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The Consumer-Manufacturer Relationship in Products Liability Cases

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defendant to withdraw the nolo plea. After sentence, it is the presence of manifest injustice which will give the defendant the right to withdraw (whether the injustice is present is also determined by the court). Also, the court of its own volition, may, if it so pleases, set aside the plea of nolo contendere.

THE CONSUMER-MANUFACTURER RELATIONSHIP IN PRODUCTS LIABILITY CASES

THE PROBLEM

Due to the great strides made in merchandising processes and methods of product distribution, there has developed almost indomitable impetus toward protection of the ultimate consumer rather than toward restriction of the manufacturer's liability as had been the tendency in the past. No doubt the buying public relies quite heavily on the representations made by suppliers of chattels in the various advertising media, and that warranties and guaranties of merchantability serve as forceful motivations for the consumer's purchasing habits. It is evident too, that under present marketing practices, most products or articles used by the public are purchased from retailers; hence, today, the manufacturer and consumer have no direct contractual relationship in most buying and selling transactions. In view of these facts, the extent of the manufacturer's responsibility to ultimate vendees who, not dealing directly with the producer, have relied on representations and suffered injury due to imperfections in the products, has been constantly changing. The past and present relationship between the producer and buyer is the scope of this comment.

THE RULE AND ITS HISTORY

Initially, the common law remedy for misrepresentation was an action on the case in the nature of deceit which was used almost entirely in direct transactions between buyer and seller.[1] However, in the early case of *Pasley v. Freeman*[2] the action of deceit was held valid for a false affirmation made by the manufacturer even though the buyer had no direct dealings with the seller. Consequently, deceit had become an established cause of action regardless of contractual privity and it had become acceptable for consumers who had been misled as to merchantability of products to seek redress in an action of trespass on the case for breach of duty which sounded in tort. In *Stuart v. Wilkins*[3] the cause of action for misrepresentation was taken out of tort and brought in assumpsit for breach of the

[1] Smith and Prosser, Torts, c. 18 (1952).

[2] 3 Term. Rep. 51 (1789).

[3] 1 Dougl. 19 (1778).

vendor's warranty of the fitness of the product and, thus, for the first time a court had established that the action had a contractual character. Gradually, the tort action had fallen into disuse and habitual resort to the contract remedy led to the misconceived insistence on privity of contract as a condition of relief, especially because under assumpsit the common count for money received would be pleaded so that the plaintiff could recover his consideration paid.[4] With the continuous infrequent use of the tort remedy, many courts believed that such remedy had been eliminated whereas, in fact, the idea that the term "warranty" implied a contractual relationship was without historical foundation and cannot logically justify the notion that warranty actions are *ex contractu.* Hence, presently, although warranty actions are considered almost exclusively as contract actions, there is no good reason why the tort action should not co-exist with it since, in reality, the breach of warranty action is a hybrid. It starts out contractually but it really emanates from a failure to carry out a particular representation and thus results in tort where the seller has violated his obligation and misrepresented his goods.[5]

Notwithstanding this historical error, the requirement of contractual privity in warranty cases was formally adopted as a rule in *Winterbottom v. Wright*[6] where the court held that when the purchaser of a motor coach was injured as a result of defects in the construction of the coach, he could not recover from the manufacturer because of lack of privity between the parties. Since that time, privity of contract had become the sine qua non of an action for breach of warranty and the holding in the *Winterbottom* case became fixed as the unwavering rule in subsequent cases.[7] The courts justified the necessity of privity by reasoning found in *Davidson v. Nichols* where the court asserted:

> Whenever a wrong or injury results from the breach of a contract, merely, an action for redress, whether in form *ex contractu* or *ex delicto,* can be maintained only by a party to the contract. The obligation and duty arising out of a contract are due only to those with whom it is made. If the rule were otherwise and no privity of contract were required to sustain an action for a breach, there would be no limit to the liability which might be incurred by a contracting party. It would extend so as to give a right of action to all persons, however remote from any connection with the original parties to a contract,

[4] Ames, History of Assumpsit, 2 Harv. L. Rev. 1 (1888).

[5] Parish v. Great Atlantic & Pacific Tea Co., 177 N.Y.S. 2d 7 (1958). Note in 42 Harv. L. Rev. 416 (1928) comments: "Thus, the statement that a warranty is necessarily a contractual obligation accurately describes neither its nature nor its extent. It defines at most an arbitrary limitation which has been imposed by some courts in cases relating to sales and resting not upon necessities of logic but upon a conception of policy."

