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Sales-Liability of a Manufacturer for Misrepresentations to Sub-Purchaser

SALES—LIABILITY OF A MANUFACTURER FOR MISREPRESENTATIONS TO SUB-PURCHASER.—Plaintiff purchased from a retail dealer an automobile, represented by the manufacturer and dealer by advertisements to be equipped with a safety windshield. Because of the shattering of the windshield when the plaintiff had a collision, particles of glass cut him, injuring him severely. This action was brought against the manufacturer. Held, (1) no cause of action exists in warranty without privity; and (2) knowledge of falsity of representation is necessary for liability for misrepresentation.[1]

The law of warranty is older by a century than special assumpsit. In fact the action upon the case on a warranty was one of the bases upon which the law of assumpsit seems to have been built.[2] The first reported case of

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operated barber shops in New York City from 1908, and at the time of suit had 31 shops and expended $75,000 yearly in advertising. Defendant opened five shops in New York and New Jersey, applying the name "Terminal" to them, with a resulting confusion to the public. Plaintiff was granted an injunction covering not only New York where his shops were located, but also New Jersey.

[14] There can be no doubt of the cases noted, because of the finding that the trade-mark of appellant and that of appellee were not confusingly similar. The question as to the geographic extent to which trade-marks would be protected could be controlling only where there was a confusing similarity.

[1] Chanin v. Chevrolet Motor Co. (C. C. A., seventh circuit), 89 F. (2d) 889.

[2] Williston, Sales (2d), Sec. 195.

an action on a warranty brought in assumpsit was not until 1778.[3] Although, from that time on, the general practice has been to bring an action for breach of warranty in contract, today we still have an action of tort for warranty irrespective of any fraud on the part of the seller or knowledge on his part that the representation constituting the warranty was true.[4] Admitting that an action will lie for warranty in tort, the problem arises of whether or not one must be in privity of contract to bring this action. In the English case of *Winterbottom v. Wright*,[5] the rule was announced that a cause of action in tort did not arise from the breach of a duty existing by virtue of contract unless there is a privity of contract between the plaintiff and the defendant. This "citadel of privity" has been pierced in many situations.[6] The Uniform Sales Act seems to limit a warranty to a transaction between the seller and the immediate buyer.[7] However, upon looking at the cases that have applied this Act there is a divergence of opinion, but it appears that the majority require privity here in an action of tort as well as in the contract action of special assumpsit.[8]

Having found privity to be a prerequisite either in tort or contract, the question arises of whether there is such a relation between the manufacturer and sub-vendee or ultimate consumer. Because of our modern industrial system with mass production and national advertising, it has been argued that the consumer is essentially in privity of contract with the manufacturer. Since the intermediate dealer is only a mere conduit bringing the parties together, is the warranty therefore extended not to the retailer, but to the ultimate consumer? A research study found much evidence that manufacturers actually so regard themselves in direct relation with the consumer.[9]

Might it not be possible that these advertisements by the manufacturer be treated as a general offer on the part of the manufacturer which is accepted

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[3] Stuart v. Wilkins (1778), 1 Dougl. 18.

[4] Shippen v. Bowen (1886), 122 U. S. 575, 7 Sup. Ct. 1283; Schuchardt v. Allers (1863), 1 Wall. 359, 368 (Either case or assumpsit will lie for a false warranty; scienter need not be averred, and if averred, need not be proved).

[5] (1842), 10 M. & W. 109; also, see a case note in 13 Indiana L. Jl. 85 as to some of the extensions of the application of this rule.

[6] Thomas v. Winchester (1852), 6 N. Y. 397; Huset v. J. I. Case Threshing Machine Co. (1903), 120 F. 865; Delvin v. Smith (1882), 89 N. Y. 470; Heaven v. Pender (1883), L. R., 11 Q. B. Division 503; Peru Heating Co. v. Lenhart (1911), 48 Ind. App. 319, 95 N. E. 680; MacPherson v. Buick Motor Co. (1915), 217 N. Y. 382, 111 N. E. 1050; Boyd v. Coca Cola Bottling Works (1914), 132 Tenn. 23, 177 S. W. 80.

[7] "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation . . . is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." Smith Hurd Ann. St. C. 121½, Sec. 12; Burns Indiana Statutes (1933), Sec. 58-112; Discussed in Williston, Sales (2nd), Sec. 194, and Williston, Contracts (2d), Sec. 1503.

[8] Cases holding no privity is necessary: Davis v. Van Camp Packing Co., (1920), 189 Iowa 775, 176 N. W. 382, 17 A. L. R. 649; Ward Baking Co. v. Trizzino (1928), 27 Ohio App. 475, 161 N. E. 557; Mazetti v. Armour & Co. (1913), 75 Wash. 622, 135 P. 633. Cases holding privity is necessary: Kramer v. Mills Lumber Co. (1928), 24 F. (2d) 313, 60 A. L. R. 366; Connecticut Pie Co. v. Lynch (1932), 57 F. (2d) 447; Turner v. Edison Storage Battery Co. (1928), 248 N. Y. 73, 161 N. E. 423.

[9] Bogert and Fink, Business Practice Regarding Warranties in the Sale of Goods, 25 Illinois L. Rev. 400.

by the ultimate consumer when he purchases the article from the retail dealer?[10] To answer these questions in the affirmative might give a just result, but it would be stretching the law of contracts, and resorting to fiction which would not be in line with the modern theory of law today.

