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IMPLIED WARRANTY IN FLORIDA

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The subject of products liability is probably the most rapidly expanding area of substantive law at the present time. There are at least three reasons for this. First, each year more and more manufactured articles, such as automobiles, machinery, household and business appliances, and medical and cosmetic preparations, have high potentialities for creating serious harm to persons or property. Second, the arts of advertising, labeling, and packaging have reached such proficiency that more and more things are being purchased solely on the reputation and advertising of the manufacturer. Moreover, goods are frequently packaged in sealed containers, and often the purchaser does not have the ability, the opportunity, or the desire to make an inspection of the articles purchased. Third, the masterful and realistic logic of Mr. Justice Cardozo in the famous *MacPherson v. Buick Motor Co.* case[1] in the year 1916 has given to courts and counsel strong impetus, and in some cases perhaps the necessary courage, to re-examine previous decisions on the subject.

Before turning to the development of the Florida law on this subject, a brief survey of some of the underlying principles and current problems is in order. The survey, however, will be confined to the question of defects in the articles sold; any reference to warranties of title and similar warranties will be omitted, and only occasional mention will be made of the obligations of vendors not connected with defects in articles sold, such as the growing responsibility to give proper caution and instruction as to the use of the articles.

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[1]217 N.Y. 382, 111 N.E. 1050 (1916).

LIABILITY FOR DEFECTIVE PRODUCTS

A vendor of personal property may be liable for defects in articles sold under three doctrines: (1) negligence, (2) misrepresentation, and (3) breach of warranty.[2]

Negligence. Liability for negligence generally relates to the design, manufacture, or inspection of the article sold; and liability may attach to the manufacturer or assembler, the wholesaler, the retailer or last vendor, or to some or all of them, depending upon the facts of the particular case.

Misrepresentation. The principles of fraud apply to sales of personal property in the same manner in which they apply to any other type of contract, and there seems to be nothing novel or unique in the application of the doctrine of fraud to sales of personal property. Fraud will, however, ordinarily give rise to a cause of action solely to the person to whom the representation was made, and the remedy has not been extended to third persons in the same manner as the other remedies. Actually, the distinction between fraud and breach of warranty may be a very tenuous one, and in cases in which either theory can be used the breach of warranty theory seems to be by far the more popular.

Breach of Warranty. An express warranty is based on an agreement or a specific statement, and it supersedes any implied warranties covering the same subject. An implied warranty is a promise or representation that the vendor is presumed to have made as a matter of law, under the particular circumstances, in the absence of a binding agreement to the contrary. While Florida has not adopted the Uniform Sales Act, the provisions of sections 13 through 16 of the act seem to be a substantially correct statement of the common law on this subject as followed by the courts in a majority of the states. A typical example is the provision that when a buyer tells a seller the purpose for which the goods are being purchased and relies on the seller's skill and judgment in that connection, there is an implied warranty that the goods are reasonably fit for the purpose. This is true regardless of whether the vendor is or is not the grower or the manufacturer of the goods.

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[2]Brown Cracker & Candy Co. v. Jensen, 32 S.W.2d 227 (Tex. Civ. App. 1930).

It must be stressed that warranty is an absolute liability and is not in any way based upon negligence.[3] Since separate counts for negligence and for breach of warranty are frequently included in the same action to cover the same situation, courts have sometimes become confused as to the distinction between these two actions. They often fail to specify whether a particular action is based on negligence or breach of warranty, and sometimes erroneously state that it is necessary to prove negligence in order to hold a defendant liable for breach of warranty. The distinction between these two actions is, and should be kept, perfectly clear, even though it is frequently possible to proceed under either or both of these theories in a particular case.

PROBLEMS THAT ARISE IN PRODUCTS LIABILITY

What is the nature of an action for breach of warranty? Originally, breach of warranty was considered to be a tort in the nature of deceit, but it was remediable in assumpsit. When the action of assumpsit became associated with actions based upon the breach of a contract not under seal, warranties came to be looked upon as contracts, and actions for breach of warranty as actions for breach of contract not under seal.[4] There is a decided tendency at present to go back to fundamentals and consider actions for breach of warranty as actions for tort in the nature of deceit.[5]

Privity

In the landmark case of *MacPherson v. Buick Motor Co.,* the plaintiff was injured when a wheel of his automobile collapsed. The question was presented whether one who purchased an automobile from a dealer could sue the manufacturer because of the manufacturer's negligence in not inspecting a defective wheel which had been purchased from another manufacturer and incorporated into the automobile. Until that case the general rule, with very few exceptions, was that such an action could not be maintained because there was no privity of contract or dealing between the plaintiff-purchaser and the defendant-manufacturer. However, the Court of Appeals of

[3]Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949).

[4]SHIPMAN, COMMON LAW PLEADING §§57, 58 (3d ed. 1923).

[5]See cases cited in Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958).

New York in the *MacPherson* case held that such an action would lie and that privity was not a requirement. This case is so well known that further comment is unnecessary except to call attention to the fact that the case merely held that privity was not required when the manufacturer was negligent and the article, if defectively made, could be very dangerous and would probably be used by persons other than the first purchaser without making any tests or inspection. This case changed the fundamental thinking on this subject, and more and more courts have dispensed with the privity requirement when the action is based on negligence. However, the right to proceed in such cases in the absence of privity is not universal, and in some jurisdictions it is still narrowly confined to cases involving potentially dangerous objects.

