Chapter 13. Implied Warranty of Merchantability

13.1. Introduction. There are ***two implied warranties of quality*** that arise by operation of law: the implied warranty of ***merchantability*** (§ 2-314) and the implied warranty of ***fitness for a particular purpose*** (§ 2-315). By far, the most important warranty implied by operation of law is the warranty of merchantability. Read § 2-314. Note that the warranty is not only given only by a merchant seller, but only by a "merchant with respect to goods of that kind."

> § 2-314. Implied Warranty: Merchantability; Usage of Trade.
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> (1) 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.
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> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promise or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

It's helpful to the review the different categories of merchant in Article 2. *[The following is a repeat of 2.3.2.:]* Under § 2-104(1), a merchant falls into the class of a merchant *as to goods* in one of three ways:

- A person who *deals in goods of the kind*;
- A person who, *by his occupation* (and not by hobby) holds himself out as having knowledge or skill peculiar to the goods involved (for example, an automobile parts dealer, although he doesn't deal in cars, may nonetheless be a merchant as to cars because *by his occupation* he has special knowledge of car parts and car maintenance (see *Fay v. O'Connell*, 1990 Mass. App. Div. 141);
- A person who employs an agent who, *by the agent's occupation*, holds himself out as having knowledge or skill peculiar to the goods involved (see *Swift Freedom Aviation, LLC v. R.H. Aero*, 2005 U.S. Dist. LEXIS 37261 (E.D. Tenn. 2005)).

☑ **Purple Problem 13-1.** Fill in the conditions that must be present to give rise to an implied warranty of merchantability:

(1) There is a contract involving _____;

(2) The seller is a _____; and

(3) There is no valid _____ of the implied warranty of merchantability.

☑ **Purple Problem 13-2.** Jay Celebrity, a city boy, recently bought a ranch in Nevada. Jay enters a farm supply store, and asks the salesman for his recommendation as to which herbicide would control a knapweed infestation that has started in one of his pastures. The farm supply store carries several lines of herbicides; Jay buys the product recommended by the salesman. It kills not only the knapweed, but every green thing in sight (which, it turns out, is what the product is designed to do).

(1) Is there an implied warranty of merchantability?

(2) What if, unbeknownst to Jay, the sales clerk was new, and had little knowledge of herbicides. Does that fact affect the existence of the warranty?

☑ **Purple Problem 13-3.** Joan, a hairdresser by profession, sells her Labrador retriever's first litter of puppies. One of the purchasers asks for Joan's advice in selecting a puppy which would be suitable for show, and the purchaser relies on Joan's recommendations. It turns out that the puppy has hip dysplasia, making it unfit for show purposes. Further, because of the hip dysplasia, the puppy is not suitable for breeding, which is an ordinary purpose for which female puppies are purchased. Is there an implied warranty of merchantability?

☑ **Purple Problem 13-4.** Marilyn enters a grocery store to purchase a bottle of bleach, wearing a very expensive coat. Due to poor packaging, the bleach spills all over her coat and ruins it on her way to the checkout stand. When she brings a claim for breach of the implied warranty of merchantability for inadequate packaging, the store argues that because it had not yet sold her the bleach, there was no contract, there was no seller, and she has no claim. Will the store prevail? See *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979).

13.2. Merchantability Standards. In order to comply with the warranty of merchantability, the goods sold must, ***at a minimum***, meet ***all six*** of the standards set forth at UCC § 2-314(2), to the extent those standards apply. For example, the standard requiring a good to conform to an affirmation of fact on a label would not apply if there is no label. The goods must:

> (a) pass without objection in the trade under the contract description;
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> (b) in the case of fungible goods, such as wheat in a bin, be of fair average quality within the description;
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> (c) be fit for the ordinary purposes for which such goods are used;
>
> (d) run, within the variations permitted by the agreement (including any standards allowed by usage of trade) of even kind, quality and quantity within each unit and among all units involved;
>
> (e) be adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promise or affirmations of fact made on the container or label, if any.

