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Sales--Implied Warranty of Merchantability

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Denny: Sales--Implied Warranty of Merchantability

Sales—Implied Warranty of Merchantability

D, a dealer in mobile homes, sold to *Ps*, by a written contract containing no warranties, a mobile home equipped with a natural gas cooking stove. *D's* agent moved the trailer to its permanent location, and made various repairs and adjustments to ready it for occupancy. *D's* agent then assured *Ps* that the trailer was ready for occupancy without need for further checking or inspection. *Ps* moved into the trailer and lit the burners on the gas stove. Almost immediately an explosion resulted. *Ps* obtained a judgment in the trial court, which was reversed by the circuit court. *Ps* then appealed to the West Virginia Supreme Court of Appeals. *Held*, reversed and remanded. *Ps* could recover for the personal injuries and damages to the trailer. *D's* agent negligently induced the *Ps* to rely on assurances that the trailer had been checked out and was ready for occupancy. Relying on these false assurances *Ps* moved in, and as a consequence were injured. Moreover, there was an implied warranty in relation to the stove. The rule excluding implied warranties from sales of goods *in esse* where the purchaser is given the opportunity to inspect does not apply to this case. The stove involved as not merely a defective chattel, or a chattel with a defective part. Here, the explosion was caused by the total absence of a vital component of the stove. Implicit in the sale of the stove was an implied warranty that the stove was a whole, complete stove. Breach of that implied warranty renders *D* liable. *Nettles v. Imperial Distributors, Incorporated*, 159 S.E. 2d 206 (W. Va. 1968).

The cause of action in the principal case arose in April 1963, over a year before West Virginia adopted the Uniform Commercial Code. Thus, even though the case was not argued before the West Virginia Supreme Court of Appeals until 1967, the law of sales as it existed prior to the Uniform Commercial Code controlled the outcome of the case.

The majority opinion considered two theories of recovery asserted by the *Ps*. First, the *Ps* claimed that relying on false assurances of the *D's* agent caused their injuries. The court agreed with this argument, and it would seem that the *Ps* could have had their recovery on this basis alone. The second theory of the *Ps* was grounded in warranty. *Ps* asserted that *D* breached an implied warranty of merchantability by sale of the defective stove. The court also upheld this contention by a three to two decision with a disagreement over the implied warranty furnishing the reason for the split.

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Implied warranties in contracts of sale have been the cause for no small amount of confusion and disagreement. The early cases in dealing with warranties make it clear that a seller was not liable when the article which he sold was of bad quality, unless he was aware of the quality. If one knew the goods he was selling were not merchantable, at least if he were a dealer, the law might perhaps have held him liable.[1] But as early as 1815 in *Gardiner v. Gray,*[2] the strict doctrine of *caveat emptor* began to crumble. In that case, Lord Ellenborough held that an implied warranty of merchantability arose when goods were sold by description. However, this case far from answered all the problems concerning the implication of an implied warranty of merchantability. Sales concerning executory contracts of sale, sales of an existing chattel specifically described, sales where the buyer inspected the goods, and sales by a manufacturer all posed different problems. The difficulty was in what cases should the warranty of merchantability be implied and in what cases should the maxim of *caveat emptor* still retain its original vitality. The classification most often adopted is borrowed from the early case of *Jones v. Just.*[3] The first rule laid down by Judge Mellor in that case states:

> First, where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor,* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor manufacturer. In such case, it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable.

In explaining the rationale of this rule Williston reasons that where the buyer inspects, or has an opportunity to inspect, no warranty is implied as to defects which the examination ought to reveal, for the basis of implied warranty is justifiable reliance of the buyer upon the seller's judgment. Where the defects are latent, however, the buyer's right of inspection should not limit the implication of a warranty in regard to such defects. This appears to be the English rule, but, the tendency at common law in the United States was to hold that inspection, or the opportunity for inspection, precludes the

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[1] 1 S. Williston, Sales § 228 (3d ed. 1948).
[2] 4 Camp. 144, 171 Eng. Rep. 46 (1815).
[3] L. R. 3 Q.B. 197 (1868).

existence of any implied warranty, regardless of whether the defect is latent or who is the seller.[4]

The West Virginia view prior to the adoption of the Uniform Commercial Code appears to be clearly in accord with what Williston feels is the weight of authority. Two West Virginia cases specifically adopt the principles set forth in *Jones v. Just.*[5] Likewise, three other cases approve segments of Mellor's famous opinion.[6] Although the majority opinion in the principal case indicates a dislike for the pronouncements in *Jones v. Just,* they begrudgingly seem to concede that the rules laid down in that case appear to be the law in West Virginia, at least insofar as the principle that there can be no implied warranty of merchantability when the buyer has an opportunity to inspect and the seller is not a grower or manufacturer.

