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Sales--Implied Warranties--Requirement of a Sale

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to ultimately decide whether freedom of the press or the right to a fair and impartial trial is the "preferred" or "basic" freedom. In a complex modern society and constitutional form of government, both of these freedoms merit the maximum legal protection that the courts can bestow.

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SALES — IMPLIED WARRANTIES — REQUIREMENT OF A SALE

Stromsodt v. Parke-Davis & Co., 257 F. Supp. 991 (D.N.D. 1966).

One defense to a personal injury suit for breach of implied warranty is that no sale occurred to which a warranty could attach.[1] The requirement that a sale be involved is often confused with the privity question, although the two are quite distinct.[2] The lack-of-sale defense has come into play most often in those cases involving food,[3] blood for transfusions,[4] drugs,[5] and other such items which are intended for intimate bodily use as part of a service. In comparison with others, however, this defense has been seldom used, making any judicial consideration of it, whether direct or indirect, of more than passing importance.

In *Stromsodt v. Parke-Davis & Co.*,[6] a federal district court, applying North Dakota law, held sub silentio that a technical sale is not a necessary element for an implied warranty action against the manufacturer of a vaccine which was administered to the plaintiff by his physician.[7] *Stromsodt* involved the drug, Quadrigen, which

[1] See, *e.g.*, Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954). See generally 3 DUESENBERG & KING, SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 7.01(2)(b) (1966); 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 19.02 (1966); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

[2] See Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960).

[3] See, *e.g.*, Dickens v. Horn & Hardart Baking Co., 209 A.2d 169 (Del. Super. Ct. 1965).

[4] See, *e.g.*, Goelz v. J. K. & Susie L. Wadley Research Institute & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961).

[5] Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960).

[6] 257 F. Supp. 991 (D.N.D. 1966).

[7] *Id.* at 992.

contained four antigens: diptheria toxoid, tetanus toxoid, pertussis (whooping cough) vaccine, and poliomyelitis vaccine. The plaintiff, an infant boy, received two injections of the drug, the first in August 1959 and the second in October of that year. After the second injection he suffered a violent reaction which can best be described as a convulsion or seizure.[8]

Medical testimony showed that the plaintiff had suffered permanent damage to the brain and central nervous system, and, at the time of the trial, the indications were that the boy would have to be institutionalized.[9] Having found that the drug itself was defective and caused the injuries, the court granted judgment for the plaintiff in the amount of $500,000.[10] It was held that the defect in the drug constituted a breach of the implied warranty of merchantability and that lack of privity is no defense to actions by the ultimate consumer against the manufacturer where " 'through advertising or other media of education and information defendant has convinced and persuaded the medical profession to prescribe its drug . . . .' "[11]

The court in *Stromsodt* did not directly consider the sale requirement in its decision. However, by holding that lack of privity is no defense and then applying the implied warranty theory,[12] the court necessarily decided that the requirement of a sale does not bar an action against the manufacturer of a drug which the consumer received from his doctor as part of the doctor's medical treatment or services.[13]

If *Stromsodt* is followed in the future by the North Dakota courts, it will place North Dakota with the small but growing number of states that have begun to whittle away at the requirement of a technical sale in order to find implied warranties.[14]

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[8] *Id.* at 993.

[9] *Id.* at 994.

[10] *Id.* at 998.

[11] *Id.* at 995, citing Bennet v. Richardson-Merrell, Inc., 231 F. Supp. 150 (E.D. Ill. 1964). The court also held that the defendant was liable in tort for negligence, thus finding for the plaintiff in both warranty and negligence. 257 F. Supp. at 996-97.

[12] *Id.* at 994-95.

[13] *Accord*, Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960).

[14] See Gottsdanker v. Cutter Labs., *supra* note 13; Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. Dist. Ct. App. 1966). See generally Farnsworth, *supra* note 1; Rheingold, *Products Liability — The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 692 (1965); Note, *Drug Liability — Survey, Study, and Progress*, 16 W. RES. L. REV. 392 (1965); Note, *Should the Doctrine of Implied Warranties Be Limited to Sales Transactions?*, 2 VAND. L. REV. 675 (1949).

