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# Panel Discussion - Products Liability - History

Clarence C. Johnson

# PANEL DISCUSSION–PRODUCTS LIABILITY

CLARENCE C. JOHNSON*

## HISTORY

On behalf of the panel I would like to thank Mr. Sawyer and those members of the Wyoming Bar Association who are responsible for our presence here today. We are highly complimented for the privilege of appearing before this group. In our discussion of products liability, I do not believe we will be able to give you many answers. Our aim today will be to point out issues and procedures you might desire to consider in the handling of a case of products liability. To accomplish this we have divided our program into two parts. During the first part we will cover the following:

1. Brief history of Products Liability with emphasis on the issue of privity.
2. Preparing and pleading the plaintiff's case.
3. A consideration of general problems arising in the defense of products liability cases.

We will then discuss, as a panel, issues such as: 1) the necessity of a sale; 2) the distinction, if any, between breach of warranty and strict liability; 3) the position of the middleman in a products liability case; 4) the steps to be taken by a defendant to protect his rights of indemnifcation; 5) the statute of limitations and other questions.

In commenting upon the history of products liability the logical event from which to commence a discussion appears to be the decision in the case of *Winterbottom v. Wright*,[1] decided in 1842. Although this case is credited with the so-called "general rule" that a manufacturer was not liable for negligence to third parties with whom he had no contractual relations, there are three preliminary observations which might be of interest.

1. The case involved an action on a contract.
2. The decision was that of sustaining a demurrer.
3. It was the dictum of Lord Abinger that set the pattern of our law for the next eighty years.

In the *Winterbottom* case the plaintiff's pleading alleged that the defendant entered into a contract with the Postmaster General whereby the defendant agreed to supply a mail coach and undertook to maintain it in a safe condition. Also, that the Postmaster entered into another contract with plaintiff's employer whereby the later agreed to use that coach in conveying the mail and to supply a horseman. The plaintiff was that horseman who drove the coach in reliance upon the contract between the Postmaster General and the defendant and was injured as the defendant

*San Francisco, California.

1. 10 Mees. & W. 109, 152 Eng. Reprint 402.

had negligently failed to keep the coach in safe repair as he had contracted. The issue was, could the plaintiff recover from the defendant under these circumstances where no privity of contract existed?

Lord Abinger had this to say:

> I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. . . . There is no privity of contract btween these parties;! and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. . . .

The first landmark exception to this general rule of no liability absent privity came ten years later in the the case of *Thomas v. Winchester.*[2] Here the defendant was a manufacturing druggist who negligently put up a jar of belladonna which is a poison, and labeled and sold it as as extract of dandeline, a harmless medicine. This mislabeled poisonous compound was sold to a retail druggist who in turn sold it to the plaintiff for his wife's use. When the husband brought legal action the defendant moved for a non-suit on the ground that it was a remote vendor and that no privity of contract existed. The court recognized the general rule as cited in the *Winterbottom* case but held that this rule did not apply to the sale of a poisonous drug in place of a harmless medicine. Such an act was immmently dangerous to human life. Thus developed the first exception to the general rule later to be referred to as the parent of the dangerous instrumentality doctrine.

Another exception developed around food products sold for human consumption. However, historical developments must be considered in talking about food and drink. Going well back into history we find there were innumerable regulations governing weight, measure and quality of food for human consumption. In fact, strict liability on the seller of food in the nature of an implied warranty was recognized by case dicta and text writers beginning about 1431.[3]

In further tracing the history of the general rule requiring privity and the development of exceptions, we come to the case of *Huset v. J. I. Case Threshing Machine Company.*[4] The complaint in this case alleged that J. I. Case manufactured a threshing machine which contained a cylinder of fast revolving knives which were guarded with a sheet iron covering which had no support and was so pliable and easily bent that it was incapable of sustaining the least weight. That the Case Company knew it was necessary to the operation of the thresher for a man to walk

2. 6 N.Y. 397, 57 Am. Dec. 455 (1852).
3. Prosser, "The Assault Upon the Citadel."
4. 120 Fed. 865, 61 L.R.A. 303 (1903).

on this sheet iron covering; and further, that this dangerous condition was none not readily discoverable by persons engaged in operating the machine; that the thresher was sold to one Pifer who engaged the plaintiff as a laborer to assist him in running it; and that the plaintiff in the course of his employment stepped on the sheet iron which gave way and as a result he lost his leg above the knee.

