

6-1-1949

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Recommended Citation

Robert B. Dean Jr. and Charles H. Warfield, Should the Doctrine of Implied Warranties Be Limited to Sales Transactions, 2 *Vanderbilt Law Review* 675 (1949)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol2/iss4/5>

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SHOULD THE DOCTRINE OF IMPLIED WARRANTIES BE LIMITED TO SALES TRANSACTIONS?

The purpose of this discussion is to examine implied warranties in order to determine if their application is limited to sales transactions. In approaching this problem, it is necessary to understand the development of warranty. In the early law, warranty was a pure action of tort.¹ Special assumpsit developed over a hundred years later than warranty² and was based on the tort action of warranty.³ Thus, at the beginning, assumpsit was thought of as a tort action.⁴ Later assumpsit came to be regarded as similar to covenant and hence became classified with contract actions.⁵ Warranty was still considered a tort action, and it was not until 1778 in *Stuart v. Wilkins*⁶ that an action of warranty was brought in assumpsit.⁷ It was in this manner that the obligation of a warrantor came to be thought of as contractual in nature.

Warranty cannot be said to be strictly a matter of contract. In any transaction, there may be an express contract of warranty, but this does not rule out other warranties. For example, *A* warrants to *B* that a particular horse is sound.⁸ The courts hold such a representation of fact to be a warranty.⁹ Where there is such a positive representation, the seller's actual intent to warrant is generally held immaterial.¹⁰ It follows that if the intent of the seller is immaterial, the obligation is one imposed by law.

One point must be kept in mind when warranties are being considered. Some courts have spoken in terms of warranty and then have proceeded on the basis of negligence.¹¹ Actually, the effect of a warranty is to impose an absolute liability on the warrantor.¹²

1. 1 WILLISTON, SALES § 197 (3d ed. 1948); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

2. 1 WILLISTON, SALES § 195 (3d ed. 1948); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

3. 1 WILLISTON, SALES § 195 (3d ed. 1948).

4. *Ibid.*

5. *Ibid.*

6. 1 Doug. 18, 99 Eng. Rep. 15 (K. B. 1778).

7. PROSSER, TORTS § 82 (1941); 1 WILLISTON, SALES § 195 (3d ed. 1948); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

8. The older cases held such statements to be opinion and therefore no basis for a warranty. *Tyre v. Causey*, 4 Harr. 425 (Del. 1846); *Turner Bros. v. Clarke*, 143 Ga. 44, 84 S. E. 116 (1915); *Wells v. Welch*, 205 Mo. App. 136, 224 S. W. 120 (1920); *Erwin v. Maxwell*, 7 N. C. 241, 9 Am. Dec. 602 (1819).

9. *McClintock v. Emick*, 87 Ky. 160, 7 S. W. 903 (1888); *Ormsby v. Budd*, 72 Iowa 80, 33 N. W. 457 (1887); 1 WILLISTON, SALES § 201 n. 13 (3d ed. 1948).

10. *Ingraham v. Union R. R.*, 19 R. I. 356, 33 Atl. 875, 876 (1896): "[I]f the representation as to the character or quality of the article sold be positive, and not mere matter of opinion, and the vendee understands it and relies upon it as a warranty, the vendor is bound thereby, no matter whether he intended it to be a warranty or not." See also *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172 (1887); 1 WILLISTON, SALES § 201 (3d ed. 1948).

11. *E.g.*, *Dam v. Lake Aliso Riding School*, 6 Cal. 2d 395, 57 P. 2d 1315 (1936); *Moore v. Ardmore*, 188 Okla. 74, 106 P. 2d 515 (1940).

12. *Lollar v. Jones*, 229 Ala. 329, 157 So. 209 (1934); *Pelletier v. DuPont*, 124 Me.

Implied warranties arose where there was no representation or contract of warranty in regard to the transaction. At the early law, the seller was not liable when the article which he sold was of bad quality where there was neither warranty nor representation.¹³ But since 1815, in *Gardiner v. Gray*,¹⁴ it is certain that in many cases the seller is under an obligation to furnish merchantable goods although there are no representations or warranties as to the quality.¹⁵ This obligation came to be known as implied warranty. As in the case of express warranty, the effect of this obligation is to place an absolute liability on the warrantor.¹⁶ It is not necessary that the warrantor be guilty of any negligence. Such is the settled law of England¹⁷ and the overwhelming weight of authority in this country.¹⁸