The requirement of privity resisted change even more stubbornly in the cases based on breach of warranty. Frequently these cases resulted in a wholly illogical and unjust result or required the court to justify its decision by reasoning that it is difficult to read without laughing. For example, in one case[6] decided in New York less than two years ago, two children were injured after eating unwholesome food purchased at a supermarket, and the children brought action against the supermarket for the injuries received. There was no question, except for the defense raised, that the supermarket was liable for breach of implied warranty of wholesomeness, but the defendant claimed that there was no privity of contract because the food was not purchased by the children but by their mother. Since breach of warranty was considered to be an action for breach of contract, and privity was an essential prerequisite to maintenance of an action for breach of contract, the defense interposed by the defendant was a formidable one. The trial judge, however, was not a man to take such an injustice lying down. "They said it couldn't be done, but he did it." Realizing that he could not lick the obstacles of contract and privity, he joined them. He reasoned that when the mother bought the food, she bought it for the benefit of herself and the members of her family; therefore, the implied warranty of fitness was a contract for the benefit of herself *and* the members of her family under the third-party benefit doctrine. The judge then went on to inquire whether it would be material if, in addition to the facts noted, the wife bought the food with money supplied by the husband. He

[6]Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958).

reasoned that in such cases the husband would be an undisclosed principal and the wife an agent; and the implied warranty resulting from the sale to the wife would, in effect, result in an implied warranty running to the husband for the benefit of himself and the members of his family. The trial judge concluded, in a very scholarly opinion, that the children were entitled to recover. This illustrates the mental gymnastics that courts frequently use even now to arrive at just results.

A more common situation in which the doctrine of privity raises its ugly head is when the buyer would have a cause of action against the manufacturer for breach of warranty but for the fact that there was no privity of contract because he purchased from the retailer rather than the manufacturer. As a result of situations like this, there was pressure on the courts to abolish the doctrine of privity in cases based on breach of warranty. Accordingly, a number of courts have dispensed with the requirement of privity in breach of warranty cases, but this has been a slow process, frequently achieved only by mental gyrations similar to those employed in the supermarket case mentioned above.

In dealing with the problem of privity in regard to breach of warranty, some states have merely extended the *MacPherson* doctrine to cover breach of warranty cases. A few states have solved the privity question in warranty cases by going back to the original doctrine that a breach of warranty is a tort, and holding that privity is not necessary in an action in tort. An example of this is the famous Ohio case of *Rogers v. Toni Home Permanent Co.*,[7] decided in 1958. The plaintiff purchased a home permanent kit from a local store; the set was labeled "Very Gentle," and the manufacturer had advertised its excellence. She used it carefully, but she lost her hair. Evidently figuring that she had been scalped, both literally and figuratively, she sought relief in the courts. The supreme court came to her rescue by holding that labeling and advertising constitutes an express warranty and that a breach of warranty is an action in tort, in which privity of dealing is not essential.[8] Other courts have held that actions for breach of warranty are hybrid actions somewhere between contract and tort.

During the period when the courts of many states were declining

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[7]167 Ohio St. 244, 147 N.E.2d 612 (1958).

[8]Other courts have also held that advertising creates an express warranty. See Arfons v. duPont de Nemours Co., 261 F.2d 434 (2d Cir. 1959).

to give relief in product liability cases because of the technical doctrine of privity and the courts of other states were valiantly striving to arrive at just results by a process of tenuous and devious reasoning, the Florida courts were going directly to the point. They have solved these questions in a logical and just, as well as in a dignified, manner by holding categorically that privity is unnecessary in these cases regardless of whether they are based on negligence or on breach of warranty.

Statutes of Limitations

The nature of the action for breach of warranty has other consequences which must be solved, either by categorical statements or by advancing logical or illogical reasons. One such problem is the statute of limitations, which in most states seems to be shorter for tort actions than for ordinary contract actions. The question of the statute of limitations sometimes presents a serious problem in product liability cases. This was illustrated by a 1952 case[9] decided under the laws of Connecticut. A boy was injured by a defectively made gun which was purchased from a local retailer. In a negligence suit against the manufacturer, the manufacturer pleaded the one-year statute of limitations covering negligence and claimed that its liability, if any, was extinguished one year after it manufactured the gun. Unfortunately, the gun was still owned by the retailer at the end of the one-year period; it was not until several years later that the gun was sold by the retailer to the ultimate purchaser. The boy was injured subsequent to that. The court agreed with the defendant, although one judge filed a vigorous dissent on the ground that a cause of action cannot be barred before the injury occurs or the cause of action accrues. The dissenting judge stated, inter alia:[10]

> "Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry . . . . For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff."

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[9]Dincher v. Marlin Firearms Co., 198 F.2d 821, (2d Cir. 1952).
[10]*Id.* at 823.

The reasoning of the majority opinion is still apparently followed in a few states, but the effect has recently been greatly lessened by the recognition of a duty to warn as to the existence of defects. This duty is held to be a continuing one and therefore not subject to any statute of limitations until the accident happens.[11] Since the Florida courts have been very skillful in handling certain troublesome questions relating to statutes of limitations, there is no reason to believe that they will not be able to handle capably situations like the ones just mentioned.[12]

Contributory Negligence

Even though breach of warranty is tagged as a tort, that does not logically give the defendant any right to interpose the defense of contributory negligence.[13] However, this appears to be happening.[14] It seems highly illogical in connection with the issue of liability, although it might logically be very material to the question of damages. Possibly the courts have become confused by connecting these two issues, which are entirely distinct though frequently interrelated.

An allied topic is the power of the vendor or manufacturer to limit his liability by contract or by warnings attached to the articles or printed in small type on the back of invoices.[15] Lack of space forbids further discussion of that topic other than to say that the effectiveness of such attempts may be influenced by the question of whether the liability of the vendor is based on negligence or upon breach of warranty, and, if the latter, whether breach of warranty is to be considered as a breach of contract, a tort action, or an action of a hybrid nature.

By way of summary, it will be seen that although the doctrine of *McPherson v. Buick Motor Co.* has been responsible for a great and beneficial change in the law relating to products liability, there is still a great deal of confusion in a majority of the states and glaring contrast among the comparatively few settled principles as they are applied in the various jurisdictions. Happily, Florida has gone to the forefront of the states that have resolved the questions involved in

[11]Rogers v. White Metal Rolling & Stamping Corp., 249 F.2d 262 (2d Cir. 1958).
[12]City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).
[13]Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W.2d 382 (1920).
[14]Fredendall v. Abraham & Straus, Inc., 279 N.Y. 146, 18 N.E.2d 11 (1938).
[15]See 55 C.J., *Sales* §698 (1931).

this area in a logical and just manner. How this result came about in Florida is the principal theme of this article.