Note: these are minimum standards; additional or higher standards can be established by usage of trade or course of dealing.

13.2.1. The price paid by a consumer may establish a higher standard of merchantability. See the last sentence of Comment 7 to § 2-314, which states:

> In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

For example, a purchaser will expect longer wear and higher quality from a $1,000 coat versus a $100 coat.

13.2.2. A breach of either the implied warranty of merchantability or the implied warranty of fitness for a particular purpose occurs ***at the time of sale***. However, how long a particular good should last is a component of the standard of merchantability. If a particular model of toaster would be objectionable in the trade if it did not work for at least three years, a purchaser can show that the warranty of merchantability was breached at the time of sale if the seller sells a toaster that works only six months.

☑ **Purple Problem 13-5.** For each situation listed below, indicate which (if any) of the six minimum standards above have not been met (more than one may apply):

(1) Ann purchases wine at Liquid Planet. When she uncorks the bottle one week later, there is mold in the wine.

(2) Ann, instead of opening the wine, uses it to prop a door open. The bottle breaks under the door's weight, and the spilled wine damages Ann's carpet.

(3) Carl buys a bag of salt for his water softener. On the way out the door, the bag splits open, causing Carl to slip and fall.

(4) Dan buys three cans of eggshell paint to paint his living room. After he's finished, he notices that the paint from the third can has left the walls slightly (but noticeably) different than the walls painted with the first two cans.

(5) General Milling orders one ton of hard red spring wheat, with a minimum protein content of 15%. When the shipment arrives, a sample testing shows that on average, the protein content is 15%, but some grain has a higher protein content, and some has a lower protein content.?

13.3 Merchantability of Used Goods. The implied warranty of merchantability applies to the sale of ***used goods*** by a merchant who sells goods of that kind. See Comment 3 to § 2-314. However, the standard of merchantability will be less for used goods than for new goods. Even among used goods, a "newer" or "more expensive" used good will have different standards than an "older," "less expensive" used good, as expressed by the court in *Dale v. King Lincoln-Mercury*, 676 P.2d 744, 748 (Kan. 1984):

> A late model, low mileage car, sold at a premium price, is expected to be in far better condition and to last longer than an old, high mileage, "rough" car that is sold for little above scrap value.

Nonetheless, a used car, in order to be merchantable, must be fit for its ordinary purpose of driving, *i.e.*, be in reasonably safe condition and operable.

☑ **Purple Problem 13-6.** Evan buys a used Nintendo game from a local pawn shop for $10. He goes home and puts the game in his Nintendo; it doesn't work. Has the implied warranty of merchantability been breached?

13.4.0. Special Standards of Merchantability for Food. Is the warranty of merchantability breached when a restaurant patron has ordered a bowl of fish chowder, and is seriously injured by a fishbone? Or a patron breaks a tooth on a cherry pit in a cherry pie? How about a patron who breaks a tooth on a bolt contained in an order of mashed potatoes? The early line of cases distinguished between "natural substances" and "foreign substances," but today a majority of courts apply a "reasonable expectations" test, which considers whether the consumer reasonably should have expected to find the injury-causing substance in the object, whether natural or foreign.

13.4.1 Case: *Webster v. Blue Ship Tea Room*

Webster v. Blue Ship Tea Room, Inc.

Supreme Judicial Court of Massachusetts
May 4, 1964

347 Mass. 421, 198 N.E.2d 309, Priscilla D. WEBSTER v. BLUE SHIP TEA ROOM, INC. Argued April 6, 1964. John J. C. Herlihy, Neil L. Lynch, Boston, for defendant. Blair L. Perry, Boston, for plaintiff. Before WILKINS, C. J., and SPALDING, WHITTEMORE, CUTTER and REARDON, JJ. [Note: Footnote material has been reworked into the text without notation. - EEJ, ed.]

