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Sales--Warranty--Breach of Implied Warranty of Merchantability (Fredendall v. Abraham & Strauss, Inc., 279 N.Y. 146 (1938))

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SALES—WARRANTY—BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY.—Plaintiff, purchaser of a gallon of "Globe Quick-Dry Fluid for Dry Cleaning", sued to recover damages from defendant department store for illness occasioned by the use of the fluid, alleging breach of an implied warranty of merchantability. The container bore the legend, "The fluid contains ingredients which produce vapors, which if inhaled in large amounts may cause discomfort and distress" and that "with reasonable care it can be used with absolute safety". The directions instructed the purchaser to use the fluid only out-of-doors or in a room well ventilated by a cross draft. Plaintiff, who had read these instructions, used the fluid in a small room in which there was no cross ventilation, and was made sick by the fumes. Upon appeal by the defendant from an affirmance of a judgment in favor of the plaintiff, *held,* reversed. "We think the evidence conclusively shows that the plaintiff failed to use reasonable care in the use of the fluid and that this default was an essential cause of her illness." *Fredendall* v. *Abraham & Straus, Inc.,* 279 N. Y. 146, 18 N. E. (2d) 11 (1938).[1]

At early common law the doctrine of *caveat emptor* placed the risk of the possibility of a defect on the vendee in the absence of an express warranty. The creation by the law of the doctrine of implied warranties shifted the burden to the shoulders of the vendor because of his more intimate knowledge of the article.[2] Early suits for breach of warranty sounded in tort and were in the nature of trespass on the case sounding in deceit; but the action later evolved into assumpsit.[3] Hence today, the general rule is that in actions for breach of warranty there must be privity of contract.[4] Although we have come to regard warranty as an action in contract, a seller's liability may never-

[1] Whether defendant could be held under §§ 1360 and 1364 of the N. Y. EDUCATION LAW and § 1743 of the PENAL LAW (the twenty four grains of carbon tetrachloride in the preparation being destructive to human life) was not passed upon by the court although plaintiff contended that this rendered the goods unmarketable as a matter of law.

[2] "An implied warranty in the case of a sale of an article is an obligation imposed by law." Craig v. Pellet, 209 Ill. App. 368 (1918). "It is a child of the law. * * * It [the law] writes it, by implication, into the contract which the parties have made." Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927).

That the doctrine of *caveat emptor* precluded the existence of implied warranties, see WHITNEY, SALES (2d ed. 1934) § 170. Today, implied warranties are enumerated under N. Y. PERS. PROP. LAW § 96, or under a corresponding section of a similar statute in each of the other states.

[3] The first reported case allowing recovery for a breach of warranty in an action on the contract was Stuart v. Wilkins, 1 Doug. 18 (Eng. 1778); 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 70.

[4] Statutory warranties in sales of goods run in favor of immediate purchasers only. Hazelton v. First Nat. Stores, 88 N. H. 409, 190 Atl. 280 (1937). For exceptions see Rachlin v. Libby-Owens-Ford Glass Co., 96 F. (2d) 597 (C. C. A. 2d, 1938). Where the action is for negligence and not for breach of contract privity of contract is not necessary. Ritchie v. Sheffield Farms Co., Inc., 129 Misc. 765, 222 N. Y. Supp. 724 (1927).

theless sound in tort as well as in contract.[5] The latest implied warranty to be recognized is the implied warranty of merchantability.[6] To meet this warranty the merchandise must be at least of minimum quality and goodness, and reasonably fit for the general purpose for which it is to be used.[7] This warranty of merchantability has been extended to include a warranty of safety in the use of the article but only in those cases in which the product has been used in the prescribed way, or where the use to which the product was to be put was made known to the vendor.[8] This extension can never be implied where the product has been abused. The use of the product in the instant case, without regard to the directions on the label, constituted such an abuse.

It is possible by the use of appropriate words, or by the making of an inconsistent expressed warranty, or by examination of the goods,

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[5] Thus where the rule as to implied warranty in the sale of beverages in bottles does not apply, as in Tennessee, any recovery must be based on negligence. Coca-Cola Bottling Co. v. Rowland, 16 Tenn. App. 184, 66 S. W. (2d) 272 (1932). In Schuler v. Union News Co., — Mass. —, 4 N. E. (2d) 465 (1936), the court said: "The third count for breach of warranty was properly included in an action of tort. An action of tort as well as an action of contract may be maintained upon a false warranty. This is definitely laid down by Chief Justice Shaw in Norton v. Doherty, 3 Gray 272 (Mass. 1855), where a judgment for the defendant in such an action of tort was held to bar a later action of contract upon the same warranty."

