Maryland Law Review

Volume 8 | Issue 1 Article 6

Seller's Liability on Implied Warranty of Wholesomeness and Fitness for Consumption in Sale of Food to Consumer Contracting Trichinosis - Necessity of Privity of Contract - Vaccarino v. Cozzubo

SELLER'S LIABILITY ON IMPLIED WARRANTY OF WHOLESOMENESS AND FITNESS FOR CONSUMPTION IN SALE OF FOOD TO CONSUMER CONTRACTING TRICHINOSIS —NECESSITY OF PRIVITY OF CONTRACT

Vaccarino v. Cozzubo[1]

Plaintiff-appellee's daughter, with money furnished by his wife, purchased sausage from defendant-appellant, a retail dealer operating a grocery and meat store. After having been cooked by the wife, the sausage was eaten by plaintiff and his family, and all subsequently were found to have contracted trichinosis.[2] Plaintiff sued for damages for breach of warranty of wholesomeness and fitness for consumption, and recovered judgment, the trial court instructing the jury that if they found that the plaintiff was infected with trichinosis as a result of eating the sausage, their verdict should be for the plaintiff. On appeal, this was reversed and the case remanded for new trial.

The Court of Appeals considered first the defendant's contention that there was no privity of contract between himself and the plaintiff. While agreeing that such privity was requisite, it nevertheless regarded the requirement as satisfied, on the theory that the wife and daughter were acting as plaintiff's agents in helping him to carry out his obligation to support and maintain the family. The Court then went on to discuss the implied warranties rising under the Uniform Sales Act,[3] saying: "It is absolutely clear that there was an implied warranty in this case that the sausage was of merchantable quality and reasonably fit for human consumption." This, however, it was held, extends no further than that the meat was fit for human consumption when properly cooked, and "the jury should have been authorized to give a verdict for the plaintiff only in case they found that the plaintiff was infected with trichinosis by eating the sausage after it was cooked in the usual or proper manner."

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[1] 31 A. (2d) 316 (Md., 1943).

[2] Trichinosis is defined by the Court as "a disease caused by trichinae, nematodes which are occasionally found in pork and which breed in the human body, causing muscular swelling, pain and fever". The disease is one causing serious disability, sometimes death. In the instant case, plaintiff is stated to have been unable to do even light work for nearly a year.

[3] Uniform Sales Act, Sec. 15 (1), (2); Md. Code (1939) Art. 83, Sec. 33 (1), (2).

In holding privity of contract necessary to support a suit for breach of warranty, the Court was in accord with prior authority in Maryland.[4] It was also in accord with what was formerly at least the undoubted weight of authority generally.[5] There is a respectable and increasing body of authority, however, denying that such privity is requisite and allowing maintenance of such an action independently of negligence or the traditional views as to necessity for privity of contract; recent cases in many jurisdictions show a decided trend in this direction and it may even be that they represent the present weight of authority.[6] The conflicting views on this point have occasioned considerable comment, usually with reference to the warranty liability of manufacturers to sub-purchasers, but also in cases such as the instant one, where suit is brought against a retail dealer by one other than the immediate purchaser.[7]

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[4] Flaccomio v. Eysink, 129 Md. 367, 100 A. 510 (1916); State v. Consolidated Gas, Elec. L. & P. Co., 146 Md. 390, 126 A. 105 (1924); Poplar v. Hochschild, Kohn & Co., 180 Md. 389, 24 A. (2d) 783 (1942), noted (1942) 7 Md. L. Rev. 82.

[5] See, e. g., Birmingham Cheri-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 S. 64 (1921); Nelson v. Armour Packing Co., 76 Ark. 352, 90 S. W. 288 (1905); Drury v. Armour, 140 Ark. 371, 216 S. W. 40 (1919); Abercrombie v. Union Portland Cement Co., 35 Ida. 231, 205 P. 1118 (1922); Prater v. Campbell, 110 Ky. 23, 60 S. W. 918 (1901); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. (2d) 701 (1930); Pelletier v. Dupont, 124 Me. 269, 128 A. 186. (1925); Roberts v. Anheuser Busch Assoc., 211 Mass. 449, 98 N. E. 95 (1912); Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916); Hazleton v. First Nat. Stores, 88 N. H. 409, 190 A. 280 (1937); Smith v. Salem Coca-Cola Bottling Co., 25 A. (2d) 125 (N. H., 1942); Tomlinson v. Armour, 75 N. J. L. 748, 70 A. 314 (1908); Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923); Tomlinson v. Ballard & Ballard, 208 N. C. 1, 179 S. E. 30 (1935); Crigger v. Coca-Cola Bottling Works, 132 Tenn. 545, 179 S. W. 155 (1915); Coca-Cola Bottling Co. v. Sullivan, 178 Tenn. 405, 158 S. W. (2d) 721 (1942).

