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SALES—IMPLIED WARRANTY—LIABILITY OF PRODUCER

Mrs. LeBlanc, consumer, sued the Louisiana Coca-Cola Bottling Company for damages sustained due to a deleterious substance contained in their product. The usual defenses in a case of this kind were employed, namely, that the plant is equipped with the most modern machinery, and utilizes all possible sanitary precautions, which factors allegedly preclude the possibility of foreign substance entering the bottle while in the plant of the defendant. Justice McCaleb, speaking for the majority of the court, concluded that due to the nature of the defendant's enterprise, such as advertising and representing the quality of its product to the consumer, the injured plaintiff may collect damages *on the basis of implied warranty*. A strong dissent by Justice Hawthorne epitomized the importance of this decision by emphasizing the many problems which, being unsatisfactorily resolved, impair the validity of the conclusion. In a concurring opinion, Justice LeBlanc agreed with the result reached by the majority, but heartily disapproved with the reasoning employed—the use of implied warranty. *LeBlanc v. Louisiana Coca-Cola Bottling Company*, 221 La. 919, 60 So. 2d 873 (1952).

With the exception of two appellate court decisions,¹ all previous cases of this type have been decided on the basis of negligence and the doctrine of *res ipsa loquitur*.² It has been necessary for the plaintiff to prove first, that he was damaged, second, that the injury was due to the deleterious substance in

1. *Dye v. American Beverage Co.*, 194 So. 438 (La. App. 1940); *Hill v. Louisiana Coca-Cola Bottling Co.*, 170 So. 45 (La. App. 1936). It is interesting to note that both these decisions were written by the author of the majority opinion in the *LeBlanc* case. Also, they are based on implied warranty, rather than negligence.

2. Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LOUISIANA LAW REVIEW 70, 98 (1941). Although Professor Malone contends that the actual basis for the cases is warranty, with *res ipsa loquitur* serving merely as "window dressing," the writer of this note is of the opinion that the cases cited therein use *res ipsa loquitur* as the real foundation for the decisions. See Comments, 23 Tulane L. Rev. 130 (1948), 23 Tulane L. Rev. 96 (1948). But see Prosser, *Handbook of the Law of Torts* 297 (1941), where it is pointed out that the size of the article will affect the application of *res ipsa loquitur*. Even due care might not have discovered the fly in the bottle in the principal case. Even Justice McCaleb admits that *res ipsa loquitur* has previously been used exclusively in cases of this type (observe especially notes 2 and 3 of the instant case, 221 La. 919, 920, 60 So. 2d 873, 874 [1952]), and the resort to common law authority for support of the warranty doctrine.

Lack of space prevents a discussion of the distinction between explosions of bottles and deleterious substance contained in bottles, but this writer feels that the distinction is untenable.

the product of the defendant, and finally, and of utmost importance, that there had been no tampering with the bottle since it left the plant of the defendant producer.³ The paramount importance of the instant case lies in its abrogation of the third requirement. The court reasoned that since the basis of this case is warranty, and since the showing of tampering would provide an avenue of escape for the defendant, the burden of proving same should properly rest upon the defense.⁴

Since the decision of the instant case is based on warranty, the positive provisions of the Civil Code⁵ on redhibition should serve as illumination for an examination of the problems involved. Redhibition is the avoidance of a sale on the ground that there was some vice or defect in the thing sold, which renders it useless or so inconvenient that the buyer would not have purchased it if he had known of the vice.⁶ Certain attributes must be present for the success of a suit in warranty—reliance by the vendee, and a *hidden* defect that the purchaser would not have noticed, even with the exercise of due care.⁷ Also, it is incumbent upon the injured plaintiff to show that the vice existed at the time of the sale.⁸ The primary distinction made by the code is between the liability imposed upon good faith sellers as opposed to the liability of sellers who knew of the defect. In the former case, liability extends only to a return of the purchase price.⁹ On the other hand, those vendors who were aware of the vice are held liable not only for all damages which may have been caused but also for the restitution of the price.¹⁰

3. This requirement is necessary to fulfill the essential element of the doctrine of *res ipsa loquitur*, known as exclusive control. Prosser, *Handbook of the Law of Torts* 298 (1941). See also cases cited in Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 *LOUISIANA LAW REVIEW* 70, 98 (1941).

4. Also, it was said that the warranty relied upon by the consumer was that the bottle be wholesome at the time of the final sale. This was possible because of a finding of direct warranty from manufacturer to consumer. The distinction is once again drawn between explosions of bottles and those bottles containing unwholesome substances. See note 2 *supra*.

5. Art. 2520 et seq., La. Civil Code of 1870.

6. *Ibid*.

