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Liability For Damages Resulting From Consumption
Of Deleterious Foodstuffs In Louisiana

A complete picture of the remedies available to a person injured as a result of consuming deleterious foodstuffs has not yet been drawn by the Louisiana courts.¹ There is no doubt that in certain factual situations such a person may recover damages from the manufacturer or preparer of the injurious commodity. There are other situations not yet encountered in the reported cases which might possibly sustain a like result. As yet, Louisiana courts have not allowed the recovery of damages against the retailer of the foodstuff, but again, there are circumstances under which damages might possibly be allowed.

Although the Louisiana courts in their disposition of deleterious foodstuffs cases seldom cite the articles of the Civil Code on redhibitory defects, it is probable that their decisions in this area are rendered with the basic principles of these code articles in mind.² Under these articles, a seller who fails to declare the

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¹ The scope of this Comment is limited to a consideration of Louisiana law. Otherwise, the breadth of the subject would be far too great to be undertaken in a work of this kind. Furthermore, the law of other states, as in Louisiana, is in a state of flux. See Annots., 77 A.L.R.2d 7 (food), 215 (drink) (1961). A classical treatment of the subject is found in Jeanblanc, Manufacturers' Liability to Persons Other Than Their Immediate Vendees, 24 VA. L. REV. 134 (1937). See also Fruemer & Friedman, Products Liability (1961); James, Products Liability, 34 Texas L. Rev. 44, 192 (1955); Koerner, The Beleaguered Citadel of Privity in the Distributive Process of the Sale of Goods, 7 N.Y.L. F. 176 (1961); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L. J. 1099 (1960); Notes, 48 Geo. L.J. 606 (1960), 21 Md. L. Rev. 247 (1961); 2 Vill. L. Rev. 278 (1957); 22 Am. Jur. Food § 94-119 (1939); 36A C.J.S. Food § 57-71 (1961); 77 C.J.S. Sales § 305(b) (3), 331(a) (1952).

² The only case found actually citing the code articles on redhibition was MacLehan v. Loft Candy Stores, 172 So. 367, 369 (La. App. Orl. Cir. 1937): “There is an implied warranty in every sale. The vendor guarantees the vendee against the hidden defects of the thing sold. R.C.C. arts. 1764, 2520 et seq.” The later case of Ogden v. Rosedale Inn, 189 So. 162, 164 (La. App. Orl. Cir. 1939) cited the MacLehan case, but did not mention the articles on redhibitory vices. However, the opinion used the words “latent defects,” thus tending to show that the court had the redhibition articles in mind. The leading case of Doyle v. Fuerst & Kraemer, Ltd., 129 La. 838, 56 So. 906, 40 L.R.A. (N.S.) 480 (1911) (discussed page 435 infra) likewise did not cite these articles. However, later cases involving an application of the articles on redhibition have cited Doyle in support of their finding as though it involved a redhibitory defect. E.g., Tuminello v. Mawby, 220 La. 733, 735, 57 So.2d 606, 608 (1952): “In the [Doyle case], plaintiff instituted an action for damages for a vice in certain goods sold under Article 2545.” (Emphasis added.) ; Daly v. Abramson, 117 So.2d 772, 778 (La. App. 2d Cir. 1959) ; Mohana v. Woodall, 69 So.2d 163, 169 (La. App. 1st Cir. 1953) ; Di Pietro v. LeBlanc, 68 So.2d 156, 159 (La. App. 1st Cir. 1953). Apparently, the French consider the deleterious foodstuff cases to be based on the articles on redhibition. “[I]t is a redhibitory vice for foodstuffs not to be healthful [and] unadulterated.” 11 BEUDANT, COUR DE DROIT CIVIL FRANÇAIS no 256 (1938).
latent defect of the thing sold is liable in an action in redhibition by the buyer should the thing sold prove so unfit that he would not have made the purchase had he known of the defect. In such a case the buyer's obligation is lacking in cause, for he has bought in error and his will is vitiating. The seller who did not know of the defect is bound to restore only the purchase price plus the expenses of the sale. However, a seller who knows of the redhibitory vice of the thing sold, and fails to declare it, must, in addition, pay such damages as were within the contemplation of the parties. Moreover, if the seller knowingly makes a false declaration as to a quality of the thing, his act is treated as fraudulent and damages for all the direct and immediate consequences of the sale are allowable.

See Note, 13 LOUISIANA LAW REVIEW 624, 626 (1953) for a discussion of the French treatment of the subject.

3. LA. CIVIL CODE art. 2522 (1870) : "The buyer can not institute the redhibitory action, on account of the latent defects which the seller has declared to him before or at the time of the sale. . . ."

Id. art. 2521: "Apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices."

Id. art. 2520. This warranty is included in every sale unless expressly excluded. Id. art. 2476; Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So.2d 830 (1955); Nelson v. M. C. M. Truck Lines, 209 La. 382, 25 So.2d 236 (1946). It is necessary that the defect existed at the time of the sale, and the burden of proof is upon the buyer. LA. CIVIL CODE art. 2530 (1870). However, see Comment, 19 LOUISIANA LAW REVIEW 165, 168-69 (1958), for a discussion of the doubtful status of this code requirement as regards burden of proof, in view of the jurisprudence.

4. LA. CIVIL CODE arts. 1824, 1893 (1870). See also Smith, A Refresher Course in Cause, 12 LOUISIANA LAW REVIEW 2 (1951); 11 BEUDANT, COUR DE DROIT CIVIL FRANCAIS n° 280(2) (1938).

5. LA. CIVIL CODE art. 2531 (1870). Compare the penalty imposed upon a party breaching a contract in good faith under id. art. 1934(1). Friedman Iron & Supply Co. v. J. B. Beaird Co., 222 La. 627, 63 So.2d 144 (1953) contains an extensive discussion of damages in this latter circumstance.

The French consider actual damages sustained as part of the expenses of the sale. However, any future profits lost or other anticipated damages do not fall within this rule. Note, 13 LOUISIANA LAW REVIEW 624, 626 (1953).

6. LA. CIVIL CODE art. 2545 (1870).

7. Id. art. 2547. See also id. art. 1934(2). (The French do not treat a false declaration of quality as a redhibitory defect. Instead they handle such problems through "error that gives rise to the action of nullity." 11 BEUDANT, COUR DE DROIT CIVIL FRANCAIS n° 253 (1938)). Should the buyer's declaration of quality be in good faith, while giving rise to the action in redbition if this quality is wanting in the thing sold, only the purchase price and expenses are recoverable since he obviously did not know of the vice of the thing. LA. CIVIL CODE art. 2529 (1870). See note 5 supra.

In connection with the foregoing, it might be noted that the prescriptive period will also be controlled by the seller's knowledge, or lack of knowledge, of the defect. If the seller is in good faith the prescriptive period is one year from the date of the sale. Id. art. 2534. If the seller is in bad faith the prescriptive period is again one year, but it does not commence to run until the discovery of the defect by the buyer. Id. art. 2545. However, should the seller perpetrate fraud upon the buyer, the prescriptive period is ten years. Id. art. 3544.
Recovery Against Manufacturers

From the foregoing it is evident that, in the absence of actual or imputed knowledge of the defect on the part of the vendor, recovery of "damages" from the vendor on a redhibitory defect theory is limited to a return of the purchase price. In keeping with the views expressed by a number of French commentators, the Louisiana courts have created a conclusive presumption that the manufacturer knows of the defects in the things it sells, the rationale being that lack of knowledge on the part of a manufacturer or fabricator is to be equated with fault. This presumption was applied in Doyle v. Fuerst & Kraemer, Ltd., where it was held that a restauranteur is presumed to have knowledge of the defects in the food which he prepares and serves.

