Washington University Law Review

Volume 18 | Issue 1

1932

Some Rights and Liabilities Arising Out of the Sale of Food for Human Consumption

Herbert K. Moss

Moot Court system there will also be briefs and oral arguments such as would be presented to an appellate tribunal.

To fill the vacancy caused by the desire of Mr. Sam Elson to enter active practice, Mr. Edward S. Stimson has been appointed Assistant Professor of Law. He has A.B., B.S. and A.M. degrees from Ohio State University and the degrees of J.D. and S.J.D. from the University of Michigan. He has served as Professor of Economics at Carroll College and as assistant in law at the University of Michigan. He has also had three years' experience in the actual practice of law in Toledo, Ohio. He is the author of a book, JURISDICTION TO TAX, which will shortly be published by the West Publishing Co.

Notes

SOME RIGHTS AND LIABILITIES ARISING OUT OF THE SALE OF FOOD FOR HUMAN CONSUMPTION

It is a matter of rather common knowledge not only that ordinary articles for human consumption, being normally of a somewhat perishable nature, prove often unwholesome, but also that the consumption thereof may be attended by disastrous results to the health of the individual. Not at all infrequently a lawyer is called upon to prosecute an action for the recovery of damages for injuries sustained by the eating of such food. If the article has been prepared by a manufacturer and sold to a retailer from whom the victim purchased it, the lawyer must decide upon whom liability may be fastened and upon what theory the right of recovery must be based. Manifestly, in the normal course of affairs it would be more beneficial to the aggrieved party to obtain judgment against a large corporation manufacturing foodstuffs than against a small independent retailer with a slight pecuniary investment. Perhaps the victim has been served the deleterious food in a restaurant. If so, the lawyer is confronted by the additional question whether the ordinary rules concerning sales of goods can be applied thereto.

Let us consider first the liability of the individual retailer. The decision in the English case of *Begge v. Parkinson*[1] in 1862 is usually pointed to as inaugurating the general rule that the implied warranty of fitness for a particular purpose shall be applied in the sale of food as against the immediate vendor, and it would be a useless multiplication of authorities to cite decisions

[1] (Exch. 1862) 7 H. & N. 955, 158 Eng. Repr. 758.

sustaining this doctrine. Historically, it is important to note that *Begge v. Parkinson* arose out of a pre-existing contract to supply provisions, but the cases since decided have expressly extended the rule to present orders of goods.[2] The general rule may be stated that there is an implied warranty of fitness in a sale of food for human consumption as between a retailer and a consumer when the latter makes known, either expressly or impliedly, to the former the intended purpose for which the article is to be used and relies on the skill and judgment of the former that it is fit for such a use.[3] A perusal of current decisions indicates that the universality of this rule has never been seriously questioned, either in those jurisdictions acting under the Uniform Sales Act or under the common law.

However, there are some issues arising out of the application of the rule to particular fact situations which are highly controversial and must be discussed here. The rule in the case of *Rinaldi v. Mohican Co.*[4] to the effect that a "mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required"[5] is universally accepted. Thus, it is easy to satisfy the first requisite for the application of this warranty, i.e. the necessary knowledge in the seller of the buyer's intended use.

There is considerable contrariety of opinion as to how to satisfy the second prerequisite for the application of the implied warranty of fitness, namely, did the buyer, either expressly or impliedly, rely on the seller's skill and judgment in making the selection. The advent into the business of supplying and preparing foods of the more highly specialized methods of canning and packing foodstuffs by a manufacturer or packer who sells his products to the retailer has raised the question of whether it can be said that the buyer relies on the retailer's skill and judgment in the selection of a particular article, since obviously the retailer cannot have made an inspection of the contents of the particular can or sealed package. The argument that there is no such reliance has prevailed in some courts. A leading case recognizing this view is *Aronowitz v. F. W. Woolworth Co.*,[6] but its value as a precedent is greatly weakened by the fact that it was decided in one of the lower appellate tribunals in New York and also because it has been rendered ineffective by other New

[2] Farrell v. Manhattan Market Co. (1908) 198 Mass. 271, 84 N. E. 481 and the cases cited therein.

