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WARRANTY AS A LAWYER'S TOOL IN MOTOR VEHICLE CASES

A, B and C, taking some beer with them, left the tavern to drive home. A was driving his new car, B and C were guests. A was driving 85 miles per hour and refused to slow down when asked. At this point a defective rivet in the right front rim fell out causing the tubeless tire to go flat. The care went out of control and wrecked. Serious injury to the occupants resulted.

These are the facts of *Ford Motor Co. v. Arguello*, decided by the Wyoming Supreme Court on June 19, 1963.¹

Let us suppose that B, paralyzed from the waist down, with no hope of recovery and with a young wife and two children, enters your office and relates this story. Immediately you are filled with apprehension, for this case is loaded with obvious problems!

You have three prospective defendants, the first being the driver who is insured as to the driver's liability. The guest statute is clearly applicable, there is an assumption or risk problem, a possible joint enterprise problem, and there is a very real proximate cause issue.

The second prospective defendant is the dealer, who may be liable for possible misrepresentation as to the fitness of the car. It would be indeed difficult to convince the court or a jury that this injury resulted from the dealer's negligent inspection and preparation of the car for sale. As to the liability of the dealer, one still encounters the problems of assumption of risk, contributory negligence, imputed negligence, and proximate cause.

The manufacturer is the third possible defendant. The burden of proving that the manufacturer was negligent in the manufacturing or in the inspection of rivets presents a tremendous problem. Assumption of the risk, contributory negligence, imputed negligence, and proximate cause present additional obstacles. However, *res ipsa loquitur* may be helpful in proving negligence.

But what about warranty? Does the dealer warrant the products he sells to be safe? Does the manufacturer warrant its products?

Neither the plaintiff-appellee's brief² nor the opinion of the Wyoming Supreme Court give any indication that a warranty theory was alleged or relied on in this modern replica of *MacPherson v. Buick Motor Company*.³

This article is devoted to an analysis of express and implied warranty

1. *Ford Motor Co. v. Arguello*, 382 P.2d 886 (Wyo. 1963).

2. No. 3054. Filed June 20, 1962.

3. *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050 (1916). A Cardozo opinion.

as a lawyer's tool under the Uniform Commercial Code as adopted in Wyoming.⁴

Historically, implied warranty grew out of express warranty in the early nineteenth century. Both express and implied warranty are actions on contract, and both result in "strict liability" to the warrantor. The development of warranty as a legal concept has been recent, rapid, legislative, and judicial.⁵

The Uniform Sales Act was first to crystallize the law of warranty.⁶ The Uniform Sales Act has been superseded by the Uniform Commercial Code in many jurisdictions. Wyoming adopted a slightly modified version of the Uniform Commercial Code in 1961.⁷

EXPRESS WARRANTY. The Uniform Commercial Code section 2-313 superseded Uniform Sales Act sections 12, 14, and 16 in governing statutory express warranty. An express warranty may be written or oral or may arise from the showing of a sample or model.⁸ It may arise from "any affirmation of fact or promise made by the seller."⁹ The express warranty must be reasonably relied upon by the buyer and thus become "part of the basis of the bargain";¹⁰ however, it must be distinguished from mere "puffing" or "seller's talk." An affirmation merely of the value of the goods, or commendation of the goods, does not create a warranty.¹¹