9. George v. Shreveport Cotton Oil Co., 114 La. 498, 505, 38 So. 432, 434 (1905): "[A] manufacturer who disposes of the things which he himself has manufactured can properly and legitimately be held presumptively to a knowledge of the qualities of the things he sells." Accord, Templeman Bros. Lumber Co v. Fairbanks, Morse & Co., 129 La. 983, 1002, 57 So. 309, 315 (1911): "The manufacturer of a machine is held to the knowledge of even latent defects. . . . It was its [the defendant's] duty to know it, and it had full opportunity to know it. It must, therefore, be presumed to have known it." Contra, Kodel Radio Corp. v. Shuler, 171 La. 469, 131 So. 462 (1930). But see Tuminello v. Mawby, 220 La. 733, 741, 57 So.2d 666, 669, n. 1 (1952): "[T]here has been some conjecture as to the effect of [the Kodel case] on the [George case]. . . . It is questionable that the Kodel case repudiated or limited the [George case], but if it did, we consider the [George case] sound and would refuse to follow the Kodel case here." Further, the even later case of Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 125, 81 So.2d 830, 833 (1955) cited the Tuminello case as standing for the proposition that the manufacturer is presumed to have knowledge of the vices contained in its product, without even mentioning the Kodel case. It is submitted that the vitality of Kodel insofar as it dealt with presumptive knowledge on the part of a manufacturer is now dissipated.
10. "His unskillfulness or lack of knowledge in all that concerns his art is a fault which is imputed to him, as no one should publicly make profession of an art if he is not possessed of all the knowledge necessary for exercising it well; imperitia culpae annumeratur (incompetency is reckoned a fault). Dig. L. 132, Reg. Juris." Pothier, Venté § 214, as quoted in Doyle v. Fuerst & Kraemer, 129 La. 838, 843, 56 So. 906, 908, 40 L.R.A.(N.S.) 480, 483 (1911). See the additional quotations from the Doyle case, note 12 infra. For a discussion of the policy behind this presumption, see note 42 infra and the text following.
11. 129 La. 838, 56 So. 906, 40 L.R.A.(N.S.) 480 (1911).
12. In the Doyle case, the plaintiff was stricken with ptomaine poisoning after eating cakes and chocolate with whipped cream prepared and served by defendant on its premises. In allowing recovery, the court announced: "The principle which governs in this case is that every one ought to know the qualities, good or bad, of the things which he fabricates in the exercise of the art, craft, or business of which he makes public profession, and that lack of such knowledge is imputed to him as a fault, which makes him liable to the purchaser of his fabrications for the damage resulting from the vices or defects thereof which he did not make known to them and which they were ignorant of." Id. at 840, 56 So. at 907, 40 L.R.A.(N.S.) at 482. Although the clear intent of the Doyle case was to apply the presumption of knowledge only to a preparer of foodstuffs, as evidenced by
the consumer was permitted to recover damages for his physical injuries in addition to a return of the purchase price. Although the Doyle case appears to have been decided on a warranty basis, the jurisprudence dealing with deleterious food and drink in the ensuing forty years is an admixture of tort and contract principles, the tort doctrine of res ipsa loquitur being frequently employed. Then, in 1952, the Louisiana Supreme Court of appeal have loosely used the term “vendor” (MacLehan v. Loft Candy Stores, 172 So. 367 (La. App. Orl. Cir. 1937)) and “seller of foodstuff” (McAvin v. Morrison Cafeteria Co., 85 So.2d 63 (La. App. Orl. Cir. 1956)) when stating the rule of the Doyle case. This may have been caused by the fact that the court in Doyle used the term “vendor” late in its opinion (129 La. 838, 846, 56 So. 906, 909, 40 L.R.A.(N.S.) 480, 484 (1911)) after it had already established that it was dealing with a preparer or fabricator of foodstuffs; or may stem from the fact that the first headnote of the Doyle case (which, incidentally was not prepared by the court), used the words “a seller of food” rather than a “preparer or fabricator of food.” At any rate, no harm was done in either the MacLehan or McAvin cases, supra, since both actually dealt with defendants which manufactured or prepared foods, and it is clear in the opinions of both cases that the court was applying the presumption of knowledge to the defendants because they had themselves fabricated the foodstuffs which caused plaintiffs’ illnesses. Moreover, Lescher v. Atlantic & Pacific Tea Co., 129 So.2d 96, 97 (La. App. 2d Cir. 1961) correctly states the rule of Doyle as applying only to preparers of food, and thus should clear up any confusion in this respect.

13. “When . . . the food proves to be unwholesome the warranty is breached, and he [the defendant preparer-vendor of food] is responsible.” (Emphasis added.) 129 La. 838, 846, 56 So. 906, 909, 40 L.R.A.(N.S.) 480, 484 (1911).

14. In both Colorado Milling & Elevator Co. v. Rapides Grocery Co., 142 So. 626 (La. App. 2d Cir. 1932) and Consolidated Flour Mills Co. v. Di Marco, 136 So. 657 (La. App. 1st Cir. 1931), the court held that there was in the sale of flour an implied warranty that it was fit for human consumption. However, neither case involved injury to a vendee purchasing for personal consumption. Rather, they dealt with large sales of flour for resale purposes and the plaintiffs objected to the qualities of the flour for this purpose. In Costello v. Morrison Cafeteria Co., 135 So. 245 (La. App. Orl. Cir. 1931), the plaintiff, poisoned after eating cream cheese purchased from defendant, attempted, inter alia, to recover on implied warranty. The court pretermitted the question, saying: “Having come to the conclusion that the petition sets forth a cause of action under the doctrine of res ipsa loquitur, there being a general allegation of negligence, it is unnecessary to discuss the issue of whether the petition alleges a cause of action under the law of implied warranty.” Id. at 246. The claim of warranty was again raised in Russo v. Louisiana Coca-Cola Bottling Co., 161 So. 909 (La. App. Orl. Cir. 1935). However, the court decided the case adversely to plaintiff on a question of fact (the evidence made it impossible to believe that plaintiff had actually swallowed two small pieces of glass as she had alleged) and thus did not have to answer the question.

One case, Arndt v. D. H. Holmes Co., 119 So. 91 (La. App. Orl. Cir. 1928), allowed recovery without discussion of the basis of liability, merely citing Doyle as authority. Defendant had virtually admitted liability, and the only real question was as to quantum.