While a few jurisdictions state that implied warranties arise from the intention of the parties,¹⁹ the accepted view is that they arise by operation of law.²⁰ This was well expressed by the Minnesota Supreme Court: "An implied warranty is not one of the contractual elements of an agreement. It is not one of the essential elements to be stated in the contract, nor does its application or effective existence rest or depend upon the affirmative intention of the parties. It is a child of the law. It, because of the acts of the parties, is imposed by the law. It arises independently and outside of the contract. The law annexes it to the contract."²¹

The most important class of cases in which warranties have been implied is that concerning a contract to sell or a present sale of goods. Here Section 15 of the Uniform Sales Act is now recognized as the law with regard to

269, 128 Atl. 186, 39 A. L. R. 972 (1925); *Kennedy v. F. W. Woolworth Co.*, 205 App. Div. 648, 200 N. Y. Supp. 121 (Sup. Ct. 1923); *Rodgers & Co. v. Niles & Co.*, 11 Ohio St. 48, 78 Am. Dec. 290 (1860); *Leopold v. Van Kirk*, 27 Wis. 152 (1870).

13. 1 WILLISTON, SALES § 228 (3d ed. 1948).

14. 4 Camp. 144, 145, 171 Eng. Rep. 46, 47 (N. P. 1815): "[U]nder such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them."

15. 1 WILLISTON, SALES § 228 (3d ed. 1948): "[I]t has not been doubted that in some cases at least the seller of goods is under an obligation to furnish goods which are at least merchantable though no agreement or representation as to quality was made."

16. See note 12 *supra*.

17. *Randall v. Newson*, 2 Q. B. D. 102 (1877); 1 WILLISTON, SALES § 237 (3d ed. 1948).

18. *Lollar v. Jones*, 229 Ala. 329, 157 So. 209 (1934); *Patterson v. Orangeburg Fertilizer Co.*, 117 S. C. 140, 108 S. E. 401 (1921); *Tennessee River Compress Co. v. Leeds & Company*, 97 Tenn. 574, 37 S. W. 389 (1896).

19. *Burntisland Shipbuilding Co. v. Barde Steel Product Corp.*, 278 Fed. 552 (D. Del. 1922); *Couts v. Sperry Flour Co.*, 85 Cal. App. 156, 259 Pac. 108 (1927).

20. *J. B. Holt Co. v. Bridges*, 162 Ga. 154, 132 S. E. 889 (1926); *Sterling-Midland Coal Co. v. Great Lakes Coal & C. Co.*, 334 Ill. 281, 165 N. E. 793 (1929); *Bekkevold v. Potts*, 173 Minn. 87, 216 N. W. 790, 59 A. L. R. 1164 (1927); *Allis-Chalmers Mfg. Co. v. Frank*, 57 N. D. 295, 221 N. W. 75 (1928); *Vold*, SALES 468 (1931), 1 WILLISTON, SALES § 239b. (3d ed. 1948).

21. *Bekkevold v. Potts*, 173 Minn. 87, 216 N. W. 790, 791, 59 A. L. R. 1164 (1927).

implied warranties in most jurisdictions.²² While this section materially broadens the concept of implied warranty in many states,²³ it is merely a statement of the common law in other jurisdictions.²⁴ The main element in such cases is reliance by the buyer on the seller.

In spite of care and honesty on the part of the seller, it is generally deemed that he should bear the risk that his title may be defective. The seller is in better position than the buyer to know the antecedents that affect his title and the quality of the thing sold.

The doctrine of implied warranty still finds its largest application in the law of sales. The idea has been expressed that it is peculiar to that kind of transaction. Why should the doctrine be confined to sales? It rests on an implied representation of fact. The expediency and justice of implying such a representation and warranty may be as cogent in other forms of transactions as in sales. This discussion will deal with four other situations in which implied warranties may be used. One who makes a bailment, grants a license for the grantor's benefit and a warranty may be implied as to the bailed chattel. An individual who purports to act as an agent and thus to bind an alleged principal can reasonably be deemed to make warranties just as though the transaction were one that could technically be called a "sale." And in the restaurant cases, courts have labored with the question of whether the food was "sold" or whether the customer only had a license to eat it. Why should that question make any difference? Some recent "pop bottle" cases have turned on the question of whether a "sale" had taken place. Need the implication of a warranty be so technical?

In several groups of cases the courts have shown a commendable tendency to recognize that the doctrine of implied warranties is one of broad application.

BAILOR-BAILEE

What is the liability of the bailor with regard to the bailed chattel?²⁵

In many cases the courts have based liability on negligence.²⁶ For instance the livery-stable keeper who rents horses²⁷ or the modern day "U-Drive-It" company²⁸ is liable on this basis. In other situations the courts speak the

22. 1 U. L. A. § 15 (1931).