The court also considered the possibility of a cause of action for misrepresentation, but required a false representation with knowledge of the falsity. This limitation, the requirement of "scienter,"[11] has arisen because of the failure of the courts to take into consideration the three types of liability for misrepresentation: liability for an intended wrong—deceit; negligent wrong—misrepresentation negligently made; and liability without fault—liability for innocent misrepresentation.[12] Under negligent misrepresentation there are the two leading cases of *Glanzer v. Shepard*,[13] which imposed liability, and *Ultramares v. Touche*,[14] which reached an opposite result. Other cases have allowed a recovery in the action of deceit where the defendant, although honestly believing his misrepresentations to be true, had at the time no reasonable grounds so to believe;[15] however, this is actually not an intended invasion, under which deceit is classed, but a negligent misrepresentation.

The principle underlying the decisions imposing absolute liability appears to be that anyone, irrespective of good or bad faith on the part of the actor, who profits as a result of his own false representation should bear the burden of the injury to one who justifiably relies on the truth thereof.[16] A relationship is considered as arising out of the justifiable reliance, and privity of contract has not been considered a limitation. A recent Washington case furnishes an example of this basis of liability. In *Baxter v. Ford Motor Sales*,[17] in which the facts were almost identical with the instant case, the court held that it was error to exclude catalogues put out by defendant representing that their cars contained shatter proof glass. Here the court recognized a relation between the manufacturer and ultimate consumer which arises out of the manufacturer's advertisements, and thereby imposed absolute liability for innocent misrepresentation.

The imposing of this absolute liability for misrepresentation, even though limited by the nature of the relationship, has been criticized as outrageous, and the opponents have advocated that liability for misrepresentations be limited to negligent misrepresentations.[18] But if this is true, why should not this same test be applied to defamatory words? Yet the law governing

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[10] Carlill v. Carbolic Smoke Ball Co. (1893); 1 Q. B. 256.

[11] Peek v. Derry (1889), 14 App. Case 337.

[12] Harper, Law of Torts, Sec. 222.

[13] (1920), 233 N. Y. 236, 135 N. E. 275.

[14] (1931), 255 N. Y. 170, 174 N. E. 441. In relation to this, see Joillet v. Cashman (1923), 235 N. Y. 511, 139 N. E. 714; Industrial Products v. Erie R. R. (1927), 244 N. Y. 331, 155 N. E. 652.

[15] Whitehurst v. Life Ins. Co. of Va. (1908), 149 N. C. 273, 62 S. E. 1067; Prestwood v. Carlton (1909), 162 Ala. 327, 50 So. 254; Trimble v. Reid (1895), 97 Ky. 717, 31 S. W. 861.

[16] McDaniel v. Crabtree (1927), 142 Wash. 168, 254 P. 1091; Chatham Furnace Co. v. Moffatt (1888), 147 Mass. 403, 18 N. E. 168.

[17] (1932), 168 Wash. 456, 12 P. (2d) 409.

[18] Smith, Liability for Negligent Language, 14 Harvard L. Rev. 184.

defamation is not a law requiring care and caution in greater or less degrees, but a law of absolute liability qualified by an absolute exception.[19]

Admitting there is authority to support the imposition of absolute liability, is such a result socially desirable? Is not this relationship, springing, as it does, out of justifiable reliance, sufficient? Since the purpose of imposing liability is the prevention of injury, it seems logical to have the pressure brought to bear upon the one who controls the processes of production. It is in such cases as this that liability for innocent misrepresentations might well be imposed. Accordingly, it is submitted that although this is a new doctrine, it is one which conforms to the needs of our modern economic society. Therefore, a manufacturer who makes material representations relative to qualities possessed by its products, knowing that such statements will be relied on, should be held to strict liability for injuries to life, limb, or property, which may be caused by lack of the qualities represented, although the parties are not in privity of contract.

In conclusion it should be recognized that this is not a liability of warranty or in deceit or negligence, but an absolute tort liability arising out of the parties' relations in society.[20] I. K.

MUNICIPAL CORPORATIONS—LIMITATION OF INDEBTEDNESS—Action by Jefferson School Township against Jefferson Township School Building Company to secure the cancellation of a lease contract which the former contended placed its indebtedness in excess of the amount which it could incur under Article 13 of the Indiana Constitution. The defendant was organized pursuant to an act of the Indiana General Assembly of 1927 for the purpose of erecting a school building which was to be used by Jefferson School Township, under terms and conditions of a combined lease and contract, object of which was to enable the school township eventually to become owner of the building. The lease was for a term of 26 years, rent to be paid semi-annually, with an option to purchase the property at any time, such purchase price in no event to exceed amount actually invested by the lessor corporation. The school township was to pay taxes and insurance, and make any repairs and improvements necessary. If the rental payments should at any time exceed the amount necessary to meet incidental corporate expenses and to pay dividends and interest on outstanding securities of the lessor, such excess should be used in the redemption and cancellation of its securities at their par value; and if the total excess of rental payments should be sufficient to redeem the outstanding securities of the lessor and pay accrued interest and dividends, it would convey all its right, title, and interest in and to the premises and property in question to the lessee. In conclusion, the lease provided that "nothing herein shall be construed to provide or impose any obligation on the part of the lessee to purchase such schoolbuilding and property from the lessor,

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19 Williston, Liability for Honest Misrepresentation, 24 Harvard L. Rev. 426; Artemus Jones (1909), 2 K. B. 444. (Query, should the interest of reputation be awarded a greater degree of protection by the law than an interest in bodily safety?)

20 For further study in this field see: Miller, Scienter in Deceit and Estoppel, 6 Indiana L. Jl. 153; Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harvard L. Rev. 732; Carpenter, Responsibility for Intentional, Negligent and Innocent Misrepresentations, 24 Illinois L. Rev. 749.