The following cases seem to have been decided on a tort basis by the courts of appeal. Moore v. Louisiana Coca-Cola Bottling Co., 58 So.2d 310 (La. App. Orl. Cir. 1952); Day v. Hammond Coca-Cola Bottling Co., 53 So.2d 447 (La. App. 1st Cir. 1951); Nichols v. Louisiana Coca-Cola Bottling Co., 46 So.2d 695 (La. App. Orl. Cir. 1950); Mayerhefer v. Louisiana Coca-Cola Bottling Co., 45 So.2d 442 (La. App. Orl. Cir. 1950); White v. Coca-Cola Bottling Co., 16 So.2d 579 (La. App. 2d Cir. 1943); Jenkins v. Bogalusa Coca-Cola Bottling Co., 1 So.2d 426 (La. App. 1st Cir. 1941); Hollis v. Ounehita Coca-Cola Bottling
Court, in *LeBlanc v. Louisiana Coca Cola Bottling Co.*,\(^{15}\) allowed recovery of damages to a plaintiff injured by consumption of a bottled soft drink given to her by a neighbor, on the theory that the manufacturer of foodstuffs in sealed or capped containers “by advertisements extolling the quality of its product” had warranted the wholesomeness and fitness for human consumption of its product to the purchasing or consuming public.\(^{16}\) The case reaffirmed the idea that deleterious foodstuffs actions against the manufacturer or preparer should be based on warranty, and extended this warranty to consumers who had not purchased the deleterious material. Justice Hawthorne wrote a strong dissenting opinion in which he pointed out that warranty in the civil law arises only from contract and that no privity existed here...

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\(^{15}\) 221 La. 919, 60 So.2d 873 (1952), 13 Louisiana Law Review 624 (1953), 27 Tul. L. Rev. 369 (1953).

\(^{16}\) *Id.* at 924, 60 So.2d at 874-75. Although the result in *LeBlanc* seems equitable (see page 447, infra), basing the holding on the ground of “warranty by advertising” might present certain problems in future cases. In addition to the question (discussed later in this Comment) of whether a consumer’s right of action is dependent upon the manufacturer’s advertising, it is debatable whether the manufacturer by “advertisements extolling the qualities of its product” intends to advertise the wholesomeness of its product. That a bottled soft drink will not contain a roach is probably assumed even without advertising by the mere fact that it is placed on the market for sale and consumption. Rather it would seem that the purpose and effect of the advertising is to induce the public to partake of the product of one manufacturer over those of others because of superior taste or nutritious qualities. It appears that the court could have accomplished the same result with less objection by saying simply that the manufacturer in placing its product in the channels of commerce for eventual consumption by the public has warranted its wholesomeness and fitness for human consumption.
since the plaintiff was not a purchaser. Be that as it may, the warranty theory of the LeBlanc case appears to be used today by the various courts of appeal, which have abandoned most of their negligence language in handling deleterious foodstuffs cases.

17. In pure legal theory there can be little argument but that Justice Hawthorne is correct in this position. However, it is doubtful that concepts of privity should be, or are being, strictly applied in this area of the law. There appears to be an irreconcilable conflict between the courts, authorities, and law review writers, as pointed out in Arnaud's Restaurant v. Cotter, 212 F.2d 883 (5th Cir. 1954). Professor Murray points out that "this whole concept of an implied warranty against latent defects is now a hybrid of the law of sales and torts." Murray, Implied Warranty Against Latent Defects: A Historical Comparative Law Study, 21 LOUISIANA LAW REVIEW 586, 587 (1961). Another authority feels that "the question is of more academic interest than of practical importance in this particular type of case." Malone, The Work of the Louisiana Supreme Court for the 1952-1953 Term—Torts, 14 LOUISIANA LAW REVIEW 182, 183 (1953). It has been suggested that regardless of the validity of the extension of warranty without privity in LeBlanc, this objection could be overcome "if the warranty was recognized as being merely a warranty imposed by law as a matter of public policy irrespective of agreement." Smith, The Work of the Louisiana Supreme Court for the 1952-1953 Term—Sales, 14 LOUISIANA LAW REVIEW 146, 147 (1953). A very recent decision rendered by a federal district court held that, under the law of Hawaii, privity is not required in a products liability case involving a hula skirt that caught fire. In that case, a donee of the vendee was allowed to recover against the vendor even though no state court had ruled on the issue, the court indicating that it felt privity could be ignored since the majority of jurisdictions do so today Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961). To the same effect, see the recent case of Hamon v. Digliani, 174 A.2d 204 (Conn. 1961). For further discussion of the privity doctrine, see James, Products Liability, 34 TEXAS L. REV. 192, 193 (1956); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960); Koerner, The Beleaguered Citadel of Privity in the Distributive Process of the Sale of Goods, 7 N.Y.L.F. 177 (1961); Note, 21 Md. L. REV. 247 (1961).

18. Lescher v. Great Atlantic & Pacific Tea Co., 129 So.2d 96, 97 (La. App. 2d Cir. 1961) ("recovery by petitioners is conditioned upon a breach of an implied warranty"); Reine v. Baton Rouge Coca-Cola Bottling Co., 126 So.2d 635, 636 (La. App. 1st Cir. 1961) ("The majority opinion [in the LeBlanc case] allowed recovery upon implied warranty . . . [and] it is the law of this State"); Walker v. American Beverage Co., 124 So.2d 157, 160 (La. App. 4th Cir. 1960) ("The law is well-settled that any processor, bottler or packager of food or drink, for human consumption, warrants it to be absolutely free from harmful or deleterious substances."); Miller v. Louisiana Coca-Cola Bottling Co., 70 So.2d 409, 411-12 (La. App. Orl. Cir. 1954) ("The relatively recent case of Le Blanc . . . is apposite and controlling," quoting the passage dealing with warranty by advertisement, already given in the text accompanying note 16 supra); Montz v. Louisiana Coca-Cola Bottling Co., 64 So.2d 805 (La. App. Orl. Cir. 1953). But cf. Morrow v. Bunkie Coca-Cola Bottling Co., 84 So.2d 851, 852 (La. App. 2d Cir. 1956) ("This is an action in tort by plaintiff," citing LeBlanc and affirming the district court's judgment for plaintiff). It is interesting to note that the opinion in the Morrow case, supra, was written by the same judge who rendered the opinion in the Lescher case, supra. In the latter case, the defendant had excepted, inter alia, that plaintiff's petition did not allege actionable negligence. The court, although mentioning this exception, did not discuss it on the merits, but rather noted that plaintiff's "action arises ex contractu," 129 So.2d at 97.

The opinion in Arnaud's Restaurant v. Cotter, 212 F.2d 883 (5th Cir. 1954), the only federal case decided under Louisiana law on deleterious foodstuffs since LeBlanc, contains an excellent discussion of the subject. The court concludes that recovery in Louisiana is today conditioned upon breach of an implied warranty of fitness for human consumption, despite the concurring and dissenting
It should be noted that the facts of LeBlanc limit the holding to actions against the manufacturer\textsuperscript{19} for breach of implied warranty brought only by the consumer\textsuperscript{20} of foodstuffs contained in capped or sealed containers.\textsuperscript{21} The cases prior to LeBlanc had generally followed the doctrine of \textit{res ipsa loquitur}, one requirement of which was that the plaintiff must negate tampering with the container after it leaves the control of the manufacturer.\textsuperscript{22} LeBlanc eliminated this as a requirement for plaintiff to make out his case, and relegated tampering to a defense.\textsuperscript{23}

opinions in the LeBlanc case, and regardless of what may be the law in other jurisdictions.

No Louisiana Supreme Court decision has been found on a deleterious foodstuff case since LeBlanc. However, the following significant dictum is contained in Larkin v. State Farm Mutual Automobile Insurance Co., 233 La. 544, 552, 97 So.2d 389, 392 (1957) ("Nor is a resort to Res Ipsi Loquitur warranted in cases where the existence of negligence is an immaterial issue, such as cases dealing with food and drink for human consumption, since the manufacturer insured his product to be free from taint or impuruous substances.").

