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Implied Warranty of Fitness and Privity of Contract

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IMPLIED WARRANTY OF FITNESS AND PRIVITY OF CONTRACT

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In a recent case[1] a two year old infant, accompanied by his mother and her gentleman friend, was driven to the outside food-service station at defendant's restaurant. An employee of defendant took the food order, including a dish of ice cream for the infant. The food was paid for by the man, who was unrelated to the child. While the infant was eating his ice cream, a piece of metal became lodged in his throat, rendering him ill for several days, and necessitating medical attention.

In a suit instituted on behalf of the infant, the defendant made a motion to dismiss at the close of the plaintiff's case and again at the close of all the evidence.

The motions were based upon the authority of a line of New York cases, which require "Privity of Contract" for a recovery on the theory of breach of warranty. Defendant argued that a number of leading cases, including *Chysky v. Drake Bros. Co.*,[2] were authority for the proposition that since the infant was not a party to the contract between the gentleman who purchased the food and the defendant, recovery on the theory of breach of warranty must be denied. Decision was reserved upon these motions and, after a verdict for the plaintiff, the Court ruled that all motions directed to the complaint and to the verdict be denied.

It is a well established rule in New York State that an action for damages caused by the breach of an implied warranty of fitness with regard to food may be maintained by him to whom the warranty is made, i.e., the purchaser.[3] This rule was applied and somewhat expanded in *Ryan v. Progressive Grocery Stores*[4] wherein it was held that a person injured as a result of the consumption of unwholesome food purchased by the injured party's agent stands in privity to the contract of sale and therefore can recover for a breach of warranty.

Recently, in *Bowman v. Great Atlantic and Pacific Tea Company*,[5] the Appellate Court of New York had occasion to re-examine the rule, particularly on the question of what constitutes the privity

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1 Walker v. Hot Shoppes of New York, Inc., 21 Misc. 2d 103, 200 N.Y.S.2d 742 (Albany County Ct. 1960).

2 235 N.Y. 468, 139 N.E. 576 (1923).

3 Rinaldi v. Mohican Co., 225 N.Y. 70, 121 N.E. 471 (1918); N.Y. Pers. Prop. Law § 96(1).

4 255 N.Y. 388, 175 N.E. 105 (1931).

5 284 App. Div. 663, 133 N.Y.S.2d 904 (4th Dep't 1954), aff'd without opinion, 308 N.Y. 780, 125 N.E.2d 165 (1955).

that will permit an injured person who did not purchase the unwholesome food to recover damages caused by a breach of the implied warranty of fitness. The *Bowman* case reaffirmed the agency theory enunciated in *Ryan* and held that the plaintiff, who resided with and jointly kept house with her sister who purchased the food as plaintiff's agent at joint expense and for joint consumption, was a party to the contract of purchase made by the sister and could maintain an action for breach of implied warranty for damages sustained after eating unwholesome salad dressing.

There have been many persuasive pleas made in recent years, urging the expansion of the privity rule in New York State.[6] The fact remains, however, that in many instances the Appellate Courts have refused to expand the strict requirements of the rule as heretofore stated.[7]

The line of cases which we are discussing, i.e., where a plaintiff seeks recovery on the theory of breach of warranty for having sustained damage as a result of eating unwholesome food purchased in a food market for consumption off the premises, must be distinguished from cases wherein the food was purchased for on-the-premises consumption. In a cogently reasoned decision, it has been held in New York State that where two friends in a public eating house order food for consumption on the premises, the mere fact that one pays the total luncheon check does not deter the non-paying patron from asserting a cause of action for breach of warranty.[8] The defense that the warranty ran only to plaintiff's friend who paid the check was held untenable. The case points out that a contract was made when the restaurant accepted the order and the implied warranty arose at once, running to both patrons. Any arrangements between them as to who would pay and who, if anyone, would reimburse were of no concern to the restaurant. The Court clearly delineated between the purchase of food in a store and that in a restaurant, in the former case, food being ordinarily paid for when purchased, while in the latter, the food is purchased when it is accepted and since the patron impliedly obligates himself to pay when the order is taken by the waiter, at that time the warranty commences.

The subject case is somewhere between the ordinary food market food purchase and restaurant food purchase, the distinguishing factor

[6] George Stark, Justice of the Municipal Court of the City of New York, Implied Warranty of Quality and Wholesomeness In the Sale of Food, 137 N.Y.L.J. No. 67 (April 8, 9, 10, 1957).

[7] Greenberg v. Lorenz, 14 Misc. 2d 279, 178 N.Y.S.2d 404 (New York City Ct. 1957), rev'd, 7 App. Div. 2d 968, 183 N.Y.S.2d 991 (1st Dep't 1957).

[8] Conklin v. Hotel Waldorf Astoria Corp., 5 Misc. 2d 496, 161 N.Y.S.2d 205 (New York City Ct. 1957).

being that the plaintiff asserting the warranty was an infant under 2 years. The Court trenchantly observed that it would be folly to have a cause of action depend on whether the child placed the order himself or someone placed the order in his behalf, but in his presence. That great importance attached to the presence of the child can be seen in the following language:

> "It strikes me as being absurd to make it a prerequisite here that a child of less than two years should have actually contracted with the restaurant. The situation can be distinguished from other cases in which the ultimate consumer was not present when the food in question was purchased. Let us assume that the gentleman here had given the child twenty cents and suggested, by way of a joke or to help the child gain self-confidence, that the child himself should order the ice cream and pay the waitress. I presume that, if the child had complied, no one would argue against the present contentions of this Plaintiff. To make a legal distinction between that hypothetical situation and what actually transpired strikes me as nothing less than ridiculous."

While at first blush the rule of "privity" in New York State would seem to be eroding, there has not been a clear decision by the Court of Appeals on the point. There is a tendency by the lower court judges to liberalize the privity requirements as much as possible, a tendency not reflected in the decisions of the appellate courts. It would seem desirable that the strict rule of privity be somewhat liberalized. Perhaps, at least in food cases, the courts could work out a family food doctrine similar to the family car doctrine. This would extend to any member of the household or any guest at the table the warranty which presently runs only to the purchaser of the food purchased for off-the-premises consumption. It seems that this could be justified on the theory of a third party contract since the food dealer could or should have known the purchaser was buying food for himself or possibly other members of his household or friends. More simply—why not expand the "privity" requirement so that the warranty should run to anyone that could reasonably be contemplated to be within the contract of purchase? In effect this is what Judge Schenck says in the principal case when he points out that presence of the beneficiary at the time of making the contract is in and of itself sufficient to meet the "privity" requirements. Other cases have used other legal fictions permissible under the facts, fictions perfectly justifiable to effect a liberalization of a rule which has spawned many inconsistent and unjust results.