Law of Obligation II

Sale by Description

- ✓ Instructor : 김기창
- ✓ Institution : 고려대학교
- ✓ Dictated by : 이은지, 천진우, 이경진, 노하은, 안현준

So..we talked about sale by description, and basically if the thing sold and delivered fails to meet the description, fails to comply with the description, then it is an issue of breach of contract, because what the seller performed did not comply with what the parties have agreed.

So that is clear, there is no doubt about it.

But in addition to that, purchaser has a remedy based on breach of warranty.

Because if a thing is going to be delivered, it must be selected at some point, right? And once it's selected, article 580 becomes applicable.

So what is important to realize is that, simply put..the situation is like this.

Sale of specific good, specific property on the one hand, and sale by description on the other hand.

Now here, a defect, a hidden defect, will pose a problem of breach of contract.

So if you want to get remedy on the basis of breach of contract then you have to work hard in the sense that you have to prove breach, and you have to prove that you suffered loss, and you have to prove that there is causation, that's all fine but the defendant can avoid having to pay the damages if the defendant shows that he was not at fault.

But that's all fine.

And you have to exercise the right within, normally, what, ten, what, ten years.

It's a remedy which is available for long time.

But since it will be selected before it's finally delivered, article 580 becomes applicable.

So breach of warranty is also available.

Whereas this kind of contract, it is doubtful whether this remedy is available.

If we can be sure that the parties agreed upon purchase and sale of a specific good.

So what is available here is a breach of warranty.

Now, a lot of scholars talk about whether these remedies are, in nature, breach of contract remedy.

Or whether breach of warranty remedy is theoretically distinct from breach of contract remedy..but, think about a lot of cases.

Like potato seed turning out to produce disappointing result, or shiitake mushroom which, you know, or some couplings which is defective..think about it.

Are those contracts really a sale of specific good? Like potato seeds, mushroom germs? I don't think they are sale of specific good.

Most of those cases are in fact sale by description.

Sale of specific good is like sale of second-hand car.

Or sale of a race horse, this particular race horse.

And if it's genuinely a sale of specific good and if the seller really took good care of the thing, that particular thing until delivery but it turned out that there is a hidden defect, I don't think we can talk about sale, uh breach of contract there.

But anyway..so that's the very, the..most often you will encounter a sale in this category, okay? And the remedy is that the purchaser can demand replacement, okay? Because it's, replacement is possible.

Then the question is: what about seller, insisting on replacing the good? Buyer is not happy now, buyer wants refund.

Buyer wants his money back.

Can seller say 'no, I have this proper thing, so you will have this.

We agreed, you wanted to buy, well I do have this in stock so don't ask for refund, I will give you the replacement goods.' Do you think seller can insist replacement when buyer wants refund? (student) You don't think so? (student) Ah, demanding replacement is buyer's entitlement, not the seller's power, okay? I think so.

I think so. If..look, there was actually a case I was involved in.

Steel plates were sold.

Steel plates for ship-building grade was sold.

And in order to use to..in order to use those steel plates in ship, the steel plates must be of certified quality, okay? Otherwise the ship will not be able to get insurance, and various countries have a policy of refusing the entry of ships which has no insurance and ships which is not certified to have been made with proper quality steel plates.

So it's a safety issue and it's very important that steel plates, if it's to be used for ship-building, must be certified as to the quality, okay? So it's important point of the contract.

So the contract was about steel plates for ship-building grade, okay? Seller delivered the steel plates, you know, thousands of steel plates to a shipyard, and accompanied by fake certificate, okay? So buyer rejected all those steel plates and buyer terminated the contract alleging breach of contract.

Well it's obviously defect as well I think, right? And seller insisted that 'well, we have these steel plates, okay? If you're not happy, so we do have steel plates.

We are ready to give you these steel plates.' And buyer did not like it.

Why? Because the steel price went down in the meantime, right? So it's more advantageous for the buyer to terminate the whole thing and, you know, buy from some other suppliers.