19. "[I]t is fair to imply that, since the manufacturer, in marketing its product in capped bottles, intends them to reach the consumer in the same condition in which they leave the factory, a warranty of wholesomeness exists between it and the consumer." (Emphasis added.) 221 La. 919, 925, 60 So.2d 873, 875 (1952).

20. The "exploding bottle" cases are not controlled by the decision in LeBlanc. "The plaintiffs in the explosion cases depend entirely upon the law of negligence for recovery." \textit{Id.} at 926, 60 So.2d at 875.

21. "[T]he defendant company is engaged in the business of distributing its beverages to the public in \textit{sealed containers or capped bottles}." (Emphasis added.) \textit{Id.} at 924, 60 So.2d at 874. Actually, a capped rather than a sealed container was involved in \textit{LeBlanc}, but the majority clearly included a sealed container within the rule announced. Justice LeBlanc, concurring in the result, thought that a distinction should be drawn between sealed and capped containers because of the vulnerability of the latter to tampering. Consequently, he felt that the rule announced by the majority might validly be applied to sealed but not to capped containers.

22. "[U]nder the doctrine of \textit{res ipsa loquitur} there were three requirements placed upon a plaintiff. . . . First, he had to show that the bottle contained a foreign or deleterious substance; second, that he suffered injury for having partaken of some of the beverage, and third, that the bottle had not been tampered with after it left the defendant's possession." LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 910, 931, 60 So.2d 873, 877 (1952) (concurring opinion).

23. "[S]ince proof of tampering by others would provide an avenue of escape from liability, it would seem to be a matter of defense." \textit{Id.} at 925, 60 So.2d at 875. In the First Circuit and Second Circuit Courts of Appeal, this holding overruled a long line of decisions. For cases decided prior to LeBlanc which required the plaintiff to negate tampering, see, \textit{e.g.}, Day v. Hammond Coca Cola Bottling Co., 53 So.2d 447 (La. App. 1st Cir. 1951) and White v. Coca-Cola Bottling Co., 16 So.2d 579 (La. App. 2d Cir. 1943). Compare Reine v. Baton Rouge Coca Cola Bottling Co., 126 So.2d 635 (La. App. 1st Cir. 1961) and Morrow v. Bunkie Coca Cola Bottling Co., 84 So.2d 851 (La. App. 2d Cir. 1956) to ascertain the effect. LeBlanc had in this respect in these courts of appeal. However, the situation in the Orleans Circuit Court of Appeal was one of constant wavering as regards whether plaintiff had to negate tampering or defendant had to prove tampering. Although not altogether clear, it appears that King v. Louisiana Coca-Cola Bottling Co., 151 So. 252 (La. App. Orl. Cir. 1933) required plaintiff to negate tampering. Hill v. Louisiana Coca-Cola Bottling Co., 170 So. 45 (La. App. Orl. Cir. 1936); Dye v. American Beverage Co., 194 So. 438 (La. App. Orl. Cir. 1940); and Mayerhefer v. Louisiana Coca-Cola Bottling
However, the requirements that the plaintiff must prove that the foodstuff was in fact deleterious or impure, and that he partook of it with resulting damages, were retained. In addition, it strengthened the proposition that it is of no avail to the defendant to prove that it used great care and the latest modern equipment in the selection, preparation, and manufacture of its food or drink, or that other customers did not get sick from eating or drinking like items from the same lot.

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24. "[W]here the purchaser of a soft beverage, in a capped bottle, in apparent good condition, proves that the beverage contained unwholesome matter, and that he sustained injury from its consumption, he establishes a prima facie case for the assessment of damages against the bottler." (Emphasis added.) Montz v. Louisiana Coca-Cola Bottling Co., 64 So.2d 805, 807 (La. App. Orl. Cir. 1953).

25. "[T]he consumer must prove that the drink or food caused his illness, not merely make it conjectural." (Emphasis added.) Walker v. American Beverage Co., 124 So.2d 157, 160 (La. App. 4th Cir. 1960).

26. Pre-LeBlanc: Doyle v. Fuerst & Kraemer, Ltd., 129 La. 838, 56 So. 906, 40 L.R.A.(N.S.) 480 (1911); Mayerhefer v. Louisiana Coca-Cola Bottling Co., 45 So.2d 442 (La. App. Orl. Cir. 1950); Ogden v. Rosedale Inn, 189 So. 162, 164 (La. App. Orl. Cir. 1939) ("[proof that defendant used great precaution in manufacturing its product and that other customers did not get sick] cannot of itself, however, be regarded as establishing that the food was in fact wholesome and that it was free from latent defects"); MacLehan v. Loft Candy Stores, 172 So. 367 (La. App. Orl. Cir. 1937); Dean v. Alexandria Coca-Cola Bottling Co., 148 So. 448, 449 (La. App. 2d Cir. 1933) ("If it is impossible for any foreign substance to get in or to remain there while the bottle is going through the washing plant and being filled, it strikes us that it would be unnecessary to have an employee on the pay roll to look for an impossible thing to happen").


Under a theory of implied warranty, rather than negligence, it would seem that the use of due care by the defendant would not exonerate him if the thing sold is in fact defective. He has warranted the wholesomeness of his product to the public and has breached this warranty by placing a defective product on the market. See Murray, Implied Warranty Against Latent Defects: A Historical Comparative Law Study, 21 LOUISIANA LAW REVIEW 586, 587 (1961): "[T]ort liability is usually based upon some aspect of 'fault,' while in a breach of warranty case the questions of negligence, due care and fault are irrelevant.

27. Pre-LeBlanc: Mayerhefer v. Louisiana Coca-Cola Bottling Co., 45 So.2d 442 (La. App. Orl. Cir. 1950); Ogden v. Rosedale Inn, 189 So. 162, 164 (La. App. Orl. Cir. 1939) (see quotation from Ogden case, note 26, supra); MacLehan
Though no Louisiana cases were found on the point, it seems that the conclusive presumption of knowledge rule should also apply to meat packers and fruit or vegetable canners. This is so because these parties are in control of the product during the processing stage, and so able to discover defects and prevent the sale of the defective foodstuff. These are essentially the same basic factors upon which the rule with respect to manufacturers and preparers is grounded.28

At least two interesting questions concerning the right of action of a consumer against the manufacturer when the injurious foodstuff has been purchased from a retailer have not yet been answered by the Louisiana jurisprudence: whether such a right of action is contingent upon advertising by the manufacturer where the consumer has purchased the commodity; and, whether the foodstuff must have been contained in a sealed or capped container in order to relieve a plaintiff of the burden of negating tampering.29


Post-LeBlanc: McAvin v. Morrison Cafeteria Co., 85 So.2d 63, 65 (La. App. Orl. Cir. 1956) (“plaintiff carried only the burden of proving that the food which was served to her was deleterious and caused her illness, and we know of no law which would place an additional burden on her of showing that other persons had become ill from eating the shrimp salad”).

