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## Illinois Appellate Court Holds Coca-Cola Not Cause of Illness Suffered Immediately After Consumption

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## **TOXIC CHEMICALS** (from page 27)

the exercise of utmost care will not free one from liability for damages resulting from an abnormally dangerous activity. Section 520 of the Second Restatement of Torts lists six factors which determine whether an activity is abnormally dangerous:

(a) existence of a high degree of risk of some harm to the person, land or chattels of another; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

3 Restatement, Torts 2d, § 520 at 36 (1976).

The appellate court determined that the handling and disposal of toxic waste is an "abnormally dangerous" activity and that the risk of harm should not fall on the victim. Because radium tailings are toxic waste, USRC's dumping constituted an abnormally dangerous activity for which it could be held strictly liable.

Next, the court considered USRC's knowledge of the health risks associated with radium, noting that whether USRC had knowledge that radium tailings were an abnormally dangerous substance was relevant to a determination of absolute liability. In a 1943 letter, USRC's president cited four incidents in which employees had died from exposure to radium. Both the letter and an informational pamphlet prepared in part by USRC revealed the company's knowledge of the hazards of radioactive compounds.

Moreover, between 1917 and 1943, the plant employee who measured radon wore a lead-lined apron and numerous signs warned employees not to sharpen brushes of luminous paint with their mouths, as this procedure was known to cause cancer. Exposure to radiation had rendered one plant engineer sterile. When radon became impacted under his fingernail, the company president voluntarily cut off his entire finger.

The appellate court disagreed with the trial court's conclusion that the doctrine of *caveat emptor* barred T & E's suit. The appellate court considered the doctrine outdated, widely abandoned and inapplicable. Because T & E did not knowingly accept the radium-contaminated property, the court refused to allow USRC to escape liability by claiming that T & E bought the property at its own risk.

The court characterized USRC's conduct as a "continuing tort" because the dangers associated with the decaying radium were continuous even though the dumping had occurred many years earlier. Because the law provides that liability for a continuing tort falls on the party originally responsible for the contamination, the innocent successors in title who did not dump radium tailings on the property did not share in the liability. The appellate court noted that "[t]hose who poison the land must pay for its cure." 546 A.2d at 578, citing cases. The court reversed the judgment in favor of USRC, directed the trial court to enter judgment on the issue of liability in favor of T & E, and ordered a new trial on the issue of damages.

**Debbie Williams**

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## **ILLINOIS APPELLATE COURT HOLDS COCA-COLA NOT CAUSE OF ILLNESS SUFFERED IMMEDIATELY AFTER CONSUMPTION**

In *Warren v. Coca-Cola Bottling Co.*, 166 Ill. App. 3d 566, 519 N.E.2d 1197 (Ill. App. 1988), the Appellate Court of Illinois, First District, held that a plaintiff presented no genuine issue of material fact to support her allegation that bacteria present in the soft drink she consumed caused her illness. Consequently, the court affirmed the trial court's order granting summary judgment in favor of defendants Coca-Cola Company ("Coca-Cola") and Coca-Cola Bottling Company of Chicago ("the Bottling Company").

### **Background**

Warren purchased a can of Coca-Cola at Litt's Cut Rate drug store. The can appeared clean and the soft drink was carbonated as usual. Warren took one large gulp of the soda, which tasted terrible. Within five minutes she became ill. Warren immediately went to a hospital where her condition worsened. She informed the emergency room physician that she became sick after consuming the cola. Consequently, he listed the diagnosis on the emergency room report as "acute gastritis" caused by ingestion of coca-cola, and admitted her as a patient.

Warren remained in the hospital for six days during which time she experienced stomach cramps, diarrhea and vomiting. Her treating physician failed to pinpoint the exact cause of her illness. He advised her that the soft drink

“could have” caused her illness, but because the hospital was not equipped to analyze the soda, he could not be sure.

During Warren’s stay in the hospital, the can was covered with aluminum foil and stored in her mother’s refrigerator. Upon her discharge, Warren delivered the can to the Chicago Board of Health for analysis. The tests performed indicated the sanitary condition of the soft drink and identified pathogens which could have caused food poisoning.

A bacteriologist discovered the presence of approximately 1300 streptococci fecalis bacteria per gram in the soft drink. This amount indicated that the soft drink was “insanitary” but not necessarily capable of causing disease. During her deposition, the bacteriologist stated that nearly a million streptococci fecalis organisms are necessary to cause food poisoning in human beings. She also stated that a soft drink can which was originally sterile is likely to become insanitary after remaining open for six days. The streptococci test only indicated the amount of bacteria present at the time the soft drink was tested, so a greater number of bacteria could have been present prior to testing. Warren showed the results to her physician. He again stated only that the presence of bacteria was abnormal and “could have” caused her illness.