23. *Sampson v. Frank F. Pels Co.*, 199 App. Div. 854, 192 N. Y. Supp. 538 (1st Dep't 1922); *Ward v. Valker*, 44 N. D. 598, 176 N. W. 129 (1920); *Keenan v. Cherry & Webb*, 47 R. I. 125, 131 Atl. 309 (1925).

24. *Davenport Ladder Co. v. Edward Hines Lumber Co.*, 43 F. 2d 63 (8th Cir. 1930); *Hoback v. Coca-Cola Bottling Works*, 20 Tenn. App. 280, 98 S. W. 2d 113 (M. S. 1936).

25. See generally 8 C. J. S., *Bailments* § 25 (1938).

26. *Akers v. Overbeck*, 18 Misc. 198, 41 N. Y. Supp. 382 (Sup. Ct. 1896); *Kissam v. Jones*, 56 Hun 432, 10 N. Y. Supp. 94 (1890); *Conn v. Hunsberger*, 224 Pa. 154, 73 Atl. 324, 25 L. R. A. (n.s.) 372 (1909).

27. *Dam v. Lake Aliso Riding School*, 6 Cal. 2d 395, 57 P. 2d 1315 (1936); *Conn v. Hunsberger*, 224 Pa. 154, 73 Atl. 324, 25 L. R. A. (n.s.) 372 (1909).

28. *Milestone System v. Gasior*, 160 Md. 131, 152 Atl. 810 (1931); *Mitchell v.*

language of implied warranty yet base liability on negligence. Certain English cases call the obligation implied warranty yet limit it so that the bailor is not responsible for defects that cannot be discovered.²⁹ American courts have similar theories. Thus in *Moore v. Ardmore*,³⁰ the court said, "the implied warranty must be taken and understood in a reasonable sense. . . . It is not a broad, absolute warranty, but one that will reasonably serve the particular case."

There are cases, however, which imply a true warranty in the bailor-bailee relationship. In one case³¹ a defective tank was loaned for storing gasoline. The court found an implied warranty that the tank was reasonably fit for storing gasoline. The opinion states that "Such warranty is not confined to sales; it exists in cases of bailment."³² Another opinion holds that the implied warranty of fitness "applies with equal force, if not with stronger reason to the case of a lease of goods for a particular purpose."³³ The New York Court of Appeals said that "The implication of a warranty of fitness is not peculiar to the law of sales; it arises in cases of bailment."³⁴

The cases referred to above and others³⁵ clearly show that a true implied warranty has been found in many bailment situations. The fact that the transaction is not a sale does not prevent the imposition of an implied warranty. "One who lets property for hire may reasonably be subjected to the same implied warranties as one who sells goods. . . . Analogy with the law of sales justifies the further statement that if the hirer reasonably relied on the bailor's superior skill or knowledge in furnishing suitable property, the latter would be liable even though in fact ignorant of the defects in the goods which he furnished."³⁶

Although technically not a bailment, one other case is relevant. In *Silverman v. Imperial London Hotels*,³⁷ a case involving the renting out of a facility, the plaintiff was bitten by bugs while in the Turkish bath of the defendant. There was evidence that the defendant's premises were most scientific, hygienic and up-to-date. The court held that there was an implied warranty that the premises were reasonably fit for use as a Turkish bath. This was an absolute liability as shown by the opinion. The court stated that if the

Lonergan, 285 Mass. 266, 189 N. E. 39 (1934); Carroll v. Minneapolis Drive Yourself System, 206 Wis. 287, 239 N. W. 501 (1931).

29. 1 HALSBURY, LAWS OF ENGLAND §§ 1241-42 (Hailsham ed. 1931).

30. 188 Okla. 74, 106 P. 2d 515, 517 (1940).

31. Standard Oil Co. of New York v. Boyle, 231 App. Div. 101, 246 N. Y. Supp. 142 (4th Dep't 1930).

32. 246 N. Y. Supp. at 144.

33. Hartford Battery Sales Corp. v. Price, 119 Pa. Super. 165, 181 Atl. 95, 98 (1935).

34. *In re People*, 250 N. Y. 410, 165 N. E. 829, 832 (1929).

35. Hoisting Engine Sales Co. v. Hart, 237 N. Y. 30, 142 N. E. 342, 31 A. L. R. 536 (1923); Welder Co. v. Manufacturing Co., 15 Ohio App. 270 (1921); Hilton v. Wagner, 10 Tenn. App. 173 (E. S. 1928); Milwaukee Tank Works v. Metals Coating Co., 196 Wis. 191, 218 N. W. 835 (1928).

36. 4 WILLISTON, CONTRACTS § 1041 (Rev. ed. 1936).