Contra: Lee v. Smith, 168 So. 727, 729 (La. App. 1st Cir. 1936) (“one of the first thoughts which occurs to us is, Why should the food partaken of by [plaintiff], which she claims made her so violently sick, and which was the very same food eaten by [her two companions], not have had some distressing effect, at least, on these other two ladies?”). Of course, the fact that others were also stricken ill will be of some aid to plaintiff’s cause, e.g., Doyle v. Fuerst & Kraemer, Ltd., 129 La. 838, 56 So. 906, 40 L.R.A. (N.S.) 480 (1911); Ogden v. Rosedale Inn, 189 So. 162 (La. App. Orl. Cir. 1939). Moreover, as said in the latter case, “this type of evidence [proof that defendant used great precaution in manufacturing its product and that other customers did not get sick] is always of great value in assisting the court in the determination of the genuineness of a plaintiff’s claim and it must be weighed against the plaintiff’s evidence.” Id. at 164.

28. These factors are discussed in greater detail at page 447 infra.

29. Where the deleterious foodstuff was purchased directly from the manufacturer, neither question would arise. Since there is no middleman, the manufacturer has had control over the foodstuff at all times, and the burden of proving or disproving tampering is not a problem. Again, if the consumer has purchased the foodstuff from the manufacturer, advertising or the lack of it is not an issue. Here, the articles of the Code on redhibition, considered in conjunction with the presumed knowledge doctrine, should fully cover the situation.

Another question, not meriting textual consideration, concerns the right of action of a consumer who had not purchased the injurious foodstuffs against a manufacturer who did not advertise its product. An attempt to answer this question entails a discussion of certain jurisprudential trends. Even prior to LeBlanc consumers who had not purchased the injurious foodstuff were allowed an action against the manufacturer on a tort basis. In Laborde v. Louisiana Coca-Cola Bottling Co., 15 So.2d 389 (La. App. Orl. Cir. 1943) recovery was allowed in such a case when the foodstuff had been purchased from a middleman. In Arndt v. D. H. Holmes Co., 119 So. 91 (La. App. Orl. Cir. 1928) a
As to the former question, presumably the *LeBlanc* case would be inapplicable since it dealt with the warranty of an advertising manufacturer. Nevertheless, it is suggested that a non-purchasing consumer was allowed to recover for damages caused by deleterious foodstuffs which had been purchased by another directly from the preparer. Plaintiffs were denied recovery on the facts in *Moore v. Louisiana Coca-Cola Bottling Co.*, 58 So.2d 310 (La. App. Orl. Cir. 1952) and *Kohlman v. Jefferson Bottling Co.*, 192 So. 113 (La. App. Orl. Cir. 1939), both concerning sales from a middleman; however, in neither case was it even discussed that plaintiffs had not purchased the foodstuffs. Why then did the Supreme Court in *LeBlanc* resort to "warranty by advertising" to justify recovery by a non-purchasing consumer against the manufacturer? Before attempting to answer this question, the troublesome problem of who should prove or disprove tampering which had been bothering the Louisiana courts prior to *LeBlanc* (discussed in notes 22 and 23 supra and their accompanying text) must be recalled to the reader's attention. As has been seen, although there had been deviations in the actual application of it, a strict adherence to the theory of the tort doctrine of res ipsa loquitur required that the plaintiff prove that there had been no tampering with the foodstuff after it had left the control of the manufacturer. If this requirement were strictly adhered to, it would almost always prevent recovery of damages by the plaintiff. Whereas, under a contractual basis of recovery, no such requirement is theoretically present. Consequently, it is suggested that the Supreme Court desired to return to warranty as the basis of recovery in order to escape the requirement of the tort doctrine of res ipsa loquitur that the plaintiff must prove lack of tampering while the product was in the control of the retailer. The use of a warranty doctrine would thus facilitate the placing of ultimate responsibility on the manufacturer of the deleterious foodstuff, where equitably it appears to belong. However, under a warranty theory of recovery the problem of "privity" would present itself, especially where the consumer had not himself purchased the foodstuff from the retailer; in such a case the plaintiff would have no contractual relations whatsoever with the defendant. This could be overcome by holding that the manufacturer "by advertisement extolling the virtues of its product" had warranted the wholesomeness of it to the consuming public. The facts of *LeBlanc* presented the court with a perfect situation in which to apply both aspects of its new theory of recovery in the deleterious foodstuffs cases. "Warranty" overcame the problem of disproving tampering under res ipsa loquitur; and since plaintiff was a consumer who was not also a purchaser, "warranty by advertising" overcame the lack of contractual relationship between plaintiff and defendant. This result leads naturally to the question, "What if plaintiff in *LeBlanc* had been a purchaser?" It is felt that the decision would still have been rendered on the ground of "warranty by advertising" in order to alleviate any anxiety that the court intended to preclude a non-purchasing consumer from its new warranty theory of recovery. This view is strengthened in that the majority opinion in *LeBlanc* did not elaborate on the fact that plaintiff was not a purchaser. The next question that arises is, "What if there is no advertising by the manufacturers?" Since the use of advertising by the manufacturer provides the court with at least some ground on which to place warranty, however small, it is felt that advertising would still be a prerequisite for the recovery of damages against the manufacturer in the case of a plaintiff who was merely a consumer and *not a purchaser*. Although the court indicated in *LeBlanc* that warranty is the proper basis upon which to proceed in the deleterious foodstuffs cases, it could be argued that recovery in tort is not completely ruled out, and thus a consumer in such a case might recover under a negligence theory. Of course, plaintiff's old nemesis, proof of lack of tampering, would then enter the picture, and presumably he would have to bear that burden. It seems anomalous to say that the burden of proving or disproving tampering should depend on whether or not the manufacturer has advertised its product, for there appears to be no connection between the two. Yet, this is one of the results that the present status of the law in this area leads to, at least until more decisions are rendered which clarify it.
theory of recovery could be predicated on subrogation. Article 2503 of the Louisiana Civil Code provides, in part, that "whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty against all others." Although this article is found in the section dealing with the warranty against eviction, the Louisiana Supreme Court has indicated it would be applicable as well to the warranty against redhibition. If this be so, then the consumer who purchased from the retailer could sue the manufacturer on the theory that he is subrogated to his vendor's rights against all others, which, of course, would include the manufacturer. The problem then is just what are the rights of the retailer to which the purchaser is subrogated, for a subrogee's rights can rise no higher than those of his subrogor. Since in the nature of things the vendor-retailer will not normally suffer physical ill effects from the impure foodstuff, it would seem that if the defect were in some way discovered before sale to the public, the retailer's only remedy would be to recover the purchase price paid for the item, plus damages for loss of the re-sale of the defective item, i.e., the difference between the wholesale price and retail market price. If this is the only right to which the purchaser is subrogated, he is in no better position than if he had sued the retailer for a return of the retail purchase price in the first instance. On the other hand, it is arguable that the right to which the purchaser is subrogated is the right the retailer would have had if he had himself consumed the foodstuff with resulting sickness. That is to say, if the retailer has a right in warranty against a manufacturer on the basis of fault he could not recover without showing damage or injury. Yet, the right would still

30. LA. CIVIL CODE art. 2503 (1870).
32. McEachern v. Plauche Lumber & Construction Co., 220 La. 696, 57 So.2d 405 (1952). The suit was not for the recovery of damages, but was an action quanti minoris for diminution of the purchase price. Plaintiff sued his vendor and joined his vendor's vendor, endeavoring to obtain a solidary judgment. Plaintiff's vendor called his vendor in warranty. The trial court awarded judgment in favor of plaintiff against his immediate vendor only, and in favor of the latter against the original vendor on the call in warranty. On appeal, the judgment was amended as to quantum and affirmed, the Supreme Court saying: "We concur in the ruling of the trial judge that although the buyer is subrogated to the seller's right to action in warranty against all others, Article 2530, Civil Code, he is not given a solidary action against all previous vendors; and therefore the plaintiff, having chosen to sue his vendor, has no right to an action in solido against the [original vendor]." Id. at 707, 57 So.2d at 408.
34. Friedman Iron & Supply Co. v. J. B. Beaird Co., 222 La. 627, 63 So.2d 144 (1953).
exist. Consequently, if the purchaser acquires by subrogation this inchoate right of action in warranty and can show injury, he should recover damages against the manufacturer who is conclusively presumed to have knowledge of the defects in its products. Though no case was found touching the subject, it is suggested that a court could properly allow damages to a retail purchaser against a non-advertising manufacturer by use of subrogation.