The Implied Warranty Cases and the Rules They Contribute

The first well-reasoned case in Florida exhibiting judicial expression on implied warranty was *Berger v. E. Berger & Co.*[16] Lumber was purchased for resale to a third party, and the seller knew of the collateral contract and its specifications. The plaintiff alleged that the defendant knew when he sold the lumber that the buyer was relying on the seller's judgment to furnish only lumber of merchantable quality for the purpose of filling the collateral contract. After judgment for the plaintiff, the defendant, among other things, contended that there could be no implied warranty as to *quality*. The Florida Supreme Court held otherwise. It reviewed the facts of the case, including the buyer's lack of opportunity to inspect the lumber, and held that the exception to caveat emptor, rather than the rule, applied. The Court quoted Benjamin[17] and announced the rule that has so frequently been quoted in later opinions:[18]

> "Where a person contracts to supply an article in which he deals for a particular purpose, knowing the purpose for which he supplies it and that the purchaser has not opportunity to inspect the article, but relies upon the judgment of the seller, there is an implied condition or 'warranty,' as it is called, that the article is fit for the purpose to which it is to be applied."

Paramount in the Court's consideration were the factors that make up Rule I on implied warranty: knowledge of the purpose by the seller, reliance by the buyer, and lack of inspection.

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[16]76 Fla. 503, 80 So. 296 (1918). For other lumber situations in warranty, see Annot., 52 A.L.R. 1536 (1928). It may be noticed that in this article the following very old Florida cases have not been commented on for obvious reasons: Walker v. Gatlin, 12 Fla. 9 (1867) (warranty of slave not broken by act of government); Kendig v. Giles, 9 Fla. 278 (1860) (nonassignability of warranty of slave's soundness); Hancock v. Tucker, 8 Fla. 435 (1859) (express warranty of slave's soundness); Croom v. Noll, 6 Fla. 52 (1855) (vendor generally held to have warranted his title); Lines v. Smith, 4 Fla. 47 (1851) (sale of slave carries implied warranty of title); Croom v. Shaw's Adm'r, 1 Fla. 211 (1847) (false warranty by agent).

[17]Benjamin, Sales 595 (5th ed. 1888).

[18]76 Fla. 503, 507, 80 So.2d 296, 299 (1918).

Rule I. *There is an implied warranty of fitness for a particular purpose when there was knowledge by the seller of the purpose for which the article was bought, the buyer relied upon the seller's skill and judgment, and the buyer lacked the opportunity to inspect the goods.*

Within a year and a half, two other cases added three more rules to be observed in actions on implied warranty.

Rule II. *There will be no implication of warranty in conflict with the express terms of an agreement.*

Rule III. *When goods are sold by sample, there is an implied warranty that the goods to be delivered will, at least in quality, equal the goods of the sample.*

Rule IV. *When goods received are inferior to those ordered and there is a warranty, express or implied, notice must be given to the seller or an offer made to return them by the buyer, unless the goods are entirely worthless.*

In *Steinhardt v. Consolidated Grocery Co.*[19] the plaintiff sued for breach of an implied warranty in the sale of feed called "rice bran" because the feed contained rice hulls in violation of a Florida statute.[20] Intricacies of the common law pleadings with which most of the appellate opinion is filled need not be reiterated, but the Court did announce among other things that "the case as made by the declaration is treated by both parties as if it rests upon an implied warranty which is an inference of law on certain facts, but there will be no implication of warranty in conflict with the express terms of the agreement."[21]

American Mfg. Co. v. A. H. McLeod & Co.[22] was an action by a seller of rope for the balance of an account, in which the defendant-buyer claimed an offset because the rope was of inferior quality. There was a judgment for the plaintiff and an allowance of the set-

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[19]80 Fla. 531, 86 So. 431 (1920).

[20]Fla. Laws 1907, ch. 5661.

[21]80 Fla. 531, 533, 86 So. 431, 432 (1920). This same elementary point was made rather firmly in Cohen v. Frima Products Co., 181 F.2d 324 (5th Cir. 1950), a Florida case, but the court cited *Corpus Juris* rather than the Florida cases.

[22]78 Fla. 162, 82 So. 802 (1919).

off. The Court said that "where goods are sold by sample there is an implied warranty that the goods . . . will at least in quality be equal to the sample."[23] It further held that regardless of whether the warranty is express or implied, when the goods are inferior the buyer must offer to return them or notify the vendor, or he will be held to have acquiesced in the breach.

After a lapse of eleven years, *McDonald v. Sanders*[24] added another rule, explaining, modifying, and refining Rule I.

> Rule V. *There can be no implied warranty of condition, adaptation, fitness, or quality in a sale of a second-hand article.*

This case involved a suit on promissory notes given for the purchase of a second-hand steam shovel, the agreement being that the shovel was to have some $1,500 in new parts and to be in "good and workable condition." Upon arrival the buyer noticed a variance in condition, but, after telegraphed assurances from the seller, unloaded and used the shovel. The plaintiff sought to nail down the defendant's obligation by asserting that the defendant used the shovel for three months, paid an installment, accepted the offer of a mechanic, and was therefore estopped. The Court, relying on *Ruling Case Law,* held that generally there can be no implied warranty of a second-hand article, although there may be an express warranty. In its syllabus the Court also noted that the purchaser might thereafter refuse to pay, despite the fact that some payments had already been made, because there had been no "unqualified acceptance." At first glance, these statements appear to be new law in implied warranties, and, indeed, the Florida Supreme Court in 1956 so treated it in *Matthews v. Lawnlite Co.*[25] However, upon close examination it can be seen that the rule is really a refinement upon the buyer's lack of opportunity to inspect. The warranty being "workable condition," use of the shovel was really necessary in order to test the warranty. Nor can it reasonably be said that there was acquiescence in a defect

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[23] *Id.* at 163, 82 So. at 802.