[6] 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

[7] Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457 (1896); Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891); Carter v. Harden, 78 Me. 528, 7 Atl. 392 (1886).

or however numerous they might be, who happened to sustain a loss or suffer an injury attributable to a breach of the stipulations into which a contracting party had entered.[8]

THE EXCEPTIONS TO THE RULE OF PRIVITY—IN TORT

In spite of the overwhelming acceptance of the rule and of the fact that the prevailing rule today still requires privity of contract for an action based on breach of warranty[9] the rule has been modified and dotted with refinements and exceptions by some courts which have indulged in various fictions on which to base the manufacturer's liability.[10] The exceptions which had arisen were based both on negligence in tort and on privity in contract.

In allowing recovery on the grounds of tort, one court declared that if the seller knew the chattel was inherently dangerous for its intended use and failed to disclose such facts to the buyer, the seller became liable to anyone who might be injured by such use since the injury was to have been reasonably anticipated.[11]

In *Bright v. Barnett*[12] the court found liability against the manufacturer where the chattel was furnished for use on the defendant's premises, thus treating the buyer and user as an invitee for business.

Perhaps the most important exception has stemmed from the case of *Thomas v. Winchester*[13] where the seller was held liable to a third party for negligence in the preparation of an article dangerous to the life, health and general safety of the public. The courts were in considrable disagreement as to what was to be included in the somewhat vague concept of "inherently dangerous articles" but did not hesitate to extend exceptional recovery to the consumer and fix liability on producers of foodstuffs, medicines and firearms.[14] To add to the turmoil, the courts which allowed recovery on the theory of negligence were not in agreement as to the proof required by the injured party to establish his cause of action. Some courts said that the plaintiff had to prove actual negligence or a lack of due care on the part of the manufacturer, and that the mere showing of injury was not enough.[15] Many courts, however, felt that in cases of sale

[8] 11 Allen (Mass.) 514, 517 (1866). The court indicated that those who did not contract with the manufacturer were merely strangers in whose behalf the law did not foster any public duty on the part of the producer.

[9] 77 C.J.S., Sales § 305 (1952).

[10] Ibid., at 1125 et seq. listing states which have abandoned the privity requirement: Calif., Fla., Ill., Iowa, Kan., La., Mich., Miss., Ohio, Okla., Pa., Tenn., Tex., and Wash.

[11] Langridge v. Levy, 4 M. & W. 337 (1837).

[12] 88 Wis. 299, 60 N.W. 418 (1894). [13] 6 N.Y. 397, 57 Am. Dec. 455 (1852).

[14] Tomlinson v. Armour & Co., 75 N.J. 748, 70 Atl. 314 (1908).

[15] Melick, The Sale of Food & Drink at 275 n. 16 (1936).

of food for human consumption, proof of negligence was not required and the theory of res ipsa loquitor was used to establish a prima facie case against the producer.[16]

Thus, the courts had met with great difficulty in applying the formalism of a rule which had been adopted in a prior century and which could not be justifiably geared to the complexities of an advanced age. As a consequence, in an effort to make the jurisprudence conform to the existing economic and social changes of the times, the courts have struggled with the rule in an endeavor to ward off the obvious inapplicability of an outmoded theory. Finally, in 1916, the modern doctrine as to the liability of a manufacturer was first voiced in *MacPherson v. Buick Motor Co.*[17] by Justice Cardozo. In that case, the auto manufacturer sold an automobile to a retail dealer who in turn resold the car to the plaintiff. While driving the auto, plaintiff was injured when it had suddenly collapsed due to defects in the structure of one of the wheels. The manufacturer sought to absolve himself from liability since he had not dealt with the ultimate vendee but, in deciding the case for the plaintiff, the court stated:

> We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. . . . Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective.[18]

The reasoning of the court was that the manufacturer by placing the car upon the open market assumed a responsibility to the consumer resting, not upon the contract, but upon the relation arising from his purchase and the foreseeability of harm if proper care were not used.[19]

Although the *MacPherson* case did not extend relief beyond the ultimate purchaser, later cases did stretch the cause of action to the purchaser's employees or to members of his family.[20] In *McLeod v. Linde Air Products Co.*,[21] the court went so far as to make the seller liable to anyone who may reasonably have been expected to be in the vicinity of

[16] Campbell Soup Co. v. Davis, 163 Va. 89, 175 S.E. 743 (1934).

