The Extension of Implied Warranty Theory To Contracts Of Professional Service

Sales law imposes the risk that goods wil be unsuitable for the buyer's purpose on the seller. Where a buyer who wants goods for a particular purpose makes this known to the seller so as to show that he relies on his skill or judgment, an implied term of fitness for purpose arises.[1] Thus, a computer firm which sells a computer system to handle its buyer's accounting needs will be liable if the programme cannot do the job unless this obligation has been disclaimed.[2] The seller's liability is said to be strict in the sense that he is responsible even for latent defects which he could not have anticipated at the time of contracting. If he wants a lesser responsibility, he must contract for it.

The assumption is quite different in a contract of professional service. The law does not usually imply a warranty that the service will be reasonably fit for its intended purpose but only a term that the professional will use reasonable care and skill.[3] Thus, a solicitor who *sells* his client an unenforceable mortgage is thought to be responsible only if he was negligent.[4] It seems it is insufficient to establish merely that the service did not achieve its intended purpose.

What is the distinction between these two transactions which justifies such a radical difference in the assumptions which the law makes in approaching each? In both of the examples given above, the *buyer's* purpose was communicated to the *seller*, the *buyer* relied on the *seller's* expertise, the product requested was something fit for the *buyer's* purpose, and the *seller* unqualifiedly agreed to supply it. A commensurate measure of skill and expertise can be said to have gone into the *production* process and there was an analagous risk of latent defects.

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[1]*The Sale of Goods Act*, R.S.N.B., 1973, c.S-1, ss. 15(a). The New Brunswick Act, like its counterparts in the other Canadian provinces, is modelled on *The Sale of Goods Act* 1893 (U.K.) c. 71. A comparative table of the various Canadian and the U.K. provisions is found in Fridman, *Sale of Goods in Canada*, 2d ed., (Toronto: Carswell, 1979) at 4-5.

[2]*Burroughs Business Machines Ltd.* v. *Feed-rite Mills* (1973) 42 D.L.R. 3d 303 (Man. C.A.); see also *Public Utilities Commission of Waterloo* v. *Burroughs Business Machines Ltd.* (1974) 52 D.L.R. 3d 481 (Ont. C.A.).

[3]Dugdale and Stanton, *Professional Negligence*, (London: Butterworths, 1982) at 103 *et seq.* The distinction between the terms implied in a contract for the supply of goods and in a contract for services generally is codified in the proposed U.K. *Supply of Goods and Services Act* 1982; see Clark and Stephenson, 132 N.L.J. 1103. Part I of the Act introduces terms as to title, description, merchantability, fitness for purpose, and sample similar to those found in sections 13 to 16 of the *Sale of Goods Act*, *supra*, note 1, into all other contracts for the supply of goods, irrespective of form. Part II, which is merely intended to codify the supposed existing common law in this respect, provides that in contracts for the supply of a service, there is an implied term that the supplier will carry out the service with reasonable care and skill and within a reasonable time.

[4]*Central & Eastern Trust Company* v. *Rafuse and Cordon* (1982) 53 N.S.R. 2d 69 (S.C., T.D.). Liability was alleged in this case only on the ground of professional negligence of which the solicitor was acquitted. Apparently no argument was advanced that the solicitor had warranted the validity of the mortgage.

The distinction is not based on the status *per se* of a professional versus a commercial man. Indeed, a computer consultant might well be regarded as a *professional* in the modern usage of that term. And, as we shall see, the courts have readily implied a warranty of fitness for purpose in contracts involving the supply of goods by a *professional* in the classic sense.

Nor can the distinction be grounded on the conceptual difference between a contract for the sale of goods and a contract of service. Again, as we shall see, there is a growing judicial willingness to imply a warranty obligation in a contract of professional service where the service is related to the production of something tangible. Two separate rationales are used to effect that result: (1) the warranty is imposed by analogy to sale of goods law; (2) the warranty is implied *in fact* on the basis of the actual, albeit unexpressed, common intention of the parties in the particular circumstances of a case.

Do the *tangible product* cases merely illustrate limited exceptions to the usual negligence-based standard of professional liability? Or, do they support a more generalized extension of implied warranty theory to the professional services context?

