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Measure of Damage for Breach of Warranty and for Fraudulent Representations

Joseph Maimon

MEASURE OF DAMAGE FOR BREACH OF WARRANTY AND FOR FRAUDULENT REPRESENTATIONS—Two rules with respect to the measure of damages for breach of warranty have been enunciated by the English Courts. The first rule was established by the decision in *Towers v. Burret, (1786) 1 T. R. 133.* In that case the defendant sold a pair of horses to the plaintiff, warranting them to be three years old; in fact they were five years old. The court permitted recovery of the difference between the price paid and the actual value of the horses. In a subsequent case[1] an action was brought for breach of warranty. The court instructed the jury to find as damages the difference between the price paid and the value of the property. The jury did not follow the court's instruction but it can readily be understood what rule the early English courts applied in respect to the measure of damages for breach of warranty. This rule has been adopted by some of the courts in this country, but not in Pennsylvania. The basis for this early doctrine is, that the courts were of the opinion that if a purchaser of an article pays less than the actual value, he should not be deprived of his bargain. On the other hand, if the purchaser pays more than the actual value he should be held to his bargain.

With respect to the second rule, the learned and respected Lord Eldon through his *dictum*[2] may be deemed to be its creator. Lord Eldon stated that the measure of damage for the breach of warranty should be the difference between the value of the article as warranted by the seller and its actual value as sold. In a later case involving the same question the court refused to follow the old rule.[3] The court applied the doctrine set forth by Lord Eldon.[4]

The question naturally arises as to why the second rule was adopted when the early cases had settled the rule on the subject. The answer to this question is by no means difficult. Theoretically the second rule is sound and applying it still further in a practical manner, we can readily understand its usefulness and fairness. The underlying thought seems to be that if another measure of damage were used, the buyer would be deprived of his bargain.

Since the case of *Cothers v. Keever, (1846) 4 Pa. 168,* the courts of this state have used as the measure of damage

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[1]Fielder v. Starkin, (1788) 1 H. Bl. 17.

[2]Curtis v. Hannay, (1800) 3 Esp. 82.

[3]Clare v. Maynard, (1837) 7 C. & P. 741.

[4]Curtis v. Hannay, (supra).

the difference between the actual value of the goods and its value as it would have been if as warranted. In the case mentioned, the breach of warranty was set us as a defense. It was held that the measure of damage is not the difference between the actual value and the price paid. This case is later cited with approval.[5]

The earliest case in Pennsylvania where an action was brought for breach of warranty involved the exchange of land for a quantity of shares of stock.[6] The defendant warranted that the stock would yield a certain amount of dividend for a definite length of time. The measure of damage used was the difference between the actual value of the stock and its value if it had been as warranted. Having bound himself by his promise that the stock would yield a certain per. cent. of dividend, the defendant obligated himself to pay such sum as with the actual value would equal the value if as warranted. He could in no way escape from his obligation by pleading a measure of damage other than the one set forth, i. e., merely to pay the amount of such dividends.

From a practical point of view, where the defendant, in an action against him for breach of warranty, has not produced evidence as to the actual value of the property, the court presumes the contract price to be the actual value. The rule as to the measure of damage is still recognized and the contract is not to be used where the real value may be ascertained.[7] The basis for the rule is that if a buyer made a bad bargain he is not to be reimbursed for what he lost by mere bad judgment by seeking damages for breach of warranty. This is the view in later Pennsylvania cases.[8] In ascertaining the value of the property involved at the time of the sale, the defendant may show the price he obtained for the goods at a public sale.[9] On the other hand, in a later case,[10] the plaintiff contended that the measure of damage was the difference between the value as warranted and the worth of the property for the plaintiff's purposes. The court rejected this theory and stated that for the plaintiff's purposes the property might

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[5]Raymond Bros. v. Penna. Co., (1910) 42 Pa. Super. Ct. 601.

[6]Struthers v. Clark, (1858) 30 Pa. 210.

[7]Sugworth v. Seffel, (1874) 76 Pa. 476.

[8]Wasserman v. Fleisher, (1915) 249 Pa. 29; Raymond Bros. v. Penna. Co. (supra).

[9]Freyman v. Knecht, (1875) 78 Pa. 141.

