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Liability of Retailer and Wholesaler

William J. Hotes

Advertised-Product Liability:
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ANYONE WHO SUPPLIES A CHATTEL for use or custody or possession by another incurs some duties arising out of the transaction.[1] "No one may with impunity hand over a chattel to another for any purpose when he knows that the chattel is unreasonably dangerous for that purpose and should know that the danger is likely to pass unnoticed or unremedied by the other. In such a case the supplier owes some duty of care to prevent the injury, at least by taking reasonable steps to disclose the danger to the person to whom he furnishes the chattel." [2]

Negligence of the Retailer

The retailer, like any other supplier, will be liable for failure to take reasonable steps to prevent injury from a known danger in the article sold, when he should know that the danger is likely to pass unnoticed or unremedied by the buyer or others who might use the article.

Today, when canned, sealed, or packaged goods are commonly bought from a reputable supplier and resold in the original package, the retailer generally has no reason or opportunity to inspect the contents of the package. If the defect is hidden by the container and nothing on the outside suggests trouble to the ordinary dealer, there can hardly be contributing negligence in failing to discover the defect. Even in other situations, the duty to inspect has been denied. "The basis of the liability is the seller's superior knowledge and concealment of the latent defects. When this knowledge is with the buyer and the defect is unknown to the seller, the latter is not liable." [3] In *Garvey v. A. I. Namm,*[4] where the plaintiff was injured by a needle pro-

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1 See Restatement of Torts, Sections 388-390, especially Sec. 388, Comment c.

2 2 Harper and James, The Law of Torts, 1537-1538 (1956).

3 Tourte v. Horton Manufacturing Co., 108 Calif. App. 22, 290 P. 919, 920 (1930). See also: 65 C. J. S. 635, Negligence, Sec. 100; Kirkland v. Great Atlantic and Pacific Tea Company, 233 Ala. 404, 171 So. 735 (1936); Sears, Roebuck and Company v. Marhenke, 121 F. 2d 598 (9th C. C. A. 1941).

4 136 App. Div. 815, 121 N. Y. S. 442 (1910). See also: Sinatra v. National X-Ray Products, 26 N. J. 546, 141 A. 2d 28 (1958).

truding from the seam of a flannel dressing gown newly purchased at the defendant's department store, it was held that the defendant was liable for its failure to use reasonable care in inspecting the garment. The duty to use reasonable care "requires the seller to discover defects which may be found by inspection alone, as distinguished from dangers so concealed that mechanical tests are needed to disclose them." [5]

However, when the retailer acts as more than a mere conduit of goods, additional circumstances may impose on him a duty of inspection or testing. If the retailer maintains a sales and service department and undertakes to inspect and test his goods as part of his sales program, he will be held liable for failure to discover a defect which would have been revealed by the use of reasonable care. "The defendant took upon itself for a consideration the duty of demonstrating and adequately testing an electric wringer, whose failure to function in an emergency, as the defendant had given plaintiff reason to believe it would, indicates that the test was negligently made, and that this negligence was the proximate cause of the proven injuries." [6] When a secondhand automobile dealer sells a car as reconditioned, he is liable to the party injured if, by using reasonable care, the defect would have been noticed.[7] If a dealer uses an article for a purpose not intended by the manufacturer, he must use care to ascertain its fitness for that purpose. In *O'Donnell v. Asplundh Tree Expert Company,* where the dealer used a hook manufactured for use with harness equipment to sustain the weight of a man's body in tree clearance work, the court said: "Reasonable care requires that the article so chosen be constructed as to perform the task to which it is dedicated. . . . He was therefore under a duty to ascertain that the article was made of proper raw materials and was so manufactured as to sustain the weight of a man's body." [8]

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[5] Santise v. Martins, Inc., 258 App. Div. 663, 17 N. Y. S. 2d 741, 743 (1940).

[6] Ebbert v. Philadelphia Electric Co., 330 Pa. 257, 198 A. 323, 329 (1938). See also: Thomas v. Metropolitan Life Insurance Company, 388 Pa. 499, 131 A. 2d 600 (1957); Miszczak v. Maytag Chicago Company, 11 Ill. App. 2d 496, 138 N. E. 2d 52 (1956); Fleming v. John Deere Plow Company of Syracuse, 158 F. S. 399 (D. C. Pa. 1958).

