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Breach of Implied Warranty of Wholesomeness of Food by Retailer - Great Atlantic & Pacific Tea Company v. Adams

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Breach Of Implied Warranty Of Wholesomeness Of Food By Retailer

Great Atlantic & Pacific Tea Company v. Adams[1]

Mrs. Adams purchased two heads of lettuce which she served in a salad two days later. All who ate the salad became violently ill. Her husband, one of those injured, brought this action against defendant food market for breach of implied warranty that the lettuce purchased was fit for human consumption when in fact it was allegedly contaminated with bacteria. At the trial, expert testimony was introduced indicating that the organism (shigella sonnei) causing the illness was found in the salad but that raw lettuce was neither its natural habitat nor a favorable medium for its existence. The organism in question is usually found in human fecal matter and may be transferred to food by handling with contaminated fingers.

The lower court entered judgment for the plaintiff customer on the jury's verdict after overruling the grocer's motion for judgment n.o.v. On appeal, the case was reversed on the ground that the customer was not entitled to recover where he had not met the burden of proving the alleged breach. The customer failed to establish that the lettuce sold did not, at the time of the sale, conform to the representations of an implied warranty, and in fact introduced evidence which made it clear that contamination may have occurred after it left the store.

The importance of wholesomeness in food sold for immediate consumption was first recognized in an ancient English criminal statute[2] but later cases relied on an action on the case for deceit.[3] Toward the latter part of the eighteenth century, the contractual relation between the buyer and the seller was recognized, bringing about the action of breach of warranty in assumpsit.[4] In 1893, the existing law was codified in the English Sale of Goods Act[5] which later served as a model for the Uniform Sales Act drafted in 1906 and adopted by Maryland in 1910.[6]

This common law principle of implied warranty of wholesomeness is apparently unaffected by the Uniform Sales Act provision requiring the buyer either expressly

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[1] 213 Md. 521, 132 A. 2d 484 (1957).
[2] Statute of Pillory & Tumbrel and of the Assize of Bread and Ale, 51 HEN. 3, Stat. 6, 1 STAT. at Large 47 (1266).
[3] 3 BLACKSTONE, COMMENTARIES, (Lewis ed. 1902) §166.
[4] Stuart v. Wilkins, 1 Doug. 18, 99 Eng. Rep. 15 (1778).
[5] 56 & 57 VICTORIA, Ch. 71 (1893).
[6] MD. CODE (1951), Art. 83, §§19-96.

or by implication, to acquaint the seller with the purpose of the purchase.[7] It is generally acknowledged by the courts that when an article of food is purchased from a retailer, the implication is that it is for human consumption.[8] Selection of individual articles by the buyer with reference to size, weight, etc., as was done in the instant case, does not affect the question inasmuch as the buyer relies on the dealer to provide only wholesome food from which to choose.[9] Where, however, the buyer asks for and receives a particular brand (normally in a sealed package or container), no implied warranty of fitness arises under the Sales Act.[10] At the same time, a sale by description carries an implied warranty that the goods are of merchantable quality[11] and this implied warranty has been applied to sales of food in sealed containers.[12] It would seem, then, that one or the other of these statutory warranties will be available to the customer on any food purchased.[13] Undoubtedly, these specific statutory provisions together with the difficulty of proving the merchant's negligence, explain the development of breach of warranty as a common remedy in these cases.[14]

Although the cause of action in contract is more easily established than one in tort the purchaser is not relieved of the burden of establishing the seller's liability. The Court, in the instant case, stated:

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[7] *Ibid*, §33(1):
"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required. and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the gods shall be reasonably fit for such purpose."

[8] Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943), noted 8 Md. L. Rev. 61 (1943).

[9] VOLD, SALES (1931) 464-5.

[10] MD. CODE (1951), Art. 83, §33(4):
"In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

[11] *Ibid*, §33(2):
"Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

[12] Ryan v. Progressive Grocery Stores, 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339 (1931), holding a grocer liable for injury by a pin in a loaf of bread of another's manufacture, in a sealed wrapper, where customer asked for that particular brand.

[13] Ryan v. Progressive Grocery Stores, *ibid;* Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385, 90 A. L. R. 1260 (1932) (where the container was sealed but the customer did not ask for a particular brand).

[14] *Warranties of Kind and Quality Under the Uniform Revised Sales Act*, 57 Yale L. J. 1339 (1948).