A demurrer to the complaint was sustained by the trial court on the ground that Case owed no duty to Huset who was a stranger to the transaction between Case and Pifer. The eighth Circuit Court of Appeals in reversing the trial court stated there was three exceptions to the general rule. Privity will not be required where there exists:

1. An act of negligence of a manufacturer or vendor in the preparation or sale of a product for human consumption which is imminently dangerous to the life or health of mankind.
2. An invitation to the injured by the owner to use a defective appliance upon the owner's premises.
3. A sale or delivery of an article which is known to be imminently dangerous to life or limb of another without notice of its qualities.

What is an "imminently" or "inherently" dangerous product? Any one product on a given occasion can be dangerous, including the pencil in your pocket. In trying to establish these exceptions of "inherently dangerous," "intrinsically dangerous" and "imminently dangerous" to the general rule requiring privity, considerable confusion resulted. Thus, exceptions to the general rule requiring privity were created on a case basis. Then followed the case of *MacPherson v. Buck Motor Company*[5] wherein Justice Cardozo in effect turned the exceptions into the rule when he stated:

> 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. . . . 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. . . .

In the *MacPherson* case the plaintiff purchased an automobile from a retail dealer. The automobile had been manufactured by the defendant. The wheels on the car had been manufactured by another concern and sold to the defendant who used them without inspection. One of the wheels was defective and failed when the plaintiff was operating the automobile with a resulting injury to the plaintiff. The issue was, did the plaintiff have a cause of action against the manufacturer of the automobile with whom he had no contractual relationship?

The effect of the *MacPherson* case was not to eliminate the use

5. 218 N.Y. 382, 111 N.E. 1050 (1916).

of the phrase "imminently dangerous" but rather to so develop it as to state what is now the modern rule in terms of liability rather than adding a further exception to a rule of non-liability, Under this modern rule questions to be answered are, what constitutes a probable known danger and a foreseeable harm. In any event, when a product, negligently made, is placed on the market, under circumstances where danger is to be foreseen, lack of privity is no defense.

We now turn our attention to warranty and more specifically to the requirement of privtiy in stating a cause of action. As you all know, liability in warranty can arise where damage is caused by the failure of a product to measure up to an express or implied representation by the manufacturer or other supplier. Originally the action for a breach of warranty was one on the case sounding in tort and closely allied to deceit. It was not until 1778 that the contract action was held to lie.[6]

The history of the privity issue in the field of warranty is not dissimilar to the development of this issue in negligence actions. The State of Washington in 1913 in the case of *Mazetti v. Armour & Co.*,[7] although recognizing the general necessity for privity, nevertheless, held that in the absence of an express warranty of quality, a manufacturer of food products impliedly warrants his goods dispensed in original packages to all who may be damaged by reason of their use in the legitimate channels of trade.

In the *Mazetti* case the plaintiffs allege they were the operators of a profitable restaurant and that they bought a packaged carton of meat, bearing defendants' name, which was prepared and ready to be used as food without further cooking or work, from a local grocery which had obtained it from the defendant. That when the meat was served to one of plaintiff's customers the latter became sick and nauseated; and did then proceed to denounce the fact, in the presence of others, that he had been served foul food. As a result, the plaintiff was allegedly damaged as to reputation and profits. The issue was, did the plaintiff's complaint state a cause of action as against the manufacturer with whom no privity of contract existed?

In holding that the plaintiff had a cause of action, the Washington court stated it regarded this case as one of first impression and that if there was no authority for the remedy it was high time that such authority be established.

There followed many legal fictions designed to overcome the problem of privity, although direct privity was absent. Some of these were:

1. Third party beneficiary.
2. Warranty runing with the product.
3. Pure food statutes make the manufacturer a guarantor.

