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Implied Warranties in Service Contracts

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NOTES

Implied Warranties in Service Contracts

I Introduction

The concept of implied warranties is well established in the law of sales contracts. Such warranties were imposed upon contracts for the sale of goods by the common law and their application to such contracts has been broadened and their effect strengthened by the Uniform Sales Act and the Uniform Commercial Code.[1] Many courts have extended the protection afforded by implied warranties even beyond that which would be afforded under the liberal provisions of the Uniform Commercial Code.[2] These courts have recognized that changing business practices and an increasing use of modern day advertising media has necessitated the extension of such warranties beyond the immediate parties to the contract of sale to the ultimate consumer.[3] Addressing themselves to a related problem, many courts have also recognized that the increased use of the "standard warranty" or "standard guaranty" forms by manufacturers and sellers is often merely an attempt to limit the protection afforded the consumer by limiting all warranties to those contained in the form, and thus have not given effect to such provisions insofar as they attempt to prevent the imposition of implied warranties.[4]

There is little room for doubt that the courts and state legislative bodies alike have been striving to extend to the consumer of goods an ever-increasing amount of protection.[5] One of the major ways that this protection is being given is through an increased and more far-reaching application of implied warranties. With this fact in mind, the purpose of this note is to determine whether the purchaser of services is being as well protected as the consumer of goods and whether the courts are using implied warranties to protect the purchaser of a service from loss caused by adverse results in the same manner as they are raising implied warranties to protect the consumer of goods from loss caused by defective merchandise. Will the man who hires an architect, an engineer, or any other qualified person to render a particular service for him, and who suffers a loss because of the failure of the party rendering the service to produce the desired result, be given the same

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1 See, *e.g.*, Ezer, *Impact of Uniform Commercial Code on California Law of Sales Warranties*, 8 U.C.L.A.L. Rev. 281 (1961) and Note, 38 N.D. Lawyer 555, 604-12 (1963) for discussions of the increasing application by the courts and by the state legislatures of implied warranties in the area of sales contracts.

2 Greenman v. Yuba Power Products, Inc., 205 Cal. App. 2d 525, 23 Cal. Rpts. 282 (1962); Harmon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1962); Lee v. Cohrt, 57 S.D. 387, 232 N.W. 900 (1930); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

3 See, *e.g.*, Greenman v. Yuba Power Products, Inc., 205 Cal. App. 2d 525, 23 Cal. Rpts. 282, 284-85 (1962),

> The liability of a manufacturer predicated upon representations concerning his product . . . through labels or advertising materials . . . [is] an obligation attendant upon a new era, which dictates that the manufacturer should be held responsible to the consuming public for representations manifestly made by him to them for the purpose of promoting the sale of his product . . . . In any event, the obligation in question, strictly speaking, is not the result of a contract; is not dependent upon the existence of contractual privity; and exists independently of any buyer-seller relationship.

4 See, *e.g.*, Henningson v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960) wherein the New Jersey Supreme Court, after an extensive examination of existing policy considerations, decided that standard warranties which, in effect, act as disclaimers of those obligations that normally attend a sale are not favored by the better reasoned recent decisions and must be strictly construed against dealers and manufacturers. See also Frigidinners, Inc. v. Branchtown Gun Club, 176 Pa. Super. 643, 109 A.2d 202, 204 (1954) where the court had to evaluate the following provision in a conditional sales contract: "This contract contains the entire agreement between the Seller and the Buyer; there are no other representations, warranties or covenants by either party. This contract may not be modified except in writing." The court held that the provision did not disclaim implied warranties.

5 See Note, 38 N.D. Lawyer 555 (1963).

remedy — suit for breach of implied warranty — as is given the consumer who purchases and is injured by defective merchandise?