[6] See the following series of notes: 142 A. L. R. 490; 140 A. L. R. 191; 111 A. L. R. 1239; 105 A. L. R. 1502; 88 A. L. R. 527; 63 A. L. R. 340; 39 A. L. R. 993; 17 A. L. R. 672. See also, Klein v. Duchess Sandwich Co., 14 Cal. (2d) 272, 19 P. (2d) 799 (1939); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 P. 202 (1914); Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 S. 444 (1923); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 S. 305 (1927); Madouros v. Kansas City Coca-Cola Co., 230 Mo. App. 275, 90 S. W. (2d) 445 (1936); Helms v. General Baking Co., 164 S. W. (2d) 150 (Mo. App., 1942); Ward Baking Co. v. Trizzino, 27 Oh. App. 475, 161 N. E. 557 (1928); Catani v. Swift, 251 Pa. 52, 95 A. 931 (1915); Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 A. 537 (1931); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S. W. (2d) 828 (1942); Mazette v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913); Dobrenski v. Blatz Brewing Co., 41 F. Supp. 291 (D. C. Mich., 1941); Ketterer v. Armour & Co., 200 F. 322 (D. C. S. D. N. Y., 1912).

[7] See the series of A. L. R. notes cited *supra*, n. 6, and, in addition, Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees* (1937) 24 Va. L. Rev. 134, 146-149; Perkins, *Unwholesome*

The traditional majority view proceeds upon the basis that warranties in sales transactions, whether viewed as agreements collateral to the principal contract of sale or as conditions thereof, are in any event contractual in origin, and can consequently give rise to neither rights nor obligations except insofar as a contractual relationship is established. "The implied warranty, or to speak more accurately the implied condition of the contract, to supply an article fit for the purpose required, is in the nature of a contract of personal indemnity with the original purchaser."[8] Even though it be regarded as annexed by rule of law, and not itself consensual, the law annexes it to a contract, which must therefore exist before there can be any warranty obligation.

Against this, it is urged that while this is undeniably true as to express warranties given in connection with a sale transaction, implied warranties are not, either historically or otherwise, promissory in character and do not arise out of any agreement by the seller, but are on the contrary imposed upon him by operation of law, independently of any agreement on his part, as a matter of public policy; that they exist, of course, where there is privity of contract, but not because thereof; that they consequently should not be limited to cases where privity exists but should be extended to any other case where the same considerations of policy exist. So, in a very carefully considered and thoughtful recent opinion, it is said:

> "It has long been a well established rule that in sales of food for domestic use there is an implied warranty that it is wholesome and fit for human consumption. A majority of the American courts that have followed this holding have not based such warranty upon an implied term in the contract between buyer and seller, nor upon any reliance by the buyer on the representations of the seller, but have imposed it as a matter of public policy in order to discourage the sale of unwholesome food. . . . We believe the better and sounder rule places liability solidly on the ground of a warranty not in contract but imposed by law as a mat-

Food as a Source of Liability (1919) 5 Iowa L. Bull., 6, 86-102; Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees* (1929) 45 L. Quart. Rev. 343; Harris, *Liability to Consumers for Unwholesome Food* (1932) 9 N. Y. U. L. Q. Rev. 360; Note (1937) 21 Minn. L. Rev. 315, 321-325; WILLISTON, SALES (2nd Ed. 1924) Sec. 244, 244a; VOLD, SALES (1931) 474, 477.

[8] DeCourcy, J., in Gearing v. Berkson, cited *supra*, n. 5; quoted with approval in Flaccomio v. Eysink, 129 Md. 367, 385.

