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Manufacturers' Liability for Breach of an Implied Warranty

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The constitutionality of the Nebraska statute, when attacked on the grounds that it was a taking of private property without due process of law, has been fully upheld. "One cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights."[19]

If Wyoming is to fully utilize its water, serious consideration should be given, in addition to clearing up the ambiguous wording of our present statute, to placing the initiation of action within the power of the Board of Control just as Nebraska has done in their supervisory agency. This would be in line with the thinking at the time of the adoption of the Wyoming Constitution when it was said, "When we appoint a Board of Control to manage this water system that we say belongs to the State, let us give them authority to control it for the highest and best uses of the people of the State."[20]

FRANK C. MOCKLER

MANUFACTURERS' LIABILITY FOR BREACH OF AN IMPLIED WARRANTY

In a majority of the courts today, before a buyer can successfully maintain an action for breach of an implied warranty against a seller, the buyer must show that there is contractual privity between the parties. As a result of this privity requirement, a manufacturer is well insulated from the claims of an injured retail buyer unless the buyer can somehow show negligence on the part of the manufacturer, or the manufacturer is finally reached by carrying liability back through the retailer. But should the element of privity be required in an action on an implied warranty, thus protecting the very person who is responsible for manufacturing and marketing the product which has caused the injury? Recently a few courts have rejected this privity requirement and have held manufacturers strictly liable for their products on the theory of implied warranties.

An implied warranty has been defined as one imposed by law, arising from the relations between the parties, the nature of the transaction and the surrounding circumstances.[1] This warranty arises regardless of the seller's intention to create it, but it is rather an inference or conclusion of law which is said to have arisen from the presumed intention of the parties. Once an implied warranty is created by reason of the circumstances of the sale, the law conceives of such a warranty as being a term of the contract.[2]

19. Dawson County Irr. Dist. v. McMullen, 120 Neb. 245, 231 N.W. 840 (1930).
20. Journal and Debates of the Constitutional Convention Wyoming (1889) at p. 503.

1. Rogers v. Toni Home Permanent, 167 Ohio St. 244, 147 N.E.2d 612 (1958).
2. 77 C.J.S., Sales § 314 (1952).

At common law, the maxim of "caveat emptor" was generally applied to the sale of goods where there was no express warranty and no fraud on the part of the seller inducing the sale. Under this general rule, there was no warranty implied by law on the part of the seller with respect to the articles sold, except with respect to title and certain special matters of quality, such as merchantability and fitness for the purpose for which goods are purchased.[3] The principle of implied warranties is an exception to the common law rule and originally was a tort action for breach of duty assumed, but has since come to be regarded as a term of the contract of sale and now the appropriate remedy is a contract action.[4]

Recently the law of implied warranties has been crystallized by the Uniform Sales Act[5] and by the Uniform Commercial Code.[6] Under Section 15 of the Uniform Sales Act, two types of implied warranties of quality have been imposed upon the seller: 1) an implied warranty that the goods are fit for a particular purpose arises when the buyer makes the particular purpose for which the goods are required known to the seller and it appears that the buyer relied on the seller's skill of judgment; 2) an implied warranty of merchantability arises when goods are bought by description from a seller who deals in goods of the description. The Uniform Commercial Code also provides for an implied warranty of merchantability,[7] an implied warranty of fitness for a particular purpose,[8] and to some extent the Code has broadened the scope of these warranties. Under the Uniform Sales Act, the warranty of fitness does not apply to a sale of a specific article under its patent or other trade name. The Code abolishes this exception, but seems to permit the use of a trade name as evidence on the question of reliance. Section 2-318 of the Code extends the seller's warranty to any 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." This section allows a third party beneficiary to recover from a merchant-seller without privity but the fact remains that there is nothing contained in either the Uniform Sales Act or the Code which would make implied warranties applicable between a consumer and a manufacturer.

