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STUDENT NOTES

Implied Warranty and the Sale of Restaurant Food

Nothing is quite so commonplace on the American scene as eating in a restaurant, although the housewife may deem the event singular indeed when the breadwinner takes his family out to eat. When this occasion does arise, let us assume that the family's small son will order a chicken sandwich. Perchance the sandwich will contain a slim lethal chicken bone. When Junior bites into this sandwich, he will have bitten into a huge chunk of the Law of Sales that stands in complete chaos among the jurisdictions and is wholly unresolved in West Virginia. This situation, consumer versus restaurateur, is representative of the myriad occasions in which a restaurant patron, or his guest, or a purchaser of food from a grocer, or the patron's family or guest may be injured by poisonous food, or by foreign substances contained therein. Food products liability cases, involving wholesaler, manufacturer, retailer, restaurateur, customer, patron, and ultimate consumer, have become so involved with the

interplay of tort and contract principles, medieval inhibitions and modern public policy concepts, as to weave an esoteric pattern of fascinating confusion.

Recovery under the theory of negligence of the restaurateur in these circumstances is highly improbable,¹ and so long as this factual issue remains, with the possibility of defendant lessening or escaping liability, plaintiff's position is considerably hampered. Moreover, in many cases, where the original manufacturer of the food product was negligent, and neither wholesaler, jobber, nor retailer was negligent,² plaintiff may have recourse only to a defendant beyond the jurisdiction,³ or financially the least responsible person in the whole chain of distribution.⁴

Thus we come to plaintiff's other remedy, implied warranty of fitness for human consumption. Under this theory, he need only prove causation and trace that cause to defendant. Once these two hurdles have been crossed, defendant is absolutely liable to the purchaser for injuries resulting from consumption of food substance containing impure and deleterious matter, for defendant is held to have impliedly warranted the fitness of the food when it was sold.⁵

¹ Not only must plaintiff shoulder the burden of proof, but he has no access to defendant's methods and facilities. In sealed container cases he may rely upon the doctrine of *res ipsa loquitur*, *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 2 S.E.2d 898 (1939), to raise an inference of negligence, *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S.E.2d 729 (1946), although for a time it raised a *prima facie* presumption, *Parr v. Coca Cola Bottling Works*, 121 W. Va. 314, 3 S.E.2d 499 (1939). Originally the instrumentality had to be in defendant's exclusive control, *Keffer v. Logan Coca-Cola Bottling Works, Inc.*, 141 W. Va. 839, 93 S.E.2d 225 (1956), but this was waived by dicta in *Rutherford v. Huntington Coca-Cola Bottling Co.*, 142 W. Va. 681, 97 S.E.2d 803 (1957), and the doctrine was applicable though third-party tampering was possible, so long as it was not probable. The court expressly so held in *Ferrell v. Royal Crown Bottling Co.*, 109 S.E.2d 489 (W. Va. 1959). Judge Haymond dissented, observing that this decision constituted an utterly unwarranted departure from the doctrine as theretofore applied. What further doctrinal compromises may yet develop is purely a matter of speculation. See Comment, 60 W. VA. L. REV. 110 (1957).

It is interesting to note that no bottle case has been appealed on the theory of implied warranty in this state, although proof of the *res ipsa* elements would be thereby obviated.

² They are under no duty to inspect or test the goods. *Kratz v. American Stores*, 359 Pa. 335, 59 A.2d 138 (1948); RESTATEMENT, TORTS § 402 (Supp. 1948).

³ Cf. *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932), where the actual packer of canned corn beef was in Argentina, the first buyer a subsidiary corporation in Argentina, the primary distributor in Illinois, and the retailer, the retail buyer, and the consumer in Connecticut.

⁴ See Note 37 COLUM. L. REV. 77 (1937).

⁵ *Williams v. Coca-Cola Bottling Co.*, 285 S.W.2d 53 (Mo. App. 1955).