> "The same principles as to proof apply whether the plaintiff is attempting to prove negligence or to prove the breach of an implied warranty. If the plaintiff's own evidence shows two equally possible causes, for one of which the defendant would not be responsible, he cannot recover."[15]

In an action for breach of either an express or implied warranty, the burden of proof is on the plaintiff to establish that the article sold did not, at the time of sale, conform to the representations of the warranty.[16]

In food poisoning cases, it has been suggested,[17] that to determine the principles involved, they be divided into two groups, namely, the trichinosis cases and the sealed container cases, but a more accurate analysis should also include a third classification covering bulk or loose items. One author who feels that this distinction is often difficult to make would avoid it by holding the dealer liable in any case.[18]

Trichinosis cases. In the trichinosis cases there is little question that the trichinae nematodes which cause the disease are present in the pork at the time of sale, since these organisms originate in the live animal.[19] In Maryland, however, as in most jurisdictions,[20] the extent of an implied warranty of wholesomeness has been considerably limited. In *Vaccarino v. Cozzubo*,[21] the Court stated:

> "However, no implied warranty arises either at common law or under the statute that meat, generally fit to be eaten only when properly cooked, is wholesome when eaten raw or cooked in an unusual or improper manner."

To recover in trichinosis cases, therefore, it would seem that although the plaintiff is relieved of the burden of proving the presence of trichinae at the time of sale, he must establish that the meat was properly cooked. But if the

[15] Great Atlantic, Etc. Co. v. Adams, 213 Md. 521, 527, 132 A. 2d 484 (1957).

[16] *Ibid.* See also McCeney v. Duval, 21 Md. 166 (1864); Fenwick v. Forrest, 5 H. & J. 414 (Md. 1822).

[17] *Supra*, n. 15, 525.

[18] Brown, *The Liability of Retail Dealers For Defective Food Products*, 23 Minn. L. R. 585 (1939).

[19] *Supra*, n. 15, 526. Where the Court stated: "Indeed it is a fact so commonly known as to be judicially noticed."

[20] *Ibid;* Cheli v. Cudahy Bros. Co., 267 Mich. 690, 255 N. W. 414 (1934); Silverman v. Swift & Co., 141 Conn. 450, 107 A. 2d 277 (1954); Feinstein v. Daniel Reeves, Inc., 14 F. Supp. 167 (D. C. N. Y. 1936).

[21] 181 Md. 614, 620, 31 A. 2d 316 (1943). See also *dictum* in Holt v. Mann, 294 Mass. 21, 200 N. E. 403 (1926).

expert opinion in the *Vaccarino* case is accepted, and there is no reason why it should not be, trichinosis can be prevented by cooking pork thoroughly, so it follows almost necessarily that pork which has caused trichinosis was improperly cooked.[22] The New York Court of Appeals, refusing to adopt this reasoning which would preclude recovery in most trichinosis cases, has held that the presence of trichinae makes pork unwholesome and that a dealer who sells pork thus infected has breached the implied warranty of fitness.[23] The fact that a meat packer could not reasonably discover the presence of trichinae in his product is immaterial since the warranty is not based on negligence.[24] Obviously, in a case where pork products prepared by the manufacturer or dealer to be eaten without cooking, are purchased by a consumer who develops trichinosis, the majority of the courts would join New York in finding a breach of implied warranty of fitness.[25]

Sealed container cases. In the sealed container cases, the presence of a foreign substance or injurious ingredient in a sealed bottle or container raises a strong presumption that it was there at the time of sale and that the bottler or packer was negligent.[26] Whether or not the doctrine of *res ipsa loquitur* can be invoked against the bottler or packer[27] is immaterial in a contract action against the retailer. In any case, of course, the plaintiff would have the burden of showing that injury or illness resulted from the presence of the foreign substance. From the standpoint

[22] The virtual impossibility of proving proper cooking is shown in the Silverman case, *supra*, n. 20, where although the plaintiff had cooked the pork over a spit for four hours, the Court held he had failed to follow commonly used precautions in preparing it.

[23] 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). See also: Catalanello v. Cudahy Packing Co., 27 N. Y. S. 2d 637 (1941), aff'd. 264 App. Div. 723, 34 N. Y. S. 2d 37 (1942).

[24] 4 WILLISTON, CONTRACTS (1936), §991.

[25] Vaccarezza v. Sanguinetti, 71 Cal. App. 2d 678, 163 P. 2d 470 (1945), where in holding for a consumer who developed trichinosis from eating salami purchased from defendant retailer, the main issue was not the implied warranty, but the evidence required to prove defendant's breach.

[26] *Supra*, n. 13; Bottling Co. v. Sindell, 140 Md. 488, 117 A. 866 (1922); Armour & Co. v. Leasure, 177 Md. 393, 9 A. 2d 572 (1939); Cloverland Farms Dairy v. Ellin, 195 Md. 663, 75 A. 2d 116 (1950).