[7] Egan Chevrolet Co. v. Bruner, 102 F. 2d 373 (8th Cir. 1939); Banker v. Packard Motor Car Co., 297 Ill. App. 645, 17 N. E. 2d 987 (1938); McLeod v. Holt Motor Co., 208 Minn. 473, 294 N. W. 479 (1940); Bock v. Truck and Tractor, Inc., 18 Wash. 2d 458, 139 P. 2d 706 (1943); Kothe v. Tysdale, 233 Min. 163, 46 N. W. 2d 233 (1951); Thrash v. U-Drive-It Company, 93 O. A. 388, 113 N. E. 2d 650 (1951); Stout v. Madden, 208 Or. 360, 300 P. 2d 461 (1956).

[8] 13 N. J. 319, 99 A. 2d 577, 587 (1953).

A dealer's statements about an article may constitute negligence regardless of whether or not such statements also amount to a warranty. For example, in *Rulane Gas Co. v. Montgomery Ward & Co.*,[9] Montgomery Ward sold a water heater to Rulane with the assurance that it could be used with rulane gas. The gas company, with knowledge from the tag on the heater itself that it was not originally designed for such use, made the adjustments for gas use and installed the heater. After the heater had been in use for some time, the pilot light went out, and gas continued to fill the room. A gas company service man, instead of using a blower to dispel or dilute the gas first, lit a match, resulting in an explosion and death of plaintiff's intestate. The court held that Montgomery Ward's negligence was insulated by the subsequent intervention of the active negligence of the gas company's service man. Similarly, it was held to be negligence to prepare meat containing pork scraps and label it "lamb patties" with knowledge that a consumer might fail to cook it sufficiently to destroy trichinae.[10] The gist of liability in such cases is not deceit but rather that the statements carry an unreasonable threat of physical harm to the consumer.

The dealer's negligence extends to anyone who might foreseeably have been expected to be injured by the defect.[11]

Strict Liability of the Retailer

A retailer's strict liability for injury caused by defective articles arises out of: (1) a warranty that the goods are reasonably fit for the particular purpose of the buyer, when he makes that purpose known to the seller and it appears that the buyer relies on the seller's skill or judgment; and (2) a warranty of merchantable quality, when goods are bought by description from one who deals in goods of that description. Merchantability is increasingly recognized as including a warranty of fitness for usual purposes. "The warranty of fitness for the buyer's particular purpose is implied only when the seller has knowledge of that purpose and the buyer relies on the skill or judgment in the furnishing of goods fit for that purpose. These elements are generally not considered prerequisites to the general warranty of merchantable

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[9] 231 N. C. 270, 56 S. E. 2d 689 (1949). See also: Ashley v. Jones, 246 N. C. 442, 98 S. E. 2d 667 (1957).

[10] Russell v. First Natl. Stores, Inc., 96 N. H. 471, 79 A. 2d 573 (1951). See also: Pineau v. White, 101 N. H. 119, 135 A. 2d 716 (1957).

[11] Harper and James, op. cit. supra n. 2, 1599.

quality." [12] In application, warranty of fitness for the particular purpose and warranty of merchantable quality are related and often overlap. "From the simple proposition, first announced by Lord Ellenborough in 1815, that a dealer who contracts to sell goods of a particular description is understood to agree that he will deliver what is commonly sold in the market under that description, the courts have developed the implied warranty of merchantable quality. It has grown, by degrees, to include not only genuineness according to the description and saleability in the market, but also fitness for the ordinary uses and purposes for which such goods are made and sold, and freedom from all defects which will interfere with sale or use." [13] A warranty theory is more often available in these cases, because the injured person is more often in privity with the retailer than with the maker. "Moreover, negligence is often absent in the retailer's case (as in sealed container cases), and it always constitutes an additional hurdle in the way of recovery." [14]

The main controversy concerning the retailer's liability concerns the question of whether or not he warrants the fitness of products obtained from reputable suppliers and sold in their containers, when the buyer realizes that the seller could not and did not inspect the contents. "Probably the majority of American courts (both at common law and under the Sales Act) now hold the retailer strictly on his warranty." [15] In *Sencer v. Carl's Market*,[16] it was held that a retail dealer in food products sold in sealed packages or cans to consuming public is liable on the theory of implied warranty for injuries sustained by a purchasing consumer because of deleterious, unwholesome or unfit substance for human consumption contained in package or can. Another case held a retailer of cosmetics, such as home permanent wave preparations, as well as of food, impliedly warrants wholesomeness thereof, whether they are prepared by retailer or are canned, bottled or otherwise sealed products of another.[17]

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[12] Comment, 32 Texas L. Rev. 557, 560 (1954). See, a recent illustration: Greenberg v. Lorenz, 12 Misc. (N. Y.) 2d 883 (1958).

