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Commercial Law--Privity of Contract Necessary for Implied Warranty--Plaintiff

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Recent Cases

COMMERCIAL LAW—PRIVITY OF CONTRACT NECESSARY FOR IMPLIED WARRANTY—Plaintiff purchased an English Ford from an Alabama retailer, drove it home and parked it. Later, when he turned on the ignition, there was an explosion followed by a flash fire which burned him severely. The explosion was attributed to a crack in the gasoline tank, which allowed the gasoline to leak into the closed car and vaporize. The vapor was ignited by the spark generated when the plaintiff turned on the ignition, thus causing the explosion and fire. Plaintiff sued the English manufacturer and the American distributor in federal district court, alleging, *inter alia*, that the defendants impliedly warranted that the automobile was fit and safe for the purpose for which it was manufactured. The complaint was dismissed as to the English manufacturer for lack of jurisdiction. At the close of the case, the defendant distributor was awarded a directed verdict. *Held*: Reversed.¹ However, on the question of implied warranty, the court stated that under Alabama law there can be no implied warranty in the absence of privity of contract. *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1962).

The common law rule is that, in the absence of privity, a manufacturer of a defective article is liable neither in tort for negligence nor in contract for breach of implied warranty.² The common law tort rule has been altered by *MacPherson v. Buick Motor Co.*³ It is not the purpose of this comment to go into recovery based upon negligence; this comment discusses the requirement of privity of contract in actions based upon implied warranty. The exceptions to the common law rule have generally been limited to purchases of foods, drugs and beverages in their original containers.⁴

¹ The court reversed on the ground that a jury could reasonably have found the defendant negligent in marketing a product which was inherently dangerous and failing to inform the buyer that the article was dangerous.

² *Karger v. Armour & Co.*, 17 F. Supp. 484 (D.C. 1936); Annot., 111 A.L.R. 1235 (1937).

³ 217 N.Y. 382, 111 N.E. 1050 (1916). Where the nature of an article is such that, if negligently made, it is reasonably certain to place life and limb in peril, and the manufacturer has knowledge that it will be used without new tests by persons other than the purchaser, then the manufacturer, irrespective of privity of contract, must exercise care in the manufacture of the article.

⁴ *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); *Cernes v. Pittsburgh Coca-Cola Bottling Co.*, 183 Kan. 758, 332 P.2d 258 (1958); *Greenberg v. Lorenz*, 12 Misc. 2d 883, 178 N.Y.S.2d 407 (Sup. Ct. 1958); *Campbell Soup Co. v. Ryan*, 328 S.W.2d 821 (Tex. Civ. App. 1959); *Amarillo Coca-Cola Bottling Co. v. Louder*, 207 S.W.2d 632 (Tex. Civ. App. 1947). Annot., 79 A.L.R.2d 301, 332 (1960).

In 1815 courts began to recognize that a seller is at least under some obligation to furnish merchantable goods even in the absence of any express agreement as to quality.⁵ However, the majority of American courts, prior to the enactment of the Uniform Sales Act, held that no warranty can be implied where the seller is merely a dealer.⁶ The trend today is to allow recovery by ultimate consumers for injuries caused by defective products, without regard to privity of contract.⁷ This trend began around 1930.⁸ Since 1935, no additional states have rejected strict liability and ten more states have adopted it.⁹ At least one court has recognized the trend, but has said that its law is established and any change must be made by the legislature.¹⁰ Kentucky adopted the Uniform Sales Act in 1928,¹¹ and in 1960

¹¹ Ky. Acts 1928, ch. 148, at 481, provided that there is no implied warranty replaced it with the Uniform Commercial Code.¹² However, since neither the Act nor the Code expressly abolished the requirement of privity, the Kentucky court was able to retain it and continue to adhere to the common law rule.¹³

With the development of modern methods of manufacture and

⁵ *Gardiner v. Gray*, 4 Campb. 144, 171 Eng. Rep. 46 (N.P. 1815). For discussion, see 1 Williston, Sales §228 (rev. ed. 1948).

⁶ 1 Williston, Sales 597 n.1 (rev. ed. 1948).

⁷ *B. F. Goodrich v. Hammond*, 269 F.2d 501 (10th Cir. 1959); *Continental Copper & Steel Indus. v. Cornelius*, 104 So. 2d 40 (Fla. 1958); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Beck v. Spindler*, 256 Minn. 543, 99 N.W.2d 670 (1959); *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 569 (1959).

⁸ See Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960). "The assault upon the citadel of privity is proceeding in these days apace. So said Cardozo in 1931, and has been much quoted since. With the passage of nearly thirty years, a goodly part of the citadel still holds out; but the assault goes on with unabated vigor. [One major bastion], that of the strict liability of the seller of food and drink, is hard pressed and sore beset, and may even now be tottering to its fall." Prosser, *supra* at 1099.

⁹ Prosser, *supra* note 8, at 1110.

¹⁰ *Lombardi v. California Packing Sales Co.*, 83 R.I. 51, 112 A.2d 701, 704 (1955).

or condition as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except that: (1) where the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods should be reasonably fit for that purpose, and (2) goods which are bought by description must be merchantable.

¹² Ky. Rev. Stat. §355.2-314 (1962) provides that "a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Ky. Rev. Stat. §355.2-315 (1962) provides that if "the buyer is relying upon the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified an implied warranty that the goods shall be fit for such purpose."

