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RETAIL RESPONSIBILITY—A REPLY

By John Barker Waite*

I appreciate the courtesy of Professor Brown, and the editors of the Minnesota Law Review, in offering me an opportunity to reply to his article. I suspect that the chief difference between Professor Brown and myself is a disagreement as to wise public policy—just as we might or might not disagree concerning the economic wisdom of federal legislation relating to wages and hours of labor.

Thoughtful men today concede, I believe, that judges create legal rules as truly, if not as frankly, as do legislatures.

"Whether the judicial process be philosophically characterized as ascertainment of preexisting but previously unformulated law, as application of known law to novel facts, as reshaping of law, as making of law, or simply and frankly as declaration of choice between conflicting theories of social interest, the fact remains that in case after case decision has in truth depended upon judicial notions of wise public policy. . . . Judicial decision has ceased to be an ineluctable transcendentalism speaking through the judges; it is revealed as a very human utterance based on individual ideas of what is wise."

It has been a long accepted rule of law that the consumer of canned goods, who has suffered injury through a defect in the contents, may shift the burden of loss to someone else, whenever, (1) the injury is attributable to the fault of that someone else, or (2) when that someone else has undertaken to assume the burden of injury. The "fault" upon which shifting the burden is thus predicable is usually characterizable as "negligence." The "assumption" of responsibility for the burden is commonly signified by use of that vague term "warranty."

Whether there is such an assumption, a "warranty," by virtue of which to shift the burden is, of course, often a disputable question. The complications in the problem are manifold. But as I thought to point out in my previous article, the original underlying idea of "warranty" is a representation, express or implied in

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1Quoted from my own discussion of Reasonable Search and Research (1938) 86 U. Pa. L. Rev. 623, in which I pointed out numerous illustrations. The gist of the article was that, since decision, like legislation, does thus depend often on choice of socio-economic-political policy, judges, as well as legislators, should predicate decision on knowledge of actualities rather than on empirical theory.
fact, from which either directly or by indirection a liability for its inaccuracy devolves upon its maker. Regardless of whether the nature of the liability sounds in contract or in tort, the basis of the liability—in the original connotation of the word—is an untrue representation. If one prefers, since "representation" and "promise" are so often misused interchangeably, "warranty" connotes a promise. But the point is, that it does connote an actual promise or actual representation—actual, even though its existence be deduced by inference from the implications of the situation without verbal expression. When either "fault" is present, or "assumption"—in this sense of real though perhaps inferred, representation—is present, the law has long permitted an injured consumer to shift his loss. But when neither has been present, it was not the policy of judicial decision, until recently, to transfer the loss from the consumer's shoulders to those of another.

Parenthetically, may I here enthusiastically repudiate the implications of Professor Brown's statement that "Professor Waite's theory that a retailer should not be liable except for personal negligence entirely wipes out the whole doctrine of warranty in the law of sales." I have promulgated no such theory! I appreciate Professor Brown's restraint in not belaboring me vigorously when he assumes that I take that position. It would be an absurd proposition, of course. What I do say is, that without negligence or warranty, in the original connotation of that term, the retailer should not be liable. But Heaven forbid that by my ipse dixit I should seek to wipe out warranties.

I do agree with Professor Brown that of late both the retailer and the manufacturer have been made liable by the courts, even when there was neither fault nor real representation-warranty. In fact that long unprecedented liability is what evoked my original article. In respect to the manufacturer, this new liability is imposed upon him sometimes under the terminology of "res ipsa loquitur," sometimes, as in Parks v. Yost Pie Company, upon a theory that manufacturers of foodstuffs, at least ought to be treated more or less as insurers of its suitability—the reason for such a policy not being expounded.

So too, retailers who are in no way at fault, and who can not rationally be pretended to have assumed a liability, have had liability nevertheless thrust upon them of late. Sometimes the process of imposition has been a bald—or should we call it bold—

\[\text{(1914) 93 Kan. 334, 144 Pac. 202: “Practically, he must know it is fit or take the consequences if it proves destructive.”}\]
use of the four-term fallacy in logic. "A retailer who warrants—in the sense of represents expressly or by implication—has always been liable. This retailer did warrant—in the sense of making a sale. Therefore he is liable." Possibly there is no great harm in such law-making, superficially concealed by mutation in terminology. As King Pausole said in justification of wearing his more comfortable imitation crown, anyone intelligent enough to recognize it as an imitation would realize that any crown is a false pretense. No sophisticated person is apt to be fooled by the new guise of "warranty" into believing that the old law of liability based either on fault or assumption is being adhered to. But what good the fiction serves is open to question.

Other courts in imposing the liability upon the retailer as a matter of status, regardless of fault or assumption, have been rather more frank. One case\(^3\) simply says that "public safety demands" such a liability—i.e., that the law shall "imply a warranty."\(^4\) Another\(^5\) assumes that the retailer's liability is "absolute and rests in its ultimate basis in large part upon the necessity for public protection." But none of these courts points out wherein this "public necessity" resides.

And there you have the point of disagreement between Professor Brown and myself. I have never been able to discover sufficient justification in economics, sociology, politics, or any utilitarian consideration, for the public policy of making the retailer liable merely because of his status, without either fault or warranty, in its original sense, on his part. Professor Brown believes that it is a wise policy. We probably disagree, amicably, about the practical wisdom of much other legislation. And in this particular instance I must concede that judges in increasing number, for reasons which they successfully keep to themselves, are following Professor Brown's ideas of socio-economic wisdom rather than mine.\(^6\)

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\(^3\)Chapman v. Roggenkamp, (1913) 182 Ill. App. 117.

\(^4\)Which, of course, in any conventionally correct use of English, is wholly different from saying that the seller has implied a warranty, e.g. has so acted that a representation can fairly be inferred by the court.


\(^6\)Moreover I note that the courts have now hooked the wholesaler into the liability-based-on-public-policy scheme. See for example Schwengel v. F. & E. Wholesale Grocery Co., (1938) 147 Kan. 555, 77 P. (2d) 930. They do it, to be sure, under the false pretense of an "implied" warranty—or would it be more diplomatic to say the "modernized" significance of the term?—but they talk utilities even if they do not analyze them. Perhaps some one will try the delivery boy next. It might be difficult to get him into the warranty verbiage, but what about "actual cause, proxi-
Even though I concede that the courts, for their own cryptic reasons, do seem to be following Prof. Brown's postulate that some wise public policy makes it desirable to let injured consumer shift the burden of loss to non-negligent and, in the original sense, non-warranting retailers, perhaps I ought to take issue with him on his implicit proposition that the same reasons for the policy do not apply to "servers" of food, nor to sellers of things other than food. It is a bit difficult to argue the proper breadth of application of the reasons in the absence of some clear premise of what those reasons are. But I submit that if, openly, or under cover of a mutation in the connotation of "warranty", a retailer of food ought to be held liable to consumers, without fault or assumption and merely because of his status, then retailers of other products and servers of food ought also to be held liable because of a similarity in status.

mate or efficient cause, negligent causation, duty to avoid negligence in respect to the injured person, forseeability?" He would seem to fit there-in, except, obviously, for the negligence requirement, and that did not greatly perturb judges who thought the non-negligent retailer really ought to hear the burden of loss. I am sure that some philosophy to support it could be found in Mr. Cowan's highly instructive, and diverting, The Victim of the Law of Torts, (1939) 33 Ill. L. Rev. 532. And as for the utilities—the delivery boy is even nearer to the consumer than is the retailer!