It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty.¹²

4. A good discussion comparing the Uniform Sales Act and Wyoming's two warranty cases with the provisions of the Uniform Commercial Code is found in White, Sales Warranties Under Wyoming Law and the Uniform Commercial Code, 14 Wyo. L.J. 246 (1960). See also Day, Manufacturers' Liability for Breach of an Implied Warranty, 14 Wyo. L.J. 55 (1959). (This article contains a good discussion of the privity requirement as it existed in 1959, and points out the trend to overrule privity as a condition to warranty); Salt Lake Hardware Co. v. Connell, 47 Wyo. 145, 34 P.2d 123 (1933); International Harvester Co. v. Leifer, 42 Wyo. 283, 293 Pac. 381 (1930).
5. Prosser, Torts, § 83, at 493-4. (2d ed. 1955). Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117 (1943). Corman, The Implied Warranty of Fitness for Particular Purpose, 1958 Wis. L. Rev. 219.
6. Uniform Sales Act §§ 12-16 Wyo. Stat. §§ 34-177 to -181 1957, Superseded by the U.C.C. in 1961.
7. Uniform Commercial Code §§ 2-313 to -318, Wyo. Stat. §§ 34-2-313 to -318 (1957) (Supp. 1963); Wyo. Stat. § 34-2-318 (1957) (Supp. 1963) differs materially from the official code version.
8. Uniform Commercial Code § 2-313(1), Wyo. Stat. § 34-2-313(1) (1957) (Supp. 1963).
9. Uniform Commercial Code § 2-313(1), Wyo. Stat. § 34-2-313(1) (1957) (Supp. 1963); Loomis Bros. v. Queen, 17 Pa. D.&C. 2d 482, 46 Del. Co. 79 (1958); Mack v. Coogan, 8 Chester County 233 (Pa.).
10. *Ibid.*
11. Uniform Commercial Code § 2-313(2), Wyo. Stat. § 34-2-313(2) (1957) (Supp. 1963); Vold, Sales, 430-1 (2d ed. 1959); for a collection of cases on advertising as mere puffing or statements of fact, see 158 A.L.R. 1413, point 5. For the effect of advertising on products liability generally see 75 A.L.R.2d 112, 128-40.
12. Uniform Commercial Code § 2-312(2), Wyo. Stat. § 34-2-312 (1957) (Supp. 1963); Hansen v. Firestone Tire and Rubber Co., 276 F.2d 254 (6th Cir. 1960); Mack v. Coogan, 8 Chester Co. 233 (Pa.).

Whether or not the affirmation made gives rise to an express warranty is usually a question of fact for the jury but may, under certain circumstances, be decided as a question of law by the court.¹³

IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE; FITNESS FOR PARTICULAR PURPOSE.

The implied warranty of merchantability is provided for in section 2-314 of the Uniform Commercial Code. From a practical standpoint, this is probably the most important of the warranties.

A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.¹⁴ The code sets forth criteria for determining whether goods are merchantable.¹⁵ The goods must (among other things) be fit for the ordinary purposes for which such goods are used.¹⁶ Where the goods are suitable to some degree for the intended purpose, whether or not they are suitable to the degree which makes them acceptable is a jury question.¹⁷

The implied warranty of fitness for particular purpose is found "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods."¹⁸

The concept of "particular purpose" acquires more meaning when it is contrasted with "ordinary purpose for which such goods are used."¹⁹ Thus, this warranty is by definition more narrow than the implied warranty of merchantability. It is sufficient that the seller has reason to know that the goods are to be used for a particular purpose,²⁰ and parol evidence is admissible to show such knowledge and reliance.²¹ The purchase of goods by trade name does not preclude the finding of reliance on the implied warranty of fitness for particular purpose.²²

Other implied warranties may arise from course of dealing or usage of trade.²³

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13. Oral Warranty — Fact or Law Question, 67 A.L.R.2d 619.
 14. Uniform Commercial Code § 2-314(1), Wyo. Stat. § 34-2-314(1) (1957) (Supp. 1963); subject to exclusion or modification under § 2-316.
 15. Uniform Commercial Code § 2-314(2), Wyo. Stat. § 34-2-314(2) (1957) (Supp. 1963).
 16. Uniform Commercial Code § 2-314(2), Wyo. Stat. § 34-2-314(2) (1957) (Supp. 1963); *Gruccella v. General Motors Corp.*, 10 Pa. D.&C. 2d 65 (Pa.).
 17. *Loomis Bros. Corp. v. Queen*, 46 Del. 79, 17 D.&C. 2d 482 (Pa. 1958).
 18. Uniform Commercial Code § 2-315, Wyo. Stat. § 34-2-315 (1957) (Supp. 1963) subject to exclusion or modification under § 2-316.
 19. Uniform Commercial Code § 2-314(2)(c), Wyo. Stat. § 34-2-314(2)(c) (1957)
 20. Uniform Commercial Code § 2-315, comment 1. (Supp. 1963).
 21. *Lebanon Co., L.J. 385 (Pa.)*; *Holland Furnace Co. v. Jackson*, 106 Pittsb. Leg. J. 341 (Pa.).
 22. Implied warranty of fitness on sale of article by trademark, trade name, or other particular description. 90 A.L.R. 410.
 23. Uniform Commercial Code § 2-314(3), Wyo. Stat. § 34-2-314(3) (1957) (Supp. 1963) subject to exclusion or modification under § 2-316.

