Michigan Law Review

Volume 41 | Issue 6

1943

SALES - RETAIL DEALERS - LIABILITY FOR DEFECTS IN CANNED GOODS

J. B. W.
University of Michigan Law School

SALES — RETAIL DEALERS — LIABILITY FOR DEFECTS IN CANNED GOODS — One Ocon, a retail dealer, sold a can of spinach to plaintiff's wife, who, because of something deleterious about the spinach, became ill from eating it. Plaintiff sued for damages resulting from his wife's illness. The court of appeals certified to the supreme court the following question:—"Was Ocon, the retail dealer, liable to Josey for selling his wife a can of unwholesome

spinach, plainly labeled with the processor's name and address, upon the theory that he (Ocon) impliedly warranted that such spinach was fit for human consumption?" Without complicating the problem by an issue of the plaintiff's rights as distinct from those of the wife herself, the supreme court answered the question of warranty in the affirmative. *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W. (2d) 835 (1942).

In making its decision the court gave full recognition to the fact that precedents are in flat conflict concerning the matter. Superficially, the decision is merely one more added to the growing weight of opinion that the retail dealer ought to be held liable for some reason, despite the fact that he is utterly without fault, has made no untrue representations concerning the goods and is in no way more responsible for the buyer's injury than is the buyer himself. Unfortunately the Texas court, like its predecessors, calls the liability one for "breach of warranty." Originally and still conventionally that liability of a seller of goods which is commonly described as liability for "breach of warranty" is a liability predicated upon some inaccurate representation of fact by the seller. The particular nature of the liability—as one sounding in tort, or in contract, as one based upon fault, or upon assumption—is hopelessly confused by looseness of thought and confounded by slovenliness of verbiage. Sometimes in judicial utterance or the statements of a commentator a "warranty" is characterized as a representation of the character or quality of the thing sold; sometimes "warranty" is defined in terms of a "promise"; occasionally, some writer falls into the grievous lexicological error of calling it a "promise" that some fact exists. But whether the term "warranty" is used to connote a representation itself, or a promise to make good in damages if a representation be not true, whether the liability is founded in tort because of the falsity of the representation, or in contract because of an assumed promise to make good if the chattel sold should prove not as represented, somewhere in the background of the liability, the courts, until recently, have consistently looked for some actual representation by the seller concerning the goods. The representation might be express, or it might be implied by the mere fact of sale under the particular circumstances; and an "intention to be bound" by the representation has not always been thought necessary. But courts, until relatively recently, have consistently declined to infer a representation by implication unless such an implication was in truth fairly and reasonably inferrable from the circumstances.[1]

In the principal case and those similar ones which precede it, there is no pretense of any express representation by the seller as to the contents of the can. Neither can it fairly and reasonably be inferred that the seller has by implication said anything more than that he got the can from a reputable packing company and that so far as he knows its contents are what they purport to be. In actuality, there is no representation, express or implied, by the retail seller that the content of the can is in truth wholesome, and there is no promise, express or fairly inferrable, that he will make good in damages if the content

[1] This statement is elaborated and, the writer believes, verified in Waite, "Retail Responsibility and Judicial Law-making," 34 MICH. L. REV. 494 (1936). See also as to the historical significance of the term "warranty," Prosser, "The Implied Warranty of Merchantable Quality," 27 MINN. L. REV. 117 (1943).

proves to be harmful. By no stretch of logical reasoning, therefore, can the retailer be held liable for breach of "warranty," in the original and usually accepted connotation of that term.

As a matter of public policy, it is conceivable that the burden of loss ought to be transferrable, even in such a situation, from the consumer to the shoulders of the equally innocent retailer.[2] This is the position that courts have taken in growing numbers, at least where the retailer is a seller of food, since *Ward v. Great Atlantic & Pacific Tea Co.*[3] and the Texas court has added itself to the number. But this recent decision is at least frank; after setting forth its reasons for believing in the wisdom of the policy,[4] the court says explicitly: "We hold that a retailer who sells unwholesome food for human consumption is liable to the consumer for the consequences under an implied warrant *imposed by law as a matter of public policy.*" [5]

Thus a "warranty" has become no longer a representation, express or fairly implied, out of which springs a legal liability; it now signifies also a liability created by judicial declaration in any case of sale, when the judicial idea of public policy makes such a liability seem wise. But even one who approves of judicial legislation as a proper method of conforming law to social necessity might well be critical of its concealment behind the four-term fallacy of logic.

J. B. W.

[2] That there is no sound policy justifying the liability, because the injured consumer is already amply protected by rights of action against the packer of the goods, is argued at length in Waite, "Retail Responsibility and Judicial Law-making," 34 MICH L. REV. 494 (1936). A contrary opinion is expressed in Brown, "The Liability of Retail Dealers for Defective Food Products," 23 MINN. L. REV. 585 (1939); Llewellyn, "On Warranty of Quality, and Society," 36 COL. L. REV. 699 (1936). See also on the subject in general, Eldredge, "Vendor's Tort Liability," 89 UNIV. PA. L. REV. 306 (1941); Leidy, "Tort Liability of Suppliers of Defective Chattels," 40 MICH. L. REV. 679 (1942).

[3] 231 Mass. 90, 120 N.E. 225 (1918).

[4] Reasons, however, which seem as cogently to apply to a sale of *any* goods; leaving unexplained their judicial acceptance, generally speaking, only in food cases and their equivalents. Justice Critz, dissenting, says sapiently, 164 S.W. (2d) at 842: "As applied to the sale of food put up in scealed containers, with the name of the manufacturer or processor indicated thereon, no practical benefit to the public health can be obtained by holding the retailer liable as an implied warrantor. . . . *no rule of convenience can ever justify mulcting one in damages who has done no wrong.*" (Italics added.)

[5] 164 S.W. (2d) at 840. (Present writer's italics.)