[3] 2 Williston on Contracts (1931) 1874.

[4] (1918) 225 N. Y. 70, 121 N. E. 472.

[5] (1918) 225 N. Y. 70, 73, 121 N. E. 472, 473.

[6] (1929) 134 Misc. Rep. 272, 236 N. Y. S. 133.

York decisions to be mentioned hereafter.[7] The action was brought by the party alleged to have been injured as a result of eating canned goods sold the plaintiff by the defendant retailer, but packed by a third party. The Court, citing *Rinaldi v. Mohican Co.*,[8] points out that the purchaser of food who may assume that the seller has had an opportunity to examine the food sold, conclusively relies on the seller's skill and judgment,[9] but that it cannot be assumed that a retailer of canned goods has had an opportunity of examining the contents of a can.

> To be sure the seller has an opportunity to examine the exterior and to purchase of a reputable manufacturer, but the court knows of no process whereby the seller can examine the contents of a particular can without opening it. A purchaser is undoubtedly fully aware of the fact, so that in such instance the mere purchase standing by itself, does not conclusively establish reliance by the purchaser upon the supposed skill or judgment of the seller as to the contents of the sealed and unopened can.[10]

In *Burkhardt v. Armour & Co.*[11] the court in meeting the contention that the retailer of canned goods is in no better position than the purchaser himself with respect to judging the wholesomeness of the contents of the original package points out, that the rule being well established that in the sale of ordinary goods the seller is liable for latent defects, this liability should fasten itself upon the seller with even greater tenacity in the case of the sale of foods. The court in the same opinion shows that the existence of a rather complex manufacturing and distributing system in the food industry would greatly lessen the possibility of the victim of the deleterious food recovering against the original manufacturer, whereas the retailer is in a far better position to ascertain the responsibility and reliability of the original packer. The court in *Ward v. Great Atlantic & Pacific Co.*[12] points out, in upholding the liability of a retailer in the sale of canned goods, that the buyer himself could by no exercise of "individual sagacity" make an intelligent selection of canned goods, while the retailer should at least have exercised skill and judgment in the selection from among reputable dealers. This view gives legal effect to the real reliance placed in the dealer which is that he shall exercise skill and judgment in the selection of the manufacturer, rather than of the contents of the particular can.

---

[7] *Infra* p. 48.
[8] (1918) 225 N. Y. 70, 121 N. E. 472.
[9] (1918) 225 N. Y. 70, 74, 121 N. E. 472.
[10] (1929) 134 Misc. Rep. 272, 273, 236 N. Y. S. 133, 134.
[11] (Conn. 1932) 161 Atl. 385.
[12] (1918) 231 Mass. 90, 120 N. E. 225.

In New York, however, the ruling in *Aronowitz v. F. W. Woolworth Co.*[13] and similar cases has been nullified by the interpretation placed by the courts on another implied warranty, i.e. the warranty arising when goods are purchased of a seller dealing in goods of that type that the goods are of merchantable quality. In *Ryan v. Progressive Stores Inc.*[14] the New York Court of Appeals held that in the sale of food for human consumption when the buyer does not rely upon the judgment or skill of the seller, as where the buyer calls for an article by its patent or trade name, there nevertheless exists an implied warranty of merchantability and that, if the goods sold were not fit for human consumption, they could not be of merchantable quality. The result achieved is possibly a meritorious one in that, if an exception were made for goods sold in the original package, the buyer would in a majority of cases be relegated to his remedy against the packer, which would necessarily entail greater difficulties in the prosecution of the suit. The reasoning of the court in reaching its decision is subject to criticism since the implied warranty of merchantability, as the very name shows, grew up under the common law as applicable solely to sales between an original vendor and a purchaser for resale.[15] Not only is its historical origin distinct from the implied warranty of fitness, but it has been codified as a separate warranty under the Uniform Sales Act.[16] Thus, the Court might more logically have extended the implied warranty of fitness, rather than distorting so completely the implied warranty of merchantability. The majority of the courts refuse to allow this broad and far reaching rule of liability.

