THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

The Twenty-fifth Annual Meeting of the Canadian Bar Association will be held in the City of Toronto, on the 11th, 12th and 13th days of September, 1941.

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CASE AND COMMENT

TORTS — MANUFACTURER'S LIABILITY TO ULTIMATE CONSUMER — WARRANTY.—In *Arendale* v. *Canada Bread Co. Ltd.*[1] the plaintiff suffered injury owing to the presence of particles of glass in a slice of bread which she was eating which came from a wrapped loaf manufactured by the defendant and purchased from its driver by a sister of the plaintiff. The Ontario Court of Appeal imposed liability,[2] but the grounds of decision advanced by Riddell J.A., while unsupportable by Canadian or English authority,[3] might be construed as an attempt to break new ground in the field of manufacturers' tort liability. The learned Judge stated:[4]

> While, perhaps, it cannot be definitely drawn from the English and Scottish decisions; and, possibly, not from our own, I am of the opinion (upon which I rest my judgment), that when one manufactures for human consumption, any article, fluid or solid, he putting it on the market gives an implied warranty that it contains no deleterious substance; and that if the ultimate consumer is injured by the presence of such deleterious substance he is entitled to damages unless the manufacturer proves that it was there introduced by some agency

[1] [1941] 2 D.L.R. 41.

[2] The Court consisted of Riddell, McTague and Gillanders JJ.A. Gillanders J.A. proceeded on the orthodox ground of duty to the ultimate user, and held that *res ipsa loquitur* was applicable; *cf.* *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85. McTague J.A. agreed.

[3] *Cf.* SALMOND ON TORTS, 9th ed., at pp. 542 *ff.* and WINFIELD, TEXT-BOOK OF THE LAW OF TORT at pp. 571 *ff.* for the English view; there is no discussion of the possibility of a tort action for breach of warranty.

[4] [1941] 2 D.L.R. 41.

other than his own—in other words he must prove that this deleterious article did not obtain entrance through his act or negligence but that of some other. The onus is on the manufacturer so to prove.

Warranty, on any orthodox view, involves contract; but in the case at bar the liability could sound only in tort because there was no privity of contract between the parties to the action. How then could Riddell J.A. support the imposition of liability upon the defendant on the ground of "implied warranty"? He could have appealed to history since an action for breach of a warranty sounded originally in tort for breach of an assumed duty;[5] for, as was stated in an English text book, while "no one now regards an express warranty on a sale otherwise than as a matter of contract yet until the latter part of the eighteenth century the common practice was to declare on such warranties in tort."[6] Riddell J.A.'s short judgment, however, gives no indication of any reliance on ancient precedents nor does he give any analysis of the problem before him to jus ify a return to the original position. Support for that position can be found, nevertheless, in a number of recent American decisions.

These American cases have attempted to grapple with the problem of a manufacturer's liability to a sub-purchaser where damage is caused not owing to negligence, as for example in *MacPherson* v. *Buick Motor Co.*[8] and *Donoghue* v. *Stevenson*,[9]

[5] PROSSER ON TORTS (1941), at p. 690.

[6] POLLOCK ON TORTS, 9th ed., at p. 298. This statement was commented on by Pollock in the 10th edition at p. 303 as follows: "The explanation [of the practice of declaring on warranties in tort] is concisely given in a judgment of the Supreme Court of the U.S. by Holmes J., *F. L. Grant Shoe Co.* v. *Laird* (1909), 212 U.S. 445, 449; 'No doubt at common law a false statement as to present facts gave rise to an action of tort, if the statement was made at the risk of the speaker, and led to harm. But ordinarily the risk was not taken by the speaker unless the statement was fraudulent, and it was precisely because it was a warranty, that is, an absolute undertaking by contract that a fact was true, that if a warranty was alleged it was not necessary to lay the scienter.' *Cp.* the same learned judge's remarks as a member of the Supreme Court of Massachusetts, *Nash* v. *Minnesota Title Insurance and Trust Co.* (1895), 163 Mass. 574, 587." See HOLMES-POLLOCK LETTERS, Vol. 1, 193, where the foregoing and the statement quoted from POLLOCK ON TORTS, 9th ed., are reproduced in a note to a letter from Pollock to Holmes in the following terms: "My dear Holmes: I wish I had known your formula about the action for deceit earlier, though I believe it is better than our ancestors deserve; on the whole I have a poor opinion of their pleading logic. I suspect they shied for a long time at suing in assumpsit on a warranty because they could not believe that a single consideration could support more than one promise, nor yet evade this imaginary difficulty by supposing the consideration for the warranty to be not the contents of the principal contract, but the act of entering into it (a needless fetch, perhaps not wholly sound, but much less sound fictions have passed muster) . . . ."
See also AMES, LECTURES ON LEGAL HISTORY, 136–137.

