
Volume 52
Issue 3 *Dickinson Law Review* - Volume 52,
1947-1948

3-1-1948

Caveat Venditor-Liability of Vendors of Food in Pennsylvania

Charles L. Casper

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Charles L. Casper, *Caveat Venditor-Liability of Vendors of Food in Pennsylvania*, 52 DICK. L. REV. 135 (1948).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol52/iss3/1>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Dickinson Law Review

Published October, January, March and June by the Dickinson School of Law, Carlisle, Pa.

Vol. LII

MARCH, 1948

NUMBER 3

Subscription Price \$3.00 Per Annum

\$1.00 Per Number

CAVEAT VENDITOR-LIABILITY OF VENDORS OF FOOD IN PENNSYLVANIA

By

CHARLES L. CASPER*

I

From the earliest times purveyors of food have been held to the highest degree of care to see to the wholesomeness of such food. Two early English statutes forbade the sale of corrupt victuals.¹ Blackstone says² that "in contracts for provisions it is always implied that they are wholesome," and if they are not an action for damages for deceit will lie. The general common law rule is that where unwholesome food is sold to human beings the seller will be subjected to responsibility for the consequences. The rule is based on the high regard which the law has for human life and public health.

Pennsylvania was slow to adopt the general common law rule. The earlier cases held that there is no implied warranty in sale of goods intended for food and vendor of food was not answerable in damages for the defective quality thereof unless he expressly warranted them or was guilty of a fraud.³ In 1889 the General Assembly enacted a statute⁴ which provided that "In every sale of green, salted,

*Ph.B, Yale 1927, LL.B., Harvard 1930 Member of the Luzerne County Bar. Author of "Pennsylvania Public Utility Law and Procedure."

¹151 Hen. III, Stat. 'pillor' et tumbrel', et assis' panis et cervis, and Edw.I, Stat. de pistoribus et brasiatoribus et alius vitellariis.

²3 Comm. 165.

³Lawrence v. Yard, 1 W.N.C. 37 (1874); Thomas v. Stocker, 1 W.N.C. 402 (1875); Ryan v. Ulmer, 108 Pa. 332 (1885); Ulmer v. Ryan, 137 Pa. 309 (1890); Marshall v. Aber, 11 C.C. 570; I Dist. 770 (1892); Cannon v. Young, 19 CC 239, 5 Dist. 772 (1896). One early case held there was an implied warranty of fitness at common law: McNaughton v. Joy, 1. W.N.C. 470 (1875). However, it should be observed that in all of these cases the proposition was not raised in an action against the vendor for injuries because of defective food, but as a defense in an action for the purchase price.

⁴Act of May 4, 1889 P.L. 87, entitled "An Act relating to the sales of provisions by description."

pickled or smoked meats, lard and other articles of merchandise, used wholly or in part for food, said goods or merchandise shall correspond in kind and quality with the description given, either orally or in writing, by the vendor; and in every sale of such goods or merchandise, unless the parties shall agree otherwise, there shall be an implied contract or understanding that the goods or merchandise are sound and fit for household consumption." This statute was construed to impose liability on a vendor who sold food products to a middleman who purchased not for consumption, but for the purpose of resale,⁵ but it was held not to apply to sales of food not for human consumption.⁶

In 1915 Pennsylvania adopted the Uniform Sales Act.⁷ Section 15⁸ of that Act provides as follows:

"Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

First. Where a 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 manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purposes."

This Act did not repeal the Act of 1889, but while applicable to other commodities, it is also applicable to food products.

In the early 1900's a number of trespass actions were brought in Luzerne County to recover for injuries resulting from trichinosis contracted from eating diseased pork. Two of those cases were passed upon by the Supreme Court of Pennsylvania. In *Catani v. Swift & Co.*,⁹ the first of these cases, the Supreme Court did not follow the doctrine of the earlier cases,¹⁰ but adopted the general common law rule that where the sale of food is for immediate consumption, there is an implied warranty that the food is wholesome and fit for the purpose intended, irrespective of the seller's knowledge of disease or defects therein, and mentioned that the rule has been put in statutory form in Pennsylvania by the Act of 1889.¹¹ The Court sustained a verdict against the defendant manufacturer on the theory

This Act has been repealed by the Act of May 21, 1943 P.L. 539.