PAUL C. REARDON, Justice:

This is a case which by its nature evokes earnest study not only of the law but also of the culinary traditions of the Commonwealth which bear so heavily upon its outcome. It is an action to recover damages for personal injuries sustained by reason of a breach of implied warranty of food served by the defendant in its restaurant. An auditor, whose findings of fact were not to be final, found for the plaintiff. On a retrial in the Superior Court before a judge and jury, in which the plaintiff testified, the jury returned a verdict for her. The defendant is here on exceptions to the refusal of the judge (1) to strike certain portions of the auditor's report, (2) to direct a verdict for the defendant, and (3) to allow the defendant's motion for the entry of a verdict in its favor under leave reserved.

The jury could have found the following facts: On Saturday, April 25, 1959, about 1 P. M., the plaintiff, accompanied by her sister and her aunt, entered the Blue Ship Tea Room operated by the defendant. The group was seated at a table and supplied with menus.

This restaurant, which the plaintiff characterized as 'quaint,' was located in Boston 'on the third floor of an old building on T Wharf which overlooks the ocean.'

The plaintiff, who had been born and brought up in New England (a fact of some consequence), ordered clam chowder and crabmeat salad. Within a few minutes she received tidings to the effect that 'there was no more clam chowder,' whereupon she ordered a cup of fish chowder. Presently, there was set before her 'a small bowl of fish chowder.' She had previously enjoyed a breakfast about 9 A. M. which had given her no difficulty. 'The fish chowder contained haddock, potatoes, milk, water and seasoning. The chowder was milky in color and not clear. The haddock and potatoes were in chunks' (also a fact of consequence). 'She agitated it a little with the spoon and observed that it was a fairly full bowl * * *. It was hot when she got it, but she did not tip it with her spoon because it was hot * * * but stirred it in an up and under motion. She denied that she did this because she was looking for something, but it was rather because she wanted an even distribution of fish and potatoes.' 'She started to eat it, alternating between the chowder and crackers which were on the table with * * * [some] rolls. She ate about 3 or 4 spoonfuls then stopped. She looked at the spoonfuls as she was eating. She saw equal parts of liquid, potato and fish as she spooned it into her mouth. She did not see anything unusual about it. After 3 or 4 spoonfuls she was aware that something had lodged in her throat because she couldn't swallow and couldn't clear her throat by gulping and she could feel it.' This misadventure led to two esophagoscopies at the Massachusetts General Hospital, in the second of which, on April 27, 1959, a fish bone was found and removed. The sequence of events produced injury to the plaintiff which was not insubstantial.

We must decide whether a fish bone lurking in a fish chowder, about the ingredients of which there is no other complaint, constitutes a breach of implied warranty under applicable provisions of the Uniform Commercial Code, the annotations to which are not helpful on this point. As the judge put it in his charge, 'Was the fish chowder fit to be eaten and wholesome? * * * [N]obody is claiming that the fish itself wasn't wholesome. * * * But the bone of contention here – I don't mean that for a pun – but was this fish bone a foreign substance that made the fish chowder unwholesome or not fit to be eaten?'

The plaintiff has vigorously reminded us of the high standards imposed by this court where the sale of food is involved (see *Flynn v. First Natl. Stores Inc.*, 296 Mass. 521, 523, 6 N.E.2d 814) and has made reference to cases involving stones in beans (*Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407, 5

A.L.R. 1100), trichinae in pork (*Holt v. Mann*, 294 Mass. 21, 22, 200 N.E. 403), and to certain other cases, here and elsewhere, serving to bolster her contention of breach of warranty.

The defendant asserts that here was a native New Englander eating fish chowder in a 'quaint' Boston dining place where she had been before; that '[f]ish chowder, as it is served and enjoyed by New Englanders, is a hearty dish, originally designed to satisfy the appetites of our seamen and fishermen'; that '[t]his court knows well that we are not talking of some insipid broth as is customarily served to convalescents.' We are asked to rule in such fashion that no chef is forced 'to reduce the pieces of fish in the chowder to miniscule size in an effort to ascertain if they contained any pieces of bone.' 'In so ruling,' we are told (in the defendant's brief), 'the court will not only uphold its reputation for legal knowledge and acumen, but will, as loyal sons of Massachusetts, save our world-renowned fish chowder from degenerating into an insipid broth containing the mere essence of its former stature as a culinary masterpiece.' Notwithstanding these passionate entreaties we are bound to examine with detachment the nature of fish chowder and what might happen to it under varying interpretations of the Uniform Commercial Code.