EXCLUSION AND MODIFICATION OF WARRANTIES. The Uniform Commercial Code section 2-316 covering exclusion or modification of warranties is a tool of self-defense for manufacturers against numerous spurious claims brought by plaintiffs searching for a deep pocket which a jury could sympathetically pick for their benefit.²⁴

Freedom of contract is the essential defense in behalf of the disclaimer clauses.²⁵

The purpose of section 2-316 is to protect the buyer from "surprise" in the form of unbargained for and unexpected language.²⁶ Under the code the express warranty and the implied warranty of fitness for particular purpose are more easily excluded and modified than is the implied warranty of merchantability. To exclude an implied warranty of merchantability or any part of it "the language must mention merchantability and in the case of a writing must be conspicuous."²⁷ This language of the code should be sufficient to void the disclaimer of implied warranty found in most automobile contracts.²⁸

The provisions for exclusion of warranties must be interpreted in a manner consistent with the general purpose of the code, that is, to promote fair dealings in business contracts.²⁹ In order to forfeit all of the buyer's warranty rights the exclusion under section 2-316 should be so clear and specific that there can be no doubt as to the meaning of the contract and the intent of the parties.³⁰

Under the code a contract providing "This contract contains the entire agreement between the parties. There are no warranties, express or implied other than herein stated," has been held insufficient to exclude either implied warranty of merchantability or implied warranty of fitness for particular purpose.³¹

24. 1 Corbin, *Contracts*, § 128 (Supp. 1961); Wooters, *Warranty Disclaimers and Limitations of remedy under the Uniform Commercial Code*, 43 B.U.L. Rev. 396, 407 (1963).

25. *Hall v. Everett Motors, Inc.*, 340 Mass. 430, 165 N.E.2d 107 (1960).

26. Uniform Commercial Code § 2-316, comment 1.

27. Uniform Commercial Code § 2-316(2), Wyo. Stat. 34-2-316(2) (1957) (Supp. 1963). Conspicuously defined, Uniform Commercial Code § 1-201(10), Wyo. Stat. § 34-1-201(10) (1957) (Supp. 1963).

28. *Henningson v. Bloomfield Motors Inc. and Chrysler Corp.*, 32 N.J. 358, 161 A.2d 69 (1959), 75 A.L.R.2d 1. (This case gives a good example of a manufacturer's disclaimer clause which would not pass the U.C.C. test.)

29. *L.&N. Sales Co. v. Little Brown Jug, Inc.*, 12 Pa. D.&C. 2d 469.

30. *Hartman v. Green*, 17 Som. Leg. J. 341, 35 Wash. Co. 111 (Pa.) (dictum). Necessity of buyer's actual knowledge of disclaimer of warranty of personal property, 160 A.L.R. 357.

31. *Holland Furnace Co. v. Jackson*, 106 Pittsb. Leg. J. 341 (Pa.), *L.&N. Sales Corp. v. Green*, 17 Som. Leg. J., 35 Wash. Co. 111 (Pa.). *Miller & Co. v. Gibbs*, 6 Lebanon L. J. 344; *Levitz Furniture Co. v. Fields*, 6 Lebanon L. J. 385 (Pa.) (an implied warranty of fitness for particular purpose was not excluded by a provision in the contract where the buyer acknowledged receipt of the goods, "having first examined and tested it, and found it to be in first class condition, and as represented by the seller"); *Tumpson Co. v. Castelli*, 20 Beaver Co. L.J. 127 (Pa.); validity of provision of contract of sale of personal property negating implied warranties. 117 A.L.R. 1350; see also 133 A.L.R. 1363.