[13] Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117, 167 (1943).

[14] Harper and James, op. cit. supra n. 2.

[15] Harper and James, op. cit. supra n. 2, 1599-1600.

[16] Sencer v. Carl's Market, 45 So. 2d 671 (Fla., 1950). See also: Food Fair Stores of Florida v. Macurda, 93 So. 2d 860 (Fla., 1957); Martin v. Great Atlantic and Pacific Tea Company, 301 Ky. 429, 192 S. W. 2d 201 (1946).

[17] Higbee v. Giant Food Shopping Center, 106 F. S. 586 (D. C. Va. 1952).

Some courts deny recovery because of the fact that the customer could not have relied on his seller's skill and judgment in inspecting the contents, since inspection by him was impossible. "It seems to me that it would be unreasonable to say that, at the time of the purchase here, the vendee relied upon the superior knowledge of the vendor; but it must be assumed that both parties knew, and must have necessarily known, that the vendor was entirely ignorant of, and without means of ascertaining, the condition of the article sold, and that the means of inspection were as much open to the purchaser as the vendor."[18]

The argument for the majority view is evidence of the strict nature of warranty at common law and the broad terms of the Sales Act, which surely do not suggest an exception for latent defects. Reliance on the seller may be found in the customer's reliance on the retailer's skill and judgment in selecting his sources of supply. "The customer at a retail store is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase, unless he demands goods of a definite brand or trade-name." [19]

Harper and James urge even broader considerations. "The retailer should bear this as one of the risks of his enterprise. He profits from the transaction and is in a fairly strategic position to promote safety through pressure on his supplier. Also, he is known to his customers and subject to their suits, while the maker is often unknown and may well be beyond the process of any court convenient to the customer." [20] The retailer is able to pass the loss back to his supplier, either through negotiation or legal proceedings. The retailer's

> legal right to sue the person with whom he has dealt—the wholesaler or producer—is absolutely clear; not like the somewhat uncertain rights of his customer to sue the same person. He is entitled to recover all that his customer has recovered from him—at least if he has notified the producer to come in and defend the suit—and also his legal expense, and in some cases, compensation for injury to his good will.

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[18] Julian v. Laubenberger, 16 Misc. 646, 38 N. Y. S. 1052, 1055 (1896); Bowman Biscuit Company of Texas v. Hines, 151 Tex. 370, 251 S. W. 2d 153 (1952).

[19] Ward v. Great Atlantic and Pacific Tea Co., 231 Mass. 90, 120 N. E. 225, 226 (1918). See also: Poulos v. Coca Cola Bottling Co. of Boston, 322 Mas. 386, 77 N. E. 2d 405 (1948); Escola v. Coca Cola Bottling Co. of Fresno, 24 C. 2d 453, 150 P. 2d 436 (1944); Baum v. Murray, 23 W. 2 890, 162 P. 2d 801 (1945).

[20] Harper and James, op. cit., supra n. 2, 1600.

> Indeed, under modern practice, the customer frequently is permitted to make both the retailer and producer parties defendant. Where this is done, or where the dealer himself brings in the producer, the rights between those parties can be adjusted and the dealer promptly compensated for his loss.
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> It may also be noted that the retailer will rarely have to sue the producer or wholesaler. The threat of cutting off further business relations with him, plus the inevitable damage to his good will, will ordinarily induce the producer or wholesaler to make any settlement, within reason, which the retailer demands, without the necessity of the latter going into court to enforce his rights.[21]

With the ever-increasing dependence of the consumer on his retailer to supply the consumer's needs, the increasing importance of implied warranties is clearly seen. It is for the retailer to see that the goods which he sells are suitable for the use and purpose which the consumer will make of them. Failure to offer suitable merchandise should carry with it liability for the resulting loss suffered by the consumer. "The reason for imposing such a liability upon the seller is that the circumstances of the bargain justify the buyer in inferring that the seller by the very act of offering his goods for sale, asserts or represents that they are merchantable articles of their kind or are fit for some special purpose, and that the buyer relies upon this implied assertion or representation." [22] The burden may be heavy, but this is one of the hazards of the business.