As a necessary corollary to the rule in some jurisdictions that a retailer is not liable on an implied warranty when he resells goods in their original package, there is the proposition that in such cases the liability of the retailer, if any, must be based on negligence.[17] This negligence would consist in the failure to exercise reasonable care in the selection of reputable wholesalers from whom to purchase his supply of canned goods. Because of difficulties of proof this remedy is of course inferior to one upon a warranty.

Another quite interesting field of litigation involves the rights and liabilities arising out of the purchase of articles for human

[13] (1929) 134 Misc. Rep. 272, 236 N. Y. S. 133.

[14] (1931) 255 N. Y. 388, 175 N. E. 105.

[15] 2 Williston on Contracts (1931) 1878.

[16] Uniform Sales Act sec. 15.

[17] Dothan Chero-Cola Bottling Co. v. Weeks (1918) 16 Ala. App. 639, 80 So. 734; Fleetwood v. Swift & Co. (1921) 27 Ga. App. 502, 108 S. E. 909; Scruggins v. Jones (1925) 207 Ky. 636, 269 S. W. 743; Trafton v. Davis (1913) 110 Me. 318, 86 Atl. 179; Tavani v. Swift & Co. (1918) 262 Pa. 184, 105 Atl. 55.

consumption by a customer from a purveyor of food, like a restaurant keeper. Here again we are confronted with a decided division of authority with reference to the grounds, if any at all, of the liability of the person serving the food. The case leading the array of authorities which base the liability of the purveyor upon a breach of warranty is *Friend v. Childs Dining Hall Co.*[18] A suit was brought by a person alleged to have received injury from deleterious food served to him in a restaurant operated by the defendant. Obviously, to establish liability on the theory of warranty the victim must show that the transaction between the purveyor of the food and the customer amounted to a sale of the food, so as to bring the transaction within the purview of the implied warranty of fitness in the sale of food. The court in the instant case relied on certain cases holding that the service of food and beverages was a sale under criminal statutes forbidding the sale of certain types of food and drink.[19] Drawing such an analogy seems extremely dangerous in view of the fact that such judicial decisions may have been made purposely to forestall evasions of statutes which enunciate a profound public policy. To fortify its conclusion that such a transaction gave rise to liability on a warranty, the court reviewed certain very early English decisions and commentaries which pointed to absolute liability on the part of a "victualer."[20] A statement in one case, typical of the other statements relied on by the court, was, "If a man goes into a tavern for refreshment and corrupt meat or drink is there served him, which occasions his sickness, an action lies against the tavern keeper . . . an action lies against him without express warranty, for it is a warranty in law."[21] The court concludes by pointing out that it had been firmly established in that state that an implied warranty of fitness existed between a retail dealer and a consumer and that the same arguments would apply with equal cogency to purveyors of food.

> It would be an incongruity in the law amounting at least to an inconsistency to hold with reference to many keepers of restaurants who both supply food to guests and also put up lunches to be carried elsewhere and not eaten on the premises, that, in case of want of wholesomeness, there is a liability towards the purchaser of the lunch to be carried away, founded upon a implied condition of the contract, but that liability to a guest who eats a lunch on a table at the premises rests wholly upon negligence.[22]

---

[18] (1918) 231 Mass. 65, 120 N. E. 407.
[19] (1918) 231 Mass. 65, 68, 120 N. E. 407, 408.
[20] (1918) 231 Mass. 65, 71, 120 N. E. 407, 409.
[21] Keil. 91, 72 Eng. Repr. 254.
[22] (1918) 231 Mass. 65, 120 N. E. 407.

Within the group of cases which hold that it is a sale and that the restaurant keeper is liable on a warranty, there is a subdivision founded on the case of *Barrington v. Hotel Astor*,[23] which would limit liability to food prepared by the purveyor himself. Other courts reject this limitation[24] on the general rule as unfounded, as it is unless the doctrine of *Aronowitz v. F. W. Woolworth Co.*[25] be accepted as the measure of the scope of the implied warranty of fitness.

