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Nature of the Problem - What Is Warranty

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Advertised-Product Liability:

Nature of the Problem—What is "Warranty"?

*Judge Lee E. Skeel**

MASS PRODUCTION, mass distribution, and mass advertising of manufactured products are perhaps the chief phenomena that characterize present-day civilization in the free world. These modern facts, intimately affecting almost every person in our society, pose basic problems as to what law shall govern them. Most important of these problems is the question of what rules shall apply in seeking redress because of defective or dangerous products that cause harm to ultimate users, who were induced by advertisements, statements and assurances of the manufacturer or supplier to buy and use these products.

The fact that modern methods of selling commodities involve three parties instead of two, as was formerly the general experience [that is, (1) the manufacturer or supplier, who by direct advertising seeks to sell to (2) the consumer, using (3) the middleman as a means of distribution, the middleman purchasing the goods only for resale and not for use] places the manufacturer or supplier clearly in the position of making an express warranty to the ultimate purchaser, under the definition of express warranty as understood at common law.

The heart of the problem is the question: just what *is* an *express warranty*?

Express warranties in the past were first actionable through use of a *Writ of Deceit.* "The first form of deceit which was recognized by the common law as a ground of legal liability was that which embodied a deception of the court and a consequent perversion of the ordinary course of legal proceeding." So said Street, in his *Foundations of Legal Liability.*

Under the influence of the old Statute of Westminster Second, and the issuance of *Writs In Consimili Casu* derived therefrom, the Action Of Deceit began to be used for many other purposes. Any fraudulent act resulting in damage became a ground for the Action Of Deceit. The proper legal remedy for fraud became an Action For Deceit Upon The Case, and at first there was no remedy for misrepresentation not amounting to fraud.

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The ancient "common law forms of pleading" began to be adapted to the then-new concept.

One of the earliest cases on the subject of fraudulent sale (in the year 1367) dealt with the sale of chattels by one not having title, and with knowledge of such lack of title. There was no express warranty of title, but as fraud was the basis of the action, no warranty was needed in order to spell out a fraudulent sale.

In 1383 it was held that an Action On Case For Deceit could be employed by the purchaser against a seller who falsely warranted the nature or quality of a chattel at the time of sale. The defense was that the warranty amounted to a covenant or special promise, and that the plaintiff therefore must show that the warranty was under seal. Special promises required a seal, in those days. This objection was overruled because the plaintiff had sued in Case (i.e., for an indirect harm, rather than a direct promise). This logic was clearly sound. But fear of a flood of suits by disappointed purchasers brought a reaction on the part of the judges. The judges did not deny the doctrine of tort liability for breach of warranty, but became very strict and cautious in applying the doctrine.

At that time, if a contract was induced by fraud or misrepresentation, the aggrieved party had no remedy by Action On The Contract. The contract itself was not deemed to be rendered invalid by the misrepresentation. The concept of such a warranty, as itself a contract, is quite modern, and was not known then.

The idea that the remedy for breach of warranty should be *in contract* came about with the development of the old form of action called Assumpsit. By their very nature, warranties do arise out of contractual situations. It is easy to see how the remedy for breach of warranty was incorporated into the field of contract. However, for about four hundred years from the first recorded instance (1383) of an action for breach of warranty in a sale of a chattel, the exclusive remedy available to the injured party was by the Action On The Case For Deceit.

The first reported decision holding that the giving of a warranty at the time of a sale creates an obligation in the nature of an Assumpsit, for breach of which the Action Of Assumpsit was the proper remedy, is *Stuart v. Wilkin* (1778) 1 Dougl. 18. Assumpsit basically involved the idea of indirect breach of contract. After that date the law of warranty was transferred almost bodily to the domain of contract law.

The case of *Winterbottom v. Wright* (10 M & W 109, 11 L J Ex. 415), decided by the Court of Exchequer in 1842, is considered to be the origin of the rule that there is *no liability* of a contracting party to one with whom he is not in privity of contract (i.e., that his statements are legally actionable only by those with whom he directly contracts).

But even though the warranty action was gradually taken into the field of contracts, its beginning as an action in Deceit must be kept clearly in mind. Williston, in his single volume work on Sales, says of this:

> The action on a warranty was regarded as an action of deceit, and the words "warrantizando vendidit" seem to have been necessary to make a good count as the words "super se assumpsit" later were in the action of assumpsit. The action was thus conceived of at the outset as an action of tort. This is, of course, also true of the action of assumpsit, but it was not long before assumpsit came to be regarded, as it is regarded today, as distinguished from tort and rather to be classed in its essential nature with covenant than with trespass on the case. But the right of action on a warranty was not regarded at once as similar in its nature to assumpsit. It was, indeed, not until 1778 that the first reported decision occurs of an action on a warranty brought in assumpsit, though from the language of the court in that case it appears that the practice of declaring in assumpsit had been common for some years before. It is probable that today most persons instinctively think of a warranty as a contract or promise; but is believed that the original character of the action cannot safely be lost sight of, and that the seller's liability upon a warranty may sound in tort as well as in contract.

