

## Sales: Implied Warranty and Sale of Chicken Sandwich

William E. McCarty

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"fair play and substantial justice."<sup>26</sup> A unique feature of Wis. Stat. Ch. 262<sup>27</sup> is designed to keep the Statute's application within the limits of fair play and "substantial justice." If a state court finds on the motion of any party that as a matter of "substantial justice" the pending action though grounded on a sufficient basis for the exercise of personal jurisdiction ought to be tried in another forum outside Wisconsin, it may enter an order to stay further proceedings in this State. A moving party must stipulate his consent to suit in the alternate forum and waive his right to rely on statutes of limitations which may have run in such other forum. A hearing is had on such motion, and separate findings made by the court on each issue in a single order which is appealable. This is a great improvement over the injunctive and forum non conveniens proceedings where appeal could only be taken after entry of judgment. Wis. Stat. Ch. 262 also lays down some general considerations to guide the courts in using their discretion to grant or deny the motion, such as amenability to personal jurisdiction in Wisconsin and in any alternative forum of the parties; convenience of parties and witnesses; and a catch-all section: "Any other factors having substantial bearing upon the selection of a convenient, reasonable, and fair place of trial." As similar general considerations are found in the change of venue statutes, Wis. Stat. §261.04 and 28 U.S.C. §1404(a), and in the area of forum non conveniens, it is to be expected that the particular objective factors considered important in these areas will also apply in granting or denying the motion under the Wisconsin statute.

EDWARD R. KAISER

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Sales—Implied Warranty and Sales of Chicken Sandwich—Plaintiff ordered, paid for and consumed a sliced chicken sandwich at defendant's restaurant. The sandwich consisted of a layer of two or three pieces of thinly sliced white chicken meat and a layer of lettuce, between two slices of bread. After eating the sandwich plaintiff felt a sharp pain in his throat and upon investigation it was discovered that embedded in the lettuce and bread was a sharp fragment of chicken bone about one and one-half inches long and about one-eighth of an inch in diameter at its thickest point.

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<sup>26</sup> International Shoe Co. *supra* note 28 at 320. ". . . It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there . . ." While some of the provisions go beyond the facts of that case, i.e., permit exercise of jurisdiction with less than the number or degree of contacts found there, they may be readily sustained in view of subsequent supreme court decisions, such as *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950) and *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) (which indicate a continuing trend toward liberality).

<sup>27</sup> Wis. Stat. §262.19 (1) (1959).

The action was based upon the alternative theories of breach of implied warranty arising under Wis. Stat. 121.15<sup>1</sup> and negligence. The case is one of first impression and therefore no Wisconsin cases influenced its result. The trial court upheld the defendant's demurrer, basing its decision upon the "natural to the basic object" test.<sup>2</sup> This principle may be stated as follows: a harmful substance present in food which is natural to it cannot be a legal defect and is therefore not actionable. Since a chicken bone is natural to a chicken sandwich, the trial court decided that defendant's demurrer should be sustained. However the Wisconsin Supreme Court held for the plaintiff on the ground that the proper test should be what is "reasonably expected" by the consumer to be in the food as served.<sup>3</sup> Since a chicken bone is not reasonably expected to be in a chicken sandwich, the trial court's demurrer was reversed and the case sent back for trial. The court ruled that the "natural to the basic object" test was weak in that because a substance is natural to a product in one stage of preparation does not mean that it will be reasonably anticipated by the average consumer in the final product served. *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W. 2d 64, 69 (1960).

The "natural to the basic object" test seems to have originated in *Mix v. Ingersoll Candy Co.*<sup>4</sup> In this case plaintiff was injured by a chicken bone in a chicken potpie. On demurrer the court held the defendant was not liable under an implied warranty or negligence theory because a chicken bone was natural to the chicken potpie and therefore not a foreign substance, and it was common knowledge chicken pies occasionally contain chicken bones, and therefore their presence ought to be anticipated and guarded against by the average consumer. Note that the rule in this case is not based solely on the "naturalness" principle but that the court also considered whether such bones could be anticipated and guarded against, a tenet bearing relation to the "reasonable expectation" test adopted in the principal case. Other cases relied on by the appellee quote the *Mix* case or cite it as controlling.<sup>5</sup> The Illinois Court, in *Goodwin v. Country Club of*

<sup>1</sup> Wis. Stat. 121.15: *Implied Warranties of Quality and Fitness*. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (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 or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

<sup>2</sup> Brief for Appellant, p. 107, *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W. 2d 64 (1960).

<sup>3</sup> *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W. 2d 64, 69 (1960).

<sup>4</sup> 6 Cal. 2d 674, 59 P. 2d 144 (1936).

<sup>5</sup> *Silva v. F. W. Woolworth Co.*, 28 Cal. App. 2d 649, 83 P. 2d 76 (1938); *Lamb v. Hill*, 112 Cal. App. 2d 41, 245 P. 2d 316 (1952).