> ter of public policy. . . . The policy of the law to protect the health and life of the public would only be half served if we were to make liability depend on the ordinary contractual warranty. . . . As said in *Ketterer v. Armour & Co.*, D. C., 200 F. 322, 323—'The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon the demands of social justice.' "[9]

There are undoubtedly considerations of public policy operating against as well as in favor of a widening of the seller's liability for defects in his goods, in the absence of negligence or agreement to be answerable on his part. Spurious claims are easy to feign and difficult to disprove.[10] Yet these considerations exist also where privity of contract exists and the obligation of the seller rests on nothing more than a warranty implied by law from the fact of sale alone. It seems somewhat difficult to defend or justify in principle a rule which holds a seller of food, himself without fault or voluntary assumption of liability, answerable to an injured consumer with whom he has directly dealt but not to another whose injury is equally severe. The considerations of policy that render him liable in the one case would seem to apply equally in the other and to depend not at all upon the presence or absence of a contractual relationship between seller and buyer.

Not infrequently an injured consumer has been allowed to recover for breach of warranty, where no actual privity of contract existed, by the use of artificial fictions that have been held to satisfy the requirement of privity. So it has been held that a manufacturer selling to his immediate vendee makes the sale for the benefit of eventual users of his product, who may consequently sue as third party beneficiaries;[11] that implied warranties "run with the

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[9] Alexander, C. J., in Jacob E. Decker & Sons v. Capps, cited *supra*, n. 6.

[10] So it has been said: "There are those who trump up claims. There are those who make a business of it. There are perjured doctors, bogus injuries. There are cumulative claims against each of six defendants, on the basis of a single genuine sickness. And a false claim resting on poisoning from foodstuffs based on warranty is not easy to defend, on the facts." LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 343.

[11] Dryden v. Continental Baking Co., 4 Cal. (2d) 33, 77 P. (2d) 833 (1938); Ward Baking Co. v. Trizzino, 27 Oh. App. 475, 161 N. E. 557 (1928). *Cf.* Menaker v. Supplee-Willis-Jones Milk Co., 125 Pa. Super. 76, 189 A. 714 (1937); Lockett v. Charles, Ltd., 159 L. T. R. 547 (K. B. D., 1938).

goods";[12] that one not the immediate vendee may yet sue as assignee of his rights.[13] Such holdings, it is submitted, constitute in essence an abandonment of the requirement of privity of contract. They are but roundabout ways of saying that it need not actually be present.[13a] They are significant as indicating a widely held belief that the traditional rule causes unsound and unjust results, arousing a consequent desire to find some way of evading it without completely departing from it.

The Court of Appeals in the instant case seems influenced by a similar feeling in allowing a right of action to one not the immediate purchaser by indulging in the fiction of an agency relation between him and the actual purchaser—a fiction, in that it is a relationship not based upon any act or agreement of the parties but imposed wholly by operation of law. A similar result was reached by the Massachusetts Court in *Gearing v. Berkson.*[14] While the Court is thus able both to adhere to and to evade the rule requiring privity of contract, it may well have made possible somewhat bizarre results. For presumably neither the wife nor the daughter, who actually bought the meat, would themselves have any right to recover against the seller for breach of warranty, the contract of purchase being made, not in their individual and personal capacity, but as agents for the husband and father. It was so held at least in the Massachusetts case, which, as has been pointed out,[15] was quoted with approval, and indeed extensively relied upon by the Court of Appeals in *Flaccomio v. Eysink.* A rule which, in order to allow a right of action to one member of the family not the actual purchaser, would

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[12] Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Anderson v. Tyler, 223 Iowa 1033, 274 N. W. 48 (1937); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 S. 305 (1927); Coca-Cola Bottling Co. v. Smith, 97 S. W. (2d) 761 (Tex. Civ. App., 1936).

[13] See WILLISTON, SALES (2nd Ed., 1924) Sec. 244 for discussion of this theory.

[13a] The same may be said of holdings that though, in the absence of privity of contract, an injured consumer must sue in tort, negligence is presumed from the mere fact of sale of unwholesome food. See, e. g., Troietto v. Hammond Co., 110 F. (2d) 135 (C. C. A. 6th, 1940). *Cf.* in Maryland Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 A. 866 (1922); Salisbury Coca-Cola Bottling Co. v. Lowe, 176 Md. 230, 4 A. (2d) 440 (1939); Armour & Co. v. League, 177 Md. 393, 9 A. (2d) 572 (1939); and see Thomsen, *Presumptions and Burden of Proof in Res Ipsa Loquitur Cases in Maryland* (1939) 3 Md. L. Rev. 285.

