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Henri Niemann et al v. Grand Central Market, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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HENRI NIEMANN, MARIA NIE-
MANN, RENATE NIEMANN, by
her guardian ad litem, Henri Niemann,
and HENRI NIEMANN, JR. by his
guardian ad litem, Henri Niemann,

Clerk, Supreme Court, Utah

Plaintiffs and Respondents,

Case No. 8670

-vs-

GRAND CENTRAL MARKET, INC.
a corporation,

Defendant and Appellant.

BRIEF OF APPELLANT

RAY, QUINNEY & NEBEKER
GRANT C. AADNESEN

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and Appellant*

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BRIEF OF APPELLANT

STATEMENT OF FACTS

Plaintiffs brought this action to recover damages for illness resulting from trichinosis allegedly contracted from defendant's store at Ninth South near Main Street in Salt Lake City. The case was tried before a jury in the Third Judicial District Court in and for Salt Lake County, State

of Utah, with the Honorable Maurice Harding presiding. After plaintiffs had introduced their evidence and rested, the Court reserved its ruling on defendant's motion for an involuntary dismissal. After defendant had introduced its evidence, the Court reserved its ruling on defendant's motion for a directed verdict. The case was submitted to the jury and verdicts were rendered in favor of the plaintiffs and against the defendant in the following amounts: Henri Niemann, \$250 special damages, \$5,000 general damages; Maria Niemann, \$363.65 special damages, \$5,000 general damages; Henri Niemann, Jr., \$100 special damage, \$2,000 general damages; and Renate Niemann, \$1,000 general damages. The defendant moved the Court for a new trial or in the alternative, to set aside the verdicts and enter judgment in accordance with its motion for a directed verdict, theretofore reserved by the Court. These motions were both denied by the Court.

All meat-eating animals, including man, can become infected with *trichinae spiralis*, the result of which is an infection referred to as trichinosis. This infection has a certain source and trichinosis can only be acquired from the eating of meat that has been infected. Pork meat from swine is the principal source. In addition there are other animals that carry the infection. Bear meat is sometimes eaten in the United States and other parts of the world. Walrus and polar bear also carry the infection. There are three methods to treat raw pork which will result in the killing of the trichinae. The first is heating the pork to at least a minimum of 137° Fahrenheit in all portions, that is, near the bone as well as the outside. The second method is freezing at various temperatures, 50° Fahrenheit for a period of twenty days to 35° or 36° Faren-

heit for a period of two hours. There are other degrees and time periods which will kill the trichinae worm. The third method is the curing and salting and holding of pork products a good many days with a high concentration of salt. These are for each particular cut, and the amount of time needed to cure and make the pork safe would vary on the cut.

The life cycle of the trichinae is complete in one animal or man. After the raw pork is eaten, the sac is dissolved by the gastric juices in the stomach and the larvae are liberated from their cyst. They there enter the mucosa of the intestine and develop into full grown worms. After they become mature, they copulate and shortly after that the male is digested and dies. The female lays eggs and each female worm lays between 1,000 and 1,500 eggs. These eggs are deposited in the intestinal mucous and they hatch, become larvae and are carried to the lymphatic blood stream and out into the muscles of the body. They particularly infest those muscles with the richest blood supply. The diaphragm is a favorite muscle, the calf and the deltoid muscles. Once the larvae enter the muscle, they stay there. Initially they set up a foreign body reaction, which is the cause of inflammation and the symptoms of pain and discomfort. This gradually subsides and the body becomes adjusted to it. The larvae seal themselves off in little cysts and they remain there permanently in the patient's muscles. When the larvae are ingested, they are approximately one-half millimeter in length. When they grow into a worm, the female is five or six millimeters in length and the male one or two millimeters to three millimeters. In the form of inches that would be about one-sixteenth of an inch for a male and one-quarter

of an inch for a female. The parasite becomes encapsulated in the muscle, and may remain alive in the calcified capsule for a long time. Still later they die and are absorbed or calcify and break down into crumbled masses and are absorbed in the body. The average time between the taking of the trichinae into the body and the occurrence of the symptoms resulting therefrom is from seven to fourteen days after the ingestion of the infected meat, but it can occur anywhere from two days up to four weeks after (R. 246-258).

