



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 39 | Number 1

Article 14

12-1-1960

Food -- Sales -- Implied Warranty of Fitness for Human Consumption

John H. P. Helms

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

John H. Helms, *Food -- Sales -- Implied Warranty of Fitness for Human Consumption*, 39 N.C. L. REV. 86 (1960).

Available at: <http://scholarship.law.unc.edu/nclr/vol39/iss1/14>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

It is not discernible when the court will or will not apply the defective statement-defective cause rules. It is apparent, however, that an alert attorney should amend as early as possible after the sustaining of a demurrer and not rely on relation back.¹⁴ Similarly, should he discover a defect in his complaint, he would be wise to amend and not to rely on waiver.

H. MORRISON JOHNSTON, JR.

Food—Sales—Implied Warranty of Fitness for Human Consumption.

In *Adams v. Great Atl. & Pac. Tea Co.*¹ plaintiff purchaser of a box of corn flakes sued defendant retailer for damages for breach of an implied warranty. While eating the corn flakes plaintiff bit down on an extremely hard object and broke off part of a tooth, the remainder of which was subsequently extracted. Plaintiff alleged that the food, sold in the original sealed container, was unwholesome and unfit for human consumption.² A chemical analysis showed that the object causing the harm was part of a grain of corn that had partially crystalized into a state as hard as quartz. In affirming an involuntary nonsuit, the North Carolina court held as a matter of law that the presence of the harmful object was not a breach of the implied warranty. The court predicated

¹⁴ In the principal case the death occurred February 26, 1956; the defendant's demurrer *ore tenus* was sustained January 31, 1958; and the plaintiff's attorney did not ask leave to amend until March 7, 1958. If he had immediately moved for leave to amend instead of relying upon relation back, he could have averted the situation which defeated the cause of action for wrongful death.

¹ 251 N.C. 565, 112 S.E.2d 92 (1960).

² Where the article is sold for human consumption, the existence of the implied warranty between vendee and his immediate vendor is firmly established in North Carolina. *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951); *Williams v. Elson*, 218 N.C. 157, 10 S.E.2d 668 (1940); *Rabb v. Covington*, 215 N.C. 572, 2 S.E.2d 705 (1939). See generally Note, 32 N.C.L. Rev. 351 (1954).

It is not clear in North Carolina whether the vendee could sue the manufacturer on implied warranty. An initial dictum stated that the manufacturer could be held liable. *Ward v. Morehead City Sea Food Co.*, 171 N.C. 33, 87 S.E. 958 (1916). In *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30 (1935) the court expressly rejected this theory for the reason that there was no contractual relation between the manufacturer and the consumer to which implied warranty could attach. This requirement of privity was followed in subsequent cases. *Enloe v. Charlotte Coca-Cola Bottling Co.*, 208 N.C. 305, 180 S.E. 582 (1935); *Caudle v. F. M. Bohannon Tobacco Co.*, 220 N.C. 105, 16 S.E.2d 680 (1941). The present trend in other jurisdictions is toward eliminating this requirement of privity. See generally Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. Rev. 551 (1941).

Plaintiff may sue the manufacturer for negligence. *Ward v. Morehead City Seafood Co.*, *supra*. The value of the warranty action is that negligence need not be proved, implied warranty being a form of liability without fault. Existence of the warranty does not eliminate the necessity for proof that the product was defective when it left the manufacturer's hands. *Great Atl. & Pac. Tea Co. v. Adams*, 213 Md. 521, 132 A.2d 484 (1957). See generally DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER §§ 2.15, 4.1 (1951); PROSSER, TORTS § 84 (2d ed. 1955).

the decision on its finding that the harmful object was natural to the corn flakes and that a consumer of the product should be expected to anticipate its presence.