And seller didn't like that idea and seller insisted on replacing the steel plates.

And we have to decide whether that is possible or not.

It's obviously sale by description.

It is not a question of breach of warranty, it's clearly a breach of contract issue, but

even if it's a breach of warranty issue, for instance if the steel plates have some physical defect for example...still, I don't think replacement is within power of the seller to decide.

It's the buyer who has a choice whether to go for refund or whether to demand replacement.

Okay? What about vehicle recall? In my lecture handout, I just offer one entry about vehicle recall.

Excuse me, what is vehicle recall, could you just tell us briefly about..you? Don't look sideways, I asked you to do that.

So vehicle recall, what is it? (student) Yeah, when a vehicle has a defect, especially safety-related defect, if the brakes is not functioning property, then the vehicle manufacturer announces recall, right? So that people can bring in the cars and then they will repair it, right? That's vehicle recall.

So how can you explain that in terms of Korean law? Is it a warranty liability issue or.. what, is it breach of contract? Liability? Why does manufacturer do that? Are they required to do that, or..? (student) So it's breach of warranty issue? Yeah, yeah, but that's okay, but vehicle recall is available even if you did not buy direct from manufacturer or direct from the sales agent of the car manufacturer.

Even if you bought it from somebody else second-hand, you can still go to the manufacturer.

So it seems that vehicle recall does not depend on sale contract, right? So it does not..it is not really a contract, contract law issue and it's quite difficult to explain the legal basis of vehicle recall.

It is something which is being practised, right? There is a widespread practice, but I don't think it's possible to explain it as a warranty liability in its narrow sense because it does not.. apparently it does not require a contractual relationship between...

Even if you have no contractual relationship with the manufacturer, manufacturer still offers that service.

And the question then is, suppose you buy direct from manufacturer, and then this has a serious defect which requires vehicle recall, and the manufacturer announced recall.

Promising that, you know, 'bring that in, we'll repair it for free.'

Can you refuse that recall service and instead demand damage? I think you can.

You can.

Vehicle recall is some additional service offered by the manufacturer.

And I don't think that replaces the existing remedy under civil code.

It would be rare that people would ask for money when they were offered the possibility of having the defect repaired free of charge, why would, why would you want to seek damages?
But still, I think there is a possibility if purchaser wants money damage.

It should be possible.

Because they are separate, vehicle recall does not supersede the civil code to remedy.

So in my view, vehicle recall cannot fully be explained as a warranty liability.

It can perhaps be explained by resorting to customary law.

A law which developed based on the trade usage and now it became, it achieved the status of customary law. Ok.

Vehicle recall is however different from warranties offered by the car manufacturers.

I don't know whether you have the experience of actually buying a car.

But if you buy a car, the car manufacturers or car dealers offer warranties like 3-year warranty or, you know, 200,000 mile warranty and they say, 'Within that period, we offer free repair.' Even if the defect does not fall under serious categories like affecting security even if it's minor defect like, you know, some window does not open and close, shut properly.

Something like any kind of issues including those serious defect but, much wider range of free repair is offered within that, like 3-year warranty period.

This is purely contractual.

So if you, well, if you sell your car to somebody else before 3 years lapse, quite often this warranty is not transferred.

So you lose warranty.

Whereas recall that goes on almost indefinitely as long as the car is there, and as long as the defect is very serious, threatening safety issues right? Then this recall applies whether you have any contractual relationship or not.

As long as you are the owner of the car, which is affected by those kind of serious defects, you are entitled to bring the car in and they will repair it.

So this recall is different from warranty.

So these additional remedies are available even for sale by description and those additional remedies must be exercised within 6 months, ok? Of realizing the defect.

94다23920: hiking shoes case.

It is a sale on the basis of a sample.

So seller presented a sample and buyer examined the sample and was satisfied and a sale contract was concluded.

On condition that the thing sold complies with the sample.

So we want to buy hiking shoes just like this sample.

So that's the contract.

Therefore it is sale by description, right? It is not sale of specific pair of hiking shoes.