IMPLICATION OF A WARRANTY OF FITNESS FOR PURPOSE IN THE TANGIBLE PRODUCT CASES

The *Sale of Goods Act*[5] is viewed as primarily a codification of common law. Thus, the courts have considered themselves free to apply its provisions "if relevant in principle and appropriate in the circumstances"[6] by analogy to transactions not falling within the direct scope of the Act. This technique has been utilized to imply a warranty of fitness for purpose in the following types of contracts involving a professional service:[7]

1. with respect to the materials component in a contract under which both materials and a professional service are to be supplied.

2. with respect to the finished chattel in a contract where both services and materials are to be incorporated by the professional in its production.

Dodd v. *Wilson*[8] illustrates the first type of transaction. There, a veterinarian was held to have impliedly warranted the fitness of certain contaminated serum which he had injected into the plaintiff farmer's cows. The veterinarian had not been negligent either in administering the serum or

[5]*Supra*, footnote 1.

[6]This is the wording adopted by the Uniform Law Conference in ss. 2.2(4) of the *Uniform Sale of Goods Act* which codifies the common law practice in this regard.

[7]Ontario Law Reform Commission, *Report on Sale of Goods*, Vol. I, Ministry of the Attorney-General, 1979, at 45 *et seq.*

[8]*[1946] 2 All E.R. 691.*

in failing to detect that it was contaminated. Warranty liability was imposed on the basis that the farmer's rights should not depend on the conceptual distinction between a contract for the sale of goods and one for work and materials, *viz.*, on whether he had bought the serum in a separate transaction or in conjunction with services. In the former case, he could have relied on the implied condition of fitness for purpose in the *Sale of Goods Act*. It was only reasonable that he should have the benefit of an analogous term in the latter case, especially since the veterinarian could seek indemnity from his own supplier under his *pure* contract for the sale of goods.

The rationale for implying a warranty of fitness for purpose in the first type of transaction is expressed in terms of a policy: the desirability of ensuring a continuous contractual chain of liability based on the same standard from the ultimate buyer back to the seller who originally put the defective goods on the market. A different rationale must be employed to support the implication of a warranty in the second type of transaction, *i.e.*, contracts where the professional service is incorporated into the production of a finished chattel. Here there is no seller behind the professional against whom liability is ultimately sought.

In *Samuels* v. *Davis*,[9] DuParcq L.J. held that where a dentist undertakes to make a denture for a patient, a term is to be implied in the contract that the dentist will supply a denture which is reasonably fit for the purpose for which it is intended. It is a "matter of legal indifference whether the contract be regarded as one for the sale of goods or one of service to do work and supply material".[10]

The dentist had not been guilty of negligence or lack of skill in constructing the denture. However, DuParcq L.J. distinguished the case of the professional in the practice of his profession generally, where the obligation is to take reasonable care and skill, from the case "where a chattel is ultimately to be delivered",[11] in which event the professional's obligation is one of implied warranty unless disclaimed. In making this distinction, DuParcq L.J. must have recognized that an equal or even greater degree of care and skill is employed in the manufacture of many goods. The fact that it is a professional *manufacturer* acting in the course of his profession who

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[9] *[1943] K.B. 526.*

[10] *Ibid.*, at 527.

[11] *Ibid*, at 529-30: "I cannot doubt that if someone goes to a professional man, however eminent, and whatever skill the practice of his profession may demand, and says: 'will you make me something which will fit a particular part of my body?' as everybody does say impliedly who asks that a denture may be made, and the professional gentleman says 'yes', without qualification, he is then warranting that when he has made the article, it will fit the part of the body in question. I think one is getting into the region of fancy if one assumes that any other contract is made by implication. Of course there are many cases where no professional man would make such a contract, but in those cases he would undoubtedly make an express contract limiting his liability . . . If a dentist takes out a tooth or a surgeon removes an appendix, he is bound to take reasonable care and to show such skill as may be expected from a qualified practitioner. The case is entirely different where a chattel is ultimately to be delivered."

produces the goods, rather than a commercial manufacturer acting in the course of his business, should not of-itself change the implied obligation.

The implication of a warranty in these types of transactions does not, at first blush, impinge greatly on the traditional negligence standard of professional liability (unless of course one happens to be a dentist, druggist,[12] optometrist or the like). Essentially, all the courts have done here is apply the principle, "treat like cases alike"; *i.e.*, treat the professional in the same fashion as a seller of goods would be treated in cases where the professional has attained that dual status either by selling goods along with his professional skills or by using his professional skills to produce goods. Quite rightly, in this process, the courts have also treated as irrelevant any conceptual distinction which exists between a contract for the sale of goods and one of service.