⁵Weiss v. Swift & Co., 36 Pa. Super 376 (1908).

⁶Fuchs v. Eichenlaub, 16 Dist. 932, 54 Pitts. 376 (1907); O'Connor v. Lachman, 65 Pitts. 590 (1917).

⁷Act of May 19, 1915, P.L. 543; 69 P.S., Section 1 et seq.

⁸69 P.S., Section 124.

⁹251 Pa. 52, 95, A. 931, LRA 1917 B. 1272 (1915).

¹⁰See Note 3, Supra.

¹¹This case was decided by the Supreme Court on October 4, 1915. The Court did not refer to section 15 of the Uniform Sales Act which had become effective in Pennsylvania on May 19, 1915.

of breach of the implied warranty. In *Tavani v. Swift & Co.*,¹² the trial of the action resulted in a verdict for defendant, and plaintiff appealed. Mr. Justice Fraser, who had written the opinion in the *Catani* case, delivered the opinion of the Court sustaining the verdict on the ground that the action was in trespass for negligence and not for breach of warranty, and that no negligence on the part of defendant had been shown. It is difficult to reconcile the reasoning in these cases. If there was a breach of an implied warranty of fitness in the *Catani* case, the same breach must have occurred in the *Tavani* case. Liability should not be made to depend upon the theory of the action, but, as Mr. Justice Fraser pointed out in the *Catani* case, upon "the demands of social justice".

In *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*,¹³ plaintiff brought an action of trespass for injuries sustained from swallowing broken glass contained in a bottle of carbonated beverage. The Supreme Court sustained a verdict for plaintiff on the theory that once the presence of the glass was shown in the bottle, the accident proves its own negligent cause, and the jury would be permitted to infer negligence.¹⁴ The Court further stated that the particular dereliction of the defendant need not be shown; the negligent act is demonstrated by showing the glass in the bottom of the bottle. The Supreme Court laid down the rule that those engaging in the business of manufacturing food or beverages for consumption must use a high degree of care to see that the food or beverage is free from foreign or deleterious substances that *injurious* affect the user. All reasonably scientific and up-to-date methods must be employed to obviate the presence of any injurious substances, but even where such methods are employed and such substances get into the product and their presence there may be due to carelessness somewhere along the line, the manufacturer will be responsible to a member of the public injured thereby. The Court decided the case purely on the theory of negligence, and expressly stated that it did not consider any question of representation or warranty. In such cases the negligence of defendant is a question for the jury.¹⁵ Although a manufacturer owes a duty of reasonable inspection before the commodity is placed on the market for consumption, the test is whether the circumstances are such as would satisfy a reasonable and well balanced mind that the accident resulted from the negligence of the defendant.

In regard to the liability of manufacturers, the Courts have developed what is known as the "original package rule". A manufacturer who puts on the market food intended for human consumption in a sealed bottle or original package is held to represent to each purchaser, even though the purchase is made through a dealer,

¹²262 Pa. 184, 105 A. 55 (1918).

¹³296 Pa. 114, 145 A. 700 (1929).

¹⁴Followed in *Murphy et al v. Yuengling Dairy Products Corp.*, 34 D. & C. 355, 6 Sch. Reg. 242 (1938).

