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of classification may be regarded as one of only academic importance.⁴²

PARTICULAR CONTRACTS

*J. Denson Smith**

The decisions of the First Circuit Court of Appeal and the Supreme Court in *McCauley v. Manda Brothers Provisions Co.*¹ do not dissipate the obscurity that surrounds the theory on which recovery may be based in products liability cases. The court of appeal found a retailer of a hot sausage sandwich wrapped in cellulose and stapled not liable to the purchaser because of the absence of a showing of negligence or of knowledge of its unwholesomeness. The manufacturer of the sausage who sold to a preparer of sandwiches was also held not liable because the evidence precluded a finding of responsibility on its part. Finally, the preparer was held liable to the purchaser from the retailer apparently on the theory that a preparer of food is presumed to know its condition and warrants its wholesomeness. The Supreme Court granted certiorari at the request of the preparer, who did not complain of being cast but was seeking merely to enforce contribution against the retailer. The plaintiff did not apply for certiorari. The Supreme Court affirmed the holding of the court of appeal, which had reversed the district court's judgment insofar as the retailer was concerned for lack of a showing of negligence on the retailer's part. It also rejected the preparer's claim in contribution because of the retailer's freedom from negligence. In passing, it noted that the judgment of the district court had not cast the preparer and retailer as joint tortfeasors but that each was cast on the basis of warranty. In a concurring opinion, Judge Sanders observed that since 1911 a manufacturer has been held liable for damages

42. It is noteworthy that in France both delictual action and action *de in rem verso* are subject to the long prescriptive term of thirty years. See FRENCH CIV. CODE art. 2262; 3 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 290 (1923); Cass. Civ., July 18, 1910, D.1911.I.355. However, in some instances the running of the prescriptive term for the criminal action—which is always shorter—will preclude the civil action. For a discussion of this delicate problem see 2 SAVATIER, *TRAITÉ DE LA RESPONSABILITÉ CIVILE EN DROIT FRANÇAIS* 227-37 (2d ed. 1951). In Louisiana, instead, there is an important difference between the prescriptive periods of articles 3536 and 3544 of the Civil Code which seems to be the real reason why the court felt inclined to allow the exceptional remedy in the instant case on grounds of the general principle contained in Article 1965, which has no equivalent in the French Civil Code.

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1. 202 So.2d 492 (La. App. 1st Cir. 1967) *affirmed* 252 La. 528, 211 So.2d 637 (1968).

caused by unwholesome food products either on a delictual theory or a theory of implied warranty. He noted that running throughout the cases is a conclusive presumption that a manufacturer knows of the unwholesomeness of the food product he prepares and said that this was consistent with the fault requirement of Civil Code Article 2315 covering delictual responsibility. He expressed the opinion that Civil Code Article 2531 negates the retailer's liability for damages under a warranty theory, and he also said that the weight of authority supports the view that a retailer is under no duty to open sealed containers and hence is not at fault in failing to do so.

As far as the retailer is concerned, unless knowledge of unwholesomeness can be imputed to him, no recovery of damages is permissible on a warranty theory and if there is no evidence of mishandling on his part recovery on a delictual theory is likewise precluded under existing jurisprudence. With respect to one who supplies a retailer, the situation is different. If he is the manufacturer or preparer the case of *LeBlanc v. Louisiana Coca Cola Bottling Co.*² would permit recovery by the consumer provided the product is marketed in a sealed container. Thus, the preparer in the instant case would be responsible on a theory of implied warranty provided the stapled cellulose wrapper should be treated the same as, say, a capped bottle. The opinion of the court of appeal seemed not to adopt this view, however, but found, on the contrary, a warranty running to the purchaser on the basis of the principle applied in *Doyle v. Fuerst & Kraemer, Ltd.*,³ which imputes knowledge to a preparer of food products. The difficulty with this position, however, is that the preparer in *Doyle* sold to the consumer, thereby establishing a contractual relationship, whereas the preparer in the instant case sold to the retailer. Pretermitted consideration of the implied warranty theory of the *LeBlanc* case, warranty against redhibitory defects is rooted in contract, but not liability based directly on fault. The basis of recovery was, therefore, not clearly articulated. Theoretically it appears, however, that fault is at the basis of responsibility in damages whether recoverable in an action of warranty against redhibitory defects or on a delictual theory. Recovery against a preparer might, therefore, be based on a finding of fault, without regard to contract, and this may have been the theory underlying the judgment against the preparer in the instant case. But there is doubt. There

2. 221 La. 919, 60 So.2d 873 (1952).