37. 137 L. T. Rep. 57, 43 T. L. Rep. 260 (K. B. 1927).

premises were not reasonably fit, it did not matter that every possible step was taken to put them in proper condition. Here is another example of a situation where there is no sale, but a warranty.

IMPLIED WARRANTIES IN SERVICE OF FOOD

Is the liability of a restaurant based only on negligence or is strict liability imposed? The starting point is to notice the oft cited statement that the service of food is not a sale, but an utterance.³⁸ Following this line of reasoning, many courts say since there is no sale, no warranty can be implied.³⁹ Other arguments are to the effect that there is no historical basis for an insurer's liability on the part of one serving food.⁴⁰ It is further stated that the protection to the public should lie with the pure food acts.⁴¹ Still another argument is that such liability would lead to unfounded claims.⁴² The theory is advanced that an implied warranty would not be expressive of the obligation between the parties.⁴³ Probably the most honest courts are those who state such liability would be an undue burden on restaurants.⁴⁴

On the other hand, it appears that the common law of England was to the effect that it was an implied term of the restaurant contract that the guest be furnished wholesome food.⁴⁵ "If a man goes into a tavern for refreshment, and corrupt meat or drink is there sold to him, which occasions his sickness, an action clearly lies against the tavern keeper. . . . An action lies against him without express warranty for it is a warranty in law."⁴⁶ There were similar holdings in this country even before the Sales Act. In *Thompson Co. v. Smith*,⁴⁷ the plaintiff was injured by a bad grapefruit served at defendant's restaurant. The Tennessee court held that: "It [the restaurant] ought to be held to conclusively know the condition and fitness of food it sells for immediate use and consumption. . . . It is not claimed that defendant was guilty of any negligence, and in fact the suit is not predicated on the negligence of the defendant in knowing the condition of its food or in selecting an unwholesome grapefruit for plaintiff's immediate use. . . . [T]here ought to be, and

38. BEALE, INNKEEPERS § 169 (1906); *Parker v. Flint*, 12 Mod. 255, 88 Eng. Rep. 1303 (K. B. 1697); *Crisp v. Pratt*, Cro. Car. 549, 79 Eng. Rep. 1072 (K. B. 1635).

39. *Valeri v. Pullman Co.*, 218 Fed. 519, 520 (S. D. N. Y. 1914); *Albrecht v. Rubinstein*, 63 A. 2d 158 (Conn. 1948); *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533, L. R. A. 1915B 481 (1914); *Kenney v. Wong Len*, 81 N. H. 427, 128 Atl. 343 (1925); *Nisky v. Childs Co.*, 103 N. J. L. 464, 135 Atl. 805, 50 A. L. R. 227 (1927).

40. *Valeri v. Pullman Co.*, 218 Fed. 519 (S. D. N. Y. 1914).

41. *Ibid.*

42. *Ibid.*

43. *F. W. Woolworth Co. v. Wilson*, 74 F. 2d 439 (5th Cir. 1934).

44. *Ibid.*

45. *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407 (1918); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 9 (1888), citing cases from the Yearbooks; 1 BL. COMM. *430; 3 BL. COMM. *165; 1 WILLISTON, SALES §§ 241, 242 (1948).

46. *Keil*, 91, 72 Eng. Rep. 254 (K. B. 1585); *Burnby v. Bollett*, 16 M. & W. 644, 647, 153 Eng. Rep. 1348 (Ex. 1847).

47. 8 Tenn. C. C. A. 95 (1917).

we think there is, a law that holds the seller liable on an implied warranty that the grapefruit is reasonably fit and suitable for the purpose for which it was intended."⁴⁸ Other jurisdictions, including California⁴⁹ and Kansas,⁵⁰ have similar holdings.

Since the Sales Act an increasing number of jurisdictions have found the service of food implies a warranty under the Sales Act.⁵¹ The basic reason for allowing recovery in such cases is well stated by the Rhode Island court: "The relation between a restaurant keeper and a customer originates in contract. By selecting and ordering food, the customer makes known to the restaurant keeper not only what food he wants, but also that he expects to receive food fit for human consumption. An inspection of the food by the customer is generally impractical. . . . The customer must of necessity rely upon the skill and judgment of the restaurant keeper to furnish him for a stated price the kind of food that he orders and expects to receive."⁵² The rationale furnishes a reasonable legal vehicle for recovery. All the elements of an implied warranty seem to be present. The restaurant keeper knows the purpose it is to be used for; the customer relies upon his skill and judgment.