On Friday, the 24th of June, 1955, Henri Niemann accompanied by his wife and his daughter, Renate, and his small son Niels, went to the Grand Central Market at Ninth South and Main (R. 127). There they bought some ground beef, some weenies, some liver, some lamb necks and some fruits, potatoes and beans. They took this home and put it in the ice box (R. 137). Mrs. Niemann put the ground beef in a bowl, salted and peppered it, cut an onion in fine pieces, which she added, and broke a raw egg over the contents of the bowl, mixed it all together and spread it on bread (R. 170). Mrs. Niemann ate three slices of bread with this raw meat spread on it; Mr. Niemann ate two slices and Henri, the son, ate one slice. Renate did not eat it; she just took a taste with a fork while Mrs. Niemann was mixing it. There was some left, and the next day, Mrs. Niemann ate it all. (R. 162-163).

The Niemanns had traded with Suhrmann's Market, located on South Temple across from the Greyhound Terminal. They bought unsalted butter, eggs and cheese from that market. These items were also kept in the refrigerator (R. 138). They had had some mettwurst in

their home, which had been brought to them by Carla Schnibbe sometime between April and June of that year (R. 149). This was eaten by the family.

Mr. Niemann also had a general practice of picking up scraps of meat at the Grand Central Market from the garbage can. He would have a big sack full, which he would put in the refrigerator and feed the dog for one week (R. 146-147).

On Saturday, prior to the 4th of July, which was on a Monday, the Niemann family left Salt Lake City and went to Bear Lake. They testified that the only meat they had prior to their illness and after the ground beef they ate on Friday were some weenies, which they cooked over a fire at Bear Lake. A conflict in the testimony occurred, however, when Mr. Glen Kilpatrick, Supervisor of Food and Drug Weights and Measures of the Department of Agriculture for the State of Utah, testified as follows:

Q. Mr. Kilpatrick, have you ever seen any of the people who are sitting in the first row, whom we identify as the plaintiffs in the case, the Niemanns?

A. Yes, I have.

Q. Which people have you seen?

A. Mrs. Niemann, and the young girl.

Q. The little girl called Renate?

A. Yes.

Q. Will you tell us where and under what circumstances you saw them?

A. I visited their home on about the 17th of August to discuss a matter with them.

MR. ROBERTS: That date I didn't get.

MR. AADNESEN: August 17th.

Q. (By Mr. Aadnesen) Who was present?

A. There was Mrs. Niemann, her daughter, myself and one of my inspectors, Herbert N. Johnson.

Q. Mr. Kilpatrick, will you give us the substance of that conversation, and the exact words as well as you can remember.

A. Well, our purpose in visiting the home—

MR. ROBERTS: We object what the purpose was.

A. The conversation—we attempted to get information from Mrs. Niemann regarding foods—

MR. ROBERTS: Just a minute, the attempt—that is not the conversation.

Q. (By Mr. Aadnesen) Mr. Kilpatrick, will you please say as closely as you can remember what she said to you, what you said to her, and what was said by Renate?

A. May I refer to my notes?

Q. You certainly may.

A. I asked Mrs. Niemann what foods she had consumed prior to her sickness.

She said on about June 24th she had eaten some hamburger which she had purchased from the Grand Central Market, which they had mixed with onion, salt, pepper, and egg and had eaten it raw.

I asked what other types of raw meats were consumed by the family, she said she couldn't think of any other meats that family had eaten raw.

I asked what other type of food the family had eaten.

She informed me twice the family had eaten

frankfurters, cooked meats; had no recollection of raw meats.

When she mentioned frankfurters, I pursued the type of frankfurter meat that had been eaten, and Mrs. Niemann couldn't recall eating any other than just store packed frankfurters.

The daughter Renate did remember what was referred to as German sausage—we couldn't get a name on—and I asked Renate to describe it. She described the round meat, that it was round in nature and had a gray appearance.

I asked if it was stick bologna, she said she knew stick bologna. She said no.

I asked if it was pepperoni. She said no.

I asked if it was salami. She said no.

I further asked if they had meat, some German sausage, that people had given them the meat,—the answer was no.

I asked if they had eaten out in people's houses, and the answer was no.

That is about the extent of that conversation on that day.

