SALES

Implied Warranties of Goods Sold in Sealed Packages — Liability of the Manufacturer

The purchaser's remedies under an implied warranty of goods sold in sealed packages, a problem of increasing importance under modern mercantile methods, have again presented the difficulties of satisfactory solution in a recent case in Ohio. In that case, Nieman sued the Dow Drug Co., retailer, and the Frieder and Sons Co., wholesaler, for personal injuries sustained as a result of the explosion of a firecracker concealed in one of four cigars sold in cellophane wrappers by the Dow Drug Co. to the plaintiff.[1] The charge to the jury by the trial court authorized a verdict in favor of the plaintiff which might be based either on the theory of implied warranty or of negligence. Under this charge a verdict was rendered in favor of the plaintiff as against the retailer, but not against the wholesaler.[1a] In affirming the lower court's holding, the Court of Appeals for Hamilton County held that there was an implied warranty of merchantability imposed upon the dealer.

The problems confronting the courts in these cases are twofold: first, the liability, if any, of the manufacturer; second, the liability, if any, of the dealer. Section 15 of the Uniform Sales Act[2] contains provisions on implied warranties applicable to our immediate problem, which section, insofar as is material here, reads: "Subject to the provisions of this chapter 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) When 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) When the goods are bought by 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."

The fact that the goods are in a sealed container does not appear to have added any complicating factors to actions by the consumer against the manufacturer. In sealed package cases, as in all other cases of implied

[1] *Dow Drug Co.* v. *Nieman*, 57 Ohio App. 190, 13 N.E. (2d) 130, 6 Ohio O. 77, 21 Ohio L. Abs. 399 (1936).

[1a] Since no form was returned by the jury as against the wholesaler, the court said it was to be inferred that they had found in favor of him.

[2] Ohio G.C., sec. 8395.

warranties, the privity doctrine still appears as the major point of conflict. Many cases, if not a numerical preponderance of the more recent ones, still refuse to overturn the early precedents which set up a rigid concept of privity of contract. These cases demand a direct connection between the manufacturer and consumer in order to hold the defendant on an implied warranty.[3] There is noticed, however, a gradual trend by a substantial number of courts to allow recovery by the consumer against the manufacturer with but a minimum of emphasis on privity of contract. This is accomplished either by admitting the necessity of privity and finding it by the application of one of several theories, or by recognizing that the doctrine is outmoded and repudiating it. The several theories by which privity is found in these cases are: (1) the theory of an agency established between the manufacturer and the dealer whereby the implied warranty arises in favor of the consumer and is traceable to the manufacturer;[4] (2) a concept of warranty as running with the chattel;[5] (3) a theory of third party beneficiary.[6] This third view is set forth in Ohio by Judge Levine in *Ward Baking Co.* v. *Trizzino*,[7] saying, "In other words, this contract between the groceryman and the Ward Baking Co. to all intents and purposes was a contract entered into for the benefit of a third party, to wit, the ultimate consumer. Whatever implied warranty arises in favor of the groceryman, who established the contractual relationship with the Baking Company, is for the benefit of the third party, namely, the ultimate consumer." It is gratifying to observe that the concept of privity is being broadened to permit recovery in these cases even though there is no direct contractual relationship between the consumer and the manufacturer. Another line of authority is slowly developing to the effect that privity of contract is not essential to recovery by the consumer against the manufacturer.[8] Still another group of cases has been decided on the basis of a recognition of the privity doctrine in this type of suit, but makes an exception to this rule in the

[3] See *Burkhart* v. *Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); *Pelletier* v. *Dupont*, 124 Me. 269, 128 Atl. 186 (1925); *Nehi Bottling Co.* v. *Thomas*, 236 Ky. 684, 33 S.W. (2d) 701 (1930); *Crigger* v. *Coca Cola Co.*, 132 Tenn. 545, 179 S.W. 155 (1915); *Dothan Chero-Cola Co.* v. *Weeks*, 16 Ala. App. 639, 80 So. 734 (1918); *Chysky* v. *Drake Bros.*, 235 N.Y. 468, 139 N.E. 576, 27 A.L.R. 1533 (1923).

[4] *Hall Mfg. Co.* v. *Purcell*, 199 Ky. 375, 251 S.W. 177 (1923); *Timberland Lumber Co.* v. *Climax Mfg. Co.*, 61 Fed. (2d) 391 (1932).

[5] *Mazetti* v. *Armour & Co.*, 75 Wash. 622, 135 Pac. 633, 48 L.R.A. (N.S.) 213, Ann. Cas. 1915C, 140 (1913); *Anderson* v. *Tyler, et al.*, 274 N.W. 48 (1937).