Much has been written on the question of whether a sale exists in such instances.⁵³ But many writers feel that the decision as to sale or not obscures the real issue.⁵⁴ It should be kept in mind that implied warranties are not limited to sales alone.⁵⁵

Even if a particular court is averse to finding a sale, recovery may still be had. In *Cushing v. Rodman*,⁵⁶ the plaintiff was injured by a pebble which was imbedded in a roll he was eating in defendant's restaurant. There was no negligence on the part of the defendant. Recovery was allowed. The court did not dwell on the question of a sale. There is some contractual relation which will allow the implication of a warranty. It seems desirable to hold the restaurant keeper strictly liable, in view of the near impossible task of proving negligence.⁵⁷ The plaintiff must find evidence of such negligence on premises

48. *Id.* at 103-104.

49. *Goetten v. Owl Drug Co.*, 6 Cal. 2d 683, 59 P. 2d 142 (1936).

50. *Stanfield v. F. W. Woolworth Co.*, 143 Kan. 117, 53 P. 2d 878 (1936).

51. *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407 (1918); *Temple v. Keeler*, 238 N. Y. 344, 144 N. E. 635 (1924); *West v. Katsafanas*, 107 Pa. Super. 118, 162 Atl. 685 (1932); *Barrington v. Hotel Astor*, 184 App. Div. 317, 171 N. Y. Supp. 840 (1st Dep't 1918); *Greenwood v. John R. Thompson Co.*, 213 Ill. App. 371 (1919); *Yochem v. Gloria*, 134 Ohio St. 427, 17 N. E. 2d 731 (1938); *Ford v. Waldorf System*, 57 R. I. 131, 188 Atl. 633 (1936); 1 WILLISTON, SALES § 242b (3d ed. 1948).

52. *Ford v. Waldorf System*, 57 R. I. 131, 188 Atl. 633, 636 (1936).

53. Notes, 15 *FORD. L. REV.* 92 (1946), 24 *MARQ. L. REV.* 155 (1940); 25 *CALIF. L. REV.* 117 (1936); 27 *MICH. L. REV.* 477 (1929).

54. See 27 *MICH. L. REV.* 477, 478 (1929), wherein it is stated that the question of sale or not seems to be one of policy. The real question is should the plaintiff be given an additional remedy to spare him the task of proving negligence. See 25 *CALIF. L. REV.* 117 (1936), to the effect that no attempt should be made to impose liability under section 15 of the Sales Act since resort to the Sales Act obscures the real issue.

55. 1 WILLISTON, SALES § 242b (1948); Note, 27 *YALE L. J.* 1068 (1918).

56. 82 F. 2d 864 (D. C. Cir. 1936).

57. *Cushing v. Rodman*, 82 F. 2d 864 (D. C. Cir. 1936); *VOLD*, SALES § 153 (1931).

controlled by the defendant from employees of the defendant. It is not clear that such liability would mean an undue burden. Speaking in an economic sense, it would appear that the defendant could better stand the loss and distribute it over his business.⁵⁸ Such liability would encourage higher standards by those engaged in the service of food to the public.

Cases arise not only where the restaurant keeper has prepared food, but where he serves food which is prepared by others in a form not subject to inspection without destroying the marketability of such food. The Maine court held in such a situation that the parties have an equal opportunity of inspection and refused to imply a warranty.⁵⁹ In other cases, including *Cushing v. Rodman*,⁶⁰ are to the effect that the restaurant is the one to bear the loss.⁶¹ This latter view seems preferable since the basis of implied warranty is strict liability, not the opportunity of the restaurant to thoroughly inspect the food it serves.

The trend today is in the direction of absolute liability on the restaurant. This seems desirable, and it may be done by means of implied warranty with no stretching of legal principles.⁶² In the first place, a sale may be found. But, warranties are not limited to sales. The following quotation from Williston is appropriate, "Even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant. The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor, and to charge the seller of an unopened can of food for the consequences of the inferiority of the contents of the can, and to hold free from liability a restaurant keeper who opens the can on his premises and serves its contents to a customer, would be a strange inconsistency. A sale is not the only transaction in which a warranty may be implied."⁶³

AGENT'S IMPLIED WARRANTY OF AUTHORITY

Where a person, acting as an agent, has contracted with another on behalf of a certain principal, but without authority, the question is raised: Upon whom should the responsibility for the consequences of the unauthorized transaction fall? Since the assumed principal is not liable,⁶⁴ the loss must be

58. *Cushing v. Rodman*, 82 F. 2d 864 (D. C. Cir. 1936).

59. *Bigelow v. Maine Cent. R. R.*, 110 Me. 105, 85 Atl. 396 (1912).

60. 82 F. 2d 864 (D. C. Cir. 1936).

