

THE ROAD TO SHANKLIN PIER, OR THE LEADING CASE THAT NEVER WAS

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On the night of 15th October 1987 a huge storm hit the south of England. It was recorded as the greatest storm to hit the area since the Great Storm of 1703.¹ In places the wind reached a speed of over 100 knots. 18 people were killed, and an estimated 15 million trees were lost. In some cases the landscape was changed irrevocably.²

One of the casualties of the storm was the Victorian pier at Shanklin, on the Isle of Wight. According to the BBC website,³ this pier was built under statutory powers by the Shanklin Esplanade and Pier Company and opened to the public in the summer of 1890. From then on the pier had a relatively uneventful career for most of its existence. We are told that the pier was used for a number of activities, including fishing and clay pigeon shooting. Cruises were provided round the island from the landing stage, and those who felt more adventurous could sail to Brighton or Eastbourne, or even to Cherbourg in France. Regattas and water carnivals were popular, and there was always entertainment from local stunt men, including “Professor Wesley”, a one-legged man who dived into the sea from a flaming tower on the pier.

During the Second World War suffered a fair degree of damage, being bombed by German aircraft. It was then partly demolished to prevent it being used as a landing stage for invading troops. After the war ended steps were taken to refurbish the pier, and it is at this stage that we move into legal territory, for as a footnote to the BBC website records, one incident that occurred during the plans to re-open Shanklin Pier was the painting of the pier. This gave rise to what the website terms the “landmark Contract Court Case” of *Shanklin Pier Ltd v Detel Products Ltd*.⁴ However, most contract lawyers would agree that this gives the case more importance than it deserves; though it is certainly a significant case, it is not a landmark case for the law of contract as *Donoghue v Stevenson*⁵ is a landmark case for the law of tort. There is no notice on the sea front at Shanklin, as there is at the site of Minchella's Café on Wellmeadow Street in Paisley. Academic lawyers do not organise pilgrimages to Shanklin.⁶ Paint makers do not run competitions

¹ www.dandantheweatherman.com

² As in Sevenoaks, Kent, where the famous trees that gave the town its name were reduced to a single specimen.

³ www.bbc.co.uk/dna, “The Guide to Life, the Universe and Everything”.

⁴ [1951] 2 K.B. 854.

⁵ [1932] A.C. 562.

⁶ Compare the 1990 “Pilgrimage to Paisley” organised by the Canadian Bar Association, the Faculty of Advocates and the Law Society of Scotland. This culminated in a conference in Paisley Town Hall attended by over two hundred judges, lawyers and academics from around the world: see the Scottish Council of Law Reporting website at www.scottishlawreports.org.uk.

asking customers to compose a slogan on the lines “Blenkinsop’s Paint will not peel off your pier because . . .”⁷

Yet it is the purpose of this paper to argue that *Shanklin Pier Ltd v Detel Products Ltd*, had it been properly appreciated and applied, could indeed have been a case as important as *Donoghue v Stevenson*. More than that, the “collateral contract” analysis used in that case could have been used to provide consumers with a remedy against the manufacturer as effective, if not more so, than the tort of negligence as developed in *Donoghue v Stevenson*. In the pages which follow we shall begin by looking at the background to *Shanklin Pier Ltd v Detel Products Ltd*, and at the judgment of McNair J. in that case. We shall then look at how a similar set of doctrines was used to develop a key consumer remedy in the United States. Finally, we shall see how and why these developments failed to take hold to the same extent on this side of the Atlantic.

The Law of Warranties

The seller’s warranty was described by Prosser as “a freak hybrid born of the illicit intercourse of tort and contract”.⁸ Nowadays the word “warranty” is used, at any rate in the context of the sale of goods, to mean a minor term of the contract, breach of which may give rise to a claim for damages but not to the right to treat the contract as repudiated.⁹ However, prior to the nineteenth century the word was used in a very different sense; indeed, the action for breach of warranty originally had nothing to do with the law of contract at all,¹⁰ being older by a century than special *assumpsit*.¹¹ The original nature of this action is can be seen from *Chandelor v Lopus*,¹² decided at the beginning of the seventeenth century. Here the buyer of a jewel claimed that the seller, a goldsmith who specialised in precious stones, had affirmed it to be a bezoar stone when in fact it was nothing of the sort. The buyer’s action succeeded in the Court of King’s Bench, but the decision was reversed in the Exchequer Chamber for error of law, “because the declaration contains not matter sufficient to charge the defendant, viz.: that he warranted it to be a Bezoar stone, or that he knew that it was not a Bezoar stone; for it may be that he himself was ignorant whether it were a Bezoar stone or not”. Thus it was established that a buyer could not claim damages in respect of a false

⁷ A few years ago a competition of this sort was run by Fentiman & Co Ltd, a soft drinks manufacturer. Bottles of Fentiman’s Ginger Beer were marketed with a picture of a snail substituted for the usual company logo of a German Shepherd dog, and customers were invited to complete the slogan “You will not find a snail in a bottle of Fentiman’s Ginger Beer because. . .” The prize was £7,400, the equivalent in contemporary terms of the damages awarded to the pursuer in *Donoghue v Stevenson*.