Further, *Stromsodt* follows the lead of a California court in the *Gottsdanker v. Cutter Labs.*[15] case, which was one of the first to consider the sale requirement for implied warranty in the situation involving drugs administered to the patient by his physician. In addition to the lack-of-sale argument, the defendant in *Cutter* asserted that as a matter of public policy there should be no recovery on implied warranties where "new drugs" were involved.[16] The court found this argument unpersuasive when the product caused the very disease it was designed to prevent.[17] However, the question of whether such an argument would be valid in cases where a new drug causes harmful side effects was not considered. If the injuries in *Stromsodt* are viewed as harmful side effects of the defective vaccine,[18] then *Stromsodt* has extended *Cutter* one step further so that "new drugs" do not enjoy immunity from breach of warranty claims whether they cause the disease they are designed to prevent or cause harmful side effects.

Stromsodt would therefore indicate a broadening of implied warranty protection. If the trend continues, the sale requirement for warranty actions might well be eliminated, at least in cases involving a combined sale of goods and services.[19] It should be noted, however, that there is a solid line of cases which have not permitted recovery in warranty because the transaction was primarily a service;[20] and, of course, where privity is still required for warranty actions, the case is usually dispensed with on this ground, and the sale-service question is never reached.[21]

The position of the Ohio courts on this question is not completely clear. There appears to be no Ohio case directly related to the vaccine situations in *Stromsodt* and *Cutter.* However, Ohio's latest pronouncement on the privity question may indicate how such

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15 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960).

16 *Id.* at 611, 6 Cal. Rptr. at 326.

17 *Ibid.*

18 A close reading of the court's medical findings would seem to support this construction. 257 F. Supp. at 995.

19 The final step, of course, would be to allow implied warranty recovery in pure service situations. This, however, is a much different case from those in which there is both a sale and a service and in which one or the other predominates. For a discussion of several cases involving a service only, including such arrangements as bailments and leases or rentals of equipment, see generally 3 DUESENBERG & KING, *op. cit. supra* note 1, § 7.01(2)(b); 2 FRUMER & FRIEDMAN, *op. cit. supra* note 1, § 19.02; Farnsworth, *supra* note 1.

20 See, *e.g.*, Foley Corp. v. Dove, 101 A.2d 841 (D.C. Munic. Ct. App. 1954); Victor v. Barzaleski, 19 Pa. D. & C.2d 698 (Luzerne County Ct. 1959).

21 See, *e.g.*, Berry v. American Cyanamid Co., 341 F.2d 14 (6th Cir. 1965).

a case would be decided. In *Lonzrick v. Republic Steel Corp.*,[22] the Ohio Supreme Court held "that there can be an action in tort, based upon breach of [implied] warranty, and no contractual relation between the plaintiff and the defendant is required."[23] This relieves the plaintiff of the more onerous burden of proving negligence. Instead, he need merely prove that the product was defective at the time the manufacturer sold it, that the defect caused the injury or damage to the plaintiff while the product was being used for its ordinary and intended purpose, that the defect was the proximate cause of the injury, and that the plaintiff's use of or proximity to the defective product could reasonably have been anticipated.[24]

The classification of a breach of warranty as a tort has a significant effect upon the lack-of-sale defense. This defense can be asserted only where the cause of action for breach of implied warranty is based on contract, the argument being that a sale of goods is necessary to support an implied warranty.[25] Such a plea would therefore have no validity in tort actions for breach of implied warranty which are not limited to sales transactions. It would thus be difficult to imagine how the fact that part of the vaccine treatment consisted of a service could be raised in Ohio as a defense to recovery upon an implied warranty. Therefore, the plaintiff in *Stromsodt* could also have recovered in Ohio, provided that the cause of action were made out to be an action in tort.

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[22] 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

[23] *Id.* at 236, 218 N.E.2d at 192. The court noted that there may also be an implied warranty based on contract. This is the Uniform Commercial Code type of warranty which arises from the contractual relationship between a buyer and seller. *Id.* at 234, 218 N.E.2d at 189-90. The implied warranty relied upon by the court as a basis for the action in tort arose when the manufacturer put his product on the market. By doing so, he impliedly warranted that it was safe for its ordinary and intended purposes. *Id.* at 235-36, 218 N.E.2d at 190.

[24] *Id.* at 237, 218 N.E.2d at 192-93.

[25] See, *e.g.*, Perlmutter v. Beth David Hosp., 308 N.Y. 100, 104-05, 123 N.E.2d 792, 794 (1954).