Volume 47
Issue 2 *Dickinson Law Review - Volume 47, 1942-1943*

1-1-1943

Recent Cases

RECENT CASES

IMPLIED WARRANTY IN SALE OF FOOD IN ORIGINAL PACKAGE BY RETAILER

In *Bonenberger v. Pittsburgh Mercantile Co.*, 28 A. 2d 913, it is held that a housewife, who orders a can of oysters, impliedly informs the dealer that she is buying for human consumption as food and she is deemed to have relied upon the dealer's skill and judgment in selecting the can of oysters delivered. Therefore, if the can contains a piece of oyster shell, and the buyer is injured by swallowing it, the dealer is liable, regardless of fault.

Liability is imposed on the theory of breach of an implied warranty. Justice Parker writes the opinion and Justice Patterson writes a dissenting opinion, in which Chief Justice Schaeffer joins.

In *West v. Emanuel,* 198 Pa. 180, decided in 1900 and so before the enactment in Pennsylvania of the Uniform Sales Act, it was held that a druggist could not be held liable in an action of trespass for injuries resulting from the use of a patent medicine, since he could not be deemed negligent in failing to analyze the contents of each bottle or package he receives from the manufacturer. The possibility that he might be liable on an implied warranty, that he is not selling a deadly poison disguised as a useful medicine, was not discussed. Perhaps the form of action diverted the mind of the court from a consideration of this question. It should not have done so. The liability of a retailer may "sound either in contract or tort." The warranty is a "hybrid between tort and contract." 5 WILLISTON ON CONTRACTS (Rev. Ed.) sec. 1505, page 4200. *Erie City Iron Works v. Barber,* 102 Pa. 156 and 106 Pa. 125, at page 141 and *Nock v. Coca Cola Bottling Works of Pittsburgh,* 102 Super. 515. Justice should not be administered according as plaintiff's attorney labels his action trespass or assumpsit. In the *Barber* case, at page 163, it is conceded that trespass will lie for breach of an express warranty and recovery may be had on proof of the contract, without more, and on the other hand assumpsit will lie against the manufacturer in a suit by one who purchased from a retail dealer. An injured party should not be required to make an irrevocable election of some legal theory of liability and stand or fall as the court may or may not approve this theory, when the facts show a cause of action on another theory. 36 Dick. L. Rev. 106. "The remedies of the injured consumer ought not be made to depend upon the intricasies of the law xxx but on the sound demands of social justice." In the *Nock* case the action was assumpsit, tried as if in trespass. After a trial on the merits, the pleadings were deemed amended to conform with the proofs. So, though the action be trespass, recovery should be had on proof of breach of an implied warranty.

In *Ebbert v. Phila. Electric Co.* 330 Pa. 257, at page 264, Justice Maxey said: "It would, for example, be utterly impracticable and unreasonable to require grocers to open and analyze the contents of every can of food they sell. The purchaser

in such cases does not expect any such precaution to be taken and *relies wholly upon the integrity, good faith and care of the person who put up the food in the cans. The rule of the nonliability of vendors in 'original package' cases is firmly established in the law.*" The court was speaking of liability ex delicto, as the action was one of trespass. In the instant case the action was assumpsit and liability is said to be imposed on the dealer by section 15 of the Uniform Sales Act. This section, however, makes it a condition precedent that "it appears that the buyer relies on the seller's skill or judgment."

The court held that whether the oysters were in fact reasonably fit for human consumption as food was a matter for the jury to pass upon but it appears to hold that, in the sale of food to be put to immediate use, it is to be inferred that the buyer does rely upon the seller's skill and judgment in selecting the article delivered, and this regardless of whether the goods are or are not in "original packages." It is said: "The dealer is in a better position to know or ascertain the reliability and responsibility of the packer than is the retail purchaser." But there is nothing in the case to suggest that the packer of the oysters was not both reliable and responsible. The better reason for the decision is simply one of social policy. The injured party should have a remedy against the one who is within the reach of legal process and the dealer should be indemnified by the negligent packer. This is, of course, another case of imposing liability without fault but we have become familiar with that under our workmen's compensation laws. True, the consumer can carry accident insurance but the dealer can carry liability insurance and add this to the price of his goods, as part of his overhead expenses. This will involve fewer policies of insurance and give protection to the entire public, they in turn really paying the cost of this protection. Obviously, it is now incumbent upon all dealers to procure such insurance without delay, as they are in effect insurers of their customers against injury from any article of food sold.

