Land & Water Law Review

Volume 1 | Issue 1 Article 13

January 1966

Torts - Implied Warranty - Sale Not Required - Applicable to a Lease for Entire Term of the Lease - Cintrone v. Hertz Truck Leasing and Rental Service

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TORTS—Implied Warranty—Sale Not Required—Applicable to a Lease for Entire Term of the Lease. Cintrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965).

The plaintiff was injured while he was a passenger in a truck leased from the defendant by his employer, Contract Packers. The truck was leased for a long term period and the defendant was responsible for all maintenance of the vehicle during the period of the lease. The plaintiff was injured when the truck hit a bridge, allegedly because of a brake failure. The plaintiff sought recovery from Hertz on the basis of (1) negligence of the defendant in inspection or maintenance; (2) breach of defendant's warranty that the vehicle was fit and safe for use. The trial court refused to submit the issue of whether or not there was a breach of the implied warranty to the jury and the jury found in favor of the defendant on the issues of negligence and contributory negligence. The appeal was solely on the ground that the contractual relationship between Hertz and the plaintiff's employer gave rise to an implied continuing promissory warranty by Hertz that the truck was fit for the purposes of operation and transportation of goods on the public highways. The New Jersey Supreme Court *held* that, since a bailor for hire such as the defendant puts motor vehicles in the stream of commerce not unlike a manufacturer or retailer; (1) the strict liability of implied warranty should apply, and ,(2) such warranty continues for the agreed rental period as an incident of the lease, irrespective of any service and maintenance undertaking by the lessor. Therefore it was reversible error for the trial judge to dismiss the breach of warranty claim without submitting the issue to the jury.

Warranty originated in tort but later came to be regarded as a term of the contract of sale, for which the normal remedy was a contract action.[2] However, a contract action was never satisfactory because in the case of an implied warranty the obligation was imposed upon the seller involuntarily as a consequence of the seller's conduct irrespective of any

1. Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965).
2. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118 (1943).

agreement. The seller's warranty has been described as a curious hybrid, unique in the law.[3] So long as the emphasis was on the contract aspect of the implied warranty remedy, it was a very limited and generally unsatisfactory remedy. Probably the greatest limitation on the contract warranty action has been the doctrine that without privity of contract between the plaintiff and the defendant there could be no recovery.[4] Since this doctrine often resulted in unjust results, especially after methods of merchandising changed so that the ultimate consumer of goods almost never dealt directly with the manufacturer, it was often attacked and gradually weakened by many exceptions.[5]

Another very limiting, but less litigated, requirement has been the requirement of a sale as a necessary prerequisite for a recovery upon breach of an implied warranty. It seems that, since implied warranties are generally an incident of a sale, many courts overlooked the fact that the need for the protection which implied warranties furnish may be as great in other relationships as it is in the law of sales. Some of the decisions denying recovery for want of a technical sale seem absurd when compared to analogous situations where a sale could be found.[6] Other courts implied a warranty by finding a sale without considering that there might be a warranty even if there were no sale.[7]

In New Jersey privity was nearly done away with in *Henningsen v. Bloomfield*[8] by extension of the *MacPherson*

3. PROSSER, TORTS 651 (3d ed. 1964).
4. See Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).
5. See, *e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). The purchaser of an automobile was allowed to recover from the automobile manufacturer, even though there was no privity of contract between them because the manufacturer was found to be negligent and the purchaser of the car was held to be in the class of persons for whose use the car was supplied. Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d. 828 (1942). A non-negligent manufacturer of contaminated food was held liable for injuries sustained by the consumers of the food as a matter of public policy.
6. See, *e.g.*, Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954). Blood received by a hospital patient, with the patient's knowledge and specifically paid for by that patient, was held not to have been "sold" so as to raise an implied warranty of fitness and merchantable quality. Albrecht v. Rubenstein, 135 Conn. 243, 63 A.2d 158 (1948). Service of food in a restaurant for immediate consumption was held not to be a "sale."
7. See, *e.g.*, collection of cases cited; Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 661 n. 56 (1957).
8. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

v. Buick[9] doctrine to cases where negligence on the part of a manufacturer cannot be proven, or does not even exist. The court based their decision entirely upon public policy grounds rather than applying some fiction to make a desired result fit into an old form. This decision has already been cited by many courts and will undoubtedly prove to be a landmark decision in the law. Five years after *Henningsen v. Bloomfield*[10] the New Jersey court made it clear in *Santor v. A. M. Karagheusion, Inc.,*[11] that the manufacturer's strict liability in tort would not be limited to personal injuries and in *Schipper v. Levitt & Sons, Inc.,*[12] that it would not be limited to dangerous instrumentalities.