[24] 103 Fla. 93, 137 So. 122 (1931).

[25] 88 So.2d 299 (Fla. 1956). Caveat: the Court referred to Tampa Shipbuilding & Eng. Co. v. Garretson, 43 F.2d 309 (5th Cir. 1930); Lambert v. Sistrunk, 58 So.2d 434 (Fla. 1952); United States Rubber Products v. Clark, 145 Fla. 631, 200 So. 385 (1941); and McDonald v. Sanders, *supra* note 23, as cases involving second-hand goods. This appears to be incorrect from the facts given in the appellate opinions, as only the *McDonald* case involved second-hand goods.

when, as in this case, the defect was not discoverable without using the shovel, even though payments were made until the discovery.

At this point it is well to go backward in time to 1909 to *Vaughan's Seed Store v. Stringfellow*,[26] the first of the "seed" cases.[27] This case added Rules VI and VII.

> Rule VI. *A seller of seeds by name impliedly warrants that the crop shall correspond in kind and quality to the name of the seed.*

> Rule VII. *The measure of damages for breach of warranty in the sale of seed is the difference between the value of the crop that would have been raised if the breach had not occurred. If the seed produces no crop, bearing in mind that damages cannot be recovered for remote or conjectural consequences, the damages recoverable are the price paid for the seed, expenses in preparing the soil and planting the seed, and the loss sustained for having the land lie fallow for a year.*

In this case, seeds for "Arlington White Pine" cucumbers were sold, but they produced cucumbers of such inferior quality that they were unmarketable. It is interesting to note the closeness of the language of the Court on the measure of damages to that in *Atlanta & St. A. B. Ry. v. Thomas*,[28] to be discussed later. The latter case appeared within a year after the former, and the cases probably parallel because of the influence of *Hadley v. Baxendale*.[29]

The second seed case, *West Coast Lumber Co. v. Wernicke*,[30] despite a vigorous dissent, added still another rule.

> Rule VIII. *A sale of seed by name raises an implied warranty that the seed is true to its name, despite the fact that the buyer inspected the seeds; the fact of inspection is immaterial, since their nature cannot ordinarily be ascertained by inspection.*

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[26] 56 Fla. 708, 48 So. 410 (1909).

[27] For a specific seed problem, see Annots., 168 A.L.R. 581 (1947); 117 A.L.R. 470 (1938); 62 A.L.R. 451 (1929); 32 A.L.R. 1241 (1924); 16 A.L.R. 859 (1922).

[28] 60 Fla. 412, 53 So. 510 (1910).

[29] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[30] 137 Fla. 363, 188 So. 357 (1939).

In the *West Coast* case seed had been sold as Texas Seed Ribbon cane; the charge was that it contained 60% kaffir seed and that the crop harvested was unfit for ensilage, for which it was intended. The seed was intermixed, and the Court took notice of, and laid great stress on, the fact that even an expert would have been hard put to discover the variance by inspection. An added element of claimed damages was the fact that the kaffir, when placed in storage, molded and caused further loss.[31] The Court affirmed the judgment for the plaintiff and relied on the *Vaughan's Seed Store* case; the rule of difference in crop value as the measure of damages was upheld. The Court also adopted the rule of a Mississippi case, *Grafton-Stamps Drug Co. v. Williams*[32] — the sale of seed raises a warranty as to character. It was on this latter rule that *Phillips v. Beamer*[33] affirmed another such judgment for the plaintiff in Florida. The action was for failure of warranty as to variety and quality of seed. The case, affirmed in a per curiam decision, adds nothing to the list of rules.

The two remaining seed cases, *Hoskins v. Jackson Grain Co.*[34] and *Corneli Seed Co. v. Ferguson,*[35] added to the law of implied warranty, but in the interest of chronological development they will be considered later.

In 1940 came the landmark case of *Smith v. Burdine's, Inc.*,[36] in which the complainant alleged that lipstick which she purchased in reliance on the recommendation of a sales person proved to be poisonous and injured her health. Count one was upon a theory of implied warranty of fitness, and count two was sounded on an express warranty of wholesomeness. The Court, after reviewing *Berger v. E. Berger & Co., Benjamin on Sales,* and *Williston on Sales,* added another rule.

> Rule IX. *The existence of an implied warranty of fitness for a particular purpose must and necessarily does depend upon whether the buyer relied upon his own judgment at the time of the purchase or relied on the skill and judgment of the seller; it is a fact question for the jury.*

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[31]Consequential loss is an important consideration. See discussion under heading "The Measure of Damages" *infra.*

[32]105 Miss. 296, 62 So. 273 (1913).

[33]144 Fla. 769, 198 So. 695 (1940).

[34]63 So.2d 514 (Fla. 1953).

[35]3 Fla. Supp. 144, 64 So.2d 162 (1953).

[36]144 Fla. 500, 198 So. 223 (1940).

As a caveat to this rule it should be noted that when the buyer asks for a product by a trade name, the element of reliance is deemed destroyed in an action against the retailer but, of course, not against the manufacturer. This rule is incorporated into the Uniform Sales Act;[37] but, except for an implication in the discussion of the facts in the *Smith* case, no Florida court has made the distinction.

The leading case of *Blanton v. The Cudahy Packing Co.*,[38] the first of the food cases, established a now well-known principle in the law of implied warranty in Florida.

> Rule X. *A manufacturer of food products sold in sealed containers to retailers for resale is liable to the ultimate consumer for injuries, despite the lack of privity of contract, on the implied warranty of wholesomeness and fitness for human consumption.*

The ultimate purchaser of the defendant's meat products received a judgment for injuries sustained as a result of the meat's unwholesomeness. The reviewing court was concerned with the question of whether lack of privity[39] would defeat the action in warranty. On the strongest considerations of public policy, the Florida Supreme Court considered the authorities, noted the "general trend," and affirmed the judgment for plaintiff. This case is the basis upon which Florida's far-reaching warranty law is built.