It is a curious fact that the court makes no reference to our act of May 4, 1889, P.L. 87, 69 P.S. sec. 123, "Historical Note." This act was not repealed by the Sales Act, as was the Act of Apr. 13, 1887, P.L. 21, (see sec. 77 of Sales Act) except in so far as it may be deemed inconsistent with the provisions of the Sales Act. The 15th section of the Sales Act subordinates its provisions to "any statute in that behalf" i.e. relating to the fitness of goods for a particular purpose. The Superior Court regarded this act as in effect in sales of "food" but not in sales of "drink." (*Nock* case, at p. 517) The act provides that "in every sale of articles of merchandise, used wholly or in part for food, unless the parties shall agree otherwise, there shall be an implied contract or undertaking that the goods or merchandise are sound and fit for household consumption." This act does not inject the question of reliance upon the seller's skill or judgment, as does the Sales Act, and it indicates the legislative view of public policy in cases involving sales of food. Williston comments on the fact that this Act of 1889 is still in effect in Pennsylvania. WILLISTON ON CONTRACTS, Rev. Ed., Vol. 4, sec. 996, page 2743.

Much that is found in the opinion is taken from the opinion of the majority of the court in the leading case of *Ward v. A. & P. Co.*, 231 Mass. 90, 5 A.L.R. 242 LEWIS'S CASES ON SALES, p. 271. The dissenting opinion in this case observes that the effect of the decision is to charge dealers in food with liability as insurers, and this is undoubtedly true. That this is dictated by several considerations of public policy, see VOLD ON SALES, sec. 149, page 466.

Judge Hand has presented the arguments against imposing absolute liability on the retailer of canned goods in *Valeri v. Pullman Co.*, 218 Fed. 519. He says:

> "My own feeling is that protection to the public lies not so much in extending the absolute liability of individuals, as in regulating lines of business in which the public has a particular interest in such a way as reasonably to insure its safety. In other words, pure food laws, and rigorous inspection of meats, canning factories, and other sources of food supply, would seem to me a much more effective way of protecting the public than by the imposition of the liability of an insurer upon those who furnish food. The former method corrects the evil at its source. The latter method only imposes an obligation in cases which ex hypothesi cannot be guarded against by the individual by the exercise of due care. It shifts the loss from the person immediately suffering injury to a person who has neglected no precaution in supplying the food. This certainly is not in accord with the general tendencies of the common law. I am inclined to think that the imposition of such an obligation would tend to lead in the long run to the prosecution of unfounded claims, rather than to the protection of individuals or the public."

J. P. M.

FRIGHT WITHOUT PHYSICAL INJURY UNDER THE WORKMEN'S COMPENSATION ACT

Decedent was employed as a sewing machine operator by M. While operating an electric power machine near a window, D was frightened by a loud clap of thunder and a flash of lightning. The latter did not enter the building. Soon afterward D collapsed and upon examination, it was found she had suffered a cerebral hemorrhage caused by an emotional disturbance. D died. The parents of D sought to enforce a claim for compensation under the Workmen's Compensation Act. Upon hearing before a referee, an award was made in favor of the claimant on the basis of an injury caused by accident in the course of employment. An appeal was taken to the Workmen's Compensation Board, which modified the finding to the effect that D's injury was caused by emotional disturbance rather than direct physical contact but sustained the award. On appeal to the Court of Common Pleas, the appellant's exceptions were sustained and judgment entered for him. *Held*: Emotional disturbance which is unaccompanied by physical force, violence, or strain, is not the basis for an award of compensation. *Liscio v. Makrasky & Sons,* 147 Pa. Super. 483 (1942).