At another page, Dr. Williston also said:

> As has been seen, the action upon a warranty was in its origin a pure action of tort. There is no doubt that today the obligation of a warrantor is generally conceived of as contractual, and there can be no doubt also that a seller may expressly promise to be answerable for some alleged quality of the articles sold, or that if he makes such a promise for good consideration he enters into a contract. This, however, does not either upon authority or reason exhaust the possibilities of express warranties. It should not be the law, and by the weight of modern authority, it is not the law that a seller who by positive affirmation induces a buyer to enter into a bargain can escape from liability by denying that his affirmation was an offer to contract. A positive representation of fact is enough to render him liable. The distinction between warranty and representation which is important in some branches of the law is not appropriate here. The representation of fact which induces a bargain is a warranty.

> As an actual agreement to contract is not essential the obligation of the seller in such a case is one imposed by law as distinguished from one voluntarily assumed.

The legal obligation created by an express warranty thus actually being one imposed by law, and actionable in tort, it should not be limited to cases between persons having direct contractual obligations. Undoubtedly the idea of the need of "privity" came into the law because at an early state in the development of the law of express warranty, the representations inducing a sale were almost always made directly to the buyer by the seller. Such was the nature of commerce and of sales in those days. But the element of "privity" was brought into the law without full consideration of the principle that a warranty then was really merely collateral to the contract; and this in a type of commerce in which a breach of warranty was in fact not a breach of the contract itself.

In modern business, today the manufacturer or supplier induces the sale of his product by direct representations to the customer. Advertising directs the consumer to the middleman, to make the purchase. Yet the ultimate purpose of the advertising is for the benefit of the manufacturer or supplier. This fact requires a new approach in our law governing business methods.

In the light of this change in methods, it certainly should *not* be the law that he who induces a sale of his product by direct representations cannot be compelled to make his representations good, when the person whom he induces to use his product is damaged because such representations were untrue, even though innocently made. This must be particularly true where the purchaser does not require or receive a promise about the goods *from the middleman,* only because *he relied on the representations of the manufacturer or supplier.* If relief be denied against the party who *induces* the sale, then no action is available for the breach of the inducing cause of the sale, even though the positive representations were the actual inducing cause of the transaction. To deny a cause of action against one who induces the sale and who benefits by the transaction, because of the absence of "privity," is to disregard completely the historical background of the express warranty obligation. That warranty originally was, as indicated above, merely collateral to the purchase agreement, and its breach was separately redressed in tort. That was, and is, sound logic, and just in its results.

A closely analogous situation is found in cases dealing with the rights of a creditor. A creditor, induced to extend credit to

another by reason of misrepresentations or mistaken representations of fact made by a third person as to the financial trustworthiness of the one requesting credit, may seek redress *from such third person by action in tort.*

Actions in tort for negligence in the manufacturing of a product, since the decision in the case of *McPherson vs. Buick,* have universally been recognized as available to a sub-purchaser against the manufacturer. But such an action, except where the doctrine of *res ipsa loquitur* can be employed, is of little real use to the purchaser, because the processes of the manufacturer are wholly within the control and possession of such manufacturer, and beyond the knowledge of the ultimate purchaser.

The ability of the common law to adopt desirable revisions of established legal principles, and yet to maintain stability, has been the basis of its strength as a world legal system. It certainly is desirable to continue the legal principles of express warranty, as defined by the common law, and to hold liable in tort one who induces a sales transaction to his benefit by direct (and untrue) statements to the buyer as to the quality or desirability of the goods sold. It is sound law and logic to permit an action for damages by virtue of the buyer's reasonable reliance upon such representations which prove to be untrue. Certainly modern methods of doing business have removed from the law of express warranty the need to find "privity" between the parties to a modern purchase by a consumer of a product "sold" by modern advertising and merchandising methods.

[*Editor's Note:*

Just before going to press we learned of a new United States Court of Appeals decision adopting Judge Skeel's reasoning almost verbatim. *Arfons v. E. I. Du Pont De Nemours & Co., Inc.*, 2d Circ., No. 24989, decided Nov. 24, 1958; Swan, Moore & Kaufman, JJ. David S. Maclay, of Marsh, Day & Calhoun of Bridgeport, Conn. (defense counsel in that case) sent a photocopy to John R. Kistner of Cleveland, who in turn sent one to this Review. The decision, reversing a dismissal of the plaintiff's complaint for failure to state a cause of action, dealt with an action for breach of warranty resulting in personal injuries to the ultimate user of dynamite and a fuse. The dynamite (made by Du Pont) and fuse (made by another company, Ensign-Bickford) were alleged to have been warranted as safe through advertisements and literature, though the complaint failed to allege the place of the original or subsequent sales. Citing the *Rogers v. Toni* decision (see p. 1 herein), the United States Court of Appeals said (among other things):

". . . The privity requirement was rejected as inconsistent with the true relationships between manufacturer and consumer created by modern advertising and merchandising methods . . .

"The *Rogers* case permits the consumer to look to the manufacturer to make good losses caused by defective products, where the sale or use of the product was induced by representations directed by the manu-

facturer to the consumer. In taking this forward step the Ohio court recognized that, in this modern society, laws which fitted the needs of other times must be adjusted to keep pace with society's growth and present needs. Clearly, the key relationship is one between producer and buyer. The retailer is in the unhappy position of being governed, in the selection of many products which he sells, by consumer pressure generated by manufacturer advertising. In addition the manufacturer is in the best position to minimize the possibility of latent defects.

"We do not read the *Rogers* case as merely another step along a well traveled road. That decision blazed a new trail . . . We cannot at this point say that the *Rogers* case is limited to its particular facts and might not be extended to inherently dangerous merchandise . . ."]