II The Nature and Effect of Implied Warranties

An implied warranty is an obligation imposed by law apart from any contractual provisions existing between the parties.[6] Thus, where a housewife purchases a loaf of bread and law imposes upon the seller an implied warranty that the bread is fit for human consumption;[7] where a man purchases a lathe the law imposes upon the manufacturer and upon the seller an implied warranty that the lathe is safe under conditions of ordinary and proper usage;[8] and where a prospective purchaser informs a seller who deals in the type of goods in question of the particular purpose for which he desires such goods, then relies on the seller to select the proper goods for his needs, the law imposes upon the seller an implied warranty that the goods selected and sold will be fit for that particular purpose.[9] All of these implied warranties should be imposed regardless of any contractual disclaimer or limitation of warranties that may exist between the parties to the contract of sale.[10]

The imposition of an implied warranty subjects the manufacturer and/or the seller of the goods in question to strict liability for any loss suffered by a protected party due to the breach of the warranty. If, for example, the bread sold to the housewife is not fit for human consumption and she is made sick because of eating it, an action *ex contractu* based on breach of implied warranty arises in her favor against the seller. To sustain this action, the housewife need only prove that she purchased the bread from the defendant, that she in good faith and without negligence ate it and became ill, and that she suffered damages thereby. She need not, however, allege or prove that the defendant seller was in any way negligent in his purchase, display or sale of the bread. The liability resulting from the imposition of an implied warranty is strict liability for damages suffered because of the breach of such warranty by parties to whom the warranty extends.[11]

The nature and effect of implied warranties, therefore, extend to the consumer of goods a twofold protection. In the first instance, at least according to the more well-reasoned decisions, if the circumstances of the sale are such as warrant the imposition of an implied warranty, the courts will impose it in spite of contrary provisions in the contract of sale.[12] Thus, the consumer is protected against an attempt by a manufacturer or seller to strictly limit the obligations and duties he owes to the consumer. Secondly, the injured consumer is relieved of the onerous burden of having to prove negligence on the part of the manufacturer or seller for he is said to have a contractual action for breach of warranty.[13] It is primarily this second manner of protecting the consumer which is important in determining whether the consumer of services will be protected in the same manner as is the consumer of goods.

III General Principles Governing Service Contracts

Examination of those cases dealing with the liability of one who undertakes to perform a service for another reveals: (1) that the law imposes upon a party who contracts to render a service for another the obligation to perform the service with that degree of skill, efficiency and knowledge that is possessed by those of ordinary skill, competency and standing in the particular trade or profession in

6 See Vold, Sales § 84 (2d ed. 1959); 1 Williston, Sales §§ 195-97 (Rev. ed. 1948); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

7 Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

8 Greenman v. Yuba Power Products, Inc., 205 Cal. App. 2d 525, 23 Cal. Rpts. 282 (1962).

9 U.S.A. § 15 (1); U.C.C. § 2-315; Mack v. Coogan, 8 Chest. Co. Rep. 233 (Pa. 1957).

10 *Supra* note 4.

11 Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

12 *Supra* note 4.

13 *E.g.*, Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

which the performer is employed;[14] (2) that one who performs a service for another will be held liable for damages suffered by his employer only when he has failed to fulfill his obligation to perform in accordance with the standards of his trade or profession;[15] and (3) that one who contracts to perform a service for another does not, in the absence of an express agreement, guaranty or warranty the results of his work.[16] The Alabama case of *Broyles v. Brown Engineering Co. Inc.*,[17] was the only decision found which directly conflicted with numbers (2) and (3) of the general principles stated above. The *Broyles* case and its effect on the law governing service contracts, if any, will be discussed in another section of this article.

The majority rule is well established: one who employs another to perform a service for him must, absent the existence of an express guaranty of satisfactory results, allege and prove that the services were not performed in accordance with the established trade or professional standards governing the party rendering the services, before he may be compensated for damages suffered by him because of the failure of expected results. In an illustrative case,[18] plaintiff hired defendant, a "test hole digger," to determine the depth of fill on certain adjoining lots plaintiff was interested in purchasing. The defendant dug numerous holes and informed the plaintiff that the fill was from twelve to sixteen inches in depth; plaintiff then purchased the lots. When construction of an apartment building was begun, fill to depths of five to six feet was discovered which added materially to plaintiff's cost of construction. Plaintiff brought suit against the defendant and alleged breach of implied warranty, negligence and deceit. The trial court sustained all three allegations and entered judgment for plaintiff in the amount of the additional cost of construction. On appeal, the Supreme Court of California reversed as to the allegation of breach of implied warranty,[19] on the grounds that the contract involved was one for the performance of a service and:

> Thus the general rule is applicable that those who sell their services for the guidance of others in their economic, financial and personal affairs are not liable in the absence of negligence or intentional misconduct. . . . [Those who hire experts] purchase service, not insurance.[20]