Some of the courts feel that sound considerations of public policy are of sufficient cogency to impose liability on the restaurant keeper.[26] The following excerpt is typical:

> The trend of the times is to require eating houses to be as sanitary as possible, and to protect the public as far as can be by inspection, tests, etc. The importance of pure food to the public and the inability of a guest to see and examine his food prior to its preparation and cooking, of necessity requires that one who holds himself out as a public purveyor of food and an expert in producing and preparing the same be held as an insurer against injury occasioned by failure to furnish wholesome and pure food to eat.[27]

Under such a test it is not absolutely clear whether the liability is one based on a warranty or an example of a tort liability imposed without reference to the fault of the defendant.

In direct opposition to this line of decisions we have those authorities permitting recovery only on a showing of negligence.[28] The dissenting opinion in *Friend v. Childs Dining Hall Co.*[29] is frequently cited as disposing of the effect of the language in the early English cases. Justice Crosby there says that what appears to be a liability on a warranty is based either on the fact that the victualer had actual knowledge of the unwholesomeness of the food or else upon some ancient statute which imposed a penalty for serving such food or drink. The existence of "pure food" statutes has been held immaterial on the ground that they

[23] (1918) 184 App. Div. 317, 171 N. Y. S. 840.

[24] Clark Restaurant Co. v. Simmons (1927) 29 Ohio App. 220, 163 N. E. 210.

[25] (1929) 134 Misc. Rep. 272, 236 N. Y. S. 133.

[26] Smith v. Carlos (1923) 215 Mo. App. 488, 247 S. W. 464.

[27] (1923) 215 Mo. App. 488, 490, 247 S. W. 468.

[28] Greenwood Cafe Co. v. Lovinggood (1916) 197 Ala. 34, 72 So. 354; Merril v. Hudson (1914) 88 Conn. 314, 91 Atl. 533; Rowe v. Louisville & Nashville R. R. Co. (1922) 29 Ga. App. 851, 113 S. E. 823; Kenny v. Wong Lea (1925) 81 N. H. 427, 128 Atl. 343; Nesky v. Childs Co. (1927) 103 N. J. L. 464, 135 Atl. 805; Coreu v. S. S. Kresge Co. (1932) 10 N. J. Misc. 489, 159 Atl. 799; Clark Restaurant Co. v. Rau (1931) 41 Ohio App. 23, 179 N. E. 196.

[29] (1918) 231 Mass. 65, 120 N. E. 407.

were designed to benefit both hotels and individuals and not to impose an additional liability on hotels for the sole benefit of individuals.[30] The courts have expressly denied that there is any public policy in favor of imposing absolute liability.[31] They point to the alleged fact that the whole tendency of the recent development of the law of tort liability is away from any such liability without fault. In at least one state this tendency has reached the dignity of a positive rule of law.[32] Furthermore, by the great weight of authority, there can be no possibility for applying the doctrine of implied warranties in the sale of food, as in legal contemplation the restaurant keeper sells service rather than food.[33] The courts point out that if any such liability had existed it would have been the foundation for innumerable suits, more especially since the absolute liability of a hotel keeper for the goods of his guest would prove a potent analogy.[34]

Relying solely on legal authority one is bound to reach the conclusion that no implied warranty can exist where the food is sold for immediate consumption on the premises. But if one chooses to disregard strict adherence to legal doctrines then the anomaly becomes more apparent in that one would not ordinarily differentiate between the sale of articles of food to be taken from the premises of the seller and the "sale" of articles to be consumed where bought, nor does it seem proper that different liabilities should attach in the two cases.

When an attempt is made to hold the original vendor, even more difficult problems are presented. It would not be unnatural to find a division of the authorities upon this subject, but the diversity of the theories upon which the various courts proceed in arriving at their respective results is both interesting and startling.