¹⁵This rule has been consistently followed: *Nock v. Coca Cola Bottling Works of Pgh.* 102 Pa. Super. 515, 156 A. 537 (1931); *Madden v. Great A. & P. Tea Co.*, 106 Pa. Super. 474, 162 A. 687; (1932); *Smith v. Coca Cola Bottling Co. of Pa.*, 152 Pa. Super. 445, 33 A. 2d 448.

that the contents thereof are wholesome and suitable for the purpose for which they are sold.¹⁶ The rule is based on the fact that since the purchaser cannot examine the goods for himself, he has the right to rely on the manufacturer and it is only just and reasonable to hold the manufacturer responsible. But where the food is not sold in the original package, and plaintiff's evidence failed to exclude the possibility that the deleterious matter got into the food before the manufacturer came into possession of it or after it had been sold to the retailer, the manufacturer will not be liable.¹⁷ In order to hold the manufacturer liable, there must be proof that the manufacturer sold and delivered the food to the retailer. In *Bilk v. Abbotts Dairies, Inc.*,¹⁸ plaintiff brought an action of assumpsit against a manufacturer for breach of warranty to recover for injuries caused by unwholesome milk. Plaintiff testified he purchased the milk from a vendor who had handled defendant's milk for several years, and that the bottle and cap had inscribed on them the name of defendant company, but there was no averment or proof that the defendant had sold and delivered the bottle of milk in question to the dealer from whom plaintiff made the purchase. The Superior Court sustained the entry of a nonsuit. Judge Stadfield, who wrote the opinion, distinguished this case from the *Rozumailski* and *Menaker* cases, because those were in trespass. The decision seems wrong in principal, because recovery should not be made to depend on the choice of form of action. Here was a clear case of "original package", and to require proof of sale and delivery by defendant to the retailer would appear to place an undue burden on the injured and innocent plaintiff.

The Federal Courts sitting in Pennsylvania were originally loath to impose liability on vendors of deleterious food. In the first reported case¹⁹ the Circuit Court of Appeals held a vendor of food is not an insurer and refused to hold a vendor liable without proof of negligence. The District Court for the Middle District of Pennsylvania refused to follow this decision, but followed the decision of the Pennsylvania Supreme Court in the *Rozumailski* case.²⁰ This court continued to follow the Pennsylvania decisions in a later case,²¹ on the authority of *Erie R. R. Co. v. Tompkins*.²²

So far consideration has only been given to the liability of the manufacturer. What is the liability of a retailer? Where the foreign substance gets into the food through the negligence of the retailer, he will be liable.²³ But what is his liability

¹⁶*Nock v. Coca Cola Bottling Works of Pgh.* 102 Pa. Super. 515, 156 A. 537 (1931); *Menaker v. Supplee-Wills-Jones Milk Co.*, 125 Pa. Super. 76, 189 A. 714 (1937).

¹⁷*Werner v. Armour & Co.*, 320 Pa. 440, 183 A. 48 (1936).

¹⁸147 Pa. Super 39, 23A. 2d 342 (1941).

¹⁹*Horn & Hardart Baking Co. v. Lieber*, 25F. 2d 449 (3 Cir., 1928).

²⁰*Quinn v. Swift & Co.*, 20F. Supp 234 (D.C., Mid.D.Pa. 1937) The injury was caused by a piece of metal in a sausage encased in an unbroken skin. The Court applied the "original package rule".

²¹*Newcomb v. Armour & Co.*, 39 F. Supp. 716 (D.C., Mid.D.Pa. 1941).

²²304 U. S. 64

²³*McCabe v. Pennsylvania Railroad Co.*, 311 Pa. 229, 166 A. 843 (1933).

when he purchases from a manufacturer and resells in the original package food later shown to be deleterious? The Supreme Court originally held²⁴ that the retailer would not be liable in an action of trespass for negligence, because he is not required to analyze the contents of each package he receives and sells. In *Ebbert v. Philadelphia Electric Co.*,²⁵ an action of trespass against the vendor who was not the manufacturer of a defective mechanical device, Mr. Justice Maxey (now Chief Justice) said by way of dicta:

"It would, for example, be utterly impracticable and unreasonable to require grocers to open and analyze the contents of every can of food they sell. *The purchaser in such cases does not expect any such precaution to be taken* and relies wholly upon the integrity, good faith and care of the person who put the food in the cans. The rule of the nonliability of vendors in "original package" cases is firmly established in the law." (italics by the Court)

Justice Maxey relied on Section 401 of the *Restatement of the Law of Torts*.