⁸ “The Assault on the Citadel” (1960) 69 Yale L.J. 1099 at 1126. “A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty” (1929) 42 Harvard L.R. 414.

⁹ Sale of Goods Act 1979, s.11(3).

¹⁰ Street, *Foundations of Legal Liability* (1906), Vol 1 ch XXVII; Williston, “What Constitutes an Express Warranty in the Law of Sales” (1908) 21 Harvard L.R. 555; Greig, “Misrepresentations and Sales of Goods” (1971) 87 L.Q.R. 179; *Williston on Sales* (4th ed., by Squillante and Fonseca, 1974), Vol 2 chap.15.

¹¹ See below, n.19.

¹² (1603) Cro Jac 4.

representation made by the seller in the absence of proof either of fraud or breach of warranty on his or her part. The action for fraud, of course, developed into the modern tort of deceit; it is the action for breach of warranty that we are concerned with in this context. Generally speaking, this required the buyer to prove three things: (1) that a false representation had been made; (2) that this representation amounted to a warranty; and (3) that he or she had acquired the goods in reliance on this misrepresentation.¹³ The question of whether an affirmation amounted to a warranty in any given case was later said to be one of intention,¹⁴ but the early cases do not indicate that anything more was required than that the affirmation be such as to lead a reasonable man to believe that a statement of fact was made to induce the bargain.¹⁵ Thus in *Crosse v Gardner*¹⁶ the plaintiff bought two oxen from the defendant, who affirmed that they belonged to him. In fact the seller had no title, and the true owner later recovered them from the buyer. It was held that the seller was liable in damages even in the absence of fraud on his part. The same reasoning was applied to the sale of a lottery ticket in *Medina v Stoughton*;¹⁷ once again, the buyer was later dispossessed by the true owner and recovered damages, it being said that where one having possession of a chattel sells it, the bare affirmation of title amounted to a warranty on which action could be brought.

As we have seen, the action for breach of warranty originally had nothing to do with contract; if anything, it was grounded in tort rather than contract.¹⁸ However, by the middle of the eighteenth century actions for breach of warranty began to be pleaded in *assumpsit*,¹⁹ the eventual result being that the law of warranty was, in the words of Street, “transferred almost bodily into the domain of contract”.²⁰ One result of this was that the notion of intention to warrant took on a different significance. This is well illustrated by the case of *Hopkins v Tanqueray*, decided in 1854.²¹ Here the defendant sent his horse to Tattersalls for sale by auction. The day before the auction he came across the plaintiff inspecting the horse’s legs, and said to him: “Oh, you need not trouble yourself to examine the horse’s legs; you may rely on me that the horse is sound in every respect; you have nothing to look for.” At the auction the following day the plaintiff bought the horse, which proved to be unsound. An action was brought to recover damages, at which

¹³ Greig, *op. cit.* at n.10, pp.179-180.

¹⁴ *Pasley v Freeman* (1789) 3 T.R. 51 at 57 (Buller J). According to Greig, *op. cit.*, pp.181-183, this *dictum* was unnecessary to the decision and was in any event misunderstood in later cases.

¹⁵ Williston, (1908) Harvard L.R. 555 at 560.

¹⁶ (1688) Carth 90.

¹⁷ (1700) 1 Salk 210.

¹⁸ *Williston on Sales*, para.15.2. Thus for instance, as with the modern doctrine of misrepresentation, it only applied to representations of existing fact. “The warranty can only reach things in being at the time of the warranty made, and not things *in futuro*; as, that a horse is sound at the buying of him, not that he will be sound two years hence”: Blackstone, 3 Comm 165.

¹⁹ The first reported case of this sort was *Stuart v Wilkins* (1778) 1 Dougl 18, but the practice of pleading on the basis of *assumpsit* was said in that case to be well established.

²⁰ *Op. cit.* at n.10, p.399.

²¹ (1854) 15 C.B. 130.

evidence was given that horses sold at Tattersalls were without warranty unless indicated otherwise in the catalogue. The defendants argued that the assertion made to the plaintiff on the day before the sale was a mere statement of opinion rather than a warranty, that it was a mere representation which could provide no ground of action in the absence of fraud, and that the statement was not intended to form part of the contract.²² It was held by the court that there was no evidence of a warranty fit to go to the jury. According to Jervis C.J., the defendant had made no more than “a bona fide representation of what he believed to be the fact”,²³ while Maule J. said that there was “not the smallest ground upon which the jury could infer that the parties intended or understood from what passed on that occasion that the defendant would be liable to an action if the horse turned out to be unsound”.²⁴ Cresswell J. said that there was no evidence of “a formal contract of warranty at the time of the sale”,²⁵ Crowder J., adding that “[a] representation, to constitute a warranty, must be shewn to have been intended to form part of the contract”.²⁶ Though the judgments differed in their emphasis, the upshot of this case was that a seller who induced a buyer to purchase goods on the faith of some affirmation, be it never so persuasive or positive, could now escape liability by convincing the court that the affirmation in question was not intended as an offer to enter into a contract:²⁷ that is to say, that the statement in question was not a warranty but a “mere representation”.²⁸

Even where there was no doubting the seller’s intention to “warrant” the accuracy of the assertion in the contractual sense, problems could still arise where an oral assertion was followed by a written contract which made no reference to the assertion in question. This was because of the parol evidence rule, that is to say the “firmly established ... rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument”.²⁹ One way around this rule was to construe the oral assertion in terms of a supplementary or “collateral” contract between the parties.³⁰ In *Lindley v Lacey*³¹ the plaintiff was induced to sign a written contract for the sale of a business by the defendant’s oral promise to settle an action brought against the plaintiff by a third party. The court held that this promise could be enforced as an agreement distinct from the main contract: it was as if there was a written agreement ready to be signed and that one of the

²² *ibid.*, at 131.