Chowder is an ancient dish preëxisting even 'the appetites of our seamen and fishermen.' It was perhaps the common ancestor of the 'more refined cream soups, purées, and bisques.' Berolzheimer, The American Woman's Cook Book (Publisher's Guild Inc., New York, 1941) p. 176. The word 'chowder' comes from the French 'chaudière,' meaning a 'cauldron' or 'pot.' 'In the fishing villages of Brittany * * * 'faire la chaudière' means to supply a cauldron in which is cooked a mess of fish and biscuit with some savoury condiments, a hodge-podge contributed by the fishermen themselves, each of whom in return receives his share of the prepared dish. The Breton fishermen probably carried the custom to Newfoundland, long famous for its chowder, whence it has spread to Nova Scotia, New Brunswick, and New England.' A New English Dictionary (MacMillan and Co., 1893) p. 386. Our literature over the years abounds in references not only to the delights of chowder but also to its manufacture. A namesake of the plaintiff, Daniel Webster, had a recipe for fish chowder which has survived into a number of modern cookbooks and in which the removal of fish bones is not mentioned at all. [For instance:]

> 'Take a cod of ten pounds, well cleaned, leaving on the skin. Cut into pieces one and a half pounds thick, preserving the head whole. Take one and a half pounds of clear, fat salt pork, cut in thin slices. Do the same with twelve potatoes. Take the largest pot you have. Fry out the pork first, then take out the pieces of pork, leaving in the drippings. Add to that three parts of water, a layer of fish, so as to cover the bottom of the pot;

> next a layer of potatoes, then two tablespoons of salt, 1 teaspoon of pepper, then the pork, another layer of fish, and the remainder of the potatoes. Fill the pot with water to cover the ingredients. Put over a good fire. Let the chowder boil twenty-five minutes. When this is done have a quart of boiling milk ready, and ten hard crackers split and dipped in cold water. Add milk and crackers. Let the whole boil five minutes. The chowder is then ready to be first-rate if you have followed the directions. An onion may be added if you like the flavor.' 'This chowder,' he adds, 'is suitable for a large fishing party.'

Wolcott, The Yankee Cook Book (Coward-McCann, Inc., New York City, 1939) p. 9.

One old time recipe recited in the New English Dictionary study defines chowder as 'A dish made of fresh fish (esp. cod) or clams, stewed with slices of pork or bacon, onions, and biscuit. 'Cider and champagne are sometimes added.'' Hawthorne, in The House of the Seven Gables (Allyn and Bacon, Boston, 1957) p. 8, speaks of '[a] codfish of sixty pounds, caught in the bay, [which] had been dissolved into the rich liquid of a chowder.' A chowder variant, cod 'Muddle,' was made in Plymouth in the 1890s by taking 'a three or four pound codfish, head added. Season with salt and pepper and boil in just enough water to keep from burning. When cooked, add milk and piece of butter.' Atwood, Receipts for Cooking Fish (Avery & Doten, Plymouth, 1896) p. 8. The recitation of these ancient formulae suffices to indicate that in the construction of chowders in these parts in other years, worries about fish bones played no role whatsoever. This broad outlook on chowders has persisted in more modern cookbooks. 'The chowder of today is much the same as the old chowder * * *.' The American Woman's Cook Book, supra, p. 176. The all embracing Fannie Farmer states in a portion of her recipe, fish chowder is made with a 'fish skinned, but head and tail left on. Cut off head and tail and remove fish from backbone. Cut fish in 2-inch pieces and set aside. Put head, tail, and backbone broken in pieces, in stewpan; add 2 cups cold water and bring slowly to boiling point * * *.' The liquor thus produced from the bones is added to the balance of the chowder. Farmer, The Boston Cooking School Cook Book (Little Brown Co., 1937) p. 166.