The rule stated in *Gagne v. Bertran*[21] and therein applied to "test hole drillers," is equally applicable to all who perform services for others.[22] However, the law in this country was once that the mere negligent rendering of certain professional services did not subject the party rendering them to any liability. Lawyers, for example, as late as 1933 were held liable only in the case of gross

14 See, *e.g.*, Bloomsburg Mills Inc. v. Sardoni Construction Co., 401 Pa. 358, 164 A.2d 201 (1960) (Architect); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954) (Attorney); Duenewald Printing Corp. v. G. P. Putnam's Sons, 276 App. Div. 26, 92 N.Y.S.2d 553 (Sup. Ct.), *rev'd on other grounds*, 301 N.Y. 569, 93 N.E.2d 452 (1950) (Printer); Wilson v. Blair, 65 Mont. 155, 211 P. 289 (1922) (Doctor); Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915) (Engineer); City of East Grand Forks v. Steele, 121 Minn. 296, 141 N.W.181 (1913) (Accountant).

15 See, *e.g.*, Ewing v. Goode, 78 Fed. 442, (C.C.S.D. Ohio 1897) (Doctor); Rolins Engine Co. v. Eastern Forge Co., 73 N.H. 92, 59 A. 382 (1904) (dicta: general reference to all who perform a service); Chapel v. Clark, 117 Mich. 638, 76 N.W. 62 (1898) (Architect).

16 See, *e.g.*, Bonadiman-McCain, Inc. v. Snow, 183 Cal. App. 2d 58, 6 Cal. Rptr. 52 (1960) (Engineer); Wilson v. Blair, 65 Mont. 155, 211 P. 289 (1922) (Doctor); Looker v. Gulf Coast Fair, 203 Ala. 42, 81 So. 832 (1919) (Architect); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889) (Attorney).

17 151 So.2d 767 (Ala. 1963).

18 Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954).

19 *Id.* at 21. The court upheld the trial court as to its finding of negligence and deceit, but reversed it as to damages.

20 Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15, 20-21 (1954).

21 43 Cal. 2d 481, 275 P.2d 15 (1954).

22 See, *e.g.*, Ewing v. Goode, 78 Fed. 442 (C.C.S.D. Ohio 1897) (Doctor); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954) (Attorney); Rolins Engine Co. v. Eastern Forge Co., 73 N.H. 92, 59 A. 382 (1904) (dicta: general reference to all who perform a service); Chapel v. Clark, 117 Mich. 638, 76 N.W. 62 (1898) (Architect).

negligence.[23] Architects, too, were immune from suits for negligence. Early American decisions, following English cases,[24] held that an architect was a quasi-arbiter and as such was not liable for the damages suffered by those who employed his services.[25] The decisions like *W. L. Douglas Shoe Co. v. Rollwage*,[26] and the early architect cases, however, have had little lasting effect on the law governing service contracts, and the rule of the *Gagne* case is the position held by the majority of American courts today.[27]

IV Determination of Liability in Service Contract Cases: The Majority View

In determining whether one who has contracted to render a service has fulfilled the duty imposed upon him to perform in accordance with the recognized standards of his trade or profession, the majority of courts will look to the manner and method of performance and will generally consider the fact of failure of intended results only as circumstantial evidence of negligent performance.[28] Because one who contracts to perform a service is not, according to the great weight of authority, held to a guaranty of satisfactory results,[29] mere proof of failure of intended results generally will not, in and of itself, sustain an allegation of negligent performance.[30] In one case,[31] the plaintiff, an architect, sued his employer for the value of his services. The employer, alleging negligent performance by the architect, requested that an instruction be given to the effect that if the plans and specifications as prepared by the plaintiff were found by the jury to be faulty and if it was found that because of the faulty plans and specifications the defendant suffered unnecessary expense in the construction of the building, the jury should determine the amount of this expense and deduct it from the value of the services rendered. The trial court refused to grant the instruction and a verdict for the plaintiff for the full value of his services was returned by the jury. On appeal, the Supreme Court of Michigan affirmed, stating that, "[T]he request does not correctly state the law. It makes the architect a warrantor of his plans and specifications, . . . The law does not imply such a warranty or the guaranty of the perfections of his plans."[32] As to the services of doctors, the prevailing view is that except in those cases where the doctrine of res ipsa loquitur[33] is applicable, no presumption of negligence is to be derived from the fact of injury or adverse results of treatment of, or operation on, a patient.[34]