²³ *ibid.*, at 139.

²⁴ *ibid.*, at 140.

²⁵ *ibid.*, at 141-142.

²⁶ *ibid.*, at 142.

²⁷ *Williston on Sales*, para.15.3.

²⁸ *Power v Barham* (1836) 4 A & E 473; *Behn v Burness* (1863) 1 B & S 751; Treitel, *The Law of Contract* (11th ed., 2003), pp.353-356; Willis, *The Law Relating to the Contract of Sale of Goods* (1929), pp.123-124.

²⁹ *Jacobs v Batavia & General Plantations Trust* [1924] 1 Ch. 287 at 295 (Lawrence J).

³⁰ Wedderburn, “Collateral Contracts” [1959] C.L.J. 58.

³¹ (1864) 17 C.B. (NS) 578; *Morgan v Griffith* (1871) L.R. 6 Ex. 70; *Erskine v Adeane* (1873) L.R. 8 Ch. 756; *Angell v Duke* (1875) L.R. 10 Q.B. 174; Wedderburn, *op. cit.*, pp.64-65.

parties said to the other: “If you put your name to that, I will do so and so.”³² This reasoning was extended to an oral warranty in *De Lasalle v Guildford*,³³ where a tenant was induced to take out a lease by the landlord’s assurance that the drains were in good order. The collateral contract device proved to be a useful technique not only for getting round the parol evidence rule, but also in cases where the main contract was defective for one reason or another;³⁴ it could even be used to enforce promises or affirmations which appeared at first sight to contradict the terms of that contract.³⁵ Some judges were suspicious of this device, it being said by Lord Moulton in *Heilbut, Symons & Co v Buckleton*³⁶ that proof of a collateral contract required evidence not only of the terms of such contracts but also of an *animus contrahendi* on the part of those involved.³⁷ However, when used properly the collateral contract was said to be a necessary and useful weapon in the modern law of contract.³⁸

So far all the cases we have been considering involve only two parties: A makes a certain statement to B, on the faith of which B enters into a contract with A. However, it often happens that the person who makes the statement is not the person with whom the contract is ultimately made. Here the situation is slightly different: A makes a statement to B, on the faith of which B enters into a contract with C.³⁹ In *Brown v Sheen and Richmond Car Sales Ltd*⁴⁰ the plaintiff agreed to buy a car from the defendants after being told by the manager that it was in perfect condition and “good for thousands of trouble-free miles”. Since the plaintiff needed to acquire the car on credit terms, the defendants sold it to a finance company, which then let it out on hire purchase to the plaintiff. The car turned out to be defective, and the plaintiff sued the defendants for the cost of the necessary repairs. It was held by Jones J. that even though there was no direct contract of sale between the parties damages could still be recovered on the following grounds: (1) the defendants had given a warranty as to the condition of this car; (2) the plaintiff was induced by the warranty to enter into the hire-purchase agreement; (3) the warranty was broken; and (4) the plaintiff suffered damage through the breach as he paid a larger sum under the hire-purchase agreement for the car than it was worth and he would have paid if the warranty had not been given.⁴¹ This gave rise to the following question: what about the very common situation where a customer buys goods from a retailer on the faith of assertions made by the manufacturer? Here we have another situation in which A makes a statement to B, on the faith of which B enters into a contract with C. It is this situation with which *Shanklin Pier Ltd v Detel Products* is concerned.

³² *ibid.*, at 585 (Erle J).

³³ [1901] 2 K.B. 215.

³⁴ Wedderburn, *op. cit.* at n.30, pp.69-75.

³⁵ *Webster v Higgin* [1948] 2 All E.R. 127; *Harling v Eddy* [1951] 2 K.B. 739; *City and Westminster Properties Ltd v Mudd* [1958] 2 W.L.R. 312.

³⁶ [1913] A.C. 30.

³⁷ *ibid.*, at 47.

³⁸ Wedderburn, *op. cit.* at n.30, p.77.

³⁹ *Op. cit.*, pp.68-69.

⁴⁰ [1950] 1 All E.R. 1102.

⁴¹ *ibid.*, at 1104.