Thus, we consider a dish which for many long years, if well made, has been made generally as outlined above. It is not too much to say that a person sitting down in New England to consume a good New England fish chowder embarks on a gustatory adventure which may entail the removal of some fish bones from his bowl as he proceeds. We are not inclined to tamper with age old recipes by any amendment reflecting the plaintiff's view of the effect of the Uniform Commercial Code upon them. We are aware of the heavy body of

case law involving foreign substances in food, but we sense a strong distinction between them and those relative to unwholesomeness of the food itself, e. g., tainted mackerel (*Smith v. Gerrish*, 256 Mass. 183, 152 N.E. 318), and a fish bone in a fish chowder. Certain Massachusetts cooks might cavil at the ingredients contained in the chowder in this case in that it lacked the heartening lift of salt pork. In any event, we consider that the joys of life in New England include the ready availability of fresh fish chowder. We should be prepared to cope with the hazards of fish bones, the occasional presence of which in chowders is, it seems to us, to be anticipated, and which, in the light of a hallowed tradition, do not impair their fitness or merchantability. While we are bouyed up in this conclusion by *Shapiro v. Hotel Statler Corp.*, 132 F. Supp. 891 (S.D. Cal.), in which the bone which afflicted the plaintiff appeared in 'Hot Barquette of Seafood Mornay,' we know that the United States District Court of Southern California, situated as are we upon a coast, might be expected to share our views. We are most impressed, however, by *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167, where in Ohio, the Midwest, in a case where the plaintiff was injured by a piece of oyster shell in an order of fried oysters, Mr. Justice Taft (now Chief Justice) in a majority opinion held that 'the possible presence of a piece of oyster shell in or attached to an oyster is so well known to anyone who eats oysters that we can say as a matter of law that one who eats oysters can reasonably anticipate and guard against eating such a piece of shell * * *.' (P. 259 of 170 Ohio St., p. 174 of 164 N.E.2d.)

Thus, while we sympathize with the plaintiff who has suffered a peculiarly New England injury, the order must be

Exceptions sustained.

Judgment for the defendant.

13.4.2. The Foreign-Natural Test and the Reasonable-Expectation Test. The following passage from *Schafer v. JLC Food Systems, Inc.*, 695 N.W. 2d 570, 574-75 (Minn. 2005) explains the foreign-natural test and the reasonable-expectation test for food merchantability:

> The bright-line rule set out in the foreign-natural test, which assumes that all substances that are natural to the food in one stage or another of preparation are in fact anticipated by the ordinary consumer in the final product served, has been called into question. For example, in *Betehia v. Cape Cod Corp.,* 10 Wis.2d 323, 103 N.W.2d 64 (1960), a restaurant patron was injured by a chicken bone in a chicken sandwich and sued the

restaurant for breach of implied warranty of fitness and for negligence. *Id.* at 65. The court concluded that it did not logically follow that consumers should expect that every product containing some chicken must as a matter of law occasionally or frequently contain chicken bones or chicken-bone slivers simply because chicken bones were natural to chicken meat. *Id.* at 67. Thus, the court concluded that categorizing a substance as foreign or natural might have some importance in determining the degree of negligence of the processor of food, but it was not determinative of what was unfit or harmful for human consumption. *Id.* The court further concluded that the naturalness of a substance to a food served was important only in determining whether the consumer might reasonably expect to find such substance in the particular type of food served. *Id.*; *see also Ex Parte Morrison's Cafeteria of Montgomery, Inc.*, 431 So.2d 975, 978 (Ala.1983) ("The undesirability of the foreign substance test lies in the artificial application at the initial stage of processing the food without consideration of the expectation of the consumer in the final product served."); *Jackson*, 168 Ill. Dec. 147, 589 N.E.2d at 548-49 (stating that the foreign-natural test was "unsound and should be abandoned"); *Phillips v. Town of West Springfield*, 405 Mass. 411, 540 N.E.2d 1331, 1332-33 (1989) (stating that the foreign-natural test's focus on the product in its natural form failed to recognize that sellers might fairly be held responsible in some instances for natural substances in food that caused injury).