Q. Did you contact them again, subsequently?

A. Yes sir.

Q. Will you tell when and who was present?

A. I contacted them the following day and the same two were present.

Q. And also your assistant?

A. Yes.

Q. Was this at their home?

A. Yes.

Q. Would you give us what was said in that conversation?

A. I showed them a piece of a product known as mettwurst, which I had picked up from the Grand Central Market and asked Renate if this was the piece of meat she referred to that they

had. She said it was very similar in nature, except the piece of meat I had was small and the piece they had was larger and not so familiar in nature.

I asked Renate when they had it, she said they had it on their trip to Bear Lake and gave me the dates they went there, and those dates were July 2nd and 4th.

Q. Was there any discussion as to the source of that particular sausage and mettwurst?

A. That they had purchased?

Q. Yes.

A. As she recalled her brother received this meat from Suhrmann's Market when he was buying unsalted butter at that store, he went to buy unsalted butter and had purchased this at that time.

MR. AADNESEN: No further questions.
(R. 262-265)

Henri Niemann, Jr. testified that around the 9th of July he went to Suhrmann's Market and purchased some mettwurst.

A. Yes. I went down, it was the Saturday after the 4th of July, it must have been the 9th or something like that, and I went down, I was strong enough to get up, I had very bad headaches, I didn't feel too good, but I could keep myself on my feet and they decided I should go down town to get the little brother something to eat; the family didn't have an appetite, I didn't either.

Mom said "get butter and cheese" and I got this sliced mettwurst, you call it salami, I guess, I bought about half a pound of it.

Q. Do you know who ate it?

A. No.

Q. What did you do with it?

A. I just put it in the refrigerator.

Q. What was done with it?

A. Put it in the refrigerator, and Mom said she didn't have an appetite for it, and I didn't either.

Q. Counsel also talked about some mettwurst that came from Mrs. Schnibbe?

A. Yes.

Q. When was that?

A. About the first of May or the 15th.

Q. Did you have any of it?

A. Yes, I did.

Q. Did your little brother Nels?

A. Yes.

MR. ROBERTS: You may cross examine.

CROSS EXAMINATION

BY MR. AADNESEN:

Q. You don't have any trouble with your job, do you?

A. Not too much, no.

Q. What do you mean by "not too much"?

A. Well, there is some things I have trouble with—little things.

Q. Do you remember—little things?

A. Yes.

Q. What are they?

A. Oh, I don't know; I can't recall all, there is too many of them. It is like I am sometimes very tired for no reason and I have had plenty of rest and everything.

Q. You have worked steady, haven't you, since you went back to work?

A. Yes.

- Q. You haven't been off the job at all because you haven't felt well?
- A. I don't stay home for any little thing.
- Q. Your principal job is laying bricks, isn't it?
- A. Yes.
- Q. Do you have to build any scaffolding, or anything?
- A. Yes.
- Q. You can keep up with the men pretty well except you are an apprentice?
- A. I try to.
- Q. You are not an expert you would call it, you are still an apprentice?
- A. Yes.
- Q. Do you know how many bricks you can lay in a day?
- A. I don't lay the whole day in bricks, I do some scaffold-building off and on, I am on the wall with them, and sometimes I tend a little and do this and that.
- Q. As I understand it, when you bought this mettwurst, after you had been sick, you went to Suhrmann's Market, is that correct?
- A. Yes.
- Q. Where is that located, Mr. Niemann?
- A. It is on South Temple, right across from Greyhound.
- Q. Right across from Greyhound?
- A. Yes.
- Q. Where did you live?
- A. 3953 Highland Drive.
- Q. You went from 3953 Highland Drive clear in to Suhrmann's market?
- A. Yes.

Q. Did you have any other business there?

A. No, I went to get some bread from the baker here on 2nd South, I believe, between Main and West Temple.

Q. And what about the stores out in your neighborhood?

A. Well, they did not have that bread and the things we come for; I just came into town.

Q. And got the mettwurst?

A. Got the mettwurst, cheese and bread I was coming in for.

Q. And Swiss Cheese?

A. Yes.

Q. You like that market?

A. Yes. (R. 178-181)

On the 4th of July at Bear Lake, the plaintiff, Mr. Niemann, the father, and Mrs. Niemann complained of illness and returned to Salt Lake City. Henri, Jr. did not become ill until around the 11th of July (R. 187) and Renate did not become ill until two or three days after that (R. 183). There is no dispute in the record that the illness of all four of the plaintiffs was trichinosis.