The Shanklin Pier Case

Shanklin Pier Ltd v Detel Products Ltd is but a case at first instance, and is only briefly reported.⁴² The whole report is only four pages long, and the judgment of McNair J. takes up little more than two of those pages. The background to the case is, as we have already seen,⁴³ the decision to refurbish the pier, which had fallen into disrepair during the war. To this end the plaintiff company signed a contract with a firm of contractors to have the necessary repairs effected, and to have the whole pier repainted.⁴⁴

Early in 1946 the plaintiffs were approached by one of the directors of the defendant company, with a view to obtaining a contract for the supply of the paint.⁴⁵ He told them that a certain paint manufactured by the defendants known as “DMU” would be suitable for the work, showed them a pamphlet detailing its properties, and assured them that if used it would last for at least seven years if not more.⁴⁶ Acting on the faith of these statements the plaintiffs, who were entitled to vary the specifications of their contract with the contractors, amended the relevant specification by ordering the use of two coats of DMU paint. However, the paint proved to be most unsatisfactory and lasted for only three months. As a result of this the plaintiffs were put to extra expense amounting to over £4,000.⁴⁷

The plaintiffs now sought to recover this in damages from the defendants on the basis of breach of warranty. The defendants however argued that no such warranty had ever been given, and that in any event it could not apply in the present situation since the paint had been sold to the contractors and not to the plaintiffs.⁴⁸ So was there a warranty here, and if so what was its scope?

On the first point, McNair J, after reviewing the evidence of the negotiations between the parties, had no difficulty in deciding that the defendants had indeed warranted the soundness of their paint. The cases established that an affirmation at the time of sale was to be taken as a warranty, provided it appeared on evidence to have been so intended.⁴⁹ So did it make any difference that the sale was to the contractors rather than to the plaintiffs themselves? The answer was that it did not. In the words of McNair J

“Counsel for the defendants submitted that in law a warranty could give rise to no enforceable cause of action except between the same parties as the parties to the main contract in relation to which the warranty was given. In principle this submission seems to me to be unsound. If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty was given, I see no reason why there may not be an enforceable warranty between A and B supported by the

⁴² [1951] 2 K.B. 854.

⁴³ Above at n.4.

⁴⁴ [1951] 2 K.B. at 854.

⁴⁵ *ibid.*

⁴⁶ *ibid.*, at 854-855.

⁴⁷ *ibid.*, at 855.

⁴⁸ *ibid.*

⁴⁹ *Crosse v Gardner* (1688) Comb 142; *Medina v Stoughton* (1700) 1 Salk 210.

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.”⁵⁰

The importance of this in the commercial context cannot be exaggerated. As has been pointed out,⁵¹ we now live in a world where purchasers, whether in the consumer or business context, rely on a daily basis on representations by manufacturers as to the quality of their goods. Under traditional principles of contract law, the doctrine of privity prevents the purchaser claiming damages from the manufacturer on the basis of such representations.

In *Shanklin Pier Ltd v Detel Products Ltd* we have a simple and elegant solution to the problem in the shape of a collateral contract in which the manufacturers say to the ultimate consumers of the goods: “If you buy our product from the retailer, we will warrant that it is suitable for the purpose”.

Warranties in the United States

The problem of manufacturers’ advertising and the law of privity was addressed extensively in the United States, where the old law of warranties played a very prominent part in the development of remedies in the field of consumer protection.⁵² The leading case here is *Baxter v Ford Motor Co*,⁵³ a case decided in the Supreme Court of Washington State in 1932. In this case the plaintiff purchased a Ford Model A sedan from a dealer who had in turn purchased it from the defendants. The defendants’ catalogue contained the following statement: “All of the new Ford cars have a Triplex shatter-proof glass windshield – so made that it will not fly or shatter under the hardest impact.”⁵⁴ Having seen the catalogue, the plaintiff bought the car. Six months later he was driving along the road when the windshield was shattered by a pebble from a passing car, causing injuries including the loss of an eye. In an action against the defendants for damages it was argued that there could be no implied or express warranty without privity of contract, and that the statement in the catalogue should not have been admitted into evidence. However, the court held that the defendants were liable for breach of warranty, saying that the plaintiff here was in a position similar to that of the consumer of a wrongly labelled drug. The rule in such cases did not rest on contractual obligations, but rather on the principle that the original act of delivering an article was wrong when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, the article was not safe for the purposes for which the consumer would ordinarily use it. As Herman J. commented:

⁵⁰ [1951] 2 K.B. at 856.

⁵¹ See the comments of Herman J. in *Baxter v Ford Motor Co* 12 P. 2d 409 (1932), below at n.55, and of Judge Fuld in *Randy Knitwear Inc v American Cyanamid Co* 226 N.Y. Supp. (2d) 363 (1962), below at n.73.

⁵² See generally Jaeger, “Privity of Warranty: has the Tocsin Sounded?” (1963) 1 *Duquesne University L.R.* 1; Prosser, “The Assault on the Citadel” (1969) *Yale L.J.* 1099.

⁵³ 12 P. 2d 409 (1932).

⁵⁴ *ibid.*, at 411.

“Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.”⁵⁵

A similar approach can be seen in *Hamon v Digliani*,⁵⁶ where a consumer of detergent was allowed to recover damages for personal injury from the manufacturer in an action for breach of warranty. Saying that the plaintiff had been induced to buy the goods by the manufacturer’s advertising, the Supreme Court of Connecticut based its decision fairly and squarely on the old law of warranties. In the words of Murphy AJ:

“These cases, and others of similar import, rely on the original concept of an action for breach of warranty, that is, that it sounds in tort and is based on the plaintiff’s reliance on deceitful appearances or representations rather than on a promise.”⁵⁷

So far we have been considering the problem of “vertical” privity: that is to say cases where a buyer of goods seeks to recover damages for breach of warranty from someone other than the seller.⁵⁸ However, actions for breach of warranty can also be brought in many United States jurisdictions in cases of “horizontal” privity: that is to say cases where a seller of goods is sued by persons other than the buyer.⁵⁹ This problem is addressed by section 2-318 of the Uniform Commercial Code, which reads as follows:

“A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.”

