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The Service of Poisonous Food in Restaurants

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COMMENTS

THE SERVICE OF POISONOUS FOOD IN RESTAURANTS

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The recent Connecticut case of *Albrecht v. Rubinstein*,[1] decided on December 2, 1948, is of great general and legal interest.

The essential facts are simple. The plaintiff, a police officer of the city of Hartford, entered defendant's restaurant to secure something to eat. Policemen, like malefactors, need nourishment. He requested defendant to give him a "good sandwich." Defendant replied, "How would you like a good fresh corned beef sandwich?" Plaintiff said, "Good," and was served with a sandwich which he consumed on the premises. Thereafter he went home and suffered a serious attack of vomiting and stomach pains. He was taken to the Hartford Hospital where his illness was diagnosed as "food poisoning."

Plaintiff brought suit in the Court of Common Pleas, Hartford County, on three counts: (1) express contract, (2) implied contract, (3) negligence.

There was no sufficient evidence of negligence and the jury found for defendant, accordingly, on the third count.

The trial court directed a verdict for defendant, as a matter of law, on the first two counts.

Thereupon plaintiff appealed from the judgment entered against him, emphasizing particularly the direction of the verdict on the second count (implied contract and implied warranty), which he urged was erroneous.

The Supreme Court of Errors of Connecticut, in an opinion written by Judge Jennings, affirmed the judgment on the ground that the service of food in a restaurant does not constitute a sale, that there was no express or implied warranty that the sandwich would be any good, and that therefore the trial judge did not err in directing a verdict for defendant on the counts alleging an express warranty and an implied warranty.[2]

In fairness to the Supreme Court of Errors, it should be said that the direction of a verdict on these counts was correct if the law laid down in two earlier Connecticut cases is sound, namely *Merrill v. Hodson*[3] and *Lynch v. Hotel Bond Co.*[4] But in the last cited case a vigorous dissenting opinion was written by Judge Haines who felt that the decision in *Merrill v. Hodson* should be re-examined and tested under modern conditions and the requirements of a sound and just public policy. In part, Judge Haines said,

"The citizen may well wonder at the intricacies of the law when told that he is protected in the purchase of ice cream at a drug store which he consumes upon the premises, using the facilities there provided, but may be poisoned and denied

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1. 135 Conn. 243, 63 A. 2d 158 (1948).
2. *Ibid.*
3. 88 Conn. 314, 91 Atl. 533 (1914).
4. 117 Conn. 128, 167 Atl. 99 (1933).

a remedy when he does exactly the same thing in a restaurant. He has just cause for doubting that 'law is founded on reason.' "[5]

It seems to me that a good deal can be said in support of the proposition that when defendant represented he would serve the plaintiff "a good, fresh corned beef sandwich," he was making a warranty. Good does not mean bad. Nor should "a good, fresh corned beef sandwich" lead up to a bad belly-ache. Yet the law, like the Delphic oracle, is full of mysteries which the ordinary mind oftentimes cannot fathom, and the learned Supreme Court of Errors of Connecticut held that the word, "good" "was too indefinite and uncertain in meaning to be the basis of a warranty."[6] But the dictionary which reposes on my desk tells me otherwise, so I suppose that really I have no business to place trust in dictionaries.

But assuming, *arguendo,* that there was no express warranty, is there not present an implied warranty that the food is fit for human consumption, pursuant to the numerous authorities above and hereinafter cited?

I suppose, however, that the Supreme Court of Errors felt bound (like Prometheus) by the Spartan rule of stare decisis. It has been said that, "Perhaps the most fundamental characteristic of Anglo-Saxon law as distinguished from other systems of jurisprudence is its deference to the principle of stare decisis which may be defined as the obligation of courts to adhere to the results of decided cases and to refrain from disturbing general principles which have been established by judicial determination. [Citing cases.] The theory underlying this principle is that 'certainty is of the very essence of the law,' that 'shifting and changing rules or principles do not constitute law,' and that 'the avoidance or prevention of litigation through the establishment by the courts of fixed and certain rules is a useful and beneficent effect of the litigations had'."[7]

While, in general, this is quite true—and as a practicing lawyer for forty-one years I have learned its truth to the cost of my clients—nevertheless the rule of stare decisis is not an Iron Curtain, absolutely stable, rigid and unyielding. Social security and stability are sometimes found in change. The Law, it is true, must be reasonably stable, yet it cannot stand still as the sun allegedly did in the days of our ancestors. Old decisions become outdated by the rapidly changing conditions of modern society and discoveries, and must give way to rules appropriate to the new era. Thus there is no impelling reason why I should wear red flannel drawers because my maternal grandparent wore them in 1848 when he travelled from Alsace-Lorraine to San Francisco, California, via the Isthmus of Panama—and I do hate to think how he must have itched!

5. *Id.* at 135, 167 Atl. at 101. Among the authorities cited by Judge Haines in his dissenting opinion were opinions in such respectable jurisdictions as Massachusetts, New York, Illinois, Indiana, Minnesota, Ohio and Missouri. Judge Haines also cited and quoted the reasoning in the classic book on Sales written by Professor Williston (2d ed. 1925) p. 425, § 242b, and an article in 27 YALE L. J. 1068 (1918).

6. Albrecht v. Rubinstein, 135 Conn. 243, 245, 63 A. 2d 158, 160 (1948).

7. *In re* Herle's Estate, 165 Misc. 46, 49, 300 N. Y. Supp. 103, 109 (1937), citing Grifenhagen v. Ordway, 218 N. Y. 451, 458, 113 N. E. 516, 518 (1916).