The principal case presented the New Jersey court with the opportunity to apply its progressive reasoning to extend the strict liability of an implied warranty to a situation where there clearly was not a seller-buyer relationship. The *Henningsen, Santor* and *Schipper* cases were cited as making it plain that, if the relationship between Hertz and Contract Packers was one of manufacturer or dealer and purchaser, rather than one of lessor and lessee, an implied warranty of fitness for operation on the public highway would have come into existence at the time of sale and also that the breach of such a warranty which caused personal injury to an employee of the purchaser would have given the injured employee a right of action against Hertz.[13] They then went on to compare the similarities of a bailment for hire and a sale and said:

> There is no good reason for restricting such warranties to sales. Warranties of fitness are regarded by law as an incident of a transaction because one party to the relationship is in a better position than the other to know and control the condition of the chattel transferred and to distribute the losses which may occur because of a dangerous condition the chattel possesses.[14]

9. *Supra* note 5.
10. Henningsen v. Bloomfield Motors, Inc., *supra* note 8.
11. Santor v. A. M. Karagheusion, Inc., 44 N.J. 52, 207 A.2d 305 (1965). The only loss was a carpet which did not wear well.
12. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). The loss was the personal injury of a child resulting from faulty home construction.
13. Cintrone v. Hertz Truck Leasing & Rental Service, *supra* note 1, at 775.
14. *Ibid.*

After discussing the nature and incidence of an action based on strict liability in tort and citing and discussing several recent cases in this area from other jurisdictions, the court went on to state:

> In this developing area of the law we perceive no sound reason why a distinction in principle should be made between the sale of a truck to plaintiff's employer by a manufacturer, and a lease for hire of the character established by the evidence.[15]

This analogy was said to compel the extension of warranties to leases of this type whether a cause of action is set out in terms of strict liability in tort or on sales concepts of implied warranty.[16] However, the court ended its discussion of the warranty issue with the statement that the tort action would be more appropriate in such a case.[17]

The reason the court gave for refusing to distinguish between the sale of a truck and a lease for hire of the character involved in this case was that most of the significant criteria which in sales transactions give rise to an implied warranty of fitness or which support a cause of action based on strict liability in tort, were present: (1) The risk of harm to the lessee and his employees, passengers and members of the public from the operation of a defective truck on highways is great; (2) the representation of the lessor that the vehicles are fit for use for the lessee's purposes; (3) the reliance of the lessee on the representation of the lessor is bound to be great.[18]

The court approved of the argument made by Harper and James[19] that development of the warranty doctrine in sales should point the way by suggestive analogy to similar results in cases where a commodity is leased. Several other influential authors were also cited in support of the same argument.[20]

In extending the warranty doctrine to a bailment situation the court did not act without precedent.[21] However, it

15. *Id.* at 781.
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. 2 HARPER & JAMES, TORTS § 28.19 (1956).
20. Cintrone v. Hertz Truck Leasing & Rental Service, *supra* note 1, at 776.
21. See, *e.g.*, Hoisting Engine Co., Inc., v. Hart, 237 N.Y. 30, 142 N.E. 342 (1923); Booth Steamship Co. v. Meier & Oelhaf Co., 262 F.2d 310 (2d Cir. 1958); Gambino v. John Lucas & Co., 263 App. Div. 1054, 34 N.Y.S.2d. 383 (1942); Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964).

apparently went further than any other court has gone when it applied the strict liability for breach of implied warranty to a long term lease and held that the warranty lasted as long as the lease. Although there was a maintenance agreement between Cintrone and Hertz, the majority expressly held that the warranty or representation of fitness did not depend on the existence of the defendant's undertaking to service and maintain the trucks while they were leased.[22] Rather, it sprang into existence on the making of the agreement to rent the trucks and continued for the agreed rental period.[23] As Justice Proctor pointed out in his concurring opinion, the decision could have been based on the narrower ground that a new implied warranty of fitness came into being at the beginning of each day because of the servicing agreement which gave Hertz control over the leased trucks each night.[24]

The anticipated criticism that this would put the risk of failure of a rented vehicle because of deterioration upon the lessor was answered by the arguments that the risk ought to be imposed upon the rental business in the interest of the consuming public as well as the members of the public traveling the highways and that, since Hertz had retained supervision and control of the vehicles, they had opportunity to see that these vehicles remained fit for use or to withdraw them from operation and replace them when the estimated service life is at or approaching an end or if for any reason continued fitness for use is questionable.[25]

The decision seems to be broad enough to be applicable to other situations in the modern business world which are technically not sales but are designed to serve the same ends as a sale.[26] In the principal case judicial notice was taken of the growth of the business of renting motor vehicles, trucks and pleasure cars. The implied warranty protects the consuming public by putting the risk of injury from faulty merchandise on the party best able to prevent such faults from

22. Cintrone v. Hertz Truck Leasing & Rental Service, *supra* note 1, at 778.
23. *Ibid.*
24. *Id.* at 783 (concurring opinion).
25. *Id.* at 778.
26. Although leasing of equipment used in industry is in itself a big business, the doctrine of this case could apply equally well to the rental of items generally referred to as consumer goods. A check of nearly any local telephone directory will show firms advertising, "We rent most everything."

occurring, who is also generally in the best position to absorb the loss, especially in those jurisdictions which have done away with the restrictive requirement of privity. However, the principal case imposes a greater burden on the lessor than on a manufacturer in a similar situation because a manufacturer is liable only for injuries caused by a defect which existed when the vehicle left the manufacturer's control,[27] while under the doctrine of this case, the lessor will be liable for any defect which arises during the entire leasing period. As a matter of public policy it is difficult to see why the lessor should bear all the risk of injury caused by faults in the vehicle, whether or not they were present when the lessee obtained possession.