This appears to be the first North Carolina decision on whether or not the presence in food of a harmful substance natural to the product is a breach of the implied warranty of fitness for human consumption.³ In similar cases other jurisdictions have differed as to both the test for liability and the result obtained. As background for an analysis of *Adams* some of those decisions from other states will be examined.⁴

In *Mix v. Ingersoll Candy Co.*⁵ plaintiff, while eating a chicken pie in defendant's restaurant, was injured by a fragment of chicken bone. On appeal defendant's demurrer was sustained, the court stating: "It is sufficient if it may be said that as a matter of common knowledge chicken pies occasionally contain chicken bones. . . . Bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones."⁶ The rationale of *Mix* appears to be that food suppliers are not held to a standard of perfection and that consumers ought to anticipate the occasional presence of substances which are natural constituents of the food even though such substances are normally removed during preparation for consumption. This reasoning has been followed in a number of cases⁷ where the factual circumstances have been analogous to *Mix*.

³ "The case is apparently one of first impression in North Carolina." Brief for Appellee, p. 2. Compare *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E.2d 392 (1955), 34 N.C.L. Rev. 394 (1956) (sale of hair rinse); *Droughon v. Maddox*, 237 N.C. 742, 75 S.E.2d 917 (1953), 32 N.C.L. Rev. 351 (1954) (sale of cow at public auction); *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951), 30 N.C.L. Rev. 191 (1952) (alleged poisonous ingredients in salt substitute); *Walker v. Hickory Packing Co.*, 220 N.C. 158, 16 S.E.2d 668 (1941) (spoiled and rancid lard); *Williams v. Elson*, 218 N.C. 157, 10 S.E.2d 668 (1940) (glass in sandwich); *Rabb v. Covington*, 215 N.C. 572, 2 S.E.2d 705 (1939) (metal in encased sausages).

⁴ Both warranty and negligence cases are utilized in this discussion. The purpose of this note is to determine on what basis courts find food to be "unfit for human consumption" due to the presence of some "natural object." A finding of unfitness is essential to either action. On the similarities of the two actions, see *Bryer v. Rath Packing Co.*, 221 Md. 105, 156 A.2d 442 (1959); *Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155 (1924). See generally *DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER* § 1.11 (1951); 2 *HARPER & JAMES, TORTS* § 28.22 (1956); *PROSSER, TORTS* § 84 (2d ed. 1955); 5 *WILLISTON, CONTRACTS* § 1505 (1937); *Prosser, The Assault Upon the Citadel*, 69 *YALE L.J.* 1099 (1960).

⁵ 6 Cal. 2d 674, 59 P.2d 144 (1936).

⁶ *Id.* at 681, 59 P.2d at 148.

⁷ *E.g.*, *Shapiro v. Hotel Statler Corp.*, 132 F. Supp. 891 (S.D. Cal. 1955) (fish bone in "Hot Barquette of Seafood Mornay"); *Lamb v. Hill*, 112 Cal. App. 2d. 41, 245 P.2d 316 (Dist. Ct. App. 1952) (splinter of bone in chicken pie); *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 53 S.E.2d 718 (1949) (bone in barbecued pork sandwich); *Goodwin v. Country Club*, 323 Ill. App. 1, 54 N.E.2d 612 (1944) (turkey bone in creamed chicken); *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366 (1941) (bone fragment in pork chop). In *Silva v. F. W. Woolworth Co.*, 28 Cal. App. 2d 649, 83 P.2d 76 (Dist. Ct. App. 1938) (turkey

Other cases, however, have placed less reliance on the naturalness of the object as a test in itself, but instead have determined liability by looking at the nature of the final product, the circumstances normally surrounding its consumption and the customary habits and common knowledge of mankind.⁸ The test applied in these cases is what the average consumer could reasonably expect to find in his food. Thus in *Betehia v. Cape Cod Corp.*⁹ the court reversed a dismissal of plaintiff's complaint which was based on the presence of a sliver of chicken bone in a chicken sandwich. Discussing *Mix* at length, the opinion stated:

Naturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to find such substance in the particular type of dish or style of food served. . . . The test should be what is reasonably expected by the consumer in the food as served, not what might be natural to the ingredients of that food prior to preparation.¹⁰

Adams appears to follow the rationale of *Mix*.¹¹ Assuming that the substance was natural to the corn flakes, the holding is consistent with other cases following *Mix*.¹² The validity of the court's assumption¹³ of

bone in roast turkey and dressing), the court cited *Mix* as controlling. The opinion stated that the criterion for determining liability was whether the object causing the injury was foreign; this apparently disregards part of the *Mix* rationale, but under the facts the result follows *Mix*.