There are two exceptions to this general rule that one who performs a service will not be held liable for damages suffered by his employer unless it is shown that he negligently or wilfully failed to fulfill the duty of due care and diligence imposed upon him by the law and mere proof of failure of intended result will not *per se* sustain an allegation of negligent performance. One is where it is determined

23 See, *e.g.*, W. L. Douglas Shoe Co. v. Rollwage, 187 Ark. 1084, 63 S.W.2d 841 (1933).
24 *E.g.*, Stevenson v. Watson, L.R. 4 C.P. Div. 148, 40 L.T.R. (N.S.) 485 (1879).
25 5 Am. Jur. 2d Arbitration and Award § 107 (1962).
26 187 Ark. 1084, 63 S.W.2d 841 (1933).
27 *Supra* note 22.
28 *E.g.*, Chapel v. Clark, 117 Mich. 638, 76 N.W. 62 (1898).
29 See note 16 *supra* and accompanying text.
30 *E.g.*, Rolins Engine Co. v. Eastern Forge Co., 73 N.H. 92, 59 A. 382, 384 (1904) wherein the court stated: "The obligation . . . of one who undertakes to perform a service for another, is due care. He contracts to exercise the diligence and skill of the average man of the ability which he professes in like work. If he exercises such care, he is not liable, in the absence of express contract, merely because the expected result is not obtained."
31 Chapel v. Clark, 117 Mich. 638, 76 N.W. 62 (1898).
32 *Id.* at 62.
33 Res ipsa loquitur is merely the proposition that an inference of negligence may be raised without direct evidence of the negligent act if three conditions exist: (1) the injury must be of a type not ordinarily occurring absent negligence; (2) the defendant must have had exclusive control of the instrumentality effecting the injury; and (3) the plaintiff must not have contributed to the injury. Prosser, Torts 201 (2d ed. 1955).
34 41 Am. Jur. *Physicians and Surgeons* §§ 125, 127 (1942).

that an express guaranty of results was made, and the other is where the doctrine of res ipsa loquitur is found to be applicable to the fact situation in question.

In those situations in which an alleged guaranty is found to exist, the party seeking to recover or setoff damages need not allege negligence at all. The failure of intended results, in and of itself, constitutes breach of contract. Where, for example, a doctor contracted to cure, but the patient died from subsequent treatment, the court said that when death occurred there was a breach of contract, that an action *ex contractu* arose at that time, and that allegations of negligence and evidence relative to due care were immaterial.[35] Especially in the fields of medicine and its related sciences, contracts wherein the results of service contracts are guaranteed are uncommon, but they do exist.[36] At least one court has intimated that the respectable physician would not enter into a contract where the results of his services were guaranteed.[37]

> If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he use the highest possible skill. Insurance of such a contract could protect only the medical charlatans. The honorable member of the medical profession is more keenly conscious than the rest of us that medicine is not an exact science, and he undertakes only to give his best judgment and skill. He knows he cannot warrant a cure.[38]

In spite of the language just quoted, a number of courts have found that statements made by physicians to the effect that while the operation might not cure the hearing problem, it would not worsen it,[39] that the radium treatments would not leave a scar[40] and that the injured hand would be made one hundred per cent perfect,[41] constituted express warranties and the failure of the promised results gave rise to actions for breach of contract. Where a dentist guaranteed to construct two dental plates for plaintiff to her entire satisfaction, and the plates fit improperly and caused sores in the mouth of plaintiff, the court found a breach of guaranty;[42] and where an architect told a prospective employer that a building constructed in accordance with plans prepared by him would be "well and properly lighted," and "first class in every respect," he was held to an express warranty of results.[43] Damages in cases involving suits for breach of guaranty or express warranty are generally limited to an amount sufficient to place the injured party in as good a position as he would have been in had the defendant performed his contract.[44] In the case of *Carpenter v. Moore*,[45] the court reversed the judgment as to damages awarded for the plaintiff's pain and suffering on the grounds that the amount paid, or promised to be paid, is the limit of recovery in this type of action, there being no proof of negligence or want of professional skill.[46]