These decisions, nonetheless, suggest a more dramatic extension of the warranty obligation. Firstly, it would be anomolous to imply different standards of contractual responsibility to the two components in a contract for work and materials.[13] If the defect lay with the services rather than the materials, the buyer would then have to establish negligence and not merely unsuitability. Logic and consistency require that a warranty be implied in respect of the services as well. This possibility is made explicit in the *Samuels* v. *Davis*[14]-type transaction where, in effect, the warranty is implied in respect of the professional's services in constructing the requested product. Thus, while neither line of authority purports directly to extend implied warranty theory into the realm of pure services, both contain the seed of that result.

IBA v. *EMI Electronics*,[15] a recent English decision in the design engineering context, recognizes this logical extension. The case involved liability for the sudden collapse of a television mast. The first defendants (EMI) were the main contractors for the design, construction and erection of the mast. The second defendants (BIC) has been employed by EMI as their subcontractors for the design, construction and erection of the mast. The plaintiff owners of the mast (IBA) claimed against EMI, alleging both breach of contract and negligence, and against BIC alleging negligence.

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[12]In *Ex parte Boots Cash Chemists Southern Ltd.* (1920) 89 L.J. (K.B.) 55, Reading C.J. held that "the making up of a prescription and its transference for a price to the person who ordered it is a sale within the meaning of the [Profiteering] Act". He noted that the value of every article is made up of two things — the value of its component parts and the cost of the labour expended on it.

[13]In its *Report*, *supra*, note 7., at 48, the OLRC noted this anomoly, but did not "feel called upon to justify the distinction" since any change in the existing law "with respect to the scope of the implied warranty of care and skill in a contract for services or the labour component in a contract for work and materials" fell quite outside "its terms of reference". Thus, the only change recommended in this respect in the existing law of sale of goods was the inclusion of a provision making the implied terms as to title, merchantability and fitness applicable to *goods* supplied under a contract for work and materials. This provision was adopted in ss. 5.15(2) of the *Uniform Sale of goods Act*, *supra*, note 6.

[14]*supra*, footnote 9.

[15](1978) 11 B.L.R. 38 (C.A.); (1980) 14 B.L.R. 1 (H.L.); Dugdale and Stanton (1981) 131 N.L.J. 583.

EMI also sought to recover over against BIC in the event it was found liable to IBA. It was clear that the collapse of the mast was due neither to faults in workmanship nor the use of inappropriate or defective materials; it was the design alone that was unsuitable and that had been the exclusive work of BIC's engineers.

The Court of Appeal held that there was an implied obligation as to the fitness for purpose of the design both in the contract between IBA and EMI and in the subcontract between EMI and BIC. Counsel had argued against this finding on the ground "that design is normally the function of a professional man and that the law is clear that no professional man warrants more than the exercise of reasonable care and skill according to the accepted standards of his profession; he never warrants a successful outcome".[16]

In the Court's view, there was no reason why the duty should be only one of reasonable care if bad design rather than the supply of bad materials were involved. A builder contracting to build and sell a house is under an implied obligation that the house shall be fit for habitation when completed; a *fortiori*, one who contracts to design, supply and erect a mast should be "at least under some obligation as to its fitness for the purpose for which he knows it is intended to be used upon its completion".[17]

More significantly, the Court recognized *Samuels* v. *Davis*[18] as authority for the proposition that a professional may be held to be under an implied warranty obligation in respect of his services where the end product is something tangible and not merely under an obligation to use reasonable care and skill. The analogy here to sale of goods law and products liability theory is clear. If a manufacturer or seller of goods cannot evade the implied warranty by asserting that the defect lay with services rather than materials then neither should the professional engineer be able to do so in the building context.

IBA had not relied on the skill of EMI, its immediate contractor, for the design of the mast and in fact EMI had not taken any part in it. However, the Court considered it "should not be too astute"[19] in requiring reliance on skill and judgment for the purposes of the implied warranty in the main contract if to do so would break the chain of contractual liability and thereby prevent ultimate recovery against BIC, the party responsible for the defective design and upon whose skill and judgment both IBA and EMI had

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[16]*Ibid.*, at 50 (C.A.)

[17]*Ibid.*, at 51 (C.A.)