⁸ *E.g.*, *Bryer v. Rath Packing Co.*, 221 Md. 105, 156 A.2d 442 (1959) (chicken bone in chow mein prepared from "ready to serve boned chicken"); *Lore v. De Simone Bros.*, 172 N.Y.S.2d 829 (Sup. Ct. 1958) (fragment of bone in salami); *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960) (oyster shell in fried oysters); *Wood v. Waldorf Sys., Inc.*, 79 R.I. 1, 83 A.2d 90 (1951) (fragment of bone in chicken soup); *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W.2d 64 (1960) (sliver of bone in chicken sandwich). In *Wieland v. C. A. Swanson & Sons*, 223 F.2d 26 (2d Cir.), *cert. denied*, 350 U.S. 862 (1955), the court held that whole chicken bones are anticipated in packaged chicken cut up for fricassee, and that therefore they could not be the basis for liability; the court indicated that bone slivers in the same product would sustain an action. While *Lore*, *supra*, and *Wood*, *supra*, discuss the issue in terms of the naturalness of the object, they clearly have departed from the *Mix* rationale, as they hold that fragments of bone natural to meat are not natural to the final products involved.

⁹ 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

¹⁰ *Id.* at —, 103 N.W.2d at 67, 69. Compare *Allen v. Grafton*, 170 Ohio St. 249, 258-59, 164 N.E.2d 167, 174 (1960): "However, the fact, that something that is served with food and that will cause harm if eaten is natural to that food and is not a 'foreign substance' will usually be an important factor in determining whether a consumer can reasonably anticipate and guard against it."

¹¹ The opinion cites with apparent approval the *Mix* case and most of the cases which have followed *Mix*.

¹² These cases have uniformly decided the issue of liability as a matter of law. *E.g.*, *Shapiro v. Hotel Statler Corp.*, 132 F. Supp. 891 (S.D. Cal. 1955) (fish bone in seafood); *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 53 S.E.2d 718 (1949) (bone in barbecued pork sandwich); *Goodwin v. Country Club*, 323 Ill. App. 1, 54 N.E.2d 612 (1944) (turkey bone in creamed chicken); *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366 (1941) (bone fragment in pork chop). *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960), expressly rejected the *Mix* doctrine but looking at all the circumstances decided as a matter of law that a piece of oyster shell in fried oysters is to be anticipated.

¹³ The opinion at the outset stated that "Plaintiff's case is based upon the pres-

naturalness is, however, open to question. It is arguable that the "metamorphosis" undergone by the grain of corn in the process of its preparation changed its character in such a way that it was no longer natural to either corn or corn flakes. This crystalized grain is distinguishable from bones, oyster shells, cherry pits and other substances which, although not removed from food, retain their original composition and characteristics. In *Adams* there was certainly a basic change in the corn. The finely processed nature of the final product in *Adams*, the changed character of the particle of corn, and the manufacturer's claims as to the fitness of his product as a breakfast food for children cast doubt upon the soundness of the court's finding as a matter of law that the object was "natural" to the corn flakes.¹⁴

In *Gimenez v. Great Atl. & Pac. Tea Co.*,¹⁵ a case analogous to *Adams*, the plaintiff's stomach was lacerated as a result of eating canned crab meat which contained stone-like, jagged, struvite crystals. These crystals had formed subsequent to canning by a union of the chemicals found in the natural juices of the meat. On appeal plaintiff's recovery for breach of implied warranty was sustained, the New York court finding that the crystals were "dangerous" and "deleterious." Neither the appellate division nor the court of appeals stated whether the crystals were natural or foreign.¹⁶ The variance in result from that in *Adams* would seem to lie in the difference in rationale since the New York court did not look to the test of naturalness.¹⁷ As contrasted with the preparation of meat, seafood, poultry, and fruit dishes, *Adams* and *Gimenez*¹⁸ are instances where it is contemplated that the entire ingredient will be made suitable for human consumption by a system of processing. Whenever the processing creates changes in the condition of the ingredient so as to make the food in fact harmful, naturalness would seem to have little bearing on fitness for human consumption.