Warren filed suit against Coca-Cola, the Bottling Company and Litt’s Cut Rate alleging breach of an implied warranty, strict liability and negligence. After extensive discovery, Coca-Cola and the Bottling Company moved for summary judgment. In its motion for summary judgment, Coca-Cola argued that neither the pleadings nor deposition testimony indicated that the bacteria in the soft drink caused Warren’s illness, and attached the affidavits of two company vice presidents to support its position. One affidavit established that Coca-Cola manufactured only the Coca-Cola syrup and not the soft drink itself. The second affidavit established that the syrup was manufactured in an entirely closed system, was laboratory tested prior to packaging in sterile containers, and was not contaminated before being shipped to the Bottling Company. In its motion for summary judgment the Bottling Company also argued that neither the pleadings nor the deposition testimony indicated that the bacteria in the soft drink caused Warren’s illness. The Bottling Company reasoned that any such conclusion was drawn by Warren herself and not by a physician or bacteriologist.

In her attempt to rebut this evidence, Warren relied on several documents. First, she recited portions of her deposition testimony in which she had stated that the Coca-Cola tasted bad and that she became sick immediately after consum-

ing it. Second, Warren referred to the bacteriologist’s determination that the soft drink was insanitary. Third, she referred to the emergency room physician’s report which established the soda as the causal link to her illness. After a hearing, the trial court granted summary judgment in favor of Coca-Cola and the Bottling Company. No judgment was entered for or against Litt’s Cut Rate.

#### **The Appellate Court’s Analysis: Applicable Standards for Prevailing on Claims of Strict Liability or Negligence**

The only issue on appeal was whether Warren’s injury was caused by a dangerous amount of streptococci fecalis present at the time the soft drink was consumed. The appellate court began its analysis by examining the pleadings, deposition transcripts and affidavits filed by both sides. If those documents, as a whole, failed to present a genuine issue of material fact, then Coca-Cola and the Bottling Company were entitled to summary judgment as a matter of law, and the trial court’s order would be sustained.

Coca-Cola and the Bottling Company manufactured the syrup and soft drink and sold the final product in a sealed can for purchase and human consumption. An implied warranty of fitness is imposed upon manufacturers that their product is suitable for human consumption. Warren was entitled to recover damages if she proved that either the syrup or the soft drink was not fit for human consumption or was defective. In order to prevail on either a theory of breach of implied warranty or defective product, Warren had to establish that the condition of the cola was the same when it left the defendants’ control as it was when she drank it. Warren could also recover damages under a theory of negligence if she proved that the defendants breached their duty to adequately prepare, inspect and package their products.

The court stressed that “the mere fact that injury occurs in consumption of the product does not alone raise a presumption, or otherwise create an inference, under any of the above theories, entitling the consumer to recover against the manufacturer.” 519 N.E.2d at 1202. For Warren to rebut the evidence presented by Coca-Cola and the Bottling Company, she had to set forth facts from which the trial court could have inferred: 1) that the cola was contaminated at the time Warren consumed it; 2) that Warren’s illness was a direct result of the contamination; and 3) that Coca-Cola and the Bottling Company were responsible for the contamination.

#### **The Court’s Holding: No Proof that Cola Caused Illness**

First, the appellate court concluded that War-

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## COCA-COLA (from page 29)

ren's evidence was insufficient to establish that either defendant was responsible for contamination of the soft drink. Coca-Cola testified that its product was sanitary because it was manufactured in a closed system. Warren offered no evidence to rebut this assertion because she failed to present any evidence tending to show that the syrup was contaminated when it left the control of Coca-Cola. In addition, Warren failed to show that the soft drink was contaminated when it left the control of the Bottling Company.

Second, the court rejected Warren's argument that the emergency room physician's report established a causal link between the soft drink and Warren's illness because the report merely recited information which Warren had reported to the physician. The court reasoned that Warren's own speculation as to the origin of her illness was insufficient to establish actual cause. Moreover, both the bacteriologist and the emergency room physician concluded that the contaminated soft drink was a *possible* cause of Warren's illness. The court declared that a possi-

bility was insufficient to raise an inference of fact.

Finally, the court found no conclusive proof that the soft drink was contaminated when Warren consumed it. The bacteriologist's determination that bacteria was present might have been sufficient had the can been tested immediately, but six days had passed between consumption and testing. Therefore, the test results were insufficient to raise an inference that the cola caused Warren's illness.

The court concluded that Warren failed to present sufficient evidence that the cola was contaminated when she consumed it. But even if it had been contaminated, the court concluded Warren failed to prove that the contamination caused her illness, or that defendants were responsible for the contamination. The appellate court affirmed the trial court's judgment in favor of Coca-Cola and the Bottling Company.

Sharon Dardanes

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