[14] 223 Mass. 257, 111 N. E. 785 (1916). To the same effect is Hazleton v. First Nat. Stores, 88 N. H. 409, 190 A. 280 (1937); see also, Klein v. Duchess Sandwich Co., 14 Cal. (2d) 272, 93 P. (2d) 799 (1939).

[15] *Supra,* n. 8; the New Hampshire Court also so holds in the Hazleton case.

deny such right to another member, damaged in the same way, who was in fact the actual purchaser, seems at least odd.

It seems questionable whether it would not have been preferable to dispense with the use of artificial and technical means of evading the requirement of privity of contract, and to rest the seller's liability squarely on a warranty obligation imposed by law and not by contract, needing no privity between buyer and seller to bring it into being.[16] Presumably the Court felt precluded from doing so by prior authority in this State.[17]

In dealing with the extent of the seller's liability for breach of warranty, the Court's ruling that the plaintiff could recover, if found to have contracted trichinosis by eating the meat, only if he showed that it had been cooked in the "usual or proper" manner, taken in conjunction with language used in other parts of the opinion, inferentially raises a question as to whether, either in theory or fact, there can *ever* be a recovery on an implied warranty in such cases. For the Court states specifically that "the danger of contracting trichinosis can be eliminated by *proper* cooking"[18] and goes on to recite the expert testimony that cooking the meat thoroughly, so that all portions are heated to a temperature of 137 to 150 degrees, will completely destroy the parasite.

If these words mean, as standing alone they might be taken to mean, that cooking to be "proper" must meet the above requirements, then the buyer who complies with the Court's ruling as to showing cooking in the "usual or proper manner" necessarily disproves in so doing his claim that he contracted trichinosis from meat so cooked. A trichinosis-infected plaintiff under such a standard would be either unable to show "proper" cooking or unable to show injury from defendant's meat; in either case he would

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[16] See as to this, in addition to the authorities cited *supra*, n. 7, Note (1939) 6 Univ. of Chi. L. Rev. 514.

[17] Cases cited *supra*, n. 4. Conceivably, the expressions in those cases might be regarded as *obiter*. Flaccomio v. Eysink was an action in tort; State v. Consolidated Gas, Elec. L. & P. Co. a suit under Lord Campbell's Act; in Poplar v. Hochschild, Kohn & Co. there was in fact privity of contract between plaintiff and defendant; the instant case consequently could be said to be the first case in the State raising the question directly in a suit based on breach of warranty. However, in both the Flaccomio and Consolidated Gas Co. cases, it was the absence of any warranty obligation that caused relief to be refused and it was because of lack of privity of contract that the Court refused to find a warranty as existing in the plaintiff's favor.

[18] Italics supplied.

be precluded from recovering on his claim of breach of warranty.

While there are decisions that might support such a result,[19] it seems improbable that this was intended by the Court, since it also states: "It is not necessary, of course, for the plaintiff . . . to prove that the pork was cooked at a specific temperature or for a specific length of time. . . . The implied warranty in the case before us was . . . that it [the pork] was wholesome and fit to eat after *ordinary domestic cooking.*"[20] Presumably, then by "proper" cooking, the Court means domestically rather than scientifically proper.

It is nevertheless not altogether clear from the opinion just what is the degree of proof required in this respect of the plaintiff or what is the extent of the seller's implied warranty in such cases. The relatively few decisions elsewhere in trichinosis cases are for the most part equally lacking in clarity and present a somewhat confused picture. They may be grouped roughly into four classes as follows:

(1) Cases refusing recovery where the meat was used in an unusual manner, which the seller could not reasonably have anticipated.[21]

(2) Cases refusing recovery where plaintiff shows thorough cooking.[22]

(3) Cases allowing recovery where there is a showing that the meat was cooked though not to an extent that would destroy trichinae.[23]

(4) Cases refusing recovery where the meat was cooked insufficiently to constitute proper cooking.[24]

The Court in the instant case cites together cases from each of the first three classes in support of its conclusion.

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[19] See cases cited *infra*, n. 22.

[20] Italics supplied. The lower Court had refused the defendant's first prayer, which would have directed a verdict for the defendant, if cooking to less than 137 degrees was found by the jury (Record, p. 44).

[21] Cheli v. Cudahy Bros. Co., 267 Mich. 690, 255 N. W. 414 (1934); Dressen v. Merkel, 284 N. Y. Supp. 697 (1936), aff'd 272 N. Y. 574, 4 N. E. (2d) 744 (1936).