[17] 217 N.Y. 382, 111 N.E. 1050 (1916).

[18] Ibid., at 389, 1053.

[19] Authority cited note 17, supra.

[20] Crane Co. v. Sears, 16 Okla. 603, 35 P.2d 916 (1934).

[21] 318 Mo. 397, 1 S.W. 2d 122 (1927).

the chattel when applied to its intended use and to be endangered if it turned out to be defective.

EXCEPTIONS TO THE PRIVITY RULE—IN CONTRACT

Once the liability of the manufacturer to the ultimate consumer had been established on the basis of negligence, an attempt was made to find some basis on which to hold the manufacturer strictly liable making him in effect, a guarantor of his product, regardless of the amount of care he exercised. Hence, the best way to accomplish this was to extend the liability of implied warranty to the ultimate consumer.[22] An impediment to the extension of this liability, however, was the unfounded theory expounded in the *Stuart* case treating "warranty" as contractual in nature requiring contractual privity which did not, in fact, exist. The courts, however, soon began to display ingenuity in evolving theories in order to avoid the objection of lack of privity.

The first exception which some courts employed was in cases dealing with goods designed for human consumption.[23] Those courts maintained that the requirement of privity of contract was not controlling and that the warranty of wholesomeness and fitness of food attaches to and runs with the goods much the same as warranties in realty transactions. In *Wiedeman v. Keller* the Supreme Court of Illinois in justifying such exception remarked:

> In an ordinary sale of goods, the rule of caveat emptor applies, unless the purchaser exacts of the vendor a warranty. Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious, and may prove so disastrous to the health and life of the consumer, that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound, and fit for the use for which it was purchased. It may be said that the rule is a harsh one, but, as a general rule, in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale, which are not possessed by the purchaser, that it is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk.[24]

In support of this theory, some writers place liability on the manufacturer based on a feeling that social policy demands that the burdens of accidental injuries caused by defective chattels can best be assumed by the manufacturer through insurance or pricing methods.[25]

[22] Authority cited note 9, supra.

[23] Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. 2d 445 (1936); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915); Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914).

[24] 171 Ill. 93, 99, 49 N.E. 210, 211 (1897). [25] Prosser, Torts, at 673 (1941).

Subsequently, in *Baxter v. Ford Motor Company*,[26] the exception to the requirement of contractual privity was extended to products other than those for human consumption. In that case, a pebble thrown by the tire of a passing car had shattered the windshield of plaintiff's automobile causing severe injuries to his eye. Despite the lack of privity, the court allowed relief based on representations of the manufacturer that the car's windshield was made of non-shatterable glass. The court said: "[T]he original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, the article is not safe for the purposes for which the consumer would ordinarily use it."[27]

A second method employed by the courts to fix liability on the producer was to find a unilaterial contract between the manufacturer and the ultimate consumer.[28] If the manufacturer made representations in an advertisement in such a way as to induce a vendee to rely on them, the manufacturer was held directly liable to the vendee upon a unilateral contract which was created, according to the court, by the vendee's acceptance of the claims of the advertisement.

One theory which some courts used to circumvent the need of privity was the "agency doctrine." In *Ryan v. Progressive Grocery Stores*[29] the plaintiff was injured by a pin which was concealed in a loaf of bread purchased by his wife. The court allowed recovery to the plaintiff husband on the basis that the wife acted as his agent in making the purchase and that the only contract which existed was actually between the plaintiff and the defendant baker.[30]

In *Bowman v. The Great Atlantic & Pacific Tea Co.*,[31] the judge refused to extend this theory of agency but did allow the injured party to recover on still another premise; viz., the "household-fund theory." In that case, the defendant had sold a bottle of contaminated salad oil to the sister of the plaintiff. When eating the salad oil, the plaintiff became violently ill and attempted to recover on the basis that the sister acted as her agent in the purchase. The court did not acknowledge this but allowed recovery maintaining that since the plaintiff and the purchaser lived together, the money used for the purchase had come from a joint expense

[26] 168 Wash. 456, 15 P.2d 1118 (1932).

[27] Ibid., at 466.

[28] Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893).