Five years after the *Blanton* case, *Cliett v. Lauderdale Biltmore Corp.*[40] nailed down the liability in food cases.

> Rule XI. *A seller of food for value to immediate consumers is* absolutely *liable for injuries as a result of unwholesomeness of the food on the implied warranty of fitness for human consumption* regardless of negligence, *the basis being the reliance of the consumer on the seller's skill and judgment.*

The *Cliett* case involved a single sale of prepared food in a restau-

[37]UNIFORM SALES ACT §15(4): "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."

[38]154 Fla. 872, 19 So.2d 313 (1944).

[39]That is, the obstacle to recovery in actions on the liability of the supplier by third persons. The rule preventing recovery when no privity exists stems from Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

[40]39 So.2d 476 (Fla. 1949), 3 MIAMI L.Q. 638.

rant; and, in opposition to the defendant's "service, not sale" argument,[41] the Court literally threw the *Blanton* case back at the seller, holding that if there is liability when no privity exists, there is even greater reason for recovery when there is privity.

The three remaining food cases, *Sencer v. Carl's Market*,[42] *Florida Coca-Cola Bottling Co. v. Jordan*,[43] and *Food Fair Stores, Inc. v. Macurda*,[44] made further refinements on the warranty rules in regard to food. In the *Sencer* case the action was against the retailer, not the manufacturer, as in the *Blanton* case; and the defendant contended that the difference was controlling. The Court disagreed; and, upon the same considerations of public policy seen in food cases such as *Blanton*, held that the implied warranty liability extended to the retailer of a packaged food product as well as to the manufacturer. The product involved was canned sardines, and a disturbed dissent[45] pointed out the conflict of authorities on the retailer's similar lack of actual responsibility for the unwholesomeness. The dissent, it appears, chose to ignore the fact that the retailer selected the manufacturer and probably was governed by the profit motive in so doing. In the *Florida Coca-Cola Bottling Co.* case the bottled product had been obtained from a machine and the drink contained glass fragments. The Court could find no reason, it said, not to apply the *Blanton* rule to bottled products also. In the *Food Fair* case the offending product involved was canned spinach containing worms. A verdict for the plaintiff was resisted on appeal by Food Fair (perhaps, to be fair, its insurer), not on the warranty law but upon the excessiveness of the verdict and on the argument that the plaintiff's illness, vomiting, and nervous condition were the result of psychological reaction rather than a direct injury from eating the spinach. It was even suggested as an argument that canned Mexican worms adorn the shelves of many gourmet shops. The Court failed to see the luxury of this and, in words so beautiful in their sarcastic quality that they are worthy of examination, affirmed the judgment.

Placed among the food cases, chronologically, is *Lambert v. Sistrunk*,[46] which contributed another rule.

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[41]See, *e.g.*, Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533 (1914); Nisky v. Childs, 103 N.J.L. 464, 135 Atl. 805 (Sup. Ct. 1927); PROSSER, TORTS 672 (1941).

[42]45 So.2d 671 (Fla. 1950), 3 U. FLA. L. REV. 380.

[43]62 So.2d 710 (Fla. 1953).

[44]93 So.2d 860 (Fla. 1957).

[45]45 So.2d 671, 673 (Fla. 1950).

[46]58 So.2d 434 (Fla. 1952). See *Survey of Florida Law*, 8 MIAMI L.Q. 494 (1954).

Rule XII. *When a common article is sold by a retailer, other than food products and planting seed, and the buyer has, by reason of the article's nature, the same opportunity to inspect as the seller, and the defect is not inherent, there can be no implied warranty.*

The case, however, is of dubious value. The product involved was a stepladder, in the process of the sale of which the clerk said, "It is strong." The buyer contended that the *Blanton* and *Smith* cases necessitated recovery on an implied warranty. The Court, in review, distinguished the cases: first, on the ground that the buyer, having the same knowledge as the salesman, could have discovered the defect by inspection; second, the warranty of fitness for a particular purpose did not apply because "the use of a stepladder is as well known to a buyer as to a seller and is as limited as it is well known."[47] The case rather defies analysis of its positive place in warranty law.

The pinnacle of modern warranty law in Florida was reached between 1955 and 1958 with the cases of *Matthews v. Lawnlite Co.*[48] and *Continental Copper and Steel Industries Inc. v. E. C. "Red" Cornelius, Inc.*[49] It will be recalled that until 1955 the status of the privity-unnecessary rule was confined to food products. However, in the *Matthews* case of 1955 the offending product was an aluminum chair. The plaintiff was sitting in the chair and his finger was severed by a concealed mechanism when he grasped the handle. In reversing an order of dismissal, the Florida Supreme Court reverted to *MacPherson v. Buick* and other authorities and noted that these cases "have so often departed from or modified the old theory that an innocent third party who purchases from a retailer cannot sue a manufacturer because of absence of privity of contract that the doctrine may be said to have been abandoned in many jurisdictions."[50] The case has added a rule to the list.

Rule XIII. *An implied warranty does not protect against hazards apparent to the plaintiff; it protects against an unusual or nonapparent use. It does not protect against injury imposed while carelessly using a dangerous mechanism.*

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47 58 So.2d 434, 435 (Fla. 1952).
48 88 So.2d 299 (Fla. 1956).
49 104 So.2d 40 (3d D.C.A. Fla. 1958), 13 U. MIAMI L. REV. 252.
50 88 So.2d 299, 300 (Fla. 1956).