It has long been the law that "in contracts for provisions it is always implied that they be wholesome, and if they be not the same remedy (damage for deceit) may be had."⁶ The earliest recorded case in which a party successfully sued for breach of warranty upon a contract theory was in 1778.⁷ Thereafter, Lord Ellenborough said, "A dealer who contracts to sell goods of a particular description is understood to agree that he will deliver what is commonly sold in the market under that description."⁸ Thus the law developed that warranties of fitness attached to sales though not expressly mentioned by the parties. The one formidable obstacle remaining is the establishment of plaintiff's position in the contractual situation to entitle him to recovery on the warranty. This problem has impeded the development of the law in this field, for actions for breach of implied warranty are tort actions in their nature, yet are treated by the law as actions upon a contract.⁹ The more liberal rule of tort damages has been applied to these actions,¹⁰ and contributory negligence has been held to be a defense.¹¹ It follows that to prove that he is entitled to recovery for his chicken bone injuries, Junior must first show that a sale was transacted, in order to raise an implied warranty.¹²

Was the service in the restaurant in fact a sale? At early common law it was the rule that an innkeeper who furnishes food for his guests does not sell the food, he "utters his provision."¹³ The courts said that the food is incidental to the other services, and the essence of the transaction is not a sale but a service. A minority of American courts yet holds that food furnished by a restaurant

⁶ Breach of implied warranty is a hybrid and "sounds in tort as well as in contract." *Parish v. Great Atl. & Pac. Tea Co.*, 177 N.Y.S.2d 7, 16 (Munic. Ct. 1958). It is a somewhat inaccurate assumption that defendant's liability is strictly contractual. Williston, *Progress of the Law*, 34 HARV. L. REV. 741 (1921); PROSSER, *TORTS* 493 (2d ed. 1955).

⁷ *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939); *Greco v. S. S. Kresge Co.*, 277 N.Y. 26, 12 N.E.2d 557 (1938) (recovery for wrongful death allowed in implied warranty action).

⁸ *Fredendall v. Abraham & Strauss, Inc.*, 279 N.Y. 140, 18 N.E.2d 11 (1938); PROSSER, *op. cit. supra* note 6, at 494.

⁹ 3 BLACKSTONE, *COMMENTARIES* *165.

¹⁰ *Stuart v. Wilkins*, 1 Dougl. 18 (K.B. 1778).

¹¹ *Gardiner v. Gray*, 4 Camp. 144, 171 Eng. Rep. 46 (K.B. 1815).

¹² *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954), where a patient was injured as a result of a transfusion of impure blood, held that a sale had not occurred, thus denying the patient the right to sue the hospital for breach of warranty.

¹³ *Crisp v. Pratt*, Cro. Car. 549, 550, 79 Eng. Rep. 1072, 1073 (1640); *Parker v. Flint*, 12 Mod. 255, 88 Eng. Rep. 1303 (1699).

to a patron is not a sale.¹⁴ However, in the majority of jurisdictions, such a transaction is a sale, and a patron injured by food may sue the restaurateur for breach of warranty.¹⁵ It appears that the language of the Uniform Sales Act has no bearing on the question, as states holding both ways embrace the Act.¹⁶ However, the Uniform Commercial Code expressly provides that food furnished by a restaurant to a patron is a sale.¹⁷ The majority holding appears to be gaining numbers through legislation,¹⁸ although a number of states,¹⁹ including West Virginia, have not expressly treated the question.²⁰ The writers feel that the law should impose a warranty upon the service of food on the ground of social advantage,²¹ for otherwise the food sellers have the consuming public almost at their mercy. Largely for this reason, other fringe areas have also been deemed "sales" for the purpose of imposing warranties upon the producer.²²

Assuming then, that a sale has been transacted, Junior is not likely to be confronted with a disclaimer of such warranty to bar

¹⁴ *Nisky v. Childs Co.*, 103 N.J.L. 464, 135 Atl. 805 (1927); *Yeo v. Pig'n Whistle Sandwich Shops, Inc.*, 83 Ga. App. 91, 62 S.E.2d 668 (1950); Annot., 7 A.L.R.2d 1027, 1054 (1949).

¹⁵ *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407 (1918); *Zorinsky v. American Legion, Omaha Post No. 1*, 163 Neb. 212, 79 N.W.2d 172 (1956); Annot., 7 A.L.R.2d 1027, 1032 (1949). Incidentally, glass particles in a glass of water breached an implied warranty of food (?) in *Sartin v. Blackwell*, 200 Miss. 579, 28 So. 2d 222 (1946); and implied warranty was breached by injury due to foreign substance imbedded in ice. *Gladiola Biscuit Co. v. Southern Ice Co.*, 267 F.2d 138 (5th Cir. 1959).