61. *Greenwood v. John R. Thompson Co.*, 213 Ill. App. 371 (1919); *S. H. Kress & Co. v. Ferguson*, 60 S. W. 2d 817 (Tex. Civ. App. 1933); *Morelli v. Fitch and Gibbons*, [1928] 2 K. B. 636; *Wren v. Holt*, [1903] 1 K. B. 610.

62. *Cliett v. Lauderdale Biltmore Corp.*, 39 So. 2d 476 (Fla. 1949). It is stated that there is "in this country a warranty of wholesomeness peculiar to the sale of food, based on the public policy of protecting the community from unwholesome provisions." *Perkins, Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 86 (1919).

63. 1 WILLISTON, SALES § 242b (1948).

64. "No obligation can be imposed upon the principal by the act of the agent outside of his real or apparent authority." *Harriss v. Tams*, 258 N. Y. 229, 179 N. E. 476, 479 (1932).

borne either by the agent or the third party. Of these latter two persons, the agent should assume the risk, for he has induced reliance and change of position by a third party because of express or implied representations of authority.⁶⁵

If, then, the agent is to be held responsible, upon what basis is his liability founded? In most jurisdictions today the agent is not liable on the unauthorized contract.⁶⁶ For example, "Wisconsin in common with many other states no longer adheres to the doctrine that the agent is liable upon the contract itself."⁶⁷ Instead it is held that "An agent impliedly warrants his authority to make the representations through which he induces another to make a contract with the principal. For the breach of that implied warranty, the agent is liable to the injured party for all damages which flow naturally from reliance upon the agent's assertion of authority."⁶⁸ From an analysis of cases, it will be found that this rule of liability upon an implied warranty remains in force by the weight of authority in this country.⁶⁹

To establish this liability on an implied warranty, the purported agent must make representations that he has authority to act in behalf of a principal.⁷⁰ The *Restatement* takes the position that this representation does not

65. 1 MECHAM, AGENCY § 1362 (1914).

66. *Wallace v. Bentley*, 77 Cal. 19, 18 Pac. 788 (1888); *Jacobs v. Williams*, 85 Conn. 215, 82 Atl. 202 (1912); *Tedder v. Riffin*, 65 Fla. 153, 61 So. 244 (1913); *Doolittle v. Murray*, 134 Iowa 536, 111 N. W. 999 (1907); *Noyes v. Loring*, 55 Me. 408 (1867); *Abbey v. Chase*, 6 Cush. 54 (Mass. 1850); *Cole v. O'Brien*, 34 Neb. 68, 51 N. W. 316 (1892); *Noe v. Gregory*, 7 Daly 283 (N. Y. 1877); *Russell v. Koonce*, 104 N. C. 237, 10 S. E. 256 (1889); *Haupt v. Vint*, 68 W. Va. 657, 70 S. E. 702 (1911).

67. *Boelter v. National Mfrs. Bank*, 194 Wis. 1, 215 N. W. 436 (1927).

68. *Harriss v. Tams*, 258 N. Y. 229, 179 N. E. 476, 478 (1932). *Cardozo, C. J.*, in *New Georgia National Bank v. Lippmann*, 249 N. Y. 307, 164 N. E. 108, 109, 60 A. L. R. 1344 (1928), stated that "at common law, the remedy against an agent signing a note without authority was not upon the note itself, but for breach of an implied warranty."

69. *Kohlberg v. Havens*, 41 Cal. App. 222, 182 Pac. 467 (1919); *Golden v. Ellwood*, 299 Ill. 73, 132 N. E. 223 (1921); *Chamberlain v. Spalding*, 170 S. W. 2d 454 (Mo. 1943); *Christensen v. Nielson*, 73 Utah 603, 276 Pac. 645 (1929). In *Groeltz v. Armstrong*, 125 Iowa 39, 99 N. W. 128, 129 (1904), the rule is aptly stated: "It is well settled that an agent purporting to act for and bind a principal whom he has no authority to bind, and who does not thereby become bound, is liable, not on the contract which he attempts to make, but for breach of implied warranty." The position taken by the RESTATEMENT, AGENCY § 329 (1933), is stated as follows: "[A] person who purports to make a contract, conveyance, or representation on behalf of a principal whom he has no power to bind thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized."

Contra: *Lutz v. Van Heynigen Brokerage Co.*, 199 Ala. 620, 75 So. 284, 287 (1917). The court in this case stated that "The manifest effect of our decision in *Ware v. Morgan* . . . was to exclude the recognition of the remedy by an action against the pseudo agent on his implied warranty that he was authorized to contract for his identified principal. . . . There are respectable authorities for the view, pronounced in more recent times, that recognizes the right of the contracting party, who has been disappointed by the failure of the ostensible agent to possess authority to bind his ostensible principal, to sue the ostensible agent for a breach of his implied warranty of authority to engage for his disclosed principal. . . . [W]e do not feel justified at this late day in altering the very clear doctrine set forth . . . in our case of *Ware v. Morgan*."

