COLLATERAL WARRANTIES AND THE LAW OF MIS-STATEMENTS

WELLS (MERSTHAM) LTD. v. *BUCKLAND SAND AND SILICA CO. LTD.*[1]

The case the subject of this note, although only a decision at first instance of the Queens Bench Division, is important in that it illustrates a gradual development within the framework of the law of contract of liability for negligent mis-statements. This note will consider the case in relation to the law of contract and then briefly examine wider implications in its relation to the law of tort.

The Facts

Mr. Russell, the manager of the plaintiff's nursery, visited the defendant's sand pit and spoke to a Mr. Clark. The plaintiff company was engaged in the growing and selling of chrysanthemum plants, the growing of which required the use of a mixture of peat and sand which could only contain a certain small percentage of iron oxide. Mr. Russell explained the nature of the plaintiff's business and enquired whether the defendant had any sand available suitable for that purpose. Mr. Clark suggested that the defendant's B.W. sand would be suitable, it being a well-washed sand with a low iron oxide content. Russell was shown an analysis confirming this fact. On enquiry Russell was told that deliveries of this B.W. sand could be relied on as conforming to analysis and gave no indication that the sand would vary from digging to digging.

Edmund Davies, J. was satisfied that Clark had induced in Russell's mind the confident belief that B.W. sand would be suitable for the plaintiff's purpose.

Clark quoted a price ex pit and said that the plaintiff would be better off to make its own transport arrangements, as it could probably do this on cheaper terms than the defendant could quote.

Six days later the plaintiff through the agency of its parent company ordered three cubic yards of sand from the sand company. To save transport costs the plaintiff found it expedient to order subsequent deliveries of B.W. sand from Hall & Co., a firm dealing in builders' materials. The driver of Hall & Co. on each occasion called at the defendant's pits and requested B.W. sand. Hall & Co. paid the defendant company and debited the account of the plaintiff's agent, its parent company, there being no evidence that those particular consignments of sand were known by the defendant to be destined for the plaintiff's nurseries or that it was intended to be used for horticultural purposes.

After using the sand the plaintiff met with unprecedented misfortune in propagation. The sand supplied was found to have four times the iron oxide content of that shown by the analysis. His Honour found this material variation from the position as represented had in fact caused the loss complained of.

The plaintiff brought action for £2,500 for breach of warranty, it being agreed that if liability could be established £550 should be apportioned as that attributable to the first load, or that the subject of the direct sale between the parties. Counsel envisaged a possible difference in legal consequences in relation to the direct sale and those flowing from the later sales to Hall & Co.

The Decision

The sale of the first load was a contract for the sale of goods by description, and so a condition was implied under s. 13 of the Sale of Goods

[1] (1964) 1 All E.R. 41.

Act, 1893, that sand supplied under that description would in fact be properly washed sand. As iron oxide is soluble in water it follows that the sand could not have agreed with the description under which it was sold. As the defendant was in breach of this condition it was held responsible for the £550 damage flowing from that breach.[2]

The decision mainly involves the question of liability for the deliveries made by Hall & Co. Clearly enough there was no direct contract of sale between the parties to this action.

There was no suggestion that Clark was other than honest. His mis-statements were honestly made. This accepted, His Honour said:

> . . . if they are to be regarded merely as statements inducing contracts to buy the defendants' sand, they clearly cannot provide the basis of an action for damages, for it is a fundamental rule that none can be awarded for innocent misrepresentation.[3]

Counsel for the plaintiff contended that the statements were not "merely statements inducing contracts" but went beyond this to an express warranty. The plaintiff was relying on what has been called a collateral contract, based on the statement of Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* that "there may be a contract the consideration for which is the making of some other contract".[4]

Edmund Davies, J. considered the warning of Lord Moulton that such collateral contracts "must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties must be clearly shown"[5] and the caution of Denning, L.J. in *Oscar Chess, Ltd.* v. *Williams*[6] that "whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice". His Honour then held that "a warranty was here intended and expressed that the constituents of B.W. sand were (and would be found to be) as set out in the analysis supplied, and on the basis of that warranty the plaintiffs entered into contracts to buy such sand".[7]

He then asked himself "does it make any difference that, the warranty having been given to the plaintiffs, all the purchases other than the first were made from a third party?"[8] As it was purely fortuitous that all the loads were not sold by the defendant direct to the plaintiff he contended that justice would demand an affirmative answer. In support his Honour quoted three cases at first instance and one in the Court of Appeal[9] where the warranty given by the defendant was held enforceable notwithstanding that the main contract was subsequently entered into between the plaintiff and a third party.