¹⁶ Restaurant service is a sale within the terms of the Uniform Sales Act. *Goetten v. Owl Drug Co.*, 6 Cal. 2d 683, 59 P.2d 142 (1936); Annot., 7 A.L.R.2d 1027, 1034 (1949). It is not a sale within the terms of the Act. *McCarley v. Wood Drugs*, 228 Ala. 226, 153 So. 446 (1934); Annot., 7 A.L.R.2d 1027, 1056 (1949).

¹⁷ UNIFORM COMMERCIAL CODE § 2-314.

¹⁸ See *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533 (1914) overruled by CONN. GEN. STAT. § 2161c (Supp. 1953); and *Dining Hall Co. v. Swingler*, 173 Md. 490, 197 Atl. 105 (1938) changed by 7 MD. CODE ART. 83, § 94(1) (Cum. Supp. 1958), both to include the serving or providing of food for human consumption by any eating establishment in the term "sale." The original UNIFORM SALES ACT has no such provision.

¹⁹ See Annot., 7 A.L.R.2d 1027, 1060 (1949).

²⁰ *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S.E. 94 (1936), was limited to its facts, the court expressly not then undertaking to pass upon the liability of restaurant keepers. No West Virginia cases have been found.

²¹ VOLD, SALES 454 (2d ed. 1959); 1 WILLISTON, SALES § 242(6) (rev. ed. 1948).

²² *Ruud, Vendor's Responsibility for Quality in the Automated Retail Sale*, 9 KAN. L. REV. 139 (1960). Sale by vending machine is a sale by description and the implied warranty of merchantability exists. *Mead v. Coca-Cola Bottling Co.*, 329 Mass. 440, 108 N.E.2d 757 (1952). In a self-service sale, the contract of sale is made at the checkout counter. *Loch v. Confair*, 361 Pa. 158, 63 A.2d 24 (1949).

his recovery. This is merely due to the peculiar relationship a restaurateur bears to the consuming public, and the promotion of his local reputation. However, disclaimer presents a serious problem in all other implied warranty cases. The general rule is that where a duty to the public is not involved, private parties may contract away their negligence liability.²³ Owing to the harshness of this rule as applied to mass contracts, the courts have employed various methods to invalidate disclaimers while adhering to basic contracts principles.²⁴

After many years of struggling with this problem, the New Jersey court finally cut the Gordian Knot, and declared that an automobile manufacturer's warranty disclaimer was invalid as a matter of public policy.²⁵ This public policy motivation should certainly be applied to warranty disclaimers in food sales. However, the New Jersey case represents the first rumblings of a movement to disallow disclaimer of implied warranty, but is in line with the current trend toward better protection of the consumer.²⁶

The law on this point in West Virginia appears to be represented solely by the federal case of *Maryland Cas. Co. v. Owens-Illinois Glass Co.*,²⁷ wherein Judge Moore held that where an agreement for purchase of soft-drink bottles contained a provision by which the manufacturer disclaimed any liability for damages due to defective bottles delivered under this agreement, the manufacturer was not liable for payment made to a person injured when a bottle exploded because of a latent defect.²⁸ No similar case decided by

²³ *Shafer v. Rea Motors, Inc.*, 205 F.2d 685 (3d Cir. 1953); RESTATEMENT, CONTRACTS § 574 (1932). However, the public interest in freedom from exculpatory negligence clauses is not necessarily limited to the narrow field of public enterprises. *Mohawk Drilling Co. v. McCullough Tool Co.*, 271 F.2d 627 (10th Cir. 1959). Conditions attached to the warranty to limit the seller's liability are to be strictly construed against the party in whose interests they are made. VOLD, *op. cit. supra* note 21, at 444-47.

²⁴ Note, 23 MINN. L. REV. 785 (1939).

²⁵ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

²⁶ Comment, 109 U. PA. L. REV. 453 (1951).

²⁷ 116 F. Supp. 122 (S.D. W. Va. 1953).