6. Prosser, "The Assault Upon the Citadel," Yale Law Journal, Vol. 69, No. 7, p. 1126.
7. 75 Wash. 622, 135 Pac. 633.

4. Food cases, a special exception to the privity rule.
5. Uniform Sales Act includes the consumer as a buyer.

What about cases which involve products other than food? We would like to call your attention to three of these decisions. In 1958 the Michigan Supreme Court in the case of *Spence v. Three Rivers Builders & Masonry Supply*[8] held that where a manufacturer failed to properly inspect and test raw materials going into building blocks, a buyer of those defective blocks could recover from the manufacturer either on the theory of negligence or implied warranty, even if the buyer was a remote buyer with whom the manufacturer had no direct contractual relations. In this case cinder building blocks manufactured and sold for building purposes began to crack, pit, and discolor a few months after they were bought and used by the plaintiff to build a cottage. Plaintiff, herself, did not buy the blocks from the manufacturer so that the issue of privity was squarely before the court upon her action against the manufacturer based on a breach of both an express warranty and an implied warranty that the blocks were of merchantable quality. The court found there was no express warranty; that there was a breach of an implied warranty but that plaintiff could not recover because of lack of privity. This finding was reversed by the Supreme Court. Justice Voelker, speaking for the majority, pointed out that a court which lacks a clear and understandable rule of its own cannot be expected to impart one to others. He went on to state that there was authority in Michigan to treat actions of this kind based upon implied warranty by the manufacturer as though they were explicity grounded upon negilgence. The next question to be answered in Michigan is what place evidence of due care on the part of manufacturer plays in warranty cases. We might ask, was it intended that there be a distinction between breach of warranty and a negligent breach of warranty and that it is only intended that privity not be required in the latter?

The next two cases to be mentioned have both received nationwide attention and will undobutedly come in for discussion today. I will refer to them very briefly. The first is *Henningsen v. Bloomfield Motors Inc.*[9] Claus Henningsen purchased a new Plymouth automobile from Bloomfield Motors which he told the dealer he intended to give to his wife as a Mother's Day gift. Some ten days later and with less than 500 miles of use, Mrs. Henningsen was driving the new Plymouth on a highway at about twenty miles per hour when suddenly there was a loud noise from the bottom of the car under the hood and the steering wheel spun in her hands. The car veered sharply to the right and crashed into a brick wall the front of the car was so badly damaged that it was impossible to determine if any of the parts of the steering mechanism were defective. The Henningsens brought action against both the local dealer and Chrysler Corporation to recover for Mrs. Henningsen's bodily injury and for

8. 353 Mich. 120, 90 N.W. 873.
9. 32 N.J. 358, 161 A.2d 69 (1960).

property damage. At the trial there was expert evidence to the effect that the accident must have been due to a mechanical defect or failure. The case was given to a jury on the theory of a breach of an implied warranty of merchantability with results favorable to the plaintiffs against both defendants. The trial court did not feel there was sufficient proof to submit the case on the issue of negligence. In upholding the trial court the New Jersey Supreme Court commented on the issue of privity as follows:

> . . . We are convinced that the cause of justice in this area of the law can be served only by recognizing that she (Mrs. Henningsen) is such a person who, in the reasonable contemplation of the parties to the warranty, might be expected to became a user of the automobile. Accordingly, her lack of privity does not stand in the way of prosecution of the injury suit against the defendant Chrysler. . . .

The court then pointed out that the retailer's claim to the doctrine of privity rose no higher than that of the manufacturer. Of considerable interest was the court's comments with respect to the purchase order for the new Plymouth which contained an express warranty by which the manufacturer warranted the automobile to be free of defects in material or workmanship and further stated that it was in lieu of all other warranties, express or implied. The court held this was a disclaimer of an implied warranty of merchantability so inimical to public good as to compel an adjudication of its invalidity.

The last case I will draw to your attention is that of *Gottsdanker v. Cutter Laboratories*.[10] Here the plaintiffs suffered poliomyelitis resulting from vaccine which contained live and active virus. In allowing a recovery for the plaintiffs to stand, the California court affirmed that the manufacturer of the vaccine was liable for both a breach of warranty of fitness as well as one of merchantability. In regard to the privity issue the court pointed out that the established rule in California permitted a consumer of food to recover from the manufacturer upon a breach of an implied warranty and that there existed no reason to differentiate policy considerations requiring pure and wholesome food from those requiring pure and wholesome vaccine. This does not mean that the requirement of privity has been lifted in California as to products other than food and drugs. In fact, the privity issue in warranty actions is far from being settled. Some jurisdictions have gone father than others and for this reason it is an issue that requires your attention in the handling of a products claim. But then, there are many other issues of equal importance in this relatively new but fast developing field. To start us out on matters to be considered in preparing and pleading the plaintiff's case, I would like to call upon John Finger.

10. 6 Cal. Rptr. 325 (1960).