Most jurisdictions have adopted the provision in this form, but some states have incorporated a wider version making the seller liable to any natural person who may reasonably be expected to use, consume or be affected by the goods and who was injured in person by breach of the warranty.⁶⁰

⁵⁵ *ibid.*, at 412.

⁵⁶ 174 A. 2d 294 (1961).

⁵⁷ *ibid.*, at 296.

⁵⁸ White and Summers, *Uniform Commercial Code* (5th ed., 2000), para.11-2.

⁵⁹ *ibid.*

⁶⁰ White and Summers, *op. cit.* at n.58, para.11-3.

In the years up to 1960 the action for breach of warranty was the normal technique used in the United States for overcoming the problem of privity in the field of personal injury to consumers.⁶¹ However, following the seminal decisions of the Supreme Court of New Jersey in *Henningsen v Bloomfield Motors Inc*⁶² and the Supreme Court of California in *Greenman v Yuba Power Products*⁶³ breach of warranty in this context was largely superseded by the imposition of strict liability in tort without any reference to any warranty whether express or implied.⁶⁴ But what about cases where the plaintiff seeks to recover for purely economic loss? This brings us on to the decision of the New York Court of Appeals in *Randy Knitwear Inc v American Cyanamid Co*, to which we shall now turn.

In *Randy Knitwear Inc v American Cyanamid Co*⁶⁵ the defendants were the manufacturers of a resin called “Cyana”, which was designed to prevent fabric shrinkage. In connection with this labels were produced for use on garments made out of fabric treated with the resin. These read as follows:

A
CYANA
FINISH
This Fabric Treated for
SHRINKAGE
CONTROL
Will Not Shrink or
Stretch out of Fit
CYANAMID

Quantities of the resin were sold to fabric manufacturers, Apex and Fairtex, who used it to make up fabrics. These were then sold on to the plaintiffs, who used the fabrics to manufacture garments. Despite the assurances of the defendants, the fabrics suffered from shrinkage, and as a result the plaintiffs incurred loss of profits amounting to over \$200,000. The plaintiffs now sought to recover this sum from the defendants, who argued that they were not liable in the absence of privity of contract.⁶⁶ The judgement was delivered by Judge Fuld,⁶⁷ who began by referring to the previous decision of

⁶¹ Prosser, *op. cit.* at n.52, pp.1125-1126

⁶² 161 A. 2d 69 (1960).

⁶³ 377 P. 2d 697 (1963).

⁶⁴ Restatement 2d., Torts, section 402A (1965); Prosser, “The Fall of the Citadel” (1965-1966) 50 Minnesota L.R. 791; Tebbens, *International Product Liability* (1979) paras. 2.1.1.2 and 2.1.1.3.

⁶⁵ 226 N.Y. Supp. (2d) 363 (1962); *Southland Milling Co v Vege Fat Inc* 248 F. Supp. 482 (1965); *Jackson v Benson Motors Inc* 216 N.W. 2d 396 (1974); *Klages v General Ordnance Equipment Corp* 367 A. 2d 304 (1976); *County of Chenango Industrial Development Agency v Lockwood Greene Engineers Inc* 114 A. 2d 748 (1985); *Oak Point Associates v Southern States Screening Inc* 1992 US Dist LEXIS 11505.

⁶⁶ 226 N.Y. Supp (2d) 363 at 365-366.

⁶⁷ One of the great innovative judges of the New York Court of Appeals, famous also for his celebrated judgement in the conflict of laws case of *Babcock v Jackson* 140 N.Y.S. 2d 743 (1963).

the same court in *Greenberg v Lorenz*⁶⁸ the previous year, a case of “horizontal privity” in which it was held that in cases involving foodstuffs and other household goods the implied warranties of fitness and merchantability ran from the retailer to the members of the purchaser’s household, regardless of privity of contract.⁶⁹ The question was now whether the traditional privity limitation could also be dispensed with in an action for express warranty by a remote purchaser against the manufacturer who induced the purchase by representing the quality of the goods in public advertising and on labels which accompanied the goods.⁷⁰ Referring to *Baxter v Ford Motor Co*,⁷¹ the judge said that there was no good reason for restricting the doctrine of that case to personal harm or injury, adding that since the basis of liability in this sort of case turned not on the character of the product but on the representation, there was no justification for a distinction on the basis of the type of loss suffered or on the type of article or goods involved.⁷² More generally, Judge Fuld said that while it once may have been true to say that warranties which induced the contract of sale were normally express terms of that contract, in modern conditions the significant warranty was that given by the manufacturer through mass advertising and labelling to ultimate business users or consumers with whom there was no direct contractual relationship. In the words of Judge Fuld:

“The world of merchandising is . . . no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer’s denial of liability on the sole ground of the absence of technical privity. Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. Equally sanguine representations on packages and labels frequently accompany the article throughout its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers. Under these circumstances, it is highly unrealistic to limit a purchaser’s protection to warranties made directly to him by the immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.”⁷³

Whatever the legal theory underpinning these decisions may be, it has been pointed out by White and Summers in their commentary on the Uniform Commercial Code that most courts allowing recovery rely on one of two

⁶⁸ 213 N.Y.S. 2d 39 (1961).