This section of the code does not solve the problem of disclaimer found in contracts of adhesion such as the motor vehicle manufacturers offer the purchaser.³² But the courts have a remedy for such situations on the grounds of lack of consideration and unconscionability.³³

CUMULATION AND CONFLICT OF WARRANTIES. "Warranties whether express or implied shall be construed as consistent with each other and as cumulative."³⁴ If such construction is unreasonable, then the intention of the parties governs.³⁵ Express warranties displace inconsistent implied warranties other than the implied warranty of fitness for particular purpose.³⁶

THIRD PARTY BENEFICIARIES OF WARRANTIES are provided for in section 2-318. This provision amounts to a statutory exception to the privity rule. Wyoming defines the third party beneficiary to be "any person who may reasonably be expected to use, consume, or be affected."³⁷ In this respect it is more liberal than is the official Uniform Commercial Code section which provides that the third party beneficiary is "any natural person who is in the family or household of his buyer or who is a guest in his home."³⁸

The Wyoming version is subject to two interpretations. Whether it moves privity back one step to permit suit against the immediate vendor's supplier or whether it casts the entire requirement of privity to the four winds is uncertain. The latter view appears more in keeping with modern trends.

Under the officioal version of the Uniform Commercial Code, Arguello would clearly not be a third party beneficiary to any warranties to A because he was not a member of the family or a guest in A's house. Under the Wyoming version Arguello could have qualified .

Whether or not Wyoming's provision yields a different result is uncertain. In *Thompson v. Reedman Motors and General Motors Corp.*³⁹ a non-family auto guest was injured when the accelerator pedal stuck in a new Chevrolet. The court found that plaintiff-guest was not a third

32. Contracts of Adhesion, in this context, are those in which one party is in a position to be able to offer the other a rigid unbargained "contract" on a take it or leave it basis; see generally, Ressler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 Colum. L. Rev. 629 (1943); Wooters, *Warranty Disclaimer under the U.C.C.*, 43 B.U.L. Rev. 396 (1963).

33. Uniform Commercial Code § 2-302, Wyo. Stat. § 34-2-302 (1957) (Supp. 1963); Uniform Commercial Code § 2-719, Wyo. Stat. § 34-2-719 (1957) (Supp. 1963); *Henningson v. Bloomfield Motors and Chrysler Corp.*, 32 N.J. 358, 161 A.2d 69 (1960).

34. Uniform Commercial Code § 2-317, Wyo. Stat. § 34-2-317 (1957) (Supp. 1963); *L.&N. Sales Co v. Stuski*, 188 Pa. Sup. 117, 146 A.2d 154 (1958).

35. Uniform Commercial Code § 2-317, Wyo. Stat. § 34-2-317 (1957) (Supp. 1963); express warranty as excluding the implied warranty of fitness, 164 A.L.R. 1231.

37. Wyo. Stat. § 34-2-318 (1957) (1963 Supp.).

38. Uniform Commercial Code § 2-318.

39. *Thompson v. Reedman Motors and General Motors*, 199 F. Supp. 120 (E.D. Pa. 1961).

party beneficiary under the Uniform Commercial Code, *but this did not bar his suit* against the dealer and manufacturer on a warranty theory.⁴⁰

It appears that Wyoming's 2-318 may better represent existing law than does the uniform version. It also seems apparent that the code provision on third party beneficiaries may be overlooked when it would otherwise bar recovery.⁴¹

Courts in the past have contented themselves with inventing "a remarkable variety of highly ingenious, and equally unconvincing theories to get around lack of privity between plaintiff and defendant."⁴² No less than twenty-nine different theories to accomplish this result have been identified.⁴³

Today the trend is no longer to get around the unjustness of the privity requirement, but rather to overrule or disregard it as a condition to suit against a seller of any product in a condition dangerous for its intended use.⁴⁴ Dean Prosser indicates that the recent cases "give the definite im-