In those situations in which the doctrine of res ipsa loquitur,[47] or the so-called "ulterior act" and "common knowledge" doctrines[48] are applicable, negligent per-

35 Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940).
36 *E.g.*, Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955).
37 Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92 (1940).
38 *Id.* at 95.
39 Noel v. Proud, 189 Kan. 6, 367 P.2d 61 (1961).
40 Crawford v. Duncan, 61 Cal. App. 647, 215 Pac. 573 (1923).
41 Hawkins v. McGee, 84 N.H. 114, 146 Atl. 641 (1929) (dicta).
42 Carpenter v. Moore, 51 Wash. 2d 795, 322 P.2d 125 (1958).
43 Niver v. Nash, 7 Wash. 558, 35 P.380 (1893).
44 5 WILLISTON, CONTRACTS § 1338 (Rev. ed. 1937).
45 51 Wash.2d 795, 322 P.2d 125 (1958).
46 See also Hirsh v. Safian, 257 App. Div. 212, 12 N.Y.S.2d 568 (1939), wherein the court said that recovery for breach of contract in medical cases is usually limited to compensation for consequences that were reasonably within the contemplation of the parties when the contract was made and which flow naturally from the breach; for example, medical fees and hospital bills.
47 *Supra* note 33 and accompanying text.
48 See Note, 77 HARV. L. REV. 333, 345 (1963) wherein the "Ulterior Act" and "Common Knowledge" doctrines, alleged refinements of the res ipsa loquitur doctrine, are explained and examined.

formance must still be alleged, but the result itself will constitute *per se* proof of such negligent performance.[49] The difficulty in this area lies in determining in the first instance whether or not the doctrines are applicable to the fact situation in question.[50] There is conflict as to the applicability of res ipsa. One court stated:

> This doctrine is, however, generally restricted to cases of injuries inflicted by a mechanical apparatus or some other inanimate object within the defendant's exclusive control. It does not ordinarily apply to cases of injuries caused by the careless act or thoughtless omission of a human being. *It follows, hence, that there is no sound basis for extending it to actions for negligence against a member of a learned profession.* To do otherwise would practically require him to guarantee success in every case. Such a course would be contrary to the principles of fairness to the professions and against the best interests of the public.[51]

Although this case dealt with the services of a doctor, and while the court did find that an express warranty might have been made,[52] the quoted language is a clear indication of the court's feeling that res ipsa has no application to the cases of service contracts.[53] Most courts, however, will apply res ipsa in cases dealing with service contracts and, more specifically, in cases of medical malpractice, where the results are such that a layman can conclude as a matter of common knowledge and observation that due care was not exercised in the performance.[54] Res ipsa will not, however, be applied merely on the basis of adverse or unfavorable results.[55]

The classic and perhaps most liberal case applying res ipsa in a medical malpractice suit, is the case of *Ybarra v. Spangard*.[56] There the court applied res ipsa in an action brought against all the attending doctors and nurses where, after an appendectomy, the plaintiff suffered atrophy of certain muscles but recalled only feeling two hard objects at his shoulders when placed on the operating table. It has been suggested, however, that even the California courts have withdrawn from such a liberal application of this doctrine.[57]

From the analysis of the cases considered thus far, it would appear that one who has suffered damages because of the failure of expected results from services rendered by a professional man or a tradesman must either show that an express guaranty of results was made, or show that the services were wilfully or negligently performed in an unskillful or unworkmanlike manner. At least one court, however, would take exception to this seemingly obvious conclusion.[58]

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49 *E.g.*, Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944). Where patient suffered atrophy of certain muscles after an appendectomy, court found that all the doctors and nurses were guilty of negligent performance of their duty.

50 See Note, 47 MARQ. L. REV. 239 (1963) for a discussion of many recent medical cases in which the courts have applied or rejected the res ipsa doctrine.

51 Johnson v. Rodis, 151 F. Supp. 345, 347 (D.D.C. 1957) (emphasis added).

52 *Id.* at 348 where, in reference to the allegation that the defendant doctor had stated that the proposed shock treatments would be perfectly safe, the court inferred that if defendant had not qualified his statement in any way, it might properly be found to be a warranty.