Mr. Niemann understood that any pork products of any kind had to be cooked or one might get trichinosis (R. 142).

In the summer of 1955, about the middle of August, the Salt Lake City Health Department received reports of trichinosis. An investigation was undertaken by that department and one of the reports related to a family named Niemann. In the course of the investigation, the Department obtained samples of mettwurst from Suhrmann's Market. One portion of the sample was delivered

to the L.D.S. Pathological Laboratory at the L.D.S. Hospital, one to the Salt Lake City Health Department Laboratory and one to the Utah State Health Department Laboratory (R. 305-307). Tests on that particular mettwurst contained trichinae spiralis (R. 309). The sample from Suhrmann's Market was the only sample that contained trichinae spiralis (R. 311).

In the month of June, 1955, the Grand Central Market at Ninth South purchased all of its pork from Cudahy's, Swift, Wilson, Hormel and Rath. All of the products had been inspected by Federal inspectors at packing houses. (R. 199). At that particular market, the grinding of the meat is begun at about eight o'clock in the morning. Both ground beef and sausage is ground through the one grinder in that store. The beef is always ground first and the sausage is ground afterwards. About eighty pounds of beef is ground every morning and once to twice a week about forty pounds of sausage is ground. On Fridays and Saturdays five hundred to a thousand pounds of beef is ground. The meats are kept separate, even in the ice box, and nothing is ever mixed. The market has hooks at one end where they have all of their pork toward the door. Near the east wall, all the beef is hung and next to that, the lamb and then the pork.

The pork is ground into sausage after the beef has been ground for two specific reasons: First, the sausage is left until last so that while the girls are wrapping the meat, the butcher has time to stop and clean the mill; and, second, because of the strong seasonings, sage, pepper and the like which is put into the sausage. If this seasoning were not removed, the beef would taste like sausage. No

pork is ever put in the ground beef. The pork and the beef cannot be put through the same grinder without making a change, which requires the worm to be taken out from the cutter and a different one put in. After sausage has been ground, the particular machine is washed at that time. At that particular market, there is a big sink and the mill and everything will sit right down in it to wash it. They use a nozzle which they screw on a hose and with a force of pressure sufficient to clean everything out. The water used is so hot one can hardly stand one's hand in it. The temperature of the water has been measured and it is about 160°. The mill is always washed after sausage has been made. If a customer asks for a special grind for meat loaf, for instance, the machine is always washed after and a special charge is levied for the time that it takes for the butcher to take the grinder down and wash it. (R. 200-209).

During the months of April, May and June of 1955, the Valley Sausage Company stopped smoking mettwurst for Suhrmann's Market. To properly smoke mettwurst, one brings the temperature up to 137° Farenheit on the inside. At Suhrmann's Market the Swiss cheese was kept in the same showcase with the Mettwurst. The same knife was used to cut the cheese that was used to cut the mettwurst and the same scale was used to weigh the cheese that was used to weigh the mettwurst. Mr. Suhrmann could not tell the difference between the veal, pork and beef (R. 275-283).

STATEMENT OF POINTS

POINT I.

THERE IS NO EVIDENCE SUFFICIENT FOR EVEN AN INFERENCE THAT PLAINTIFFS COULD HAVE PURCHASED MEAT INFECTED WITH TRICHINAE FROM THE DEFENDANT.

POINT II.

THE COURT ERRED IN GIVING INSTRUCTION NO. 4 AND IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 9.

ARGUMENT

POINT I.

THERE IS NO EVIDENCE SUFFICIENT FOR EVEN AN INFERENCE THAT PLAINTIFFS COULD HAVE PURCHASED MEAT INFECTED WITH TRICHINA FROM THE DEFENDANT.

In this case, plaintiffs attempt to base their recovery upon an inference that because they had trichinosis, and as they allege, the only raw meat they purchased came from the defendant's store, they must have gotten trichinosis from that source. As the record shows, this is subject to great question. Secondly, they seek to infer that because only one grinder existed at the market and that both sausage and beef were used, it therefore followed that if the machine was not properly washed or

was not washed at all, it was possible for some nebulous amount of pork infested with trichinae to have become attached to the beef they purchased and that this resulted in their cases of trichinosis.

