

December 1959

Torts--Warranty of Vendor for Latent Defects in Chattel Manufactured by Third Person

L. O. H.

West Virginia University College of Law

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Recommended Citation

L. O. H., *Torts--Warranty of Vendor for Latent Defects in Chattel Manufactured by Third Person*, 62 W. Va. L. Rev. (1959).

Available at: <https://researchrepository.wvu.edu/wvlr/vol62/iss1/9>

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TORTS—WARRANTY OF VENDOR FOR LATENT DEFECTS IN CHATTEL MANUFACTURED BY THIRD PERSON—*D*, a retailer, sold a sixteen-foot extension ladder manufactured by another to *X*, who, without having used the ladder in an extended position, loaned the ladder to *P*. *P* suffered injuries when the upper right rail broke while he was standing on the second rung from the top. The defect was a latent one. *Held*, under local law the seller of a chattel manufactured by another, who has no reason to know of any dangerous condition of the chattel, is not liable for harm caused by such condition even though he might have discovered the defect by an inspection or test before selling it. *Burgess v. Montgomery Ward & Co., Inc.*, 264 F.2d 495 (10th Cir. 1959).

It is not readily determinable from a reading of the principal case the form of action under which it was brought. The court said that it was unnecessary to consider the rather nebulous distinctions between recovering on a theory of negligence and on a theory of a breach of an implied warranty, since any breach of warranty in such a situation would be caused by negligence. This is a rather strong statement and may be subject to some question, but it is apparent that the plaintiff in this case could not have recovered from the vendor under any theory. In order to recover for negligence, the plaintiff would have to show a breach of a duty of inspection on the part of the defendant, and it has been held that vendors who are not the manufacturers of an article have no duty to inspect that article for latent defects. *Zesch v. Abrasive Co. of Philadelphia*, 353 Mo. 558, 183 S.W.2d 140 (1944). A retailer of goods has a duty only to inform a buyer of defects of which he, the retailer, knows or has reason to know. *Bergstresser v. Van Hoy*, 142 Kan. 88, 45 P.2d 855 (1935). In the principal case the plaintiff would have his remedy against the manufacturer. The noted case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), established the principle that a manufacturer is liable for injuries to remote vendees or users of his chattels which are inherently dangerous or rendered so by the defect, despite the lack of privity of contract. Decisions subsequent to the *MacPherson* case have generally allowed recovery on a theory of negligence and not on implied warranties. *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946).

Since the precise question presented in the principal case has never been considered in West Virginia, an examination of cases relating to implied warranties might be beneficial.

First it is convenient to consider a brief definition of an implied warranty and its purpose. In *Bekkvold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927), the court stated that an implied warranty is not an element of a contract. It need not be stated in the contract and its application or very existence does not depend on any affirmative intent of the parties. Because of the acts and relationship of the parties to each other, an implied warranty is imposed by the law; it is an obligation which arises outside of the contract. The use of the concept of implied warranties is to promote and maintain high business standards and to prevent sharp dealings.

One of the early West Virginia cases in which the court examined the principles of implied warranties was *Hood v. Bloch*, 29 W. Va. 244, 11 S.E. 910 (1886). This was an action of assumpsit by A for the price of cheese which he had sold to B. B, who had no opportunity for inspection, received cheese of a much poorer quality than that which he had ordered, and defended the action on the theory that the vendor had impliedly warranted the merchantability of the cheese. In holding in B's favor, the West Virginia court cited extensively from the English case of *Jones v. Just*, L.R. 3 Q.B. 197 (1868), which held, in part, that where goods are in existence and may be inspected by the buyer and there is no fraud on the part of the seller, the doctrine of *caveat emptor* applies. This was held to be the rule, at least where the seller was neither the manufacturer nor the grower. The West Virginia court thought this to be a very logical and well reasoned opinion, although, as can be seen from the factual situation of the case then under consideration, the adoption of these views was not necessary to the ultimate decision of the case and was dicta. Still this excellent opinion would likely be given consideration by our court in reaching a decision on the subject today.

Another West Virginia case which adds to the belief that the courts of West Virginia would be in accord with the principal case is *Watkins v. Angotti*, 65 W. Va. 193, 63 S.E. 969 (1908), which held that where there was a sale of a definite chattel, specifically described, the actual condition of which could be determined by either party by a thorough inspection, there were no implied warranties of merchantability. See also *Lambert v. Armentrout*, 65 W. Va. 375, 64 S.E. 260 (1908).