53 This limitation on the applicability of res ipsa is in full accord with Dean Prosser's views, for he too would limit its application to those cases where the injury was caused by an instrument within the exclusive control of the defendant. PROSSER, TORTS, 201, (2d ed. 1955).

54 *E.g.*, Farber v. Olkon, 40 Cal.2d 503, 254 P.2d 520, 524 (1953):

> That doctrine (*res ipsa*) applies in medical malpractice cases only where a layman is able to say as a matter of common knowledge and observation, or from the evidence can draw an inference, that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. . . .

55 See, *e.g.*, Sattlemire v. Cawood, 213 F. Supp. 897 (D.D.C. 1963) and Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960).

56 25 Cal.2d 486, 154 P.2d 687 (1944).

57 See Note, 47 MARQ. L. REV. 239 (1963).

58 Broyles v. Brown Engineering Co., 151 So.2d 767 (Ala. 1963).

V Determination of Liability in Service Contract Cases: The Minority View

The *Broyles* case involved an incorporated group of civil engineers which entered into a contract with the plaintiffs to render civil engineering services and to submit plans and specifications for the drainage of a tract of land to be used in the construction of a housing project. After the defendant's services were performed the tract still remained subject to periodic flooding. The plaintiffs brought an action against defendant for damages suffered by them as a result of defendant's breach of an implied warranty of reasonable results. The trial court sustained defendant's demurrers to each of the allegations of the complaint and the plaintiffs appealed. The Supreme Court of Alabama reversed and remanded the action.

In reaching its decision, the court first pointed out that neither negligence nor the want of due care in the preparation of the plans and specifications was charged in the complaint. "A breach of implied warranty of adequate results is the gravemen of each count."[59] This is the factor that makes the *Broyles* case unique in the law of service contracts. The court then examined the law governing implied contracts and concluded that: "An implied contract arises where there are circumstances which, according to the ordinary course of dealing and common understanding, show a *mutual intent* to contract."[60] With this rule of law guiding it, the court proceeded to find that because the defendant knew that correct plans were essential for the proper drainage of the water from the tract, "[T]he parties mutually intended an agreement of guaranty as to the sufficiency and adequacy of the plans and specifications to accomplish proper and adequate drainage."[61] A brief examination of the law governing service contracts as it has been applied to other fields of professional services was then made and the court admitted that other courts have been "reluctant"[62] to imply a contract of guaranty or insurance of favorable results in such situations. In spite of this admission, the court concluded its opinion by saying that the services rendered in this case were different than other types of professional services[63] and that

> A contracting civil engineer employed to survey and submit plans and specifications for drainage of an area of land as here involved, when he accepts employment, being competent and qualified as he holds himself out to be, *should expect to be charged with a guaranty of reasonable result.* . . .[64]

The theory of law upon which the *Broyles* case is based is not clear. From the language used in the beginning of its decision[65] the court seems to base its result on the finding that an implied in fact contract of guaranty existed between

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59 *Id.* at 770.

60 *Id.* at 770 (emphasis added).

61 *Id.* at 771.

62 *Id.* at 771. In light of the analysis of the findings of other courts in the service contract area, the use of the term "reluctant" appears to be a mild understatement of the facts.

63 The court stated, as to the practice of medicine: "The practice of medicine being to a great degree experimental, it cannot be said . . . that a physician intended, in the absence of express words, to insure favorable results or a cure." *Id.* at 771; as to lawyers: "[L]awyers are dealing with factors that are beyond their control and under such circumstances, common dealings would reasonably suggest the absence of any implied guaranty of results." *Id.* at 771; as to architects: "His work is to a certain degree experimental. . . . The law of physics, gravity and the rotation of the earth, must . . . be taken into account. The texture of the soil, a factor beyond his control, must be considered. For these reasons and others . . . our courts have not held architects to a strict accountability of guaranty." *Id.* at 771-72; as to a civil engineer employed to locate a government land line: "[H]e is dependent on obtaining a correct starting point for his survey — a point that is often obscured or is evidenced by misleading or false marks — marks that are made by someone else. An engineer under such circumstances cannot ordinarily be expected to guaranty or insure definite and positive results." *Id.* at 772; but as to the civil engineering services in question, the court stated: "[A]n engineering survey of drainage requirements of a tract of land . . . is not entailed with unknown or uncontrollable topographical or landscape conditions. . . ." *Id.* at 772.

64 Broyles v. Brown Engineering Co., 151 So.2d 767, 772 (Ala. 1963).

65 *Supra* notes 62 and 63 and accompanying text.

the parties. The language used in the conclusion of the opinion,[66] however, indicates that an implied warranty of reasonable results would have been imposed even if an implied in fact contract was not found to exist. Both of these theories present certain difficulties. As to the finding of an implied in fact contract of guaranty, the court itself was cognizant of the rule that such a finding will be made only when it is clear that the parties mutually intended to so contract.[67] The court's conclusion that the defendant intended to guaranty the results of its services appears illogical. As to the contention that the law will impose an implied warranty of satisfactory results upon the contract of one who agrees to perform a service for another, the court takes a position that it is in direct conflict with the vast majority of opinions on the question.[68] It would seem that the proper implication to be drawn from the facts presented to the court in the *Broyles* case would be that knowing the law governing service contracts, plaintiff should have required from defendant a written guaranty of satisfactory results. Upon finding that the plaintiff did not secure such a provision in the contract, most courts would have probably declined to read into the agreement a provision that was not placed therein by the parties themselves, both of whom were legally competent to contract.[69]

The case of *Hill v. Polar Pantries*[70] must also be considered at this point. While it differs from the *Broyles* case in that the court, because negligence was alleged and found to exist in the performance, was not faced with the same question presented to the court in *Broyles,* it nevertheless indicates that at least one other court might apply the same reasoning and reach the same result as the court in *Broyles. Hill* involved an action by the owner of a frozen food locker plant against the architect who prepared the plans for the construction of the plant and agreed to supervise the construction. Some months after the plant was completed and put into operation, the cement floor began to crack and within a short time thereafter the cracking became so serious as to render the plant unusable. The owner brought suit against the contractor and alleged that he had negligently failed to prepare adequate plans and had negligently failed to properly supervise the construction of the plant. Defendant argued that he had neither installed the freezer unit nor constructed the plant. In a motion for a directed verdict, the defendant alleged that the evidence was insufficient to show that he was negligent for there was no proof that the damages resulted from his services rather than from the negligence of the construction company that installed the freezer unit and built the plant. The trial court denied defendant's motion and the jury returned a verdict for the plaintiff. On appeal, the judgment was affirmed, the court stating that there was an implied warranty of the sufficiency of the plans and specifications for the contemplated purpose and, further, the evidence was sufficient to support the jury's finding of a breach of such warranty.

VI Conclusion

As revolutionary as the holding in the *Broyles* case may appear to be, it is submitted that it will be strictly limited to those circumstances wherein the court can make the determination that absolutely no unknown or uncontrollable factors entered into the performance of the service in question. As the general nature of the performance involved in the vast majority of service contracts prevents such a determination, the cases following *Broyles* will no doubt be few in number. In all other cases involving suits against tradesmen or professional men for failure

66 *Supra* note 66 and accompanying text.
67 *Supra* note 62 and see 17A C.J.S. *Contracts* § 328, pp. 288-89.
68 See, *e.g.,* Bonadiman-McCain, Inc. v. Snow, 183 Cal. App.2d 58, 6 Cal. Rptr. 52 (1960); Wilson v. Blair, 65 Mont. 155, 211 P. 289 (1922); Looker v. Gulf Coast Fair, 203 Ala. 42, 81 So. 832 (1919); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889).
69 Our Lady of Victory College & Academy v. Maxwell Steel Co., 278 S.W.2d 321 (Tex. 1955).
70 219 S.C. 263, 64 S.E.2d 885 (1951).

to produce the desired results when rendering a service, the purchaser of that service will still be bound by the well-established general rule that in the absence of an express agreement, one who performs a service will not be liable for damages caused by a failure of expected results unless he has wilfully or negligently failed to perform those services in accordance with the accepted standards of his trade or profession. In spite of the holding in the *Broyles* case, proof of negligent performance, either by direct evidence or through the inference raised by the doctrine of res ipsa, where applicable, is still a necessary and an integral part of any suit brought against one who has performed a service where an express guaranty of the results of that service was not obtained.

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