The principal case did involve the sale of an existing chattel, the buyer did have an opportunity to inspect, and the seller was neither a grower nor manufacturer. How then could the court find that there was an implied warranty of merchantability with respect to the gas cooking stove? The answer is not startling, for as might be suspected, the court found the factual situation in the principal case distinguishable from previous cases. In the principal case, the defect which caused the gas stove to explode was the lack of a small adapter, a tube which connected the oven burners to the gas supply. As a result, when the *Ps* lit the burners on top of the stove, the oven immediately filled with gas and then exploded from the gas flames of the burners on top of the stove. Reasoning that even though the rule in West Virginia may exclude implied warranties from sales of goods *in esse* where the purchaser is given opportunity to inspect, the court felt this case did not involve a merely defective chattel, or part of a chattel, for here " . . . only part of the stove was delivered . . . "[7] to *Ps.* The distinguishing feature according to the majority was the fact that a small part of the stove, a piece of tubing only a few inches long, was totally absent. But what if only one half of the adapter had been gone? Would the decision have been the same? Or, what

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[4] 1 S. WILLISTON, SALES § 234 (3d ed. 1948).

[5] Schaffner v. National Supply Co., 80 W. Va. 111, 118–119, 92 S.E. 580, 583-584 (1917); Hood v. Bloch Bros., 29 W. Va. 244, 252-3, 11 S.E. 910, 913 (1886).

[6] Showwalter v. Chambers, 77 W. Va. 720, 726, 88 S.E. 1072, 1074 (1916); Erie City Iron Works v. Miller Supply Co., 68 W. Va. 519, 521-522, 70 S.E. 125, 126 (1911); Watkins v. Angotti, 65 W. Va. 193, 198, 63 S.E. 969, 971 (1909).

[7] 159 S.E.2d 206, 213 (1968).

if there had been only a hole in a gas line in the stove and escaping gas from this hole had caused the explosion? In both cases it could not be said that the stove was entirely whole, for in both situations the absence of something, *i.e.,* half of the adapter and the amount of metal necessary to span the hole, would be gone. Likewise, it could be said that the *Ps* did not receive a *whole* stove and the rule excluding implied warranties should not apply. It can hardly be claimed sound jurisprudence, or even good logic, to imply a warranty of merchantability merely because a small part of a chattel is totally absent, and in a sale of a similar chattel to exclude such a warranty if all parts are present yet the chattel was improperly assembled. As Judge Browning, joined by Judge Haymond, points out in the dissent:

> The ingenuity of a judge whether he sits beside the Kanawha, the Potomac or the Wabash, when he sets out to "distinguish upon the facts" a case under consideration from previous decisions of his court which are totally indistinguishable is something to behold. To my mind, it is pure sophistry to say that the fact that the part of the stove called an "adapter" was negligently not inserted by the manufacturer rather than being defective distinguishes this case from the previous decisions.[8]

The dissent went on to say that the rule excluding implied warranties from the sale of goods *in esse,* where the purchaser is given the opportunity to inspect was firmly established in West Virginia and that if the court was going to overrule a long line of cases directly in point it should do so by direction and *not* by indirection.[9]

Should a situation similar to that in the principal case arise today, the outcome would be governed by the Uniform Commercial Code. Section 2-314 of the code provides that unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale. In order to satisfy this implied warranty of merchantability, the goods must be "fit for the ordinary purposes for which such goods are used."[10] Thus, it would appear that the vendor in the principal case breached that warranty by sale of a cooking stove which was unfit for cooking, or for that matter, any other purpose. It would be no answer that the defect was latent

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[8] *Id.* at 216.
[9] *Id.* at 217.
[10] UNIFORM COMMERCIAL CODE § 2-314 (2) (c).

and could not have been discovered by the vendor upon inspection. For what the code requires is not evidence that the defects should or could have been uncovered by the seller, but only that the goods upon delivery were not of a merchantable quality or fit for their particular purpose.[11]

Even if one inclines toward the position taken by the minority in the principal case and considers that the majority opinion does violence to well-established principles of law in West Virginia, it should be remembered that the case has little value as a precedent setting decision since it deals with West Virginia law as it existed *prior* to the adoption of the Uniform Commercial Code. Therefore, the principles of the case would apply only to contracts of sale arising before July 1, 1964. The unimportance of the case in setting precedent may in part account for the court's willingness to strain reason and principles of law in order to arrive at what they felt to be an equitable result.

Peter Thomas Denny

Torts—Res Ipsa Loquitur in Medical Malpractice
Foreign Object Left in the Patient

Action was brought by a patient against her physician to recover damages for injuries sustained through alleged negligence of physician in failing to remove laparotomy pad (lap pad) inserted in the patient's abdomen during the course of surgery. The trial court held that the *res ipsa loquitur* doctrine was not applicable and required her to produce *expert evidence* to establish *D's* negligence and *P* appealed to the Supreme Court of Appeals of Virginia. *Held,* reversed and remanded. Expert evidence is not required to establish the physician's negligence where the patient showed (1) that while she was in an unconscious state the physician was in complete control of the operation and (2) the failure of physician to remove the lap pad from her abdominal cavity before closing the wound constitutes such a breach of duty owed to her that (3) a layman could infer negligence without the aid of expert testimony. Under these facts the doctrine of *res ipsa loquitur* is applicable. *Easterling v. Walton,* 156 S.E.2d 787 (Va. 1967).

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[11] Vlases v. Montgomery Ward & Co., 377 F. 2d 846 (3d Cir. 1967).