The doctrine of *caveat emptor*, as mentioned in *Hood v. Bloch*, *supra*, is exceedingly harsh and has been modified and riddled by exceptions in later cases because of the needs of a modern com-

mercial society. One exception to the doctrine has been recognized where a buyer makes known his needs to the seller and relies on the judgment of the seller to supply the article which will best suit his purpose. *Pennington v. Cranberry Fuel Co.*, 117 W. Va. 680, 186 S.E. 610 (1936); *Schaffner v. National Supply Co.*, 80 W. Va. 111, 92 S.E. 580 (1917). Save for this exception, the principles stated in *Jones v. Just*, *supra*, were again followed in *Schaffner v. National Supply Co.*, *supra*. An earlier West Virginia case, *Erie City Iron Works v. Miller Supply Co.*, 68 W. Va. 519, 70 S.E. 125 (1910), is apparently in conflict with the exception stated above, but it is felt that *Pennington v. Cranberry Fuel Co.*, *supra*, represents the more acceptable view. However, there is nothing in these cases to intimate that West Virginia would reach a result contra to the principal case.

A study of authorities from other jurisdictions further supports the belief that the result reached in the principal case was completely justifiable. In *Zesch v. Abrasive Co. of Philadelphia*, *supra*, an action was brought by an employee of the purchaser against the manufacturer and the seller of an abrasive cutting-off wheel for injuries sustained by him when the defective wheel disintegrated. The vendor could not have discovered the defect by an exterior inspection. The court held that the vendor had no duty under these facts to subject the wheel to any rigid tests or inspections for latent defects, *since the wheel was manufactured by another*. The court went even further and said that absent any showing that the purchaser had requested the vendor to furnish the wheel for a particular purpose, there was no implied warranty of fitness attached to the wheel. See also *King Hardware Co. v. Ennis*, 39 Ga. App. 355, 147 S.E. 119 (1929).

Recovery for personal injuries from the use of ordinary merchandise under the theory of implied warranties has been denied in a number of cases from other jurisdictions. *Sears, Roebuck & Co., v. Markenke*, 121 F.2d 598 (9th Cir. 1941); *Terrell v. Florence*, 53 Ga. App. 354, 185 S.E. 839 (1936); *Crandall v. Stop & Shop*, 288 Ill. App. 543, 6 N.E.2d 685 (1937); *Kratz v. American Stores Co.*, 359 Pa. 335, 59 A.2d 138 (1948).

The Virginia court considered a case with a similar factual situation in *Belcher v. Goff Bros.*, 145 Va. 448, 134 S.E. 588 (1926). In this case G conducted a small retail business in a little Virginia township. G carried a variety of goods, including coal oil or kerosene, which it bought from a West Virginia firm. G had sold this

kerosene for several years, and no one had ever complained about it. Y bought some of the oil which had been adulterated by gasoline and she was severely injured when it exploded. In an excellently written opinion, the Virginia court considered numerous authorities on the subject and reached the conclusion that where the vendor is not the manufacturer and the purchaser knows or should know this, then the vendor is not responsible for latent defects on the theory of implied warranty. *Accord, Universal Motors Co. v. Snow*, 149 Va. 690, 140 S. E. 653 (1927).

The above decisions have a firm foundation. Any other results would have been inequitable and undesirable, defeating the very reason for the existence of implied warranties. As was so ably pointed out in *Ellis v. Montgomery & Crawford, Inc.*, 189 S.C. 72, 200 S.E. 82 (1938), a rule contra to the one in the principal case would make retailers of the simplest and most common household and other goods absolute insurers of the infallibility of all those in the manufacturing process, from the raw-material suppliers to middlemen handling the finished product which he re-sells to the ultimate consumer.

L. O. H.

TORTS—WRONGFUL DEATH—SUICIDE ACTIONABLE WHERE INDUCED BY DEFENDANT.—A diamond broker having committed suicide, his personal representative brought an action against two diamond dealers to recover under N.Y. Decedent Estate Law § 130. *Ds* had allegedly obtained a diamond from deceased upon the agreement that they would return the stone or give compensation therefor upon demand. Decedent had received the diamond from a wholesaler on the same terms. When decedent called for the diamond, *Ds* refused to return it or to pay for it, thereby intentionally threatening the broker's reputation and livelihood. *P* alleged that *Ds'* wilful act induced in the broker an irresistible impulse to take his own life. *Held*, denying motion to dismiss the cause of action, that where it was alleged that malicious and intentional conversion of a consigned diamond induced in the deceased an irresistible impulse to take his own life, and that he did so, recovery could be had for the death of deceased caused by *Ds'* wrongful act. *Cawverien v. De Metz*, 188 N.Y.S.2d 627 (1959).

The principal case represents the latest stage in the evolution of a rule of law that has been three quarters of a century in the