⁶⁹ Compare U.C.C. s.2-318, above at nn.59-60.

⁷⁰ 226 N.Y. Supp. (2d) 363 at 366.

⁷¹ 12 P. 2d 409 (1932): above at nn.53-55.

⁷² 226 N.Y. Supp. (2d) 363 at 367

⁷³ *ibid.*, at 367-368.

rationales to justify allowing non-privacy consumers to recover for direct economic loss.⁷⁴ The first is that manufacturers induce customers to purchase their products by representations of quality; merely putting the product on the market is to represent to all who might ultimately buy the product that it is at least merchantable. Secondly, some courts reason that even absent extensive advertising, manufacturers are the “real” sellers upon whom the consumers rely, the buyer’s immediate dealer acting merely as a “conduit” between the manufacturer and the consumer purchaser. The authors indicate that they are doubtful as to this second rationale, and it is interesting to note that the first rationale is not far from the reasoning used by McNair J. in the *Shanklin Pier* case: by putting the goods on the market the manufacturer is saying to the ultimate purchaser: “Buy my product, and I will promise that it is suitable for its purpose.” However, as we shall now see the courts in England did not take the opportunity to develop the law in this direction, and as a result *Shanklin Pier Ltd v Detel Products Ltd* never achieved its full potential.

A Lost Opportunity?

Shanklin Pier Ltd v Detel Products Ltd is authority for the proposition that where a manufacturer or producer makes a direct representation to a particular buyer, on the faith of which he or she acquires the goods from a third party, the buyer may be able to sue the manufacturer on the basis of a collateral warranty. In *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd*⁷⁵ the plaintiffs’ manager, R, went to the defendants and told their manager, C, that he needed sand for propagating chrysanthemums. C then suggested that a particular type of sand would meet the plaintiffs’ needs, and gave R a sample with an accompanying chemical analysis. On the faith of this R ordered several consignments of sand, some direct from the defendants and some through a third party. The sand turned out to be totally unsuitable, and damages were claimed. In relation to the sand that had been ordered direct from the defendants there was no problem, there being a clear breach of the implied terms under the Sale of Goods Act, but what about the sand which had been ordered through the third party? In an extensive judgement Edmund Davies J. held that in this case the plaintiffs could recover for breach of collateral warranty on the basis of the *Shanklin Pier* case, saying that two ingredients were necessary to establish such a warranty, namely: (1) a promise or assertion by the supplier as to the nature, quality or quantity of the goods which the customer might reasonably regard as being made *animus contrahendi*, and (2) the acquisition of those goods by the customer in reliance on that promise or assertion.⁷⁶ He added that a warranty might be enforceable notwithstanding that no specific main contract was discussed at the time it was given, though the necessary *animus contrahendi* would be unlikely to be inferred unless the circumstances showed that it was within the contemplation of the parties that such a contract would be entered into.⁷⁷

⁷⁴ *Op. cit.* at n.58, para.11-5.

⁷⁵ [1965] 2 Q.B. 170.

⁷⁶ *ibid.*, at 180.

⁷⁷ *ibid.*

As we have seen, the collateral warranty device was also used to circumvent the problems of privity in the hire purchase context.⁷⁸ In *Andrews v Hopkinson*⁷⁹ the defendant, who was a car dealer, showed a car to the plaintiff and said, "It's a good little bus! I would stake my life on it; you'll have no trouble with it!" On the faith of this the plaintiff agreed to take the car, which was sold to a finance company and then let out on hire purchase to the plaintiff. In fact the car was seriously defective, and shortly afterwards the steering failed, causing a collision in which the plaintiff was injured and the car totally destroyed. The defendants were held liable in negligence for putting a dangerous car on the road, but McNair J. also held them liable for breach of collateral warranty. This was on the basis of the defendant's express representation, but the judge also canvassed the possibility of implying a warranty into a collateral contract in cases such as this on the basis of section 14 of the Sale of Goods Act. This would have indeed been a bold move, but one in line with the approach seen in the United States.⁸⁰

A third situation which is relevant in this context is the manufacturer's guarantee. Where a customer buys electrical or other goods from a retailer, they are often accompanied by a guarantee in which the manufacturer agrees to repair the goods or replace them free of charge if any defects appear within the specified period. The enforceability of these guarantees has been said to be conjectural, on the grounds of lack of privity between the manufacturer and the customer. One way round this problem is to construe the guarantee, assuming that the customer is aware of it at the time when the goods are purchased, as a promise to abide by its terms if the customer agrees to buy the goods.⁸¹ This analysis is fully in accordance with *Shanklin Pier Ltd v Detel Products Ltd*.

Finally, it seems that collateral warranties are often relied on in the construction industry in cases of economic loss caused by building or design defects.⁸² Prior to 1990 these could be dealt with under the umbrella of negligence,⁸³ but in *Murphy v Brentwood District Council*⁸⁴ the House of Lords held that the mere existence of such defects were not normally actionable in negligence in the absence of a special relationship of reliance between the parties. This led to a growth in the use of formal collateral warranty agreements in connection with building developments, but even in the absence of such agreements the collateral contract device is still sometimes used to enforce liability.⁸⁵ Such a case was *George Fischer*

⁷⁸ Above at n.40.