The *Matthews* case is extremely significant in the modern Florida law of warranty. First, as already noted, privity is unnecessary to sue a remote manufacturer on implied warranty of *any product* (if it results in personal injury?). Second, a careful reading of the *Matthews* case will disclose a fusion of negligence and warranty principles to the point where they are practically inseparable. Does the Court mean to infer that the presumptions of implied warranties are to become a part of negligence law so that such things as duty to others can be established by the rules of warranty? Or that the defenses to negligence, such as contributory negligence and assumption of risk, are to become available in warranty law? There is a strong basis in the opinion for such a belief.[51]

There is also some justification after reading the *Matthews* case for believing that the reason for extending the privity-unnecessary rule to aluminum chairs was because of the element of personal injury, a very strong public policy consideration in itself. There *might* have been some justification for such a belief, but it ended with the *Continental Copper* case. There, the contractor on a government building project brought an action against the remote manufacturer for breach of implied warranty of electrical cable. The cable, which had been underground for eight months, proved to be defective; as a result, there were several power failures and the cable had to be dug up. In sustaining a judgment for the plaintiff against the manufacturer, the Third District Court of Appeal reviewed the *Blanton* case and the Supreme Court's broadening of the privity rule to the point where, as in *Matthews,* it included manufactured articles other than seed and food. From an analysis of these two cases, it can justifiably be said that the following rule is the law of Florida today.

> Rule XIV. *A consumer, ultimate user, or purchaser may recover from a manufacturer of an article, whether food, seed, or other product, despite the absence of privity, on an implied warranty of fitness for a particular purpose or of wholesomeness (depending on whether the article is food or otherwise) when the buyer has relied on the skill and judgment of the manufacturer or seller.*

There still remain the other seed cases of *Hoskins v. Jackson Grain*

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[51]Nor would it be unprecedented. See Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

Co.[52] and *Corneli Seed Co. v. Ferguson.*[53] In the latter case the action was for breach of implied warranty in the sale of watermelon seeds because the seed did not produce the variety of melons named. Aside from the now well-established existence of such a warranty, the case is authority on the matter of disclaimers. The seller had printed on his invoices and on the bags containing the seed a disclaimer or nonwarranty. The seller gave no warranty, express or implied, as to quality, description, productiveness, or other matter. The Court drew a distinction between varietal quality and varietal kind and held that in the case of kind variance in seeds, the disclaimer was nonoperative. It based the holding upon the fact that in the case of kind *the variation is a latent defect which the buyer cannot ordinarily discover upon inspection,* whereas variations in quality are apt to be caused by improper husbandry; hence another rule.

> Rule XV. *A disclaimer of warranty cannot operate against the vendee when defects in the thing sold are latent and cannot be discovered by inspection but only by use.*

In *Hoskins v. Jackson Grain Co.* the action was against a *wholesaler* for breach of implied warranty of seed in that there was a variety difference between that sold and that actually produced; this case added another rule.

> Rule XVI. *One who purchases items of food* or other products *in original packages offered for sale for human consumption or use generally purchases them in reliance upon the express or implied condition that they are wholesome and fit for the uses or purposes for which they are advertised or sold, and any person who is injured or sustains a loss as a result of a breach of the condition may hold manufacturer,* wholesaler, *or retailer liable regardless of privity of contract.*

The emphasis is added to suggest that the answer to the question many have asked in recent years — "Can the wholesaler be held under the privity-unnecessary rule?" — is purported to be answered by the *Hoskins* case. Indeed, it would seem a little strange to create this small island of immunity in warranty law in view of the modern Florida expressions.

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[52] 63 So.2d 514 (Fla. 1953).

[53] 3 Fla. Supp. 144, 64 So.2d 162 (1953).

In the *Hoskins* case, it should also be pointed out, the Court was faced with the added element of a Florida statute[54] pertaining to agricultural or vegetable seed which may have given the Court extra assurance not available in nonstatute cases. It held that "where one violates a penal statute imposing upon him a duty designed to protect another he is negligent as a matter of law, therefore responsible for such damage as is proximately caused by his negligence";[55] it further held that privity of contract could not affect that responsibility.

Two federal cases have arisen in Florida that should be considered in relation to the law of warranty. In *Tampa Shipbuilding & Eng. Co. v. General Constr. Co.*[56] the goods involved were unascertained rock to be used in building a causeway. The case is of dubious value to the point under discussion, however, because it preceded *Erie R.R. v. Tompkins*[57] and therefore may not adequately reflect Florida law; but it stands for the following proposition:

> A sale of a particular pile of unascertained goods, at hand and capable of inspection, though not by the manufacturer, and not a product of the seller, supports no implied warranty; but if unascertained rock is sold for a particular purpose known to the seller, he is held to have furnished goods suitable for the purpose.

In the second case, *Valdosta Milling Co. v. Garretson*,[58] a more reliable one since it occurred subsequent to *Erie*, there was a complaint in negligence and also one for breach of implied warranty of fitness of feed for consumption by animals. The feed was alleged to have contained Paris green, which caused the death of the plaintiff's horses. The court noted that at that time (1954) the courts had not applied the doctrine of implied warranty of fitness beyond food cases but that the legislature had, in an act[59] similar to the one involved in *Hoskins*, made it a misdemeanor to place in commerce

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[54]FLA. STAT. §578.09 (1957).

[55]63 So.2d 514, 515 (Fla. 1953).

[56]43 F.2d 309 (5th Cir. 1930).

[57]304 U.S. 64 (1937).

[58]217 F.2d 625 (5th Cir. 1954).

[59]FLA. STAT. ch. 580 (1943) (now amended and known as the "Commercial Feed Law.")

feed containing a substance injurious to animals. Judgment for the plaintiff was affirmed on this compelling basis.[60]

THE MEASURE OF DAMAGES

Except for the food cases and the seed cases, the extent of losses recoverable in warranty is not a simple matter. There is a dearth of law squarely on point in Florida; however, it is believed that there is enough to make certain assertions.

It must be recalled that the action of warranty, historically speaking, has been an itinerant child of English jurisprudence. It has been a part of tort, then of contract, and now apparently of tort again. Its origin and development have teased writers for generations,[61] but one thing has remained rather clear: the measure of damages for breach of warranty rather uniformly parallels the measure of damages for breach of contract.[62] The most famous statement of this, most of which has been applied to warranty in other jurisdictions and to breach of contract in Florida as well, comes from the English case of *Hadley v. Baxendale*:[63]

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The Florida Supreme Court adopted this statement in *Atlanta*

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[60]The case of Johnson v. Dichiara, 84 So.2d 537 (Fla. 1955), was designated as a case of implied warranty by the reporter, but upon closer examination it would appear to be one of express warranty. The action was in equity to foreclose on ice machinery. It was treated under equity rules by the reviewing court and does not seem to add anything to warranty law.