Edmund Davies, J. said that in his view "two ingredients, and two only, are required in order to bring about a collateral contract containing a warranty: (1) a promise or assertion by A as to the nature, quality or quantity of goods which B may reasonably regard as being made animo contrahendi, and (2) acquisition by B of the goods in reliance on that promise or assertion".[10] He adopted the statement that "the consideration given for the

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[2] *Id.* at 46.
[3] *Id.* at 44.
[4] (1913) A.C. 30 at 47.
[5] *Ibid.*
[6] (1957) 1 All E.R. 325 at 328.
[7] (1964) 1 All E.R. at 45.
[8] *Ibid.*
[9] *Brown* v. *Sheen and Richmond Car Sales Ltd.* (1950) 1 All E.R. 1102; *Shanklin Pier Ltd.* v. *Detel Products Ltd.* (1951) 2 All E.R. 471; *Andrews* v. *Hopkinson* (1956) 3 All E.R. 422 and *Yeoman Credit Ltd.* v. *Odgers* (1962) 1 All E.R. 789 respectively.
[10] (1964) 1 All E.R. at 45 and 46.

promise is no more than the act of entering into the main contract. Going ahead with that bargain is a sufficient price for the promise, without which it would not have gone ahead at all".[11]

Although what has been said is sufficient to dispose of the case, apparently for the sake of completeness of the classical framework of contract, he continued:

> A warranty may be enforceable notwithstanding that no specific main contract is discussed at the time when it is given, though obviously an animus contrahendi[11a] (and, therefore, a warranty) would be unlikely to be inferred unless the circumstances show that it was within the present contemplation of the parties that a contract based on the promise would shortly be entered into. Furthermore, the operation of the warranty must have a limitation in point of time which is reasonable in all the circumstances.[12]

Judgment was, therefore, entered for the plaintiffs for £2,500.

Analysis of the Decision

It can be seen that Edmund Davies, J. first decided that there was a warranty, and only then sought to relate it to a particular contract. This divorce of the warranty from a contract seems to offend classical theories of the law of contract. Although in the instant case it was said absurd to regard the warranty as being impliedly restricted to orders placed directly by the plaintiff with the defendant, circumstances are conceivable in which the warranty may be construed as limited to direct sales, for example, where work has to be done on the goods prior to sale. This would mean that a warranty is found, but as being limited to cases outside the scope of collateral contracts, no contract can be raised to cover orders not placed direct with the defendant. If in this case there had been no direct sale and the warranty was limited, it seems the case would have failed before a contract could have been asserted. This, of course, does not say there is no contract. As all the cases referred to above and the instant case have been concerned with goods sold or supplied by description or hire purchase agreements where a particular transaction is in mind, this has as yet caused no inconvenience. This course seems to have been forced on his Honour by the way the case was presented to him, and in fact by the nature of the remedy itself. It in fact involved a certain amount of repetition as, particularly where the only term of the collateral contract is in fact the warranty, the same considerations inevitably were applied first to find a warranty and then the contract. This is not an error in the judgment but it is logically unnecessary and seems to put the cart before the horse. On grounds of conformity with the proper theory of contract and in view of the possible development of this part of the law it would be prudent for such cases to be approached by first finding the contract and then defining it in terms of the transactions leading up to it.

The two ingredients required to bring about a collateral contract containing a warranty have already been referred to. This evinces a looseness of expression. Referring to a collateral contract containing a warranty suggests that there may be a collateral contract without a warranty. As collateral contracts considered have always, although perhaps not necessarily, contained a warranty as their only term, the suggestion would not seem correct. The warranty must be the basis of a collateral contract. Further, the second ingredient of acquisition of goods in reliance on the promise is not a requirement of bringing about a collateral contract, but relates simply to

[11] *Id.* at 46.

[11a] This reviewer translates *animus contrahendi* as an intention to be bound contractually.

[12] *Ibid.*

whether the plaintiff will have a remedy if the promise is found to be false — a question of damages.

The first requirement of "a promise or assertion by A as to the nature quality or quantity of the goods which B may reasonably regard as being made animo contrahendi" is misleading in its apparent simplicity. It in fact begs the question. The questions of intention to contract and consideration are left to be answered by reference to earlier cases which have already been referred to. In fact the question of consideration on the above analysis is left as a matter of inference from the interaction of the two ingredients.