[10]Himes v. Krehl, (1893) 154 Pa. 190.

now be worthless; however, in the open market it might have a fair value. Why should the defendant seller lose the benefit of that fair value? This is supported by subsequent cases.[11] Introducing evidence as to the actual value of the property and its value if the goods had been as warranted is likewise important. The court will then, as a matter of law, instruct the jury as to the measure of damage.[12] For the measure of damage see the cases cited.[13]

The enactment of the Uniform Sales Act in Pennsylvania[14] did not change the law as to the measure of damage for breach of warranty. The Act is declaratory of the common law of Pennsylvania on the subject. The sections dealing with the measure of damage for breach of warranty, namely, Section 69, Clauses 6 and 7, have been construed together, since the cases arising since the adoption of the Act involve both clauses.

In addition to the recovery as stated in Clause 7 of Section 69, the plaintiff could also recover expenses, if made in good faith and not too remote under Clause 6. The expenses incurred are held to be the loss directly and naturally resulting in the ordinary course of events.[15] Where a defendant by way of recoupment set up the measure of damage to be the same as that under Sect. 69, Clauses 6 and 7 it was held, that unless there were special circumstances showing proximate damage to a greater amount, the plaintiff would recover the difference between the value of the goods at the time of the delivery to the buyer and the value they would have had if they had been as warranted.[16] On the other hand, the buyer may set up the seller's breach of warranty by way of recoupment in diminution of the price.[17] Where the buyer shows, through special circumstances, that his damage is greater than the usual amount allowed under the Act, he is entitled to re-

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[11]Pasquinelli v. Southern Macaroni Mfg. Co., (1922) 272 Pa. 468; Samuel v. Delaware River Co., (1918) 69 Pa. Super. Ct. 605.

[12]Shoe v. Maerky, (1907) 35 Pa. Super. Ct. 270.

[13]Jones & Laughlin Steel Co. v. Wood & Co., (1915) 249 Pa. 423; Samuel v. Delaware River Steel Co., supra.

[14]Act of May 19th, 1915, P. L. 543.

[15]Griffin v. Metal Products Co., (1919) 264 Pa. 254; Rex Auto Exchange v. Hoffman, (1924) 84 Pa. Super. Ct. 369; Hoffman v. Hockfield Bros., (1920) 75 Pa. Super Ct. 595.

[16]Hoffman v. Hockfield Bros., supra.

[17]Plympton Cabinet Co. v. Rosenberg, (1929) 96 Pa. Super. Ct. 330.

cover for such damage. By special circumstances is meant those circumstances where the buyer has acquainted the seller with sufficient facts at the time the contract was made, so that the damage sustained by the buyer was reasonably contemplated.[18]

Another subject with relation to damages is the measure of damage for fraud or fraudulent representations.

In England, as well as in this country, the law on the subject is far from harmonious. On the one side we have the rule as set forth in *Peek v. Derry, (1887) 37 Ch. Div. 541,*[19] namely, that the measure of damage in actions for fraudulent representations is the difference between the real value of the property and the price paid. The real value was determined as of the time of purchase which could be shown by subsequent events and was not to be measured by the market value at the time of purchase. In using market value, there would be a likelihood that a mistake would be made as to the value of the property. This rule has been followed in England.[20] The other line of cases hold that the measure of damage is the difference between the actual value and the represented value.[21]

In Pennsylvania the decisions are in hopeless conflict; some holding the measure of damage to be the difference between the value of the property at the time of the sale and the price paid; others holding the measure of damage to be the difference between the actual value and the represented value.[22] The reason for the former rule seems to be, that if any other measure of damage were used, one would be recovering purely speculative profits he might have anticipated but never made; whereas he should only recover that with which he has parted for which he has received no equivalent.[23] In a case involving the sale of stock[24] the measure of damage for fraud was the difference

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[18]Wolstenholme v. Randall, (1928) 295 Pa. 131.

[19]Reversed on some other ground, Derry v. Peek, (1889) 14 App. Cus. 337.

[20]Arkwright v. Newbold, 17 Chan. Div. 301; Huntingford v. Massey, 1 F. & F. 690.

