IN THE HIGH COURT OF SWAZILAND

(HELD AT MBABANE)

CrVTL CASE NO.: 1457/04

In the matter between

WANDDLE NDZINISA **Plaintiff**

and

STEERS FAST FOODS AND RESTAURANT t/a STEERS **Defendant**

HEARD ON: 23rd November 2005 JUDGMENT

DELIVERED ON: 31st JANUARY 2006

CORAM: P.Z. EBERSOHN J.

FOR PLAINTIFF: ATT. M. SIMELANE

FOR DEFENDANT: NO APPEARANCE

JUDGMENT

EBERSOHN J:

[1] In this matter the plaintiff claims damages from the defendant.

[2] In the particulars of claim the plaintiff alleged that on the 21st February 2004 he bought a **"Special 8"** packet of "take away" food from the defendant which is a specialist fast food seller and which packet comprised of two pieces of chicken, a 340 ml. cold drink and some lettuce.

[3] He further alleged that due to the negligence of the defendant there were snails on the lettuce, a fact he himself was unaware of. When he chewed the lettuce he realised that there was something else with the lettuce in his mouth. He spat out the mixture he was chewing and upon realising that there were snails in the lettuce he involuntarily started vomiting and thereafter,

when recalling the incident, he would involuntarily vomit again and that he was as a consequence thereof traumatised.

[4] In the particulars of claim he claimed £100,000.00 for emotional shock, E310.00 for hospital expenses and £50,000.00 for pain and suffering.

[5] The defendant did not file a plea and was barred. On the 14th September 2005 Maphalala J. consequendy granted default judgment against the defendant and the matter was postponed to enable the plaintiff to lead oral evidence with regard to the **quantum** of his claim.

[6] The matter came before me.

[7] The plaintiff testified that he was alone at his residence on the 21st February 2004, his family being away, and he decided to treat himself and decided to buy from the defendant its advertised **"Special 8"** take away. He went to the defendant's shop and made his purchase and then proceeded to his residence where he made himself at ease and opened the packet containing the pieces of chicken and the lettuce.

[8] He stated that he was very fond of lettuce and with a fork he put some of the lettuce into his mouth and started chewing. He stated that he then realised that the lettuce was crunchier than what he expected it to be and realised that he in fact was not chewing only the lettuce but that he was chewing something else too. He spat it out and noticed that he in fact was chewing snails and the lettuce. He realised that some pieces of the snails and the lettuce remained in his mouth and he involuntarily started vomiting onto the kitchen floor.

[9] He thereafter washed himself and cleaned up the kitchen floor and he went to the hospital for medical assistance. He testified that thereafter, when thinking about the incident, he would involuntarily vomit again and stated that he was clearly traumatised by the incident.

[10] He testified that he went back to the defendant's shop where he purchased the "take away" and upon informing the manageress of the shop of what had happened she was not sympathetic at all and actually gave him a cold shoulder.

[11] I must now examine the authorities with regard to such a claim to try to determine the

quantum.

[12] In the leading English case of **Donoghue v. Stevenson** [1932] AC 562 (HL) 580 Mrs. Donoghue suffered a shock and severe gastro-enteritis after drinking ginger beer from a bottle which contained a decayed snail and which bottle of ginger beer was produced by the defendant. She successfully sued the defendant for damages on the ground of his negligence.

[13] At that time the issue appears to have been rather novel in English law although Pothier's **Law of Sale** was by then quite well known in Roman-Dutch law. See in this regard par. 214 (translation of Jones J.) thereof.

[14] The Appeal Court, it being the highest court in England, decided the issue in her favour.

[15] The Appeal Court held that the manufacturers of food, medicine and related products and the distributors thereof were liable to the end user thereof for any defect therein which was detrimental to the health of the end user. The manufacturer, in order to escape liability, therefore has a duty to display reasonable care to guard against such defects in his products.

[16] The Appeal Court examined and then consolidated the various authorities relating to defective products. In the process **Lord Atkin** expressed himself as follows:-

> **"... 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 product will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care".**

[17] **Lord Macmillan** stated in the case that he had

> **"no hesitation in affirming that a person, who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form which he issues them, is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his produce..."**

[18] It must be noted that the duty only extends to latent defects; the bottle of ginger beer was opaque and the decayed snail could not be seen before the contents were used. If the defect is

patent, i.e. obvious, and the consumer chooses to use it, the manufacturer may escape liability because the chain of causation is broken.

[19] The Privy Council's opinion in **Grant v. Australian Knitting Mills Ltd.** [1936] AC 85 confirmed the judgment in **Donoghue v. Stevenson** and set out more fully the applicable principles.

[20] The Privy Council ruled in the case that the claimant

> **"is not required to lay his finger on the exact person in 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".**

[21] When a foreign object or impurity is found on opening food or drink sold in a sealed container the inference that it was there from the date of manufacture is virtually irresistible and an inference of negligence scarcely less strong. See eg **Lockhart v Barr** 1943 SC (HL) 1 (phenol in aerated water); **Zeppa v Coca Cola Ltd.** [1955] 5 DLR 187 (glass in soft drink); **Shandloff v City Dairy** [1936] 4 DLR 712 (glass in chocolate milk); **Mathews v Coca Cola Co of Canada Ltd.** [1944] 2 DLR 355 (mouse in soft drink); **Varga v John Labatt Ltd., Highgate and Hurse** (1957) 6 DLR (2d) (chlorine solution in beer).

[22] **Daniels and Daniels v White** [1938] 4 All ER 258 (carbolic acid in lemonade) is one of the few cases in which the claim failed. For criticism of the judgment wherein the claim apparently failed in view of the weak evidence adduced by the plaintiff see (1939) 55 LQR 6, 352.