Since a majority of the courts today do require a contractual relationship between the parties, the primary obstacle which an ultimate consumer must overcome in an action of this sort against a manufacturer is that of privity. Some courts have been able to find privity between the consumer and the manufacturer by the use of various devices, including: 1) the manufacturer makes an offer for a unilateral contract which is accepted

3. 46 Am. Jur., Sales § 337 (1943).
4. Prosser, Torts, 493 (2d ed. 1955).
5. Id. at 494-495.
6. To date the Uniform Commercial Code has not been adopted in Wyoming.
7. Uniform Commercial Code § 314.

by the retail purchaser; 2) the manufacturer authorizes the dealer to bind him to a warranty when the dealer makes a retail sale; 3) the retail buyer as a creditor of the dealer can assert the dealer's right against the manufacturer; 4) the retail purchaser is a third party beneficiary of the contract; and 5) the warranty runs with the articles sold.[9] These more or less fictional devices are used by the courts to circumvent the privity requirement and in effect this amounts to strict liability to the manufacturer. In cases involving defective food and drugs, a few courts have completely disregarded the privity requirement,[10] but most of the courts which do recognize this exception to the privity rule have refused to extend it to any other type of product.[11]

Recently, however, a few courts have rejected the privity rule and have extended strict liability of manufacturers to subjects which cannot be classed as foodstuffs or drugs. In *McAfee v. Cargill, Inc.*,[12] the plaintiff's show dogs became sick after having been fed contaminated dog food processed by the defendant. The court, in allowing recovery against the manufacturer, held that, "lack of privity would be no bar under applicable California law to a buyer's action against a manufacturer of dog food for breach of warranty. The same public policy considerations present for the protection of humans in the use of packaged and processed foods are also present where instead we deal with animals." In *Kruper v. Proctor and Gamble Co.*,[13] the plaintiff was injured by a piece of wire which was imbedded in a cake of soap manufactured by the defendant. Although this case was reversed on other grounds,[14] the court stated that the question of privity should not protect one who sells unmerchantable goods where inspection will not disclose the defect. The plaintiff in *Graham v. Bottenfield's, Inc.*,[15] brought an action for damages for breach of implied warranty that the hair dye distributed by the defendant was fit for the purpose of applying to the hair and scalp and that it could be applied without injury. The court in this case stated that "public policy is the basic foundation for the imposition of liability under the doctrine of implied warranty." The court went on to say that there is as much reason for holding a manufacturer, jobber, or distributor, of a hair dye liable for breach of implied warranty, as there is in holding food manufacturers liable.

The privity requirement has also been relaxed in the case of an explosive cigar. In *Dow Drug Co. v. Nieman*,[16] the plaintiff was injured

8. Uniform Commercial Code § 2-315.
9. Braucher and Sutherland, Commercial Transactions, 9 (2d ed. 1958).
10. Prosser, Torts, 507 (2d ed. 1955).
11. Id. at 510.
12. 121 F. Supp. 5 (S.D. Cal., 1954).
13. 113 N.E.2d 605 (Ohio App. 1953).
14. Krupar v. Procter and Gamble Co., 160 Ohio St. 489, 117 N.E.2d 7 (1954).
15. 176 Kan. 68, 269 P.2d 413 (1954). Although the buyer and seller in this case were in privity, the language used by the court seemed to indicate that they would have allowed recovery even without privity.
16. 57 Ohio App. 190, 13 N.E.2d 130 (1936).

when a firecracker, wrapped in a cigar manufactured by the defendant, exploded while the plaintiff was attempting to light the cigar. It is difficult to determine upon what grounds the plaintiff was allowed to recover, since the trial judge submitted the case to the jury in such a way that the verdict could have been based either on negligence or implied warranty, but this case seems to indicate that privity is not necessary in a fact situation such as this. In *Pillars v. R. J. Reynolds Tobacco Co.*,[17] the plaintiff became violently ill when he bit into a plug of chewing tobacco containing a human toe. In an action against the manufacturer, the court said, "the fact that the courts have at this time made only the exception of foodstuffs to the general privity rule does not prevent a step forward for the health and life of the public. The principles announced in the cases which recognize the exception, in our opinion, apply with equal force to this case.

A child who was injured when a Pepsi-Cola bottle exploded was allowed to recover from the distributor, even though, there was no privity of contract.[18] Although the court stated that the defendant warranted that the bottle was not inherently or imminently dangerous, it stated that the implied warranty was not limited to "the unwholesomeness of the contents of the bottle but pertained as well to the bottle itself" and that recovery would not be denied on the grounds that there was no privity of contract. In *DiVello v. Gardner Machine Co.*,[19] the plaintiff's husband was killed when a grinding wheel disintegrated during normal use. The wheel had been manufactured by the defendant and sold to the husband's employer. The court, in allowing the plaintiff to recover, held that, "the sale of the grinding wheel carried with it an implied warranty of merchantability and fitness for the usage designed and that such warranty extended to the workman of the vendee who was injured in its ordinary use."