Against these inferences appears the most positive evidence in the record by the two witnesses who were called by the plaintiffs, Mr. LaMont Richins and Mr. Edwin Robert Benzon. Mr. Richins was the meat supervisor of the Grand Central Market and Mr. Benzon was the manager of that particular market at that time. The following is the testimony of each:

Q. Will you tell us how you go about in this Grand Central Market in making sausage?

A. Well, in making sausage, we have some pans, you might say, that will hold all the way from forty to sixty pounds, we always keep beef and pork separate, they are never together, and we take the sausage trimmings out, put it on the scale, weigh it—and to make good sausage, you can't make it good if there is too much seasoning, we figure so many pounds to so many ounces of seasoning, and we weigh it out and take it through the grinder, and you never make ground sausage through the same plate you make ground beef. It has to be a larger plate. The first thing you do is put the large plate on the head of the grinder and run through the sausage, and then put the lean and coarse together,—some butchers like mostly coarse and some maintain it all depends on what looks best in the package, and never use fine.

After we make sausage the mill is always cleaned and washed.

Q. Right then?

A. Right then. (R. 193-194)

* * * * *

Q. Now, could sausage, some particules of sausage be left in the grinder?

A. I doubt that very much.

Q. Could it be?

A. I doubt it.

Q. If it were, would it mix with the beef when the beef was put through?

A. If there happened to be some it would be the first to come through the grinder, but I doubt that very much because we don't use the same plate.

Q. And what about the pans, do you use the same pans for both your sausage and your ground beef?

A. The same pans were used, but they are always washed. Everytime you get through using them, they are always washed. (R. 195)

* * * * *

Q. Mr. Richins, what is the order of grind that you have at Grand Central Market?

A. The order of grinding, we have a rack set up at this particular store where all our ground beef is on that same rack, and we have a different place for pork and lamb, but it is in separate pans.

The first thing in the morning when a butcher comes in to grind, the first thing he grinds is ground beef, then either ground round or ground chuck, and if he needs sausage he will grind sausage.

Q. When you say he will grind sausage, how often does he do that?

A. Sometimes twice a week, at other times three times at the most.

Q. Does he grind beef every morning?

A. We grind beef sometimes five or six times a day.

Q. The first that is ground then is the beef, is that right?

A. Yes.

Q. And if you need sausage, that is ground?

A. That will be ground after all beef has gone through.

Q. You mention a large plate, is that on the grinder?

A. That isn't on the grinder, the worm is taken out and the cutter, and the other put in.

Q. As I understand it, you can't grind sausage and ground beef through the grinder without making a change?

A. No.

Q. You say it is always cleaned after you have ground sausage, is that correct?

A. Yes.

Q. What is the reason for that?

A. The reason for that is we leave the sausage until the last, after everything is out; while the girls are wrapping the meat, the butcher has time to stop and clean that mill.

Q. Is there any reason, after grinding sausage, and he didn't clean it, what would happen?

A. The reason is, if you didn't clean it you would have all your ground beef tasting like sausage, because of the seasoning.

Q. That has to come out?

A. That has to come out, you wouldn't know whether you had sausage or ground beef.

- Q. You talk about seasoning, what kind of seasoning are you talking about?
- A. It is real strong seasoning, sage and pepper and the like in it.
- Q. How much beef is ground every morning?
- A. We grind around eighty pounds.
- Q. Any more than that?
- A. We will grind before noon, and on Saturday in that particular store, it will be between five hundred and one thousand pounds goes through that same mill.
- Q. How does that compare with sausage?
- A. About forty pounds of sausage, or fifty.
- Q. That is just occasionally?
- A. Yes,—forty or fifty.
- Q. That would last two or three days?
- A. Yes.
- Q. When you wash this particular machine down there, where is it washed?
- A. Right in the meat market there, we do all the grinding in the ice box. In that market we have a big sink, that the mill and everything will set right down in it to wash it, and we have all the hot water we need there.
- Q. How did you get hot water in there, fill the sink?
- A. At that particular time, to get the stuff out, we have a nozzle we screw on, the same thing you use for your hose at home, that had quite a force so that would clean everything out.
- Q. So that would clean it out and put pressure on the parts of the grinder?
- A. Yes.
- Q. Do I understand you have to take the grinder apart to change those parts?