[27] In the Armour & Co. case, *ibid*, 410-411, the Court stated:

> "There is a conflict also in the authorities as to whether the doctrine of *res ipsa loquitur* applies where the harmful food was taken from sealed and unbroken packages . . . , but there too the conflict is more often due to the variance in the facts of different cases than to any fundamental difference in principle . . ."

But in the earlier Goldman case, *ibid*, the Court had broadened the "control" element of harm producing agency to include control of the agency at the time of the negligent act which caused the injury.

of ease of recovery, there appears to be a decided advantage in a contract action against the retailer on the basis of his strict liability independent of negligence over one in tort against the bottler or packer. The overwhelming majority[28] of cases now hold the retailer liable even where the goods are sold in sealed containers on the ground that packaged foods containing foreign substances are not of merchantable quality.[29] Inasmuch as the action is in contract, the Maryland Court of Appeals has consistently held that in the absence of privity of contract, the benefit of the implied warranties do not inure to a subpurchaser.[30] In other words, the implied warranty does not run with the goods.[31]

In most of the Maryland cases, however, the customer has shunned the contract action against the retailer and brought his action against the bottler or packer. Absent the required privity he has been restricted to tort.[32] The explanation perhaps lies in the traditional efforts of lawyers to turn every breach of contract into tort, probably because of the more liberal tort rules as to damages.[33]

Bulk cases. In cases involving bulk or loose foods, there is less difficulty in holding the retailer under an implied warranty of wholesomeness because of his opportunity for inspection. In these cases the contract action would not be exclusive and under Maryland's liberal rules of procedure,[34] the tort count could probably be included.

Conclusion. There seems to be no question that a retailer grocer is liable for breach of an implied warranty of

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[28] For collected cases see Prosser, *The Implied Warranty of Merchantable Quality*, 27 Minn. L. Rev. 117 (1943).

[29] The justification of such policy was expressed in Ward v. The Great Atlantic & Pacific Tea Company, 231 Mass. 90, 120 N. E. 225, 226 (1918), which allowed a customer to recover damages directly from retailer for injury suffered in consequence of the presence of stones in a can of beans.

> "It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser. . . . [The law] places responsibility upon the party to the contract best able to protect himself against original wrong of this kind, and to recoup himself in case of loss, because he knows or comes in touch with the manufacturer." Bracketed material added.

[30] Flaccomio v. Eysink, 129 Md. 367, 100 A. 510 (1916); Vaccarino v. Cozzubo, *supra*, n. 21.

[31] Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916), denying recovery to a woman made ill by food which she purchased as agent for her husband.

[32] Coca-Cola Bottling Wks. v. Catron, 186 Md. 156, 46 A. 2d 303 (1946); Armour & Co. v. Leasure, *supra*, n. 26; Bottling Co. v. Lowe, 176 Md. 230, 4 A. 2d 440 (1939); Bottling Co. Inc. v. Sindell, *supra*, n. 26; Cloverland Farms Dairy v. Ellin, *supra*, n. 26.

[33] PROSSER, LAW OF TORTS (2nd ed. 1955) 483-485.

[34] Md. Rules of Procedure (1956), Rule 313, authorizing joinder of claims.

fitness and merchantability of food, and although it appears that such breaches are rather common occurrences, there have been only three cases to date going to the Maryland Court of Appeals utilizing this form of action.[35] There is no apparent reason why the customer does not take advantage of this strict liability (independent of negligence) by bringing a contract action directly against the dealer, whether or not the manufacturer is identified. Under Maryland's rules of procedure,[36] it would seem that the retailer could file a third-party claim against the wholesaler with whom he is in privity, who in turn could implead the manufacturer. If recovery by an injured customer is to be restricted, as a matter of practice, to cases predicated on negligence, particularly where a more adequate remedy is available, the desirable social interest of public health and safety in matters of food may be seriously impaired.

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[35] Great Atlantic, Etc. Co. v. Adams, 213 Md. 521, 132 A. 2d 484 (1957); Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943), noted 8 Md. L. Rev. 61 (1943); Dining Hall Co. v. Swingler, 173 Md. 490, 197 A. 105 (1938), where plaintiff was injured by a piece of tin in a sandwich served to him in defendant's restaurant. The Court held the serving of food in a restaurant was not a sale of food and that therefore, breach of implied warranty was not the appropriate action.

[36] *Supra*, n. 34, Rule 315 — Third-Party Practice.