*Peoria*,<sup>6</sup> stated that those eating the meat of animals, fish or fowl should do so with the knowledge that such food may contain pieces of bone. An analysis of these and other cases,<sup>7</sup> cited in the *Betehia* case, lead one to the conclusion that while the "naturalness" principle is given great weight, the question of anticipation enters into each case and is often used as supporting argument. As pointed out by Dickinson, after discussing the *Mix*,<sup>8</sup> *Silva*<sup>9</sup> and *Brown* cases,<sup>10</sup>

These cases already cited in the preceding section have adopted the consumer expectation approach as a supporting rationale, possibly on the assumption that anything that is natural to the product is in fact anticipated by the consumer.<sup>11</sup>

The appellant argued that though this bone was natural, its presence in the food could not be reasonably anticipated by the consumer and the court adopted this position.<sup>12</sup>

In *Wood v. Waldorf System*,<sup>13</sup> involving a chicken bone in chicken soup, the court presented a concise statement of the "reasonable expectation" test:

In our judgment the question is not whether the substance may have been natural or proper at some time in the early stages of preparation of this kind of soup, but whether the presence of such substance, if it is harmful and makes the food unfit for human consumption, is natural and ordinarily expected to be in the final product which is impliedly represented as fit for human consumption.<sup>14</sup>

The Rhode Island Court placed emphasis on the nature of the food being served, its preparation and its final appearance. In the *Betehia* case the court also stressed the appearance of the article as finally served.<sup>15</sup>

Wisconsin, in adopting the "reasonable expectation" test, has taken the more logical position. Dickerson points out that those cases resting on the principle of "naturalness," "in the sense that nothing that is an inherent part of the raw product itself can be a legal defect," are of

<sup>6</sup> 323 Ill. App. 1, 54 N.E. 2d 612 (1944).

<sup>7</sup> *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366 (1941); *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 53 S.E. 2d 718 (1949); *Shapiro v. Hotel Statler Corp.*, 132 F. Supp. 891, (S.D. Cal. 1955); *Adams v. Great Atlantic and Pacific Tea Co.*, 251 N.C. 565, 112 S.E. 2d 92 (1960).

<sup>8</sup> *Supra* note 4.

<sup>9</sup> *Silva v. F. W. Woolworth Co.*, *supra* note 5.

<sup>10</sup> *Brown v. Nebiker*, *supra* note 7.

<sup>11</sup> DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 186 (1st ed. 1951).

<sup>12</sup> *Supra* note 3, at 67.

<sup>13</sup> 79 R.I. 1, 83 A. 2d 90 (1951).

<sup>14</sup> *Id.* at 93.

<sup>15</sup> "There is a distinction between what a consumer expects to find in a fish stick and a baked or fried fish, or in a chicken sandwich made from sliced white meat and in roast chicken. The test should be what is reasonably expected by the consumer in the food as served, not what he natural to the ingredients of that food prior to preparation." *Supra* note 3, at 68-69.

little value, and prefers the "reasonable expectation" test.<sup>16</sup> The specific facts in each of these cases are of great importance and the "reasonable expectation" test allows the court to give special scrutiny to each particular fact situation. For example, a court, in applying the "reasonable expectation" test, could conclude that a chicken bone in a piece of fried chicken should be expected, but a bone in a sliced chicken sandwich should not be expected. But the court could not reach the same result applying the "natural to the basic object" test because the court is placed in a "straight-jacket" of its own making and would have to reach the same result whether the article involved was fried chicken or a sliced chicken sandwich, chicken bone being natural to either article.

What effect will the "naturalness" theory have on future Wisconsin law? It seems that "naturalness" is now important only in determining whether the consumer may reasonably expect to find a bone in the particular preparation he is eating.<sup>17</sup> Therefore, while some states have adopted the "natural to the basic object" test and used the expectation idea in support of it, Wisconsin has adopted the "reasonable expectation" test and uses the question of naturalness to help determine what is reasonably expected.

The Court said that what is reasonably expected by the consumer is a jury question in most cases.<sup>18</sup> Of the nine cases cited in the principal case as adopting the "natural to the basic object" test,<sup>19</sup> only one of these was decided by a jury and the appellate court overruled this finding.<sup>20</sup> But of the eight cases<sup>21</sup> putting forth the "reasonable expectation" idea five of these<sup>22</sup> were decided by juries when first tried.

<sup>16</sup> *Supra* note 11, at 185.

<sup>17</sup> *Supra* note 3, at 328, 103 N.W. 2d 64, 67.

<sup>18</sup> *Id.* at 69.

<sup>19</sup> *Mix v. Ignersoll Candy Co.*, 6 Cal. 2d 674, 59 P. 2d 144 (1936); *Silva v. F. W. Woolworth Co.*, 28 Cal. App. 2d 649, 83 P. 2d 76 (1938); *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366 (1941); *Goodwin v. Country Club of Peoria*, 323 Ill. App. 1, 54 N.E. 2d 612 (1944); *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 53 S.E. 2d 718 (1949); *Lamb v. Hill*, 112 Cal. App. 2d 41, 245 P. 2d 316 (1952); *Davison-Paxon Co. v. Archer*, 91 Ga. App. 131, 85 S.E. 2d 182 (1954); *Shapiro v. Hotel Statler Corp.*, 132 F. Supp. 891, (S.D. Cal. 1955); *Adams v. Great Atlantic and Pacific Tea Co.*, 251 N.C. 565, 112 S.E. 2d 92 (1960).