Liability of the Wholesaler

The liability of sellers of goods to their immediate vendees and the liability of manufacturers to the ultimate consumer have been the subject of much legal thought. However, little attention has been given to the liability of the other member of the merchandising chain, the wholesaler, who is neither retailer nor manufacturer, but who serves as a distributive link between the manufacturer and the retailer.

The wholesaler is the most elusive of all the sellers the consumer might want to reach. Because he does not deal directly with the consumer, he is protected from conventional warranty

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[21] Brown, The Liability of Retail Dealers for Defective Food Products, 23 Minn. L. Rev. 585, 605-606 (1939).

[22] Williston on Sales, Secs. 231, 591 (Rev. ed. 1948).

actions by the lack of privity. "Nor do we think a recovery based upon warranty can be sustained. . . . It arises out of contract, and cannot be asserted against one with whom the plaintiff has had no contractual relations. The appellant is a stranger to the respondents so far as any contract goes, and has made no warranty upon which the respondents can rely." [23] Since he does not create the product, which is usually packaged, he is relatively immune from an action for negligence. "There may be cases where the presence of a dangerous ingredient in the article sold may in itself justify an inference of negligence on the part of the defendant. But such an inference is not warranted where a merchant deals in an article not generally regarded or known to be dangerous and simply sells it in the condition in which he buys it, without any reason to suspect, or any means of detecting the presence of the dangerous quality except by a chemical analysis. . . . There is no evidence that he or his agents knew that the whisky contained wood alcohol, or that they were guilty of negligence in handling or selling it. According to the proof in the case the bottles were filled from the demijohns in which he purchased the whisky, and it was sold in the condition in which he bought it." [24] The wholesaler is almost invulnerable to suit by the consumer as long as he remains purely a distributor.

Of course, where an injured consumer is in a position to maintain an action against the retailer or the manufacturer of the goods which caused his injury, there is little reason for his contemplating an action against the wholesaler.

> However, if circumstances are such as to make an action against the retailer or the manufacturer inadvisable, it may be that an action against the wholesaler is the injured consumer's only feasible source of recovery. For example, the retailer may be execution-proof, as with a corner grocer

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[23] Cornelius v. B. Filippone & Co., Inc., 119 N. J. L. 540, 197 A. 647, 648 (1938). See also: DeGouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S. W. 2d 336 (1937); Howson v. Foster Beef Co., 87 N. H. 200, 177 A. 656 (1935); Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 38 N. Y. S. 2d 788 (1st Dept. 1942); Duncan v. Juman, 25 N. J. Super. 330, 96 A. 2d 415 (1953); Lombardi v. California Packing Sales Co., 85 R. I. 51, 112 A. 2d 701 (1955); Bowman Biscuit Company of Texas v. Hines, op. cit. supra n. 18.

[24] Flaccomio v. Eysink, 129 Md. 367, 100 A. 510, 515 (1916). See also: Elmore v. Grenada Grocery Co., 189 Miss. 370, 197 S. 761 (1940); Cornelius v. B. Filippone & Co., Inc., op. cit. supra n. 23; Hopkins v. Amtorg Trading Corp., op. cit. supra n. 23; Singer v. Zabelin, 24 N. Y. S. 2d 962 (N. Y. City Ct. 1941); Hamson v. Standard Grocery Company, 328 Mas. 263, 103 N. E. 2d 233 (1952).

> operating on a hand-to-mouth basis, or the manufacturer may be a non-resident of the state unwilling to submit to local jurisdiction. Under these circumstances the wholesaler may remain the sole possible source of recovery. In other situations, the particular position of the wholesaler may make him a more attractive defendant than the retailer or the manufacturer. Thus, the large wholesaler owning a famous brand-name is a prime target for consumer claims, since his financial condition is usually good, and he is particularly vulnerable in wishing to avoid unflattering publicity.[25]