7. Art. 2521, La. Civil Code of 1870.

8. Art. 2530, La. Civil Code of 1870: "The buyer who institutes the redhibitory action, must prove that the vice existed before the sale was made to him. If the vice has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale."

9. Art. 2531, La. Civil Code of 1870: "The seller who knew not the vices of the thing, is only bound to restore the price, and to reimburse the expenses occasioned by the sale. . . ."

10. Art. 2545, La. Civil Code of 1870: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages."

The distinction between good and bad faith sellers may be traced to its origin in the rules of the Roman Edicts, where essentially the same stipulations will be found as presently obtain in the Civil Code of Louisiana.¹¹ The French Civil Code reflects the direct influence of the Roman law in this field.¹² However, the jurisprudence of France has apparently not limited the right of the abused purchaser to a return of the purchase price, even though the vendor was in good faith. The words "and expenses occasioned by the sale"¹³ have been extended to include damages.¹⁴ Additional liberalism in French courts is evidenced by the tendency to impute knowledge of the defect to the vendor, if he manufactured the article.¹⁵ This approach is based on the theory that the manufacturer either actually knows of the defect, or is lacking in the skill necessary to his vocation.¹⁶ In this connection, Pothier has said that no one should publicly make profession of an art if he is not possessed of all the knowledge necessary for exercising it well.¹⁷

Although Louisiana has not expanded the purview of redhibition principles to such an extent,¹⁸ there is an inclination to impute knowledge of the defect to the producer, thereby putting

11. Digest 21.1.31.18.

Moyle, Contract of Sale in the Civil Law 195-216 (1892) contains an excellent discussion of the entire development of warranty in the Roman law.

12. Art. 1641 et seq., French Civil Code. Cf. Digest 21.1.1.8. See also 1 Domat, Civil Law (Strahan's tr. Cushing's 2 ed. 1861); Pothier, Treatise on the Contract of Sale (Cushing's ed. 1839); Morrow, Warranty of Quality: A Comparative Survey, 14 Tulane L. Rev. 529 (1940).

13. Art. 1646, French Civil Code.

14. This extension has been referred to as a "misinterpretation" by the commentators. See 10 Planiol et Ripert, *Traité Pratique de Droit Civil Français* 137, n° 134 (1932); Cass. Req. 29 juin 1847, S.48.1.705. But cf. 24 Laurent, *Principes de Droit Français* 288-291, nos 294-296 (5 ed. 1893). See also Morrow, Warranty of Quality: A Comparative Survey, 14 Tulane L. Rev. 529 (1940).

From this it would seem that French jurisprudence has extinguished the distinction between good and bad faith vendors. That is not entirely true. While a bad faith vendor is liable for both *damnum emergens* and *lucrum cessans*, that is, both actual loss and failure to realize anticipated profits, the good faith vendor is liable only for *damnum emergens*. Cass. Req. 17 mars 1826, S.1926.1.371; 10 Planiol et Ripert, *Traité Pratique de Droit Civil Français* 137, n° 134 (1932). But cf. Limonges, 20 avril 1887, S.88.2.156. See also Morrow, Warranty of Quality: A Comparative Survey, 14 Tulane L. Rev. 529, 537 et seq. (1940).

15. Dalloz, Codes Annotes, Art. 1645, nos 15, 16 (1946); Baudry-Lacantinerie et Saignet, *De la vente et de L'échange*, n° 436 (1908).

16. *Ibid.*

17. Pothier, Treatise on the Contract of Sale § 214 (Cushing's ed. 1839).

18. *Boyd v. J. C. Penney Co.*, 195 So. 87 (La. App. 1940); *J. I. Case Threshing Machine Co. v. Davis*, 131 La. 87, 59 So. 24 (1921); *Moore's Assignee v. King*, 12 Mart. (O.S.) 261 (La. 1822).

him in bad faith and allowing the injured plaintiff to collect damages.¹⁹

In the 1952 decision of *Tuminello v. Mawby*,²⁰ the plaintiff, purchaser, sued the defendant, builder, for damages sustained due to a redhibitory defect in a house which he had bought. The court conclusively held that Mawby was presumed to have knowledge of the vice, since it had been constructed by him. Although the jurisprudence is not as uniform as the *Tuminello* case might lead us to believe,²¹ it seems settled that the present policy of the court is to impute knowledge to the manufacturer. To substantiate this position, the French authorities have been quoted liberally with approval.²²

A classic rule of warranty both in the civil law²³ and in the common law²⁴ restricts warranty to the limits of the contract. In the instant case, no such privity of contract existed between the plaintiff and defendant.