Where suit against the manufacturer is brought by a party injured as a result of consuming deleterious foodstuffs which have been purchased from a middleman, and which were either exposed or in non-sealed or non-capped containers, the difficult problem of who should prove or negate tampering is presented.

35. Some support for this position may be gleaned by again resorting to the warranty against eviction by analogy. Assuming the conditions requisite to the recovery of damages in addition to the purchase price have been fulfilled, the following is illustrative of this analogy. If A sold to B a tract of land which B subsequently sold to C, and C were evicted by X, whose right to the land existed at the time of the sale from A to B, it could hardly be doubted that C (the subrogee) would have a cause of action in warranty against A by virtue of the 1924 amendment to Article 2503 of the Civil Code. Yet, B (the subrogor) has never been evicted and thus has suffered no damage, just as the retailer in our deleterious foodstuffs case did not consume the poisoned food and consequently received no damage. The possible flaw in this reasoning, however, is that unlike the foodstuff case, C could have chosen to sue the immediate vendor, B, rather than the remote vendor, A. Therefore, allowing C an action in warranty against A merely eliminates an unnecessary step in the juristic process. Moreover, if C were to choose to sue B, and B were mulcted in damages in this action, he would of course have suffered damages. Whereas, if C were the second vendee in a deleterious foodstuff case, he would have no cause of action for damages against his immediate vendor, B, if the latter were an unknowing, non-manufacturing, retailer. Thus, there is no superfluous lawsuit to eliminate, and B is in no danger of being mulcted in damages in an action by C if C is not allowed to sue A directly. Another factor militating against the subrogation theory is that damages in such a case might be considered purely speculative insofar as the retailer is concerned (it is his right which the purchaser is seeking to enforce) and the Louisiana courts have demonstrated a marked reluctance to allow speculative damages. See, e.g., Tidwell v. Meyer Bros., 160 La. 778, 107 So. 571 (1926); Scheinuk The Florist, Inc. v. Southern Bell Telephone & Telegraph Co., 128 So.2d 683 (La. App. 4th Cir. 1961), and cases cited therein at 685.

36. The foregoing subrogation argument would not seem to be valid in the case of a non-purchasing consumer inasmuch as Article 2503 of the Civil Code specifically provides that the “buyer” shall become subrogated to the vendor’s actions in warranty. An argument that the consumer is the third party beneficiary of a stipulation pour autrui between the vendor and vendee under LA. CIVIL CODE arts. 1890, 1902 (1870) seems too attenuated to merit serious consideration. This is especially so in the face of the reluctance with which the Louisiana courts have been willing to apply and extend these articles of the Civil Code. See Smith, Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui, 11 Tul. L. Rev. 18 (1936).

37. The same problem with respect to tampering and who shall bear its burden of proof will be present irrespective of whether the consumer has or has not also purchased the foodstuff from the retailer. There is no logical relationship between the inquiries of whether the foodstuff has been tampered with and
Although *LeBlanc* has relieved the plaintiff of the burden of
negating tampering in the case of sealed or capped containers,
it is doubtful that the courts would be willing to go so far as to
similarly favor plaintiff in the case of containers that can be
opened and closed at will without detection. The opportunity to
tamper seems to be too great. In these cases the manufacturer
has lost control over the product and should not be held to have
insured its wholesomeness other than that it will be safe when
delivered to the middleman and will so remain unless tampered
with.

*Recovery Against Retailers*

The recent case of *Lescher v. Atlantic & Pacific Tea Co.* involved an unsuccessful attempt by a consumer who purchased a
can of deteriorated peas to recover damages from his retail
vendor. The court held that a retailer, who is not also a manu-
facturer, of food products in sealed containers is not liable to
his vendee for breach of implied warranty as to the wholesome-
ness of the products sold in the absence of knowledge of the dele-
terious conditions of the product. The result reached in the *Les-
cher* case is in accord with both the statutory law and jurispru-
dence in this field and was not an unexpected one. It does,

whether the plaintiff purchased or was given the foodstuff. The *difference, how-
ever, is in whether the plaintiff will be allowed to maintain the action in the first
place, i.e., regardless of whether or not the foodstuff has been tampered with,
does this plaintiff have a right of action against the manufacturer. Assuming
that the manufacturer has advertised the virtues of its product, which is not
contained in a sealed or capped container, the question arises as to whether or
not the court will apply the *LeBlanc* doctrine. That is, can the “warranty by
advertising” rule be invoked only where the manufacturer’s product is contained
in a sealed or capped container? The following language of the court in the
*LeBlanc* case indicates an affirmative answer: “[I]t is fair to imply that, since
the manufacturer, in marketing its product in capped bottles, intends them to
reach the consumer in the same condition in which they leave the factory, a
warranty of wholesomeness exists between it and the consumer.” 221 La. 919,
925, 60 So.2d 873, 875 (1952). This emphasis on the container being sealed or
capped runs throughout the majority opinion. If the court accepts the subroga-
tion argument previously suggested, a purchaser injured by consuming deleterious
foodstuffs would have his right of action regardless of the type, or lack, of
container. But a consumer who did not purchase the foodstuff might well find
himself without a warranty theory on which to proceed.

38. 129 So.2d 96 (La. App. 2d Cir. 1961).
39. In order to allow recovery in this case against the retailer the court of
appeal would have had to extend the *LeBlanc* rule which runs only to manufac-
turers. And this the court was unwilling to do. “We are urged to rule, as has
been done in several other state jurisdictions, that a retail vendor of such food
products impliedly warrants the contents of the sealed containers do not contain
food that is unwholesome or unfit for human consumption.” “Such pronounce-
ments are fundamentally based on a rule of public policy, which in the absence
of legislative support would have no appropriate effect in our civil law state.”
however, raise the question of when may a non-manufacturing retailer be held liable in damages to a consumer in a deleterious foodstuffs case. It seems clear that such a retailer could be held if it sold food known to be defective. Beyond this, recovery against such a retailer would seem plausible where the retailer places its own label on the goods in lieu of a label by the actual manufacturer. By such action the retailer has made it impossible for the purchasing public to apprise itself of the manufacturer's identity, and instead is reasonably led to believe that the retailer is the manufacturer of the product. It would seem that the retailer is, in effect, substituting itself for the manufacturer and has assumed, at least overtly, responsibility for the proper control of the product during the manufacturing process. A court could well take the view that by adopting the action of the manufacturer as its own, the retailer will be held to a presumptive knowledge of any defects in the product. The problem of


40. No case could be found directly on this point. However, such a case would clearly fall within the articles of the Civil Code on redhibitory vices. LA. CIVIL CODE art. 2520 et seq. (1870). These articles are discussed in notes 3-7 supra, and their accompanying text.