The case is important in its recognition that a warranty may exist (his Honour says "may be enforceable") notwithstanding that no specific main contract is discussed at the time when it is given if it was within the present contemplation of the parties that a contract based on the promise would shortly be entered into. However, Edmund Davies, J. said that "the operation of the warranty must have a limitation in point of time which is reasonable in all the circumstances".[13] It cannot be accepted that this was meant to be a requirement of law. Why should not the parties stipulate that the warranty shall operate beyond what is considered a reasonable time? As a presumption of fact, however, this is justifiable as these collateral contracts or warranties are invariably raised as a matter of inference.

The Scope of the Doctrine of Collateral Warranties

The existence of the remedy cannot be disputed but its operation has in the main been confined to hire purchase situations,[14] although the present case and *Shanklin Pier Ltd.* v. *Detel Products Ltd.* have allowed the remedy against manufacturers (the term is used in a broad sense) who have induced contracts for the supply or use of their product. The cases have followed the formalities of contract insisting on intention to be bound, offer and acceptance which is taken for granted once the former is established, and consideration.

As to consideration it is accepted that the consideration for a promise may be no more than entering into another contract. But in the case referred to above[15] McNair, J. said:

> I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.

In that case the consideration was provided by stipulating that a particular paint manufactured by the defendants should be used to paint the pier. So the act forming the consideration need not be the entering into of a contract or be related to a contract. Is it necessary for the act claimed to be the consideration to be for the benefit of the person giving the warranty? Even if this were true as a matter of theory, many cases have shown that this has little reality and that a consideration or a bargaining can invariably be found in the interests of justice between the parties.[16] However, a statement inducing a contract or other act is not likely to be made unless there is some benefit, and nor is it likely that a judge will be convinced of the necessary *animus contrahendi* on the part of a person giving gratuitous advice.

It appears clearly established, particularly in view of *Wells* v. *Buckland Sand*, that the warranty need not be made with any specific transaction in mind, as long as a transaction based on the promise is within the contemplation of the parties.

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[13] *Ibid.*
[14] *Supra* n. 9.
[15] *Shanklin Pier Ltd.* v. *Detel Products Ltd.* (1951) 2 All E.R. 471 at 472.
[16] *De la Bere* v. *Pearson* (1908) 1 K.B. 280; *Coggs* v. *Bernard* 2 Ld. Raym. 909; *Bainbridge* v. *Firmstone* 8 Ad. & E. 743.

So there seems to be ample scope as a matter of theory to create contractual liability for negligent mis-statements. Where the ultimate transaction is entered into with the person making the statement the question is adequately answered by determining whether the statement is a warranty or merely an innocent misrepresentation. Where the ultimate transaction causing the loss is made with a third person the same question must be asked. As suggested above, the question of consideration is not really important as this can be easily found and the requirement is satisfied by a contract entered into with another despite the lack of any real benefit; if the transaction was in the contemplation of the parties, the mere making of the promise would indicate the sufficiency of the transaction as consideration in the eyes of the promisor. The only factor which can limit the scope of the doctrine is that of intention or *animus contrahendi*. It is suggested, and this is supported by judgments of the Court of Appeal and Queens Bench Division,[17] that the actual identities of the parties are of secondary importance and only a factor relevant in determining intention.

The suggestion of McNair, J. above,[18] that the act forming the consideration must be for the benefit of the promisor, as a matter of contract law theory must be related to intention rather than consideration. Whether the courts will lay down as a matter of law that there must be a benefit before a collateral warranty can be raised is uncertain. Even so, it is true that a benefit of a kind can always be found, otherwise the statement would not be made. Terms such as direct and substantial add nothing, and have been attacked in other contexts.[19] Probably an attempt to lay down the above as a proposition of law would only serve to confuse the law and would introduce numerous meaningless distinctions. It would be far better for this to be left as one of the questions of fact to be used in ascertaining intention in each particular case.

What factors then are relevant to intention? No doubt benefit is an important consideration. The statement of Lord Denning referred to in the judgment of Edmund Davies, J. leaves this as a question of fact: "if an intelligent bystander would reasonably infer that a warranty was intended, that will suffice."[20] That case did concern innocent misrepresentation, but the same considerations must apply; the knowledge and position of the parties, and whether the statement was one of fact intended to be acted upon and was peculiarly in the knowledge of the person making the statement or was intended to be mere puffing on which reliance would not be placed. In the case of collateral warranties one may in an appropriate case read in a limitation that the warranty is only to operate with respect to particular defined transactions and, as suggested in *Wells* v. *Buckland Sand*, that it may only have effect for a particular time.

