

Sales: Breaches of Warranty: Absolute Responsibility

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NOTES

SALES—BREACHES OF WARRANTY—ABSOLUTE RESPONSIBILITY.—Tort is a term more comprehensive than breach of contract. It covers more kinds of injuries. Innumerable interests of individuals may be affected by the acts of others. If responsibility is imposed upon the actors they are tortfeasors. It is assumed to be the unusual situation where responsibility is imposed upon the actor who has not been at fault. In the field contract the interests affected are most often the interests in the bargains negotiated between the parties affected. One person's breach has prevented the other's realizing upon the bargain as planned. But the breach may affect other interests than the interests in the bargain. Whether the party in default will have to compensate the other party for the injuries to those other interests depends upon what the parties have intended to protect by their bargain.¹ Responsibility in these instances is comparable to responsibility within the field of tort. But there is, apparently, this difference. It is unnecessary to make any inquiry beyond the fact of the breach and the intention of the parties; fault, that is, carelessness or intent on the part of the party in default to cause the particular injury or any like it, is not important.

The extension of the sellers' responsibilities for breaches of warranty in contracts for the sale of goods illustrates the attitude of the courts in these cases that may be described figuratively as "quasi-delictual." At the early common law the slogan was "let the buyer beware."² So long as the buyer got the specific horse that he had bargained for the seller was not in default. The horse might be worthless, but to get any relief at all the buyer had to show that the seller had misled him. He had to make out a case against the seller as against a tortfeasor. But the courts by decision were building upon the idea of express and implied warranty to give the buyer more protection because of the seller's default, and these decisions were finally codified under the generalizations of the Sales Act.³

¹ Miller, *Damages, Responsibility, and Loss of Profits* (1932) 17 Marq. Law Rev. 3.

² In *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (1625), the court held, in the sale of a precious jewel, that a bare affirmation that it was a bezor stone without warranting it to be so was no basis for a cause of action.

³ *Bigge v. Parkinson*, 7 H. & N. 955 (1862) (which created the exception); *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608; *Emerson v. Bingham*, 10 Mass. 197, 6 Am. Dec. 109 (1813); *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N.E. 154 (1885); *Van Bracklin v. Fonda*, 12 Johns 468, 7 Am. Dec. 339 (1815); *Craft v. Parker, W. & Co.*, 96 Mich. 245, 55 N.W. 812, 21 L.R.A. 139 (1893); *Weideman v. Keller*, 171 Ill. 93, 49 N.E. 210 (1897). The courts avoided the danger of burdening the dealer in canned foods with a harsh responsibility by carrying the implied warranty back as far as the manufacturer, regardless of his want of privity with the ultimate purchaser. *Daier v. Van Camp Packing Co.*, 189 Ia. 775, 176 N.W. 382, 17 A.L.R. 649 (1920); *Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155 (1924). The court, in *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), expressed the present tendency of the law in this regard as follows: "Implied warranty is not one of the contractual elements of the agreement. It is not one of the essential elements to be stated in the contract, nor does its effective application or existence rest or depend on the affirmative intention of the parties. * * * Because of the acts of the parties it is imposed by law. The doctrine of implied warranty should be extended rather than restricted." See also, *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339 (1931).

What constitutes a warranty has been defined by statute. The Uniform Sales Act declares any affirmation of fact or any promise by the seller relating to the goods to be an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.⁴ However, no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only is construed to be a warranty. Implied warranties have also been defined by the Act.⁵

The courts have used the Sales Act to help them clarify the sellers' duties arising from both express and implied warranties. The present rules place an almost absolute liability upon the vendor for injuries suffered by the vendee because the article purchased has not been as represented.⁶ In actions such as these the vendor has little if anything in the way of a defense to avert judgment. Unless he can show that he did not know the purpose for which the article was to be used, or that he did not actually make the representation alleged, or that the vendee was not in fact induced to purchase as a result of his representations, he cannot defeat the action. The vendor may have been extremely diligent and careful in ascertaining the condition of the thing sold, and it may have been impossible for him to know or foresee that the article might not ultimately be as represented, but these facts would be of no avail as defenses. The apparent harshness thus imposed is justified by the courts on the ground of public policy and the general welfare. In the recent case of *Lentz v. Omar Baking Co.*,⁷ the plaintiff, a cripple,

⁴ Wis. Stats. (1933) § 121.12.

⁵ Wis. Stats. (1933) § 121.15 provides: "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.
- (2) Where the goods are bought by the description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.
- (3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.
- (4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.
- (5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

⁶ *Tyler v. Moody*, 111 Ky. 191, 63 S.W. 433, 49 A.S.R. 406, 54 L.R.A. 417 (1902); *Shuman v. Heater*, 76 Neb. 119, 106 N.W. 1042 (1900); *Rollins v. Northern Land Co.*, 134 Wis. 447, 114 N.W. 819 (1908); *Ireland v. L. K. Ligett Co.*, 243 Mass. 243, 137 N.E. 371 (1922); *Smith v. Denholm & McKay Co.*, 192 N.E. 631, Mass. (1934).