[29] 255 N.Y. 388, 175 N.E. 105 (1931).

[30] Accord: Mouren v. The Great Atlantic & Pacific Tea Co., 139 N.Y.S. 2d 375 (1955).

[31] 284 App. Div. 663, 133 N.Y.S. 2d 904 (1954).

fund and had been purchased for joint consumption. In denouncing the agency theory, the court explained:

> I think the Ryan case did not extend the agency rule beyond the case of a wife purchasing for her husband. . . . In 1943, long after the decision in the Ryan case, the Law Revision Commission after an exhaustive study, recognized the extreme limitations of the privity rule, and recommended to the Legislature an amendment . . . which would have given a right of action to the buyer's employees and to the members of his household. This the Legislature refused to do . . . I think this court should not, through a theory of agency, go beyond that which was permitted in the *Ryan* case, namely, the wife acting as agent for the husband.[32]

Some jurisdictions in seeking to make the producer of chattels guarantee the fitness of his products believed the best way to place liability on him was on grounds imposed by law as a principle of public policy to protect human health and life.[33] In *Ketterer v. Armour & Co.*[34] the court believed that remedies to an injured consumer should not be based on the intricacies of the law of sales but should rest "upon the demands of social justice." In abolishing the privity requirement, the court vaguely concluded in *Madouros v. Kansas City Coca-Cola Bottling Co.*

> [I]f privity of contract is required, then, under the situation and circumstances of modern merchandising in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons.[35]

One court has gone even farther and engaged in a discussion about the "sacredness of human life" in allowing a consumer recovery.[36]

Perhaps the most frequently used means to avoid the privity barrier and, perhaps, the most acceptable theory adopted by the courts is the "third party beneficiary doctrine."[37] In those cases, the retailer who is in effect a distributing medium for articles manufactured by the producer, enters into a contract for the benefit of the public who is the beneficiary. Thus, the contractual relation of the producer and retailer is engaged in for the benefit of a third party—the ultimate consumer. The most recent court to adopt this exception was one in New York in *Parish v. Great Alantic & Pacific Tea Co.* where the court in abolishing the old rule reasoned:

[32] Ibid., at 907, 908.

[33] Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942).

[34] 200 Fed. 322 (S.D.N.Y., 1912).

[35] 230 Mo. App. 275, 90 S.W. 2d 445, 450 (1936).

[36] Davis v. Van Camp, 189 Iowa 775, 176 N.W. 382 (1920).

[37] Klein v. Duchess Sandwich Co. Ltd., 14 Cal. 2d 272, 93 P. 2d 799 (1939); Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P. 2d 833 (1938); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937.

We must correct errors in the law and we must make those recognized and accepted changes with the times which are substantiated by reason and experience. Reason outranks technicality. Public welfare and human rights are far more important than a tenacious adherence to unsound decisions of the past, especially when outmoded or where reasons for their existence are nonexistent today.[38]

CONCLUSION

Thus, in recent years, significant changes have developed in the negligence and warranty cases which have greatly expanded the range of manufacturer's liability as had been manifested by earlier authorities. In fact, the expansion has grown to the point where the courts are at almost hopeless variance as to the present rule in such cases. What is more alarming is that this disagreement will continue and expand to new heights as new occasions arise which make it fitting "to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization."[39]

However, in spite of the diversity of reasoning employed by the courts in establishing the rights and duties between manufacturers and consumers, it is safe to assert that almost anyone can recover from the manufacturer of a defective or deleterious article which has been put out in the legitimate channels of trade regardless of the "due care" or "privity" requirements. In the final analysis, any outmoded fictions formerly employed by manufacturers to seek relief from their responsibility to the buying public cannot be asserted in view of the recent findings of the courts which have attempted to keep abreast with our ever-changing ways of life.

[38] 177 N.Y.S. 2d 7 (1958).

[39] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612, 615 (1958).

WIRE TAPPING—A DEFINITION OF "INTERCEPTION," "DIVULGENCE," "USE," "CONSENT OF THE SENDER," AND "PERSONS PROHIBITED" SINCE THE NARDONE CASE

Congress had enacted what appeared to be a very comprehensive piece of legislation to prohibit the interception of wire communications and their divulgence if either is not authorized by the sender and to prohibit the derivative use of such intercepted communications if that is also not authorized by the sender. A pertinent part of this enactment reads as follows:

[No] person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same,