²⁸ The court noted the exceptions to the general rule of disclaimer validity, they being a public interest involved, and wanton misconduct. 116 F. Supp. at 124. Significantly, there were no West Virginia cases cited.

the Supreme Court of Appeals has been found.²⁹ However, disclaimers have been looked upon with disfavor by the writers, for traditional contract principles cannot cope with the mass contract, and new concepts need to be developed.³⁰

Upon the further assumption that no disclaimer of warranty is present, Junior must dispose of but one more matter, and he is in court. But, that matter is the showing of privity of contract to entitle him to sue on the warranty, since the food was ordered by his father, and this matter has destroyed more than one otherwise valid claim.³¹ It had long been the rule that privity was essential to allow an injured party to sue upon a warranty.³² In the majority of cases concerning privity, the issue arises between the consumer and the original manufacturer, who interposes the insulation of retailers and jobbers.³³ However, the same principles apply to a situation involving a retailer and a purchaser's guest.³⁴

The privity requirement was abrogated in an early Washington case in the name of protection of the public interest.³⁵ Subsequently, numerous courts invented a variety of ingenious legal fictions,³⁶ including the pronouncements that the retailer is the consumer's agent to buy³⁷ and the manufacturer's agent to sell,³⁸ that the consumer is a third-party beneficiary of the purchaser's contract with the re-

²⁹ The West Virginia cases on exculpatory negligence clauses in ordinary contracts uphold such clauses, *Borderland Coal Co. v. Norfolk & W. Ry.*, 87 W. Va. 339, 104 S.E. 624 (1920), excepting public policy contravention by dicta, *Keystone Mfg. Co. v. Hines*, 85 W. Va. 405, 102 S.E. 106 (1920); however, the judicial power to hold a contract void as against public policy is a "very delicate and undefined power [to be exercised] only in cases free from doubt." *Barnes v. Koontz*, 112 W. Va. 48, 163 S.E. 719 (1932) syl. 1. Are food for human consumption cases free from doubt?

³⁰ Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632, 640 (1943).

³¹ Dickerson, *Recent Developments in Food Products Liability: Privity*, 8 DEFENSE L.J. 105 (1960).

³² In 1842, Lord Abinger foresaw: "the most absurd and outrageous consequences, to which I can see no limit," if it should ever be held that the defendant who made a contract with *A* would be liable to *B* for his failure to perform that contract properly. *Winterbottom v. Wright*, 10 M. & W. 109, 114, 152 Eng. Rep. 402, 405 (Exch. 1842).

³³ *Strict Liability of Manufacturers: A Symposium*, 24 TENN. L. REV. 923 (1957).

³⁴ *Bowman v. Great Atl. & Pac. Tea Co.*, 308 N.Y. 780, 125 N.E.2d 165 (1955).

³⁵ *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

³⁶ *Gillam, Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153 (1957).

³⁷ *Wisdom v. Morris Hardware Co.*, 151 Wash. 86, 274 Pac. 1050 (1929).

³⁸ *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 482, 161 N.E. 557, 559 (1928).

tailer;³⁹ and that a warranty "runs with the goods" from the manufacturer to the consumer.⁴⁰

These fictions have inspired some juggling of semantics. The New York courts have allowed recovery where a husband was injured by consuming bread which his wife had purchased, even though the husband was not in privity with the retailer, by holding the wife to be the husband's agent.⁴¹ In a similar situation, where the purchaser-wife was injured, the wife was held to be acting in her own right and not as an agent.⁴² Where two sisters jointly operated a household, sharing expenses, and one was injured consuming food bought by the other, the court allowed recovery, holding the purchaser to be plaintiff's agent, though the money was shown not to be exclusively plaintiff's, but from a mutually-created fund.⁴³ Where plaintiff's friend paid for her lunch in defendant's restaurant, it was held that a contract was made by both parties when the meal was ordered, the warranty arose then, and it mattered not who subsequently paid.⁴⁴ These troublesome fictions have been inspired by the will to serve justice without overturning the requirement of privity which, until recently, was exacted by the New York Court of Appeals.⁴⁵

The great movement toward dispensing with the privity requirement was precipitated by the classic case of *MacPherson v. Buick Motor Co.*,⁴⁶ in which the New York court, speaking through Judge Cardozo, held that "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made,

³⁹ *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953).

⁴⁰ *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927).

⁴¹ *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931).