Strong public policy is not always a substantial enough reason for allowing recovery against a manufacturer without privity. The plaintiff in *Soter v. Griesedieck Western Brewery Co.*,[20] was denied recovery when she brought an action for damages alleging that she had been injured when a beer bottle exploded. The court in this case held, "implied warranties, such as arise with respect to the fitness for human consumption of bottled beverages do not arise with respect to the bottle or container which may be weakened by the manner and method in which it is handled or by other circumstances. In *Wood v. General Electric Co.*,[21] the plaintiff's house had been burned as a result of a defective electric blanket manufactured by the defendant. The court denied recovery for breach of an

17. 117 Miss. 490, 78 So. 365 (1918).
18. Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1958).
19. 102 N.E.2d 289 (Ohio Com. Pl. 1951).
20. 200 Okla. 302, 193 P.2d 575 (1948).
21. 159 Ohio St. 273, 112 N.E.2d 8 (1953).

implied warranty that the blanket was of merchantable quality because there was no "contractual privity between the parties." The plaintiff in *Russo v. Merck and Co.*,[22] brought an action against the defendant for the wrongful death of her husband. The plaintiff alleged that blood plasma, manufactured and sold by defendant to the hospital in which the husband was a patient, contained a poisonous substance which caused her husband's death. The court in this case held, "apart from privity of contract there can be no warranty." It would seem that in one jurisdiction a sick dog can recover for breach of implied warranty without privity, but in another jurisdiction, without this magic element, a widow cannot recover for the wrongful death of her husband.

Although the cases extending strict liability are very few in number, when compared with the decisions which require privity, the very fact that these cases are in existence seems to indicate a slowly growing tendency to hold manufacturers strictly liable for injuries caused by their products.

Should manufacturers be required to carry the burden of strict liability for their products? Many writers today are advocating strict liability. Professor James of Yale has stated "strict liability is to be preferred over a system of liability based on fault whenever you have an enterprise or activity beneficial to many, which takes a more or less inevitable accident toll of human life and limb."[23] Many sound reasons are given by the advocates of strict liability. As a preventive measure the manufacturer is in a position to promote safety in his products. By imposing strict liability upon him, he in turn will use more care in manufacturing his products. As a curative measure, the manufacturer is usually in a much better position than the retailer to distribute losses over society as a whole. This can be accomplished either by insurance or a slight raise in the prices of his products. In an action of negligence against a manufacturer, even with the use of res ipsa loquitur, the injured consumer usually has a difficult time proving how the manufacturer was negligent.[24] If strict liability were imposed, not only would the difficulty of proving negligence be avoided, but "the wastefulness and uncertainty of a series of warranty actions carrying liability back through retailer, jobber, and wholesaler to the original maker"[25] would be done away with. When these reasons are added to the basic proposition that it is good business policy for manufacturers to stand behind their products, strict liability of the manufacturer seems to be a very desirable principle of law.

On the other hand, to say to a manufacturer, "to escape liability you must see to it that your products are absolutely safe, even though there is no known way of doing so,"[26] is, to some people, too harsh a rule. Professor

22. 138 F. Supp. 147 (C.D. R. I., 1956).
23. James, General Products—Should Manufacturers Be Liable Without Negligence? 24 Tenn. L. Rev. 923 (1957).
24. Prosser, Torts, 506 (2d ed. 1955).
25. Ibid.
26. Supra note 24.