[7] See Note (1940), 25 Minn. L. Rev. 83.

[8] (1916), 217 N.Y. 382, 111 N.E. 1050.

[9] [1932] A.C. 562.

but owing to the failure of the manufactured article to live up to some representation, express or implied, made by the manufacturer to promote the sale thereof. A major factor in this question is, of course, the sub-purchaser's or ultimate consumer's reliance on the representation. An action for breach of warranty offered the likeliest solution to the matter;[10] and in some of the cases in which such an action was brought the usual requirement of privity was dispensed with.[11] Especially with respect to actions against manufacturers of food stuffs has there been a developing case law supporting the holding that the manufacturer's warranty extends to the ultimate consumer.[12] But not in all cases allowing recovery by a sub-purchaser against a manufacturer for breach of warranty have the American courts boldly repudiated the requirement of privity. A number of theories have consequently been advanced to explain the basis of relief,[13] while seeking to preserve some semblance of the privity notion.

One of these theories regards the warranty as running with the chattel as in the case of covenants running with the land; another invokes the law of agency and regards the intermediate dealer as an agent; a third enables the sub-purchaser to sue as a third party beneficiary in respect of the warranty; a fourth has to do with an assignment of the manufacturer's warranty by the dealer to the sub-purchaser; and a fifth undefined ground of relief is advanced that "the manufacturer has represented the goods to be suitable by placing them on the market."[14]

Recovery by a sub-purchaser against a manufacturer for breach of warranty, express or implied, imposes on the latter a

[10] A leading case is *Baxter* v. *Ford Motor Co.* (1932), 168 Wash. 456, 12 P. (2d) 499, 15 P. (2d) 1118; (1934), 179 Wash. 123, 35 P. (2d) 1090; the manufacturer represented in literature advertising his cars that the windshields were of shatterproof glass. The purchaser of a car from the dealer found this representation to be false when a stone thrown up by a passing car shattered the windshield and injured him. Liability was imposed but the ground of relief is none too clear from the judgment; see note (1933), 18 Cornell L.Q. 445. A subsequent case by the same court indicated that the basis of relief was for breach of express warranty although there was no privity; see *Murphy* v. *Plymouth Motor Corp.* (1940), 100 P. (2d) 30 (Wash.). A similar result was reached in *Bahlman* v. *Hudson Motor Car Co.* (1939), 290 Mich. 683, 288 N.W. 309. Here the manufacturer stated in its advertising literature that its cars had a solid, seamless steel top, but a purchaser from a dealer found when his car overturned in an accident that the top was not seamless.

[11] See Note (1929), 42 Harv. L. Rev. 414; Note (1938), 52 Harv. L. Rev. 328.

[12] *McNicholas* v. *Continental Baking Co.* (1938), 112 S.W. (2d) 849 (Mo.); *Curtiss Candy Co.* v. *Johnson* (1932), 163 Miss. 426, 141 So. 762.

[13] For a discussion of these theories, see Leidy, *Another New Tort* (1940), 38 Mich. L. Rev. 964; Note (1940), 25 Minn. L. Rev. 83.