The comment on that section relates to sales at retail and says:²⁶

"Goods bought of retail or wholesale dealers in their original packages and labelled as the product of the manufacturers are usually bought in reliance upon the manufacturer's competence and care. This is always the case where a purchaser asks for a particular brand. Therefore, the retailer is not subject to liability for bodily harm caused by their defective condition, unless the condition is such that even the cursory inspection which a dealer should make of any article, which he puts in stock and sells, would disclose some indication that the goods had deteriorated to a dangerous extent. On the other hand, if the purchaser depends upon the recommendation of the retailer, he is entitled to expect that the retailer will know something of the manufacturer of the goods he sells and will not recommend the goods made by a manufacturer whom the retailer, by reputation or previous experience with his products, should know to be careless or incompetent."

While this statement conforms to section 15 of the Sales Act, in that it makes liability depend on reliance on the seller's skill or judgment, it is submitted that it is too fine a distinction to have liability turn on the ground whether or not the purchaser asks for the packaged goods under a brand name. Two customers may be injured by the same product, one of them having purchased by brand name, and the other not. The rights of these injured persons should not differ. Further, a recent survey of the Committee of Consumer Relations in Advertising, Inc. shows that only 12% of consumers think the best way to buy is to purchase advertised brands, and that they have more confidence in the over-the-counter word of retail-

²⁴West v. Emanuel, 198 Pa. 180, 47 A. 965, 53 LRA 329 (1901).

²⁵330 Pa. 257, 198 A. 323 (1938).

²⁶page 1088.

ers.²⁷ To distinguish cases of liability from non-liability on the ground of whether the article was ordered by brand name is neither practical nor in accord with sound reasoning.

Four years after the decision in the *Ebbert* case the Supreme Court took an opposite view. In *Bonenberger et al. v. Pittsburgh Mercantile Co.*²⁸ plaintiff brought an action of assumpsit against a retailer for injuries received from an oyster shell contained in a pint of canned oysters. The lower Court gave binding instructions for defendant, and the Supreme Court reversed and awarded a *venire facias de novo*. The report fails to show whether or not the oysters were ordered by brand name, but the opinion indicates that this would be immaterial if the second clause of section 15 of the Sales Act,²⁹ applies. The Court declined to discuss how definite the description must be to bring it within this section. The Court distinguished *West v. Emanuel* and *Ebbert v. Philadelphia Electric Co.* on the ground that they were in trespass for negligence, while the *Bonenberger* case was in assumpsit for breach of warranty, and therefore the holdings of the tort cases were not applicable. The Court was forced to this specious reasoning in order to impose liability on a retailer of goods in the original package. But the Court went on to say that the dealer is in a better position to know or ascertain the reliability and responsibility of the packer than is the retail purchaser, and that the law will place the responsibility on the party best able to recoup his loss.

In the *Bonenberger* case it was argued that the injury arose from a part of the product sold as distinguished from a foreign substance or a noxious or impure condition of the food itself, and that therefore the goods were reasonably fit for human consumption as food and the defendant should not be liable as a matter of law. The majority of the Court rejected this argument, and held that the question of whether the food was fit for human consumption was for the jury.³⁰

In cases where the deleterious food is procured from a restaurant, will the restaurateur be liable? If the action is brought on the theory of breach of warranty, there is only a warranty in case of a sale. But when food is eaten in a restaurant, is there a sale? The older authorities hold that where a customer orders a meal, title to the food never passes.³¹ Where a customer orders and pays for a definite portion of food, title probably passes. In *West v. Katsafanas*³² plaintiff ordered a pork sandwich from defendant. The sandwich proved deleterious, and plaintiff was injured

²⁷Time Magazine of May 26, 1947

²⁸345 Pa. 559, 28 A. 2d 913, 143 A.L.R. 1917 (1943).