A. Oh yes, you have to take the cutter out and the blade off.

Q. That is the time you clean the machine?

A. Yes, that is the time we clean the machine.

Q. Is that right hot water?

A. It is real hot, you can hardly stand your hand under it.

Q. Have you made any measurements to the heat?

A. About 160 is the way it comes out.

Q. You have measured it?

A. Yes, we have done that.

Q. That puts 160 degrees in the nozzle then?

A. Yes sir. (R. 195-198)

Mr. Benzon in like manner was quite emphatic about this particular point:

Q. Are there ways which sausage could get into beef?

A. Intentionally, or otherwise?

Q. Otherwise?

A. No. (R. 205).

Added to this is the positive testimony in this case that the beef was always ground first and the sausage thereafter, and that while every morning eighty pounds of beef approximately was ground, two or three times a week only forty pounds of sausage was ground. On Fridays and Saturdays from five hundred to one thousand pounds of ground beef would be ground.

The inferences in this case do not even deserve the stature of "speculations." Beef was not ground after grinding sausage, and a different plate was used. The grinder was taken apart and washed in the water at a

heat of 160°, which heat immediately kills trichinae, and with a nozzle with sufficient force to clean the grinder, so not even a small amount of pork could have remained in the grinder and adhered to the beef, especially on a day in which some five hundred pounds to a thousand pounds of ground beef had been ground through the grinder. The only positive evidence is that the plaintiffs could not have gotten ground beef with some particularly small particles of sausage, eaten the same and gotten trichinosis. The record is devoid of any evidence that any sausage had been ground on the day the Niemanns allegedly purchased the beef.

In spite of the testimony of plaintiffs that the only raw meat eaten by them came from defendant's store, positive and affirmative evidence was introduced to the contrary. Under such circumstances the inference disappears and can have no probative value, nor can it support a verdict. An epidemic of trichinosis broke out in Salt Lake City among the German speaking people at the time the plaintiffs became ill. Trichinae infected pork products, particularly mettwurst, was found to be the carrier, and Suhrmann's Market the source. In addition to the evidence introduced into this case regarding that matter such has now been determined to be a fact in the cases of *Schneider v. Suhrmann's Market*, *Bodon v. Suhrmann's Market* and *Naujoks v. Suhrmann's Market*, in each of which cases judgment was entered against the defendant, Suhrmann's Market, and there are now pending in the Third Judicial District Court, in and for Salt Lake County, twenty-odd cases, all with Suhrmann's Market as the defendant and all involving trichinosis.

To hold defendant responsible in this case is in effect to invoke the doctrine of *res ipsa loquitur*, such as was discussed and refused in the case of *Jordan v. Coca Cola Bottling Co.*, 117 Utah 578, 218 P.2d 660.

The probability of other sources of infection have been established, as above stated. Plaintiffs traded at Suhrmann's Market, where they purchased unsalted butter, cheese and mettwurst. These products were kept in the same showcase in the market, cut by the same knife and weighed on the same scales, and when carried to plaintiffs' home they were kept in the same refrigerator as were other products consumed by the plaintiffs.

POINT II.

THE COURT ERRED IN GIVING INSTRUCTION NO. 4 AND IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 9.

Plaintiffs relied solely upon Section 60-1-15, Utah Code Annotated, 1953, to support their case. Although they had incorporated an allegation of negligence in their case and in their requested instruction, such was abandoned during the trial and a breach of an implied warranty became their sole theory for recovery. 60-1-15, Utah Code Annotated, 1953, reads as follows:

"60-1-15. * * * Subject to the provisions of this title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

“(1) *Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller’s skill or judgment (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.*”
(Emphasis added)

The law is well settled that that portion of the statute we have emphasized above means that if plaintiff uses a product in an unusual or different manner, the statute cannot apply. In this case plaintiffs ate the ground beef allegedly purchased from the defendant in its raw state. Under ordinary and usual circumstances ground beef is sold to be cooked and eaten. Such usual and ordinary circumstances were discussed by the court in several cases dealing with this matter.