[6] *Coca-Cola Bottling Co. of Ft. Worth* v. *Smith*, 97 S.W. (2d) 761 (Tex. Civ. App.) (1936), holding the fact that the third party beneficiary is not known at the time the contract arose is immaterial. He is one of a class which is sufficient, if the class is sufficiently described or designated (obviously the ultimate consumer here).

[7] *Ward Baking Co.* v. *Trizzino*, 27 Ohio App. 475 (1928).

[8] *Brown Candy Co.* v. *Jensen*, 119 Texas 447, 32 S.W. (2d) 227 (1930); *Coca-Cola Bottling Works* v. *Simpson*, 158 Miss. 390, 130 So. 479 (1930).

case of food sold in sealed packages.[9] The extreme to which courts have felt justified in going to allow the consumer to recover on the warranty is well illustrated by *Madouros* v. *Kansas City Coca-Cola Co.*[10] wherein the court recognizes the trend toward allowing recovery by the consumer and said, "Under conditions which now surround and apply to business of this nature it does not seem to the author that this case (sealed packaged goods) should be decided according to strict technical principles heretofore deemed necessary and which arose under entirely different conditions and circumstances. * * * If privity of contract is required, then under the situation and circumstances of modern merchandising in such matters, privity of contract exists in the consciousness and understanding of all right thinking persons." Rather than strain the concept of privity to a point where it is not privity of contract at all, it would appear wiser to repudiate the doctrine entirely and place the manufacturer in a position as regards the consumer, in which the nature of the facts justly requires him to be placed.

Liability of the Retail Dealer

Several complicating factors not present in the problem of manufacturer liability are present in a consideration of the liability of the dealer on an implied warranty in cases of sealed packages. Here the goods are sealed before they reach the hands of the retail dealer, and are not opened until after they leave his hands. In this case the dealer, by inspection, cannot protect the consumer from injury, nor can he protect himself from suit. Herein it appears that the superior skill and judgment of the seller cannot be put to its proper use. *Quaere*, then, whether the retailer should be held to an implied warranty of fitness for a particular purpose, when such a warranty requires reliance by the buyer upon the seller's skill and judgment. The cases are in great conflict on the point, many holding that by the very terms of the warranty, the dealer cannot be held liable.[11] In *Kirkland* v. *Great Atlantic and Pacific Tea Co.*,[12] it is said

[9] *Madouros* v. *Kansas City Coca-Cola Bottling Co.*, 90 S.W. (2d) 445 (1936); *Nock* v. *Coca-Cola Bottling Works of Pittsburgh*, 102 Pa. Sup. Ct. 515, 156 Atl. 537 (1931); *Mazetti* v. *Armour & Co.*, 75 Wash. 622, 135 Pac. 633, 48 L.R.A. (N.S.) 213, Ann. Cas. 1915C, 140 (1913); *Nemela* v. *Coca-Cola Bottling Co. of St. Louis*, 104 S.W. (2d) 773 (1937), on a theory of implied contract between manufacturer and the unknown consumer; *Davis* v. *Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920).

[10] 90 S.W. (2d) 445 (1936).

[11] *Biglow* v. *Maine Central R.R. Co.*, 110 Me. 105, 85 Atl. 396, 43 L.R.A. (N.S.) 627 (1912); *Dothan Chero-Cola Bottling Co.* v. *Weeks*, 16 Ala. App. 639, 80 So. 734 (1918); *Andrews & Son* v. *Harper*, 137 Wash. 353, 242 Pac. 27 (1926), dairy food in original package; *Walden* v. *Wheeler*, 153 Ky. 181, 154 S.W. 1088, 44 L.R.A. (N.S.) 597 (1913); *Oindraux* v. *Maurice Mercantile Co.*, 37 Pac. (2d) 747 (1937), is based on a statute making one who sells provisions for domestic use, impliedly warrant they are

that the retailer is not liable to the purchaser of goods in sealed packages (flour in this case) if the retailer buys from a reputable manufacturer and the goods are without imperfection discoverable "by the reasonable care of one skilled in dealing in and supplying goods to the public." This seems to place a legal duty on the retailer to deal with reputable manufacturers and should impose a liability on him for a breach of that duty. Is it not this judgment in the choice of manufacturers which is relied upon by the buyer? If so, then the retailer should only be liable when he fails to comply with this duty.[13]