40. Citing *Mannsz v. Macwhyte Co.*, 155 F.2d 445, 449 (3rd Cir. 1946) (defective wire rope) *held*, the requirement of privity between the injured party and the manufacturer of the article which injured him has been obliterated under Pennsylvania law; *Jarnat v. Ford Motor Company*, 191 Pa. Super. 422, 156 A.2d 568 (1959) (defective steering mechanism on truck); *Magee v. General Motors Corp.*, 177 F. Supp. 101 (W. D. Pa. 1953); 213 F.2d 899 (3rd Cir. 1954); 124 F. Supp. 606 (W. D. Pa. 1954); *aff'd per cur.*, 220 F.2d 270 (3rd Cir. 1955) *accord*: *Allen v. Savage Arms Corp.*, 52 Luzerne Leg. R. 159 (Pa.) (here the court expressly did not base its decision on § 2-318 but rather on the ground of foreseeable area of harm) *followed*: *Picker X-Ray Corp. v. General Motors Corp.*, Mun. Ct. of App. D. C., 185 A.2d 919 (1962) (defective steering mechanism on car) *cited with approval*: *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d (1962) (defective power tool) *same result*: *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (1960) (defective brakes) *held* manufacturer was the actual entity with which buyers were dealing, the dealer from whom the purchase was made was merely a conduit or subterfuge; therefore, no privity problem. *See also*: *Wilson v. American Chain and Cable Co.*, 216 F. Supp. 32 (E. D. Pa. 1963).

41. See authorities cited note 40 *supra*.

42. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099, 1124 (1960).

43. Gillam, *Products Liability in a Nutshell*, 37 *Ore. L. Rev.* 119, 153-55 (1957).

44. *Supra* notes 39 and 40; *Spence v. Three Rivers Builders and Masonry*, 353 *Mich.* 120, 90 *N.W.2d* 873 (1958) (defective cinder blocks) *held* remote buyer has action against manufacturer either in implied warranty or negligence; *Continental Copper and Steel Industries v. Cornelius, Inc.*, 104 *So. 2d* 40 (Fla. App. 1958) (defective electrical cable) *held* privity is not necessary to recovery on implied warranty; *B. F. Goodrich v. Hammond*, 269 *F.2d* 501 (10 Cir. 1959) (defective tire) *held* wrongful death action based on implied warranty of fitness not barred because of lack of privity; *Jarnat v. Ford Motor Company*, 191 *Pa. Super.* 422, 156 *A.2d* 569 (1959) (defective Kingpin) *held* against manufacturer even though privity not present; *Peterson v. Lamb Rubber Co.*, 343 *P.2d* 261 (Cal. App. 1959) (defective abrasive wheel) *held* employee of purchaser could sue on implied warranty; *Hinton v. Republic Aviation Corp.*, 180 *F. Supp.* 31 (S.D. N.Y. 1959) (defective airplane) *held* privity not necessary between passenger and manufacturer for implied warranty wrongful death action; *Middleton v. United Aircraft Corp.*, S.D. N.Y. 1960, 6 *An. Cos.* 17957 (airplane); *Beck v. Spindler*, 99 *N.W.2d* 670, 684 (Minn. 1959) (defective house trailer) *held* recovery allowed; *McAfee v. Cargill, Inc.*, 121 *F. Supp.* 5 (S.D. Cal. 1954) (dog food); *Kruper v. Proctor & Gamble Co.*, 113 *N.E.2d* 605 (Ohio 1953) (wire in soap) reversed on other grounds 117 *N.E.2d* 7 (1953); *Pillers v. R. J. Reynolds Co.*, 117 *Miss.* 490, 78 *So.* 385 (1918) (human toe in chewing tobacco); *Henningson v. Bloomfield Motors and Chrysler Corp.*, 32 *N.J.* 358, 161 *A.2d* 69 (1960) (defective steering); *Strahlendorf v. Walgreen Co.*, 16 *Wis. 2d* 421, 114 *N.W.2d* 823 (1962) (strong dicta-toy airplane) *held* for defendant on other grounds; *Chap-*

pression that the dam has bursted and those in the path of the avalanche would do well to make for the hills."⁴⁵ As the assault on the citadel of privity nears completion common sense and justice appear victors, but the courts have yet to clear the debris.

