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# Sales--Implied Warranty--Restaurant Food

James D. Kendis

fund. Unless this is done, the court will certainly subtract the estate taxes before computing any statutory shares.[17]

It would seem that the *Roth* case represents the better view There appears to be no good reason why a residuary clause similar to that in *Roth* must be invalidated simply because the widow elects to take her statutory share. Giving effect to the testator's intention as expressed in such a clause is neither unfair to the other beneficiaries nor contrary to public policy.

WILLIAM A. HANCOCK

## SALES — IMPLIED WARRANTY — RESTAURANT FOOD

*Webster v Blue Ship Tea Room, Inc.*,
198 N.E.2d 309 (Mass. 1964)

A warranty action as it exists today is a curious hybrid of tort and contract law[1] At its inception, liability in such cases was based on tort and the action was trespass on the case.[2] Warranty subsequently came to be regarded as a term of the contract of sale; the remedy for breach was a cause of action sounding in contract.[3] The first warranty cases involving sales required express representations as to the character or quality of the goods, but during the nineteenth century a trend began which gave rise to the present day implied warranties.[4] Implied warranties became crystallized in the Uniform Sales Act[5] and are presently found in the Uniform Commercial Code.[6]

In *Webster v Blue Ship Tea Room, Inc.*,[7] the Supreme Judicial Court of Massachusetts was faced with the task of interpreting provisions of the Uniform Commercial Code in a case involving sale of food by a restaurant. There, plaintiff, a resident of New England, went into defendant's restaurant for lunch and ordered a bowl of fish chowder. After taking several swallows of chowder, plaintiff discovered that something had lodged in her throat. Two days later a fish bone was located and removed, but only after it had caused injury to plaintiff's throat.[8] The plaintiff brought suit and was awarded the verdict from the auditor and trial court, whereupon the defendant appealed to the Supreme Judicial Court of Massachusetts. There, the court reversed the trial court and held that there was no breach of implied warranty of fitness for merchantability

17. The phrase "or otherwise" is critical. This indicates that the decedent recognized the possibility of his wife's renunciation of the will and that in such event he desired item VIII to be effective. It would also be advisable to include an express provision stating how the taxes should be paid in the event of the widow s renunciation of the will. A future court may not give the phrase "or otherwise" the same broad meaning as did Judge Wasserman in the *Roth* case.

In order to properly analyze this decision, it is necessary to examine the background of the questions involved. At common law three considerations existed when implied warranty actions were brought against restaurants: (1) whether food was a part of the service given to a lodger; (2) whether substances found in food were natural to it; and (3) whether tort defenses applied to warranty actions. As to the first consideration, early courts held that since the lodger paid for food and lodging in one lump sum, he was only buying a service and no implied warranty existed if the food was unfit or adulterated.[9] Today, however, a majority of jurisdictions hold that sale of food is subject to an implied warranty of fitness.[10] The Uniform Commercial Code specifically

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1. Court decisions in states which have adopted the UNIFORM COMMERCIAL CODE should be of particular interest to the other twenty-seven jurisdictions. This is especially true as to implied warranties, since many of the UNIFORM COMMERCIAL CODE provisions are new.

2. PROSSER, TORTS § 95, at 651 (3d ed. 1964); see Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

3. PROSSER, *op. cit. supra* note 2, at 651. See generally Wilson, *Products Liability*, 43 CALIF. L. REV. 614 (1955).

4. "Early in the nineteenth century the slow growth of a business practice by which reputable sellers stood behind their goods, and a changing social viewpoint toward the seller's responsibility, led to the development of "implied" warranties of quality, which were attached by the law to certain types of sales, and which in effect made the seller an insurer of his goods." PROSSER, *op. cit. supra* note 2, at 653 (citations omitted). See generally Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

5. A simple explanation of these provisions is found in PROSSER, *op. cit. supra* note 2, at 653.
> [The Uniform Sales Act reduces the implied warranties of quality] to two: a warranty that the goods are fit for the particular purpose of the buyer, when that purpose is made known to the seller, and the latter knows that the buyer is relying upon his skill or judgment to select and furnish suitable goods; and a warranty that the goods are of merchantable quality, when they are bought from one who deals in goods of that description.

6. The warranty provisions are found in §§ 2-312, 318 of the UNIFORM COMMERCIAL CODE [hereinafter cited as UCC]. Citations are to the 1962 official text published by the American Institute and the National Conference of Commissioners on Uniform State Laws. The following sections are pertinent to this discussion: (1) Section 2-314(1) provides that "unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale", (2) Section 2-314(2)(c) states that "goods to be merchantable must be at least such as (c) are fit for the ordinary purposes for which such goods are used"; (3) Section 2-316(3)(c) provides that "notwithstanding subsection (2) (c) an implied warranty can also be excluded or modified by course of dealings or course of performance or usage of trade."