⁴² *Gimenez v. Great Atl. & Pac. Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934).

⁴³ *Bowman v. Great Atl. & Pac. Tea Co.*, 133 N.Y.S. 2d 904 (4th Dept.), *aff'd without opinion*, 308 N.Y. 780, 125 N.E.2d 105 (1954).

⁴⁴ *Conklin v. Hotel Waldorf Astoria Corp.*, 161 N.Y.S.2d 205 (Munic. Ct. 1957). These legal gymnastics would handily serve Junior's immediate purposes, but they do little toward formulating a workable rule.

⁴⁵ *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 139 N.E. 576 (1923). However, the privity requirement was recently overruled as regards the purchaser's family in *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773 (1961), holding that at least as to food and household goods the presumption should be that the purchase was made for all the members of the household. "The injustice of denying damages to a child because of non-privity seems too plain for argument."

⁴⁶ 217 N.Y. 382, 111 N.E. 1050 (1916).

it is then a thing of danger."⁴⁷ This rule, which by-passed privity and allowed the consumer to recover from the manufacturer upon a showing of negligence, swept the country,⁴⁸ and was extended to include other users of the chattel⁴⁹ at the one extreme, and repairmen who do work on the chattel⁵⁰ at the other.

Although privity was no longer required in an action for a negligent injury, it remained an obstacle to recovery for breach of warranty. Many states, including West Virginia, refused to raise an artificial agency or other relationship, and paved the way for absolute non-liability in a large area. In *Pennington v. Cranberry Fuel Co.*,⁵¹ the Supreme Court of Appeals held that in the absence of statute, the retailer does not impliedly warrant to the consumer the contents of a sealed package of food. He only warrants that he has purchased from a reliable manufacturer and that there is no apparent defect in the food. After this case came *Burgess v. Sanitary Meat Market*,⁵² which held that the retailer is liable for defects in unsealed packages of food. However, the *Burgess* case contained dicta to the effect that to recover on an implied warranty, privity was necessary.⁵³ These two cases considered together would appear to prevent recovery from the retailer in a sealed package case, yet bar recovery from the manufacturer in any event on an implied warranty, except in the highly improbable situation where privity might be shown. Surely such a blind spot of the law should not exist. No West Virginia case has been found which treats the problem directly. However, it appears that this state would lean toward requiring privity were the question to be considered.

On the other hand, a recent federal case arising in West Virginia⁵⁴ seemed to imply that absence of privity is no bar to an action on a warranty. In that case, the purchaser of impure food and members of his family were injured by food poisoning, and sued the retailer and manufacturer. The court held that, "Whether

⁴⁷ *Id.* at 389, 111 N.E. at 1053.

⁴⁸ *Saena v. Zenith Optical Co.*, 135 W. Va. 795, 804, 65 S.E.2d 205, 210 (1951).

⁴⁹ *Hoenig v. Central Stamping Co.*, 273 N.Y. 485, 6 N.E.2d 415 (1936).

⁵⁰ *Vrooman v. Beech Aircraft Corp.*, 183 F.2d 479 (10th Cir. 1950).

⁵¹ 117 W. Va. 680, 185 S.E. 610 (1936), commented upon in Comment, 43 W. VA. L. Q. 84 (1936).

⁵² 121 W. Va. 605, 5 S.E.2d 785 (1939), commented upon in Comment, 46 W. VA. L. Q. 348 (1939).

⁵³ "Of course, a food seller's implied warranty does not inure to the benefit of parties other than the purchaser." *Id.* at 611, 5 S.E.2d at 787.

⁵⁴ *Kyle v. Swift & Co.*, 229 F.2d 887 (4th Cir. 1956).

the liability . . . be held to rest upon implied contract or negligence in manufacture . . . the evidence before us was sufficient to take the case to the jury as against the manufacturer. . . ."⁵⁵ Thus, the state of the law in West Virginia on the issue of privity is doubtful, 1939 dicta on the one hand, and a 1956 federal decision on the other.

Among the jurisdictions which have wrestled with the problem, a trend of increasing liberality has made itself known. A name case in the field, *Jacob E. Decker & Sons v. Capps*,⁵⁶ dispensed with the legalistics of privity altogether and, observing that it is usually impracticable, if not impossible, for the ultimate consumer to analyze the food and ascertain whether or not it is suitable for human consumption, laid down the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food are so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.