AS A LAWYER'S TOOL warranty is a potent and complicated weapon. Because the concepts of express and implied warranty are recent in origin and rapid in development, there is a certain amount of understandable confusion and conflict in the courts. Warranty is an independent remedy which may be claimed alternatively with or instead of the tort action for negligence when both are applicable.⁴⁶ The unsuccessful pursuit of one is not *res judicata* to the other.⁴⁷

Liability does not depend upon knowledge of defects or negligence on the part of the seller. He is strictly liable when warranty is found.⁴⁸ The seller has bound himself unqualifiedly to the existence of the characteristics or qualities warranted; and absolute liability against the warrantor is available to the buyer or third party beneficiary of the warranty who was injured by the non-existence of such characteristics or qualities.⁴⁹

The burden of proof resting upon the plaintiff entails merely a demonstration of the fact that the goods did not have the properties warranted. The plaintiff is not required to show the technical causation of the failure of the goods to match their warranty.⁵⁰

Counsel would be well advised to give immediate notice of the alleged breach of warranty to the warrantor.⁵¹

Contributory negligence is not a defense to the contract action of

man v. Brown, 198 F. Supp. 78 (Hawaii D. 1961) (hula skirt caught fire). Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)* 69 Yale L.J. 1099 (1960). Keeton, *Products Liability—Liability without Fault and the Requirement of a Defect*, 41 Tex. L. Rev. 855 (1963). Goldberg, *Implied Warranty—The Privity Requirement in Personal Injury Cases*, 1963 Wis. L. Rev. 660 (1963). McCurdy, *Warranty Privity in Sales of Goods*, 1 Huston L. Rev. 201 (1964).

45. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1113 (1960).

46. Prosser, *Torts*, p. 491 (2d ed. 1955); Belli *Modern Trials*, Vol. 1, 297 (1954).

47. Silverman v. Oil City Glass Bottle Co., 110 Pittsb. Leg. J. 221 (Pa.) (here the court rejected the theories of election of remedies, estoppel, and *res judicata*). *Dam v. Lake Aliso Riding School*, 6 Cal.2d 395, 57 P.2d 1315 (1936). *Koser v. Hornback*, 365 P.2d 988 (Idaho 1954). 12 A.L.R. 778; 131 A.L.R. 847.

48. Prosser, *Torts*, p. 494 (2d ed. 1955).

49. *Hanson v. Firestone Tire and Rubber Co.*, 276 F.2d 254 (6th Cir. 1960); *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio 1959); *Bahlmon v. Hudson Motor Car Co.*, 288 N.W. 309 (Mich. 1939).

50. See authorities cited note 49 supra; a good discussion of the problems involved is found in Keeton, *Products Liability—Proof of Manufacturer's Negligence*. 49 Va. L. Rev. 675 (1963).

51. Uniform Commercial Code §§ 2-607, 714, Wyo. Stat. 34-2-607, 714 (1957) (Supp. 1963). *Notice Required: Whitfeld v. Jessup*, 31 Cal.2d 826, 193 P.2d 1 (1948); *Baum v. Murray*, 23 Wash.2d 890, 162 P.2d 801 (1945); *Columbia Axle Co. v. Amer. Auto. Ins. Co.*, 63 F.2d 206 (6th Cir. 1963); see Williston, *Sales*, § 484-A, n.8; Belli, 1 *Modern Trials* § 47, p. 305; Uniform Sales Act § 49. *No Required: Kennedy v. Woolworth Co.*, 205 App. Div. 648, 200 N.Y.S. 121 (1923). *Filing Considered Notice: Silverstein v. Macy & Co.*, 266 App. Div. 5, 50 N.Y.S.2d 916 (1943); see Williston, *Sales*, § 484.

warranty.⁵² However, the courts have reached the same result by finding "lack of due care," "avoidable harm," and "failure to heed warning" on the theory that the injury did not proximately result from the breach of warranty.⁵³ In these cases the buyers' training, skill, and knowledge with respect to the proper use of the product is a factor.⁵⁴ The use of contributory negligence as a defense to warranty should be distinguished from its use as a factor in mitigating damages.⁵⁵ The cases seem to indicate that "the problem is reduced to one of what the consumer has a right to expect," that is, "a product reasonably fit for the purpose for which it is sold."⁵⁶

The confusion between warranty and similar tort remedies is found in other areas too.