7. 198 N.E.2d 309 (Mass. 1964).

8. *Id.* at 309-10.

9. See, *e.g.*, Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533 (1914); Nisky v. Childs Co., 103 N.J.L. 464, 135 Atl. 805 (Ct. Err. & App. 1927). *Cf.* Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960). Some courts have called this the Connecticut-New Jersey rule. It appears, however, that today neither state may be following this theory. See PROSSER, *op. cit. supra* note 2, at 655 n.18.

10. The majority rule is called the Massachusetts-New York rule. *E.g.*, Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918); Sartin v. Blackwell, 200 Miss. 579, 28 So. 2d 222 (1946); Betehia v. Cape Cod Corp., *supra* note 9. See also PROSSER, *op. cit. supra* note 2, at 655.

provides that food and drink served on the premises shall be subject to an implied warranty of merchantability.[11]

The second consideration as to foreign substances found in food concerns the test of what constitutes reasonable fitness.[12] The case law has developed two tests. Under the "naturalness" test, it is held that any substance natural to the food in which it is found cannot be a legal defect and does not give rise to a breach of warranty of reasonable fitness.[13] In order to overcome the harsh results of the naturalness test, some courts devised the "reasonable expectation" test.[14] Under this rule the courts look at what is reasonably expected to be found in the food and not what might be natural to the ingredients.[15] This test usually involves a jury question, for the courts refuse to hold as a matter of law that a patron must reasonably expect a bone or other natural substance in his food just because of its presence in the unprepared food. However, a few jurisdictions, including Ohio, have reversed jury verdicts for plaintiffs on the ground that the trial court should have found as a matter of law that the substance was natural to the product.[16] Both the naturalness test and the reasonable expectation test are still valid, and appear to be applicable to the ordinary purposes test under the Uniform Commercial Code.[17]

The third consideration under the common law is whether tort defenses of contributory negligence and assumption of risk apply to implied warranty cases. Some authorities state the better view to be that such defenses are not available in the contract-warranty area.[18] On the other hand, some courts permit these defenses if the plaintiff discovers the defect but proceeds to use the product, resulting in injury.[19] The Uniform

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11. See UCC § 2-314.

12. See UNIFORM SALES ACT § 15(2). In § 2-314(2)(c) the UCC uses "fit for ordinary purposes" instead of "reasonably fit."

13. See, *e.g.*, Silva v. F. W Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (Dist. Ct. App. 1938); Goodwin v. Country Club, 323 Ill. App. 1, 54 N.E.2d 612 (1944) See generally Note, *Implied Warranty and the Sale of Restaurant Food*, 63 W VA. L. REV. 326 (1961).

14. See Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960)

15. See, *e.g.*, Wood v. Waldorf System, Inc., 79 R.I. 1, 83 A.2d 90 (1951); Betehia v. Cape Cod Corp., *supra* note 14.

16. See Berns, *Sales, Survey of Ohio Law – 1960*, 12 W RES. L. REV. 550, 552 (1961)

17 While the UNIFORM SALES ACT does not define merchantability, the case law decided under the act defines it in the same way as the UCC. From this one could argue that with the same language being used, these tests could be used under the UCC. See, *e.g.*, Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); McCabe v. Liggett Drug Co., 330 Mass. 177, 112 N.E.2d 254 (1953); DeGraff v. Myers Foods, Inc., 8 Bucks Co. L. Rep. 364, 19 Pa. D. & C. 2d 19 (C.P. 1958) See generally 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, § 19.03[2], at 504-06 (1961).

18. See 1 FRUMER & FRIEDMAN, *op. cit. supra* note 17, § 16.01[3], at 367-68; MORRIS, TORTS 283 (1953)

19. See PROSSER, *op. cit. supra* note 2, at 356-57

Commercial Code deals with the problem by means of special provisions which may bar recovery to a buyer who uses a product after he knows of a defect.[20]

In the *Webster* case, the court viewed the problem as one of applying the Uniform Commercial Code in light of the above common law tests. In this respect, the court looked to three important facts which it held to be of particular significance: (1) the plaintiff was born and raised in New England;[21] (2) fish chowder recipes do not mention the removal of bones;[22] and (3) a person sitting down in New England to eat fish chowder embarks on an adventure which may entail the removal of some fish bones.[23] On the basis of these three points, the court held that bones in chowders should be anticipated in light of the traditional recipes, and consequently do not impair its fitness for merchantability.[24]

