Marquette Law Review

Volume 47
Issue 3 *Winter 1963-1964*

Article 12

Sales: What Constitutes Sufficient Notification for Breach of Warranty

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that there should have been some indication of exactly what deponent had personally observed, what he had heard from others, and what he had learned from the reports or records of the Bureau of Narcotics. It seems that if the source is indicated in a way that will satisfy the courts, that type of fact, generally known as evidentiary, must be pleaded. That the defendant distributed narcotics is an ultimate fact. The circumstances which enable one to make the assertion are evidentiary facts, and it seems that this is what the courts require.

In conclusion, the policy which the courts seek to effectuate in enforcing the requirement of a showing of probable cause is one of requiring the magistrate issuing the warrant or summons to come to his own conclusions as to whether it (probable cause) exists. The purpose is to place a barrier—presumably impartial—between the law enforcement officer who might stand to gain by acquiring a warrant, and the party whose arrest is sought. Obviously, a recital of the elements of the crime and the fact that the defendant committed it is not going to be enough. This is no more than stating a legal conclusion and is insufficient even in a civil complaint. It helps if the complainant indicates the sources of his belief. By doing this he necessarily brings in more facts. However, even this will be insufficient if these sources are stated generally as they were in *Greenberg* and *DiBella.* One is drawn unavoidably to the conclusion that the courts, in no matter what terms they state their criticisms, are all ultimately requiring evidentiary, as opposed to ultimate, facts or legal conclusions. This is the type of fact specifically suggested in *Greenberg.* These facts by their nature allow the magistrate to draw his own conclusion and thus fulfill the policy the courts are trying to enforce. MARY C. CAHILL

Sales: What Constitutes Sufficient Notification for Breach of Warranty—A tire purchased by plaintiff-Wojciuk from one of the defendants, Stuewer, blew out, causing the automobile in which the plaintiffs were riding to turn over. Plaintiff-wife suffered serious bodily injuries. Defendant-Stuewer had told the plaintiffs that the tire would never blow out, and advertisements also stated that the tire was guaranteed for life against any defects. On the day of the accident the plaintiff, Wojciuk, telephoned defendant, Stuewer, and told him of the mishap, saying, "Herb, what kind of tires did you sell me? . . . We had a blowout and a terrible accident resulted from it."[1] The plaintiffs subsequently brought suit against Stuewer for "breach of express warranty that the tire would not blow out suddenly" and for "breach of implied warranty of merchantable quality and fitness" in *Wojciuk v. United States Rubber*

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[1] Wojciuk v. United States Rubber Co., 19 Wis. 2d 224, 235, 120 N.W. 2d 47, 53 (1963).

Co.[2] Plaintiffs also brought suit against United States Rubber Company for negligence in manufacture and inspection and against Phillips Petroleum Company for negligence in manufacture because the tire was represented to the public as Phillips' own product.

In this case, the Wisconsin Supreme Court was asked for the first time to decide whether or not section 121.49 of the Wisconsin Statutes[3] required notification from the buyer to the seller in cases of breach of warranty involving personal injury rather than commercial loss. The court decided that under its interpretation of section 121.49, prompt notice of the breach was necessary to preserve one's cause of action.[4] Upon rehearing, the court decided that the question of whether or not the telephone conversation was adequate notification of the breach of warranty was for the jury.[5] Apparently, in holding the notice of Wojciuk to Stuewer to be a jury question rather than insufficient notification as a matter of law, the Wisconsin court mitigated its requirements of notification under section 121.49 of the Wisconsin Statutes.[6]

In the *Wojciuk* case, the Wisconsin court adopted the majority position requiring notice of breach of an express warranty in order to recover in a personal injury case.[7] The majority view is based on section 49 of the Uniform Sales Act, which expressly requires that notice of the breach be given to the seller. The Indiana court, holding the minority position, in *Wright, Bachman, Inc. v. Hodnett*[8] decided that notice of breach of warranty was not a prerequisite to the buyer's cause of action.[9] Also taking the minority position, the intermediate appellate courts of New York did not require notice of breach of warranty when personal

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[2] Wojciuk v. United States Rubber Co., 19 Wis. 2d 224, 120 N.W. 2d 47 (1963), *motion for rehearing granted,* 121 N.W. 2d 294 (1963), *modified on rehearing,* 122 N.W. 2d 737 (1963).