[6] Implied warranties of title were earliest recognized, and later warranties of fitness for a disclosed purpose were similarly implied. Medina v. Stoughton, 1 Salk. 210, 1 Ld. Ray. 593 (Eng. 1700); Jones v. Bright, 5 Bing. 533 (Eng. 1829).

[7] "At least of minimum quality and goodness", Howard v. Hoey, 23 Wend. 350, 351 (N. Y. 1840). "A good enough delivery to pass generally under that description after full examination * * * of passing grade for such goods." McNeil & Higgins v. Czarnikow-Rienda Co., 274 Fed. 397, 399 (S. D. N. Y. 1921). "Free from latent defects that render it unmerchantable", Carlton v. Lombard, 149 N. Y. 137, 153, 43 N. E. 422 (1896).

The lower court in the instant case charged that "the term merchantable, while frequently used as synonymous with saleable, may be given a broader meaning to include adaptability to the use to which the merchandise is to be put. If an article cannot be used in the light of the directions given for its use and in the exercise of reasonable care without resulting in serious consequences to the person using it, that article is not of merchantable quality." To the same effect is Kelvinator Sales v. Quibbin, 234 App. Div. 96, 97, 254 N. Y. Supp. 123 (1st Dept. 1931): "The term merchantable, while frequently used as synonymous with saleable, may be given a broader connotation to include adaptability to the immediate use to which it is to be put." See WHITNEY, SALES, *op. cit, supra* note 2, § 172; also WILLISTON, SALES (2d ed. 1934) § 235.

[8] Grant v. Australian Knitting Mills (1936 A. C. Australia 85) 105 A. L. R. 1483, where purchaser of undergarment who contracted a skin disease from wearing it recovered from the retailer on the ground of implied warranty of merchantability under § 14 of the Sales of Goods Act of South Australia, which is almost identical with § 96 of the Personal Property Law of this state. *Cf.* Crandall v. Stop & Shop, 288 Ill. App. 543, 6 N. E. (2d) 685 (1937), where the implied warranty would not be extended to render the retailer liable for injuries caused by the opening of a glass container of fruit preserves.

or by disclaimer, to limit or nullify an implied warranty.[9] In so doing, however, one must consider questions of notice, fraud, public policy, and statutory requirements, as well as the tendency of the courts to construe such provisions either strictly or liberally.[10] In the instant case the caution on the container formed part of the contract, and defendant's implied warranty was conditioned upon the compliance of the plaintiff with the legend.[11] The failure of the plaintiff to comply with this portion of the contract was the direct and proximate cause of her injury.[12] The defense of lack of due care is, in this type of case, as consistent with an action for breach of contract as with an action in tort for negligence.[13] The act of the plaintiff in the instant case was wilful; had the harm been caused by accident a different conclusion might have been reached.[14] But if one by his vol-

[9] N. Y. PERS PROP. LAW § 152, "Where any right, duty or liability would arise under a contract or sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract of sale." Section 71 of the Uniform Sales Law (identical with N. Y. PERS. PROP. LAW § 152) is declaratory of the common law. Christian Mills, Inc. v. Brethold Stern Flour Co., 247 Ill. App. 1 (1927). In Ryan v. Progressive Grocery Stores, 255 N. Y. 388, 394, 175 N. E. 105 (1931), Cardozo, J., said: "It [the rule] may even be different, though the purchase is by description, if the goods are subject to inspection and the defects are of such a nature that inspection will reveal them." Also see WILLISTON, *op. cit. supra* note 7, § 239a.

[10] A disclaimer is not likely to be upheld if printed where the vendee is not likely to see it. Amzi Godden Seed Co. v. Smith, 185 Ala. 246, 64 So. 100 (1913). A disclaimer will be set aside on the ground of fraud. Davis v. Joyner, 27 Ga. App. 132, 107 S. E. 551 (1921). In S. F. Bowser v. McCormack, 230 App. Div. 303, 243 N. Y. Supp. 442 (4th Dept. 1930), a strict construction was adopted by the court.