The court in *Webster* cited two cases[25] as authority, neither of which were soup cases[26] nor decided under the Uniform Commercial Code. Both cases were cited in support of the view that restaurants are not liable for natural substances left in the food after preparation. However, it is interesting to note that although the same result was reached in both of these cases, each seemed to use a different test; the reasonable expectation test was applied in one case,[27] while the other was decided on the naturalness test.[28] It would appear that the *Webster* case adopted the reasonable expectation approach, although the court makes no specific mention of the existence of either test.[29]

Since the *Webster* case was decided in a state which has adopted the Uniform Commercial Code, it is significant to note the consequences which flow from the adoption of the reasonable expectation test. A careful examination of this test shows that it allows the defense of assumption of risk to be brought into warranty cases in a disguised form. For example, in *Webster* the case was decided on whether the plaintiff should

20. UCC § 2-316, comment 8. The code makes allowance for buyers who discover the defect but use the goods anyway by providing that the defective product may not be the proximate cause of the injury.

21. Webster v. Blue Ship Tea Room, Inc., 198 N.E.2d 309 (Mass. 1964).

22. *Id.* at 311-12.

23. *Id.* at 312.

24. *Ibid.*

25. Shapiro v. Hotel Statler Corp., 132 F. Supp. 891 (S.D. Cal. 1955) ( fishbone in fish); Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960) (oyster shell in oysters).

26. For a case involving soup which would allow plaintiff to recover, see Wood v. Waldorf System, Inc., 79 R.I. 1, 83 A.2d 90 (1951). *Wood* was decided under the reasonable expectation test.

27. Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960)

28. Shapiro v. Hotel Statler Corp., 132 F. Supp. 891 (S.D. Cal. 1955). The court's decision mentions the naturalness test and hints at the reasonable expectation test, although the reasoning seems to discuss the naturalness test as the true test.

29. Webster v. Blue Ship Tea Room, Inc., 198 N.E.2d 309, 312 (Mass. 1964)

have reasonably expected to find the undesirable item because of her imputed knowledge of the recipes used in making the soup. Thus, if the court holds as a matter of law or the jury finds as a matter of fact that the plaintiff should have reasonably expected the presence of the foreign substance, but nevertheless proceeded to eat the food causing injury, the plaintiff would be precluded from recovering on an implied warranty But in *Webster* it is uncertain as to whether the court meant to extend the negligence defense of assumption of risk to a warranty case. On the one hand, it could be argued that in adopting the reasonable expectation test the court was actually motivated by the fact that the plaintiff had assumed the risk. This would bring Massachusetts into the class of jurisdictions which have extended negligence defenses to warranty cases. On the other hand, it might be argued that the court merely wanted to apply the reasonable expectation test, but without extending the defense of assumption of risk to a warranty action.

The court could have perhaps avoided this ambiguity by applying section 2-316(3)(c) of the Uniform Commercial Code. This section provides that an implied warranty can be excluded or modified by usage of trade.[30] Section 1-205(2) defines usage of trade as any practice or method in a place which justifies an expectation that it will be observed with respect to the transaction in question. Section 1-205 further provides that "an applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance."[31] The court in *Webster* points out that it is a tradition in New England to serve fish chowder which is not completely boned and that the average New Englander should expect this.[32] On this basis, it could have been argued that the customer accepted this usage as part of the contract for the purchase of food, and by applying these sections of the code the court could have concluded that no implied warranty existed concerning the presence or absence of bones in fish chowder. This approach would have enabled the court to reach the same conclusion and in addition render a decision which is more acceptable under the code.

A burden has been placed on courts in states which have adopted the Uniform Commercial Code to give rulings which conform with the code and which clearly explain how it is to be applied. The *Webster* decision avoided application of the code and used instead the common law "reasonable expectation" test. The problem raised in using this test is that

30. See Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. REV. 281, 305, 318 (1961).

31. UCC § 1-205(5).

32. One can only wonder if the *Webster* court would have ruled in the same way if the plaintiff would have been a resident of another state and unaware of the recipes for fish chowder.

it may be a disguised form of assumption of risk, opening up a further question of the propriety of extending negligence defenses to warranty actions. This problem could have been avoided in the *Webster* case by application of the code provisions excusing warranty of fitness if a certain usage of trade so demands.[33] Thus, the court could have ruled that in New England the usage of trade is that a patron cannot expect a chef to find every possible bone in fish chowder, and that bones in soup do not impair its fitness for consumption.

JAMES D. KENDIS

33. The usage of trade would be between the patrons and the restaurant. Another approach, however, might be that the custom is determined by the restaurant.