[3] Wis. Stat. §121.49 (1961), Uniform Sales Act §49, "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

[4] Wojciuk v. United States Rubber Co., — Wis. 2d —, 122 N.W. 2d 737 (1963).

[5] *Id.* at 740.

[6] Mack Trucks, Inc. v. Sunde, 19 Wis. 2d 129, 119 N.W. 2d 321 (1963); Schaefer v. Webar, 265 Wis. 160, 60 N.W. 2d 696 (1953); Marsh Wood Products Co. v. Babcock & Wilcox Co. 207 Wis. 209, 240 N.W. 2d 392 (1932).

[7] 3 Williston, Sales §484(b) (rev. ed. 1948).

[8] 235 Ind. 307, 133 N.E. 2d 713 (1955).

[9] Prior to the enactment of the Uniform Sales Act by the Indiana Legislature, "notice of breach of warranty was not a prerequisite to the bringing of an action by the buyer for such breach." In the *Wright Bachman* case, the court did not alter the previous law but interpreted §70 of the Uniform Sales Act to mean that notice of the breach of warranty was unnecessary. Section 70 states that nothing in this act "shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable."

injuries were sustained.[10] The notice requirement has been criticized by authorities in the field of torts.[11] In the *Wojciuk* case, the Wisconsin Supreme Court rejected the decision of the Indiana court and stated, in the dicta, that the purpose of section 70 of the Uniform Sales Act was to define liability and not to exempt the notification requirement of section 49.[12]

Sufficient notification under section 49 of the Uniform Sales Act requires the buyer to notify the seller within a "reasonable time" after the breach has occurred[13] that the buyer will look to him for damages.[14] The majority of courts require the notification of a breach of warranty to conform to the above standard because "[t]he purpose of a notice of the breach of warranty is to permit the seller to investigate the claim" and to protect the seller against belated damage claims.[15] What "constitutes reasonable time must be determined from the particular circumstances in the individual case."[16] For example, in *Tegen v. Chapin*,[17] the Wisconsin court held fifty-seven days to be an unreasonable time, while in *Bonker v. Ingersoll Products Corporation*,[18] a federal court held a delay of four months before notifying the buyer of the breach of warranty to be within a reasonable time.

The court in deciding, as a matter of law, whether or not notification of the breach was made within a reasonable time, will look for any circumstances excusing or justifying the delay.[19] Extenuating circumstances, such as, latent defects[20] or the seller's acting in such a manner as to induce the buyer to delay,[21] will extend what normally is considered to be a reasonable time. However, the general rule (at least the rule intended for the protection of the buyer) is that once the buyer is aware or ought to have been aware of the defect in the goods, he should *promptly* notify the seller of the defects or they will be deemed to have been waived.[23]

The problem of determining what a notification must contain in

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[10] Kennedy v. F. W. Woolworth Co., 205 App. Div. 648, 200 N.Y. Supp. 121 (1923); Silverstein v. R. H. Macy & Co. 266 App. Div. 5, 40 N.Y.S. 2d 916 (1943).

[11] 2 HARPER & JAMES, THE LAW OF TORTS §28.17 (1st ed. 1956). The authors warned that the majority rule "may prove a trap to the unwary victim who will generally not be steeped in the 'business practice' which justifies the rule."

[12] Wojciuk v. United States Rubber Co., *supra* note 4.

[13] 3 WILLISTON, *op. cit. supra* note 7.

[14] Mack Truck, Inc. v. Sunde, *supra* note 6.

[15] Hellenbrand v. Bowar, 16 Wis. 2d 264, 270, 114 N.W. 2d 418, 421 (1961).

[16] Steiner v. Jarrett, 130 Cal. App. 869, 280 P. 2d 235, 237 (1954).

[17] 176 Wis. 410, 187 N.W. 185 (1922).

[18] 132 F. Supp. 5 (D. Mass. 1955).

[19] Tegan v. Chapin, *supra* note 17.

[20] Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P. 2d 1272 (1937).

[21] Cohan v. Associated Fur Farms, 261 Wis. 584, 53 N.W. 2d 788 (1952).

[22] 3 WILLISTON, *op. cit. supra* note 7.

[23] Locke v. Williamson, 40 Wis. 377, 381 (1876).

order to be adequate was a significant issue in the *Wojciuk* case.[24] The telephone conversation between plaintiff-Wojicuk and defendant-Stuewer seemed to fall short of informing Stuewer that Wojciuk was going to look to him for damages. Wojciuk, in the telephone conversastion, did not make any reference to damages, nor did he say anything concerning his intention to exercise his legal rights. By permitting the issue of sufficient notification for breach of warranty to go to the jury in this case, the Wisconsin court appeared to alleviate the strict prerequisites of notification required in prior cases.