The consumer who chooses to bring an action against a wholesaler for injury resulting from defective goods may proceed in tort, where negligence is almost always alleged, or in contract for breach of warranty (usually implied warranty of quality). The consumer-plaintiff will proceed according to the available remedy which may best be adapted to his case, since in practice the measure of damages is substantially the same. "Where the goods fall short of the warranted quality, the usual measure of the buyer's damage when he sues in contract on the warranty, unless a greater loss appears, is the difference between the value of the goods when delivered, and their value if they had been as represented. . . . This same measure will be applied by most courts if the buyer chooses, as he often may do, to sue in tort for misrepresentation of the quality of the goods." [26] A breach of warranty action is more attractive to an injured consumer than is a negligence action because he needs only to establish that the warranty existed and that its breach caused his injury. "The drawback to the warranty action is simply that to date, the great majority of states have refused to allow a warranty action by the consumer against the wholesaler because of lack of privity. In an action based upon a theory of negligence, on the other hand, not only must the plaintiff establish that the wholesaler in dealing with the goods owes him a duty of due care, but the plaintiff must also prove that it was the wholesaler's failure to exercise such due care which caused the injury. Proving this element of fault—the failure to exercise due care—and establishing its causal connection to the plaintiff's injury often causes great difficulty." [27]

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[25] Note, 1955 Wash. U. L. Q. 380, 382.

[26] McCormick, Damages, Secs. 176, 672 (1935); Oleck, Damages To Persons and Property, Secs. 253, 254 (1957 revision).

[27] 1955 Wash. U. L. Q. op. cit. supra n. 25.

Wholesaler's Liability for Negligence

Where a wholesaler sells goods in such a manner as to make it appear that he is the manufacturer, he may be found liable to the consumer not only for his own negligence, but also for that of the manufacturer, which the wholesaler is said to assume. "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." [28] In a 1910 case it was held, "We believe the law is and should be that where a person selling an article represents to the purchaser that it is wholesome and pure, and that it is good to take into the human system, and it is proven that the representation was false, and that the article was a deadly poison, dangerous to human life, and that a person, relying upon the statement, purchases the article and uses it for the purposes for which it has been sold and is injured thereby, the seller should be liable, as a matter of law." [29] The wholesaler's representation that the goods are his own product raises a vicarious liability for the acts of the manufacturer. This liability arises most commonly when the wholesaler sells, under his own private brand name, goods made by another. When qualifying words appear on the label, such as "packed for" or "distributor," or when the name of the manufacturer is printed in small letters on a label which is clearly that of the wholesaler, the question arises as to when such language is sufficient to preserve the seller's position as a wholesaler.

In *Swift & Co. v. Blackwell*,[30] the Swift company was held liable in negligence for defective food packed for Swift by Libby. Although the word "Distributor" followed the Swift name in small letters on the can, the word "Swift" was emphasized elsewhere on the can and in the advertising. The court felt that an over-all impression that the product was a Swift product and that it was manufactured by Swift was given. "By putting a chattel out as his own product he induces reliance upon his care in making it; therefore, he is liable if, because of some negligence in its fabrication or through lack of proper inspection during the process of manufacture, the article is in a dangerously de-

[28] Restatement, Torts, 400 (1934).

[29] Darks v. Scudders-Gale Grocer Co., 146 Mo. App. 246, 130 S. W. 430, 436 (1910). See also: Thornhill v. Carpenter-Morton Co., 270 Mass. 593, 108 N. E. 474 (1915); Dolly v. Holly Manufacturing Co., 49 C. 2d 720, 321 P. 2d 736 (1958).

[30] 84 F. 2d 130 (C. C. A. 4, 1936).

fective condition which he could not discover after it was delivered to him. The rule applies only where the chattel is so put out as to lead those who use it to believe that it is the product of him who puts it out, but the fact that it is sold under the name of the person selling it may be sufficient to induce such a belief." [31] It is not clear whether the words "packed for" are a better protection to the seller.[32]

The identification of the wholesaler with the particular product is not so obvious where the name of the brand is not the name of the wholesaler. "The Leggett Company selected a packer to supply it with products. Through advertising and other means it publicized the name 'Premier'; it put this trade-name, with the words 'The Guarantee of Quality,' on the can of peas; it put its own name on the can adding the word 'Distributor'; nowhere on the can is the name of any other person as canner, nor is there any definite statement that the defendant is not in fact the canner. It might be both canner and distributor. It is fair to say that its conduct has been such that it might be held to have adopted this product as its own and to have made itself responsible for the acts of the undisclosed packer of its own selection." [33] The court held the defendant liable for the manufacturer's negligence. A Georgia court reached the opposite conclusion because the evidence did not show that the brand name was the defendant's. However, it granted the plaintiff a new trial, saying: "We do think, however, that, since the evidence is undisputed that the article was actually handled by the defendant, it was incumbent on it to exculpate itself to the extent of showing that it had in good faith procured it from some reputable manufacturer, distributor, or dealer, as an article reasonably safe for the use intended especially so since there is nothing on the package to indicate who, as manufacturer or packer, was ultimately responsible for the alleged tort." [34]

It has been suggested that mere ownership of the brand should be enough to support liability. This is based on the as-

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[31] Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385, 391 (1932).