²⁹"Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

³⁰Two members of the Court (Patterson, J. and Schaffer, C. J.) dissented on this point.

³¹See 1. Williston, Sales, Sec. 242b

³²107 Pa. Superior 118, 162 A. 685 (1932).

thereby. The question was raised whether the transaction constituted a sale. The Superior Court concluded that it did, and in sustaining a verdict for plaintiff on the theory of breach of an implied warranty said:

"Undoubtedly, if one purchases a sandwich, or piece of pie, or other food, to be carried away and eaten, it constitutes a sale and the seller is liable. To conclude that he is not subject to pay damages if the food is eaten on the premises, but if carried to the pavement and there consumed, he is liable, is inconsistent and not in accord with sound reasoning. The evil consequences in the one case are the same as in the other. The attempt to establish a distinction as to liability is not practicable."

It would thus appear that a restaurateur will be liable for injuries caused by deleterious food served by him regardless whether the food is served as a meal or by the portion, or whether for consumption on or off of the premises where it is served.

II

In bringing an action for injuries occasioned by deleterious food which form of action should be chosen? We have seen that the action sounds either in tort for negligence or in contract for breach of warranty. In an early Pennsylvania case, it was held that an action of trespass on the case would not lie for breach of an implied covenant of warranty.⁸³ And where an action is brought on the theory of trespass rather than warranty, absence of negligence is a complete defense.⁸⁴ But where the theory of the action is negligence it is not necessary to prove the particular dereliction, the mere presence of the foreign substance when in a sealed container is sufficient, the accident proves its own negligence.⁸⁵

There has been great conflict in the decisions concerning the proper form of action. As late as 1931 the Superior Court said:⁸⁶

"There is considerable confusion in the decisions as to the theory of the liability of the defendant in this class of cases. Some of them hold that an action is based upon negligence alone; others that it may be founded on an implied warranty; and still others that where an implied warranty exists, it does not extend to third parties. Undoubtedly, an action in tort could have been brought, but in

⁸³*Erie City Iron Works. v. Barber & Co.* 102 Pa. 156 (1883). This decision is not in accord with the historical development of actions for breach of warranty. As Professor Williston points out in his article "What Constitutes an Express Warranty in the Law of Sales", 21 Harv. L. Rev. 555, "The law of warranty is older by a century than special *assumpsit*, and the action upon the case on a warranty was one of the bases upon which the law of *assumpsit* seems to have been built. The action on a warranty was regarded as an action of deceit, and the words "*warrantizando vendidit*" seem to have been necessary to make a good count as the words "*super se assumpsit*" later were in the action of *assumpsit*. The action on a warranty was thus conceived of at the outset as an action of tort."

⁸⁴*Tavani v. Swift*, 262 Pa. 184, 105 A.55 (1918)

⁸⁵*Rozumailski v. Phila. Coca Cola B. Co.*, 296 Pa. 114, 145 A. 700 (1929)

determining whether or not that form is exclusive, one is confronted by a conflict of authorities which is confusing. The question whether an assumpsit under a contract of implied warranty of fitness; etc., may be maintained is, in many instances so closely related to the question of negligence that the decisions are not always susceptible of clear classification. In 26 C.J. 783; it is stated that the general rule is, that in all sales of food or beverage for immediate consumption by a dealer, there is an implied warranty of fitness or wholesomeness for the consumer."

In *Henderson v. Nat. Drug Co.*³⁷ it was held that an action against a druggist to recover for personal injuries for a harmful drug should be *ex delictu* rather than *ex contractu*, except where the suit is based on the breach of an express warranty.³⁸ The Court appears to neglect section 15 of the Sales Act, and does not mention it in its opinion. The Court distinguishes this case from the food cases, and holds that in food cases it is immaterial whether the case is tried on a theory of negligence or on the theory of breach of an implied warranty.

