

Advertising may be described as the science of arresting human intelligence long enough to get money out of it.

STEPHEN LEACOCK

Caution: Cape does not enable user to fly.

Instructions on Kenner Products' Batman costume

Warning: May contain eggs.

Warning on a carton of eggs

Caution: Do Not Swallow!

Warning on a coat hanger

Remove child before folding.

Instructions on a stroller

Do not hold the wrong end of a chainsaw.

Warning on the box containing a chainsaw

Consider ...

13.1

Amy Rothbaum bought a Samsung 4G phone that shut down randomly (the Random Shut Down Defect). Rothbaum was given a replacement phone, but it shut down as well. Rothbaum filed a class action

suit against Samsung, along with other purchasers who were experiencing the same difficulties. What theories could she use to recover? And can she recover?

13-1 Development of Product Liability

For some time, courts followed the principle of *caveat emptor*—"Let the buyer beware." This theory meant that sellers were not liable for defects in their products and that it was the buyer's responsibility to be on the alert for defects and take the appropriate precautions.

Following a series of court decisions in which buyers were allowed recovery and courts questioned the public policy wisdom of *caveat emptor*, the *Restatement (Second) of Torts* adopted its now-famous Section 402A on strict tort liability (discussed later in this chapter). With this adoption, the area of product liability had gone full swing from no liability (*caveat emptor*) to an almost *per se* standard of liability for defective products.

13-2 Advertising as a Contract Basis for Product Liability

13-2a Express Warranties

An **express warranty** as provided in the Uniform Commercial Code (UCC) is an express promise (oral or written) by the seller as to the quality, abilities, or performance of a product (UCC § 2-313). The seller need not use the words *promise* or *guarantee* to make an express warranty. A seller makes a warranty by displaying a sample or model or giving a description of the goods. Promises of how the goods will perform are also express warranties. "These goods are 100% wool," "This tire cannot be punctured," and "These jeans will not shrink" are examples of express warranties.

Ads are but one form of express warranties. The negotiation process can find the seller making express warranties to the buyer. For example, if a seller tells the buyer that a dog is a purebred, that a painting is a "painting by Francis Bacon," or that a horse is "disease-free," the seller has made an express warranty. Statements made by the seller to the buyer before the sale that are part of the basis of the sale or bargain are express warranties. Information included on the product packaging is an express warranty if that information includes statements of fact or promises of performance.

Exhibit 13.1 Statements of Fact versus Opinion

STATEMENT	FACT OR OPINION?
<i>This car gets 20 miles per gallon.</i>	Fact
<i>This car gets great gas mileage.</i>	Opinion
<i>These goods are 100% wool.</i>	Fact
<i>This is the finest wool around.</i>	Opinion
<i>This truck has never been in an accident.</i>	Fact
<i>This truck is solid.</i>	Opinion
<i>This mace stops assailants in their tracks.</i>	Fact (promise of performance)
<i>This mace is very effective.</i>	Opinion
<i>This makeup is hypoallergenic.</i>	Fact
<i>This makeup is the future of beauty.</i>	Opinion
<i>This ink will not stain clothes.</i>	Fact
<i>This ink is safe to use.</i>	Opinion
<i>These tulip bulbs are first-grade quality.</i>	Fact
<i>These tulip bulbs will make your garden the envy of the neighborhood.</i>	Opinion
<i>This watch is waterproof.</i>	Fact
<i>This watch is durable.</i>	Opinion

Opinions, however, are not considered a basis for transactions and are therefore not express warranties. For example, the statement "This glassware is as good as anyone else's" is sales puffing and not an express warranty. Exhibit 13.1 gives some examples of statements of fact versus opinion.

Castro v QVC Network, Inc. (Case 13.1) deals with an issue of liability for representations via ad statements.

CASE 13.1

Castro v QVC Network, Inc.
139 F.3d 114 (2nd Cir. 1998)

A Turkey of a Pan: Liability on Thanksgiving Day

FACTS

In November 1993, QVC Network (appellee), an operator of a cable television home-shopping channel, advertised, as part of a one-day Thanksgiving promotion, the "T-Fal Jumbo Resistal Roaster." The roaster was manufactured by U.S.A. T-Fal Corporation. The QVC ad described the roaster as suitable for roasting a 25-pound turkey. At the time that T-Fal and QVC entered into an agreement for the sale of the roasting

pan, T-Fal did not have a pan in its line large enough to roast a 25-pound turkey. T-Fal asked its parent company in France to provide a suitable roasting pan as soon as possible. The parent company provided a larger pan to which it added two small handles.

Loyda Castro (appellant) ordered the roasting pan and used it for roasting her turkey on Thanksgiving Day, 1993. Mrs. Castro was injured when she tried to remove the turkey from the oven. Using two large

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