The case of *Cheli v. Cudaby Bros. Co.*, 255 N. W. 414, (S. Ct. Mich. 1934) explained the application of the Uniform Sales Act and the section above quoted on implied warranties of customers of foods. In that case plaintiff brought an action against the defendant for the death of an individual resulting from trichinosis, where uncooked sausage was prepared from raw pork which had been purchased from a dealer. The court said:

“While this court has held that the statutes impose criminal liability upon those selling adulterated foods, regardless of the absence of proof of criminal intent or guilty knowledge, *People v. Snowberger*, 113 Mich. 86, 71 N. W. 497, 67 Am. St. Rep. 449, we cannot hold that the Legislature intended to impose upon the producer the absolute civil responsibility of an insurer in cases where

every reasonable means designed to guarantee the safety of food for normal use has been employed.

“The death of the deceased in the instant case resulted from the eating of raw pork infected with trichinae. It seems well established by the evidence that the danger to the public is reduced to a minimum if the meat is thoroughly cooked. The ultimate consumer, however, demands that fresh pork be offered for sale. If it has been completely sterilized by any of the means hereinbefore indicated, the meat loses this freshness.

“* * *

“Although the defendant cannot be held to respond in damages for negligence, may liability be imposed for breach of an implied warranty? The doctrine of implied warranty, while often confused with that of negligence, rests upon another principle of law. The two theories are often asserted in the same action, and this has at times led to a confusion of reasoning. The propriety of including both theories in separate counts in the same action was clearly pointed out by Justice Wiest in *Hertzler v. Manshum*, supra. That case also held that a manufacturer who prepared food-stuffs destined to be sold to and consumed by the public is bound by an implied warranty that its product is free from foreign poisonous, or deleterious substances. Implied warranties of quality are limited by the Uniform Sales Act. Section 15 thereof, being section 9454, C. L. 1929, reads:

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

“(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller’s skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.’

“Tested by this language, the record does not disclose that the buyer expressly or by implication made known to the seller that the pork was required for the purpose of making raw sausage, to be eaten in an uncooked state. Nor is there any showing that an implied warranty or condition as to the quality or fitness of raw pork as food in an uncooked condition is annexed to the sale by the usage of trade. See subdivision 5 of the same statute. Comparatively speaking, only an infinitesimal amount of the pork sold is eaten raw. It seems to follow logically that it is unfair to impose the liability of an insurer upon the meat packer through the implication of a warranty that pork is fit for human consumption in a raw state. This is especially true in view of the fact that the danger of infection can be reduced almost to the vanishing point by ordinary cooking methods. Fresh pork is not ordinarily intended to be eaten raw. The warranty should be applied only to food used in the usual, rather than in the unusual and improper, manner.

“We are satisfied that defendant cannot be held liable either for negligence or breach of an implied warranty. It is unnecessary to discuss other alleged errors.”

In like manner, the case of *Feinstein v. Reeves*, 14 F. Supp. 167, discussed the application of this rule:

"Plaintiff Sussler presented his case under two alleged causes of action. The first alleged cause was based upon an implied warranty by defendant Reeves, Inc., that the pork chops sold were wholesome and fit for human consumption. The evidence clearly shows that trichinae infested pork is wholesome and fit for food when properly cooked. Pork chops are not sold to be eaten in the raw state. The warranty of wholesomeness is, not that the pork is free from trichinae, but, rather, that it is fit for food when properly cooked. If I understand correctly the facts upon which the decision in *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471, was based, then the above holding is not in conflict with that decision.

"* * *

"When this law was passed, the makers well knew that the parasite, trichina, was present in considerable percentage of otherwise healthy hogs; that its presence could not be detected by any known practical method of inspection; that pork so infected was wholesome when cooked; that the United States and state government made no attempt to inspect for trichinae and made no restriction against its sale for food when cooked. In view of these facts, I cannot hold that it is the intent of the statute to include hogs infected with trichinae under the classifications 'diseased animals' or 'unfit for food.' "

This court has in like manner adopted the foregoing rule in the case of *Bennett v. Pilot Products Co.*, _____ Utah _____, 235 P.2d 525, where this court stated at page 527:

"* * * Rather we must adhere to the philosophy enunciated by the cases reflected in re-

spondent's citations and which was put so aptly by Dean Proser in his work on Torts, p. 679, to the effect that: 'The manufacturer is at least entitled to assume that the chattel will be put to a normal use by a normal user, and is not subject to liability where it would ordinarily be safe, but injury results from some unusual use or some personal idiosyncrasy of the consumer.' Citing *Walstrom Optical Co. v. Miller*, Tex. Civ. App., 1933, 59 S. W. 2d 895."