In *Bonenberger v. Pittsburgh Mercantile Company*³⁹ the action was brought in assumpsit for breach of warranty. The Court based the right to recover on the first clause of section 15 of the Sales Act, and held that the buyer does rely on the seller's skill or judgment, even where the subject of the sale is canned goods not open to inspection by the dealer who is not the manufacturer because the dealer is in a better position to know or ascertain the reliability and responsibility of the packer than is the purchaser. The law places the responsibility on the party best able to recoup his losses. But the Court took this view because the action was in assumpsit rather than in trespass, and held that the principles of the tort cases⁴⁰ did not apply.

In *Bilk v. Abbotts Dairies, Inc.*,⁴¹ plaintiff brought an action in assumpsit against a bottler of milk to recover damages for personal injuries alleged to have been sustained by plaintiff from broken glass contained in a bottle of milk. Plaintiff testified that he purchased the bottle of milk in question from a particular vendor who had handled defendant's milk for several years, and that the bottle and cap had inscribed thereon the name of defendant company. There was no averment of proof that the defendant company had sold and delivered the bottle of milk in question to the dealer from whom plaintiff had made the purchase. In an endeavor to prove this point plaintiff offered in evidence an allegation of his statement of

³⁶*Nock v. Coca Cola Bottling Works*, 102 Pa. Superior 515 (1931)

³⁷343 Pa. 601, 23 A. 2d 743 (1942).

³⁸The court followed the earlier case of *West v. Emanuel*, 198 Pa. 180, 47 A. 965, 53 L.R.A. 329 (1901) which relates to drugs. The Courts of other states take the opposite view e.g., *Thomas v. Winchester*, 6 N.Y. 397, 57 Am. Dec. 455 (1852); *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L.R.A. 612 (1889).

³⁹See note 28.

⁴⁰*West v. Emanuel*, 198 Pa. 180, 47 A. 965, 53 L.R.A. 329, and *Ebbert v. Philadelphia Electric Company* 330 Pa. 257, 198 A. 323.

⁴¹147 Pa. Superior Court 39, 23 A. 2d 342, (1941).

claim to which no affidavit of defense had been filed, averring that the bottle in question had been prepared, manufactured and packed by defendant. An objection to this offer was sustained. At the conclusion of plaintiff's case, defendant moved for a nonsuit. The lower Court granted the motion, and on appeal the Superior Court affirmed. The Court held that although this action was brought in assumpsit, it nevertheless sounded in tort, and that the provisions of the Practice Act⁴² relating to affidavits of defense in actions of tort are to be applied in so far as they relate to the averments relied on to establish negligence and the damages claimed.

This decision appears to be wrong on the question of pleading. By failing to file an affidavit of defense under section 13 of the Practice Act or an Answer under Rule 1045 of the Rules of Civil Procedure defendant admits all averments relating to the identity of the person by whom a material act was committed, and plaintiff is entitled to have this undenied averment placed in evidence.⁴³

The existence of liability of defendant and plaintiff's right to recover should not be made to depend on the form or theory of action. Whether the action is brought in assumpsit for breach of warranty or in trespass for negligence, the pleadings, proofs and right to recover should conform to the same standards. This is particularly true in regard to the period of limitations within which an action may be brought. The statute of limitations in contract cases is six years while the period of limitations for tort actions for personal injuries is two years.⁴⁴ But an action of assumpsit to recover consequential damages for breach of warranty brought after two years have passed, will be banned because the gist of the action is damages for personal injuries, although plaintiff would be entitled at least to nominal damages for breach of contract and might recover the value of the article sold.⁴⁵

III

What measure of proof is required to establish a prima facie case of liability? The *Rozumailski* case laid down the doctrine that in the case of a sealed container, the mere presence of the foreign body in the container is sufficient to take the case to the jury. It is for the jury to determine whether the foreign matter was in the food at the time of the sale, and the question of defendant's negligence is for the jury.⁴⁶ Where from the facts it is apparent that the foreign substance was swallowed and could not be successfully removed and therefore it would be impossible to state its

⁴²Act of May 14, 1915 P.L. 483, Section 13, as amended by the Act of April 4, 1929 P.L. 140; 12 P.S., Section 412.