In the case of a new vehicle the lessor could sue the manufacturer and dealer for defects which were present when the vehicle was sold, but the principal case makes the lessor liable for defects which develop after the vehicle is in the possession of the lessee. Although the lessor may be in a better position to absorb the loss than the lessee, he certainly will not always be in a better position to prevent the fault from occurring, especially under long term leases.

Since the warranty of fitness was held not to be dependant upon the existence of the defendant's additional undertaking to service and maintain the trucks while they were leased, the rule of this case that the impled warranty of fitness for use came into existence at the time of the making of the lease and continued for the agreed rental period would be applicable to the type of situation where a new vehicle is leased for a period of time, often one year, and the lessee provides all the maintenance and upkeep of the vehicle during this period of time. In such a situation the only control that the lessor has over the vehicle is his control over the length of the lease. It seems unfair and unrealistic to burden him with an implied warranty that the vehicle will remain fit for use on the highway for such a long period of time. The lessee really has the most control over the vehicle during the term of the lease. It would seem that such doctrine would either reduce the flexibility of leases of automotive vehicles

27. Jakubowski v. Minnesota Mining & Mfg., 42 N.J. 177, 199 A.2d 826 (1964).

and other equipment with similar maintenance problems or possibly make them impractical from the lessor's standpoint because of the cost of assuming the added risk. Lessors would feel that they have to retain sufficient control over the maintenance of the vehicles to attempt to locate defects and correct them before injuries occur. In order to maintain such control the lessor would have to make all leases subject to a maintenance agreement.

The fact that the New Jersey court has based their decisions in the warranty cases since *Henningsen v. Bloomfield*[28] on public policy grounds leaves them latitude to apply the strict liability of a warranty action to other situations where the public's need for protection is as great but the scope of the action has heretofore been limited by the technical requirements of privity and a sale.[29] That this court may continue to expand the application of the strict liability for breach of implied warranty is indicated by language used in the *Schipper* case where the court said:

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected as they were step by step in *Henningsen* and *Santor*.[30]

When considering the requisites for an implied warranty action in Wyoming, whether based on sales concepts or as strict liability in tort, one must enter the realm of speculation. The Wyoming Supreme Court has never had to decide whether either a sale or privity is necessary to maintain an action based on breach of an implied warranty. However, when the Uniform Commercial Code was adopted in Wyoming, section 2-318 of the Code, dealing with third party beneficiaries of warranties, was made broader in scope than the

28. Henningsen v. Bloomfield Motors, Inc., *supra* note 8.

29. The next logical application of the doctrine might be to allow recovery in an action against a manufacturer, dealer, or lessor to an innocent bystander injured because of a defective product.

30. Schipper v. Levitt, *supra* note 12, at 325.

official version.[31] It can be argued that this section of the code amounts to a statutory exception to the privity rule.[32] The Wyoming version of the section is so broad that it may be interpreted as a complete elimination rather than a modification of the privity requirement.

In the principal case the New Jersey court cited a comment to Section 2-313 of the Uniform Commercial Code.[33] Although this section deals with express, rather than implied warranties, the comment purports to refer to the entire article on sales. The pertinent part of this comment is:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract of sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents.[34]

At least the Uniform Commercial Code should present no obstacles to prevent the Wyoming court from reaching the same result as the New Jersey court did in the principal case when it is faced with a similar problem.

The doctrine of strict liability in tort for breach of implied warranty is a useful one in the complex and impersonal business world of today. It is a useful and desirable doctrine for the protection of the consumers and perhaps even innocent bystanders. There is no logical reason for confining the doctrine to cases where a technical sale can be found when

31. Compare WYO. STAT. § 34-2-318 (Supp. 1965). "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty . . . ." *with* UNIFORM COMMERCIAL CODE § 2-318. "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty . . . ."
32. See, *e.g.*, Comment, *Warranty as a Lawyer's Tool in Motor Vehicle Cases*, 18 WYO. L. J. 259 (1964).
33. Cintrone v. Hertz Truck Leasing & Rental Service, *supra* note 1, at 775.
34. UNIFORM COMMERCIAL CODE, § 2-313, comment 2.

there are so many other business transactions which serve the same purpose as a sale. However, in its efforts to modernize the doctrine, the New Jersey court may have gone one step too far when it made the lessor's liability even greater than a manufacturer's by holding that the implied warranty of fitness extended for the full term of the lease, irrespective of any maintenance agreement. Such a doctrine could certainly hamper the growth and popularity of the long term lease in some industries.

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