After this path had been charted, it was trod by many progressive courts. Many states, including Virginia, which had heretofore allowed recovery in absence of privity solely on negligence,⁵⁷ upon reviewing their standing, dispensed with privity of implied warranty in food cases on the ground of public policy.⁵⁸ This casting aside of privity, in effect imposing strict liability upon the manufacturer of food,⁵⁹ has accelerated in gaining acceptance in recent years. Dean Prosser's copious research⁶⁰ has revealed that at present seventeen jurisdictions⁶¹ require no privity in food cases by case law and five more⁶² by statute, twenty-two in all; fourteen jurisdictions⁶³ reject strict liability and require privity; two others⁶⁴ are

⁵⁵ *Id.* at 889.

⁵⁶ 139 Tex. 609, 164 S.W.2d 828 (1942).

⁵⁷ *Norfolk Coca-Cola Bottling Works V. Krausse*, 162 Va. 107, 173 S.E. 497 (1934).

⁵⁸ *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E.2d 203 (1959).

⁵⁹ Note, *A Limitation on Caveat Venditor*, 25 ALBANY L. REV. 67 (1961).

⁶⁰ Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1107-1110 (1960).

⁶¹ Arizona, California, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Texas, Virginia, and Washington.

⁶² Connecticut, Georgia, Minnesota, and South Carolina.

⁶³ Alabama, Arkansas, District of Columbia, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, South Dakota, Tennessee, and Wisconsin. For New York's modification, see note 45 *supra*.

⁶⁴ North Carolina and West Virginia.

doubtful; and in the fourteen states remaining,⁶⁵ there appears to be no decision determining whether strict liability exists in food sales. If the trend toward strict liability develops into the general rule, no food poisoning case should be treated as a "hardship" case,⁶⁶ and unwieldy fictions⁶⁷ will not be necessary to the meting out of substantial justice. However, the no-privity rule has been recently applied in non-food cases,⁶⁸ and this fact may indicate further liberalization of the rule.

The foregoing is not to say that nothing more need be proved once it is established that an implied warranty runs to Junior and that he was injured by deleterious matter in the food. If the substance which injured the restaurant patron was in fact the object ordered and contemplated by him, he could not, of course, recover for his injury. For example, where plaintiff orders fried chicken and chokes on the wishbone,⁶⁹ it is clear that no implied warranty could be invoked. Conversely, if a needle imbedded in mashed potatoes causes injury, liability would obviously fall upon the restaurateur. However, the reported cases involve nice distinctions, more subtly drawn than these examples.

To determine liability in cases of this class, the test has been established that so long as the substance contained in the food is natural to the food involved, as a matter of law the food is not rendered unfit for human consumption because of the presence of the substance.⁷⁰ The leading case of *Mix v. Ingersoll Candy Co.*⁷¹

⁶⁵ Alaska, Colorado, Delaware, Hawaii, Idaho, Indiana, Nebraska, Nevada, North Dakota, Oregon, Utah, Vermont, and Wyoming.

⁶⁶ See *Lane v. C. A. Swanson & Sons*, 130 Cal. App. 2d 210, 278 P.2d 723 (1955), where it was held that the description "Boned Chicken" on the label, together with the statement "No bones" in advertisements, constituted an express warranty to the consumer that there were no bones whatsoever in the product.

⁶⁷ See *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18, 266 P.2d 163 (1954), where, ironically, plaintiff persuaded the court to use the tort approach to bridge the privity gap, and the court then applied the one-year tort statute of limitations instead of the two-year contract statute, thus barring the action.

⁶⁸ *Midwest Game Co. v. M. F. A. Milling Co.*, 320 S.W.2d 547 (Mo. 1957), applied strict liability to a sale of fish food. *McQuaide v. Bridgeport Brass Co.*, 190 F.Supp. 252 (D. Conn. 1960), applied it to the sale of an injurious insecticide. The present border is defined by *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958), which imposed strict liability upon the manufacturer of cinder building blocks. Inherently dangerous?

⁶⁹ Heaven save his table manners.

⁷⁰ *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936).