[23] American cases also suggest a general willingness by the courts to act on circumstantial evidence eg where bottles have exploded. See in this regard Escola v **Coca Cola Bottling Co of Fresno** 150 P 2d 436 (Cal, 1944); **Robertson v Gulf South Beverage Inc** 421 So 2d 877 (La, 1982) (a decision which is highly questionable on the facts); **Lescale v Louisiana Coca-Cola Bottling Co Ltd** 422 So 2d 241 (4th Or, 1982) and, in general, Madden & Owen, **Products Liability,** § 7:9. Any inference may be displaced where there is evidence to suggest improper handling: see eg **Yelland v National Cafe** [1955] 5 DLR 560 (Sask CA), but little willingness to do so where tyres have blown out during the course of driving. See eg **Shramek v General Motors Corporation** 216 NE 2d 244 (III

App, 1964); **Markwell v General Tire & Rubber Co** 367 F 2d 748 (7th Cir, 1966). cf **Markle v Mulholland** Inc 509 P 2d 529 (Ore, 1973). Where the tyre was being fitted and exploded whilst being inflated the court, on the evidence, did not find negligence on the part of the manufacturer: see **Ewer v Goodyear Tire and Rubber Co** 480 P 2d 260 (Wash App, 1971).

[24] In cases relating to telephones it has been held to be a matter of common experience that carefully designed and constructed telephones do not make an explosive sound impairing the hearing of the user; see **Gandy v Southwestern Bell Telephone Co** 341 SW 2d 554 (Tex Civ App, 1960); **Scott v Diamond State Telephone Co** 239 A 2d 703 (Del, 1968). **Peterson v Minnesota Power and Light Co** 291 NW 705 (Minn, 1940). But cf **Godfrey's Ltd. v Ryles** [1962] SASR 33 (SA Sup Ct) (a fire erupted in a secondhand kerosene refrigerator).

[25] Other examples where liability was found to exist were where cigarettes exploded when being lighted and chewing tobacco which contained the remnants of a moth or worm.

[26] One of the leading authorities in South Africa about the vendor's liability is **Kroonstad Westelike** Boere **Kooperatiewe Vereniging v Botha** 1964 (3) SA 561(A) at 571G-572A wherein the principles set out in the **Donoghue** case were followed and applied by the Appeal Court (as it was then known) without referring to
the **Donoghue** case. At p. 571G **Holmes J A** stated the following:

> **In my opinion the preponderant judicial view, and which this Court should now approve, is that liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold."**

[27] The sufferer who sustained personal injuries in an incident can be compensated in money. There are, however, no scales by which pain and suffering and mental agony can be measured and the courts tended to take into consideration the severity of the matter and the effect the incident had on the plaintiff and that it was not possible to express and convert it exactly, and with certainty, into monetary terms. The amount to be awarded as compensation can thus only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case. See in this regard **AA Mutual Insurance Association Ltd v Ma quia** 1978 (1) SA 805 (A) at 809B; **Southern Versekering v Carstens N.O.** 1987 (3) SA 577 (A).

[28] Comparative awards in other cases thus may be a useful guide and be instructive but not decisive. In **Protea Assurance Co Ltd v Lamb** 1971 (1) SA 530 (A) at 535H-536A, the court said the following:

> **"It should be emphasised, however, that the process of comparison does not take the form of meticulous examination of awards made in other cases in order to fix the amount of compensation. Nor should the process be allowed so to dominate the enquiry as to become a fetter upon the court's general discretion in such matter."**

[29] it is settled law mat psychological **sequelae,** which the plaintiff in the case before me claims he has suffered, can be the subject of a damages claim arising from an incident or other occurrence, provided that it can be established that plaintiff

suffered a detectable psychological injury. (See **Bester v Commercial Union Versekeringsmaatskappy van SA Beperk** 1973 (1) SA 769 (A) at 776H-777A; **Barnard v Santam Bpk** 1999 (1) SA 202 (SCA) at 208H-209A; **Road Accident Fund v Sauls** 2002 (2) SA *55* (SCA) at 61 I-J.). See also in this regard my judgment regarding damages due to post traumatic stress suffered and which case was reported as **Minister of Safety and Security v Sibili** [2003] 4 All SA 451 (Tk).

[30] I find that the plaintiff suffered mild psychological **sequelae** as a result of the incident.

[31] Considering the circumstances and facts of the case and the fact that the plaintiff was not severely traumatised I am of the opinion that an award for general damages (which includes emotional shock, pain and suffering) in the amount of E4,000.00 is adequate. The medical expenses of E310.00 will also be awarded and also costs. Interest will also be awarded a tempore morae. In South Africa interest is by statute awarded in terms of the provisions of the **Prescribed Rate of Interest Act,** No. 55 of 1975 from the date of demand where a demand was sent and from the date of judgment where no demand was sent. Swaziland unfortunately does not have a similar statutory provision and the tempus mora will thus be the date my judgment is handed down.

[31] I accordingly grant judgment in plaintiffs favour as follows:

1. The defendant is to pay to the plaintiff

(a) E4,000.00 as general damages; and

(b) E310.00 being medical expenses; totalling an

amount of E4,310.00.

2. The defendant is to pay interest on the amounts awarded in paragraph 1. at the rate of 9 % per annum calculated from the date this judgment is handed down namely the 31st January 2006 until the date of payment of the said total amount.

3. The defendant is to pay the plaintiffs costs and the fees of counsel are certified in **terms of rule 68 (2)**

P.Z. EBERSOHN
JUDGE OF THE HIGH COURT