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Liability Without Fault

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LIABILITY WITHOUT FAULT.—In *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271, appeared, as a basis for the decision, the statement that "When our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law." Mr. Justice McKenna has recently voiced the same idea. In his dissenting opinion in *Arizona Copper Co.* v. *Hammer*, 39 Sup. Ct. Rep. 553, he contends that the Workmen's Compensation Act of Arizona is unconstitutional, because, "It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault." Even the majority of the court seemed inclined to justify their decision, that the Act was constitutional, by the argument that, as the liability under it would be known in advance, employers could protect themselves by "reducing wages and increasing the selling price of the product, in order to allow for the statutory liability."

The fallacy of this proposition, as a principle of the Common Law, has been several times pointed out. One type of case, however, in which liability without fault not only exists, but is constantly being enlarged, seems to have been ignored. By the Common Law there is imposed upon sellers of goods, in certain instances, a liability of which they are not notified and which has no relation whatever to fault or free will on their part.

These are the cases in which sellers of goods are held to be absolute insurers of the harmlessness thereof. In *Parks* v. *Yost Pie Co.*, 93 Kan. 334, for instance, the plaintiff had been poisoned by some deleterious substance in a pie which he had bought from a retail dealer. There was no privity of contract with the defendant, but the latter, as a manufacturer, had made the pie and sold it to the intermediate dealer. The action for damages was in tort. There was absolutely no evidence of fault on the defendant's part even offered, beyond the facts stated. Nevertheless, the court held that the

defendant was liable, on the ground that "A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically he must know it is fit or take the consequences." In *Jackson* v. *Coca Cola Co.*, (Miss.) 64 So. 791, one who was a bottler of soft drinks was held liable for injury to one who drank thereof, although there was no contract between him and the plaintiff and although no evidence of his negligence was given, on the ground that he was "under a legal duty" to see that no one was injured by foreign substances in his product.

An even more obvious type of extraneously imposed liability is found in those cases where the liability was founded originally on free will—that is to say, where a seller is held liable as a "warrantor." The original basis of this liability seems to have been that of misrepresentation and deceit. AMES, HISTORY OF ASSUMPSIT, 2 HARV. LAW REV. 8. It has long been treated, however, as a contractual liability. In this theory, at first, the element of intent on the seller's part to assume a liability was considered essential. In some cases it is held that the intent must expressly appear, as by use of the word "warrant." *Chandler* v. *Lopus*, Cro. Jac. 4, discussed by Mr. Ames, 2 HARV. LAW REV. 9; *De Sewhenberg* v. *Buchanan*, 5 Car. & P. 343. In others it is held that it must at least be clearly implied in fact. *Borrekin* v. *Bevan*, 3 Rawle (Pa.) 23; *Henson* v. *King*, 3 Jones (N. C.) 419; *Coats* v. *Hord*, 154 Pac. 491. But at present the tendency is to ignore all thought of real intention on the seller's part and to "imply" a liability as a matter of law from the mere act of sale. Thus, in *Chapman* v. *Roggenkamp*, 182 Ill. App. 117, the defendant had sold a can of peas to plaintiff. There was some sort of toxin in the peas and the buyer was made violently sick. He sued the seller in damages on the theory of an implied warranty. The sale was the ordinary grocery store transaction and there was nothing to indicate intentional or conscious assumption of liability of any sort by the seller. Furthermore, he had not himself canned the peas, but had bought them from a well reputed packing house. He had no more knowledge of the contents of the can than the buyer, the plaintiff, had, and could not in any sense have been said to be at fault. Yet, despite this absence of either intent to assume a liability, or fault of any sort, on the defendant's part, he was held liable in damages. The same result was reached in *Ward* v. *Great Atlantic and Pacific Tea Co.*, 231 Mass. 90, where the defendant, a grocer, sold, in the usual way, a can of beans which he had bought from a well known wholesaler who used all modern and proper methods in the packing process. The defendant was wholly without actual fault, and, of course, without knowledge of anything wrong with the beans. The buyer broke a tooth on a stone that was with the beans and was allowed to recover damages from the seller. The decision was based upon a section of the Sales Act, but the court expressly said that the section was but a codification of the Common Law. See also, *Sloan* v. *F. W. Woolworth Co.*, 103 Ill. App. 620. In the most recent decision, *Carnavan* v. *City of Mechanicsville*, 177 N. Y. S. 808, decided coincidently with the statement of Mr. Justice McKenna quoted above, this absolute liability, as a matter of law, rather than of real intention, was extended to those

who sell water for household purposes. The defendant was held liable, on an implied warranty of wholesomeness, regardless of any negligence on its part, because the plaintiff had contracted typhoid fever from the water which its municipal waterworks had furnished.

The reason given for these holdings bases them squarely, not on any *real* assumption of liability, but on a liability *imposed by law as a matter of public policy.* In *Jackson v. Watson & Sons,* [1909] 2 K. B. 193, it was said by Vaughn Williams, L. J., that the cause of action, whether in form of tort or of contract arose out of a duty following the *relation* of the parties.

Should Mr. Justice McKenna ever desire to withdraw from his position in the *Arizona Copper Co. case,* without the appearance of having reversed himself, he might say boldly, on the precedent of *Parks* v. *Yost Pie Co.,* "Practically, an employer must know his employment is safe, or take the consequences." Or he might say, more euphemistically but none the less legitimately, "In every contract of employment there is, if public policy so requires, an implied warranty that the work is safe." J. B. W.