70. 1 MECHAM, AGENCY § 1366 (1914). "[I]n order to enable a plaintiff to maintain an action he must prove misrepresentation in fact,—that is to say, a representation by the defendant that he was authorized to sign on behalf of an alleged principal when

have to be expressly or directly made; it is enough if the agent misstates facts which if true would authorize him to make a contract.⁷¹ It is also important to note here that many courts regard it immaterial that the representations were made in strict good faith.⁷² The usual statement of this view is to the effect that the agent is personally liable "even if he knew of his lack of authority and assumed to act as if he were authorized, or whether he honestly was of opinion that he possessed authority when as matter of fact he had none."⁷³ Of course, if the representations were fraudulently made, an action in tort for deceit would probably lie. But in order to provide a remedy in situations where the misrepresentation is innocently made, the courts, one text-writer has said, "have invented the fiction that the agent 'warrants' his authority whenever he makes a contract for his principal, and allow an action for the breach of this warranty of authority."⁷⁴

Here again, the nature of the warranty of authority appears as an obligation imposed by law. No sale has taken place, the agent is not liable on the unauthorized contract, and yet the law imposes upon him an absolute liability. In *Moore v. Maddock*,⁷⁵ Lehman, J., clearly stated that "An action for breach of warranty rests upon a contract which the law implies. . . . The only promise or warranty on the part of the defendant . . . is implied by the law, regardless of the defendant's actual intent."

INJURIES SUSTAINED BEFORE SALE COMPLETED

What is the liability of a store or manufacturer when before a sale is consummated, a container explodes causing injury?⁷⁶ Recovery has generally not been allowed on an implied warranty basis. Illustrative of this view is the case of *Lasky v. Economy Grocery Stores*.⁷⁷ Here the plaintiff was injured when a bottle of tonic exploded. The plaintiff had not purchased this tonic. The court denied recovery on the theory that since there was no sale, there could be no warranty. Merchandise in a self service store is treated as the

in fact he was not so authorized,—but he need not prove that this misrepresentation was due to an omission or wrong of the party signing." To complete the picture of liability of the agent, it must be shown in addition to the misrepresentation, that the agent in fact had no authority. *Id.* § 1366. Also the third party must have relied on the misrepresentation which caused the injury. *Id.* § 1369.

71. RESTATEMENT, AGENCY § 329, comment *c* (1933).

72. *Groeltz v. Armstrong*, 125 Iowa 39, 99 N. W. 128, 129 (1904): "In order to establish the individual liability of the person thus purporting to act as agent, it is not essential to show that his express or implied representations as to authority were intentionally false." See also, *Williams v. DeSoto Oil Co.*, 213 Fed. 194 (8th Cir. 1914); *Magaw v. Beals*, 242 Mass. 321, 136 N. E. 174 (1922); *Christensen v. Nielson*, 73 Utah 603, 276 Pac. 645 (1929).

73. *Magaw v. Beals*, 242 Mass. 321, 136 N. E. 174, 175 (1922).

74. HUFFCUT, AGENCY § 183(2) (1901). See also *Moore v. Maddock*, 251 N. Y. 420, 167 N. E. 572, 574, 64 A. L. R. 1189 (1929), where the court says that "The doctrine of an implied warranty is based upon a fiction. . . ."

75. 251 N. Y. 420, 167 N. E. 572, 573, 64 A. L. R. 1189 (1929).

76. This discussion does not intend to probe into the problem of whether the manufacturer or seller is the preferred person to stand the loss.

77. 319 Mass. 224, 65 N. E. 2d 305 (1946).

property of the store until paid for.⁷⁸ Thus, where there is an injury before a sale, it would seem impossible to find a warranty under section 15 of the Sales Act.