> The statute [section 121.49 Wisconsin Statutes] does not require that the notice shall be in any particular form. It should fairly advise the seller of the defect asserted in the performance of a particular promise or sale; it should repel any inference of waiver, and at least by implication should assert that there has been a violation of the buyer's legal rights.[25]

Until the *Wojciuk* case, the Wisconsin court consistently had held that the "notice is sufficient if it fairly apprises the seller the buyer looks to him for damages."[26]

As is evidenced by the *Wojciuk* case, there seems to be a trend in judicial thinking toward mitigating the requirements of the sufficiency of notice of breach of warranty. This trend is embodied in the interpretive comment subsequent to section 2-607 of the Uniform Commercial Code recently adopted by the Wisconsin Legislature.[27] Section 2-607(3) states:

> Where a tender has been accepted
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> (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy. . . .

The fourth comment on said section reads:

> The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for *the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.*
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> *The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched.* There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied upon by the buyer. . . . *Nor is there any reason for requiring the notifica-*

[24] Wojciuk v. United States Rubber Co., *supra* note 4, at 740.
[25] Ingalls v. Meissnes, 11 Wis. 2d 371, 384, 105 N.W. 2d 748, 755 (1960); Annot., 53 A.L.R. 2d 266, 269 (1957).
[26] Ace Engineering Co. v. West Bend Malting Co., 244 Wis. 91, 93, 11 N.W. 2d 627, 628 (1943).
[27] Wis. Laws 1963, ch. 158. (To become effective July 1, 1965).

> *tion to be a claim for damages or of any threatened litigation or other resort to a remedy.* The notification which saves the buyer's rights under this Article *need only be such as informs the seller that the transaction is claimed to involve a breach,* and thus opens the way for normal settlement through negotiations.[28] [Emphasis added.]

Thus, the adoption of the Uniform Commercial Code in Wisconsin will establish a standard for the element of "reasonable time" required for proper notification of breach of warranty. The requirement of adequate notification, as modified by the Wisconsin Supreme Court in the *Wojciuk* case, seems to conform to the philosophy of the Uniform Commercial Code, set forth above. JAMES WM. DWYER

Torts: Abolishment of Parental Immunity in Wisconsin—In recent years the Wisconsin Supreme Court has been systematically abrogating the doctrine of immunity. Charitable immunity in *Kojis v. Doctor's Hospital,*[1] governmental immunity in *Holytz v. City of Milwaukee,*[2] religious immunity in *Widell v. Holy Trinity Catholic Church,*[3] and most recently parental immunity in *Goller v. White*[4] have been eliminated. Under the holding in the *Goller* case, a parent may now be liable to his child for negligence, unless the alleged act involves an exercise of parental authority or ordinary parental discretion with respect to the provision of food, clothing, housing and other care.

Daniel G. Goller, a twelve-year-old, was injured while riding on a farm tractor driven by his foster father, James J. White. The boy's guardian ad litem brought an action against White and Farmers Mutual Automobile Insurance Company to recover damages, alleging that White was negligent in allowing the child to ride on the draw-bar of the tractor and that Farmers Mutual had issued a policy of liability insurance to White which covered the child's injuries. The trial court dismissed both complaints on the grounds that the insurance policy afforded no coverage to the plaintiff and that White stood in *loco parentis* to the plaintiff and could not be held liable in negligence.

On appeal, the supreme court considered the parental immunity doctrine, first noting the growing tendency to depart from the holding in *Wick v. Wick*[5] which was cited by the trial court as authority for its determination. The rationale of the *Wick* decision preventing a child from suing his parent for negligence, was that a contrary holding would introduce discord and contention into the family relationship. The de-

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[28] UNIFORM COMMERCIAL CODE §2-607, comment 4 (Official Text, 1962).
[1] 12 Wis. 2d 367, 107 N.W. 2d 131, 107 N.W. 2d 292 (1961).
[2] 17 Wis. 2d 26, 115 N.W. 2d 618 (1962).
[3] 19 Wis. 2d 648, 121 N.W. 2d 249 (1963).
[4] 20 Wis. 2d 402, 122 N.W. 2d 193 (1963).
[5] 192 Wis. 260, 212 N.W. 787 (1927).