⁷¹ *Ibid.*

set the pace in this area. In that decision plaintiff had been injured by a chicken bone in a chicken potpie. The court felt that despite the fact that a chicken bone may occasionally be encountered in a chicken pie, the pie is reasonably fit for human consumption in the absence of some further defect. The rule which has come to be called the "naturalness test" was formulated by the court in holding that "bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones."⁷² This rule in California was further defined in a later case,⁷³ where the source of litigation was a piece of bone in dressing, on a plate of roast turkey with dressing and vegetables. The court stated that there was no substance present not natural to the type of meat served.

The naturalness test appears to apply whether the action is brought under the tort or contract theory. Unnaturalness must be shown in order to establish either breach of implied warranty or negligence.⁷⁴ The question of naturalness has also been held to be a defensive matter, and not a matter which plaintiff is required to prove.⁷⁵ Naturalness is usually a matter of law,⁷⁶ although it has been held to be a jury question.⁷⁷

The doctrine appears to be limited to bones natural to the particular kind of meat served. Crab meat not being used in the preparation of pompano en papillote, a piece of crab shell found therein was held to be a foreign substance in that dish.⁷⁸ However, although the person who was being served an unusual seafood dish did not know what it was, a fish bone which injured him was held

⁷² *Id.* at 682, 59 P.2d at 148.

⁷³ *Silva v. F. W. Woolworth Co.*, 28 Cal. App. 2d 649, 83 P.2d 76 (1938).

⁷⁴ *Norris v. Pig'n Whistle Sandwich Shop*, 79 Ga. App. 369, 53 S.E.2d 718 (1949). Particles of bone in food prepared from meat are ordinarily expected, and its presence did not raise an inference of negligence in preparing the food.

⁷⁵ *Davison-Paxon Co. v. Archer*, 91 Ga. App. 131, 85 S.E.2d 182 (1954).

⁷⁶ See cases cited in note 79 *infra*.

⁷⁷ *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942).

⁷⁸ *Arnaud's Restaurant, Inc., v. Cotter*, 212, F.2d 883 (5th Cir. 1954).

to be natural to the dish and he could not recover.⁷⁹ The New York court applied the test to a non-bone case, involving natural salt crystals which formed in canned crabmeat after the canning process, holding that the presence of these crystals constituted a breach of warranty of fitness.⁸⁰

The difficulties inherent in the dogmatic approach of the naturalness test were subtly pointed out in *Brown v. Nebiker*,⁸¹ which followed the *Mix* case⁸² but treated "naturalness" differently. The court said that one who eats the type of meat that bones are natural to ought to anticipate and be on his guard against the presence of bones, which he knows will be there. This viewpoint changed naturalness, a question of law, to the reasonable expectation of the ordinary prudent consumer, clearly a question of fact.

This difference was expressly recognized in *Wood v. Waldorf System*,⁸³ which stated that the question is not whether the substance may have been natural or proper at some time in the early stages of preparation, but whether the presence of such substance, if it is harmful, is natural, and ordinarily expected to be in the final product. The emphasis was placed upon the nature of the food being served, its preparation, and its final appearance.

The difference in result of the "naturalness" (i.e. natural to the basic object) test and the "reasonable expectation" test is graphically illustrated in a comparison of the *Mix* case and the recent decision of *Betehia v. Cape Cod Corp.*⁸⁴ The *Mix* case held a chicken bone to be natural to a chicken potpie. The *Betehia* case reached the opposite result, holding that a chicken bone is not reasonably expected to be in a chicken sandwich. The court reasoned that the naturalness test is weak in that because a substance is natural to a product in one stage of preparation does not mean that it will

⁷⁹ *Shapiro v. Hotel Statler Corp.*, 132 F.Supp. 891 (S.D. Cal. 1955). In *Goodwin v. Country Club*, 323 Ill. App. 1, 54 N.E.2d 612 (1944), a turkey bone contained in creamed chicken was held natural to that type of meat and recovery was denied. No recovery for injurious whole chicken bone in canned chicken fricassee, because bones are normally left in chicken as cut up for fricassee. *Wieland v. C. A. Swanson & Sons*, 223 F.2d 26 (2d Cir. 1955).

⁸⁰ *Gimenez v. Great Atl. & Pac. Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934).

⁸¹ 229 Iowa 1223, 296 N.W. 366 (1941).