⁷ (Neb. 1934) 252 N.W. 419. In *Wells v. Oldsmobile Co. of Oregon*, (Ore. 1934) 35 P. (2d) 232 the court defines the essential allegations of a complaint for breach of warranty as including a statement of the consideration for the warranty; the allegation of the warranty; the reliance thereon the breach of the warranty, and the resultant damages.

had purchased a horse from the defendant baking company. The defendant's agents had been informed by the plaintiff's daughter that he required a gentle horse. They assured her that the horse, which had been used for several years on bakery routes, was a gentle horse. When the plaintiff hitched the horse to a buggy, the horse ran away, broke the side of a barn and injured the plaintiff. The court held the defendant company responsible in damages for the injury saying that, under the Sales Act, there had been an express warranty that the horse was gentle. The Lentz case illustrates this arbitrary interpretation of the law. It might readily be argued that the defendant company had no means of knowing the hidden quirk in the temperament of the animal sold. Actually, the horse had been exceptionally well-behaved while in the possession of the company. There was no negligence on the part of the company, nor was there any intent to misrepresent. Usually where the buyer is justified in relying on the seller's statements, the seller occupies or assumes a position of superior knowledge.⁸ In the Lentz case, however, representations made by the defendant were substantiated by the facts as known to it. The effect of the court's decision was to make the defendant virtually an insurer of the vendee against all accidents caused by the horse sold.⁹

The courts will not disregard the elements of negligence entirely, however. The defense of contributory negligence is still available where it can in fact be shown that the negligence of the plaintiff was the cause, or at least one of the causes of the injury.¹⁰ Similarly, where the breach of the warranty is not a cause of the injury, the courts will not allow a recovery.¹¹

Under the common law action of false warranty with a count in deceit, it was necessary for a buyer to contest the question of *scienter* with the vendor.¹² Where the buyer sounded his case in tort for the breach of warranty, he was forced to prove the negligence of the defendant. The evidence in the case was very often completely in the

⁸ *Meshbesh v. Chamellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N.W. 428, 13 Am. St. Rep. 441 (1909); *Conkling v. Standard Oil Co.*, 138 Ia. 596, 116 N.W. 822 (1908); *Titus v. Poole*, 145 N.Y. 414, 40 N.E. 228 (1895).

⁹ See, *Consolidated Pipe Co. v. Gunn*, (Cal. 1934) 35 P. (2d) 350, in which the court, admitting an implied warranty in the sale of a casing shoe for use in drilling a water well, refused to sustain an action for breach of warranty where the evidence showed the possibility of damaging the shoe by its use, although not originally defective. The court says, at p. 352, "If the appellant's contention is sustained in this case, it simply means that the law implied, not a warranty of reasonable capacity, but a guaranty that the article would prove capable of doing the work; in other words, the result would be that the respondent would become an insurer." The courts have limited the severity of the rule in those cases where the seller is merely a dealer in goods of known and described kind, and liability has been denied. *Bieglow v. Maine Central R. Co.*, 110 Me. 105, 85 Atl. 43 L.R.A. (N.S.) 627 (1913); *Webster v. Romano Engineering Corporation*, (Wash. 1934) 34 P. (2d) 428.

¹⁰ *Nelson v. Wm. H. Ziegler Co., Inc.*, 190 Minn. 313, 251 N.W. 534 (1933), where it was held that the question of contributory negligence in an action for personal injuries resulting from a breach of warranty was one to be decided by the jury.

¹¹ *Journal Co. v. Simons*, 112 Wis. 548, 88 N.W. 580 (1902); *Cavanaugh v. Spring Valley Stock Farm Co.*, 206 Ia. 893, 221 N.W. 512 (1928).

¹² *Fields v. Brown*, 160 N.C. 295, 76 S.E. 8 (1912); See, *Flessher v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14 (1916); *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 40 N.E. 1039, 28 L.R.A. 735, 47 Am. St. Rep. 489 (1895).

control of the seller thus making a recovery highly improbable. Often too, the expense of making out a case showing negligence was so great as to be prohibitive in actions involving only small amounts. In addition, it was difficult to attach responsibility to the person primarily responsible for the defect in the article purchased.¹³ Under the present law, however, the buyer is amply protected by allowing a recovery for his injuries in contract for breach of warranty, without the necessity of proving either *scienter* or negligence.

From the point of view of policy it makes little difference whether the seller who is at fault be held responsible on the theory of tort or contract. It is important to know whether the conduct of the seller will have any effect upon the scope of his responsibility. Perhaps a seller should be held to a responsibility more strict than that of a donor, lender, or even the manufacturer, where the use of the product has resulted in physical injuries to the person of the buyer. It is a process of adjusting losses between actor and sufferer. Certainly there has been a growing tendency to use the scheme of implied warranties as an excuse for extending the limits of the seller's responsibility.

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¹³ Williston, *Sales* (1924) Vol. I, 469. "If the buyer cannot recover from the seller he cannot recover from anyone for the defective character of the goods which he has bought. The wrong done by the sale of defective materials to the manufacturer who later sold the goods cannot form the basis of action by the ultimate buyer. Consequently, the real wrongdoer, who has caused the ultimate injury, escapes. On the other hand, if the manufacturer is held to an absolute liability irrespective of negligence, it will unquestionably increase the degree of care which he will use, and if in any case he is compelled to pay damages for breach of warranty, where the real cause of the defect was inferior material, which he himself innocently purchased, he will have a remedy over against the persons who sold him this inferior material, and his damages will include whatever he himself has had to pay for breach of warranty. Thus the loss will be borne ultimately by the person who should be held responsible." See, *Patterson v. Orangeburg Fertilized Co.*, 117 S.C. 140, 108 S.E. 401, 405 (1921).