Article 2503 of the Civil Code, as amended, provides that the buyer shall become subrogated to his seller's rights and actions in warranty against all others. This article is in the section on eviction, and no similar provision is in the section concerned with redhibition.²⁵ However, in the recent case of *McEachern v.*

19. See p. 629, *infra*.

20. 220 La. 733, 57 So. 2d 666 (1952).

21. *Doyle v. Fuerst & Kraemer, Ltd.*, 129 La. 838, 56 So. 906 (1911); *George v. Shreveport Cotton Oil Co.*, 114 La. 498, 38 So. 432 (1905). Both of these cases held that the manufacturer was chargeable with knowledge of the defect. But *Kodel Radio Corp. v. Shuler*, 171 La. 469, 131 So. 462 (1930), held that the manufacturer was not presumed to know of the defect, and that he was liable for damages only if he actually knew of the vice. Clearly the court was cognizant of the holding in the *George* and *Doyle* cases for there is a dissent which cites those decisions as authority for the proposition that the manufacturer is chargeable with knowledge of defects in its product. However, the *Tuminello* case has alleviated the difficulty of an attempted reconciliation by means of a note. It is there said: "It is questionable that the *Kodel* case repudiated or limited the *Doyle* case or the *George* case, but, if it did, we consider the *Doyle* and *George* cases sound and would refuse to follow the *Kodel* case here." 220 La. 733, 741, n. 1, 57 So. 2d 666, 669, n. 1 (1952).

22. See *Tuminello v. Mawby*, 220 La. 733, 57 So. 2d 666 (1952).

23. *Laclede Steel Co. v. Silas Mason Co.*, 67 F. Supp. 751 (D.C. La. 1946); *Strother v. Villere Coal Co.*, 15 So. 2d 383 (La. App. 1936); Note, 14 Tulane L. Rev. 470 (1940); 17 Baudry-Lacantinerie et Saignat, *Traite Théorique et Pratique du Droit Civil, de la vente et de l'échange* 369, n° 432 (2 ed. 1900); 10 Huc, *Commentaire Théorique et Pratique du Code Civil* 209, n° 154 (1894).

24. 1 Williston, *Sales*, §§ 244, 244a (2 ed. 1924), and cases cited therein.

25. Art. 2503, La. Civil Code of 1870, amended by La. Act 116 of 1924. The following words were added: "But whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty against all others."

*Plauche Lumber and Construction Company*²⁶ it was held without discussion that Article 2503 applies to redhibitory defects as well as warranty of title. This application appears to be in accord with the civilian practice of extension by analogy. It also appears to be in harmony with what the French are doing without the aid of a specific provision of the Civil Code.²⁷

In France the subvendee may proceed directly against the original vendor.²⁸ The hypothesis followed is that by resale of the defective goods, the vendee transmits to the subvendee all the rights which the original vendor has conferred upon him by the initial sale, including the right to redhibition in the case of breach of warranty.²⁹ There is authority in our code for the position that the right to sue in warranty is included in the sale from the retailer to the consumer, as an accessory to the thing.³⁰ This may offer additional support for the position taken in the *McEachern* case.

But the instant case did not find the warranty contract by means of subrogation of rights from the vendee to the subvendee. The basis of the holding was that there is a *direct warranty* by the manufacturer to the consumer. No codal authority has been found for this type of action. However, it does appear logical that the manufacturer intends the consumer to rely on his manifestation of quality, and therefore that the purchase of the bottle by the consumer might be considered as an acceptance of the warranty.

Here there was no sale by anyone to the plaintiff, as the bottle of Coca-Cola had been given to her by a friend. The court did not explain the finding of a warranty by the manufacturer

26. 220 La. 696, 57 So. 2d 405 (1952). There the court said: "We concur in the ruling of the trial judge that although the buyer is subrogated to the seller's right to action in warranty against all others, Art. 2503, . . ." Note that this case was actually against the vendee; the court used that language to repel an attempt to sue both parties in solido.

27. See notes 28, 29, *infra*.

28. Art. 1641 et seq., French Civil Code; cf. Digest 21.1.1.8. See also 1 Domat, Civil Law (Strahan's tr. Cushing's 2 ed. 1861); Pothier, Treatise on the Contract of Sale (Cushing's ed. 1839); Morrow, Warranty of Quality: A Comparative Survey, 14 Tulane L. Rev. 529, 550 (1940).

29. See Smith, Third Party Beneficiaries in Louisiana: The Stipulation Pour Autri, 11 Tulane L. Rev. 18 (1936). See also Cass. civ., 12 novembre 1884, S.86.1.149; Paris, 24 fevrier 1882, S.83.2.229; Bordeaux, 11 janvier 1888, S.91.2.5, 10 Planiol et Ripert, Traité Pratique de Droit Civil Français 145, n° 138 (1932). See Art. 1166, French Civil Code. This article was changed by the redactors of the Louisiana Civil Code of 1825. See their comment thereon, Louisiana Legal Archives, Projet of the Civil Code of 1825, 263 (1936).

