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Sales -- Disclaimer of Implied Warranty Void Because Against Public Policy

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terms of the highest degree of care, the jury is impressed with the peculiar hazards and the unusual advantages inherent in that calling. It may be that these courts feel constrained to emphasize the most significant circumstance—defendant's being a common carrier—in the most conclusive way possible, in a legal rule or definition. This approach certainly seems to slight the opportunity courts have of describing all the circumstances in as great detail as deemed necessary and suggests taking the easy "way out."

It is submitted that the proposition that a common carrier owes its passengers the highest degree of care should be put to the jury *not* in terms of a standard of conduct different from that imposed on others, but rather in terms of what was reasonable and proper in view of the duty owed and *all* the conditions and circumstances of the particular case. A charge of this nature would accord with the universally accepted legal concept of the prudent man and at the same time make intelligible to the lay triers of fact what precisely they are to decide.[30]

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Sales—Disclaimer of Implied Warranty Void Because Against Public Policy.

In *Henningsen v. Bloomfield Motors, Inc.*[1] the Supreme Court of New Jersey considered the effect of disclaimer and limitation of liability clauses contained in a standard automobile warranty.[2] The plaintiff purchased an automobile from a local dealer as a gift for his wife. A warranty was set forth in fine print on the reverse side of the sales contract, together with a stipulation that there were no warranties, either express or implied, except as provided for in the agreement.[3] The disclaimer was contained in the following words: "[T]his warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities . . . ."[4] In addition, the following

[30] The charge by the trial judge in the principal case would have this effect. See note 3 *supra*.

[1] 32 N.J. 358, 161 A.2d 69 (1960).

[2] The warranty is the uniform warranty adopted by the Automobile Manufacturers Association. It is used by all the major automotive manufacturers in the sale of new automobiles. Thus, well over 90% of new car sales were covered by this warranty and disclaimer. See *Id.* at 390, 161 A.2d at 87.

[3] The express warranty provided: "The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle *to the original purchaser* or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective. . . ." *Id.* at 367, 161 A.2d at 74. (Emphasis by the court.)

[4] 32 N.J. at 367, 161 A.2d at 74.

provision appeared in small print on the front side of the contract:

> The front and back of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning same has been made or entered into, or will be recognized . . . .
>
> I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature . . . .[5]

Within two weeks after the delivery of the automobile the plaintiff's wife had an accident while driving it due to a mechanical failure. Actions against the manufacturer and the dealer were brought by the wife[6] for the personal injuries and by the husband for property damages, each alleging a breach of implied warranty. The defendants contended that the disclaimer barred any recovery except for the replacement of parts. The court, however, found that the disclaimer was void as being against public policy and allowed recovery.

The implied warranty of merchantability arose in order to alleviate the harsh results of the rule of *caveat emptor*.[7] Whereas the latter allowed the vendee virtually no recourse against a seller of defective goods, the implied warranty placed upon the vendor the duty to provide goods which were at least capable of being used for the purpose in-

[5] *Id.* at 366, 161 A.2d at 73-74.

[6] Privity of contract is generally required for recovery on an implied warranty. State *ex rel.* Bond v. Consolidated Gas, Elec. Light & Power Co., 146 Md. 390, 126 Atl. 105 (1924). However, some courts have recognized an exception where the product is noxious or dangerous. Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). Although this exception is generally found in cases involving food and drugs, the court in the principal case pointed out that the harmful potential of a defective automobile was analogous and held that the implied warranty ran with the sale of the automobile from the manufacturer to the ultimate consumer. The court went further toward eliminating entirely the requirement of privity in this "dangerous products" area by holding that the warranty extended to the purchaser's wife, who was not a party to the contract, on the grounds that it was reasonably anticipated that she would be a user of the automobile. This was carried even further in a dictum to the effect that the warranty extends to other "members of his family, and to other persons occupying or using it with his consent." 32 N.J. at 414, 161 A.2d at 100. *Query* how much further a court holding an occupant could recover on an implied warranty would have to go in order to allow a pedestrian injured by an automobile to recover on the same theory.

In Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960), the operator of construction equipment, an employee of the vendee in the sales contract, brought suit for personal injuries against the vendor, alleging breach of warranty. *Held:* An employee is not in privity, and therefore cannot maintain an action against the seller. Thus, North Carolina would apparently not join the New Jersey court in holding that the warranty ran to those using the automobile with the consent of the owner.

With respect to the requirement of privity see 30 N.C.L. REV. 191 (1952); 37 N.C.L. REV. 205 (1959); 7 RUTGERS L. REV. 420 (1953); 27 U. CINC. L. REV. 124 (1958).