Because of the absence of direct contractual relationship between the ultimate consumer and the original vendor, most of the cases which attempt to hold the original vendor liable have sounded in tort rather than in contract. At the outset, the litigant is confronted by the rule, generally accepted in tort law, that a vendor or manufacturer of "an article is not liable to third parties who have no contractual relationship with him for negligence in the construction, manufacture, or sale of such article,"[35]

[30] Traves v. Louisville & Nashville R. R. Co. (1913) 183 Ala. 415, 62 So. 851.

[31] Rowe v. Louisville & Nashville R. R. Co. (1922) 29 Ga. App. 851, 113 S. E. 823; Valeri v. Pullman Car Co. (D. C. S. D. N. Y. 1914) 218 F. 519.

[32] Kenny v. Wong Lea (1925) 81 N. H. 427, 128 Atl. 343.

[33] Nesky v. Childs Co. (1927) 103 N. J. L. 464, 135 Atl. 805; Kenny v. Wong Lea (1925) 81 N. H. 427, 128 Atl. 343.

[34] Valeri v. Pullman Car Co. (D. C. S. D. N. Y. 1914) 218 F. 519, 521.

[35] 3 Cooley on Torts (4th ed.) 463.

on the theory that an extension of liability would be against sound public policy. Two important exceptions to this rule have gradually developed. They are: (1) "that a person who deals with an imminently dangerous article owes a public duty to all into whose hands it may come to exercise care in proportion to the peril involved"; and (2) "that a person who knowingly sells or furnishes an article which, by reason of defective construction, or otherwise, is inherently dangerous to life or property, without notice or warning of the defect or danger, is liable to third persons who suffer therefrom".[36]

It is easy to state the exceptions in the terms frequently used by the courts, but there is still a considerable contrariety of opinion whether the first of these exceptions applies to food. A case whose history well indicates this diversity of view is *Chysky v. Drake Brothers Co.*[37] The party seeking recovery from the original manufacturer drew her complaint on the basis of a liability in warranty. The Appellate Division of the Supreme Court[38] sustained a judgment for the plaintiff on this theory by reference to the opinion of Justice Cardozo in the celebrated case of *MacPherson v. Buick Motor Car Co.*,[39] which is usually conceded to have extended the doctrine of *Thomas v. Winchester*[40] (which involved the sale of an article inherently dangerous) to the sale of articles not inherently dangerous but having in themselves the potentiality of destruction and mutilation of human life if improperly and negligently prepared by the original manufacturer.[41] The Court felt that the sale of food properly fell within the extended rule of the *MacPherson* case. The Court of Appeals reversed the judgment of the Appellate Division of the Supreme Court, pointing out that the plaintiff relied on an alleged breach of warranty when there was not the requisite privity of contract with the original vendor. The analogy of covenants running with the land as recognized by the law of real property was rejected. As to the purported authority of the *MacPherson* case, the Court pointed out that that opinion went no further than to say that "under certain facts and conditions the manufacturer of an article would be liable to a third person, even though no contractual relation existed between them, if the article sold was *negligently* prepared or manufactured." The question of the liability being in tort or on a warranty apparently resolves itself into an interpretation of the case of *Thomas v.*

[36] 3 Cooley on Torts (4th ed.) 465, 466.
[37] (1923) 235 N. Y. 468, 139 N. E. 576.
[38] (1920) 192 App. Div. 186, 182 N. Y. S. 459.
[39] (1916) 217 N. Y. 382, 111 N. E. 1050.
[40] (1852) 6 N. Y. 397.
[41] 3 Cooley on Torts (4th ed.) 466.

Winchester and similar cases. A survey of the better reasoned and more carefully considered cases involving the application of the rule of *Thomas v. Winchester* and the extension made by the *MacPherson* case show that they agree in holding that liability can only exist where the original vendor has failed to use the requisite degree of care.[42]

Some courts have made use of the second exception to the general rule to impose an absolute liability on the original manufacturer on the ground that food is an article "inherently dangerous." In the case of *Manzetti v. Armour & Co.* [43] the court allowed the party injured to recover from the original manufacturer not only for his personal suffering, but also for the alleged destruction of his business as a caterer of food. The court ruled that the sale of food was an act of such a character as to bring into operation the exception to the general rule denying liability of the original vendor to third parties, that there may be such liability where "the thing causing the injury is of a noxious or dangerous kind." The court held that the liability was absolute, whether or not there was negligence.