[14] PROSSER ON TORTS (1941), at p. 691; the author points out that "a minority of jurisdictions" are responsible for the theories set out.

strict liability with, no doubt, its attendant characteristics.[15] We are told in the latest American text book on torts[16] that while the majority of the American courts refuse to impose a strict liability, even as to food, the tendency is in that direction, that it will be the law of the future and generally accepted; though whether this liability should be imposed by torturing the doctrine of warranty is another question. The author of the book, Professor Prosser, states succinctly the reason for this development:[17]

> With the liability of the manufacturer to the ultimate consumer once established on the basis of negligence, it was to be expected that some attempt would be made to carry his responsibility even further, and to find some ground for strict liability which would make him in effect a guarantor of his product, even though he had exercised all reasonable care. In recent years a considerable impetus has been given to this attempt, which has met with the approval of every legal writer who has discussed it, by an increased feeling that social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer, since he is best able to distribute the risk to the general public by means of prices and insurance. Added to this is the difficulty of proving negligence in many cases where it exists, even with the aid of *res ipsa loquitur*, together with the wastefulness and uncertainty of a series of warranty actions carrying liability back through retailer and jobber to the original maker, the practice of reputable manufacturers to stand behind their goods as good business policy, and a recognition that the intermediate seller is usually a mere conduit to market the product. There is an obvious argument that in the public interest the consumer is entitled to the maximum of protection at the hands of some one, and that the producer, practically and morally, is the one to provide it.

It is not clear from Riddell J.A.'s opinion how far he is prepared to carry "implied warranty" as establishing a basis of liability in tort. For it may be noted that in the portion of his judgment quoted at the beginning of this note, after speaking of liability on the ground of implied warranty, he imposes a qualification where the manufacturer can disprove negligence or show that some other agency was responsible for the presence of the deleterious substance. This betrays confusion rather than consistency in working out a basis of liability.

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TECHNICALITIES AND SUBSTANTIVE RIGHTS.—Encouraged by the example of so distinguished a member of the judiciary as Lord Wright I send you a note on two interesting cases which

[15] For example, contributory negligence might be no defence.
[16] PROSSER ON TORTS (1941), at p. 692.
[17] *Ibid.*, at p. 688.

seem to indicate a trend on the part of English Courts to achieve real justice despite all obstacles.

In the case of *United Australia, Limited* v. *Barclays Bank, Limited,* [1941] A.C. 1, the House of Lords reversed the trial judge, supported as he was by a unanimous judgment of the Court of Appeal, and rendered a judgment for the plaintiff which must, I think, commend itself as doing substantial justice.

The head note of the report reads as follows:—

> A cheque payable to the appellants was converted by the M. company and collected for that company by its bankers, the B. bank. The appellants brought an action against the M. company for the amount of the cheque either as money lent or as money had and received to the use of the appellants, but they discontinued that action and no final judgment was obtained. The appellants afterwards brought the present action against the B. bank for conversion of the cheque :—
>
> HELD, that the appellants by merely initiating proceedings against the M. company for money lent or for money had and received had not thereby elected to waive the tort so as to be precluded from bringing the present action in tort. In such a case it is judgment and satisfaction in the first action, and not merely the bringing of the claim, which constitutes a bar to a second action.

In so deciding the Court disapproved and refused to follow a dictum of Bovill C.J. in *Smith* v. *Baker* (1873), L.R. 8 C.P. at p. 355, where the learned Judge said:

> The law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so and bring his action for money had and received for the proceeds of goods wrongfully sold. The law implies, under such circumstances, a promise on the part of the tortfeasor that he will pay over the proceeds of the sale to the rightful owner. But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way. The principles which govern the subject are very well illustrated in the case of *Buckland* v. *Johnson,* where it is held that the plaintiff having sued one of two joint tortfeasors in tort could not afterwards sue the other for money had and received.

That dictum appears to have been quoted and relied on in subsequent judgments and by a text-book of the highest authority, namely, the 3rd Edition of Bullen & Leake.

Under the old rules as to joinder of causes of action, as they existed before the passing of the Common Law Procedure Act, a plaintiff could not, it seems, join in one action a claim in tort and a claim in assumpsit. This led to a suggestion that the

plaintiff being unable to claim both of these remedies in one action he was bound to make an irrevocable and final choice of one remedy or the other when he launched his action, and thereby elected to waive any other remedy.