¹³ The plaintiff, injured in the explosion of another's motorboat, brought action against the owner and the seller of the boat. The Kentucky appellate court, affirming a directed verdict for the seller, held that where no contractual relationship was shown between the seller and the plaintiff, the seller was not liable for breach of implied warranty. *Caplinger v. Werner*, 311 S.W.2d 201 (Ky. 1958).

distribution, the inappropriateness and injustice of the requirement of privity have become apparent.¹⁴ A warranty is regarded as a contract of personal indemnity with the original purchaser; it does not run with the goods.¹⁵ Therefore, an implied warranty is made unavailable even to the buyer's family.¹⁶ A right of action based upon breach of implied warranty rests upon the public policy of protecting innocent buyers from harm.¹⁷ The requirement of privity of contract defeats this public policy and results in inequality and injustice both to customers and mere users.¹⁸ Those jurisdictions limiting or disavowing the requirement of privity base their argument upon the motivating force of public policy.¹⁹ Since this implied warranty does not represent the express or implied-in-fact intent of the bargainers, but is imposed by law as a vehicle of social policy, the courts should extend it as far as the relevant social policy dictates.²⁰ To insure consumer protection, warranties that *do* run with the merchandise are needed to protect *all* who are likely to be hurt by the defective quality of such goods.²¹ If the requirement of privity is abolished, the public will benefit in two ways: (1) Liability will revert back to the manufacturer and cause him to exercise a higher degree of care in manufacturing his product. (2) The injured party will be permitted to recover under breach of implied warranty and will not have to resort to the difficult task of proving negligence.

Under the Uniform Sales Act and the Uniform Commercial Code it is possible to allow recovery based upon breach of implied warranty in the absence of privity. Although the Act restricts to a great extent the use of implied warranty and implies that there should be no

¹⁴ *Drury v. Armour & Co.*, 140 Ark. 371, 216 S.W. 40 (1919); *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); *Smith v. Salem Coca-Cola Bottling Co.*, 92 N.H. 97, 25 A.2d 125 (1942); *Wood v. General Electric Co.*, 159 Ohio St. 273, 112 N.W.2d 8 (1953); *Cnigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545, 179 S.W. 155 (1915).

¹⁵ 2 Harper & James, *Torts* §28.16 (1956).

¹⁶ *Borucki v. MacKenzie Bros. Co.*, 125 Conn. 92, 3 A.2d 224 (1938); *Duncan v. Juman*, 25 N.J. Super. 330, 96 A.2d 415 (1953).

¹⁷ *Rogers v. Tom Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

¹⁸ *Hermanson v. Hermanson*, 19 Conn. Supp. 479, 117 A.2d 840 (1954); *Kennedy v. Brockelman Bros., Inc.*, 334 Mass. 225, 134 N.E.2d 747 (1956); *Kroger Grocery Co. v. Lewelling*, 165 Miss. 71, 145 So. 726 (1933); *Norton Buck Co. v. E. W. Tune Co.*, 351 P.2d 736 (Okla. 1960); *Lombardi v. California Packing Sales Co.*, 83 R.I. 51, 112 A.2d 701 (1955); *Brown v. Howard*, 285 S.W.2d 752 (Tex. 1955); *Williams v. S. H. Kress & Co.*, 43 Wash. 2d 88, 291 P.2d 662 (1955).

¹⁹ *Lombardi v. California Packing Sales Co.*, 83 R.I. 51, 112 A.2d 701 (1955); *Cniggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W.2d 835 (1942).

²⁰ See *Jacob E. Decker & Son v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

²¹ See Justice Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

recovery by persons other than purchasers,²² the New Jersey court recently permitted the driver of an automobile to recover from the seller even though there was no contractual relationship between them.²³ If the New Jersey court can find liability under the restrictive wording of the Sales Act, then certainly the Kentucky court can find liability under the less restrictive wording of the Commercial Code and extend much-needed protection to ultimate consumers.

Wayne T Bunch

CONSTITUTIONAL LAW—EXTENSIONS OF THE BROWN CASE.—Negroes, living in Mississippi, brought suit in a United States district court to enjoin numerous defendants from enforcing Mississippi statutes which required racial segregation of transportation facilities. The statutes¹ applied to interstate *and* intrastate transportation. The plaintiffs contended that the statutes denied them equal protection of the laws guaranteed by the fourteenth amendment of the United States Constitution. The district court judge, believing that a *substantial* constitutional issue existed, convened a three-judge court.² The three-judge court decided to abstain from proceedings until the Mississippi courts were given an opportunity to construe the statutes. A direct appeal was made to the United States Supreme Court. *Held*: Vacated and remanded. Since state statutes requiring racial segregation of transportation facilities have been held unconstitutional it is error for a federal district court to refuse to enjoin the enforcement of such statutes; no *substantial* constitutional issue requisite for the convening of a three-judge court exists. *Bailey v. Patterson*, 82 Sup. Ct. 549 (1962), *vacating per curiam* 199 F Supp. 595 (S.D. Miss. 1961).

Three cases³ were cited by the Court to support the proposition that state statutes requiring racial segregation of interstate and intrastate transportation facilities are unconstitutional. Two of these cases,⁴ however, involved interstate transportation and the statutes were repudiated in both instances on the basis of the commerce clause

²² See note 11 *supra* for the pertinent provision of the Uniform Sales Act.

²³ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

¹ The statutes in question are: Miss. Code §§2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786-01, 7787.5 (1956). Breach of peace statutes complained of but not affected by this decision are: Miss. Code §§2087.5, 2087.7, 2089.5 (Supp. 1960).

² Ostensibly required by 28 U.S.C. §2281 (1958).

³ *Boynton v. Virginia*, 364 U.S. 454 (1960); *Gayle v. Browder*, 352 U.S. 903 (1956); *Morgan v. Virginia*, 328 U.S. 373 (1946).

⁴ *Boynton v. Virginia*, *supra* note 3; *Morgan v. Virginia*, *supra* note 3.