⁷⁹ [1957] 1 Q.B. 229.

⁸⁰ Uniform Commercial Code, para.2.318, above at nn.59-60; *Kassab v Central Soya* 246 A. 2d 848 (1968); *Israel Phoenix Assurance Co Ltd v SMS Sutton Inc* 787 F. Supp. 102 (1992). However, in *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] 1 Q.B. 71 the English Court of Appeal refused to countenance such a move.

⁸¹ Harvey, *The Law of Consumer Protection and Fair Trading* (6th ed., by Harvey and Parry, 2000), p.158.

⁸² Simons, "Parallel Lines: a Reappraisal of Collateral Contracts" (1991) 21 *Trett Digest* 2.

⁸³ *Anns v Merton London Borough Council* [1978] A.C. 728; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520.

⁸⁴ [1991] 1 A.C. 398.

⁸⁵ Simons, *op. cit.*

Holdings Ltd v Multi-Design Consultants,⁸⁶ in which the plaintiffs, the owners of a warehouse, claimed damages from the defendant designers MDC in respect of a leaky roof. In the negotiations leading up to the building contract it was originally envisaged that MDC would construct the building itself, but in the end the work was done by Multi Group, an associated company, with whom the contract was eventually signed. By the time the defect came to light Multi Group had been dissolved, so the only recourse the plaintiffs had was against MDC, with whom they had no direct contractual relationship. It was held by His Honour Judge Hicks QC that MDC were liable to the plaintiffs for breach of a collateral contract; the main contract having come into existence with direct input from MDC, the necessary reliance on their skill and judgement could be shown.⁸⁷ This case, though obviously not of high precedent value, is of interest as it shows how the collateral contract analysis can be used in cases not involving an express representation of existing fact.

However, any hopes of *Shanklin Pier Ltd v Detel Products Ltd* being used to establish a broader principle of liability were dashed by the decision of the Court of Appeal in *Lambert v Lewis*.⁸⁸ This was a case involving a complex web of litigation arising out of a fatal motor accident. A manufacturer (M) produced and marketed a towing hitch, which was advertised as being “foolproof” and needing no maintenance. M then sold it to a wholesaler (W) who then sold it to a dealer (D). D then fitted the hitch to a Land Rover belonging to a customer (C), for use in his farm and building business. While the vehicle was being driven with a trailer by one of C’s employees (E), the hitch came loose and the trailer swerved across the road, causing a collision with a car being driven in the opposite direction. In this collision the plaintiffs (PP), who were the occupants of the car, were killed.⁸⁹

PP now brought an action for negligence against C, E, D and M. At the same time C and E sued D in third party proceedings on the basis of the Sale of Goods Act. D in turn sued M in fourth party proceedings both for negligence and also for breach of a collateral warranty on the basis of the assertions made in the advertisement.⁹⁰ It is with these fourth party proceedings that we are particularly concerned in the present context, but it is worth noting that the case raised problems both of “vertical” privity (in relation to the liability of the manufacturer to the dealer) and of “horizontal” privity (in relation to the liability of the dealer to the plaintiffs).

At first instance the trial judge found in the main action that C, E and M had been negligent but not D. The third party proceedings against D were also dismissed, on the ground that though the towing hitch was clearly unmerchantable and unfit for its purpose, the negligence of C and E in fitting the hitch had broken the chain of causation between the breach of the Sale of Goods Act and the subsequent accident. This meant that the issue raised by the fourth party proceedings did not arise.⁹¹ C and E then appealed to the

⁸⁶ [1998] C.I.L.L. 1392; Simons, *op. cit.*

⁸⁷ Simons, *op. cit.*

⁸⁸ [1982] A.C. 225, *sub nom Lexmead (Basingstoke) Ltd v Lewis*.

⁸⁹ *ibid.*, at 229.

⁹⁰ *ibid.*

⁹¹ *ibid.*

Court of Appeal both in the main action and in the third party proceedings, arguing that they had not been negligent, but that if they had they could claim an indemnity from D on the basis of the Sale of Goods Act.⁹² Since a successful appeal in the third party proceedings would have raised the question of whether the manufacturer was liable to D, the Court of Appeal also had to consider the issue in the fourth party proceedings.