Whether the intention can be inferred in a particular case is a question of fact, and whether such an intention will be inferred will depend upon the justice of the particular case. As yet few cases have invoked the doctrine, which has practically been limited in operation to hire purchase transactions and to avoid the State of Frauds.[21] The application to other circumstances will require no more than a policy decision; lip service can easily be paid to the formal requirements of contract. Certainly development is more likely in England due to the larger number of cases, and the lack of the need

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[17] *Brown* v. *Sheen & Richmond Car Sales Ltd.*, *Andrews* v. *Hopkinson*, *Yeoman Credit Ltd.* v. *Odgers supra* n. 9.

[18] *Supra* n. 15.

[19] *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd.* (1961) A.C. 388.

[20] *Supra* n. 6.

[21] *De Lasalle* v. *Guildford* (1901) 2 K.B. 215.

to plead a formal cause of action as is the case in New South Wales. In fact there is no case decided by Australian courts which can add anything to what has been said. There is no reason why the doctrine should not be extended to give a contractual remedy against an agent who induces a person to enter into a contract to purchase land, an advertising company which causes a person to buy its client's products, a finance expert of a newspaper who recommends the purchase of certain securities,[22] and a banker who issues an opinion on the credit-worthiness of a customer on the strength of which a third person enters into financial transactions with that customer.

Collateral Warranties and the Law of Tort

The decision of the House of Lords in *Hedley Byrne & Co.* v. *Heller*[23] has been the subject of quite an amount of academic comment,[24] to repeat which is not the purpose of this note. Whatever its effect, it has clearly enough denied that generally there is no remedy for negligent mis-statements causing other than physical injury. There is no doubt that this case will be limited in some cases,[25] but in view of the clear statements of their Lordships it is equally clear that the bold spirits of the law will apply the seemingly sweeping statements of the House. Putting the case in the historical background of the gradual extension of liability in tort, this reviewer does not think it can be disputed that the general stream of authority will be to impose liability in tort on a person who in the course of his business gives information or advice in circumstances that a reasonable man would know that his statement would be relied on.[26] Despite the views of some academics, Lord Reid made it clear enough that he could see "no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him".[27]

When so analysed, the circumstances in which the court will raise a duty of care do not seem too different to the circumstances in which a remedy may be given on a collateral contract. In fact, what is the difference between the statement of Lord Reid quoted above and the two requirements of Edmund Davies, J. in the case the subject of this note? The notions of the reasonable man and acting in reliance on the promise or assertion are common factors. The similarity ends with the requirement in the latter case of an *animus contrahendi*. But can the test of intention to be contractually bound be related to the question of whether a reasonable man could anticipate that another would act on the faith of his representation? If the answer to this is in the affirmative the distinction between contract and tort would for practical purposes vanish. But what then would be the position of special contracts or statements by which a person purports to increase or restrict the limit of his responsibility? Liability in tort and contract can be reduced by express stipulation, but the extent of responsibility can only be increased by means of contract. This and the fact that special duties can only be created by contract, suggest that the rules of contract would take precedence, operating on a foundation of tortious

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[22] In *De la Bere* v. *Pearson* (1908) 1 K.B. 280, a newspaper provided the name of a stockbroker who was in fact an undischarged bankrupt, and appropriated money that had been sent to him. The newspaper was found liable in contract.

[23] (1963) 2 All E.R. 575.

[24] E.g., by D. M. Gordon, Q.C., 38 *A.L.J.* 39 and 70, 5 *Aust. Lawyer* 59.

[25] *Clark* v. *Kirby-Smith* (1964) 2 All E.R. 835.

[26] (1963) 2 All E.R. at 583 *per* Lord Reid.

[27] *Ibid.*

responsibility. It is conceivable that statutes of limitation could cause problems, as has been the case in trespass and negligence.

However, in the case of contract the person suffering the loss need not prove negligence. His case is proved by establishing a warranty and loss consequent on breach of that warranty. Where the contractual remedy is sought to be extended the court will either construe the implied warranty as limited to negligent mis-statements or before raising a contract will insist on proof of something more than the fact that a reasonable man could anticipate that another may act to his detriment on the faith of the representation. It is reasonable to expect, in view of the strict liability, that the factors sufficient to create tortious liability will not be sufficient for the court to imply the necessary *animus contrahendi* to give rise to liability in contract.

Conclusion

It can be seen that there are two streams of authority, quite independent of each other, which are capable of imposing liability for mis-statements.

In cases where negligence cannot be established the only remedy is contractual, although it has been demonstrated that there is no theoretical bar to this remedy being extended to practically every circumstance in which a person may make a statement on the strength of which another acts.