Generally the statute of limitations applied is for the longer contract period; however, some courts have held the shorter tort period applicable to warranty.⁵⁷ Whether the statute starts to run at the time of the sale or at the time the defect is discovered is also a subject of dispute.⁵⁸

A conflict as to whether tort or contract treatment should be applied also exists with respect to survival of actions,⁵⁹ assignability of claims,⁶⁰

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52. *Challis v. Hartloff*, 136 Kan. 823, 18 P.2d 199 (1933). (failure to discover that flour was poisonous); *Simmons v. Coca Cola*, 181 Kan. 35, 309 P.2d 633 (1957) (failure to discover matches in Coke); *Bahlman v. Hudson Motor Co.*, 290 Mich. 683, 288 N.W. 309 (1939) (express warranty of seamless car top; injury caused by seam when car rolled over); *Hansen v. Firestone Tire Co.*, 276 F.2d 254 (6th Cir. 1960) (driving on defective tire); *Kassouf v. Lee Bros. Inc.*, 26 Cal. Rptr. 276 (1962) (failure to discover worms in Hershey bar); *Vasallo v. Sabatte Land Co.*, 27 Cal. Rptr. 814 (1963) (defective milk bottle); *Chapman v. Brown, Hawaii* 198 F. Supp. 78 (1962) (hula skirt ignited); see also *Rosenfeld, The Role of Contributory Negligence in Warranty Actions*, 36 So. Cal. L. Rev. 490 (1963).
53. *Missouri Bag Co. v. Chemical Delinting Co.*, 214 Miss. 13, 58 So. 2d 71 (1952) (use of bags known to be defective); *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955) (continuing use of oil burner after notice that it was smoking); *Fredenhall v. Abraham & Strauss, Inc.*, 279 N.Y. 146, 18 N.E.2d 11 (1938) (failure to heed instructions on cleaning fluid label); see also *Friedman, Sales — Implied Warranty — Foreseeability as a Limitation to Liability*, 9 Wayne L. Rev. 383 (1963), citing *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962); *Keeton, Products Liability — Proof of the Manufacturer's Negligence*, 49 Va. L. Rev. 675, 691 (1963).
54. Compare: *McSpedon v. Kunz*, 271 N.Y. 131, 2 N.E.2d 513 (1963) ("humble housewife" cooking pork); *Eisenbrook v. Gimble Bros., Inc.*, 281 N.Y. 474, 24 N.E.2d 131 (1939) ("sophisticated chef" cooking pork).
55. *Chapman v. Brown*, 198 F. Supp. 78, 86 (Hawaii 1962). (The court said — dicta — that it was reasonable to believe that the courts of Hawaii, which had not spoken, would consider contributory negligence as mitigating damages).
56. *Prosser, The Assault upon the Citadel (Strict Liability to the Consumer)*, 60 Yale L.J. 1009 (1960).
57. *Prosser, Torts* pp. 483, 493 (2d ed. 1955); *Jones v. Boggs & Buhl, Inc.*, 355 Penn. 242, 49 A.2d 379 (1946); *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18 (1954); *contra: Challis v. Hartloff*, 136 Kan. 823, 19 P.2d 199 (1933).
58. *Citizens Util. Co. v. American Locomotive Co.*, 15 App. Div. 2d 473, 222 N.Y.S.2d 246 (1962). (held, the statute of limitations became operative from the date of the sale, and the buyer's inability to ascertain the quality or condition of the product at the time of sale is irrelevant) For a good discussion of this and *contra* cases see "Breach of Warranty — Action Held to Accrue When Goods Sold Rather Than When Defects Discovered." 63 Columbia L. Rev. 773 (1963).
59. *Prosser, Torts* p. 483 (2d ed. 1955). An action may survive in contract when it dies in tort.
60. *Prosser, Torts* p. 483 (2d ed. 1955). A contract may be assignable where a tort claim is not.