[21]Clare v. Maynard, (1837) 7 C. & P. 741; Towers v. Burrett, (1786) 1 T. R. 133.

[22]Long v. McAllister, (1922) 275 Pa. 34 and cases cited therein as to both rules.

[23]High v. Berret, (1892) 148 Pa. 261, cited with approval in Browning v. Rodman, (1920) 268 Pa. 575.

[24]Curtis v. Buzard, (1916) 254 Pa. 61, cited with approval in Long

between the actual value and the price paid. If the measure had been the actual value and represented value it might have been possible for the buyer to show that the represented value was enough more than the actual value to thereby wipe out the purchase price and get the stock for nothing.

As to the second rule, it was first enunciated in a case where the defendant had told the plaintiff that the property in question was sound, when in fact it was not. The court held the measure of damage to be the difference between the actual value of the property and the represented value.[25] The basis for this rule is, that the defrauded party is entitled to the benefit of his bargain and should be put in the same position as he would have been had the representation been true. Another reason is that if the plaintiff made a good bargain, he is entitled to the bargain. But the benefit received cannot be set off against the claim that the seller should make good his false assertions. If the plaintiff made a bad bargain he should likewise be held to that bargain and he cannot get more damages because of the defendant's fraud.[26]

A recent case on this subject is that of *Kriner v. Dinger, (1929) 297 Pa. 576.* The plaintiff sold to the defendant a mill property in return for $5000 par value stock of a milling co. organized by the defendant and $5000 par value stock of a certain coal mining co., as part payment of the purchase price. The sale to defendant was made in reliance on certain false and fraudulent representations made by the defendant as to the quality and quantity of coal to be mined by the latter corporation. The stock was in fact worthless and had been returned to the defendant. In the trial court the *defendant* asked the court to charge that the measure of damage is the "difference between the value of the stock as it was represented to be and the value as it really was". This measure of damage limited the inquiry to the stock of the mining co. Defendant now complains that the charge was wrong. The Court held that defendant cannot now complain; the charge when given

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v. McAllister, supra; Grant v. Lovekin, (1920) 285 Pa. 257; O'Rourke v. Blockson, (1918) 69 Pa. Super. Ct. 93.

[25]Thompson v. Burger, (1860) 36 Pa. 403.

[26]Stetson v. Croskey, (1866) 52 Pa. 230; cited with approval in Rock, Executor v. Cauffiel, (1921) 271 Pa. 560; Martachowski v. Orawitz, (1900) 14 Pa. Super. Ct. 175; Smysers v. McMahon, (1918) 71 Pa. Super. Ct. 142.

was of his own making and he cannot be heard to complain. Another reason given was that the defendant failed to show the actual value of the property in question at the time the agreement was made.

The Court held the measure of damage to be the difference between the actual value of all that the plaintiff received and all that he gave. In other words it was the difference between the actual value and the price paid. This case does not set forth the represented value as the measure of damage. The only reason why the represented value was used in the trial court is because the defendant asked for it even though detrimental to him. In laying down the true measure of damage the court cites the case of *Browning v. Rodman, supra.*[27]

The latest case on this subject[28] holds that in the case of fraudulent representations in the sale of stock the measure of damage is the difference between the price paid and the actual value of the stock. In case the stock had no value, the amount would be determined by what the plaintiff had paid for the stock.

In summing up we find the following propositions to be true as to the measure of damage:—

1. Breach of Warranty—The difference between the price paid and the value of the goods had the representations been true.

2. Fraudulent Representations—The difference between the price paid and the actual value.

Are we to infer that the courts are placing a premium on fraud when they allow greater damages for breach of warranty than for fraudulent representations?

Joseph Maimon

RESTORATION OF CONSIDERATION IN INFANTS' DISAFFIRMANCE OF PURCHASE OF PERSONAL PROPERTY—Installment selling has become one of the common features of our every day life. Automobiles, pianos, victrolas, household furniture, practically all ordinary commodities can now be bought on the time-payment plan. Often these sales are made to minors and these

[27]See Note 23.

[28]Hoagland v. Mulford, (1930) 148 A. 864; cites with approval—Curtis v. Buzard, supra; Browning v. Rodman, supra; Long v. McAllister, supra.