Certain cases have come very close to the imposition of an implied warranty. In *Stolle v. Anheuser-Busch*,⁷⁹ the plaintiff was injured when a bottle of beer belonging to a customer exploded. The court applied the doctrine of *res ipsa loquitur* and allowed recovery, saying, "Obviously this should be at his [manufacturer's] risk. Public policy requires that the manufacturer should assume the risks and hazards of explosion incident to the reasonable and ordinarily careful transportation and handling of these goods in the usual course of business."⁸⁰ This sounds very much of absolute liability. Still another decision is of the same tenor: "[I]f these goods are so inherently dangerous from their frequent explosions . . . that they cannot be made safe, then placing them upon the market is indictable, as well as makes the manufacturers and all vendors liable to actions for any damage accruing."⁸¹ While *res ipsa loquitur* has been applied in some of these cases,⁸² it has been refused in others on the basis that the instrumentality was not within the control of the defendant at the time of the accident.⁸³

What method of recovery does the plaintiff have in such cases? Again, it is almost impossible to prove negligence in such cases.⁸⁴ One plaintiff attempted to show that title passed when the bottle was removed from the shelf, but this was rejected.⁸⁵ Still another suggestion is to the effect that recovery can be had on the basis of the doctrine of business invitee and thus impose liability on the shop owner to provide safe premises.⁸⁶

It is submitted that recovery can be had by implied warranty. Section 15 of the Sales Act only defines what warranties are implied in sales. It does not include warranties in other kinds of transactions. Recovery should *not* be sought under the Sales Act in these cases. Implied warranties are obligations imposed by law. A warranty may be imposed here as it is done in the restaurant situation, the bailor-bailee cases or in the field of agency. The

78. *Gargaro v. Kroger Grocery & Baking Co.*, 22 Tenn. App. 70, 118 S. W. 2d 561 (W. S. 1938).

79. 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001 (1925).

80. 271 S. W. at 500.

81. *Grant v. Graham. Chero-Cola Bottling Co.*, 176 N. C. 256, 97 S. E. 27, 29, 4 A. L. R. 1090 (1918).

82. *Stolle v. Anheuser-Busch*, 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001 (1925); *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 73 S. E. 1087 (1912).

83. *Wheeler v. Laurel Bottling Works*, 111 Miss. 442, 71 So. 743 (1916); *Cashwell v. Fayetteville Pepsi-Cola Bottling Co.*, 174 N. C. 324, 93 S. E. 901 (1917); *Glaser v. Seitz*, 35 Misc. 341, 71 N. Y. Supp. 942 (Sup. Ct. 1901).

84. The plaintiff has an impossible task because he cannot tell when the particular bottle was made, what care was taken in the bottling process, or what treatment it was given after being received in the particular store.

85. *Loch v. Confair*, 63 A. 2d 24 (Pa. 1949). The court held that the customer has possession only; this is not the equivalent of delivery as in a sale.

86. 47 Col. L. Rev. 156 (1947).

defendant has put on the market or offered for sale a product which has caused injury to the plaintiff. The plaintiff is injured through no fault of his own. Upon whom should the burden fall?⁸⁷ The tendency today is in the direction of increased protection to the public. The reasons are well stated by Llewellyn, "That needed protection is twofold: to shift the immediate incidence of the hazard of life in an industrial society away from the individual over to a group which can distribute the loss; and to place the loss where the most pressure will be exerted to keep down future losses. . . . The customer, barring his own fault in use, should have no negligence to prove; that the article was not up to its normal character should be enough."⁸⁸

CONCLUSION

It is thus seen that an implied warranty has been imposed in cases involving bailment, the service of food and agent's representations. The basis for this liability is founded upon reliance by the plaintiff on the superior knowledge or skill of the defendant. These cases seem to indicate that there is no substantial reason for limiting the doctrine of implied warranty to sales. The Sales Act sets out what warranties will be implied where there is a contract to sell or a present sale of goods. It does not attempt to set out what warranties will be found in other transactions. A plaintiff can recover on implied warranty irrespective of the Sales Act.

The reasons for implying a warranty are many. In many situations it is almost impossible to prove negligence. Yet justice seems to require holding the defendant liable. He can better distribute the loss. The imposition of absolute liability on the defendant would encourage higher standards. A strong public policy demands that maximum protection be afforded the injured party in these situations. It has been suggested that the device most ready at hand to effectuate this policy is an extension of the strict liability of implied warranty.⁸⁹

Implied warranty is an absolute obligation imposed by law. It has been called nothing more than a method of shifting a loss which needs shifting;⁹⁰ or a fiction invented by the law to impose liability.⁹¹ At any rate the tendency today is in the direction of an increased use of the implied warranty.⁹² There is no basis in logic or policy for confining the doctrine of implied warranty to sales.

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87. 14 TENN. L. REV. 646 (1937).

88. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES § 341 (1930).

89. PROSSER, TORTS § 83 (1941).

90. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 343 (1930).

91. Moore v. Maddock, 251 N. Y. 420, 167 N. E. 572, 64 A. L. R. 1189 (1929).

92. Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927); VOLD, SALES 469 (1913); Note, 1939 WIS. L. REV. 459; 1 VAND. L. REV. 467 (1948).