venue,⁶¹ attachment,⁶² summary judgment,⁶³ set-off,⁶⁴ counterclaim,⁶⁵ wrongful death,⁶⁶ interest,⁶⁷ immunities,⁶⁸ and damages.⁶⁹

It appears to make no difference whether warranty damages are treated as tort or contract. Courts have been willing to treat warranty damages for personal injury as within the contemplation rule for breach of contract.⁷⁰ The Uniform Commercial Code has followed suit by providing that "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable"⁷¹

CONCLUSION

In the Arguello case the jury in the iDstrict Court⁷² found that *both* A's "gross negligence or wilful and wanton misconduct"⁷³ and Ford Motor Company's negligence in the manufacture and inspection were "concurrent proximate causes of the accident."⁷⁴ Thus, B obtained a judgment against both in the amount of \$103,000. A settled, Ford appealed, and the Wyoming Supreme Court affirmed with Justice Grey dissenting.

Whether the allegations of negligence against Ford should have been allowed to go to the jury, or whether the verdict should stand are matters upon which reasonable men differ. Dissenting opinions are not common in our Supreme Court.

Ford's negligence in the manufacture and inspection of rivets in its Michigan plant is at best difficult to prove. The practical and technical problems involved present a real challenge to the Wyoming attorney. Warranty has much to offer in such cases.

Modern case law and statutes indicate that warranty is a favored

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61. Prosser, Torts p. 483 (2d ed. 1955). Contract venue may offer more latitude.
 62. Prosser, Torts p. 483 (2d ed. 1955). A contract suit may open the way to such remedies as attachment.
 63. Prosser, Torts p. 484 (2d ed. 1955). A contract suit may open the way to such remedies as summary judgment.
 64. Prosser, Torts P. 484 (2d ed. 1955). A contract may be available as a set off.
 65. Prosser, Torts p. 484 (2d ed. 1955). A contract may be available as a counter claim.
 66. Prosser, Torts p. 494 (2d ed. 1955). Recovery under warranty for wrongful death is generally not allowed. *contra*: Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D. N.Y. 1959); B. F. Goodrich v. Hammond, 269 F.2d 501 (10th Cir. 1959).
 67. Prosser, Torts p. 483 F.N. 73 (2d ed. 1955). A contract action may carry interest where a tort action does not.
 68. Prosser, Torts p. 483 (2d ed. 1955). Some immunities, such as those of municipal corporations or charities may prevent recovery in tort but not in contract.
 69. Prosser, Torts pp. 484, 494 (2d ed. 1955).
 70. Ryan v. Progressive Stores, 225 N.Y. 388, 175 N.E. 105 (1955), 74 A.L.R. 339. (*held* grocer liable for new loaf of bread plus foreseeable damages from eating bread with pin in it) Royal Box Co. v. Munro, 284 Mass. 446, 183 N.E. 223 (1934). (*held*, box manufacturer liable for new boxes plus candy damaged by oily boxes) Stonebrick v. Highland Motors, 171 Ore. 418, 137 P.2d 986 (1943) (damages are recoverable for personal injuries directly and naturally resulting from breach of implied warranty of fitness of an automobile bumper jack).
 71. Uniform Commercial Code § 2-719, Wyo. Stat. § 34-2-719 (1957) (Supp. 1963).
 72. District Court of Uinta County — Judge Christmas.
 73. Wyo. Stat. § 31-233 (1957) (Guest Statute).
 74. Ford Motor Co. v. Arguello, *supra* note 1, at 891.

remedy for the favored consumer. Wyoming statutes lead this trend; however, in Wyoming, unlike most states, warranty is a dormant remedy. This lack of use is no indication of its potential as a lawyer's tool. Wyoming attorneys would do themselves and their clients a real service if they were to allege warranty along with or in place of negligence when it is applicable.

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