[11] In Calhoon v. Brinker, 17 Ohio Dec. 705 (1907), the court recognized the printed matter on a package of seeds as part of the contract between the buyer and the seller. The directions on the label were of primary importance in determining the liability in the cases of Willson v. Faxon, 122 N. Y. Supp. 783, 138 App. Div. 359 (4th Dept. 1910), and Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118 (1889). See Note (1937) 22 WASH. U. L. Q. 536.

[12] Campbell v. Stamper Drug Co., 85 Colo. 508, 277 Pac. 770 (1929) (failure to read the label was not negligence as a matter of law); Hartman v. Berlin & Jones Envelope Co., 71 Misc. 30, 127 N. Y. Supp. 187 (1911) ("Whether an accident was proximately caused by negligence is determined by whether the accident would have happened without such negligence and whether the accident and the resultant injury was reasonably to be foreseen").

[13] Because of the similarity between an action in contract for breach of warranty and an action in tort for negligence the courts have often found it necessary to distinguish between them. Kennedy v. F. W. Woolworth Co., 205 App. Div. 648, 200 N. Y. Supp. 121 (1st Dept. 1923); Abounader v. Strohmeyer, etc. Co., 217 App. Div. 43, 215 N. Y. Supp. 702 (4th Dept. 1926); Shepard v. Beck, 131 Misc. 164, 255 N. Y. Supp. 438 (1927); Jaroniec v. Hasselbarth, Inc., 223 App. Div. 182, 228 N. Y. Supp. 302 (3d Dept. 1928); Cohen v. Dugan Bros., Inc., 132 Misc. 896, 230 N. Y. Supp. 743 (1928); Ireland v. Louis K. Liggett Co., 243 Mass. 243, 137 N. E. 371 (1922); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); Minutilla v. Providence Ice Cream Co., 50 R. I. 43, 144 Atl. 884 (1929).

[14] As in the case of Egan v. Horn and Macy, N. Y. L. J., Nov. 8, 1935, where the death of the plaintiff's intestate caused by the fumes of a gallon of

untary act, places himself in a position of danger, he cannot recover for the resultant injury. The rule of contracts that the law will not allow the plaintiff to take advantage of his own default to the detriment of the innocent defendant would be applied. The fundamental basis of a warranty is the reliance by the buyer on the superior knowledge of the seller; thus where both parties have the same knowledge the law does not imply a warranty. Here the dangerous properties of the fluid were made known to the plaintiff. It was because of this that the plaintiff had no remedy.[15]

H. P. M.

UNFAIR COMPETITION—INJUNCTION—TRADE NAMES—"SHREDDED WHEAT".—The complainant, National Biscuit Co., sought to enjoin the defendant, Kellogg Co., from manufacturing shredded wheat biscuits in a pillow-shaped form and from selling them under the name of "Shredded Wheat". The complainant claimed the exclusive right to make shredded wheat biscuits in a pillow-shaped form, and the exclusive right to designate them by the trade name "Shredded Wheat". The defendant was accused of unfair competition on the ground that its use of the form and the trade name was, allegedly, calculated to "pass off" the defendant's goods for those of the complainant. It was shown that although the basic patent for the manufacture of shredded wheat by the Shredded Wheat Co.[1] had expired in 1912, the Kellogg Co. did not compete with the Shredded Wheat Co. until 1927, after the said company had expended over seventeen million dollars in creating a great demand for its product. However, in competing for the same market in which the complainant sold its goods, the defendant used all reasonable means to prevent the public from confusing the source of the goods. The standard Kellogg cartons were strikingly dissimilar in size, form and color from the cartons of the complainant. They were distinctively labeled "Kellogg Shredded Whole Wheat Biscuit" so as to strike the eye of even an unwary purchaser as being a Kellogg product. The defendant's cartons con-

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cleaning fluid which had been spilled on the floor. Judgment was given for the plaintiff on the ground that the defendants were chargeable with negligence in marketing into homes such quantities of a dangerous fluid. Unanimously affirmed without opinion, 248 App. Div. 697 (1st Dept. 1936).

[15] The basis of an implied warranty is justifiable reliance on judgment and skill of the warrantor, as shown by the particular circumstances. Ford v. Waldorf System, — R. I. —, 188 Atl. 633 (1936). "The purpose and use of the implied warranty is to promote high standards in business and to discourage sharp dealings. It rests upon the principle that honesty is the best policy and contemplates business transactions in which both parties may profit. Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927).

[1] To whose business and goodwill the complainant had succeeded in 1930.