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SALES - IMPLIED WARRANTY - LIABILITY OF A WATER COMPANY

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SALES — IMPLIED WARRANTY — LIABILITY OF A WATER COMPANY — Defendant, a city engaged in supplying water to its inhabitants, was sued by plaintiff, a consumer, for injuries resulting from plaintiff's drinking of lead-poisoned water at a faucet in his home. The water, although pure at the meter, became poisoned when passing through a lead pipe inspected and approved by the water company but owned by the plaintiff. Plaintiff brought his action on two different theories: (1) on implied warranty; (2) in negligence. The trial court instructed the jury without exception or objection from defendant that they might find for plaintiff, under either of these theories. The defendant was successful in the trial court, but plaintiff appealed on the ground that he was entitled to have the jury instructed to the effect that, although the sale was made at the water meter, the defendant was liable to furnish wholesome and pure water at the faucet. *Held,* since defendant failed to except to the instructions of the trial court as to his liability on implied warranty, this instruction became "the law of the trial," but since plaintiff was entitled to the instructions he requested, the judgment must be reversed. *Horton v. Inhabitants of North Attleboro,* (Mass. 1939) 19 N. E. (2d) 15.

Although the question of a public water company's [1] liability under an implied warranty of the purity and wholesomeness of the water furnished its customers did not have to be passed on in the principal case, the probability of

[1] A municipality engaged in a water business has the same rights and liabilities as a private corporation engaged in that business. Keever v. City of Mankato, 113 Minn. 55, 129 N. W. 158, 775 (1910); Lockwood v. Dover, 73 N. H. 209, 61 A. 32 (1905); 19 R. C. L. 1130 (1917).

such an issue being presented to the courts in the near future invites speculation on its outcome. Now that the furnishing of water by a public water company to a private consumer has been held a sale,[2] the way seems clear for an application, in an appropriate case, of the doctrine of implied warranty. Since "implied warranty" has come to have two different meanings—(1) that of an "obligation imposed by law as a matter of policy," and (2) a promise or representation unexpressed "but fairly and reasonably inferable from the facts,"[3] —the nature of the court's holding may depend upon which of these two interpretations plaintiff urges.[4] If he relies upon the principle of arbitrarily imposed liability evolved in the "food cases"[5] and justified upon the grounds of public policy,[6] the complaining consumer will be met with the opposing and firmly established principle of public utilities law: that a public water company is not an insurer of the purity and wholesomeness of water it supplies.[7] The significance of this conflict of rules is apparent when it is remembered that the effect of the modern decisions in the food cases holding the seller liable upon an "implied warranty" is to force him into a position of insurer.[8] The reason given for the public utilities rule is also that of public policy.[9] The problem of a court at this stage would resolve itself into choosing between two opposing public policies, and since there has been no clear,[10] consistent, or convincing explanation[11] of

[2] Canavan v. City of Mechanicville, 229 N. Y. 473, 128 N. E. 882 (1920).

[3] Waite, "Retail Responsibility and Judicial Law Making," 34 MICH. L. REV. 494 at 498 (1936); Hoe v. Sandborn, 21 N. Y. 552 (1860).

[4] The Uniform Sales Act was purposely omitted from this discussion because section 15 has had no conclusive effect upon the common law. Waite, "Retail Responsibility and Judicial Law Making," 34 MICH. L. REV. 494 at 506 (1936); 90 A. L. R. 1270 (1934).

[5] WAITE, SALES, 2d ed., 224 (1938).

[6] Chapman v. Roggenkamp, 182 Ill. App. 117 (1913); Race v. Krum, 222 N. Y. 410, 118 N. E. 853 (1918); Brown, "The Liability of Retail Dealers for Defective Food Products," 23 MINN. L. REV. 585 at 596 (1939).

[7] Boguski v. City of Winooski, 108 Vt. 380, 187 A. 808 (1936). Telephone, telegraph, and radio companies do not insure the success of the performances which they undertake. 4 WILLISTON, CONTRACTS, rev. ed., 3182 (1936). The same is true of electrical companies. Tri-City Ry. v. Killeen, 92 Ill. App. 57 (1900); Smith v. East End Electric Light Co., 198 Pa. 19, 47 A. 1123 (1901); Pennsylvania R. R. v. Lincoln Trust Co., 91 Ind. App. 28, 167 N. E. 721, 170 N. E. 92 (1929).

[8] 4 OHIO ST. UNIV. L. J. 403 (1938); Parks v. Yost Pie Co., 93 Kan. 334, 144 P. 202 (1914); 63 A. L. R. 340 (1929); 88 A. L. R. 534 (1934); 90 A. L. R. 1270 (1934).

[9] Green v. Ashland Water Co., 101 Wis. 258, 77 N. W. 722 (1898); City of Salem v. Harding, 121 Ohio St. 412, 169 N. E. 457 (1929); 5 A. L. R. 1402 (1920).

[10] Waite, "Retail Responsibility and Judicial Law Making," 34 MICH. L. REV. 494 at 497, 518 (1936); WAITE, SALES, 2d ed., 227 ff. (1938).