<sup>20</sup> *Davison-Paxon Co. v. Archer*, 91 Ga. App. 131, 85 S.E. 2d 182 (1954).

<sup>21</sup> *Roseberry v. Wachter*, 33 Del. 253, 138 Atl. 273 (1925); *Gimenez v. Great Atlantic and Pacific Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934); *O'Hare v. Peterson*, 174 Misc. 481, 21 N.Y.S. 2d 487 (1940); *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A. 2d 913 (1942); *Paolinelli v. Dainty Foods Mfg., Inc.*, 322 Ill. App. 586, 54 N.E. 2d 759 (1944); *Lore v. De Simone Bros.*, 12 Misc. 2d 174, 172 N.Y.S. 2d 829 (1958); *Bryer v. Rath Packing Co.*, 221 Md. 105, 156 A. 2d 442 (1959); *Wood v. Waldorf System*, 79 R.I. 1, 83 A. 2d 90 (1951).

<sup>22</sup> *Roseberry v. Wachter*, *supra* note 21; *Bonenberger v. Pittsburgh Mercantile Co.*, *supra* note 21; *Paolonelli v. Dainty Foods Mfg. Inc.*, *supra* note 21; *Bryer v. Rath Packing Co.*, *supra* note 21; *Wood v. Waldorf System*, *supra* note 21.

Since what is to be reasonably expected by a consumer seems more a question of fact than of law, the approach of the Wisconsin Court seems sound.

Of the cases cited in favor of the "natural to the basic object" test<sup>23</sup> all of which deny liability, applying the "reasonable expectation" test all would reach the same result, with one exception.<sup>24</sup> In that case, involving a turkey bone imbedded in the dressing of a special plate of roast turkey, perhaps a jury might find that one would not reasonably expect a turkey bone in turkey dressing. But it seems the other cases would reach the same result, even applying the "reasonable expectation" test, because they involve such preparations as a chicken bone in a chicken potpie,<sup>25</sup> a particle of bone in a barbecued pork sandwich,<sup>26</sup> a turkey bone in creamed turkey,<sup>27</sup> and other similar fact situations. Of the eight "reasonable expectation" cases cited in the principal case,<sup>28</sup> at least five might have reached a different result by applying the "naturalness" principle because the cases involved situations where the harmful object was natural to the product served to the consumer.<sup>29</sup>

The court did not stress the negligence aspect of the *Betehia* case. It seems it felt that both theories of action, implied warranty and negligence, were controlled by the same principles of law. While not an insurer, the court said the restaurant owner has the duty of ordinary care to remove harmful bones which the consumer would not ordinarily anticipate.<sup>30</sup> It appears that the principal case would have reached the same result if tried under the proposed Uniform Commercial Code. Under the U.C.C., 2-715(2)(b), consequential damages may be awarded for injury to person or property proximately resulting from any breach of warranty. The comment to this section explains that where the goods are used without such an inspection as would have discovered the defect, the question of "proximate" cause turns on whether it was reasonable for a buyer to use the goods without such inspection. Relating this to the principal case, if it was reasonable for a consumer to eat a particular preparation without expecting to find any bones in it, the bones were the "proximate" cause of the injury and thus recoverable as consequential damages under the Uniform Commercial Code. The *Betehia* case involved an-

<sup>23</sup> Cases cited *supra* note 19.

<sup>24</sup> *Silva v. F. W. Woolworth*, *supra* note 5.

<sup>25</sup> *Mix v. Ingersoll Candy Co.*, *supra* note 19.

<sup>26</sup> *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, *supra* note 19.

<sup>27</sup> *Goodwin v. Country Club of Peoria*, *supra* note 19.

<sup>28</sup> Cases cited *supra* note 21.

<sup>29</sup> *Mix v. Ingersoll Candy Co.*, *supra* note 19; *Silva v. F. W. Woolworth Co.*, *supra* note 19; *Brown v. Nebiker*, *supra* note 19; *Lamb v. Hill*, *supra* note 19; *Davison-Paxon Co. v. Archer*, *supra* note 19.

<sup>30</sup> *Supra* note 3, at 69.

other aspect of the proposed Uniform Commercial Code, namely whether the transaction between the plaintiff and defendant was a service or a sale, to which an implied warranty could attach. Both the proposed Uniform Commercial Code and the Wisconsin Court,<sup>31</sup> in the principal case state that such transaction is a sale.

A factor not mentioned in the principal case but which has been considered in warranty decisions is the matter of public policy, which requires that a person serving food to the public be held to a high standard of care because of the great harm that can be caused if such standards are not imposed. This thought seems to be an underlying principle with reference to consumer protection in the service of food.

WILLIAM E. McCARTY

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<sup>31</sup> *Supra* note 3, at 66.