Marquette Law Review

Volume 9
Issue 3 *April 1925*

Article 7

1925

Sales: Manufacturers and Dealers impliedly warrant food products free from poison: Flour Manufacturers. liability fort death of customer of retailer from poison in flour

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Appellant might contend that the Supreme Court of Wisconsin holds contra but a careful analysis of the cases shows that this is a mistake. The Wisconsin court says: "Where special assessments for public improvements are involved, the remedy by appeal is not exclusive." It may be well to note, however, in passing, that this rule as announced by the Wisconsin court has been reluctantly followed in obedience to the doctrine of *stare decisis*. Certainly it is not necessary to involve the doctrine of estoppel for when the appellant failed to raise his objection, he waived all collateral rights thereto."[3]

The legality of the assessment cannot now be impeached on the grounds that the benefits are not immediately reflected in the present market value of the premises. The lots abutted on the street, as the facts clearly show. Consequently, the "owner cannot logically contend that there has not been any material benefits through this improvement."[4]

The nation has many cities in which this form of development is constantly going on. Through this method property is transformed from its native state and made more desirable for the erection of homes and factories. Our large cities of today are testimony of the beneficial changes that have been going on. True, the nature of the improvements renders it impossible to exact the precise value that has thereby resulted, yet such uncertainty gives no cause for valid objections. Some property, by its natural state, is necessarily assesed at a figure that is more than its actual value, yet a conclusion that the assessment is therefore void does not follow. "Property that was worthless before may, by such improvement, become greatly enhanced."[5]

We therefore conclude that the property was materially benefited; that it was thereby subjected to an assessment and that as the owner had been given the right to statutory objections, he was given due process. His failure estops him from being heard in the matter and prevents him from legally saying that he had been denied fundamental rights under the "laws of the land."[6]

ALFRED E. LA FRANCE.

Sales: Manufacturers and Dealers impliedly warrant food products free from poison: Flour Manufacturers liability for death of customer of retailer from poison in flour. The plaintiff in the case of *Hertzler v. Manshum, et al,* (Mich. 1924), 200 N. W. 155, sued for damages for the death of her husband which was brought about by arsenic poison contained in flour which was used for bread of which the deceased partook. The flour was manufactured by one of the defendants and sold to plaintiff by the other defendant, who was a grocer. The court held that the presence of poison in the flour was *prima facie* evidence of negligence and that the manufacturer was liable to the ultimate consumer for breach of implied warranty for food stuffs

[3] *Kersten v. City of Milwaukee,* 109 Wis. 200; 81 N. W. 948.
[4] *Camp v. City of Davenport,* 151 Ia. 38; 130 N. W. 137.
[5] *In re Paving Floyd Park,* 196 N. W. 507.
[6] *School District Board of Education v. Blodgett,* 155 Ill. 441; 40 N. E. 1025.

purchased from a retailer, the implied warranty of the manufacturer being that the food is fit and wholesome.

The subject of the liability of the manufacturer of food products to the ultimate consumer for suffering and injuries caused by foreign or poisonous substances contained therein, will be divided into the following two distinct classes in order that it can more easily be discussed. (1) Where the liability of the manufacturer arises out of an express contract relation between the manufacturer and the consumer, and (2) where there exists no privity between the manufacturer and the consumer or no express contract relationship.

The former class will be given very little consideration because the law is well established and there exists little or no variance of judicial opinions on this phase of the subject. In considering this class it will suffice to say that where there exists an express valid contract between a manufacturer and a second party with no intervening parties, a breach of such contract is actionable under the law of contracts. There is also a theory of recovery based on negligence.[1]

In the latter class there are two recognized theories of recovery for injuries and suffering caused by foreign or poisonous substances contained in food: viz, (1) on implied warranty, and, (2) negligence in the performance of a public duty.

In considering the theory of implied warranty, the presumption is that the particular thing sold to the ultimate consumer is fit for the purpose for which it was sold and that a manufacturer of foodstuff is liable to the consumer purchasing from a retailer for the breach of the implied warranty not withstanding want of privity.[2] The consumer may bring an action in contract.[3] The liability of vendors of unwholesome food has been treated subject to the rule applicable to the case of a thing not intrinsically dangerous.[4] But if there is negligence shown, coupled with an implied warranty, there is a liability charged upon the manufacturer for injuries caused by bad or unwholesome food, provided, however, that the manufacturer knew that the condition of the food was dangerous or that he could have known by proper care.[5] If there is full opportunity for inspection by the purchaser who does not disclose his specific purpose to the retailer, there is no implied warranty of fitness.[6] This rule is relied upon by some authorities, but the better rule seems to be that there is an implied warranty where goods are sold for consumption, because the manufacturer and vendor are bound to

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[1] *Baltimore City Pass. R. Co v. Kemp,* Tort 36 Cyc. 426.