[18]*Supra*, footnote 9.

[19]*Supra*, footnote 15, at 52 (C.A.)

undoubtedly relied. As in *Dodd* v. *Wilson*,[20] the Court emphasized the use of the implied warranty as a means of ensuring that liability on a consistent standard is ultimately brought back to the original *seller*. The important difference here was that the original *seller* was a professional who had supplied a defective service, not defective goods.

In the House of Lords, the conclusion of the Court of Appeal that the fitness of the design had been impliedly warranted both by BIC to EMI and by EMI to IBA ws accepted in *obiter*[21] by several of the Lords[22] and not rejected by any of them.[23] Lord Scarman addressed most directly the argument that where a design "requires the exercise of professional skill, the obligation is no more than to exercise the care and skill of the ordinarily competent member of the profession".[24] Citing *Samuels* v. *Davis*,[25] it was his view that consistency with the law of sale of goods required the general principle that "in the absence of any term (express or to be implied) negativing the obligation, one who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose".[26]

Lord Scarman's general principle is not by its terms restricted to cases where the professional is employed to incorporate his design services into the ultimate product. It also encompasses the supply of design services *simpliciter*.[27] In an earlier case, *Greaves* v. *Baynham, Miekle*,[28] the English Court of Appeal had implied a warranty of fitness in a contract where design services alone were involved. The plaintiff contractors had employed the

[20]*Supra*, footnote 8.

[21]In the House of Lords, it was found that BIC had been negligent in its design of the mast and that EMI had contractually accepted responsibility (including responsibility for BIC's negligence) to IBA for the design. Hence, the observations of the Lords on the implied warranty of fitness issue were not necessary to the result.

[22]*Supra*, footnote 16, per Viscount Dilhorne, at 26, per Lord Fraser, at 44-45, per Lord Scarman, at 47-48.

[23]*Ibid.*, Lord Scarman, at 26, simply agreed with his brothers as to the disposition of the appeal for the reasons they gave and Lord Edmund-Davis, at 33, preferred not "to express a final conclusion" on the matter.

[24]*Ibid.*, at 47.

[25]*Supra*, footnote 9.

[26]*Supra*, footnote 15, at 48.

[27]Dugdale and Stanton, *supra*, note 3, point out at 107 that it would be inappropriate to draw a distinction between one who designs and one who designs and supplies an article: "In the first place, such a distinction would give a client greater protection under a 'package deal' contract where the contractor is responsible for design than he would have under the normal scheme using a consultant to provide the design. Secondly, where the design responsibility was divided between the consultant and the contractor it would seem difficult to justify a difference in the extent of their design duties. Thirdly, where the contractor had engaged the consultant, it could result in the contractor being under a strict duty to the employer as regards design but only able to pass on liability to the consultant responsible for the design if there was negligence".

[28][1975] 3 All E.R. 99; [1975] 1 W.L.R. 1095 (C.A.)

defendants, a firm of consultant structural engineers, to design a factory warehouse. The warehouse was built by the plaintiffs according to the defendants' design. Within a few months of completion, cracks appeared in the first floor. The plaintiffs were liable to the warehouse owners to remedy the defects. They claimed indemnity from the defendants.

It was held that the defendants had impliedly warranted the fitness of their design. The Court emphasized that the warranty arose from the *special facts*[29] of the case and that the decision laid down no general principle as to the obligation of the professional man. However, the *special facts* were rather common place. Firstly, it had been made known to the engineers that the floor would have to be strong enough to withstand vibrations produced by the random movement of fork-lifts. Secondly, the defendants had not qualified in any way their agreement to undertake the design. This relatively limited set of variables seems capable enough of yielding a general principle: where the purpose for which a design service is required is made known, the professional is under a contractual duty to provide a design which is reasonably suitable for that purpose in the absence of evidence negativing the obligation. Certainly, the one Canadian case[30] in which *Greaves* was applied is easily explicable in terms of such a general principle. It need not be added that the principle yielded parallels the conclusion arrived at by Lord Scarman as a matter of law in *IBA* v. *EMI Electronics*.[31]

A FURTHER EXTENSION?

The courts appear willing to construe contractual dealings with design professionals as implying a warranty of fitness for prupose. Where the warranty is imposed by analogy to sales law, the reasoning in *IBA* v. *EMI Electronics*[32] limits further development to cases where the ultimate purpose of the service is the production of something tangible. The warranty implied *in fact* in *Greaves*[33] is factually (if not theoretically) limited in a similar fashion. Is this a relevant cut-off point for any further extension?