[11] Various explanations have been offered. It is argued that such a rule would result in the improvement of marketing conditions by forcing the elimination of unwholesome food products. VOLD, SALES 466 (1931). In Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N. E. 225 (1918), the court suggests that the dealer must be held liable in order to give the consumer an effective remedy. See

the public policy relied upon in the food case decisions, a court would probably accept the public utilities rule on the strength of a firmly established [12] and readily comprehensible public policy.[13] If, however, the aggrieved consumer was willing and able to prove a promise or representation "fairly and reasonably inferable from the facts," his chances of success against the water company would seem to be greater. There appears to be nothing in the cases which would preclude a water company from expressly warranting the purity and wholesomeness of the water it supplies, and it would seem that a water company could do impliedly what it could do expressly in this respect. But still the plaintiff's success could not be predicted with too great a degree of certainty. In the first place, one cannot be too sure how much effect a court confronted with such facts as we have outlined would give to the phrase, often found in text books, often repeated in dicta and adhered to in cases not here in point, that "a public water company is not an insurer or guarantor of the purity of water it supplies." [14] But assuming that this presents no serious obstacle, there remains a policy, or perhaps only an attitude, in the judicial mind that the obligations of public corporations are today well defined.[15] The scope of these

WAITE, SALES, 2d ed., 299, note 78 (1938). Professor Williston says, "if the manufacturer is held to an absolute liability irrespective of negligence, it will unquestionably increase the degree of care which he will use." 4 WILLISTON, CONTRACTS, rev. ed., 2733 (1936). Others have contented themselves with the assertion that public safety demands seller's liability. Brown, "The Liability of Retail Dealers for Defective Food Products," 23 MINN. L. REV. 585 at 595 (1939).

[12] Canavan v. City of Mechanicville, 229 N. Y. 473, 128 N. E. 882 (1920); Minneapolis General Electric Co. v. Cronon, (C. C. A. 8th, 1908) 166 F. 651.

[13] "If municipalities . . . were held to respond in damages for all sickness and death caused by water-borne diseases, municipal burdens would be increased to the point where the municipalities would have to go out of existence." City of Salem v. Harding, 121 Ohio St. 412 at 417, 169 N. E. 457 (1929). The court in Green v. Ashland Water Co., 101 Wis. 258 at 266-267, 77 N. W. 722 (1898), after refusing to treat the furnishing of water by a utility company to its patrons as a sale, continued: "To say that the person or corporation performing that service shall be burdened with an implied warranty of quality of the thing carried and distributed . . . would burden such public service in a way that would be destructive of private enterprise . . . and render public enterprise in the same direction so attended with dangers as to discourage a service that has become a necessity in all communities of any considerable size, and which promotes to a high degree the welfare and happiness of individuals in communities great or small." See 5 CORN. L. Q. 479 (1920) for a public policy argument in favor of holding water companies liable under an implied warranty.

[14] 3 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 1316 (1911); City of Salem v. Harding, 121 Ohio St. 412, 169 N. E. 457 (1929); Hamilton v. Madison Water Co., 116 Me. 157, 100 A. 659 (1917); Pennsylvania R. R. v. Lincoln Trust Co., 91 Ind. App. 28, 167 N. E. 721 (1929); Canavan v. City of Mechanicville, 229 N. Y. 473, 128 N. E. 882 (1920); Green v. Ashland Water Co., 101 Wis. 258, 77 N. W. 722 (1898); 67 C. J. 1282 (1934).

[15] It seems impossible to otherwise explain the hesitancy of the courts to impose new liabilities on public service corporations. Glennen v. Boston Elevated Ry., 207 Mass. 497, 93 N. E. 700 (1911). See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 977 (1911).

obligations has been historically determined[16] and all that seems to be required of a public corporation is to refrain from negligence or wilful wrong.[17] If the company has exercised the proper degree of care under the circumstances, recovery against it for injury suffered because of foreign substances or impurities in the water is uncertain, to say the least.

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[16] 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 333 ff. (1911); 2 ibid., §§ 961, 962. See also 4 WILLISTON, CONTRACTS, rev. ed., 3170, note 1 (1936).

[17] Pennsylvania R. R. v. Lincoln Trust Co., 91 Ind. App. 28, 167 N. E. 721 (1929); Hamilton v. Madison Water Co., 116 Me. 157, 100 A. 659 (1917); Safransky v. City of Helena, 98 Mont. 456, 39 P. (2d) 644 (1936); Jones v. Mount Holly Water Co., 87 N. J. L. 106, 93 A. 860 (1915); Hayes v. Torrington Water Co., 88 Conn. 609, 92 A. 406 (1914); Campbell v. City of Helena, 92 Mont. 366, 16 P. (2d) 1 (1932); 5 A. L. R. 1402 (1920). In Green v. Ashland Water Co., 101 Wis. 258 at 267, 77 N. W. 722 (1898), the court says that if the law be administered along lines holding the water company liable for negligence and deceit, then "the safety of individuals, as affected by public water service, will be as well promoted as is consistent with the continuance of such service. . . ."