41. Although the case did not deal with consumption of a deleterious foodstuff, Henderson v. Leona Rice Milling Co., 160 La. 597, 107 So. 459 (1926) would seem to lend considerable support to this view. In that case, plaintiff, the purchaser, had ordered 80 sacks of pure Honduras rice from defendant, the vendor. It developed that plaintiff received instead 80 sacks of mixed Honduras, Carolina, and Red rice. Because of certain issues not pertinent here, in order for plaintiff to succeed in his action for damages it was necessary that the defendant have had knowledge of the mistake in the shipment of rice; and since it seems there was no proof of actual knowledge on the part of the defendant, it was necessary that knowledge be found presumptively. Note that nowhere in the opinion is it said that defendant was a “manufacturer” (which in this case would probably mean a grower or planter) of the rice. Nevertheless, the court said “the defendant company were dealers in rice with a long and extended experience in the purchase and sale of that commodity and possessed technical knowledge of the various grades of rice and knew the difference between Honduras and Carolina rice.” “The plaintiff was inexperienced as a rice grower . . . and necessarily had to rely on the good faith and the expert knowledge of the defendant company . . . . In these circumstances it must be assumed that defendant knew, and it must be held to have known, that the rice shipped to the plaintiff was not the rice purchased by him . . . . As parties hold themselves out to a purchaser, or permit this to be done, so will they be bound on their contracts.” (Emphasis added.) Id. at 601, 107 So. at 460. Although not presenting as clear an analogy as the Henderson case, Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So.2d 830 (1955) might also be cited in support of this view. That case stands for the proposition that a manufacturer who puts a finished or complete product on the market as his own is presumed to know any and all defects in the product, notwithstanding that the defect complained of occurred in a component or part that it had not fabricated but rather had purchased from another manufacturer and installed in the completed product. The result of this presumption was that plaintiff was allowed to recover, in damages, the profit it would have made from a resale of the defective product. The court said that “the question of defendant’s actual knowledge of the defects is unimportant. It was the
tampering is not present in this situation since there is no middleman between the retailer and the purchaser. Consequently, no distinction need be drawn between sealed and unsealed containers.

Policy Considerations and Suggestions

The policy behind holding the manufacturer, but not a mere retailer, liable in the deleterious foodstuffs cases seems to be sound. The conclusive presumption of knowledge is based on the premise that the manufacturer in holding itself out as one skilled in its trade has represented that its product is not defective, and that the public has relied on this representation; it is supposed to know and will be held to have known. More important, responsibility may thereby be placed on the party in control of the purity of the foodstuff during the stage when the deleterious condition generally occurs. The manufacturer is in the best position to know and discover the defect in its product and to remove the defect from the product or the product from the market.

manufacturer of the air-conditioning units, and is therefore presumed to have known of the vices therein. Hence, the trial judge properly allowed recovery of lost profits. "We are not impressed by defense counsel's suggestion that, since the defective motors contained in the air-conditioners were not manufactured by defendant, the latter should not be held for the profits lost by plaintiff as a result of the breach of the warranty of fitness. Plaintiff is the manufacturer of the air-conditioning units and liable, as such, under the law, even though the units assembled by it contained parts which were fabricated by other concerns." Id. at 125, 81 So.2d at 833. Of course, we are here dealing with a manufacturer pure and simple, even if just the manufacturer of the finished product. But, the basis of the holding may be that this defendant has led the purchaser to reasonably believe that it is the manufacturer of the whole and will be held as if it were.

To effectuate this result, a variation of the LeBlanc rule could also be used, i.e., by placing the product on its shelves with its own labels on the containers, the retailer has advertised the product as its own, and has warranted its wholesomeness and fitness for human consumption to its customers.

In accord with the statement in the text concerning the propriety of a court's taking this view toward the retailer of foodstuffs is 36A C.J.S. Food § 914 (1961), wherein the author says: "One who puts out as his own an article of food manufactured by another is subject to the same liability as though he were its manufacturer." Cited in support of this are: Swift & Co. v. Blackwell, 84 F.2d 130 (4th Cir. 1936); Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385, 90 A.L.R. 1260 (1932); Slavin v. Francis H. Leggett & Co., 114 N.J. 421, 177 Atl. 120 (1935); Walker v. Great Atlantic & Pacific Tea Co., 131 Tex. 57, 112 S.W.2d 170 (1938).

42. Albeit this presumption is open to criticism in the light of a literal reading of the Civil Code wherein knowledge, not presumed knowledge, is required as a prerequisite for the recovery of damages, it is the present practice of the courts to apply it, and there is no indication that this practice will cease. Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So.2d 830 (1955); Daly v. Abramson, 117 So.2d 772 (La. App. 2d Cir. 1959); Johnson v. Hunter, 88 So.2d 467 (La. App. 2d Cir. 1956).

43. This fact has been recognized in at least one case. Auzenne v. Gulf Public Service Co., 181 So. 54, 56 (La. App. 1st Cir. 1938) ("[T]he manufacturer . . .
If it fails to do this it is in fact responsible for the ultimate damage to the plaintiff. With respect to retailers none of these considerations appears to be present, except where the product is labelled as its own. The retailer, handling varied and numerous items of food and drink can hardly be expected to vouch for the wholesomeness of each. It normally has no control over the wholesomeness of the product for it has taken no part either in the selection of the raw materials or in the preparation of the finished product. Moreover, for these same reasons, the preventive factor does not seem to be a controlling consideration here as in the case of the manufacturer.\[44\] [is] in a better position to know the condition of the product manufactured and sold than the consumer.

Moreover, placing the loss on the manufacturer is likely to conduce it to use greater diligence to prevent a recurrence of such defects in its product. This would seem to follow despite the fact that the financial burden imposed by the actual damages awarded in a lawsuit may be lessened by liability insurance. In addition to the possibility of its insurance rates being increased or perhaps its even being uninsurable, the adverse publicity resulting from a lawsuit for defects contained in its product could hardly be welcomed by the manufacturer.

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44. There are circumstances wherein it might be said that the retailer is instrumental in controlling the wholesomeness of the foodstuff. Should it be proved that an exposed foodstuff was delivered by the manufacturer to the retailer in a wholesome state, but has subsequently become deleterious through the fault of the latter, it is submitted that an action in warranty should be allowed the purchaser against the retailer. The retailer could be held to warrant the wholesomeness of a product sold by it when the circumstances are such that it is in control of the wholesomeness of the foodstuff, and a lack of care on its part will result in contamination or spoilation of the foodstuff. Examples of such a situation might be a vegetable that has become contaminated by improper handling with insanitary implements or unclean hands, and meat that is improperly preserved. In fact, this proposed warranty of wholesomeness by virtue of proper care might be applicable even in the case of sealed or packaged containers containing frozen foodstuffs. Should a retailer allow a frozen food to thaw and be refrozen, it would seem that it has breached its warranty (if it is held that there is one) that the foodstuffs which it offers for sale have been properly cared for since the reception of the foodstuff in good condition from the manufacturer.