Where the professional service requested is related to the production of something tangible, the reasonable commercial expectations of the client are more apt to approximate those of a buyer of goods than where *pure* professional services are involved. Much of what is *sold* in the latter context consists obviously of opinion or advice. The professional's undertaking is implicitly qualified by words such as "this is my opinion" or "this course of

[29] *Ibid.*, at 105.

[30] *Medjuck and Budovitch Ltd.* v. *ADI Limited* (1980) 33 N.B.R. 2d 271 (Q.B.). See also, *NB Tel.* v. *John Maryon* (1981) 33 N.B.R. 2d 543 (Q.B.) affirmed (1983) 43 N.B.R. 2d 469 (C.A.)

[31] *Supra*, footnote 26.

[32] *Supra*, footnote 15.

[33] *Supra*, footnote 28.

action has a good probability of success". In these circumstances, the usual negligence standard of professional responsibility accurately reflects the common understanding of both parties.

However, the fact that pure professional services contracts are less apt to run to a type is an insufficient reason for applying the negligence standard in cases where a parallel *can* be drawn to the sale of goods context. That is, where the client communicates to the professional the purpose for which the service is required so as to show he is relying on the professional's skill and judgment to provide him with a service suitable for that purpose and the professional neither expressly or impliedly qualifies his agreement to supply it. The example given at the beginning of this discussion illustrates the type of pure services transaction in which these elements are likely to be found. Why should the solicitor who has *sold* his client an unenforceable mortgage be relieved of liability if negligence cannot be established, even though he did not initially advise his client that his undertaking was limited to the exercise of reasonable care and skill? Of what relevance is the tangible product distinction here?

The answer to that may depend, in part, on the theory one embraces as the basis for implied warranty liability in the law of sale of goods. This seems to have been the subject of some debate at both the judicial[34] and academic[35] level. Prosser has discerned three distinct theories (which will be called, for convenience of reference, the misrepresentation, contract and policy theories, respectively):

> 1. The warranty is a misrepresentation of fact. The seller has asserted, whether expressly or by his conduct, that the goods are of a particular kind, quality or character, and the buyer has purchased in reliance upon that assertion. This is obviously a tort theory, closely allied to the cases of deceit; and it differs from deceit only in that it imposes strict liability for innocent misrepresentations, in the absence of any "scienter" in the form of knowledge of their falsity or lack of belief in their truth . . .
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> 2. The warranty has in fact been agreed upon by the parties as an unexpressed term of the contract of sale. The seller has contracted to deliver described goods, and it is understood that they are to have certain qualities; but that understanding has not been embodied in the agreement. Nevertheless the court, by interpreting the language used, the conduct of the parties and the circumstances of the case, finds that it is there. Such a contract term "implied in fact" differs from an express agreement only in that it is circumstantially proved. . . .
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> 3. The warranty is imposed by the law. It is read into the contract by the law without regard to whether the parties intended it in fact; it arises merely because the goods have been sold at all. This theory is of course one of policy. The loss due to defective goods is placed upon the seller because he is best able to bear it and distribute it to the public, and because it is considered that the

[34]*Dodd* v. *Wilson, supra,* note 8; *Greaves* v. *Baynham Meikle, supra,* note 28, especially at 103-104.

[35]Waddams, *Strict Liability, Warranties and the Sale of Goods* (1969) 19 U.T.L.J. 157, at 157-163; Farnsworth, *Implied Warranties of Quality in Non-sales Cases* (1957) 57 Col. L. Rev. 653, at 670-674.

> buyer is entitled to protection at the seller's expense. It is perhaps idle to inquire whether the basis of such a liability is contract or tort. It partakes of the nature of both, and in either case it is liability without fault.[36]

It is Prosser's view that "the courts have flitted cheerfully from one theory to another as the facts may demand, always tending to an increasing extent to favour the buyer and find the warranty".[37] This observation also holds true in the brief evolution of implied warranty which we have witnessed in the design services cases. In *IBA* v. *EMI Electronics*,[38] the warranty in the sub-contract was implied as a matter of principle by analogy to sales law, presumably on the basis of the misrepresentation theory. However, when IBA's lack of reliance on EMI's design expertise threatened to negate the implication of a similar warranty in the main contract, the court quickly reverted to policy justifications to support its imposition.[39] *Greaves*,[40] it will be remembered, involved the implication of a warranty on the basis of the contract theory. This is the least controversial and most flexible basis (though arguably the least honest) and the Court may therefore have preferred it since design services *simpliciter* were involved.