[61]See, *e.g.*, 1 WILLISTON, SALES §197 (2d ed. 1924); Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888); Jennings, *The Implied Warranty Theory of Liability Recently Adopted in Florida*, 28 FLA. L.J. 46 (1954); 1 U. FLA. L. REV. 470 (1948).

[62]See 9 FLA. JUR., *Damages* §§25, 38, 78 (1956).

[63]9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854).

& St. A.B. Ry. v. Thomas,[64] a breach of contract case in which the defendant failed to establish a train station as agreed and the plaintiff sought damages for the decrease in the value of his land as a result of the breach. It was also adopted in another leading case, *Twyman v. Roell*,[65] which involved a farming contract.

There can hardly be a serious question as to the propriety of applying the same measure of damages for breach of warranty as for breach of contract, even though the Florida courts have not expressed themselves precisely on point.[66] It should be remembered, however, that the Court in the previously noted case of *Vaughan's Seed Store v. Stringfellow*[67] established a rule for the measure of damages in warranty, for seed cases at least, that fits the *Thomas* and *Twyman* rule very snugly. In summary, it can be said that the measure of damages for breach of warranty is that loss which arises naturally from the breach or which was, or could reasonably be presumed to have been, within the contemplation of the parties at the time of the contract or sale. It may include profits prevented, as long as they are not too remote or conjectural, and losses which are rendered certain by the evidence.

It may be noticed from reading the cases that the courts are concerned with the element of certainty. The *Twyman* case somewhat cleared up the matter: "The uncertainty," declared the Court, "which defeats recovery . . . has reference to the *cause* of the damage rather than to the *amount of it*."[68] By way of dicta, it also held that the rule with reference to prospective profits applies regardless of whether the contract in question is a farming, mechanical, or other contract.

The *Thomas* case provided a distinction that is rather important in Florida: When the loss sustained is a *necessary* result of the breach, the result is *presumed* to be within the contemplation of the parties. In that case, the expense of building a road to the place where the depot actually was located and the expenses of hauling to that depot were presumed to have been within the contemplation of the parties. Such expenses, the Court held, were reasonably capable of being ascertained. Losses that naturally and probably but not necessarily result, however, may be found to have been within the contempla-

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[64]60 Fla. 412, 53 So. 510 (1910).
[65]123 Fla. 2, 166 So. 215 (1936).
[66]See Annot., 28 A.L.R.2d 591 (1952).
[67]56 Fla. 708, 48 So. 410 (1908).
[68]123 Fla. 2, 7, 166 So. 215, 218 (1936). (Emphasis added.)

tion of the parties. On this basis the Court viewed the previously mentioned depreciation in land as not a necessary result but considered that such a loss could not, as a matter of law, be declared not to be a natural and probable result — another way of saying that it was a fact question for the jury. The case was returned for a new trial and a determination of the damages in accordance with the rules laid down in the opinion. The *Thomas* and *Twyman* cases are good law today, having been followed on these points ever since.[69] At least in breach of contract, there is no doubt as to the right to recover for lost profits; there should be no doubt in the warranty cases.

The prime difficulty in determining damages is the perennial problem of proof. Damages for loss of profits were recovered as early as 1936 and perhaps even earlier in Florida. In the case of *New Amsterdam Casualty v. Utility Battery Mfg. Co.*[70] the action was on a receivership bond, and loss of profits was recovered. In 1956, the dismissal of an action by a dentist against a telephone company for losses to his practice as a result of listing his number incorrectly was reversed with the clear announcement that such losses could be found by a jury to have been within the contemplation of the parties.[71] These examples should dispel many of the fears about the recovery of lost profits in Florida being too remote.

Damage to business reputation — loss of good will — is well within the *Thomas* and *Twyman* expressions and for a long time has been recoverable in other jurisdictions.[72] A recent example of this is an Arizona case, *Isenberg v. Lemon*,[73] in which both lost profits and loss of good will were involved. A painting contractor sued a manufac-

[69]The *Thomas* rule was followed in State *ex rel.* Peters v. Hendry, 159 Fla. 210, 31 So.2d 254 (1947); Farrington v. Richards, 153 Fla. 897, 16 So.2d 158 (1944); Woods-Haskins-Young Co. v. Dittmarr, 102 Fla. 1000, 136 So. 710 (1931); Hazen v. Cobb, 96 Fla. 151, 117 So. 853 (1928); Armstrong v. Seaboard Air Line Ry., 85 Fla. 126, 95 So. 506 (1922).

The *Twyman* rule was followed in Krohne v. Orlando Farming Corp., 102 So.2d 399 (Fla. 1958); Harvey Corp v. Universal Equip. Co., 158 Fla. 644, 29 So.2d 700 (1947); A. J. Richey Corp. v. Garvey, 132 Fla. 602, 182 So. 216 (1938).

[70]122 Fla. 718, 166 So. 856 (1935).

[71]Augustine v. Southern Bell Tel. & Tel. Co., 91 So.2d 320 (Fla. 1956).

[72]See, *e.g.*, Heller v. Suffrin, 111 F. Supp. 364 (W.D. Pa. 1953); Stott v. Johnson, 36 Cal. 2d 864, 229 P.2d 348 (1951); Grupe v. Glick, 26 Cal. 2d 680, 160 P.2d 832 (1945); California Press v. Stafford, 192 Cal. 479, 221 Pac. 345 (1923); De Rose v. Hunter Lindsay Corp., 124 A.2d 349 (N.J. 1956); Royal Pioneer Paper Box Mfg. Co. v. De Jonge, 179 Pa. Super. 155, 115 A.2d 837 (1955).

