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STUDENT NOTES

Implied Warranty and Trichinosis

Perhaps, from the outset, it should be noted that this discussion shall be limited to an investigation of the applicability of the doctrine of implied warranty to the retailer of consumer food products who sell raw pork from which the consumers contract trichinosis. The reader is cautioned in making analogies between warranties arising from food and those from other retail products, for the rules of law regulating the former are in some ways unique.

The principle of implied warranty is an exception to the rule of caveat emptor and is not of recent origin, perhaps originating in early common law when the ale-wife was journey to the tumbrel with distaff for selling sorry beer.¹ Implied warranty is an ill begot child of fortune, resulting from a freak and illicit intercourse be-

¹Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133, 1143 (1931).
tween contract and tort law. Being a hybrid from its conception, with a special function to perform, the rules governing its pro-
creators are hindrances rather than inducements to its growth. While seemingly analogous to a tort action, the doctrine was founded upon contract law, and the early cases held the principle of privity applicable and a necessary prerequisite to recovery.\footnote{See generally Prosser, Assult Upon the Citadel, (Strictly Liability to the Consumer), 69 Yale L.J. 1099 (1960).} This resulted in numerous unconscionable decisions which still plague this area of the law today.\footnote{Gearing v. Berkson, 223 Mass. 228, 111 N.E. 785 (1916). In this case a woman purchased unwholesome pork from a retailer, ate the meat and was stricken ill, but was denied recovery because she was acting as an agent for her husband and no privity of contract existed between her and the retailer. However, the court indicated that the husband could recover for the loss of his wife's services.} It is only in recent times that some of the inherent defects of the doctrine of implied warranty have been cured, the most notable improvement being the Uniform Sales Act and, more recently, the Uniform Commercial Code which has been enacted into law in West Virginia during the time of this writing.

The foundation for recovery in the typical trichinosis case is clearly set forth in Section 2-314 of the Uniform Commercial Code which states in part that there is an implied warranty in a contract of sale that the goods "... are fit for the ordinary purposes for which such goods are used. ..." This section of the Uniform Commercial Code is practically synonymous with section 15 of the Uniform Sales Act which purports to be a codification of the case law relating to that subject at the time of adoption. Therefore, decision based upon case law, the Uniform Commercial Code, or the Uniform Sales Act may be compared and analyzed in the same light.

Upon this principle of warranty law the courts established the rule that there was a warranty that pork or pork products are fit for human consumption, but only if properly cooked.\footnote{Feinstein v. Danial Reeves, Inc., 14 F.Supp. 167 (S.D. N.Y. 1936); Zorger v. Hillman's, 287 Ill. App. 375, 4 N.E.2d 900 (1936); Holt v. Mann, 294 Mass. 21, 200 N.E. 403 (1936); Vaccarino v. Cozzubo, 181 Md. 606, 31 A.2d 316 (1943); Adams v. Scheib, 408 Pa. 452, 184 A.2d 700 (1962).} This inquiry is directed toward determining whether that rule is sound and compatible with general warranty law theory.

Before venturing further it will be helpful to investigate the nature of the disease called trichinosis and how it may be detected
and controlled, so that the principles of law later encountered may be more critically analyzed. The danger of eating pork has been recognized at least since biblical times. "Nevertheless these shall ye not eat...the swine...it is unclean unto you; ye shall not eat their flesh or touch their dead carcass." In the seventh century A.D., Mohammed prohibited all those following his faith from eating pork, and this belief is still adhered to in that religion.

The discovery of the cause and the specific identification of trichinosis occurred early in the nineteenth century and methods of control and prevention were found in subsequent years.\(^6\)

Trichinosis is caused by trichinella spiralis, a microscopic parasite. The disease is contracted by man from eating meat, usually pork, containing the live parasite. Within a short time the parasite makes its way into the muscle fiber of the host and forms cysts which may cause sickness and even death.\(^7\) Authorative medical sources indicate that no economically feasible techniques for detecting trichinella infection in pork have at this time been developed,\(^8\) and "government meat inspection does not attempt to detect trichinella, for examination guaranteeing safety is considered to be impracticable." However, it is an impossibility for a human to contract trichinosis if all parts of the meat to be consumed have been previously heated to a temperature of 137°F.\(^9\)

**Early Case Development**

Initially the courts were not concerned as to what extent a warranty of fitness or merchantability attached to the selling of raw pork, but rather if any type of warranty existed when such meat had been inspected by the United States Government.\(^11\) The courts were also concerned with the problem of privity,\(^12\) and whether the plaintiff could have discovered the condition of the meat by exercising due care.\(^13\) In *Tavani v. Swift & Co.*,\(^14\) judicial

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\(^5\) Deuteronomy 14:7,8.

\(^6\) Gould, Trichinosis 3-19 (1945).

\(^7\) Cecil, A TEXTBOOK OF MEDICINE 390 (10th ed. 1959).

