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*The following sample answer is given in support of Mixit's defence against the accusation of negligence concerning the cough syrup.*

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#### Question

Does a trader who has not committed fraud owe a duty of care to users of a product that he sold even though he has no contractual privity with them?

#### Answer

A trader who has exercised reasonable diligence in procuring the goods that he trades does not owe any duty care towards users of the goods with whom he has no contractual privity where the trader has not engaged in fraud.

#### Analysis

Mixit is a chemist who conducts his business by making and selling his own products and trading products that he buys from other suppliers. At issue in this case is a cough syrup mixture that he bought from Careless, which he repackaged and sold under his own name at his store. When Mixit repackaged said cough syrup, Mixit, as a responsible trader, diligently reproduced the ingredient list provided to him by Careless. He had no reason to suspect that there was an error on the ingredient list, nor does the plaintiff allege anything to the contrary.

That day, when Brown came into Mixit's store to buy the cough syrup, he told Mixit that he needed a cough medicine that was safe for a 6-year-old boy. Mixit dutifully checked the ingredient list on the label of his re-packaged cough syrup – which constituted a reproduction of the ingredient list provided by Careless. He determined that none of the listed ingredients would cause any danger if consumed by children. Following his exercise of due diligence in ensuring that the cough mixture would be safe for consumption by children, he recommended the cough syrup to Brown, who bought it for his son. Unfortunately, because Careless made a mistake on his ingredient list, that mistake was reproduced by Mixit in the house label created Mixit for the cough syrup at issue. Mixit did not know, and critically, had no reason to suspect that the ingredient list provided by Careless, which he reproduced onto his own cough syrup label, contained any falsehood. As far as Mixit was concerned, the ingredient list that he inspected contained a complete and accurate statement of all ingredients used to produce the cough syrup. Mixit has no contractual privity with the son – the plaintiff on whose behalf Brown brought suit.

None of the above facts are contested by the plaintiff.

#### A. Plaintiff cannot bring suit against Mixit because of a lack of contractual privity

The issue involved in this case boils down to the basis on which the plaintiff could have brought suit against Mixit. Under the long-standing cases before the court, in "[the absence of] privity in that respect between the plaintiff and the defendant," an action "cannot be supported upon [a] warranty as a contract." *See Langridge v. Levy* (1837) 2 M. & W. 519; 4 M. & W. 337. Indeed, *Langridge v. Levy* specifically rejected the request of the plaintiff in that case for the court to rest the case upon the grounds that "whenever a duty is imposed on a person by contract or otherwise, and that duty is violated, *any one* who is injured by the violation of it may have a remedy against the wrongdoer." (Emphasis added.)

The *Langridge* court's reasoning in that case was right on point. Had a precedent allowing for liability to attach to a vendor without any limit to the extent of that liability, any vendor who sells any products, including any instruments or articles that are dangerous, would be open to an action for suit at any time. Such a holding would have adverse consequences for the general trade, with the potential of causing many traders to reconsider whether they should continue to sell inherently dangerous goods that, when used correctly, could be beneficial to all of us. It could also result in traders drastically increasing the

price of their products to take account of the unlimited liability that they face. These effects have policy consequences that are best resolved by the legislative branch, and not the judiciary. Therefore, the defendant urges this court to follow the *Langridge* precedent and Park B.'s counsel to "pause before ... [making] a precedent by [the court's] decision which would be an authority for an action against the vendors ... at the suit of any person.

Since Mixit and the plaintiff are not in contractual privity, judgment must be entered against plaintiff in this case.

**B. Without contractual privity, Plaintiff's cause for action must be dismissed especially when Mixit has acted in good faith at all times**

In spite of the lack of contractual privity, the *Langridge* court nevertheless found against the defendant because the court determined that the defendant had committed fraud. Specifically, the court determined that the defendant (1) had made a representation to the plaintiff's father, knowing such representation to be false; (2) with the intent that the plaintiff should rely upon a false representation to use the defective product; and (3) that absent such a representation, the plaintiff would not have used the defective gun and hence, would not have been injured. The court relied on the evidence adduced, that the defendant Levy aware that the plaintiff's father bought the defective gun to have use of the gun for himself and the plaintiff, to support its judgment that the elements of fraud were established in that case.

While fraud may have been present in *Langridge*, it is absent in this case. Unlike the defendant in *Langridge*, Mixit had no knowledge that the representations he made concerning the ingredients of the cough syrup were false. Without knowing that the representations he made were false, he could not have had the intent for the plaintiff or anyone else for the matter, to rely upon a false representation. Therefore, while it is true that the plaintiff relied upon the representation and was injured as a result of such reliance, a case of fraud cannot be made because two elements of the action of fraud are missing: (1) knowledge of falsehood; and (2) an intent for the injured party to act upon that falsehood.

**C. Even if this court were to decide that Mixit owed a duty of care to the Plaintiff, Mixit has committed no negligence because he exercised reasonable care in conducting his trade**

The case of *Longmeid v. Holliday* (1851) 5 Ex. 761, 155 E.R. 752 further bolsters Mixit's demand that a nonsuit be entered in judgment. Similar to the defendant in *Longmeid*, Mixit sold the cough syrup to Brown in good faith. Mixit had no knowledge of the defect, and, therefore, cannot be found liable for fraud. Moreover, while the *Longmeid* court suggested that situations may arise "when any one delivers to another without notice an instrument in its nature dangerous ..." that would allow a third person with no contractual privity to sue for damages caused by the use of a defective product, the court rejected the proposition that a trader should be held liable for the latent defects of his product if such defects could not have been discovered by the exercise of ordinary care. In Mixit's case, he exercised due care in relying on the warranty given to him by Careless when he bought the cough mixture in bulk. Even if the court were to find that Mixit somehow owed a duty of care to the plaintiff in spite of the lack of contractual privity, Mixit has fulfilled that duty when he exercised ordinary care in relying upon the representatives given to him by Careless when he made his bulk purchase. Having exercised his duty of care, the plaintiff cannot now claim that Mixit failed to perform his duty towards the plaintiff solely because Mixit was himself defrauded by Careless.

The case of *George v. Skivington* (1869) L.R. 5 Ex. Rep. 1, whose holding is the most favourable to the plaintiff, is similarly distinguishable on its facts. The *George* case involved a defendant who was negligent in making the product that caused injury to the plaintiff's wife. In other words, the defendant was ultimately responsible for the safety of the product that he sold to the plaintiff. Unlike Mixit, the defendant Skivington was, at all times, in control of the composition and safety of the product. In contrast, Mixit was not involved in making the cough syrup – he relied on Careless' warranty when he decided to buy the product and to sell it to his customers. To the extent that anyone failed to exercise ordinary care in this case, that person is Careless, not Mixit.

### Conclusion

In conclusion, plaintiff's action for damages against Mixit must fail because the Plaintiff cannot establish any cause of action. Not only does the Plaintiff's suit fail for lack of contractual privity, but Plaintiff also failed to establish fraud or Mixit's negligence. For these reasons, Mixit requests the court to dismiss the suit.

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Change Number: 1  
Last Saved On: 21/02/2021 10:03:00  
Last Saved By: Welly Tantono  
Total Editing Time: 123 Minutes  
Last Printed On: 21/02/2021 17:30:00  
As of Last Complete Printing  
Number of Pages: 3  
Number of Words: 1,484  
Number of Characters: 7,257 (approx.)