[2] *Van Brocklin v. Fonda,* 12 John 468 (N. Y.).

[3] *Hertzler v. Manshum et al.* 200 N. W. 155 (Mich.) Oct. 1924. In which it was held that a manufacturer of flour was liable for damages sustained by consumer who had purchased from a retailer.

[4] *Salmon v. Libby,* 114 Ill. App. 258. Plaintiff came to death by eating mince meat manufactured by defendant. There was no contract relation between the plaintiff and the defendant; this was held not a good cause of action because the mince meat was not in itself imminently dangerous.

[5] *Craft v. Parker,* 96 Mich. 245, 248; 55 N. W. 812; 21 L. R. A. 139.

[6] *Hight v. Bacon,* 126 Mass. 510.

see to it that the goods are sound and wholesome. Such implied warranty arises as soon as a sale is made, whether the vendor knows that the article is intended for immediate use or not.[7]

There is an implied warranty in every such sale that the thing sold is fit for the purpose for which it is sold and if it is unfit for such purpose the vendor is liable in damages on implied warranty.[8] Where the defendant sold hay to the plaintiff on which white lead had been spilled and this hay was fed to the plaintiff's cow which died, the plaintiff was awarded a verdict on the theory of breach of implied warranty.[9] A manufacturer is directly liable to the consumer, on the doctrine of implied warranty, for injuries caused by the unwholesomeness of food, although food was purchased from an intermediate dealer or middleman.[10] This rule has been extended to one who did not purchase the food but merely partook of it.[11]

The majority of the cases rely on the theory of negligence in the performance of a public duty, because they do not recognize the theory of implied warranty.

Negligence is a breach of legal duty to use due care; and there are four distinct things that must be shown: (1) A legal duty to use due care; (2) a negligent failure to discharge this duty; (3) damage to plaintiff; (4) damage caused in a legal sense by defendant's breach of duty.

The general rule is that a manufacturer or a packer is not liable for injuries or damages caused by any defect in the packing or manufacture of commodities placed on the market by him and sold by a retailer,[12] to

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[7] *Hoover v. Peter,* 18 Mich. 51.

[8] *Sinclair v. Hathaway,* 57 Mich. 60; Hoover v. Peter 18 Mich. 51.

[9] *French v. Vining,* 102 Mass. 132; 3 Am. Rep. 404.

[10] *Salmon v. Libby,* 219 Ill. 421; 76 N. E. 573.

[11] *Ketterer v. Armour,* 247 Fed. 921; L. R. A. 1918D 798.

[12] *Liggett & Meyers Tobacco Co. v. Cannon,* 178 S. W. 1009, in which it was held that tobacco put up in plugs for chewing purposes is not to be considered as food stuff, and therefore does not come under the exception to the rule that the manufacturer is liable for any injuries caused by any unwholesome matter contained therein.

The plaintiff, Cannon, in this case, took a bite of plug of Star-Navy chewing tobacco which had been manufactured by the defendant company, and in the course of a few minutes his mouth became sore and swollen. He took the partly masticated quid from his mouth and found that it contained a large black bug. His suffering and affliction grew so intense that it necessitated the calling of a physician to obviate the pain.

The plaintiff was not awarded the verdict because he had failed to show any negligence in the preparation of the tobacco. Chewing tobacco is not an exception to the rule and therefore the manufacturer is not liable.

Hasbroch v. Armour & Co. and others, 139 Wis. 357. In this case the plaintiff became afflicted with paralysis caused by a scratch on the palm of his hand due to a needle embedded in a bar of soap which had been manufactured by the defendant. Soap is not an exception to the rule. Verdict for defendant because the plaintiff failed to show any negligence in the manufacture of the soap.

one with whom he is not connected by a contract relationship, but foods, beverages, drugs, or any article for internal consumption are exceptions to this rule.[13]

There need be no privity shown between the parties where one is injured by the consuming of unwholesome food,[14] because the manufacturer or producer is bound to know that the food is wholesome and not injurious to the stomach of a human being. This liability does not rest upon implied contract but on the breach of a public duty.[15] It is the duty of the manufacturer to use the highest degree of care; he is bound to know that the contents of the container, is fit and wholesome. This rule is not restricted to the dealer in direct contract relation with him but is extended to the general public or one not directly a purchaser from the manufacturer.[16] Some authorities maintain that this doctrine can only be applied to those who are the immediate purchasers, but there are cases which hold that this doctrine applies to any person who may partake of unwholesome food, drugs or beverages intended for human consumption.[17]

Where there is government inspection of meat, this does not relieve

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[13] *Boyd v. Coca-Cola Bottling Works,* 177 S. W. 80. In this case the plaintiff became sick from the swallowing of a cigar butt which had been contained in a bottle of Coca-Cola. The court held that it was not necessary to show any negligence in the manufacturer or bottling, nor any privity of contract, because the defendant is liable for the breach of the public duty which duty is to allow no unwholesomeness in sealed articles of food.