[22] Wiehardt v. Krey Packing Co., 264 Ill. App. 504 (1932); Zorger v. Hillman's 287 Ill. App. 357, 4 N. E. (2d) 900 (1936); Cudahy Packing Co. v. McPhail, 170 Miss. 508, 155 S. 163 (1934); Feinstein v. Reeves, 14 F. Supp. 167 (D. C. S. D. N. Y., 1936). *Contra*, Gindraux v. Maurice Mercantile Co., 4 Cal. (2d) 206, 47 P. (2d) 708 (1935).

[23] Holt v. Mann, 294 Mass. 21, 200 N. E. 403 (1926) Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1918); McSpedon v. Kunz, 271 N. Y. 131, 2 N. E. (2d) 513 (1936); Greco v. S. S. Kresge Co., 277 N. Y. 26, 12 N. E. (2d) 557 (1938).

[24] Eisenbach v. Gimbel Bros., 281 N. Y. 474, 24 N. E. (2d) 131 (1939). But *cf.* Catani v. Swift, 251 Pa. 52, 90 A. 931 (1915).

Under the first group are cases such as *Cheli v. Cudahy Bros. Co.*,[25] where the plaintiff had used the infected pork to make raw sausages to be eaten uncooked, without informing the seller that this was the intended use. There is general agreement that one who sells food which is normally cooked before use does not warrant its wholesomeness or fitness for consumption if used without cooking. The warranty imposed upon him in this respect arises because, as stated in the instant case, the purchase in itself makes known by implication the purpose for which the article is bought. Hence, if the article is put to an abnormal use, there can be no implication from the mere fact of sale that the seller knew that this was intended by the purchaser. Of course, if the article is one that is normally sold for consumption uncooked, the usual warranties attach.[26]

Under the second group are cases such as *Zorger v. Hillmann's*[27] where the plaintiff claimed to have contracted trichinosis from eating pork chops cooked over a full gas flame for fifteen minutes. The Court denied recovery because "the evidence in this case shows that the chops were thoroughly cooked, and, therefore, under the testimony of the doctors, could not contain trichinae capable of infecting the plaintiff." Similarly in *Feinstein v. Reeves*[28] it was held that, the plaintiff having alleged thorough cooking, it was incumbent upon him to show that trichinae-infected pork, when thoroughly cooked, would cause trichinosis, whereas the evidence conclusively showed otherwise.[29]

Thus here recovery is denied when the article sold is used in what is plainly a usual and proper way, and it is held in effect that the very fact of such user negatives the plaintiff's claim of injury. On their facts, the cases here do not go to the length of requiring the purchaser to show cooking to an extent destructive of trichinae in order to satisfy the requirement of normal use, but hold only that the plaintiff's claim was not supported by the evidence since by his own testimony he had shown cooking sufficient to render the meat incapable of containing any infectious parasite. However, in the *Zorger* case, the Court, on the basis that a seller of pork warrants it as fit for con-

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[25] Cited *supra*, n. 21.

[26] Catalanello v. Cudahy Packing Co., 27 N. Y. Supp. (2d) 637 (1941); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S. W. (2d) 828 (1942).

[27] Cited *supra*, n. 22.

[28] Cited *supra*, n. 22.

[29] However, in Gindraux v. Maurice Mercantile Co., cited *supra*, n. 22, a directed verdict for the defendant under such conditions was reversed.

sumption only if properly cooked, approved an instruction that the plaintiff must show the meat sold by the defendant was unfit for consumption by human beings after having been cooked to 137 degrees—something which seems generally accepted as impossible of proof.

Cases in the third group allow recovery only where the meat has been subjected to "ordinary domestic cooking", but do not regard this as necessarily synonymous with cooking to a point that would destroy trichinae. As hereinbefore stated, it is presumably this view which the Court of Appeals has taken in the instant case. It is difficult to say with any certainty what the test here suggested imposes as an obligation on the buyer. Leading cases are *Holt v. Mann* and *McSpedon v. Kunz*,[30] both cited in the instant case.

In *Holt v. Mann* a ham had been prepared according to "approved directions in a well known cook book" and nine persons became ill with trichinosis after eating it. The Court stated that, though it was true that trichinae will be killed by exposure to heat of 137 degrees, yet in ordinary household cooking it may not be easy to be sure that every part of a ham will be heated to so high a degree; that it could have been found that the ham was cooked as thoroughly as could be expected in family cooking without killing the trichinae with which it was infected.