On the basis of which theory, if any, might our non-negligent solicitor be held to have impliedly warranted the fitness of his service for the mortgagee's intended purpose? Here there seems room for the implication of a warranty on the basis of the contract theory. Certainly, this result represents the client's understanding. To paraphrase Lord Ellenborough, "the purchaser cannot be supposed to buy [a mortgage] to lay [it] on a dunghill".[41] The solicitor may protest that he sells a "service, not insurance".[42] But, there will usually be objective evidence to show that his ignorance or the impossibility of performance is irrelevant; he has, in fact, agreed to take that risk on himself. This objective evidence is to be found in the certificate which a solicitor is commonly asked to give his client indicating that the client has received a valid mortgage.[43] Indeed, the mortgagee would ordinarily not retain the solicitor if he refused to so certify. As Zuber J.A. has pointed out in the context of land conveyancing:

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[36]Prosser, *The Implied Warranty of Merchantable Quality*, (1943) 27 Minn. L. Rev. 117, at 122-124.

[37]*Ibid.*, at 124-125.

[38]*Supra*, footnote 15.

[39]See the discussion in the text of this comment at 211-212.

[40]*Supra*, footnote 28.

[41]*Gardiner* v. *Gray* (1815) 4 Camp. 144; 171 Eng. Rep. 46

[42]*Highlight Properites* v. *John A. Blume & Assoc., Engineers*, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972)

[43]In *Central & Eastern Trust Company* v. *Rafuse and Cordon*, *supra*, note 4, it was found at 73 that "Mr. Cordon's Certificate of Title, following completion of the transaction, stated that the plaintiff had obtained a valid first mortgage. Furthermore, in the discovery evidence tendered by the plaintiff, he stated he had a responsibility to see that the plaintiff had obtained a valid mortgage". It is submitted this evidence is not atypical.

> In the ordinary course a client relies on his solicitor to guarantee the title that he certifies. The fee charged is calculated upon the sale price of the title certified and arguably the risk assumed.[44]

This reference to "the risk assumed" cannot be to the risk of being held negligent. The exercise of reasonable care is a duty which the law casts on the professional in any event. Rather, it must be to the risk that the mortgage is not a valid charge. In these circumstances, had they been asked at the time of contracting, both parties would undoubtedly have agreed that the solicitor's responsibility was to ensure that his client received a valid mortgage. This inquiry is the traditional test employed for implying a term on the basis of the contract theory.

What about the more common case where it is clear that the parties were of opposite minds on the nature of the professional's undertaking and there is no objective circumstantial evidence of the type noted above to overcome the divergence? Here there is no room for the implication of a term *in fact.*

Ormindale Holdings Ltd. v. *Ray, Wolfe, Etc.*[45] illustrates the kind of factual context in which resort to the contract theory is impossible. However, as we shall see, the void, theoretically at least, is quickly filled. In that case, the plaintiffs sought damages for losses suffered as a result of accepting the advice of the defendants, a firm of lawyers, with respect to a scheme for conversion of rental accommodatin to long-term tenure. The scheme was premised on an apparent loophole in the governing legislation. It "called for incorporation of sixteen new companies, creation of complicated intercorporate agreements, obtaining the consent of the Superintendent of Brokers for a public offering of shares, the training of real estate salesman, an advertising campaign and physical improvement of the suites to be sold. All this the plaintiffs undertook in reliance on the defendants' advice."[46] It was only after 39 suites had been sold that the project was brought to a halt. The legality of the scheme was referred to the courts. It was found that the loophole upon which the scheme was premised had never existed.

The plaintiffs claimed expenditures of several thousands of dollars which they had lost in attempting to implement the scheme as well as their anticipated profit of $5,500,000. Their claim was based both on breach of an alleged implied warranty that the conversion scheme would be effective and on professional negligence.

The defendants had throughout expressed complete confidence in the scheme, had mentioned no risk of its failure, and at no time had specifically

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[44]*Keinzle* v. *Stringer* (1982) 21 R.P.R. 44 (Ont. C.A.) at 51. Professional negligence was established in this case.