⁴³*Buehler v. U. S. Fashion Plate Co.*, 269 Pa. 428, 112 A. 632 (1921); *Lang v. Casey*, 326 Pa. 193, 191 A. 586 (1937).

⁴⁴Act of 1713, 1 Sm.L. 36; Act of 1895 P.L. 236, Section 2; 12 P.S. Section 34.

⁴⁵*Jones vs. Boggs & Buhl*, 355 Pa. 242, 49 A. 2d 379, (1946)

⁴⁶*Madden v. Great A. & P. Tea Co.*, 106 Pa. Superior 474, 162 A. 687 (1932); *Nock v. Coca Cola Bot. Wks.*, 102 Pa. Superior 515, 156 A. 537 (1931); *Levy v. Horn & Hardart Bkg. Co.*, 103 Pa. Superior 282, 157 A. 369 (1931); *Campbell v. G. C. Murphy Co.*, 122 Pa. Superior 342, 186 A. 269 (1936).

exact nature, the nature thereof need not be alleged or proved.⁴⁷ But it is necessary to prove that the injuries resulted from eating contaminated food, and that it was contaminated at the time of purchase,⁴⁸ although the burden is not upon plaintiff to prove that the foreign substance is highly poisonous. The test is whether the proof is such to satisfy a reasonable and well balanced mind that plaintiff was harmed by the negligence of defendant; it is not necessary for plaintiff to exclude every other cause of the change in his physical condition which might have produced or contributed to it.⁴⁹

On the other hand, what type of evidence may a defendant offer in defense? He may present evidence of the method of manufacture and the care used, for although due care is not a defense, there is no other way to controvert the charge that the food contained a foreign substance or that there was a breach of warranty.⁵⁰

What is the measure of damages which may be recovered? In actions for breach of warranty, it is the loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.⁵¹ But the injuries must occur from the actual ingestion of the deleterious food, and result from physical and not from psychic causes.⁵² The injury must be due to the noxious character of the food itself, and not be caused by some allergy or individual idiosyncrasy on the part of the injured person. A vendor does not warrant that although the product is harmless to practically all the public, it does not contain any substance or ingredients that may injuriously affect some individual purchaser who has a peculiar susceptibility unknown to the vendor.⁵³

IV

In an action based on breach of warranty, the defense is sometimes raised that the action cannot be maintained because there is no privity of contract between the parties. In cases where the manufacturer or processor is the defendant, there is rarely if ever any privity of contract between him and the injured plaintiff. While a manufacturer will not ordinarily be liable to those with whom he has no contractual relationship, if he puts goods upon the market in a bottle, can or original package, he in effect represents to each purchaser that the contents thereof are wholesome and suitable for the purpose for which they are sold. The purchaser has the right to rely upon the assurance of the manufacturer that the contents are

⁴⁷Murphy v. Yuengling Dairy Products Corp., 34 D.&C. 355 (C.P. Schuylkill 1938)

⁴⁸Taylor, Adms. v. Great A. & P. Tea Co., 48 D. & C. 687 (C.P. No. 3, Phila., 1943).

⁴⁹Smith v. Coca Cola Bottling Co., of Pa. 152 Pa. Superior 445, 33 A. 2d 488 (1943).

⁵⁰Canterman v. Coca Cola Bottling Co., 35 D.&C. 175 (C.P. Adams, 1945).