This view, arising as it did out of the old form of action, was unanimously negatived in the instant case which determines that no election to waive the alternative remedy arises until judgment is taken. At page 29 Lord Atkin says:

> I protest that a man cannot waive a wrong unless he either has a real intention to waive it, or can fairly have imputed to him such an intention and in the cases which we have been considering there can be no such intention either actual or imputed. These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to effect actual rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.

And at page 21 Lord Chancellor Simon on concluding his judgment uses these words:

> My Lords, I am glad that it is possible to reach this result, for the alternative view, which is based upon a misreading of technical rules, now happily swept away, would have worked substantial injustice. The appellants have lost their money, and they have lost it owing to the tort of the respondent bank. Why should they not recover it in this action? Nothing that has previously happened in the proceedings against M. F. G., no earlier step taken by the appellants, have prejudiced the position of the bank in any way. All that the respondents have been deprived of is the fleeting prospect of avoiding responsibility if the appellants had succeeded in obtaining satisfaction from another party. The "general principles of right", to which the Court of Appeal referred in its judgment, would surely indicate that the respondent bank should not escape because the appellants have wasted time and money in pursuing another remedy which turned out to be illusory.

A similar judicial trend seems observable in the judgment of the Court of Appeal in *Rex* v. *Stafford*, [1940] 2 K.B. 33. The question arose out of a proceeding under the Highway Act 1935 to substitute a new way for an ancient public footpath and to close the latter. The final step prescribed by the statute was a certificate by the justices that the substituted footpath had been completed and put in good condition and repair.

Such a certificate was wrongly issued by the justices and disputes having arisen the municipal corporation moved for an order of certiorari to quash the certificate *ex debito justitiae*.

The Justices' certificate was issued in January 1938, and the application for certiorari was made March 31st, 1939. In the meantime houses had been built on the old footway and sold to purchasers. The writ of certiorari was refused by the Divisional Court on the ground that the issue of the writ was discretionary and that the Court ought not in the exercise of its discretion to grant an order of certiorari in view not only of the long lapse of time between the date of the certificate and the date of the application, but also of the fact that during that time a number of houses had been built upon parts of the site of the old footpath while the corporation stood by.

The Master of the Rolls at page 47 says:

> So long as the old highway remains open, the builders have no right whatsoever to build houses across it, and the effect of taking any step which will open up that highway again will be to put the builders in the position of having illegally obstructed the old footpath by building houses upon it, which incidentally we are told they have sold to purchasers. The position would be really a ridiculous one, if this Court, at this stage, and in the light of what has happened, were to take a course which would result in reopening that old footpath as a public highway, with all the consequences which flow from its status as a public highway. It seems to me that this state of affairs having been brought about with the full knowledge of the council, and indeed with their actual consent, so far as regards the building of the houses, it is quite possible for the Court to grant relief which will have the effect of quashing that certificate. The result, therefore, in my opinion, is that the Court, having regard to all the circumstances of this case, and in particular the knowledge and conduct of the council and the time which has elapsed, ought not in its discretion to grant the relief asked for.

I think that these cases are indicative of a judicial trend toward administration of the substantive law in accordance with general principles of right undeterred by technicalities of procedure.

By way of warning that the cases noted above are not to be taken as lendng encouragement to careless or irregular procedure whether before or at the trial or on appeal. I would like to add a note on some current aspects of our procedure as practised. For example, in the matter of pleading our rules of practice seem adequate and quite plain. Their fundamental object is to secure that both parties shall know what are the real points in issue between them, and each is bound to give his opponent all information that is requisite to prevent surprise at the trial; while material facts only and neither law nor evidence to prove facts are to be pleaded, yet in past years

these fundamental rules have often been disregarded and either through crafty design, but more often through incapacity, carelessness or sheer laziness, long loose and rambling pleadings make up a record that fails to disclose the real issues which are to be tried, and some times fails to disclose any definite issues of law or fact.