The shoes turned out to be defective and we do have these remedies, of course.

Also Korean court allows adjustment of damages on the basis of buyer's negligence as well.

But now this concept of negligence, you should be careful.
Seller and buyer.

In the warranty liability, seller's negligence or seller's fault is not even an issue.

Ok? It's a strict liability.

We don't even think about whether seller was at fault or not.

Then why should we think about whether buyer was negligent or not, right? So if you are being very rational and logical, we should not consider whether buyer was careless or not as long as there was hidden defect, which… which broke the balance of bargain.

Then I think some adjustment must be made.

So I don't think it's… it makes any sense, or I don't think it's logical to take buyer's negligence into account.

In determining warranty liability of the seller because seller's liability… fault or negligence was not even an issue, right? Likewise buyer's negligence should not be an issue here.

But Korean court somehow takes that into account, right? But here, the concept of negligence is a very broad common-sensical notion.

It is not a strictly, clearly defined legal concept of negligence.

Why? In order to be able to talk about negligence, you must first be able to say that buyer has… what?

A duty to take care, duty of care, right? And if you fail to discharge that duty then you can be described as having been negligent.

In a sale contract what kind of duty does a buyer have? No duty.

So I don't know, I don't know what kind of negligence can be taken into account.

So whereas breach of contract remedy, of course fault is an issue, ok? Seller's fault is an issue here.

And hence buyer's fault again it's difficult to tell what is negligence.

But if we understand it in a non-technical and non-legal manner, then we can, yeah we think about contributory negligence.

There. In this particular case, however, the court felt that buyer should not be subject to any adjustment of damages.

Buyer was not negligence at all.

The defect was difficult to discover.

So… Commercial Code Article 60… 68, 69 or? Commercial Code… have a look at uhm… 69.

In a sale between merchants, the purchaser, the merchant, purchaser must without delay, inspect the goods when they are delivered.

And if they found defect or shortage of quantity, then they must immediately notify it to the seller.

If the notice was not dispatched, then the purchaser may not claim or may not resort to termination or reduction or price or claim damage.

So, what is it? Does the purchaser have a duty to notify to the seller if purchaser finds defect? Is it a purchaser's duty? Excuse me, what do you think? How can you explain that clause? (student) If he does not do something, then he will be adversely affected so in that sense it is a duty.

Yeah if you don't do something then you will be punished with some negative consequence.

Well that maybe, that's what we understand as a duty.

But at the same time, I feel very uncomfortable describing this as a 'duty'.

Well… now the next question is: 'How… what if it is very difficult to find?' And this will, this issue will constantly come up, you see.

When a thing turns out to be defective and buyer claims and seller will very often rely on this and say, 'You didn't tell us quickly enough.'

So you should not be held responsible.

But is it reasonable? Let's say I discovered the defect.

I'm the buyer.

Well I… it took me about a week before, or let's a month, before I notified.

What, what loss did buyer suffer because of my one-month delay of telling him that there was defect? Did buyer suffer anything because of my delay in telling him that this had a defect? If I, if I, let's say the sale contract took place here and I realized

the defect here.

And if I am to exercise warranty remedies, I must exercise it anyway within 6 months right? That's it.

If I delay notifying more than 6 months, I won't be able to claim anyway.

I won't have any right to resort to breach warranty remedy.

Now within that 6 month period, I kinda delayed about 3 month and now seller, can the seller completely refuse to give me any remedy arguing that I delayed notifying? I don't know what's the logic behind this.

What could does it do to the trade? Yeah.

And how, it says without delay.

So what does that mean without delay? Is 3 month considered to be serious delay or not? The clause simply state without delay, okay? I don't know.

So the court in fact, has a number of techniques of using or applying or refusing to applying this closure, commercial quote article 69 by fiddling with what is without delay and also by interpre… like sort of manipulating whether it is reasonably discoverable or not.

So it's quite fluid situation.