45. It might be said that the retailer could prevent a recurrence of the injury by refusing to buy from a particular manufacturer again, after it has once been cast in damages to a purchaser by reason of a defect contained in a product it has purchased from that manufacturer, and consequently that the manufacturer will be more resourceful in assuring that its product is wholesome in order to forestall this loss of business. However, this is certainly a heavy burden to make the blameless retailer bear, especially if the retailer is a "small corner grocer," in which case also the fear of losing its business would probably be no great deterrent to the manufacturer. Of course, allowing recovery against the retailer for damages notwithstanding that it neither knows of the defect nor is the manufacturer of the product does not have to result in final liability resting on the retailer. The retailer cast in damages in such a case, even under existing law, would have an action in warranty against the manufacturer. Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So.2d 830 (1955) (plaintiff, a dealer in air-conditioning units, allowed to recover damages from manufacturer of units purchased by it to extent that plaintiff had been cast in prior suit by sub-vendees of the units). Or the retailer could call in its warrantor by use of the "Demand Against Third Party." LA. CODE OF CIVIL PROCEDURE art. 1111 et seq. (1961) (This is the old "call in warranty." For a recent example of this procedure prior to the adoption of the new Code of Civil Procedure, see McEachern v.
Although the Louisiana courts have thus far rendered just and equitable results in their empirical development of the rules governing recovery of damages in the deleterious foodstuffs cases, it is suggested that a legislative enactment would be the best solution to the problems presented in this area of the law. Such a statute would prevent inequitable results which might occur under existing jurisprudence. For instance, a non-purchasing consumer apparently has no action in warranty against a non-advertising manufacturer who had actual knowledge of the defect contained in its product, while the same consumer could have such an action even though the manufacturer has only implied knowledge if the latter had advertised its product. The statute would also solve the perplexing question which has bothered both courts and writers of whether recovery in the deleterious foodstuffs cases lies in contract or tort. That is, it would lie in neither absolutely but would be a form of strict liability imposed by statute for policy reasons. The current confusing distinctions between advertising and non-advertising manufacturers, purchasing and non-purchasing consumers, and, for the most part, sealed and non-sealed containers, could be abandoned. Most important, it would assure that an injured party is made whole for his loss by allowing him recovery of damages against the party in control of the wholesomeness of Plauche Lumber & Construction Co., 220 La. 696, 57 So.2d 405 (1952). The facts of this case are briefed in note 32 supra.) This would not seem objectionable inasmuch as ultimate liability would rest on the manufacturer, the party most to blame. However, this again seems a harsh method, for the retailer would be involved in costly litigation through little fault of its own, and it seems an unnecessary step to have the retailer involved. In a case such as this, it would seem a court would find some way in which to hold the manufacturer liable for damages, since it is so obviously a wrongdoer. The most probable course would be in tort; perhaps even on an intentional tort basis rather than negligence, for the manufacturer could be held to have intended the natural consequences of its act of knowingly and wilfully placing a defective product on the market. The result would be the same, but a statute covering the situation would place recovery in the same category in all cases, not tort in some and contract in others. As a result, legal theory is usually emasculated in allowing recovery, regardless of its basis. For instance, since the LeBlanc case the action is said to arise ex contractu. However, in a LeBlanc type situation where the plaintiff is not a purchaser, the problem of "privity of contract" is immediately encountered. Further, if tort is said to still be the basis of recovery, then the tort doctrine or res ipsa loquitur is used in an adulterated form since proof of non-tampering by the plaintiff is eliminated, and shifted to the defendant instead is proof of tampering. The earlier cases, which are supposed to be based on tort, seem hardly less incongruous. Recovery in tort on a negligence theory is based on the care of the reasonably prudent man—due care. Yet, even due care was generally not enough in these cases, or if it was, the standard of care was so high that it was virtually unattainable.
the foodstuff and therefore is most responsible for, and able to prevent, the damage.

Conclusion

It is well settled that a person injured as a result of consuming deleterious foodstuffs has an action for damages against the manufacturer or preparer of the foodstuff from whom he purchased the commodity.\textsuperscript{48} Even if the foodstuff was purchased from a middleman it has been held that the consumer, whether the purchaser or his donee, may recover damages against the manufacturer provided the manufacturer advertised the virtues of the product and the foodstuff was contained in a sealed or capped container.\textsuperscript{49} It appears also that an injured consumer would have an action for damages against a non-manufacturing retailer from whom he purchased the injurious foodstuff if the retailer had actual knowledge of its defectiveness,\textsuperscript{50} but not otherwise.\textsuperscript{51} This much may be said definitively about the present state of Louisiana deleterious foodstuffs law. Beyond these situations the rules are not clear and have yet to be worked out. The extensions in allowing recovery for damages developed by the courts thus far seem to be sound from a policy standpoint, if not in strict legal theory, inasmuch as ultimate liability is placed on the party most likely responsible for the damages suffered and best able to prevent them, \textit{i.e.}, the manufacturer in control of the wholesomeness of the foodstuff at the time the deleterious condition arose. Unfortunately, however just this result may be, the present state of the law tends to confuse legal theory, and several areas have yet to be defined. Action of the legislature could remove these objections. Consequently it is submitted that a statute be passed allowing a consumer a cause of action for all immediate damages flowing from his partaking of a deleterious foodstuff, directly against the manufacturer thereof, \textit{without regard} to whether the manufacturer is the immediate vendor of the plaintiff, whether it has actual or implied


\textsuperscript{50} LA. CIVIL CODE art. 2520 \textit{et seq.} (1870).

\textsuperscript{51} Lescher v. Great Atlantic & Pacific Tea Co., 129 So.2d 96 (La. App. 2d Cir. 1961)
knowledge of the defect, and whether it has or has not adver-
tised its product. Meat packers and canners of fruit and vege-
tables should be considered manufacturers for this purpose. The
distinction between foodstuff in sealed or capped containers and
foodstuff not so contained when a middleman is involved could
be handled by a distinction in the burden of proof. In the former
case the manufacturer should have to prove tampering, whereas
in the latter case, the consumer should be required to prove non-
tampering. In cases where a retailer has labelled foodstuff
manufactured by another as its own, the plaintiff should have a
choice of suing either the retailer or the manufacturer.

Andrew J. S. Jumonville

Status Of Marital Settlements: Gifts Or Bargaining
Transactions

The gift tax section of the Internal Revenue Code provides
that a taxable gift is any complete and irrevocable transfer to
another, whether in trust or otherwise, to the extent that such
transfer is not supported by adequate consideration:

"Where property is transferred for less than an adequate
and full consideration in money or money's worth, then the
amount by which the value of the property exceeds the value
of the consideration shall be deemed a gift."

In the typical settlement the husband transfers money or prop-
erty in exchange for his wife's relinquishment of marital rights
which have accrued or will accrue. Accordingly, the applicabil-
ity of the gift tax to a marital transfer will depend upon whether
the relinquishment of marital rights constitutes adequate and
full consideration in money or money's worth.

Income tax is imposed on gain derived from capital, labor
or both combined, and includes profit from the sale or exchange
of capital assets. The applicability of the income tax provisions
is of importance both at the time of the transfer to the wife and
upon the subsequent sale of the property by the wife. If the

1. INT. REV. CODE OF 1954, § 2512(b).
2. Perhaps there are situations where a wife might transfer property in ex-
change for her husband’s marital rights, but for purposes of discussion the typical
situation will be assumed throughout this Comment.