Of course, it is true that in an action to recover damages for illness alleged to have resulted from eating poisonous food at defendant's restaurant, the evidence must establish with reasonable certainty that the direct cause of the plaintiff's illness was one for which the defendant is liable.[8]

In *Stubbs v. City of Rochester* mention is made of the rule of law, that when there are several possible causes of injury, "plaintiff cannot recover without proving that the injury was sustained wholly or in part by a cause for which defendant was responsible."[9]

Fortunately for the valorous cop, there seems to be no doubt in his case that the treacherous Delilah, in the form of a bad sandwich, was the cause of his downfall, and in particular, of his grave stomach-ache—an illness which, from sad experience, I do not sneeze at.

I have no desire to weary my readers by an extended discussion of the case law. Professor Williston in his treatise on Contracts, well states:

"Even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant. The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor, and to charge the seller of an unopened can of food for the consequences of the inferiority of the contents of the can, and to hold free from liability a restaurant-keeper who opens the can on his premises and serves its contents to a customer, would be a strange inconsistency. A sale is not the only transaction in which a warranty may be implied."[10]

I cannot resist telling about the mouse which the actor discovered in a kidney stew, and I do wonder what one of the learned judges of the Supreme Court of Errors of Connecticut would have done under similar conditions, or rather what his better half would have made him do, *vi et armis*. Yes, dear readers, it is an actual case, because the naked truth, as Jim Walker used to tell me, is always better than "baloney". In the case of *Barrington v. Hotel Astor*,[11] the plaintiff, a well-known actor, registered at the Hotel Astor and went to the restaurant and gave an order for liquor and food, which included kidney stew. After he had begun to eat the stew—here I quote—"he found half a mouse included in the part transferred to his plate, and the other half [of mousie] still in the casserole."[12] According to the opinion of the late learned Justice Dowling, writing for the unanimous Appellate Division, First Department, Barrington became violently sick and remained so for some weeks, and suffered, not surprisingly, a pronounced loss of appetite. He brought

8. Blackman v. Lundy, 193 Misc. 745, 87 N. Y. S. 2d 181 (1948).

9. 226 N. Y. 516, 525, 124 N. E. 137, 140 (1919).

10. 2 WILLISTON, CONTRACTS § 996 (a) (Citing numerous authorities, including New York and Massachusetts.) See also, Leahy v. Essex Co., 164 App. Div. 903, 148 N. Y. Supp. 1063 (3d Dep't 1914); Friend v. Childs, 231 Mass. 65, 120 N. E. 407 (1918); Cushing v. Rodman, 82 F. 2d 864, 868; Race v. Crum, 222 N. Y. 410, 118 N. E. 853 (1918) (a unanimous decision of the Court of Appeals of New York).

11. 184 App. Div. 317, 171 N. Y. Supp. 840 (1st Dep't 1918).

12. *Id.* at 318, 171 N. Y. Supp. at 840.

suit at Trial Term, New York County, and recovered a verdict of $1,000. Thereafter the Trial Justice, nevertheless, dismissed Barrington's complaint on the merits. As I have said, the Appellate Division reversed this unjust decision and ordered a new trial of the action with costs to Barrington. Justice Dowling said in part:

"A guest at a hotel, who orders a portion of kidney sauté, has the right to expect, and the hotel keeper impliedly warrants, that such dish will contain no ingredients beyond those ordinarily placed therein. The hotel keeper also impliedly warrants that the dish is wholesome and fit for human consumption, and contains nothing rendering it unsuitable for use as human food. The defendant does not seek to justify the inclusion of the mouse in this dish as any proper part of its menu. The presence of a foreign substance in the food upon the finding of the jury is something for which the defendant was solely responsible."[13]

There is nothing novel about this result. It was so held centuries ago in the early Year Books, if the learned Connecticut judges had seen fit to go back that far in the earnest pursuit of stare decisis.[14]

In all seriousness, the learned majority of the Supreme Court of Errors of Connecticut completely overlooks the modern and very proper public interest in the welfare and health of human beings. We are living in a new age, and old precedents must be discarded where they conflict with present-day social and economic necessities. After all, as early as 1792, when the great English Judge, Lord Kenyon, was sitting as Chief Justice of the King's Bench, he said, in overruling an unbroken line of ancient precedents in contract law:

"The old cases cited by the plaintiff's counsel have been accurately stated; but the determinations in them outrage common sense. I admit the principle on which they profess to go; but I think that the judges misapplied that principle."[15]

And, at the end of his opinion, Lord Kenyon added:

"It is our duty, when we see that principles of law have been misapplied in any case, to overrule it."[16]

If Lord Kenyon's words have any meaning, it is to be hoped that the Supreme Court of Errors will soon overrule its unfortunate decision in *Albrecht v. Rubinstein* and give to mistreated policemen, who, after all, are human beings too, their day in court.

13. *Id.* at 322, 171 N. Y. Supp. at 843.

14. See, Y. B., 9 Hen. VI, 53 (1422); Keilway, 22 Hen. VII, 91 (1485); also, Wallis v. Russell, 2 Ir. R. 611 (1902), if Officer Albrecht should desire Hibernian precedents, as surely a New York policeman would want them.

15. Goodisson v. Nunn, 4 T. R. 761, 100 Eng. Rep. 1288 (K. B. 1792).

16. *Id.* at 764, 100 Eng. Rep. at 1289.