[32] Compare Armour & Co. v. Leasure, 177 Md. 393, 9 A. 2d 572 (1940) where the wholesaler was held liable in negligence, with DeGouveia v. H. D. Lee Mercantile Co., op. cit. supra n. 23, where the wholesaler was excused.

[33] Slavin v. Francis H. Leggett & Co., 114 N. J. L. 421, 177 A. 120, 121 (1935), affd. 117 N. J. L. 101, 186 A. 832 (1936). See also: Swift and Company v. Blackwell, op. cit. supra n. 30.

[34] Fleetwood v. Swift & Co., 27 Ga. App. 502, 506, 108 S. E. 909, 911 (1921). See also: Swift and Company v. Blackwell, op. cit. supra n. 30.

sumption that the large wholesaler who brands others' products as his own is able to gain market control through integration of manufacturing and marketing. Such a wholesaler is apt to control production and even maintain an inspector at the manufacturing plant. "Such a view puts the same economic evaluation on a branding wholesaler as it does on a manufacturer. It assumes that there is a substantial correlation between brand ownership and economic domination of the channels of manufacturing and distribution. It implies that in these situations liability should ultimately rest on the wholesaler, not the offending manufacturer. No court has rested liability on this ground." [35]

The wholesaler who neither claims to be the manufacturer nor owns the brand may still be a useful object of liability in making the manufacturer more accessible to the consumer. "The wholesaler short cut reduces circuity of action and, to the same extent, removes the risk that intermediate financial irresponsibility or physical remoteness will break the chain of actual accountability." [36] In *Ellis v. Lindmark*,[37] a drug company was found to be negligent in sending a barrel of raw linseed oil to a retail druggist in response to an order for a barrel of cod liver oil. The druggist sold it to the plaintiffs who were poultry raisers.

The wholesaler's liability for his own negligence arises from his "failure to use due care in discharging the following duties: (1) the duty to purchase goods from reputable manufacturers; (2) the duty to do no act which renders the goods potentially harmful; (3) the duty to inspect the goods for defects; (4) the duty to warn of a deleterious condition in the goods of which the wholesaler has knowledge." [38]

Wholesaler's Liability for Breach of Warranty

An action for breach of implied warranty of quality is a more attractive means of recovery for the injured consumer-plaintiff than a negligence action, because fault does not need to be proved in order to recover. It is difficult, however, to establish the existence of such an implied warranty against wholesalers with whom there has been no contractual dealing; privity is still a requirement in actions for breach of a sales warranty

[35] Dickerson, Products Liability and the Food Consumer, 146-147 (1951).
[36] Ibid., 147.
[37] Ellis v. Lindmark, 177 Min. 390, 225 N. W. 395 (1929).
[38] 1955 Wash. U. L. Q. op. cit. supra n. 25, 385.

in virtually all jurisdictions. "The traditional expression has been that implied warranties, as well as express warranties, do not run with the goods to sub-vendees; hence, no privity of contract, no warranty." [39]

As we have seen in another section of this symposium, the privity requirement in implied warranty actions by injured consumers against food manufacturers has been discarded or avoided in a small but growing number of states. However, in regard to actions by consumers against food wholesalers for breach of implied warranty of quality, only in Kansas has the privity requirement expressly been discarded. "It cannot be clearly determined from the relatively small number of reported cases whether in setting aside the privity requirement the courts have made any distinction between wholesalers and manufacturers, by requiring privity in actions by consumers against the one and discarding it in similar actions against the other." [40] For example, in Missouri, a lower court has dropped privity as against the manufacturer,[41] although it has retained it as against the wholesaler.[42] In states that have allowed actions for breach of implied warranty by consumers against food manufacturers regardless of privity, it may be that actions against food wholesalers may be permitted on the same basis.