\(^8\) Cecil, A TEXTBOOK OF MEDICINE 391 (10th ed. 1959); Harrison, PRINCIPLES OF INTERNAL MEDICINE 1223 (4th ed. 1962).


\(^10\) Gould, TRICHINOSIS 281 (1945).


\(^13\) Rinaldi v. Mohican Co., 225 N.Y. 70, 121 N.E. 471 (1918).

\(^14\) 282 Pa. 227, 105 Atl. 55 (1918).
recognition was given to the fact that exposing pork to a certain temperature would render it free from the trichinella parasite.

The first case of material importance in determining the extent that a warranty of fitness or merchantability applied to the selling of raw pork was *Cheli v. Cudahy Bros.* The court stated that "... fresh pork is not ordinarily intended to be eaten raw. The warranty should be applied only to food used in the usual, rather than in the unusual and improper manner." This basic interpretation of the warranty that attaches to the selling of raw pork seems at least superficially to be reasonable and sound, but it will bear careful watching as the case law herein discussed develops this concept.

The Rule of Holt v. Mann

The reader’s attention is now directed to an investigation of one of the landmark cases in this area of warranty law, *Holt v. Mann.* The plaintiff bought pork from a retailer and stated that the same had been well cooked, and that he had contracted trichinosis from consuming the meat. The court sustained recovery on the theory of a breach of implied warranty. The court stated that the warranty "... was not that the food was fit to eat without cooking, but that it was fit to eat after ordinary domestic cooking." (Emphasis added.) To support this expression of the extent that a warranty attached to the selling of raw pork, the court cited *Gearing v. Berkson* and *Rinaldi v. Mohican Co.* While both of these cases concern recovery for the breach of an implied warranty concerning raw pork, they fail to support the proposition for which they are cited. The court also cited *Hawkins v. Jamrog* and *Jamrog v. H. L. Handy Co.* as supporting authority, but they are at best of questionable value since they concern the limitation of the implied warranty that is attached to the selling of raw turkey. A completely different type of problem is presented with regard to the selling of trichinosis infected pork.

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16 294 Mass. 21, 200 N.E. 403 (1936).
17 223 Mass. 228, 111 N.E. 785 (1916).
18 225 N.Y. 70, 121 N.E. 471 (1918).
19 The Gearing case is concerned with the problem of privity and the Rinaldi case with whether the plaintiff had exercised due care.
An examination of the reasoning of the court sheds dim light upon this interpretation concerning the nature of the warranty attached to the selling of raw pork. The court recognized that heating pork to 137°F. would kill the trichinella parasite, but it stated that it would "... not be easy for a housewife to be sure that every part of a ham would be heated to so high a degree."

In effect, the court in Holt v. Mann,22 stated that the usual and proper method for using pork was for it to be consumed only after ordinary domestic cooking, which does not necessarily constitute heating the meat to 137°F. However, this seems to be contrary to well established scientific evidence. Only one out of every six autopsies performed on adults in the United States show that that individual had at some time during his life been stricken with trichinosis,23 but it has been estimated that as much as ten per cent of the sausage sold in large city markets is infected and that each American consumes at least three servings of trichinosis infected pork in a year.24 Therefore, ordinary domestic cooking does kill the trichinella parasite, for if it did not it would seem that every American would have at some time been stricken with trichinosis. It is therefore submitted that the court in Holt v. Mann25 failed to carry its argument to its logical conclusion and that the plaintiff should have been denied recovery.

In the same year as the Holt case was decided, another landmark opinion was set forth in McSpedon v. Kunz.26 The court reiterated the nature of the warranty as set forth in Holt v. Mann,27 but also rested its decision on the fact that the retailer and the manufacturer were primarily at fault because pork could be rendered free from the trichinella parasite if the meat were frozen for a period of twenty-one days at a temperature of 5°F.28 But, while this is true, it is diametrically opposed to economic feasibility.29 This is also clearly evidenced by the fact that the United States Government does not require raw pork to be so treated to pass government meat inspection. In an able dissenting opinion Judge Lehman stated that the plaintiff should have been denied recovery

22 294 Mass. 21, 200 N.E. 403 (1936).
23 ROBBINS, TEXTBOOK OF PATHOLOGY WITH CLINICAL APPLICATION.
25 294 Mass. 21, 200 N.E. 403 (1936).
27 294 Mass. 21, 200 N.E. 403 (1936).
28 GouLd, TRICHINOSIS 282 (1945)
29 MIlLEr, MEAT HYGIENE 166-169 (2nd ed. 1958).
and in essence indicates that reasonably and properly cooked pork means heating the same to at least 137°F. This dissenting opinion is important because it is the first time judicial cognizance was taken of the possible injustice in allowing plaintiff to recover for an alleged breach of implied warranty of merchantability when he knowingly bought raw pork products.