Plant of Michigan, has expressed the thought that the present rule of liability based on fault is sufficient incentive for a manufacturer to keep his products safe. A reputable manufacturer is not purposely going to injure the good name of his company by producing and selling defective goods. This "good name" factor alone would seem to be enough incentive for a manufacturer to keep his products safe.[27] Professor Plant has recognized that strict liability may increase the pressure upon not so reputable manufacturers but he doubts that liability without fault would increase the overall incentive. To say that the manufacturer is in a better position to distribute the risk of loss over society as a whole, seems to be disregarding many small manufacturers. While a large manufacturer may be able to raise his prices to compensate for losses, many small producers and manufacturers are operating on a very slim margin and to force them to raise their prices would, in some cases, force them out of business.[28] When discussing strict liability, the quetsion is often raised, "why should one consumer have to pay for another consumer's injury?" Why should I be penalized by higher prices because someone else may be injured by a manufacturer's product? Public policy demands that the manufacturer produce articles which are safe, but to hold a manufacturer liable without fault for injuries which the manufacturer could not prevent, is too strong a principle for many people to accept.

Strict liability of manufacturers for injury caused by their products seems to be a slowly growing theory in the law today. At common law the maxim "caveat emptor" was applied to the sale of goods and a buyer purchased at his own risk. As public policy changed, the implied warranty was made an exception to the rule, but the warranty was said to be a term of the contract, and the element of privity was necessary in an action on the contract. An exception to the privity rule was recognized when the ultimate consumer was injured by unwholesome food produced or distributed by a manufacturer. Today a few courts have extended the exception to the privity rule to subject matter other than food and have held the manufacturers strictly liable for their products. Thus it seems that the subject of manufacturers' liability has changed from absolute immunity, to strict liability, in certain cases.

In the writer's opinion, a strict liability of manufacturers for injury caused by their products should be an accepted principle of law. As a matter of public policy a manufacturer should be made to stand behind his product. To function effectively, the rule would have to be a flexible one, based upon either an implied warranty of fitness for a particular purpose, or an implied warranty of merchantibility. To require privity of contract in an action against a manufacturer is to disregard the fact the retail seller, with whom the buyer is in actual privity, is merely an

27. Prosser, Torts, 506 (2d ed. 1955).
28. Ibid.

outlet for the manufacturer's products. "Even apart from the incentive for the greatest possible care which strict liability provides, there is an obvious argument that in the public interest, the consumer is entitled to the maximum of protection at the hands of someone, and the producer, practically and morally, is the one to afford it."[29]

RICHARD E. DAY

THE SPOUSE AS A STRANGER TO THE DEED

It is elementary law that one of the essentials to a good conveyance is to have the spouse join in the execution of a deed for the purpose of releasing homestead rights; however, certain problems of draftsmanship may arise as to the correct manner in which the non-owning spouse should execute such a release in Wyoming. The enactment of comparatively recent legislation seems to indicate that it is permissible for the husband or wife, who owns no interest in the property, to sign the deed as grantor in order to release homestead rights.[1] A deed which is executed in this fashion containing a reservation in favor of the grantor may give rise to an ambiguous situation. The question arises as to whether or not the reservation is sufficient to create a vested interest in the non-owning spouse. The issue is one which is most likely to arise at a date later than the conveyance, although an immediate question raised is that of reporting the gift for tax purposes *if* there is a conveyance to the spouse. Normally the problem will be encountered upon examination of the title or the administration of the estate of either husband or the wife, such as the preparation of the inventory or the payment of estate taxes.

A primitive rule of the common law, still applied in modern law, is that a reservation in a deed consists of a right in favor of the grantor and that it cannot operate in favor of a stranger to the deed.[2] At common law a reservation was the creation of some new thing issuing out of the land not previously in existence, such as a rent or feudal service.[3] Since by definition the conveyance was inoperative as to the right reserved, it was on strict principle impossible to hold that the right reserved could be transferred by force of the reservation to a third party. The authority relied upon for this interpretation was the common law writers.[4]

29. Prosser, Torts, 507 (2d ed. 1955).

1. The former requirement that the certificate of acknowledgement contain a clause releasing homestead rights has been repealed. Wyo. Comp. Stat. §§ 66-209, 66-211 (1945) as amended by §§ 2, 3, Ch. 72, S.L. of Wyo., 1949. At present, the only requirement is that the conveyance contain a clause releasing homestead rights. Wyo. Comp. Stat. § 66-209 (Supp. 1957).
2. See cases in 39 A.L.R. 128 (1925).
3. Stone v. Stone, 141 Iowa 438, 119 N.W. 712 (1909).
4. Sheppard, Touchstone of Common Assurance, 80.