[73]327 P.2d 1016 (Ariz. 1958).

turer in warranty for those losses as a result of using the defendant's defective paint. A substantial judgment for the plaintiff was reversed for a new trial to clarify the matter of damages. Although comparable cases cannot be found in the Florida reports, this is not to say that such damages have not been recovered. Actually the converse is true. The fact that such cases have been settled before or during trial very soundly indicates the validity of the belief that the measure of damages is the same as in contract. An obvious reason for the paucity of judicial expression on point is that Florida is only now becoming industrialized and confronted with mercantile and industrial warranty disputes.

WARRANTY INSTRUCTIONS

One of the great problems in trying a case in implied warranty is that of proper instructions to the jury. Of course the usual civil trial instructions of a general nature are rather standard as to such items as burden of proof, weight to be given testimony, and the like; such articles as "Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida"[74] by Justice Barns, Judge Holt, and Gerard Ehrich should be consulted on these matters.

Certain kinds of warranty instructions are adequately set out in sections 1441, 3111, 3112, and 3113 of *Florida Jury Instructions*.[75] These cover matters such as the nature of an implied warranty in general, a manufacturer's or dealer's implied warranty of fitness for a particular purpose, and a general treatment of the measure of damages for breach of contract. However, it is difficult to find satisfactory instructions covering the matters of damages for lost profits and damage to good will. The language of the opinions in the *Thomas* and *Twyman* cases would seem to provide adequate authority for an instruction to a Florida jury in the following form:

> When there has been a breach of warranty or contract, the loss which must necessarily result from the breach is presumed to have been within the contemplation of the parties at the time of the making of the contract; and the plaintiff is entitled to recover for such a direct and necessarily resulting loss. When the loss is not the necessary result of the breach but a

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[74] 7 MIAMI L.Q. 147 (1953).

[75] RICHARDSON, FLORIDA JURY INSTRUCTIONS (1954).

natural and probable consequence or result of the breach and you find that the consequence was within or should have reasonably been within the contemplation of the parties at the time of the transaction, the plaintiff is entitled to recover for that loss also.

This language should have enough clarity to be meaningful to the jury. It is also believed that section 3113 of *Florida Jury Instructions* should be modified in each particular case. In the case of a boat manufacturer, for instance, section 3113 would be as follows, the modifications appearing within the brackets:

If you shall believe from the evidence that the defendant sold the lumber in question to the plaintiff for the specific purpose of [the manufacture or building of boats for sale to third persons] and this fact was made known to the defendant, who thereupon represented to the plaintiff that [boats could properly be made or constructed from the lumber of the defendant] and that the plaintiff did not [or could not, due to the inherent nature of the lumber] inspect the stock but relied upon the statement or representation of the defendant to the effect that the lumber would meet the dimensions and specifications of [boat plans] and was thereby misled to his financial injury then your verdict should be for the plaintiff.

The authority for this is *Berger v. E. Berger & Co.* A specific case from Missouri, and a leading one, on the precise point of supplying lumber to a boat manufacturer is *Antrim Lumber Co. v. Daly.*[76]

Individual cases will necessitate different modifications, but the essential elements must be preserved, that is, the sale, the knowledge by the seller of the purpose, the reliance by the buyer upon the seller, the lack of opportunity to inspect, and the representation as to the propriety of using the particular product. This instruction should follow closely behind the broader language of section 3112, so that the jury will be compelled to relate the two to the situation involved.

"Nothin' but a houn' dog"

Fortunately for the lawyer's sanity, cases are periodically en-

[76]190 S.W. 971 (Mo. App. 1916); see Annot., 52 A.L.R. 1536 (1928).

countered, either in practice or research, that have an aspect of the offbeat, the unusual, or the humorous. The "houn' dog" case of *Brown v. Faircloth*[77] is such a case, and it would be thoroughly enjoyable but for the sobering fact that this particular hound was a bird dog that set the buyer back $3,000. The action by the buyer was for rescission, and although the case does not provide any Florida warranty law of the *Blanton* or *Cornelius* magnitude, it does contain some useful Florida authority and especially exemplifies the troublesome matter of instructions.

The principal bone of contention was whether the dog was a "three hour" dog, the animal having been bought for the express purpose of competing in field trials. The defendant admitted the representation that the animal was a "three hour" dog but contended that this meant merely a capacity to run for three hours, not the ability to run for three hours in field trials with such speed as could be expected to win, and to demonstrate other abilities peculiar to the sport. The judgment was for the plaintiff; the defendant appealed to the Supreme Court of Florida on the ground that the trial court committed prejudicial error in charging the jury. The instructions contained a charge on an implied warranty of fitness for a particular purpose, whereas the action was on an express warranty. The trial court, on motion for a new trial, admitted that the implied warranty instructions were "improvidently given," but in denying the motion it considered the whole charge and the fact that no warranty was included other than that alleged under the express warranty; therefore the express warranty under the charge included the defined implied one. The Supreme Court adopted this reasoning and affirmed.

This case should not be dismissed in any study of warranty law. Had the instruction on implied warranty been outside the express warranty allegations and charge, the Court would undoubtedly have been forced to reverse the judgment. The rule of *Steinhardt v. Consolidated Gro. Co.*[78] must be kept in mind: "[T]here will be no implication of warranty in conflict with the express terms of the agreement." Whatever one may think of the effect of instructions upon juries, in the prosecution of cases the prospect of a reversal must be kept in mind when instructions are drafted.

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[77]66 So.2d 232 (Fla. 1953).

[78]80 Fla. 531, 535, 86 So. 431, 432 (1920).

CONCLUSION

Every defect in an article sold does not give rise to a cause of action, but when a client has been injured because of a defect and he has a cause of action based thereon, there is no reason why adequate damages should not be sought. Frequently the party liable will be found to be covered by product liability insurance. Conversely, the attorney may render a valuable service to a client who is a manufacturer or vendor by calling to the client's attention the importance of seeing that his products and practices conform to proper standards and that he considers the advisability of product liability insurance as an additional measure of protection. The field of law discussed in this article is of great importance to the legal profession in this state, and it will undoubtedly become even more important as Florida grows in industrial production.