30. Art. 2461, La. Civil Code of 1870.

in favor of one who had no contractual relationship with anyone. Perhaps the plaintiff was considered as the beneficiary of a stipulation in her favor arising from the direct warranty by the manufacturer to the ultimate purchaser. If this be so, the court has come a long way from what had previously been considered a sufficient factual basis for permitting suits on the contract by a third party beneficiary.³¹

On the other hand, if the contract relationship necessary to a suit in warranty is found by extending the subrogation article of the eviction section,³² or by considering the right in warranty as an accessory to the sale,³³ other problems are presented. The subvendee would become subrogated to the rights of the vendee, subject to the original conditions and limitations. One of these qualifications requires that the buyer prove that the defect existed at the time of the sale. Since "the sale" contemplated by the original warranty was that to which the manufacturer was a party, it would seem to follow that the subvendee must show that the defect was present when the bottle was sold by the manufacturer, or that there had been no interference with the bottle since it left the plant of the defendant.

The decision in effect makes the manufacturer an "insurer" of his product. Public opinion seems to have arrived at the point where it places full responsibility upon the producer for any injury caused by defects in his product.³⁴ The legal difficulties may be simplified by resorting to the tort doctrine of strict liability.³⁵

It is respectfully submitted that an application of the pertinent articles of the Civil Code would have resulted in a more stable decision, and would have made less change in the jurisprudence. It appears that an application of the codal provisions would lead to the conclusion that the consumer bears the burden of negating tampering. However, it is the opinion of this writer that practical observation and realistic deliberation warrant the

31. *Ibid.* Cf. *Smith-Allen and Curry Mfg. Co., Ltd. v. Shreveport Waterworks Co.*, 113 La. 1091, 37 So. 980 (1905).

32. Art. 2503, La. Civil Code of 1870. See p. 627, *supra*.

33. Art. 2461, La. Civil Code of 1870.

34. Prosser, *Handbook of the Law of Torts* 692 (1941). See also Cotton, *A Note on the Civil Remedies of Injured Consumers*, 1 *Law and Contemp. Prob.* 67 (1933). Liability should only extend to normal injuries, and the plaintiff should have to trace the defect to the defendant. See *Cudahy Packing Co. v. Baskin*, 120 Miss. 834, 155 So. 217 (1934).

35. Prosser, *Handbook of the Law of Torts* 690 (1941). See also Note, 18 *Corn. L.Q.* 445 (1933).

enactment of legislation establishing a legal presumption that a bottle of "soda pop" had *not* been adulterated by an officious meddler between the time it left the plant of the producer and the ultimate purchase by the consumer.³⁶

Louisiana will probably continue to follow the trend evidenced by the *LeBlanc* case and common law jurisdictions.³⁷ Future adjudication will most likely be characterized by increased liability of manufacturers; the ultimate result could well be strict liability.

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SALES—LESION BEYOND MOIETY—IMMOVABLES
AND MOVABLES MIXED

The plaintiff and the defendants were co-owners of a poultry business. In 1948 the plaintiff sold his interest to the defendants by two¹ notarial acts executed simultaneously. One act transferred plaintiff's interest in the realty, the other his interest in the movables. The plaintiff sought to rescind the sale of the immovables on the ground of lesion beyond moiety. Parol evidence was admitted, over the objection of the plaintiff, to support the defendants' contention that the separation into two acts was done for convenience and that the parties intended the two acts to constitute a single transaction conveying both the realty and the business for a lump price. The court held that the action of lesion beyond moiety did not lie. "Rescission of sales for lesion beyond moiety is not granted in sales *involving* movables."² (*Italics supplied.*) *Corona v. Corona*, 221 La. 576, 59 So. 2d 889 (1952).

The purpose of this note is to consider the validity of this case insofar as it holds that the action of lesion beyond moiety does not lie in a mixed sale of movables and immovables.

36. Of course, the defendant should have the right to destroy such a presumption by producing positive evidence of interference.

37. Prosser, *Handbook of the Law of Torts* 690 (1941); Vold, *Sales* 464 (1931) and cases cited therein at note 75; 1 Williston, *Sales* §§ 244, 244a (2 ed. 1924) and cases cited therein.

Many manufacturers seem to have abandoned all notions of escape from charges of redhibitory defects. Bogert & Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 Ill. L. Rev. 400, 416 (1930).

1. A third act granted a mortgage in favor of plaintiff as security for the unpaid portion of the purchase price.

2. *Corona v. Corona*, 221 La. 576, 584, 59 So. 2d 889, 892 (1952).