This prolixity and vagueness in the record renders it next to impossible for the trial Judge to confine the evidence to what ultimately turns out to be the only real issue. The result is that the trial lasts for days when it ought to be concluded in hours, thus unduly increasing the costs both below and on appeal.

Some of the customary notices of appeal to the Court of Appeal and some of the alleged statements of law and fact filed by the parties might be subjected to similar criticism.

But the point is not new. Nearly fifty years ago Lord Halsbury in *The Calliope*, [1891] A.C. at page 13 said:

> I think that this case affords a somewhat important illustration of the necessity of calling upon litigants to place in some written form of pleading the precise form of action on which they rely, for I think that the time during which your Lordships have been occupied (4 days) and the time which has been occupied in the courts below has to a considerable extent been the result of an *oscillation in the minds* of the advisers of the plaintiff as to what was their cause of action.

I merely refer to these procedural abuses in order to emphasize the warning that the English cases which I have noted relate strictly to substantive rights and afford no warrant for kind-hearted judicial condonement of breaches of the rules of procedure.

I well recall how fifty years ago the customary order for payment *forthwith* by the losing party of the costs of interlocutory motions operated as a stimulant to sound and correct practice.

When the Judicature Act was passed in this province the revulsion from overstrict practice which obtained in the days of special demurrers swung the pendulum far in an opposite direction, but hoping that I am not over-optimistic, I think I see a glimmer of improvement and that the pendulum is perhaps beginning to swing back toward an observance and enforcement of our rules of practice which in most respects are quite adequate.

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EVIDENCE — DISCOVERY — PRIVILEGE AGAINST SELF-CRIMINATION.—The matter of the right of a party to a civil action to refuse to answer on discovery questions the answers to which might incriminate, recently commented on in this REVIEW[1] in connection with the judgment of the British Columbia Court of Appeal in *Staples* v. *Isaacs*,[2] has come up again in *Campbell* v. *Aird*,[3] decided by O'Connor J. of the Supreme Court of Alberta. The decision of the learned judge is in direct conflict with what was decided in *Staples* v. *Isaacs*. In holding that the defendant was not excused from answering questions on discovery because of self-crimination and that she was probably protected in respect of any subsequent prosecution based on such answers, by the combined effect of s. 7 of the Alberta Evidence Act[4] and ss. 5 (2) and 35 of the Canada Evidence Act,[5] O'Connor J. does not follow *Staples* v. *Isaacs* although there is no apparent distinction upon which a contrary holding can be justified.

It is unnecessary to repeat here what has already been said previously in this REVIEW[6] in connection with *Staples* v. *Isaacs*, but it may be enough to point out that the crux of the problem lies in the meaning of the word "witness" in s. 5 (2) of the Canada Evidence Act, for that, and not the provisions of any provincial Evidence Act, is what gives protection against criminal proceedings to persons compelled to give criminating answers to questions. *Staples* v *Isaacs* turned on the fact that (i) The British Columbia Court of Appeal did not think that the common law privilege against self-crimination was meant to be abrogated unless there was protection against subsequent use of the answers given; and (ii) s. 5 (2) of the Canada Evidence Act which purported to afford this protection in respect of subsequent criminal proceedings applied only to a "witness", which under that Act did not include an examinee for discovery. A simple amendment would overcome this defect, but until made *Staples* v. *Isaacs* appears to be sounder in result than *Campbell* v. *Aird*.

[1] (1940) 18 Can. Bar Rev. 573.
[2] [1940] 3 D.L.R. 473.
[3] [1941] 2 D.L.R. 807.
[4] R.S.A. 1922, c. 87. An amendment in 1931, [c. 23, s. 2] provided that "witness" should include an examinee for discovery. In holding that this amendment was a "law of evidence" within s. 35 of the Canada Evidence Act O'Connor J. differed from the opinion of Sloan J.A. in *Staples* v. *Isaacs*.
[5] R.S.C. 1927, c. 59.
[6] (1940) 18 Can. Bar Rev. 573.