Comparatively, the reasonable expectation test focuses on what is reasonably expected by the consumer in the food product as served, not what might be foreign or natural to the ingredients of that product before preparation. *See Betehia*, 103 N.W.2d at 69. As applied to common-law negligence, the reasonable expectation test is related to the foreseeability of harm on the part of the defendant; that is, the defendant has the duty of ordinary care to eliminate or remove in the preparation of the food served such harmful substance as the consumer of the food, as served, would not ordinarily anticipate and guard against. *Id.* The majority of jurisdictions that have dealt with the defective food products issue have adopted some formulation of the reasonable expectation test. *See* Restatement (Third) of Torts: Products Liability § 7 rep. n. 1 to cmt. b (1998).

☑ **Purple Problem 13-7.** Clark orders a chicken pot pie at his favorite restaurant. He sustains throat injuries when he swallows a one-inch chicken bone contained in the pie. Has the restaurant breached the implied warranty of merchantability

(1) under the natural substances theory?

(2) under the "reasonable expectations" theory?

13.5.0. Merchantability of Inherently Dangerous Goods. Goods that are inherently dangerous, such as knives and strychnine, are nonetheless merchantable as long as they are "fit for the ordinary purposes" for which they are used and otherwise meet the standards of UCC § 2-314. If a hunter injures herself when the handle of a knife falls off while she is using it, she may successfully assert a breach of the implied warranty of merchantability.

13.5.1. Let's pause and talk about the overlap between tort law and contract law as they apply to "inherently dangerous" goods. When the UCC was promulgated in the 1950s, the law of strict liability in tort was developing. In 1964, the American Law Institute adopted the influential Section 402A of the *Restatement (Second) of Torts*, which imposes strict liability on sellers of "defective" goods that are "inherently dangerous." *Comment i* states that "[m]any products cannot possibly be made entirely safe for all consumption," noting that "sugar is a deadly poison to diabetics" and that "good whiskey" is "especially dangerous to alcoholics." Nonetheless, neither sugar nor whiskey are "unreasonably dangerous." In order to be "unreasonably dangerous," a good "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."

13.5.1.1 Frequently, consumers who are injured by a good will bring a contractual breach of warranty claim, as well as negligence and/or strict liability claims under tort law. Recall that a breach of warranty claim is akin to a strict liability claim, in that a showing of fault or negligence is not required in order to prevail.

13.5.1.2 Is a claim for the breach of the implied warranty of merchantability identical to a strict liability claim in tort? This question was certified by the Second Circuit Court of Appeals to the highest court of New York in a case in which the plaintiff sustained injuries resulting from the rollover of her Ford Bronco when she slammed on the brakes to avoid a deer. The jury had determined that the Ford Bronco was not defective, because its narrow track width and high center of gravity were necessary to the vehicle's off-road capabilities, and thus Ford was not liable on plaintiff's strict liability tort claim.

However, the jury found that Ford was liable for breach of the implied warranty of merchantability, because the Bronco was not fit for its ordinary purpose of driving on paved roads. The New York court determined that the two claims are not identical and that the jury's finding of no product defect was reconcilable with its finding of a breach of warranty. *Denny v. Ford Motor Co*., 662 N.E.2d 730 (N.Y. 1995).

13.5.2. What about a product which causes an adverse reaction in a small group of purchasers, such as an after-shave that causes an allergic skin reaction in ten percent of those who use it, or milk that causes an upset stomach to those who are lactose intolerant? The implied warranty will not be breached if only a small number of people relative to the total number of persons using the product suffer an allergic reaction. *Hafner v. Guerlain*, 34 A.D.2d 162 (1970) (less than one percent of purchasers of Shalimar perfume suffered an allergic reaction). With regards to the milk issue, a factor to consider is that milk is a natural product; it is not anything added by the manufacturer which causes the reaction.