In *McSpedon v. Kunz* the plaintiff testified that she knew nothing about requisite degrees of heat or about trichinae; all she knew was that the chops involved should be well cooked and she fried them in a pan until she supposed they were well cooked. The Court held this to be sufficient to allow recovery on a suit for breach of warranty, saying:

> "What would any ordinary housewife do? She buys meats at reputable butchers, supposing it fit to eat after being cooked in the customary way and manner. The expert in this case testified that he did not know those things until he had been taught them in the professional school. . . . This requisite of thorough heating and the nature of trichinae may seem very simple things to us and to experts who are dealing with these matters daily, but there are many people in this country who know nothing about trichinosis or the danger lurking in meats or the requisite heating point to de-

[30] Cited *supra*, n. 23.

> stroy parasites, and who must rely, and do rely, upon the grocer and the butcher and such reputable concerns as Armour & Company to sell them wholesome food. . . . Our statute of implied warranties was passed for the very purpose of protecting and safeguarding the life and health of people like Mrs. McSpedon and her little family."

It is apparent that the Massachusetts court is much more guarded than the New York court in discussing what constitutes the ordinary and proper use of food sold for consumption after cooking.[31] In effect, the latter tells the seller he must warrant the wholesomeness of his meat if prepared only to the extent to be reasonably expected of the buyer to whom he sells in any particular case, who moreover cannot ordinarily be reasonably expected to have any particular knowledge as to the amount of cooking necessary to destroy harmful parasites in the meat.

This creates a shifting standard of liability, since different degrees of knowledge in this respect may reasonably be expected of different buyers. Thus it has been held subsequently in New York that where the buyer is a restaurant with an experienced chef, there can be no recovery, the buyer here being held to a greater degree of knowledge as to the extent of cooking requisite than in the *McSpedon* case;[32] here presumably nothing short of cooking to the degree required to destroy trichinae would satisfy the requirement of ordinary domestic cooking as a prerequisite to suit on the implied warranty of wholesomeness.

In the opinion in the instant case, nothing is said as to the extent or degree of cooking practiced by the plaintiff's wife.[33] According to the record, however, there was testimony to the effect that the meat was cooked the way the wife had always cooked it; that it was fried some thirty to thirty-five minutes; that it looked brown and cooked enough to eat.[34]

This would seem sufficient under the *McSpedon* case to support a finding by the jury that there had been ordinary

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[31] See Lehman, J., dissenting in McSpedon v. Kunz.

[32] Eisenbach v. Gimbel Bros., cited *supra*, n. 24.

[33] This is true also in some cases elsewhere in which recovery has been allowed. See Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1918); Catani v. Swift, 251 Pa. 52, 95 A. 931 (1915).

[34] Record, pp. 8, 9, 12. However there was also testimony (p. 12) that the meat was red in color after cooking, which would indicate insufficient cooking.

domestic cooking; whether this would be true under the view taken in the *Holt* case is at least doubtful. But, as pointed out by the New York court, the prevailing concepts of policy lying back of the statutory implied warranty, as well as the ordinary understanding of the buying public, would call for a construction of the warranty most favorable to the buyer, especially perhaps in sales of food. There would be no greater burden imposed upon the seller in holding him responsible for the existence of harmful parasites in meat sold by him than exists when he is held responsible for the existence of harmful substances in goods sold by him in the original package. As said by the Court in the present case, quoting Cardozo, C. J., in *Ryan v. Progressive Grocery Stores:*[35] "The burden may be heavy. It is one of the hazards of the business." The same reasons of public policy which promote the imposition of liability without fault or knowledge in the latter case apply with equal force to the former.[36]

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[35] 255 N. Y. 388, 175 N. E. 105 (1931).

[36] Perhaps with greater. It is stated in the expert testimony in the present case that the packers could eliminate all danger of trichinosis by refrigerating all their pigs at about 5 degrees for about 21 days. This fact is commented upon by the Court in the McSpedon case, and seems to have had considerable weight. For treatment of a different aspect of the problem of warranty of food, see Note, *The Doctrine of Implied Warranty Between Restaurant-keeper and Guest* (1938) 2 Md. L. Rev. 277.