If North Carolina had followed the reasoning of some of the more recent cases, the result obtained in *Adams* might have been reached

ence in the corn flakes . . . of a substance natural to the corn flakes, and not removed therefrom in the process of its preparation for human consumption. . . . His is not a case of a foreign object . . ." 251 N.C. at 566-67, 112 S.E.2d at 94.

¹⁴ Would the manufacturer, if joined, have contended that the object was natural to the product and was to be anticipated and guarded against by the average consumer?

¹⁵ 240 App. Div. 238, 269 N.Y.S. 463, *aff'd*, 264 N.Y. 390, 191 N.E. 27 (1934).

¹⁶ Plaintiff's complaint was framed on the theory that the product contained a deleterious substance other than crab meat.

¹⁷ It is not clear what specific legal principles the court applied to determine liability but it is doubtful that the decision rested on the consumer-expectation approach.

¹⁸ Bones were not involved in the *Gimenez* case. The entire crab meat, as canned, was expected to be eaten.

without the questionable finding on the naturalness of the object.¹⁹ The court in its estimation of common knowledge might have held as a matter of law that one who eats corn flakes should anticipate the presence of an occasional hard object derived from corn.²⁰ However, it is equally conceivable that the court would have left the question of reasonable fitness to the jury.²¹

The present trend is toward using naturalness as only one factor among others in order to determine what the consumer should expect. Other jurisdictions have rejected the limitations of the *Mix* rule with or without factual distinctions from the *Mix* case. *Adams* is factually more distinguishable from *Mix* than the other holdings which follow its rationale. It is submitted that reliance upon the consumer-expectation rationale would provide a sounder basis for determining liability in future cases arising in this area.

JOHN H. P. HELMS

Res Judicata—Consent Judgment in Favor of Infant as Bar to Litigation Between Joint Tortfeasors.

In *Pack v. McCoy*¹ the plaintiff brought suit to recover for his personal injuries and property damage arising out of a motorcycle-bus collision. Plaintiff was the operator of the motorcycle and defendants were the bus driver and the bus company. In a previous personal injury action a bus passenger, an infant, had sued the bus company, the bus driver, and the motorcycle operator as joint tortfeasors. The infant's suit was settled by a consent judgment entered in her favor against all defendants. The defendants in *Pack* pleaded res judicata, asserting that the prior judgment was a final adjudication of the issue of negligence between the present parties. The supreme court reversed the trial court's order striking the defense.²

¹⁹ Naturalness would be relevant in some cases, but in others this test properly could be omitted and the decision placed on what the consumer should expect, with other criteria determining the issue.

²⁰ See *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960), where the court took the case from the jury on the ground that common knowledge requires that consumers of fried oysters anticipate the presence therein of an occasional piece of oyster shell.

²¹ In most of the recent cases which have used "naturalness" only in conjunction with other criteria, the question of reasonable fitness has been left to the jury. *E.g.*, *Bryer v. Rath Packing Co.*, 221 Md. 105, 156 A.2d 442 (1959); *Lore v. De Simone Bros.*, 172 N.Y.S.2d 829 (Sup. Ct. 1958); *Wood v. Waldorf Sys., Inc.*, 79 R.I. 1, 83 A.2d 90 (1951); *Bethia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W.2d 64 (1960). *Contra*, *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960).

¹ 251 N.C. 590, 112 S.E.2d 118 (1959).

² There was a dissent. Judge Bobbitt (Judge Parker joining) thought there had not been an adjudication of the negligence between the former defendants, that the defense should not be allowed, and that precedents to the contrary should be over-ruled. 251 N.C. at 593, 112 S.E.2d at 121.