Article 69 is sometimes yes you should expect that article to be applied, and sometimes you should expect that the court will somehow avoid having to apply this clause.

Okay? Now let's summarize the, let's move on to the next handout.

Breach of warranty versus breach of contract.

This is basically summarizing what we have been talking about of the past several lectures.

So the goals are different.

Remedies in respect of breach of warranty principally aims to adjust the terms of the contract.

So it’s basically rewriting the terms of the contract by allowing reduction of price.

The parties negotiated and they arrived at a price say, let’s say 100.

But by allowing reduction of price, basically a new contract is being kind of imposed upon by the parties.

On the other hand, a breach of contract aims to enforce the terms that the parties have agreed upon rather than adjust the terms.

In this sale of specific property really poses an issue.

Quite often in a sale of specific property especially sale of second hand property, quite often seller is explicitly waiving any warranty liability saying no refund.

No return.

This is second hand junk yard.

You come and get things at a very cheap price, what do you expect? You pay and don’t come back, right? It’s..

Every risk is yours.

So it’s explicitly waiving warranty liability and that should be valid waiver except that seller has specific knowledge of defect or something.

But even when seller does not explicitly waiver the warranty liability.

Then it becomes a little bit difficult to interpret.

So the first point is what do the parties agree in a sale of specific property.

Do they agree just that thing as ease or do they agree something sound something merchantable something which is reasonable quality.

I think in most cases the party’s intent is to trade, to buy and sell something which is reasonably sound.

Like buying a house for example, you bought this house and you want to live in this house and you don’t, your intent is it that it doesn’t matter if the beam is already cracked and it’s going to collapse any moment.

No that’s not your intent, right? You just don’t have the time or energy or skill or capacity to investigate every part of it.

You simply don’t know but your expectation is that this should be, you know, a decent house.

That’s what the parties agree even if it’s specific good.

Party’s intent is not I will accept every defect there as long as this specific thing is delivered to me.

That is not what the parties intend, right? So in that sense, we do have this aspect.

Even for specific sale of specific goods, what the parties agree.

It may be that they agree this specific good and this specific good to be of certain quality.

So that’s what the parties agree.

So in that sense, if the defect turns out, then the agreement is also breached in that sense.

Even for a sale of specific property, buyer probably wants and expects to buy defectless property.

Unless explicitly waivered otherwise.

I think that’s the key.

And seller also knows this to be buyer’s intent.

And also the price is negotiated on these assumptions.

So on every count, the absence of defect is assumed I think and that’s why we offer remedy to adjust the price.

Article 374 of civil code, have a look at article 374.

So if an obligation consists in delivery of a specific item, the seller has a duty of care until the moment of delivery.

And as long as the seller took proper care to avoid new defect from supervening, can

we say that the seller's contractual obligation has fully been discharged? Some scholars argue that, but then if we understand that both buyer and seller, at least seller expects that thing, even the specific thing to be of certain quality, then maybe seller did not fully discharge his contractual duty.

Does the seller have the contractual duty to remove the defect which already existed at the time of the sale? But difficulty is this.

So a specific good, and there was already a defect.

And now if the party's agreement is this, in order to keep to that agreement, does the seller have the contractual duty to remove this defect? I think it's difficult to say that seller has contractual defect to remove.

And that's why we have this warranty liability clauses.

Just to readjust the price, accepting that this thing is like of diminished value so we offer price adjustment rather than going to this.

I gave you sample exam not some kind of question to think about.

Sale of second hand notebook, computer which has already a defect about wifi card at the time of contract.

But after the contract, Seller before delivery, negligently spilled coffee over keyboard and damaged the keyboard as well.

So the defect which was already in existence at the time of contract must be dealt with as warranty liability issue.

But supervening defect caused by negligent, negligence of the seller that is question of breach of contract issue, I think.

If the buyer chooses to prove breach of contract.

Then, there is no ground to prevent the buyer from doing it.

Because the burden of proof and the measure of damage, it is all specific to breach of contract and they are two separate institutions.