3. 129 La. 838, 56 So. 906 (1911).

remains, nevertheless, a possibility of holding the preparer liable in damages to the purchaser from the retailer on a warranty theory without extending the principle of the *LeBlanc* case to a wrapped and stapled sandwich. In the case of *McEachern v. Plauché Lumber and Constr. Co.*⁴ the court held that a buyer, in that case of a house, acquired his seller's right of action in warranty against the builder who sold to the latter. Article 2503 of the Civil Code was relied on. By an application of this principle to the facts of the instant case the purchaser would succeed to the retailer's action in warranty against the preparer which would presumably expose the preparer to an action in damages brought by the purchaser.⁵ No mention of this possibility appears in the opinions under consideration.

After shifting its position on rehearing in *Young v. Stevens*⁶ the court on second rehearing went back to its original position and held that slight encroachments by a concrete driveway and fence belonging to an adjoining property owner rendered unmerchantable the title to premises contracted to be sold and described as a single two-story house "on grounds measuring about 49' x 120' or as per title."⁶ This case will be noted in a future issue of this *Review*. The possibility of a difference in legal consequences between a case involving a mere shortage in measurement and one where no shortage exists but there is encroachment by the adjoining owner will be examined. The present writer is dubious about attributing controlling importance to what visual inspection may reveal to a prospective buyer in cases of this kind.⁷ What the buyer has in mind may be more important than what he sees, or thinks he sees.

In *Shell Oil Co. v. Texas Gas Transmission Corp.*⁸ the court properly found valid and binding an agreement providing for the determination by arbitrators of a price adjustment in a contract for the sale of natural gas. Each party was to appoint an arbitrator and the arbitrators so appointed were to select a third. But the agreement further provided that if one arbitrator was appointed and not another, the one would have power to make the price determination and that if two were appointed

4. 220 La. 696, 57 So.2d 405 (1952).

5. See POTHIER, *CONTRAT DE VENTE* nos. 215, 216 (Buguet ed. 1861).

6. *Young v. Stevens*, 252 La. 69, 209 So.2d 25 (1968).

7. Cf. *Favrot & Livaudais v. Stauffer*, 112 La. 158, 36 So. 307 (1904), and *Scurria v. Russo*, 134 So.2d 679 (La. App. 1961), noted in 23 LA. L. REV. 468 (1968).

8. *Shell Oil Co. v. Texas Gas Transmission Corp.*, 210 So.2d 554 (La. App. 4th Cir. 1968).

but did not select a third, then the latter might be appointed by the senior judge of the Fifth Federal Judicial Circuit. It was held that since no new act of volition was required by the parties with respect to the fixing of the price, the agreement was binding and could not be disregarded. The decision appears to be a sound reflection of recognized civilian principles and is also harmonious with the modern liberal approach reflected in the Uniform Commercial Code.⁹ It seems very clear that the parties did intend to bind themselves and were meticulous in trying to avoid the rule that nullifies a projected sale where the price is left to be fixed by arbitrators to be chosen by the parties and either party fails to do so.

TORTS

*Wex S. Malone**

DUTY OF CARE

Negligence as Balancing Process

Occasionally the facts of a controversy invite a sharp focus upon the essential balancing process that lies at the heart of negligence. Conduct involving a chance of injury should be characterized as negligent conduct whenever the chance is found to be *unreasonable*. Ordinarily "big" chances are more likely to be regarded as unreasonable than are "little" chances. But even a very small chance involving only a remote possibility of causing injury may be recognized as unreasonable, and hence negligent, if it is a "useless" chance—that is to say, if nothing worthwhile is to be gained by taking it.¹ Particularly is this true when, in addition, the risk is of such a nature that the consequences would be highly serious if it should materialize. The case that suggested all this ruminating is *Allien v. Louisiana Power & Light Co.*² The conduct involved was the maintenance by defendant of an uninsulated high voltage electric line at a height of twenty-eight feet above the surface and at a distance of twenty-six feet from an abandoned oil well. The picture thus presented was not one of obvious danger, and there was little likelihood of injury to anyone on the ground in the absence of some rare circumstance. Such an unexpected situation did arise, however, when operators of an oil rig mounted on a truck at-

9. Cf. UNIFORM COMMERCIAL CODE § 2-305.

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1. See the excellent discussion in Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

2. 202 So.2d 704 (La. App. 3d Cir. 1967).