Although defendant requested an instruction in keeping with the foregoing rule of law, such request was refused by the court. The requested instruction No. 9, after quoting Section 60-1-15, Utah Code Annotated, 1953, reads as follows:

"If you find from a preponderance of the evidence that plaintiffs purchased meat from Grand Central Market and did not expressly or by implication make known to the defendant that such would be eaten raw and uncooked, then you are instructed that defendant did not in any manner warrant that such meat was fit for consumption in a raw state, and, on that issue, you shall find for the defendant and against the plaintiffs, no cause of action."

We respectfully submit the court erred in refusing to instruct according to the law applicable in the case and on defendant's theory of the case.

The instruction given by the court as representing the law applicable to the case is found in instruction No. 4:

"The law imposes upon a person or corporation that sells food for human consumption a duty to see to it that it is not adulterated. Under the

law food is adulterated if it contains any added poisonous or other deleterious ingredients which may render such article injurious to health. If ground beef contains sausage with trichinae it is an adulterated food and the selling of it constitutes a violation of the Utah Statutes. It makes no difference how careful such person or corporation is, even though it uses the utmost care to prevent adulteration of food nevertheless if a person or corporation sells adulterated food it is liable for any damages proximately resulting therefrom. It is not necessary that defendant have knowledge the food was adulterated in order for plaintiff to recover.”

This instruction was requested by plaintiffs and as it was amended. The erroneous part of such an instruction becomes apparent upon the mere reading thereof. Although negligence or a standard of care is purportedly not an element left in the case, “a duty” is specified and then the instruction informs the jury that it “makes no difference how careful such person or corporation is, even though it uses the utmost care to prevent adulteration of food nevertheless if a person or corporation sells adulterated food it is liable for any damages proximately resulting therefrom. It is not necessary that defendant have knowledge the food was adulterated in order for plaintiff to recover.”

Plaintiff seeks to recover on an inference that since they contracted trichinosis, and since they purportedly purchased products from the defendant, none of which was pork, defendant must not have washed the grinding machine—in effect indirectly alleging an omission. There is absolutely no evidence in the record to support such a

contention. As the record stands, sausage was never ground before grinding beef, the grinding machine was cleaned and washed whenever sausage was ground, and with hot water from a nozzle at a temperature of 160°, which immediately kills trichinae. Plaintiffs' entire case is predicated upon the mere allegation that since plaintiffs got trichinosis it must have come from defendant's store, and therefore the inference that defendant did not wash the machine after grinding sausage and before grinding beef. Thus plaintiffs seek to take advantage of an inference of omission and then the court instructs in effect that the omission makes no difference.

CONCLUSION

It is admitted by both parties in this case that trichinae can only exist in raw pork or raw pork products as far as human consumption is concerned; that the plaintiffs purchased no raw pork products from defendant; that freezing, cooking or exposure to heat above 137° Fahrenheit will kill the trichinae. The record is clear that in defendant's market the grinding machine is always taken apart and cleaned after grinding sausage and exposed to hot water to a temperature of 160°, through a nozzle of sufficient force to clean the machine thoroughly. The record is also clear that an epidemic of trichinosis occurred in Salt Lake City about the time the plaintiffs got trichinosis and that it was traced to Suhrmann's Market, where plaintiffs had traded, and that the products they purchased from Suhrmann's were kept in the refrigerator along with other foods. At Suhrmann's Market the cheese and mettwurst and other products are kept in the same showcase, cut with the same knife and weighed

on the same scales. We submit that there is insufficient evidence to support a verdict for plaintiffs.

The court erred in giving instruction No. 4, in that such instruction does not properly represent the law applicable to this case, and also erred in refusing to give defendant's requested instruction No. 9, which instruction properly states the law applicable to an alleged breach of an implied warranty.

The verdict in the court below should be reversed and a judgment entered for the defendant and against the plaintiff.

Respectfully submitted,

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