And I don't think one prevents the other, I don't think they..

the availability of warranty liability.

In my view, it does not prevent or replace breach of contract liability.

Whether you can succeed in proving breach, is another matter.
And if the contract is truly a sale of specific good, and if the seller really took good care of the thing sold and delivered.

I don't think it is always easy to prove that there was breach of contract.

Even if there is a defect, even if the horses has a disease, I don't think it is easy to prove that there was breach of contract.

And also you cannot argue, if you are seller, and your buyer just resorts to this, and you cannot tell your buyer to, resort to breach of warranty of remedy first, if you are seller you cannot decide the priority or the order in which buyer pursues his claim.

It is entirely up to the buyer, which parts to choose, alright? So buyer does not have to go through warranty liability first and if it fails breach of contract liabilities next...

No, seller cannot dictate.

It is buyer's choice, ok?
And 99 다 40302 that case also shows that tort liability that is another path open to the buyer, to pursue, ok? And the defendant who must be in the position of seller.

The defendant can not dictate the buyer to go through contractual remedy first before you explore tort remedy.

It is entirely up to the buyer to decide.

This case was a land was sold to a temple.

And the seller is the government, local government.

And the sale contract was drafted by the seller.

And the seller's employee mistakenly designated the buyer as the head monk rather than the temple itself.

So the title was conveyed to the head monk.

It became personal property of the head monk, whereas actually it was the temple,

which bought the land, right? And head monk sold this land to some other people.

And so the purchasers, the subsale took place.

And these end purchasers, they were claiming tort liability to the seller, initial seller.

Saying, "because your employee made a mistake in drafting the sale contract.

Your employee should have put the temple not the head monk.

Because of that mistake, this property was in the hand of head monk and we bought it from the head monk and then we lost it.“ Because the temple successfully claimed the property.

And the seller, in that case claimed that, "You should resort to these remedy first.

Before relying on tort remedy." And the court said, "No, it is up to the plaintiff to choose.

There is no priority you can dictate.

It is the plaintiff’s choice.

" Purchaser need not exhaust remedy under breach of warranty clause, before suing the state, in respect of the official’s negligent handling of the registration.

Breach of warranty in tort claim may independently be pursued.

We have already covered exclusion of liability, right? Exclusion of warranty liability.

The passage, I quoted in big capital letters, this passage is worth careful reading.

Because this is a very complete, manner of ‘um’ excluding warranty.

If you are a seller, and if you want to exclude your liability, you can consider using this kind of language.

So, there is no warranty for the program, so this is about a computer program.

To the extend permitted by applicable law, except when otherwise stated in writing, the copyright holders and or other parties provide the program 'as is', without warranty of any kind.

So 'as is' means, we don't know, whatever defect may be there, but just as is.

We don't offer any guarantee or any..without warranty of any kind, either expressed or implied including but not limited to the implied warranties of merchantability, merchantability means, that a specific product or object can be bought and sold in the market.

That means without defect.

You cannot buy and sell in a market, something which has defect.

It is a very ancient concept, right? Even in Roman law, you sell a slave and if slave turns out to have very bad habit, or the tendency to steal or if slave turns out to have a disease.

Then you are entitled to some remedies.

In other words, you should not be selling slave, which has these kind of defect.

So that is the concept of merchantability.
And fitness for a particular purpose the entire risk as to the quality and performance of the program is with you.

Should the program prove defective, you assume the cost of all necessary servicing repair or correction.

So that's it.

Suppose you know that this program has a defect, if you have a specific knowledge of a defect.

And the purchaser suffered greatly had all his personal file wiped out because of that defect, you knew about.

What about this, the worth of this waiver clause?
Do you think the buyer, who had all his personal files wiped out, can have any remedy? If the seller read out three times.

And buyer knew that there is no possibility of pursuing any warranty.

And nevertheless accepted.

So, what do you think? Louder, louder.

(student) Article 584 stipulates what? Yeah, so I think that is quite clear.

If seller had specific knowledge of the defect.