Controversy has been raised on this point in Ohio as a result of a *dictum* paragraph in the syllabus in *McMurray* v. *Vaughn's Seed Store*[14] to the effect that where the dealer sells an article in the original package as it comes from the manufacturer, and the customer buys it knowing there has been no inspection by the retailer, there is no implied warranty placed on the retailer, and the retailer is not liable for damages caused by any deleterious substance in such merchandise, of the presence of which he had no knowledge. That case was pleaded and decided on the basis of tort liability thus rendering the statements as to warranty *obiter dictum*. This stood as the only authority on the subject of the retailer's liability upon an implied warranty of goods in sealed containers in Ohio until 1934 when the case of *Galjatowska* v. *Albrecht Co.*[15] was decided in the Court of Appeals for Summit County. In that case, the plaintiff sued a retail dealer for personal injuries sustained by her as a result of biting upon an iron bolt contained in a can of pork and beans. The court discussed the *McMurray* case[16] and said, "A close scrutiny of that case, however, leads us to the conclusion that notwithstanding some

sound and wholesome. Held: this statute does not apply to a retailer of goods in sealed packages where the seller had no means of knowing the condition of the contents by skill or investigation. *Great Atlantic and Pacific Tea Co.* v. *Walker*, 104 S.W. (2d) 627 (1937); *Race* v. *Krum*, 222 N.Y. 410, 118 N.E. 853 (1910); *Cook* v. *Darling*, 160 Mich. 475, 125 N.W. 411 (1910); *Parks* v. *C. C. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202, L.R.A. 1917F, 473 (1914); *Pennington* v. *Cranberry Fuel Co.*, 117 W. Va. 680, 186 S.E. 610 (1936); At Common-Law: *Linker* v. *Quaker Oats Co.*, 11 Fed. Supp. 794 (1935); *Scruggins* v. *Jones*, 207 Ky. 636, 269 S.W. 743 (1925); *Trafton* v. *Davis*, 110 Me. 318, 86 Atl. 179 (1913); *Kroger Grocery and Baking Co.* v. *Lewelling*, 165 Miss. 71, 145 So. 726 (1933).

[12] *Kirland* v. *Great Atlantic and Pacific Tea Co.*, 233 Ala. 404, 171 So. 735 (1936).

[13] See 35 Ohio Jur. p. 879 (Sales); also see Waite, "Retail Responsibility and Judicial Law Making," 34 Mich. L. Rev. 494 (1936); see also *Burkhart* v. *Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); 90 A.L.R. 1260 (1934); *Griffin* v. *James Butler Grocery Co.*, 108 N.J.L. 92, 156 Atl. 636 (1931); *Giminez* v. *Great Atlantic & Pacific Tea Co.*, 265 N.Y. 390, 191 N.E. 27 (1934); *Ward* v. *Great Atlantic and Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918); 5 A.L.R. 242 (1920); *Cleary* v. *First. Nat. Stores*, 196 N.E. 868 (1935); *Haller* v. *Rudimann*, 292 N.Y. Supp. 586, 249 App. Div. 831 (1937), holding that the implied warranty includes the bottle in which the rubbing alcohol was contained.

[14] *McMurray* v. *Vaughn's Seed Store*, 117 Ohio St. 236, 157 N.E. 567 (1927).

[15] *Goljatowska* v. *Fred W. Albrecht Co., Inc.*, 17 Ohio L. Abs. 294 (1934).

[16] See note 14.

obiter dicta observations therein, it is not authority for the position taken by the defendant in error. So far as we are able to learn, the case here presented is one of first impression in the State of Ohio * * * " The court then quoted from Justice Cardozo's opinion in *Ryan* v. *Progressive Grocery Stores, Inc.*,[17] and accepted that decision as the "more sound rule."

It is to be noticed that these two Ohio cases, as well as many other cases, place the liability of the retailer on the basis of a warranty of merchantability, and not on the warranty of fitness for a purpose.[18] It is then important to notice the differences in these two warranties and their applicability. The courts are not at all in agreement as to the true meaning of "merchantability" as used in this warranty. The most that can be said is that it denotes some average as to quality and salability in the existing market. It is variously used to mean "medium quality," "fair average quality," and "fairly salable with defects known."[19] In the case of food for human consumption, a difference in these two warranties as to the quality factor is difficult to understand. It would seem that if food is not merchantable as food it is not fit for a particular purpose as food. Thus, inasmuch as the two requirements can be synonymous in food cases, we have two possible ways to find dealer liability. Since one requires reliance on the seller's judgment, which is difficult to find in cases of sealed packages, and the other apparently has no such limitation,[20] it would seem plausible to find dealer liability on an implied warranty of merchantability in these cases, even though the court may feel that the warranty of fitness for a particular purpose is not applicable to sealed package cases.