In _Feinstein v. Danial Reeves, Inc._, the court gave a directed verdict to the defendant. While the plaintiff had alleged that the meat had been properly cooked, the court stated that he had failed to show that properly cooked pork could cause trichinosis. But the courts, in subsequent years have continued to allow the plaintiff to recover, and a majority of the jurisdiction have adopted or continued to follow the rule of _Holt v. Mann_. It was not until 1949 that an court seriously challenged the validity of the rule of _Holt v. Mann_.

_The Rule of Nicketta v. National Tea Co._

In _Nicketta v. National Tea Co._, a dramatic deviation occurred in the area of warranty law here under consideration. The plaintiff alleged that he bought raw pork from a retailer, properly cooked and then consumed the same and contracted trichinosis. The court affirmed the trial court's dismissal of the case because "... it is well established and irrefutable scientific fact, of which the court will take judicial notice, that a human cannot contract or get the illness or disease known as trichinosis from eating pork which has been properly cooked." A weakness in the court's opinion is its failure to define the term properly cooked, and then to logically support such a definition. However, by implication it indicated that raw pork must be heated to at least 137°F. for it to be properly cooked. In essence the rule of the _Nicketta_ decision is that a plaintiff can never recover under the implied warranty theory when he knowingly buys raw pork from a retailer and contracts trichinosis from the consumption of the same.

The basic question is, then, whether recovery should be allowed under implied warranty theory when a purchaser knowingly

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31 Troitto v. C. H. Hammond Co., 110 F.2d. 135 (6th Cir. 1940); Vaccaro v. Gozzubio, 161 Md. 606, 21 A.2d 316 (1943); Hazleton v. First Nat'l Stores, Inc., 88 N.H. 409, 190 Atl. 280 (1937); Greco v. S. S. Kresge Co., 227 N.Y. 26, 18 N.E.2d 557 (1938); Leonardi v. Habermann Provision Co., 143 Ohio St. 623, 50 N.E.2d 233 (1944); (note that the Ohio courts hold that pork infected with trichinosis violated section 12760 of their pure food statute).
buys raw pork from a retailer. As has been previously stated, there has been general public knowledge since biblical times that the consumption of pork is fraught with danger. In recent times, through scientific discoveries and modern means of communication, the general public has become informed that pork is safe for human consumption when properly cooked and the courts have taken judicial cognizance of this fact as evidence by the rule of *Holt v. Mann*. It is also to be kept in mind that the packers and the retailers of raw pork products are not at this time in an economically feasible position to prevent the danger of trichinosis and that no practical method to inspect pork is now available. However, the consumer is in a position to completely protect himself from the disease by simply heating all parts of raw pork to 137°F. In the United States information as to how to properly cook meat is readily available. It is submitted that it is manifestly unfair and unjust to allow an individual who buys trichinosis infected pork, along with a multitude of others, to recover on the basis of an implied warranty of merchantability simply because he negligently failed to inform himself, from the multitude of sources available, of the correct temperature to which pork must be heated to be properly cooked. It seems that to allow a plaintiff to recover in this type of case is to allow him reimbursement for his own wrong.

It is here that the hybrid nature of the warranty law again appears. Cries of foul will be heard that in essence an attempt is being made to use contributory negligence as a defense to a contractual action and that this may not be done. However, there is much authority to the contrary. But regardless of this conflict between contract and tort theory, it is submitted that a plaintiff should be denied recovery, when his own conduct is the initiator of his injury, and the manufacturer and the retailer may not reasonably eliminate the hazard. Such a situation should negate any implied warranty attached to the use of such goods. A candid examination of the recent cases decided in this area of warranty law will reveal, however, that the courts have either failed to con-

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33 See Trichinosis, U.S. Dep't of Health, Education and Welfare, Public Health Service Information, No. 47—also such information could easily be obtained from the family doctor or from a good cook book.


35 Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer) 69 YALE L.J. 1099, 1147 and n. 288 (1960).
sider the extent that a warranty should apply in this type of case, or have followed the rule of *Hole v. Mann*.

**Conclusion**

The majority view, while there is some authority to the contrary, is that a purchaser of raw pork products may recover from the retailer on the theory of breach of implied warranty if he should contract trichinosis from the consumption of the meat after alleging the same was subjected to ordinary domestic cooking. This view appears to be unsound for at least three reasons. First, because the relative positions of the plaintiff and the defendant with regard to the prevention of the harm should negate the warranty. Second, because even using the rule of *Holt v. Mann* as a guide, evidence indicates that an ordinary reasonable man so cooks pork as to destroy the trichinella parasite. Third, because the only practicable reason for the rule of *Holt v. Mann* was due to the universal knowledge of the danger of eating raw pork. It is therefore inconsistent for the courts to require the meat to be cooked but not sufficiently to kill the trichinella parasite, which was the reason for the conception of the rule.

The general area of implied warranty law in West Virginia is beset with uncertainty and doubt, and the specific problem herein considered is a question yet to be decided by the West Virginia Supreme Court of Appeals. The author expresses no opinion as to how that court will decide this type of case should it arise in the future.

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