

## Extent of Implied Warranty of Fitness - Poplar v. Hochschild, Kohn & Co., Inc.

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## EXTENT OF IMPLIED WARRANTY OF FITNESS

### *Poplar v. Hochschild, Kohn & Co., Inc.*<sup>1</sup>

Plaintiff bought a box of face powder and other toilet articles from defendant department store. The set was contained in an ornate box, decorated with two metal stars. In opening the box, plaintiff cut her finger on one of these stars. She brought an action against the department store, alleging that it was liable for breach of implied warranty of fitness. The declaration stated that plaintiff bought the powder for toilet and beautifying purposes. The Court of Appeals affirmed the lower court which had sustained defendant's demurrer, stating as reasons for doing so: (1) that an implied warranty of fitness for a particular purpose does not cover defects in the container in which the goods are packed, and (2) that there is no implied warranty of fitness as to patent defects where plaintiff has examined the goods.

One of the changes wrought by the Uniform Sales Act in respect to warranty of fitness for a particular purpose was to extend the liability of the manufacturer or grower for breach thereof to all sellers, be they growers or manufacturers or not.<sup>2</sup> A Maryland case which clearly and concisely points out this change is that of *Luria Bros. & Co. v. Klaff*.<sup>3</sup> There the plaintiff, who was the seller but not the manufacturer, brought an action to recover the price of several carloads of metal. Defendant buyer claimed that he was entitled to a set-off arising out of a prior sale of steel

<sup>1</sup> 24 A. (2d) 783 (Md., 1942).

<sup>2</sup> Sec. 15 (1), found in Md. Code (1939) Art. 83, Sec. 33: "Subject to the provisions of this sub-title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

<sup>3</sup> 139 Md. 586, 115 A. 849 (1921).

shells. He alleged that plaintiff knew that defendant was buying the shells for remelting purposes, that the defendant relied on the plaintiff's skill and judgment, and that the shells were not fit for the purposes for which they had been purchased. The trial court held that there was no implied warranty of fitness since the seller was not the manufacturer. This was reversed by the Court of Appeals, the latter court pointing out that the trial court had erroneously applied the common law rule rather than that set forth in the Uniform Sales Act.<sup>4</sup>

The rule is thus well settled that the seller impliedly warrants the fitness of the goods he sells where two elements are present, namely, (1) knowledge of the seller of the purpose for which the goods are being purchased, and (2) reliance of the buyer on the seller's skill and judgment. The necessity of the first of these two conditions precedent was pointed out in *King v. Gaver*.<sup>5</sup> In that case plaintiff had bought three heifer calves at a public sale. Subsequently he brought an action against the vendor for breach of an implied warranty of fitness, alleging that he had purchased the calves for breeding and dairy purposes and that they were unfit therefor because of their diseased condition at the time of the sale. The Court found for the defendant, one of the reasons for its decision being that there was no implied warranty that the heifers were adapted to breeding and dairying purposes as the buyer had not informed the seller of his anticipated use of the animals. The Court recognized, however, that the buyer is not required expressly to state his purpose, that this can be done by implication. And it is generally recognized

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<sup>4</sup>The language of the Court was as follows: "... the view taken by the court in regard to implied warranty was in accordance with the settled law of this state prior to the Uniform Sales Act . . . In *Commercial Realty and Construction Co. v. Dorsey*, 114 Md. 178 . . . the law of implied warranty was stated to be as follows: 'Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not his own . . . We have held with equal clearness that when the seller is not the manufacturer of the thing sold and the buyer has an opportunity of examining it there is no implied warranty, in the absence of fraud, that it shall be fit for the purpose for which it was bought . . . But the important change made by this section [15(1) of the Uniform Sales Act] was to put the seller, who is not the grower or manufacturer of the thing sold, in the position which was formerly held in this State by the manufacturer or grower only, in reference to the implied warranty mentioned.'

<sup>5</sup>175 Md. 76, 3 A. (2d) 863 (1939).

that where a buyer purchases an article commonly used for a particular purpose, he impliedly represents that he intends to use it in the usual manner.<sup>6</sup> For example, where he buys food at retail, he impliedly represents that his purpose is human consumption.

So in the case under consideration, the buyer by purchasing face powder at retail implied that the face powder was to be used for toilet and beautifying purposes, and the seller was aware of that purpose. As to the second condition precedent, that the buyer rely on the seller's skill and judgment, unless the former selects the particular item he wants, this may also be implied from the fact that the seller is in a position of superior knowledge of the subject-matter of the contract. Frequently involved in many of the cases dealing with this point is the "trade name" provision of the Sales Act which provides that in the case of a sale of a specified article under its trade name there is no implied warranty of fitness.<sup>7</sup> It could be assumed that the present plaintiff bought the goods under a trade name, for all face powders handled by a modern department store are so sold. A strict and literal construction of this provision, without regard to the policy of the Act as a whole, might lead to the conclusion that the plaintiff could not recover on the theory of breach of implied warranty of fitness. The courts have, however, increasingly concerned themselves with determining who made the selection of the goods and tend to hold that, where the seller does the selecting, the fact that the article bears a trade name is immaterial. A case to that effect is *Parker v. Morgan*,<sup>8</sup> where it was held that the manufacturer impliedly represented that the heating system sold by him would meet the standard test in the locality, notwithstanding the fact that the system had been sold under a trade name. So it is well settled that in this case an implied warranty of fitness could exist.