In laying down this rule, the Superior Court continued its policy of refusing to award compensation to employees under the Workmen's Compensation Act of June 2, 1915, P. L. 736; as amended by Act of June 4, 1937, P. L. 1552, for injury arising from mere fright, in the absence of any actual physical contact.

The Superior Court based its decision on the interpretation of Section 301 of the Act which provides: "The terms 'Injury' and 'Personal Injury,' as used in this act, . . . shall be construed to mean only violence to the physical structure of the body, and such disease or infection as naturally results therefrom; and wherever death is mentioned as a cause for compensation under this act, it shall mean only death resulting from such violence and its resultant effects . . ." The court's interpretation turned on the meaning of the words "violence to the physical structure." These words have been held to require an actual physical contact and not a threatened application of force or emotional disturbance.

In this reasoning the court has been consistent while deciding previous cases. In *Hoffman v. Rhoades Const. Co.,* 113 Pa. Super. 55, 172 Atl. 33, the decedent died after an argument with his foreman and no compensation was allowed. In this case President Judge Keller said as follows: "One's purely subjective emotions, the result of anger, grief, joy or other mental feeling, if unaccompanied by physical force or exertion cannot be made the basis of a compensible accident under our Workmen's Compensation Law." In *Fesenbeck v. Philadelphia,* 144 Pa. Super. 99, 18 Atl. (2d) 448, no recovery was allowed for the death of a fireman who died as a result of seeing a burned woman carried from a blazing building.

In both these cases, however, a fact exists that is absent in the case under

discussion. In the two cited cases the decedents were afflicted with heart disease and the emotional disturbance overtaxed already weakened organs and death resulted. In the *Liscio* case, no facts of D's previous physical weakness appear and D seemed to be a perfectly normal girl whose death was due to the pressure on the auditory and optic nerves caused by the fear of lightning. The emotional disturbance was the substantial cause of the death and not the indirect and mediate cause, acting upon an already weakened organism.

The Superior Court, however, apparently has decided to draw the line for making awards for compensation in "fright" cases and did so with "fright plus physical contact," no matter how slight, as a marker. In *Yunker v. Leechburg S. Co.*, 109 Pa. Super. 220, 167 Atl. 443, an award was allowed where the decedent had a splinter under his finger nail and died of fright when he saw the doctor raise the knife with which to extract the splinter. The court said the splinter was a sufficient physical contact on which to base an award. The distinction drawn in regard to the physical contact seems tenuous. The decedent died from the fear of the treatment to be rendered and not from the splinter. Nevertheless, the Court decided the fright was accompanied by physical contact and this justified an award in the decedent's favor.

In further justifying its decision, the Court in the *Liscio* opinion makes reference to the "Pennsylvania Law of Trespass for Negligence," which allows no recovery resulting from mere fear or emotional disturbance apart from physical contact. To discuss the reason for this tort rule is not the purpose of this discussion. It is enough to say that the situations are not analogous, since the decisions imposing liability in workmen's compensation cases are more liberal than those involving common law tort liability.

In the light of its previous decisions, the Court is consistent in reaching the result of the instant case. Under the peculiar facts, however, existing in the *Liscio* case—the fact that the fright, itself, substantially caused D's death—it would appear socially and morally justifiable to award compensation to an employee dying under these circumstances. Opportunities for fraud would be few. The employee's physical condition, prior to the death caused by fright without physical injury, would be the distinguishing feature for an award of compensation. If the fright or emotional disturbance, causing death, acts upon an already weakened physical condition, an award should not be allowed. But, if the fright or emotional disturbance, causing death, acts upon a physically sound person and is a substantial cause of the death, then an award of compensation should be allowed.

Thus, the Pennsylvania law in workmen's compensation cases allows no recovery for fright in absence of physical injury. However, the rule should be modified to include cases where fright in the absence of physical injury is the substantial cause of the employee's death.

S. S. M.