Where negligence is claimed to exist, the lawyer is faced with a problem. To claim in tort would require proof of negligence and at present, certainly, would give rise to doubts as to the applicability of *Hedley Byrne* v. *Heller*, while to claim in contract would require the more difficult task of establishing a warranty and in turn give rise to doubts as to such an extension of the present scope of collateral warranties. In particular cases this may not present a problem, but in the long run the interaction of the differing considerations of the law of tort and contract will present problems, and forms a powerful argument in this State for the abolition of the formal causes of action and in England the laying, by some means, of Maitland's ghosts.

A solution of creating a cause of action of negligent mis-statement without attempting to categorise further, may seem a rather bold step, but would not really be out of step with the present attitude of the House of Lords as evinced by the decision in *Hedley Byrne* v. *Heller*. In fact, this may be said to have been done in America, where it can almost be said that implied warranties exist which run with goods in the same manner as a restrictive covenant burdens land. This is at present confined to cases where the breach occasions personal injury.[28] This extension of strict liability shows a marked parallel to the case which originally extended liability in negligence to manufacturers, *Donoghue* v. *Stevenson*.[29] Just as that case was extended to give a remedy for negligent mis-statements causing financial loss, the American courts could extend *Escola* v. *Coca Cola Bottling Co.* on grounds of public policy to create strict liability for mis-statements occasioning financial loss. Such a development in the English courts, despite the present spate of judicial legislation, is not even foreseeable.

The answer may lie in the statement of Lord Devlin in *Hedley Byrne* v.

[28] In *Escola* v. *Coca Cola Bottling Co. of Fresno* 150 P. 2d. 436 a waitress sued in the Supreme Court of California when a bottle of coca cola exploded in her hand. The Court dealt with the problem on the basis of negligence and the claim succeeded after application of the principle *res ipsa loquitur*. However, Traynor, J. refused to decide the case on the ground of negligence. On grounds of public policy a manufacturer should incur strict liability if physical harm is occasioned by any defect in his goods. He believed that a warranty need not be related to a contract, but the obligation on the manufacturer is imposed by law, an obligation either on a quasi-contract or quasi-tort.

[29] (1932) A.C. 562.

Heller,[30] that "the result (referring to reaching a just decision in cases of negligent mis-statements) can and should be achieved by the application of the law of negligence and that it is unnecessary and undesirable to construct an artificial consideration". This could represent a policy decision not to extend at this time the remedy afforded by collateral warranties into the field of negligent mis-statement. This is not to say that collateral warranties cannot be used where a contract can be clearly proved, or where such an inference is necessary in the interests of justice. It is likely that at present courts will insist on strict proof of a contract, but the scope of this remedy should be borne in mind when difficulties are encountered in framing an action in tort.

R. O. BRADY, Case Editor — Fourth Year Student.

AN INSTANCE OF CONSISTENCY?

WEST v. *SUZUKA*

West v. *Suzuka*,[1] before the Supreme Court of Western Australia, arose out of prosecutions under s. 291 of the Mining Act, 1904-1957 (Western Australia), of five employees of the Dowa Mining Company of Japan. Section 291 is in the following terms:

> Any Asiatic or African alien found mining on any Crown Land may by order of the Warden, be removed from any goldfield or mineral field, and whether such person has or has not been convicted of an offence against the last preceding section; and no Asiatic or African alien shall be employed as a miner or in any capacity whatever in or about any mine claim, or authorised holding.

The Dowa Company was a shareholder in a local Western Australian mining company which had a working option over an old copper mine. The five defendants were all Japanese brought to Western Australia by the company to test the mine, and they carried out various duties. They apparently entered Australia pursuant to entry permits issued under the Migration Act, 1958, of the Commonwealth. Section 6 of that Act stipulates (*inter alia*) that:

> (1) An immigrant who, not being the holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited immigrant.
> (2) An officer of the Department of Immigration may, in accordance with this Section and at the request or with the consent of an immigrant, grant to the immigrant, an entry permit.
> (3) An entry permit shall be in a form approved by the Minister and shall be expressed to permit the person to whom it is granted to enter Australia or to remain in Australia or both.
> (6) An entry permit that is intended to operate as a temporary entry permit shall be expressed to authorise the person to whom it relates to remain in Australia for a specified period only and such a permit may be issued subject to conditions.

The actual permits granted to the Japanese miners were not in evidence and we do not know the form in which they were expressed nor whether they were issued subject to conditions; for instance, subject to their undertaking no employment in Australia other than in mining operations.

In deciding in favour of the defendants on the ground that the prohibition in the Western Australian Act applied only to employers, the two Puisne

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[30] (1963) 2 All E.R. at 610.
[1] (1964) W.A.L.R. 112.