The Court could have dismissed plaintiff's action on the ground which it briefly mentioned as a second reason for its decision, that is, admitting that the container was in fact defective, still there is no liability on the part of the seller because the defect was a patent one. Section 15(3) of the Uniform Sales Act provides that: "If the buyer has

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<sup>6</sup> WILLISTON, SALES (1924) 485; VOLD, SALES (1931) 485.

<sup>7</sup> Md. Code (1939) Art. 83, Sec. 31(4): "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

<sup>8</sup> 170 Md. 7, 183 A. 224 (1935).

examined the goods, there is no implied warranty in regard to defects which such examination ought to have shown." Although there is considerable confusion on the effect of inspection by the buyer in various fact situations,<sup>9</sup> yet it is clear that where the buyer has in fact inspected the goods and the defect is not latent, the seller does not impliedly warrant the fitness of the goods. A recent case so holding is that of *King v. Gaver*,<sup>10</sup> where the Court held that because the buyer had examined the heifers at the time of the sale and saw tags on them which might have indicated the presence of Bang's disease, Section 15(3) applied and that, therefore, the seller did not impliedly warrant the fitness of the calves. The effect of the examination in cases where the defect is patent is to negative the presumption that the buyer relied on the seller's skill and judgment.

The major portion of the Court's opinion dealt with a phase of the law of implied warranties never before considered by the Maryland court, namely, whether an implied warranty of fitness covers defects in the container of the goods sold. The Court held that it did not. In so deciding, reliance was placed on the Illinois case of *Crandall v. Stop and Shop, Inc.*<sup>11</sup> In that case the plaintiff was the purchaser of a jar of fruit preserves. In opening the jar, plaintiff was injured as a result of the spring clamp suddenly flying up and striking her in the face. The Court found that by the exercise of due care plaintiff could have avoided the accident and that the jar was not in fact defective. Then, expressing concurrence with a case decided in the Superior Court of Los Angeles,<sup>12</sup> the Illinois Court went on to say that:

" . . . it was not contemplated that a warranty of fitness for a particular purpose was thereby attached to many forms of container in which goods sold for human consumption are confined or packed, but only to the contents thereof—the food or beverage or substance which the purchaser was seeking or buying; that the container is but an incident to the goods thus offered for sale, and while it is just and reasonable to burden the seller with an implied warranty of fitness

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<sup>9</sup> See Note, *Sales—Warranties—Effect of Buyer's Inspection Upon an Express or Implied Warranty in the Sale of Goods* (1939) 23 Minn. L. Rev. 941.

<sup>10</sup> 176 Md. 76, 3 A. (2d) 863 (1939).

<sup>11</sup> 288 Ill. App. 543, 6 N. E. (2d) 685 (1937).

<sup>12</sup> Reported in the Chicago Daily Law Bulletin of April 20, 1936.

or of merchantable quality of the contents of a container or bottle, or of a sealed package, it would be unreasonably burdensome to attach such warranty to the container of foodstuffs sold, and thus, in effect, make the retail seller of every bottle of pop or carbonated beverage, in the manufacture of which he has no part, an insurer against damage from explosion of such bottle'."

It is submitted that a more realistic approach is that taken by the English court in the case of *Gedding v. March*.<sup>13</sup> There the plaintiff bought some bottles of mineral water from the defendant. One of the bottles burst and plaintiff was severely injured. The Court found that the accident arose from a latent defect in the bottle. In holding the defendant liable for a breach of implied warranty of fitness, the Court pointed out that the mineral water had to be delivered in some sort of container and so both the mineral water and the bottles were sold under a contract of sale, to which the warranty applies. This is a sound result. The purpose of the warranty provisions of the Sales Act is primarily to afford a reasonable measure of protection to the buying public. Such a purpose would be defeated if courts take the narrow view that by buying goods which have to be supplied in containers of some sort, if the goods themselves cause injury, the buyer is protected while if the container causes injury, the buyer is not protected. The two—the product and its necessary container—go hand in hand; injury resulting from a defect in the latter should have the same consequence as to the seller's liability for defects as the former. If a court will go so far as to hold that the seller is an insurer of the contents of the container, which the Illinois Court found to be reasonable, why should it be unreasonable for him to be an insurer of the container itself? His measure of control over each is the same. It is submitted that while the result in the principal case is sound on the particular facts yet in a case having a similar factual set-up but with the defect in the container being latent rather than patent, the Court should consider the factual question of whether the defect was one which the buyer could have discovered by reasonable inspection. If this question is answered in the negative, then the seller should be held liable to the buyer under the warranty of fitness provision of the sales act.

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<sup>13</sup> [1920] 1 K. B. 668.