⁸² *Mix v. Ingersoll Candy Co.*, *supra* note 70.

⁸³ 79 R.I. 1, 83 A.2d 90 (1951).

⁸⁴ 10 Wis.2d 323, 103 N.W.2d 64 (1960).

be reasonably anticipated by the average consumer in the final product served.

Naturalness was thrice upheld recently, one case holding that a piece of broken prune pit is not a substance foreign to prune butter,⁸⁵ and another holding that a partially crystallized grain of corn, contained in a package of corn flakes, was not a substance foreign to such food.⁸⁶ However, a sharp fragment of bone in a piece of salami was not natural to the product, as a matter of law.⁸⁷ The reasonable expectation test was recently applied, holding it to be a jury question whether slivers of chicken bone in chicken chow mein were "something that should not be there."⁸⁸

The few cases which treat the problem⁸⁹ reveal a trend toward the more liberal reasonable expectation test. This liberal trend is in line with the tendency on all fronts to relieve much of the consumer's burden and place it upon the shoulders of the party who can best prevent the disastrous results of food that falls below standards that are essential in this modern age of mass food sales.

The law of implied warranties in food sales is quite meager in West Virginia.⁹⁰ It appears that each point of Junior's case against the restaurateur would present a case of first impression to the Supreme Court of Appeals. This situation is strange indeed when one considers that the occurrence is so commonplace and the case law is so abundant in other jurisdictions. However, in the event that the Uniform Commercial Code is adopted in this state, many of these problems will be thereby obviated. The Code provides that the serving for value of food or drink to be consumed

⁸⁵ *Courter v. Dilbert Bros., Inc.*, 186 N.Y.S.2d 334 (2d Dept. 1958).

⁸⁶ *Adams v. Great Atl. & Pac. Tea Co.*, 251 N.C. 565, 112 S.E.2d 92 (1960).

⁸⁷ *Lore v. De Simone Bros.*, 172 N.Y.S.2d 829 (Sup. Ct. 1958).

⁸⁸ *Bryer v. Rath Packing Co.*, 221 Md. 105, 156 A.2d 442 (1959).

⁸⁹ Most cases involving foreign objects in food are more clear-cut. See *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 2 S.E.2d 898 (1939) (dead worm in plug of chewing tobacco); *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S.E.2d 729 (1946) (piece of wire imbedded in a cake); *Rutherford v. Huntington Coca-Cola Bottling Co.*, 142 W. Va. 681, 97 S.E.2d 803 (1957) (particles of glass in a bottle of soft-drink).

⁹⁰ See Note, *Implied Warranties in West Virginia*, 44 W. VA. L. Q. 206 (1938), where the writer felt that implied warranties of fitness, merchantability, and quality do exist in this state, by implication and dicta from the cases therein discussed. This was written before *Burgess v. Sanitary Meat Market*, *supra* note 53, was decided. See also Comment, 62 W. VA. L. REV. 98 (1959), discussing the West Virginia cases on implied warranty in their caveat emptor aspect.

either on the premises or elsewhere is a sale,⁹¹ and that a seller's warranty extends to all members of his buyer's family or household, and to any injured guest.⁹² It is felt that adoption of the Code would do much toward achieving clarity and order in this field.⁹³ The two provisions just mentioned would establish a sale and dispense with privity, two matters which have prevented countless cases from being heard on the merits.

The manufacturer of food products owes a high duty to the public to provide food worthy of the trusting faith placed in him by the consumer. The structure of the law should be molded to protect the consumer in this rightful trust, and to provide the machinery by which this high duty can be enforced. It is encouraging that the trend of codes and cases indicates a growing concern among the courts and law-making bodies to provide the legal machinery, and to shield the consumer of food products under the protective aegis of public policy.

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⁹¹ UNIFORM COMMERCIAL CODE § 2-314.

⁹² UNIFORM COMMERCIAL CODE § 2-318.

⁹³ The Code also deals with disclaimer. A disclaimer negating the implied warranty of fitness ". . . must be by a writing and conspicuous . . ." UNIFORM COMMERCIAL CODE § 2-316. Moreover, § 2-302 authorizes the striking of unconscionable clauses in sales contracts and § 2-719 (3) declares "a limitation on consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable"