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Sales: Retail Dealer's Liability for Injury Arising from Consumption of Adulterated Canned Food

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SALES: RETAIL DEALER'S LIABILITY FOR INJURY ARISING FROM CONSUMPTION OF ADULTERATED CANNED FOOD.

In *Bolitho v. Safeway Stores,*[1] plaintiff's mother had purchased from defendant retailer a package of breakfast food which she cooked and served to plaintiff, plaintiff becoming ill due to bugs, worms, string or other deleterious substances contained in the food. Defendant retailer had purchased the package from a wholesaler and had resold it in its original unbroken condition. Defendant, plaintiff's mother and plaintiff were all free from negligence in the handling of the food. The Montana Supreme Court held that neither the guaranty of the manufacturer printed on the container, nor the fact that the food was retailed in its original sealed package would relieve the retailer from civil liability for damages resulting from consumption of adulterated food contained in such a package.

A manufacturer, packer, or bottler of foods or beverages is liable to a consumer of the food for any injury caused by the unwholesomeness of the food which he manufactured, packaged, or bottled. This liability exists even though the consumer did not purchase the food directly from the manufacturer, packer, or bottler, the liability not depending upon a contract relationship between the parties.[2] In the case of *Ketterer v. Armour & Co.*[3] the defendant packer of prepared meat was held liable to the plaintiff for injury caused to plaintiff by trichinae contained in meat packed by defendant. In that case the plaintiff was not in privity of contract with either the defendant or with the retailer, but was only the employee of the purchaser from the retailer. Although today the courts seem agreed in imposing liability upon the manufacturer, there is no agreement among the courts as to the

[1] (1939) 109 Mont. 213, 95 P. (2d) 443.

[2] Ketterer v. Armour & Co. (C. C. A. 2d, 1917) 247 F. 921, L. R. A. 1918D 798; Tomlinson v. Armour & Co. (1908) 75 N. J. L. 748, 70 A. 314, 19 L. R. A. (N. S.) 923. COOLEY, LAW OF TORTS (Throckmorton ed. 1930) §345, pp. 695-9, "The general rule is that a contractor, manufacturer, vendor or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of such article. . . . To the general rule there are certain well-established exceptions. One is that a person who puts on the market an article inherently dangerous to life owes a public duty to guard against defects in it, and is absolutely liable, irrespective of negligence, to any one injured by reason of a defect therein of which no warning was given, even though there is no privity of contract between the plaintiff and the defendant." Foods come within the class of goods that are inherently dangerous.

[3] (C. C. A. 2d, 1917) 247 F. 921, L. R. A. 1918D 798.

nature of that liability. In general the cases are split between a tort theory in the courts holding that there can be no warranty without privity of contract and a contract theory of some sort applied in other courts. Under the tort theory the courts hold that the plaintiff must show negligence by the defendant manufacturer, a few courts saying that actual negligence or lack of due care by the defendant must be proven;[4] but the majority of the courts say that evidence of injuries resulting from the unwholesomeness of the food or drink or from a deleterious substance therein establishes a *prima facie* case. The majority of courts reach that result through one of the following methods: (1) By finding negligence through extension of the *res ipsa loquitor* doctrine;[5] (2) by finding negligence in making evidence of the injury to have presumptive force, either a presumption which disappears on the presentation of counter-evidence[6] or a presumption which itself has evidentiary force;[7] (3) by finding negligence from the violation of a statute;[8] or, (4) by finding, not negligence, but deceit by the manufacturer, in which case the manufacturer must have knowingly made a false representation.[9] Under the contract theory to evade the requirements of privity of contract the courts have found: (1) A unilateral contract between the manufacturer and the purchaser,[10] the dealer being the agent of the manufacturer with the power to make a representation or offer to the sub-purchaser;[11] or, (2) the sub-purchaser to be a third party beneficiary of the contract between the manufacturer and retailer.[12] It has been recommended with some rea-

[4] Moore v. Macon Coca-Cola Bottling Co. (1935) 180 Ga. 335, 178 S. E. 711.

[5] Eisenbeiss v. Payne (1933) 42 Ariz, 262, 25 P. (2d) 162; Nehi Bottling Co. v. Thomas (1930) 236 Ky. 684, 33 S. W. (2d) 701.

[6] Nichols v. Continental Baking Co. (C. C. A. 3rd, 1929) 34 F. (2d) 141; Coca-Cola Bottling Co. V. Rowland (1932) 16 Tenn. App. 184, 66 S. W. (2d) 272.

[7] Atlanta Coca-Cola Bottling Co. v. Sinyard (1932) 45 Ga. App. 272, 164 S. E. 231; Coca-Cola Bottling Co. of Shelbyville v. Creech (1932) 245 Ky. 414, 53 S. W. (2d) 745; Pillars v. R. J. Reynolds Tobacco Co. (1918) 117 Miss. 490, 78 So. 365.

[8] Peterson v. Standard Oil Co. (1910) 55 Ore. 511, 106 P. 337. For further citations see notes in 17 A. L. R. 672, 39 A. L. R. 992, 63 A. L. R. 340, 88 A. L. R. 527, 105 A. L. R. 1502. Also see this article *infra* as to the nature of pure food statutes.

[9] HARPER, LAW OF TORTS (1933) §217, p. 445.

[10] Carlill v. Carbolic Smoke Ball Co. (1893) 1 Q. B. 256; Timberland Lumber Co. v. Climax Mfg. Co. (C. C. A. 3rd, 1932) 61 F. (2d) 391.

[11] Timberland Lumber Co. v. Climax Mfg. Co. (C. C. A. 3rd, 1932) 61 F. (2d) 391. See Hall Mfg. Co. v. Purcell (1923) 199 Ky. 375, 251 S. W. 177.

[12] Coca-Cola Bottling Works of Greenwood v. Simpson (1930) 158 Miss. 390, 130 So. 479.

son that the courts drop all these legal fictions and adopt a rule of absolute liability of the manufacturer of food to all persons likely to be harmed."[13]

The vendor of food, who is not also the manufacturer, is liable for injuries resulting from the sale of unwholesome food, to the consumer on the theory of negligence, or to an injured consumer-purchaser on the theory of breach of warranty;[14] but the courts are more strict in construing his liability than they are in the case of a manufacturer or packer who in all probability is more responsible for the defect in the food. When goods are of a class known to be dangerous or likely to be dangerous, which class includes food, the vendor is liable because of his negligence for any harm resulting from the use of that chattel in the expected manner, the liability running to all expected to use the chattel, not merely to those in privity of contract.[15] But his negligence must in some way be shown. When the cause of action relied upon is not negligence, but breach of warranty, one of the implied warranties made by a retailer of food for consumption is that the food is fit for the purpose for which it is sold,[16] irrespective of the seller's lack of knowledge of the defects therein.[17] But in order for the implied warranty to be found, the vendor must be a dealer in goods of that description, and his skill and judgment must have been relied upon.[18] In the case of a retail dealer reselling food in its original package, some courts early made an excep-

[13]Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937).

[14]22 AM. JUR., *Food*, §94.

[15]MacPherson v. Buick Motor Co. (1916) 217 N. Y. 382, 111 N. E. 1050; Huset v. J. I. Case Threshing Machine Co. (C. C. A. 8th, 1903) 120 F. 865, 61 L. R. A. 303. RESTATEMENT, TORTS, §399: "A vendor of a chattel, manufactured by a third person, who sells it knowing that it is, or is likely to be dangerous, is subject to liability, as stated in Sections 388 to 390." §§388 to 390 cover the liability of suppliers of chattels known to be dangerous for the intended use, known to be incapable of safe use, and for use by a person known to be incompetent. §402: "A vendor of a chattel manufactured by a third person, is subject to liability as stated in Section 399, if, although he is ignorant of the dangerous character or condition of the chattel, he could have discovered it by exercising reasonable care to utilize the peculiar opportunity and competence which as a dealer in such chattels he has or should have."

[16]Wiedeman v. Keller (1897) 171 Ill. 93, 49 N. E. 210; Craft v. Parker, Webb & Co. (1893) 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Houk v. Berg et al (Tex. 1907) 105 S. W. 1176; S. H. Kress & Co. v. Ferguson et al (Tex. Civ. App. 1933) 60 S. W. (2d) 817.

[17]Wiedman v. Keller (1897) 117 Ill. 93, 49 N. E. 210.

[18]VOLD, SALES (1931) §149, pp. 464-5. Farrell v. Manhattan Market Co. (1908) 198 Mass. 271, 84 N. E. 481, held that where the buyer has had an opportunity to inspect the goods, there is no implied warranty as to defects that an examination would disclose.

tion and held that the retail dealer does not in such a case impliedly warrant that the food is wholesome and fit for consumption, basing their decisions on the dealer's lack of ability to know of the defect.[19] But other jurisdictions, by what was perhaps the weight of authority before the Uniform Sales Act, refused to draw a distinction between canned or packaged food and food open for inspection and held that the implied warranty was present in the sale of either.[20]

Under the Uniform Sales Act, which has been adopted in thirty-two states but not in Montana, a retailer dealer impliedly warrants that the food sold by him is wholesome and fit for consumption by the purchaser, no distinction being drawn between food sold from bulk and food resold in the original package.[21] The implied warranty arises under the Uniform Sales

[19]Scruggins v. Jones (1925) 207 Ky. 636, 269 S. W. 743; Kroeger Grocery Co. v. Lewelling et al (1933) 165 Miss. 71, 145 So. 726; Julian v. Laubenberger (1896) 16 Misc. 646, 38 N. Y. S. 1052; Pennington v. Cranberry Fuel Co. (1936) 117 W. Va. 680, 186 S. E. 610, The reasoning of these cases is critized by Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BUL. 6, at page 29, suggesting that these cases erroneously follow the English doctrine that there is no implied warranty which is in any respect peculiar to the sale of food, and that the correct American doctrine is that an implied warranty of wholesomeness accompanies any sale of food.

[20]Chapman v. Roggenkamp (1913) 182 Ill. App. 117; Sloan v. F. W. Woolworth Co. (1915) 193 Ill. App. 620; Swengel v. F. & E. Wholesale Grocery Co. (1938) 147 Kan. 555, 77 P. (2d) 930; Degouveia v. H. D. Lee Mercantile Co. (1937) 231 Mo. App. 447, 100 S. W. (2d) 336. See Burkhardt v. Armour & Co. (1932) 115 Conn. 249, 161 A. 385, 90 A. L. R. 1260; Ward v. Great Atlantic & Pacific Tea Co. (1918) 231 Mass. 90, 93, 120 N. E. 225, 226. 1 WILLISTON, SALES (2d ed. 1924) §242, p. 482: ". . . . if canned goods are to be made an exception to the general rule governing sales of food, the whole law of implied warranty should be revised and placed on the basis of negligence. But the general principle of common law is opposed to this, and certainly if a dealer is ever to be made liable for injuries caused by defective goods where he has been guilty of no fault, the reasons are stronger for holding him liable for selling defective food than in any other other kind of sale. According to the weight of authority, presumably for these reasons, a dealer is liable for selling such food even though in cans of a reputable brand."

[21]UNIFORM SALES ACT, §15(1): "Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." Burkhardt v. Armour & Co. (1932) 115 Conn. 249, 161 A. 385, 90 A. L. R. 1260; Ward v. Great Atlantic & Pacific Tea Co. (1918) 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242; Griffin v. James Butler Grocery Co. (1931) 108 N. J. L. 92, 156 A. 636; Lieberman v. Sheffield Farms-Slawson-Decker Co., Inc. (1921) 117 Misc. 531, 191 N. Y. S. 593; Bowman v. Woodway Stores (1930) 258 Ill. App. 307 (later reversed in 345 Ill. 110, 177 N. E. 727 upon the ground that the evidence was insufficient to show that the illness was caused by the canned milk.)

Act when the buyer orders provisions in the dealer's shop, the nature of the transaction being considered such that without any express statement to the effect the dealer's knowledge and skill are being relied upon to supply a package of wholesome food—unless there is a definite showing that the dealer's skill was not relied upon.[22] The warranty has been held to arise even if the purchaser chooses one can out of a number of like cans.[23] It should be noted that an implied warranty of a dealer, whether under the Uniform Sales Act or not, is in the nature of a personal indemnity to the original purchaser and inures only to his benefit; it does not run with the goods to one not in privity of contract.[24] Unlike cases involving manufacturers or packers, the courts in these cases involving retailers have adhered to the contract theory of warranties. So in order for one not the purchaser to sue the retail dealer in states other than Montana, he would have to base his action on negligence and not on a breach of warranty.

In Montana the statutory provision as to warranty of foods is R. C. M. 1935, Section 7618: "One who makes a business of

[22]Burkhardt v. Armour & Co. (1932) 115 Conn. 249, 161 A. 385, 90 A. L. R. 1260; Ward v. Great Atlantic & Pacific Tea Co. (1918) 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242; Rinaldi v. Mohican Co. (1918) 225 N. Y. 70, 121 N. E. 471. See Ireland v. Louis K. Liggett Co. (1922) 243 Mass. 243, 137 N. E. 371. For a similar holding under the English Sale of Goods Act, 1893, see Frost v. Aylesbury Dairy Co. [1905] 1 K. B. 608 *Contra:* Arnowitz v. F. W. Woolworth Co. (1929) 134 Misc. 272, 236 N. Y. S. 133 saying that a purchaser knows of the dealer's lack of opportunity to inspect the contents of the can, and so there is no reliance upon the "supposed skill or judgment of the seller." Ryan v. Progressive Stores (1931) 255 N. Y. 388, 175 N. E. 105, held that there was no reliance upon the skill and experience of the seller and that §15(1) did not apply where the purchaser ordered a loaf of bread by its brand name. But the court found the defendant liable under §15(2): "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." Food for immediate use which is not fit to eat is not of merchantable quality. (§15(4) reads, "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." This is not a limitation on (1) as then there is no reliance on the seller, nor is it a limitation on (2) as there may still be a warranty of merchantable quality.)

[23]Ward v. Great Atlantic & Pacific Tea Co. (1918) 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242.

[24]Berger v. Standard Oil Co. (1907) 126 Ky. 155, 103 S. W. 245, 11 L. R. A. (N. S.) 238; Gearing v. Berkson (1916) 223 Mass. 257, 111 N. E. 785, L. R. A. 1916D 1006; Carlson v. Turner Centre System (1928) 263 Mass. 339, 161 N. E. 245; Turner v. Edison Storage Battery Co. (1928) 248 N. Y. 73, 161 N. E. 423; Galvin v. Lynch (1930) 137 Misc. 126, 241 N. Y. S. 479; Smith v. Minneapolis Threshing Machine Co. (1923) 89 Okla. 156, 214 P. 178; Prinsen v. Russos (1927) 194 Wis. 142, 215 N. W. 905.

selling provisions for domestic use warrants, by a sale thereof, to one who buys for actual consumption, that they are sound and wholesome." Like the Uniform Sales Act there is no distinction made as to the type of food sold. This provision by itself extends the warranty to a purchaser, and whether it would be extended to anyone else under that statute alone is doubtful. But in the case of *Kelley v. John R. Daily Co.*[25] the Montana Supreme Court said that Ch. 130, Laws of Montana 1911 (now R. C. M. 1935, Sections 2578-2599) extended the warranty of the dealer that the goods are sound and wholesome to the public generally, and that the defendant was responsible for "the natural consequences of his wrongful act" of selling impure food. Sections 2578-2599 contain what is known as Montana's pure food and drug act, prohibiting the sale of adulterated food,[26] a violation constituting a misdemeanor.[27] What the court meant by a warranty to the public generally was that the defendant was liable for the injury caused by defects in the food to any one who had a right to consume the food.

It is important at this time to discuss the nature of pure food statutes. Although they are criminal acts, they impose an absolute duty not to sell adulterated food;[28] and since negligence is a breach of a legal duty, violation of the statutory duty is negligence as a matter of law, or as it is often called, "negligence per se."[29] This enables the plaintiff to make out

[25](1919) 56 Mont. 63, 181 P. 326.

[26]R. C. M. 1935, §2578: "It shall be unlawful for any person, persons, firm, or corporation, within this state, to manufacture for sale, within this state sell, offer for sale, or have within his or their possession, with the intent to sell within this state, any drugs or article of food which is adulterated or misbranded within the meaning of this act. . . . . The term 'food' as used in this act shall include all articles used as food, drink, confectionery, or condiment by man or animals, whether simple, mixed or compound."

[27]R. C. M. 1935, §2579: "For the purpose of this act, an article shall be deemed as adulterated . . . In the case of foods: . . . Fifth. If it contains any proportion of a filthy, diseased, decomposed, putrid, or rotten animal or vegetable substance, whether manufactured or not, . . . "

[28]MELICK, THE SALE OF FOOD AND DRINK (1936), p. 284.

[29]Conway v. Monidah Trust (1913) 47 Mont. 269, 132 P. 26, L. R. A. 1915E 500; Donaldson v. Great Atlantic & Pacific Tea Co. (1938) 186 Ga. 870, 199 S. E. 213; Meshbesher v .Channellene Oil & Mfg. Co. (1909) 107 Minn. 104, 119 N. W. 428; Yochem v. Gloria, Inc. (1938) 134 Ohio St. 427, 17 N. E. (2d) 731; Doherty v. Kresge Co. (1938) 227 Wis. 661, 278 N. W. 437; Kelley v. John R. Daily Co. (1919) 56 Mont. 63, 181 P. 326: "such violation is of itself legal negligence;" RESTATEMENT, TORTS, §286; Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317. *Contra:* Howson v. Foster Beef Co. (1935) 87 N. H. 200, 177 A. 656. Some cases say that violation of a pure food statute is not negligence per se, but only evidence of negligence to be considered by the jury with the other evidence: Kimball v. Davis (1918) 117

his case of negligence simply by showing injury as a result of defendant's violation of the pure food statute. As a study in the law of torts, contributory negligence by the plaintiff would, however, be a defense.[30]

It is probable that the court in the *Kelley* case desired to hold the defendant liable for no more than negligence per se, despite the fact it talked of a "warranty to the public generally." This is shown by the statement of the court that "notwithstanding the statutory liability of defendant, the defense of contributory negligence was available." Contributory negligence is a defense to negligence and not to a warranty which arises out of a contract.[31] Surely the same result could have been reached in the Kelley case from the mere breach of the pure food statute without reference to Section 7618.

In the principal case of *Bolitho v. Safeway Stores* the court adopted the statement of the *Kelley* case as to a warranty extended to the public generally and applied it to all foods, packaged or bulk. It is possible here also that the court could have based its result on Sections 2578-2599. Section 2588[32] would have relieved the defendant in the *Bolitho* case from criminal liability due to the manufacturer's guaranty which was printed on the box. However, the court said, "The statute simply re-

Me. 187, 103 A. 154; Finnegan v. Samuel Winslow Skate Mfg. Co. (1905) 189 Mass. 580, 76 N. E. 192. Some cases say that violation of a pure food statute is not conclusive evidence of negligence but is *prima facie* evidence of negligence: McRickard v. Flint (1889) 114 N. Y. 222, 21 N. E. 153; United States Brewing Co. v. Stoltenberg (1904) 211 Ill. 531, 71 N. E. 1081.

[30]Friedman v. Beck (1937) 250 App. Div. 87, 293 N. Y. S. 649, aff'd (1937) 274 N. Y. 566, 10 N. E. (2d) 554. See note in 50 HARV. L. REV. 1316 (1937).

[31]1 WILLISTON, SALES (2d ed. 1924) §237, p. 466.

[32]R. C. M. 1935, §2588: "No dealer shall be prosecuted under the provisions of this act for selling or offering for sale any article of food or drugs, as defined herein, when the same is found to be adulterated or misbranded within the meaning of this act, in the original, unbroken package in which it was received by said dealer, when he can establish a guarantee, signed by the wholesaler, jobber, or agent, or other party residing in the United States from whom he purchased such article, or if a proper printed guarantee of the manufacturer with his address be upon the package or container, to the effect that the same is not adulterated or misbranded in the original unbroken package in which the said article was received by said dealer, within the meaning of this act, designating it, or within the meaning of the food and drug act, enacted by the senate and house of representatives of the United States of America in Congress assembled June 30, 1906. Said guarantee to afford protection must contain the name and address of the party or parties making the sale of such article to such dealer, or of the manufacturer thereof as herein specified, and in such case said party shall be amenable to prosecution, fines, and other penalties which would attach in due course to the dealer under the provisions of this act."

lieves the holder of the guaranty from the criminal penalties imposed by the act," but the dealer's civil liability was not removed. If this is true, the defendant still violated the act and was liable for his "negligence per se." But the court goes further and precludes any argument that the decision is based only on the pure food act by distinguishing the *Bolitho* case from *Bigelow v. Maine Central R. Co.*[22] That case held the defendant absolved from civil liability due to the guaranty of the packer printed on the can, and that "in the absence of an express warranty the defendant was not liable." The Montana court said the *Bolitho* case differed due to the presence of the warranty in Montana. So, although it uses the language of the Kelley case, the *Bolitho* case is really the first case in Montana holding that a retail dealer of food warrants as to the food he sells to others than his immediate purchaser. If the court finds a warranty, would it say that contributory negligence is not a defense? Probably the court would still hold it a defense, as the court relies so heavily on the *Kelley* case for its statements; but still it is possible that the court would say that as there is a warranty, contributory negligence is not a defense.

The defendant had alleged that the food conformed to "the rules and regulations of the United States government under the Food and Drug Act of June 30, 1906, and all national acts," and therefor defendant was exempt from suit under Section 2596 which provided in part, " . . . and no article of foods or drugs shall be deemed to be adulterated, misbranded, or otherwise subject to the provisions of this act, when such article of food or drugs conforms to the rules and regulations of the United States government under any national act or acts." The court said this defense failed because defendant failed to show "that the rules and regulations of the United States government permit a sale of food containing bugs and worms." But if the food had been in conformity with the federal regulations, would the Montana court have still held the defendant subject to civil liability? This exemption would probably relieve the defendant from civil as well as criminal liability, as the food would not be "adulterated or misbranded" and therefor not covered by the pure food act at all. The defendant could only be held liable under the warranty of Section 7618 which extends to purchasers.

In food cases the old doctrine of *caveat emptor* has been largely abandoned. The manufacturer is held liable to the ultimate consumer for defects in the food he prepared due to a recognition by the courts that he has a duty to save the con-

[22](1912) 110 Me. 105, 85 A. 396, 43 L. R. A. (N. S.) 627.

sumer from harm if possible. So too the courts have held the vendor of food liable to the ultimate consumer for his negligence and to his immediate purchaser for a breach of warranty. Now the Montana court is extending the dealer's liability on a warranty to those out of privity of contract; by a sale of food unwholesome from any cause the dealer is made, as the court says, "the insurer of the purity of the food products." Surely the liability of the dealer who usually has little opportunity to inspect the food, especially packaged or canned food, should not be so broad as that of the manufacturer who in preparing the product had ample opportunity for inspection. The principal justification for such broad liability of the dealer who is without fault is that he is in a better position to pass the liability on to the party who should bear the loss.[84] But as Williston says, " . . . where personal injury is caused by the defect in the warranted article to a third person, and the buyer (here the dealer) is compelled to pay damages to the person injured, it is disputed whether the buyer can recover these damages from the seller.'"[85] So long as such a doubt exists, the better rule would seem to be to impose on the dealer a civil liability under the pure food act that is no broader than his criminal liability.

James G. Besancon.

TORTS: PERFORMER OF GRATUITOUS SERVICES ON PRIVATE PREMISES: INVITEE OR LICENSEE?

In *McCulloch v. Horton,*[1] plaintiff stopped in at the farm home of defendant to pay for his board and was offered a ride home, defendant stating that he was "going that way anyway." While plaintiff held open the garage door at the request of defendant so that it wouldn't sway with the wind, defendant backed his truck out swiftly and at an angle, so that the side of the truck hit against the door frame, and the resulting jar caused an upright wing on the truck to fall upon plaintiff as the truck cleared the garage. Defendant knew that the wing was then in an upright position and was unfastened. The court conceded that if plaintiff was only a li-

[84]Vold, Sales (1931) §146, pp. 454-5, and §149, pp. 466-7.
[85]2 WILLISTON SALES (2d ed. 1924) §614a, p. 1545.

[1] (1936) 102 Mont. 135, 56 P. (2d) 1344. A comment by the writer on the question of whether the Montana Court in the second appeal of this case, (1937) 105 Mont. 531, 74 P. (2d) 1, adopted the doctrine of comparative negligence appears in 1 MONT. L. REV. 97 (1940).