⁵¹Act of May 19, 1915 P.L. 543 (Uniform Sales Act), section 69, 69 P.S. Section 314; West v. Katsafanas, 107 Pa. Superior 118, 162 A. 685; Campbell v. G. C. Murphy Co., 122 Pa. Superior 342, 186A. 269 (1936).

⁵²Menaker v. Supplee-Wills-Jones Milk Co., 125 Pa. Superior 76, 189 A. 714 (1937); Koplin v. Louis K. Liggett Co., 22 D. & C. 442, 119 Pa. Superior 528, 181 A. 381, 322 Pa. 333, 185 A. (1936); Young v. Great A. & P. Tea Co., 15 F. Supp. 1018 (D.C., W.D. Pa., 1936); Martin v. Walgreen Co., 4 Fay L.J. 10.

⁵³Barrett v. S.S. Kresge Co., 144 Pa. Superior 516, 19 A. 2d 526 (1941).

fit and wholesome, and it is only just and reasonable to hold him responsible. In such cases, the common law doctrine of *caveat emptor* does not prevail.⁵⁴ But in *Bonenberger vs. Pittsburgh Mercantile Co.*⁵⁵ the Supreme Court did not pass on the question of privity of contract, since the case was sent back for retrial, and the facts concerning the purchase would appear at the time. Of course, the warranty of the manufacturer will not run to the purchaser or consumer where the food is sold loose and not in the original package and where the purchaser has an opportunity to examine it.⁵⁶

In cases where the retailer is the defendant, there is more likely to be privity of contract. But in some cases the injured party is not the purchaser. It has been suggested that although the warranty of the manufacturer runs to the ultimate consumer, the warranty of the seller runs only to the immediate purchaser.⁵⁷ It is submitted that this distinction is without foundation in logic, and was not adopted by the Supreme Court in the *Bonenberger* case.⁵⁸ The courts have been astute to answer the objection of lack of privity by holding that the purchaser is presumed to be the agent of the injured party,⁵⁹ or that the warranty is in the nature of a contract for the benefit of a third party.⁶⁰ It appears, as Judge Cardozo once remarked,⁶¹ "the assault upon the citadel of privity is proceeding in the days apace," and the courts do not give much support to this defense.

V

The foregoing cases referred to in this study illustrate the natural growth of the law from our court decisions as affected by the Pennsylvania Act of 1889⁶² and the Uniform Sales Act. The decisional standards for determining whether liability shall be imposed must necessarily be altered to adapt them to the changing conditions of modern merchandising of food and food products. The courts are well aware that the day is long past when the processor of food furnishes it directly to the consumer, and know that there is usually a long chain of distribution between the grower or manufacturer and the ultimate consumer. It is thus that what Professor Williston refers to as "that good old doctrine for the encouragement of trade known as *caveat emptor*"⁶³ has, in cases involving injury from unwholesome food, given way to a liability based upon the broader concept of what Mr. Justice Frazer has called "The demands of social justice."⁶⁴

⁵⁴Nock v. Coca Cola Bottling Works of Pgh., 102 Pa. Superior 515 A. 537 (1931).

⁵⁵345 Pa. 559, 563, 28A. 2d 913 (1942).

⁵⁶Nock v. Coca Cola Bottling Works of Pgh., 102 Pa. Superior 515, 156A. 537 (1931).

⁵⁷Mizikowski, v. Armour & Co., 33 Luzerne Leg. Reg. 421 (1934).

⁵⁸See note 59.

⁵⁹Young v. Great A. & P. Tea Co., 15 F. Supp 1018 (D.C., W.D. P., 1936).

⁶⁰Simon v. John J. Felin & Co., 35 D. & C. 645, 648 (1939).

⁶¹Ultramares Corp. v. Touche, 255 N.Y. 170, 180 (1931).

⁶²See note 4.

⁶³27 Harv. L. Rev. 1, 13.

⁶⁴Catani v. Swift & Co., 251 Pa. 52, 95 A. 931 (1915).