And withheld that information, in expressing the warranty, then the warranty is useless.

It is not valid exclusion of liability.
Because it is basically fraud.

You can not..

But surprisingly often, in a big stake contract, you have the kind of waver clause, which is drafted in a very broad fantastically all catching manner.

Saying, the buyer hereby releases the seller of any and all claims known or unknown existing from, you know, whatever until whatever.

Buyer knows that he is releasing claim with regard to even known claims, Something like that, very broad and very powerful language may be used.
And when dispute arises, buyer will rely on that clause of civil code, which stipulates that known specific defect about which seller had specific knowledge can not be excluded from waviver clause.

But seller will say, "Look, buyer took the risk."
I think, it can be a difficult issue but, on the one hand, you can validly waive your remedy in respect of something you don't know.

You are entering the shop, you entered into a shop, then you bought this thing.

And there is a sign saying no remedy.

You don't know what you are waiving, right? Sure, yeah you can waive, your remedy.

So, I think the point is this about the waiver, the validity of waiver.

This will always be an issue in a big case.

So, be careful about this.

So, there will be a party who benefits from the waiver.

Saying, we offer no remedy.
Okay? Don’t come back to us.

So the party who benefits the...

from the waiver.

And there is the other party.

Let’s say typically a buyer who accepts that kind of exclusion liability.

So the excluding party, okay? And the party who accepts that exclusion of liability.

Alright? Now, what I say is, yes.

You can accept to exclude liability.

You can accept to give up your remedy.

In respect of something you don’t even know, okay? It is possible, you can.

You cannot argue that you must know to everything in order to give up your remedy.

No.

Well, broadly you know, you can give up your remedy as long as you’re happy to give up.

You can give up your remedy with regard some defect you don’t even know about now.

It is possible.

However, what is not possible is that you know about the defect you’re going to refuse remedy and say you’re not going to give any remedy if you know about it.

The excluding party, if he..if that party knows about some defect in a particular manner, that excluding party can not withhold that defect and give up the kind of exclusion, okay? So that’s the difference you must be able to distinguish.

On the one hand, yeah, you can accept that, to give up the remedy without knowing what you’re giving up.

Fine.

As long as you're happy.

But, knowing that there is something which will give rise to remedy to the other party, you cannot persuade that other party to give up that remedy.

If you know that, it's completely different issue, alright? It's different issue.

And if this party did not know it, and that party did not know it, yeah.

It's perfectly good waiver, valid waiver.

But if this party knew about it, then this thing is nothing.

Why? Why? It's not only a matter of logic.

It's not only an issue of clever sort of a....

it's all boils down to money.

You see? It's...the waiver, it is valuable thing.

You know in exchange waiver, they might have the negotiated price, right?
Now, if this particular defect is known to the other party, the whole thing will change, right? If this party did not know about it, the whole negotiation, you know, went on the basis of proper commerciality, whereas knowing this particular defect and persuading the other party to accept, to give up a remedy about this defect.

It's fraud.

Come on.

That's fraud.

So that cannot be tolerated, but if that party did not know it and they just negotiated a waiver, very broad language, fine.

I think it is possible.

But that's convenience, a tool of analysis distinguishing the party who tries to exclude the remedy and the party who decides to take the risk and accept that

exclusion.

So these two parties must be distinguished.

And the act for the regulation of consumer contracts, 약관규제법, alright? So that statute contains specific clauses regarding exclusion of liability.

So far more broad a..

and robust intervention of the court is authorized by that statute.

What is consumer contract? It's a little bit difficult to explain, but a contract which is entered into in a routine manner or in a..in a..in a manner dictated by one party.

So that the other party has very little room for negotiating individual terms of the contract.

So that entirety of the contract is already prepared and said and other party only has a his choice whether to conclude or whether to completely refuse to conclude.

So that's consumer contract.

And that kind of contract, court has much greater power of scrutinizing the terms, right? And very often the..the consumer has very little real possibility of studying the terms of contract.

