel for the respondents argued that the appellants were aware of the possibility of the wine being fermented, if certain causes intervened, but failed to take measures to guard against such danger. I am in agreement with counsel that such possibility existed but in view of the evidence that such possibility has been estimated at 1%, I have not been persuaded that the cork had to be fastened by wire or that there should be a warning on the demijohn about the possibility of fermentation. In my view this is not a case that a reasonable probability of fermentation could be foreseen so as to necessitate an express warning against it. I would further add that not knowing the circumstances, and as no evidence has been adduced to show the reason which necessitated that such a precaution has been taken with regard to the champagne bottles, I would dismiss this contention of counsel.

Having reached the conclusion that the appellants have persuaded me that the decision of the lower court was wrong, I would, therefore, allow the appeal.

TRIANTAFYLLIDES, J.: In the result this appeal is allowed and the cross-appeal is dismissed, without any order as to costs.

Appeal allowed; cross-appeal dismissed; no order as to costs.