[7] Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 543 (1925).

tended.[8] Consequently, a disclaimer began to be inserted in sales contracts to enable the vendor to sell goods without liability based on implied warranty.[9]

It is generally held that a vendor may contract away liability arising from an implied warranty,[10] and this right is sanctioned by the Uniform Sales Act.[11] However, since implied warranties arise to protect the buyer, courts have generally held that disclaimers must be strictly construed against the seller and must be express in their terms.[12] Effective disclaimers may be found in varying forms, but it is often difficult to distinguish between some disclaimers which have been held binding[13] and others which were ineffective because they were not sufficiently express.[14] For example, in *Bekkevold v. Potts*,[15] involving the sale of a tractor and trailer, the disclaimer "no warranties have been made in reference to said motor vehicle by the seller to the buyer unless expressly written hereon at the date of purchase" was held ineffective. Yet in *Butts v. Groover*,[16] concerning the sale of a truck, the provision that "no warranties, express or implied, and no representations, promises or statements have been made by seller unless indorsed hereon in writing" was held an effective disclaimer.

Disclaimers of implied warranty which would be sufficiently express

[8] McConnell v. Jones, 228 N.C. 218, 44 S.E.2d 876 (1947); Ashford v. H. C. Shrader Co., 167 N.C. 45, 83 S.E. 29 (1914). *Cf.* UNIFORM SALES ACT § 15(1).

[9] See Comment, 23 MINN. L. REV. 784 (1938).

[10] 77 C.J.S. *Sales* § 317 (1952).

[11] UNIFORM SALES ACT § 71. "Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract of sale." The act has been enacted into law into thirty-three states, the District of Columbia, and the Panama Canal Zone. 1 UNIFORM LAWS ANNOTATED, *Sales*, at 7 (Supp. 1960).

[12] Roberts Distrib. Co. v. Kaye-Halbert Corp., 126 Cal. App. 2d 664, 272 P.2d 886 (Dist. Ct. App. 1954); Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W.2d 162 (1951); Federal Motor Truck Sales Corp. v. Shanus, 190 Minn. 5, 250 N.W. 713 (1933); Deere & Webber Co. v. Mock, 71 N.D. 649, 3 N.W.2d 471 (1942).

[13] "The above guarantee is in lieu of and excludes all other guarantees, warranties, obligations or promises, express or implied, by contract or by law . . . ." Sears, Roebuck & Co. v. Lea, 198 F.2d 1012 (6th Cir. 1952). "[I]t is understood and agreed that Greening-Smith Company shall not be held responsible for productiveness and, or, quality of the undersigned's crops." Buckley v. Shell Chemical Co., 32 Cal. App. 2d 209, 89 P.2d 453 (Dist. Ct. App. 1939). "We give no warranty, express or implied, as to description, quality, productiveness, or any other matter, or any seeds sent out, and will be in no way responsible for the crop . . . ." Lumbrazo v. Woodruff, 256 N.Y. 92, 175 N.E. 525 (1931).

[14] "This contract contains the entire agreement between Seller and Buyer; there are no other representations, warranties or covenants by either party." Frigidinners, Inc. v. Branchtown Gun Club, 176 Pa. Super. 643, 109 A.2d 202 (1954). "This Contract becomes the entire agreement between the Buyer and Seller and will contain all representations and agreements." Torrance v. Durisol, Inc., 20 Conn. Supp. 62, 122 A.2d 589 (Super. Ct. 1956). The product is "not guaranteed in any way." McPeak v. Boker, 236 Minn. 420, 53 N.W.2d 130 (1952).

[15] 173 Minn. 87, 216 N.W. 790 (1927).

[16] 66 Ga. App. 20, 16 S.E.2d 894 (1941).

in their terms to bar recovery may nevertheless be rendered ineffective. A purchaser is, as a general rule, deemed to have notice of and to have assented to all the terms of the contract, including the disclaimer.[17] However, in recognition of the complexities of modern business contracts in which the disclaimer is placed in the body of the contract, some jurisdictions have adopted the rule that the seller must have actually called the attention of the purchaser to the disclaimer clause.[18] This rule is readily applied where the disclaimer is hidden in the contract and calculated to escape attention.[19] It would seem to be applicable to the facts of the principal case, thus providing an alternative solution without considering the public policy question.

The court in the principal case recognized that the doctrines of strict construction and actual notice have been used to avert the effects of an express disclaimer,[20] yet it reached the same result by holding this disclaimer to be "so inimical to the public good as to compel an adjudication of its invalidity."[21] However, the court did not predicate its decision on the more customary public policy consideration of danger to the public.[22] Rather, it took the view that a disclaimer which the purchaser had to accept due to his unequal bargaining position amounted to a contract which had not been fairly procured and was thus against public policy.