In the 1933 Kansas case of *Challis v. Hartloff*, a consumer sued a retailer, a "broker," and a manufacturer. The court held that the plaintiff's suit against the manufacturer was barred by the statute of limitations. In reaching this result it said that the warranty obligations of the retailer and "broker" (against whom the action was timely) were separate from the warranty obligation of the manufacturer (against whom the action was not timely) and could not be used as a basis for sustaining the suit against the manufacturer. The court found that the "broker" could be found liable for violation of the implied warranty. "As to the liability of the broker, he not having any direct dealings with the plaintiff, and (in view of) his defense of the three-year statute of limitations, it may be said he made the sale of flour to the retail dealer with the same implied warranty and with the full knowledge and definite understanding that the retailer

[39] Ibid., 393.

[40] Ibid., 394.

[41] Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S. W. 2d 445 (Kansas City, Mo. Ct. of App. 1936).

[42] DeGouveia v. H. D. Lee Mercantile Co., op. cit. supra n. 23.

would in turn sell it to the plaintiff, or some other consumer, whereby human life and health would be involved by its intended use. He is liable under this implied warranty not only to his dealer but also to the purchaser of the flour from the dealer." [43] A broker is normally an agent of the seller, without title to the goods. To hold such a seller liable in warranty, especially where there is no privity of contract, would extend the consumer's civil protection about as far as it can go.

Five years later, the Kansas Supreme Court, relying to a great extent upon *Challis v. Hartloff*, held a wholesaler liable directly to a consumer for breach of warranty of sauerkraut juice, despite the facts that the product was packed by Libby, the label was Libby's and not the defendant's, there was no privity of contract between the defendant and the consumer, and the product was packed in a sealed can, impervious to inspection. The court said, "It seems illogical to hold that the injured consumer might maintain an action against the immediate seller or the manufacturer or packer, but not against the intermediate purchasers and sellers of the articles of food. To so hold would mean that if the immediate seller were financially irresponsible, and the packer, for instance, were located in a foreign country, the injured consumer would, from a practical standpoint, be without remedy." [44]

In 1954, the Kansas Supreme Court took an even bigger step in *Graham v. Bottenfield's, Inc.*,[45] where it allowed the plaintiff to recover for injuries sustained from the use of a hair preparation, known as "Miss Clairol." The defendant was a distributor. The fact that a hair preparation was involved, not foodstuffs, represents a considerable extension of the doctrine rejecting the privity requirement.

"In summation, in the vast majority of jurisdictions the lack of privity of contract stands as a bar to breach of warranty actions by injured consumers against wholesalers. Only in Kansas, where both food wholesalers and cosmetic wholesalers have been

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[43] Challis v. Hartloff, 136 Kans. 823, 18 P. 2d 199, 203 (1933).

[44] Swengel v. F. & E. Wholesale Grocery Co., 147 Kans. 555, 561, 77 P. 2d 930, 935 (1938). See also: Sharp v. Pittsburgh Coca Cola Bottling Co., 180 Kan. 845, 308 P. 2d 150 (1957); Simmons v. Wichita Coca Cola Bottling Co., 181 Kan. 35, 309 P. 2d 633 (1957); Bowman Biscuit Company of Texas v. Hines, op. cit. supra n. 18.

[45] 176 Kans. 68, 269 P. 2d 413 (1954); Simmons v. Wichita Coca Cola Bottling Co., op. cit. supra n. 44.

found liable for breach of warranty, has the privity requirement been relaxed so as to allow recovery by the consumer." [46]

From the above, it can be seen that when injured consumers have chosen to seek recovery from the wholesalers of goods which have caused them harm, they have generally brought actions for negligence or for breach of implied warranty of quality. The consumers have been most successful in negligence actions against wholesalers where they have not had to prove fault in the wholesaler in order to recover. Recovery is, of course, more difficult when some degree of fault must be shown in the wholesaler, since the wholesaler's function is usually only to handle the goods with little opportunity to cause the commodities to be deleterious.

Only in one state, Kansas, have actions by consumers against wholesalers for breach of implied warranty of quality been successful. In other states, the lack of contractual privity has been held to bar breach of warranty actions by consumers against wholesalers.

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[46] 1955 Wash. U. L. Q. op. cit. supra n. 25, at 396.