[14] *Van Brocklin v. Fonda,* 12 John (N. Y.) 468; 7 Am. Dec. 339.

[15] *Bischopp v. Weber,* 130 Mass. 411, 417, 1 N. E. 154; 52 Am. Rep. 715.

[16] *Watson v. Augusta Brewing Co.,* 124 Ga. 121, 123; 52 S. E. 152; 110 Am. Rep. 157; 1 L. R. A. (N. S.) 1178.

[17] *Crigger v. Coca-Cola Bottling Co.,* (Tenn.) 179 S. W. 155. Held "one who prepares and puts on the market, in bottles or sealed packages food, drugs, beverages, medicines, or articles inherently dangerous, owes a high duty to the public in the care and preparation of such commodities and will be liable without regard to privity of contract, to anyone injured as a result of his failure properly to safeguard and perform that duty."

Thomas v. Winchester, 6 N. Y. 397; 59 Am. Dec. 455; in this case it was held that a druggist was liable to one not the immediate purchaser for injuries caused by the druggist giving out a jar of belladonna, a deadly poison, in place of extract of dandelion. The grounds of recovery was based on a breach of public duty. This case is cited in the following: 139 Wis. 365; 88 Wis. 309; 92 Wis. 645; 90 Wis. 947. *Jackson Coca-Cola Bottling Co. v. Chapman,* 64 So. 791. This case is so colorable and so well in point that the writer will copy it *verbatim.*

"A 'sea' mousie' caused the trouble in this case. The 'wee, sleekit, cow'-rin', tim'rous beastie' drowned in a bottle of Coca-Cola. No negligence in the cleaning of the bottle was shown. Nevertheless, the little creature was in the bottle. It had been there long enough to be swollen and was undergoing decomposition when the bottle was purchased from a grocer and opened by appellant. Its presence was not discovered until several swallows had been taken. The odor led to the discovery. Appellee got sick. Suffice to say he did not get joy from

the packer of the common law duty to the public that the meat is fit and wholesome and the liability is not shifted to the government.[18]

M. T. L.

Master and Servant: Family purpose doctrine in connection with family automobile.—In the recent case of *Payne v. Leininger* (Minn. 1924) N. W. 435 the defendant owned a family automobile. His son was of age but a member of the household and, with the father's permission, took the car for a trip to South Dakota with a young woman with whom he was keeping company and her mother. The automobile overturned and the young woman was killed and her mother severely injured. There was testimony that the purpose of the son and young woman in going to South Dakota was to be married there. Plaintiff requested the trial court to charge that if such were the facts the automobile was in use for a "family purpose." The trial court left the question to the jury and there was a verdict for defendant. On appeal, the Supreme Court held that the trial court did not err in refusing plaintiff's instruction.

In this class of cases there are two possible theories on which to hold the owner liable. First, that of master and servant, and second, negligence of the owner in intrusting his automobile to an incompetent person.

In order to hold the owner liable upon the latter theory, aside from the master and servant relation, it is essential that he might reasonably have anticipated the injury as a consequence of permitting the incompetent person to employ the instrument which produced the injury and further that the owner's negligence made the injury possible.[1] Thus, if a father places his car in charge of a child of tender years he is liable for the resulting injuries. This rule is not based upon the theory of imputed negligence but upon his own negligence in intrusting his automobile to the child.[2]

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the anticipated refreshing drink. He was in the frame of mind to approve the poet's words:

"The best laid schemes o' mice an' men
Gang oft aglay
An' lea'e us nought but grief an' pain,
For promis'd joy!"

Held, when a manufacturer makes, bottles and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious." In this case it was further held that the bottler owes this duty to the general public for whom his drinks are intended as well as to the retailer to whom he sells.

[18] *Catani v. Swift Co.,* 521 Pa. 52; 95 Atl. 391. (1915). The defendant sold pork which contained trichinæ of which the plaintiff ate and became sick. *Held,* that although the government inspector had passed on this meat the packer still owed the duty to the public to sell only wholesome and fit meat.

[1] *Allen v. Bland,* Tex. Civ. App. (1914) 168 S. W. 35.

[2] *Ferris v. Sterling,* 214 N. Y. 249, 108 N. E. 406.