Only one decision has been found in which the North Carolina court has held that an express disclaimer would bar recovery. In this decision, *J. I. Case Threshing Mach. Co. v. McClamrock*,[23] the court held that a disclaimer prevented the purchaser of a piece of agricultural equipment from proving inferior quality as a defense to the vendor's suit for the purchase price. The court stated that "personal property may be sold with or without warranty, and . . . from an express stipulation that the property is not warranted a warranty will not be implied."[24]

[17] *E.g.*, Kennedy v. Cornhusker Hybrid Co., 146 Neb. 230, 19 N.W.2d 51 (1945).

[18] Stracener v. Nunnally Bros. Motor Co., 11 La. App. 541, 121 So. 617 (1929); St. Louis Cordage Mills v. Western Supply Co., 54 Okla. 757, 154 Pac. 646 (1916); Black v. B. B. Kirkland Seed Co., 158 S.C. 112, 155 S.E. 268 (1930).

[19] Reliance Varnish Co. v. Mullins Lumber Co., 213 S.C. 84, 48 S.E.2d 653 (1948).

[20] 32 N.J. at 392, 161 A.2d at 87.

[21] *Id.* at 404, 161 A.2d at 95.

[22] In Linn v. Radio Center Delicatessen Inc., 169 Misc. 879, 9 N.Y.S.2d 110 (New York City Munic. Ct. 1939), there was an express disclaimer of any warranties on the sale of baked goods. The plaintiff was injured by a tack impounded in a cookie and sued for breach of implied warranty. The court refused to allow the disclaimer to be set up as a bar to the action, stating that it "must be recognized that the health of the public is of the highest importance to the community and it is against natural justice and good morals to permit an individual or corporation to manufacture food containing dangerous foreign substances and to escape the consequences of his act by a disclaimer. To permit such a disclaimer to be effective would be against sound public policy." *Id.* at 880, 9 N.Y.S.2d at 112.

[23] 152 N.C. 405, 67 S.E. 991 (1910).

[24] *Id.* at 407, 67 S.E. at 992.

Thus it appears that the North Carolina court recognizes that disclaimers may be effective.

It is apparent, however, that a disclaimer would not preclude a recovery of the purchase price by the buyer should the seller furnish non-merchantable goods. In *Williams v. Dixie Chevrolet Co.*,[25] involving the sale of an automobile, the court stated that the purchaser could recover for want of consideration if the car were not fit for its intended use due to the defect. The court said, "The refusal to warrant against worthlessness would fall with the balance of the supposed contract for want of consideration."[26] Of course, if the terms of the disclaimer apply only to quality, it will in no way affect an implied warranty of merchantability.[27]

The New Jersey court appears to be the first to declare this standard automobile disclaimer void.[28] Courts of other jurisdictions have given the disclaimer its full effect[29] and have held that it does not violate public policy.[30] It would seem, however, that the prior cases have not met the real problem as seen by the New Jersey court—that while a disclaimer of warranty should be available to parties who choose so to contract, the imposition of these conditions by virtually all automobile manufacturers does not result in a freely bargained for and fairly obtained agreement. It is submitted that the solution to this problem can only be found by invoking the doctrine of public policy.

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Torts—Negligently Induced Fright Causing Physical Injury to Hypersensitive Plaintiff.

In *Williamson v. Bennett*[1] the defendant negligently drove her automobile into that of the plaintiff; plaintiff did not see what had struck her, but thinking that she had killed a child on a bicycle[2] she became frightened. Plaintiff came to a stop and then saw that an automobile and not a child had collided with her. Though plaintiff suffered no immediate

[25] 209 N.C. 29, 182 S.E. 719 (1935).
[26] *Id.* at 31, 182 S.E. at 721.
[27] Hall Furniture Co. v. Crane Mfg. Co., 169 N.C. 41, 85 S.E. 35 (1915).
[28] Another provision of the warranty has been attacked. In Mills v. Maxwell Motor Sales Corp., 105 Neb. 465, 181 N.W. 152 (1920), the court stated, in a dictum, that it was against "every conception of justice" to allow the manufacturer to be the sole judge as to whether parts were so defective as to be replaceable.
[29] Shafer v. Reo Motors, 205 F.2d 685 (3rd Cir. 1953); L. R. Cooke Chevrolet Co. v. Culligan Soft Water Serv., 282 S.W.2d 349 (Ky. 1955); Hall v. Everett Motors, Inc., 165 N.E.2d 107 (Mass. 1960).
[30] Brokerick Haulage, Inc. v. Mack-International Motor Truck Corp., 1 App. Div. 2d 649, 153 N.Y.S.2d 127 (Sup. Ct. 1926).

[1] 251 N.C. 498, 112 S.E.2d 48 (1960).
[2] About a month before the accident plaintiff's brother-in-law had killed a child on a bicycle when she rode into the side of his car. 251 N.C. at 500, 112 S.E.2d at 49.