The appeal in the main action was dismissed by the Court of Appeal, which found that C and E had indeed been negligent in the fitting of the trailer.⁹³ At the same time the appeal in the third party proceedings was allowed, on the basis that D's liability under the Sale of Goods Act had contributed significantly to the accident.⁹⁴ So the court now had to decide the question raised in the fourth party proceedings: could D claim an indemnity from M, either on the basis of a collateral warranty or under the tort of negligence?⁹⁵

In his claim on the basis of collateral warranty, D relied on the *Shanklin Pier* case and on *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd*,⁹⁶ arguing that the assertions made in the manufacturer's advertisements were intended to be relied on and were so relied on.⁹⁷ In response to this M argued that the assertions were mere representations and that there was no proof of the necessary *animus contrahendi*, and that in the event the necessary reliance could not be shown.⁹⁸ The Court of Appeal held that though the element of reliance had been established, the claim failed on the first ground. Though the assertions made by the manufacturer in the present case were certainly more than mere puffs, they could not be shown to have warranted their accuracy in the full sense.⁹⁹ It was also pointed out that the present facts differed from those in the *Shanklin Pier* case and the *Wells* case in one essential respect: the assertions had been made to the world in general, and not with any particular contract in mind.¹⁰⁰ This being so, the necessary requirements of a collateral contract had not been made out. The court went on to rule that the manufacturers were not liable to D in tort either, since the loss suffered by D was purely economic and no "special relationship" had been established on the basis of *Hedley Byrne & Co v Heller and Partners*.¹⁰¹

D then appealed to the House of Lords in relation to both the third party and the fourth party proceedings.¹⁰² His appeal in the third party proceedings was allowed, it being held that he was not liable to the plaintiffs under the Sale of

⁹² *ibid.*, at 229-230.

⁹³ *ibid.*, at 235-256.

⁹⁴ *ibid.*

⁹⁵ *ibid.*, at 256-259.

⁹⁶ [1965] 2 Q.B. 170; above, n.75.

⁹⁷ [1982] A.C. 225 at 256-258.

⁹⁸ *ibid.*, at 258-259.

⁹⁹ *ibid.*, at 262-263; *Howard Marine and Dredging Co Ltd v Ogden and Sons (Excavations) Ltd* [1978] 1 Q.B. 574.

¹⁰⁰ An attempt by the appellants to argue on the basis of *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256 failed, that case being distinguished on the ground that the evidence of intention to be bound was exceptionally strong.

¹⁰¹ [1964] A.C. 465; [1982] A.C. 225 at 263-267.

¹⁰² *ibid.*, at 268-271.

Goods Act, so once again the question in the fourth party proceedings became purely academic.¹⁰³

The House of Lords therefore never got to make a decision on the scope of the *Shanklin Pier* case, and the law remains as stated by the Court of Appeal: for a collateral warranty to arise in such cases there must be proof of *animus contrahendi*, which means in practice showing that the assertion was made by the producer or manufacturer to a particular customer with a particular contract in mind. This is unfortunate for two reasons. First of all, as we have seen, the requirement of *animus contrahendi* never applied in the original law of warranties; it was imported when these came to be enforced on the basis of *assumpsit* at the end of the eighteenth century, and it has been argued that the importation of this requirement was based on a misunderstanding of the law.¹⁰⁴ Secondly, it prevented the law developing as it did in the United States, where as we have seen the law of warranties has provided a very useful weapon for the armoury in cases of consumer protection.¹⁰⁵

One reason why the courts may have been reluctant to develop a broad set of principles based on the collateral warranty analysis is that there are already other tools available. In the United States, as we have seen, warranties were used extensively for many years in cases of product liability for personal injury.¹⁰⁶ But by the time of *Lambert v Lewis* this field, as far as English law was concerned, was already occupied by the tort of negligence,¹⁰⁷ and now as in the United States we have principles of strict tort liability in place to do the work.¹⁰⁸ However, where a false statement causes economic loss liability in tort is harder to establish; if the statement was made by another party to the contract, section 2(1) of the Misrepresentation Act 1967 applies,¹⁰⁹ but otherwise one must fall back on the tort of negligent misstatement and prove the existence of a “special relationship” under *Hedley Byrne*.¹¹⁰ One cannot help feeling that the collateral warranty could have been a useful technique for cases such as this.¹¹¹

All in all, the result of *Lambert v Lewis* was to deny *Shanklin Pier Ltd v Detel Products Ltd* of its claim to be considered a leading case, and to relegate it to a short paragraph at most in the contract textbooks. One of the coastal walks which makes the Isle of Wight such a delightful place for a holiday is the walk from Sandown up to the Yarborough Monument on Culver Down. One of the highlights of this walk is the splendid view it provides over Sandown Bay and over the town of Shanklin. But for the contract lawyer there is always a note of regret, as he contemplates the gap

¹⁰³ *ibid.*, at 271-278.

¹⁰⁴ Williston, *op. cit.* at n.10, pp.560-561; Greig, *op. cit.* at n.10, pp.181-183.

¹⁰⁵ Above at nn.52-74.

¹⁰⁶ Prosser, *op. cit.* at n.52, pp.1125-1126; above at n.61.

¹⁰⁷ *Donoghue v Stevenson* [1932] A.C. 562.

¹⁰⁸ Consumer Protection Act 1987; Consumer Protection (NI) Order 1987.

¹⁰⁹ Misrepresentation Act 1967, s.2(1); Misrepresentation Act (NI) 1967, s.2(1); *Howard Marine and Dredging Co Ltd v Ogden and Sons (Excavations) Ltd* [1978] 1 Q.B. 574.

¹¹⁰ *Hedley Byrne & Co v Heller and Partners* [1964] A.C. 465.

¹¹¹ See *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] Q.B. 758.

once occupied by the noble structure of Shanklin Pier. “Of all sad words of tongue or pen, the saddest are these: ‘It might have been!’”¹¹²

¹¹² John Greenleaf Whittier (1807-1982).