[45](1981) 116 D.L.R. 3d 346 (B.C.S.C.), affirmed (1982) 135 D.L.R. 3d 577 (B.C.C.A.)

[46]*Ibid.*, at 347.

indicated that it might not be sound in law or that it represented only their opinion on the relevant legislation. It was argued that these circumstances gave rise to an implied warranty of effectiveness. Taylor J. rejected this "novel proposition"[47] rather summarily: "While the defendants . . . rendered advice in a very confident vein, it was [not] given in way which would take the parties out of the normal relationship of solicitor and client, so as to create instead a contractual bargain between them as to the state of the law".[48]

The defendants had not been negligent in forming their opinion on the proper interpretation of the relevant legislation. Their liability for professional negligence ultimately rested on whether they had been in breach of duty in failing to warn their clients that an argument could be made against the legality of the scheme. Taylor J. accepted that a solicitor is under a general duty to warn his client of any risks inherent in following advice. However, the plaintiffs had not, in fact, been misled into believing there was no risk.

> The lawyer's advice in matters of statutory interpretation can never be more than an opinion. The defendants might have said: 'This is our opinion; we have complete confidence in it; but you must understand that it could be wrong. No one can be certain what a Court will decide on a question of law, and even when a Court had decided, its decision may be upset on appeal.' But I do not think a lawyer is required to give that sort of formalistic warning to experienced business clients. I cannot accept that the plaintiffs were misled into believing the advice they received was other than a legal opinion.
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> While a lawyer might have to warn of consequences unknown to his client which may flow from acceptance of his advice if it proves to be wrong, he is not, I think, normally required to warn experienced business clients of the possibility that the opinion, although firmly held, may not in fact prevail. That follows inevitably from the fact that it is, as these plaintiffs must have known, a matter of professional judgment. There was, of course, no need to advise on consequences which might result from failure of the proposed plan because these were best known to the clients: they would lose the money spent on it.[49]

Taylor J. was upheld on appeal. His reasoning on the duty to warn aspect of the claim was expressly approved.

What is most interesting about the decision is that it implicitly supports the implication of a warranty of fitness for purpose in a contract of professional service on the basis of the misrepresentation theory. Assume that the clients had not been experienced business people and hence could not be said to have appreciated that conduct suggesting a representation of effectiveness was only an opinion. It seems that the lawyer is then under a duty to give some sort of explicit warning to this effect. He cannot simply rely on the defence that he exercised reasonable care in performing his services. If the required warning is not given (either expressly or by im-

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[47] *Ibid.*, at 352.

[48] *Ibid.*, at 354.

[49] *Ibid.*, at 356-57.

plication), the client is viewed as having been misled into his purchase of the service in reliance on the misrepresentation inherent in his solicitor's conduct that it will be reasonably fit for its purpose. Precisely the same ingredients which support the implication of a warranty under the misrepresentation theory go into liability based on breach of a duty to warn. One is the mirror image of the other and to negate the possibility that there may be an implied warranty of fitness in a contract of professional service without clear evidence of a common contractual intention is to negate the existence of any duty to warn.

Of course, one can safely surmise that where a claim is made, as in *Ormindale,* for $5,500,000 in lost profits, a court will be quick to find, as in *Ormindale,* that the client was not relying, even absent any explicit qualification, on the professional to provide a service effective for its intended purpose. The nature of the damages claimed in that case suggests one reason why the courts are, and should be, reluctant to imply a warranty of effectiveness in contracts of pure professional service.

Where the professional is employed to produce something tangible, both the fee charged the client and the value of the product which he reasonably expects to receive is measured by reference to its intrinsic components: the cost of the materials and labour employed and the net profit to the professional. The same three components are utilized in determining the fee charged the client in a "pure" professional services contract (e.g., a mortgage, a deed, a trust document). However, in this case its value to the client is measured by reference to extrinsic factors e.g., $1,000.00 charged for a mortgage securing a loan of $100,000.00; e.g., $200,000 charged for an opinion which, if correct, will net the client a profit of $5,500,000.