So, when this dispute arises, the court will scrutinize every term from a fresh perspective.

So the parties' agreement is almost fictional in consumer contract, okay? In other words, those terms prepared by the supplier does not really express the parties' agreement.

It just expresses the one-sided..

one-sided wishes of the supplier, okay? And the court will verify whether those...those a...wishes or the will of what the position of the supplier must be respected or not.

So the court has a very robust scrutiny over those terms.

So this concludes a...the..warranty liability.

Topics about warranty liability.

Any questions? Oh! The case about the silicon coupling which we talk about last time.

And I...made a mistake.

I...the case was something like this.

The burner was sold to farmers, right? And farmers had their flowers all frozen because of the cracked silicon coupling.

So between the burner seller and the farmers, they settled.

So the burner seller paid whatever amount they agreed to pay.

There was settlement between them.

And having paid out to the farmers, the burner sellers sued the coupling seller, coupling supplier.

Arguing that because of your breach of contract or breach warranty, I suffered this much of loss.

So pay me.

So that would be the case.

And when you think about it, the court can ultimately...the court did ultimately refuse to allow that claim.

If breach of contract ah...the court can say, “well, there was no breach.

You know, you guys agreed about this particular product, and it was selected for delivery, okay?“ And what was delivered was good.

There is no defect.

There is no breach contract either, okay? Or, you can say “well, there was a breach contract, but the loss was not forseeable.

But that‘s a very difficult part.

But in this case, the court held that there was no breach, no defect in the first place.

But obviously, this party, the plaintiff, was suing on the ground of breach of contract.

Because they, the purchaser was claiming, extended compensation about extended loss, alright? This party is not claiming for the price reduction of that silicon coupling which was perhaps less than a dollar or something, right? They were claiming the extended loss, so it can be..only it can...only be a matter of breach contract, but the court‘s reasoning was based squarely on whether there was defect or not, and the court concluded that there is no defect, and hence, there was no breach of contract.

In other words, if there was a defect, court could say “well, there was also breach contract.“
Because this is sale by description, right? So both, in sale by description these two remedies are definitely available, okay? And if there is defect, that is breach of contract as well as breach of warranty, right? Anyway.

Any questions about warranty liabilities?(Student) Proper logic...

I think that concept is a...merchantability.

I think the important concept is merchantability.

Even for second-hand goods, it would all depend on the circumstances under which the contract was entered into, right? Second-hand goods could mean almost like junk grade second-hand good, or quite decent second-hand good.

And also there is this concept of price as well, right? And as the price approaches the near...brand new good, something...

as the price goes a...approaches the full price of a brand new good, the expectation is also high, right? And if the price is really low, then the expectation is low as well.

The whole concept of defect...must be determined taking into account, the parties’ expectation and the circumstances under which the contract was concluded.

Now, if you can conclude that this was probably what the party expected, then the notion of defect follows accordingly, okay? And if the defect is found, then...

I think the logic is...is to readjust the balance of bargain rather than hypothetical agreement.

So what you call hypothetical agreement is put forward by scholars who argue that even breach of pure...in the pure form of warranty remedy must also be an issue of breach contract.

In order to say that, you must come up with some hypothetical imaginary agreement where parties agreed to buy and sell defectless product.

That was the parties' agreement.

And you must say that in order to say that if there is a defect, then that agreement was breached.

But I think this is a little bit artificial.

I would say "well, the parties negotiated..negotiated on the basis of all sumption that this will be defectless because I'm paying this much of price.

And that negotiation was faulty in a sense.

The negotiation is defective as it **well?** So the court allows readjustment..posterior ex post readjustment to that negotiation whose balance was broken because of that hidden defect.

And that's why patent defect should not be taken into account.

That's difficult issue.

I don't think it helps you to approach this question from logical stand point.

You are far better off approaching the question from economic or business stand point.

Logic does not get you that far in this topic.

Are there questions? Okay.

Wednesday.

There will be a midterm exam, okay? And good luck!