Another court has used the "pure food" statute to fix liability on the original vendor on the theory that the violation of a statute designed for the public safety will render the disobedient vendor liable to the victim of his disobedience for damages flowing proximately from the neglectful act.[44] Undoubtedly this decision is in consonance with the rule of law that where a statute for the protection or benefit of individuals prohibits a person from doing an act, or imposes a duty upon him if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted.[45]

Other courts feel the necessity of imposing an absolute liability on the original vendor. Some of these courts refuse to indulge in technical niceties to substantiate their conclusions. In *Hertzler v. Manshum*[46] the court said that the "law recognizing the imperative need of consumers of foodstuffs to rely upon the care of the manufacturer, and the inability of the consumer in a case like this to detect injurious impurities or poisonous substances therein, and the complex system of modern production and distribution holds the manufacturer who prepares foodstuffs destined to be sold to and consumed by the public, liable to consumers purchasing from a retail dealer for a breach of the implied warranty arising from poisonous substances therein."

---

[42] 3 Cooley on Torts (4th ed.) 466 and cases cited.

[43] (1913) 75 Wash. 662, 135 Pac. 633.

[44] Meshbesher v. Channellene Oil & Mfg. Co. (1909) 107 Minn. 104, 119 N. W. 155.

[45] 3 Cooley on Torts (4th ed.) 361.

[46] (1924) 228 Mich. 416, 200 N. W. 155.

Other judges have preferred to rely solely on legal processes to establish a contractual liability. In *Ward Baking Co. v. Trizzino*[47] the court said in effect that the contract of warranty between the original vendor and his immediate vendee is really one made for the benefit of the ultimate consumer, who may then sue the original vendor under the American rule of contract law permitting the third-party beneficiary to sue the original obligor.

The courts in Pennsylvania limit the application of the breach of warranty theory to those instances where the article sold and prepared by the original vendor is placed in a package which is not to be opened by the intermediate vendor.[48] This apparently takes cognizance of a physical fact to sustain a privity of contract which is essentially a legal relationship. However, it has the merit of giving some remedy in warranty to the consumer in those states which follow the doctrine of *Aronowitz v. F. W. Woolworth Co.*[49] and hold that there is no implied warranty of fitness made by the intermediate vendor in such a situation.

The better rule would seem to be in favor of an absolute liability on the original vendor in view of: (1) the practical difficulty in proving that a certain process in the manufacture of a foodstuff has been conducted negligently, when the processes of manufacture are so complicated that an individual not in the employ of the defendant could have very little knowledge concerning their details; (2) the nature of the use to which food is to be put, demanding the greatest protection available, which can be gained most certainly by the imposition of an absolute liability; (3) the fact that the universal adoption of the "pure food" statutes shows a legislative recognition of a public policy to secure to the people the utmost protection of the public health; and (4) the fact that the jury would still exist as a safeguard to prevent the success of fraudulent suits against a manufacturer by persons not actually injured by his products.

HERBERT K. MOSS, '33.

RECENT EXTENSIONS OF THE RES IPSA LOQUITUR DOCTRINE

It is a well established principle in the Anglo-American legal system that specific negligence must be proved in cases of unintended personal injury in order to attach tort liability to the defendant. It is equally well recognized that the doctrine of *res*

[47] (1928) 27 Ohio App. 475, 161 N. E. 557.

[48] Nock v. Coca-Cola Bottling Works of Pittsburg (1931) 102 Pa. Super. Ct. Rep. 515, 156 Atl. 537.

[49] (1929) 134 Misc. Rep. 272, 236 N. Y. S. 133.