If the product turns out to be unfit for its purpose, the *prima facie* risk which the implication of a warranty imposes on the professional in the first case is that he is denied his fee. This is not an unreasonable proposition given that the client has received a worthless article for his money. The client also gets no value for his money in the second case. However, the *prima facie* risk which the implication of a warranty would shift to the professional here is of a considerably greater magnitude. Consequently, greater justification is necessary to support a finding that this result represented either the common intention of the parties or the reasonable expectations of the client, depending on whether the contract theory or the misrepresentation theory of implied warranty is employed. As Taylor J. surmised in *Ormindale*: "I cannot accept that the plaintiffs really believed that their lawyers had found a means by which, with timely action, a gain of $5,500,000 was certain."[50]

What of the case where, as in *Greaves,*[51] the professional sells *only* his design services which are then incorporated by a contractor into the finished

[50]*Ibid.*,

[51]*Supra*, footnote 28.

product? In this case, the fee charged will obviously be much less than the value of the ultimate *prima facie* loss and hence the professional's *prima facie* liability. This apparent exception is mandated by the idiosyncracies inherent in string contracts. The claim made against the professional results from the fact that his client was in turn responsible to the owner under a contract in which the consideration paid for the product *did* reflect the value of its intrinsic components and hence one in which the implication of a warranty was not unreasonable. If the professional was aware of the ultimate objective of his design, it is not unreasonable to imply a similar contractual obligation on his part. To do otherwise "could result in the contractor being under a strict duty to the employer as regards design but only able to pass on liability to the consultant responsible for the design if there was negligence".[52]

There is another aspect to the nature of the damages likely to be claimed which may also justify a difference in the judicial treatment of pure services contracts and those related to the production of tangibles. In the latter case, if the service sold turns out to be unfit for its purpose, the unsuitability may well cause serious personal injury; e.g., a defective design which results in the collapse of a quarter-mile high telecommunications tower.[53] The law favours shifting the risk of this kind of damage to the person who creates and profits from it — witness the products liability evolution — and we should not be surprised to see an analogous approach in the services context.

A third basis discerned for the implication of the sales warranties was purely policy. As between the innocent buyer and the innocent (i.e., non-negligent, non fraudulent) seller, the risk that the goods will be unsuitable should be placed on the seller because he is in a superior position to initially prevent, contractually assess, immediately bear and ultimately distribute it. That presumption certainly reflects the judicial and legislative approach to consumer transactions. This is most dramatically evidenced by the antipathy expressed at both levels towards the use of disclaimers.[54] The question has become "who should bear the risk?", not "who has agreed to bear the risk?"

In the context of commercial dealings, however, an opposite trend is emerging. The modern emphasis is against any presumption that one party has assumed a particular risk and in favour of a painstaking examination of the terms of the bargain.[55] We can surmise that one reason for this judicial reversion to classic notions of contract is a recognition of the enor-

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[52]*Supra*, footnote 27.

[53]*Supra*, footnote 15.

[54]For example, the *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, ss. 24-26, prohibits the exclusion, in transactions for the sale or supply of a consumer product, of the warranties or remedies given by the Act where the loss suffered is a "consumer loss", i.e., a loss not suffered in a business capacity.

[55]*Photo Production Ltd.* v. *Securicor Tpt. Ltd.* [1980] 2 W.L.R. 283 (H.L.)

mous consequential financial losses which can result in the commercial context when a contractual performance does not net its anticipated results. In this climate, there is no ground for presuming that one party by his very status is necessarily better able to bear or distribute such losses.

Perhaps at this broad policy level, then, it is possible to analogize contracts for the sale of goods and contracts of professional service of the type we have been discussing. On the one hand, given the nature of the *prima facie* losses liable to result in the latter case, there is less reason for the law to assume that the professional has impliedly warranted the fitness of his service for its intended purpose or that this represents the client's reasonable commercial expectations. However, two examples were given earlier of cases in the legal services context where that assumption is arguably overcome: the unqualified mortgage transaction and the failure of a solicitor to advise a client inexperienced in business affairs that his recommendation is based only on an opinion and hence inherently qualified. It is significant that the first example involved a commonplace consumer transaction and the second a consumer-type client. Just as the consequential economic loss suffered by a consumer buyer of goods is not of the magnitude found in commercial sales, the same is likely to be true in the professional services context. Just as the business buyer of goods is better equipped to appreciate and assess the existence of inherent risks than his consumer counterpart, the same is likely to be true in the professional services context. It is suggested that the modern tendency to protect the *reasonble* expectations of the consumer will be paramount in any extension of implied warranty theory to the pure professional services context.

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