Another general approach to the problem is made through the cases involving the sale of food. Both under the common law and under the Uniform Sales Act, in cases of the sale of food for human consumption *not in sealed containers*, the courts are quite uniform in holding the retail dealer to an implied warranty of fitness for human consumption.[21] When the food is sold in sealed containers this unanimity of decisions disappears and some courts feel constrained to relieve the retailer in this

[17] *Ryan* v. *Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931).

[18] *Young* v. *Great Atlantic and Pacific Tea Co.*, 15 Fed. Supp. 1018 (1936); *Borchcix* v. *Willow Brook Dairy*, 268 N.Y. 1, 196 N.E. 617 (1935); *Dow Drug Co.* v. *Nieman*, note 1 *supra*; *Goljatowska* v. *Albrecht Co.*, note 16 *supra*; *Ryan* v. *Progressive Grocery Stores*, note 17 *supra*; *Aron* v. *Sills*, 240 N.Y. 588, 148 N.E. 717 (1925).

[19] 2 Wis. L. Rev. 385 and cases cited there; 33 Col. L. Rev. 868; 1 Williston, *Sales*, sec. 235; *Ward Baking Co.* v. *Trizzino*, note 7 *supra*.

[20] *Ryan* v. *Progressive Stores*, note 17 *supra*; *Aron* v. *Sills*, note 18 *supra*.

[21] *Farrell* v. *Manhattan Market Co.*, 198 Mass. 271, 84 N.E. 481, 15 Ann. Cas. 1076, 126 Am. St. Rep. 436, 15 L.R.A. (N.S.) 884 (1908); *Race* v. *Krum*, note 11 *supra*; *Cook* v. *Darling*, note 11 *supra*; *Parks* v. *C. C. Yost Pie Co.*, note 11 *supra*.

case.[22] Other courts refuse to make an exception where food in a sealed package is involved and continue to hold the dealer to this warranty.[23] It is not difficult to understand the incentive which the courts have to protect the consumer of food more readily than in other cases. It does, however, appear to be fair to say that interpretations given the common law and statutory warranties should be equally applicable in cases of other goods sold in sealed packages. The same problems of privity, reliance, lack of opportunity to inspect, and policy are involved in both instances. The necessity of protection is still present, whether the goods be in cellophane or not. Whether this necessary measure of protection is to be achieved by the warranty of fitness or of merchantability is of little consequence. The Sales Act does not deny such liability in sealed package cases.

To hold the retailer to an implied warranty in these cases may appear to be forcing him into the position of an insurer, but inasmuch as he is adequately indemnified by the right to recover from the manufacturer for his damages, or by permitting the manufacturer to be made a party defendant,[24] this is not a serious objection.

We see, then, that the modern trend is to permit recovery from the manufacturer in cases of goods in sealed packages either by a broadened concept of privity of contract, or by repudiating the doctrine. It is important to note, however, that such a cause of action may not be practical because of the location of the parties in different jurisdictions. Also noted as the modern trend is the allowing of recovery from the retailer, in a few instances on the warranty of fitness for a purpose, but more frequently on the warranty of merchantability. Not to allow recovery in these instances could result in the warranties in sealed package cases being completely unavailable as a basis of recovery by the consumer because of lack of privity with the manufacturer, and a lack of reliance on the skill or judgment of the retailer. This is an anomalous situation to which no court could conscientiously lend its authority.

ARTHUR W. MEIFERT

[22] *Kroger Grocery Co.* v. *Lewelling*, note 11 *supra*; *Aronowitz* v. *F. W. Woolworth Co.*, 236 N.Y. Supp. 133, 134 Misc. 272 (1929); *Julian* v. *Laubenberger*, 38 N.Y. Supp. 1052, 16 Misc. 646 (1856); *Scruggins* v. *Jones*, 207 Ky. 636, 269 S.W. 743 (1925).

[23] *Bowman* v. *Woodway Stores*, 258 Ill. App. 307 (1930); *Ward* v. *Great Atlantic and Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225, 5 A.L.R. 242 (1918); *Griffin* v. *Butler Grocery Co.*, note 13 *supra*; *Lieberman* v. *Sheffield Farms-Slawson-Deacker Co.*, 191 N.Y. Supp 593, 117 Misc. 531 (1921).

[24] *Dow Drug Co.* v. *Nieman*, note 1 *supra*; *Burkhart* v. *Armour & Co.*, note 13 *supra*; *Gauder* v. *Canton Provision Co.*, 130 Ohio St. 43, 24 Ohio L. Abs. 433 (1935).