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Torts—Privity of Contract No Longer Needed in Certain Warranty Actions

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There is considerable justification for the dissent's fears that a "Pandora's box" of false claims will be opened and that a judge or jury might be convinced of a causal connection by "purchased" expert medical testimony. If there were no merit in these apprehensions, perhaps *Mitchell* would have fallen much sooner. But the exceptions to the rule have shown that it does not effectively eliminate many bad claims, but may only inhibit the prosecution of many good ones. And while medical testimoy may be presented by the plaintiff to support an unjust claim, it may also be used by the defense to disprove it.

Future cases may prove the decision in *Battalla* to be the wrong one. But it is more likely, looking at the experience of other "non-impact" states, that the majority will be vindicated. In the tradition of *Rumsey v. New York & N.E.R.R. Co.*[32] and more recently *Woods v. Lancet*,[33] the Court has reexamined a much-criticized rule of the past "without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."[34] The exceptions to and deviations from *Mitchell* had left this area of New York case law in an uncertain state. By the instant decision, the Court of Appeals has relieved much of this confusion and aligned itself with the reasoned position and not-unhappy experience of the majority of states.

R. V. B.

PRIVITY OF CONTRACT NO LONGER NEEDED IN CERTAIN WARRANTY ACTIONS

Until recently, the New York courts had continued unchanged the long standing rule that recovery in warranty, express or implied, could not be allowed in the absence of privity of contract.[35] The rule rested on the concept that a warranty is an incident of a contract, running only between the seller and one in contractual relationship (privity) with him.[36] Under the rule, retail dealers, manufacturers, and wholesalers stood immune to warranty actions by claimants other than the actual purchasers of injurious products.

The obvious harshness of the rule prompted the courts to fashion imaginative devices to supply or, more accurately, evade the privity rule in finding for certain nonpurchaser claimants. A long line of cases has used the device of the agency doctrine. The Court of Appeals first applied the device in *Ryan v. Progressive Stores, Inc.*[37] to permit a claimant, whose wife was the actual purchaser, to recover in warranty on the ground that the wife acted as the claimant's agent. The mere relationship of husband and wife gave rise to the presumption that the husband's funds were used to make the purchase. Other agency cases have included such successful claimants as: the sister of the

32. 133 N.Y. 79 (1892).
33. 303 N.Y. 349, 102 N.E.2d 691 (1951).
34. Kent's Com. (13th ed.) 477, cited in Woods v. Lancet, supra note 33 at 355, 102 N.E.2d at 694.
35. Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928).
36. Fairbank Canning Co. v. Metzger, 118 N.Y. 260, 23 N.E. 372 (1890).
37. 255 N.Y. 512, 157 N.E. 828 (1927).

actual purchaser,[38] the wife of the actual purchaser,[39] and the guest of the actual purchaser.[40] The position of the infant nonpurchaser claimant helped lead to the fashioning of the second device, since the use of the agency doctrine in favor of the infant would have necessitated the unlikely presumption that the child's money was spent for the purchase. In the lone case employing the device of the third-party beneficiary doctrine the court reasoned that the parent had made the purchase for the benefit of the child, and thus the purchase was in effect a third-party beneficiary contract.[41] It should be noted that the courts have generally limited recovery to actions involving injurious food products.[42] Thus, the courts have in the past been satisfied to confine their efforts in expanding warranty protection on behalf of nonpurchaser claimants to the fashioning and use of devices to evade the privity rule rather than any attempt to directly alter the rule, itself.

The present case, *Greenberg v. Lorenz*,[43] seems for the first time to dispense with the royal seal of privity. The Court of Appeals held that an infant, whose father was the actual purchaser, could recover against a retailer for breach of warranties of fitness and merchantability[44] in the sale of a can of salmon having bits of metal concealed in the fish. Chief Judge Desmond concluded, "Today when so much of what we eat is bought in packages it is not just or sensible to confine the warranty's protection to the individual buyer. At least as to food and household goods, the presumption should be that the purchase was made for all the members of the household."[45]

It is significant that the Court speaks beyond the infant claimant in the case to such other nonpurchaser claimants as comprise the "members of the household." Presumably, any of the nonpurchaser claimants coming within this category will in the future be accorded the benefit of the distinct doctrine of the case. It is also reasonable to expect that the nonpurchaser claimants permitted recovery under the agency doctrine will eventually be included under the new doctrine. Moreover, since the Court's basis for allowing recovery is the arbitrary discrimination against nonpurchaser claimants caused by the privity rule, the same arbitrary discrimination posed by the "members of the household" limit promises a further broadening of the class of permissible claimants. Similarly, the Court's words go beyond food items (although the case deals

38. Bowman v. Great Atlantic & Pacific Tea Co., 284 A.D.2d 663, 133 N.Y.S.2d 904 (4th Dep't 1954), aff'd without opinion, 308 N.Y. 780, 125 N.E.2d 165 (1955).
39. Gimenez v. Great Atlantic & Pacific Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934).
40. Welsh v. Schiebelhuth, 11 Misc. 2d 312, 169 N.Y.S.2d 309 (Sup. Ct. 1957).
41. Parrish v. Great Atlantic & Pacific Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (Munic. Ct. 1958).
42. In Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953) the Court in passing on a statute of limitations point did not dismiss the cause, as it might have, on the ground that the warranty protection accorded nonpurchasers extended to food items and not to the clothing item involved in the case.
43. 9 N.Y.2d 195, 213 N.Y.S.2d 39 (1961).
44. N.Y. Pers. Prop. Law § 96 (1)(2).
45. Greenberg v. Lorenz, supra note 43 at 215, 213 N.Y.S.2d at 42.

precisely with canned salmon only) to include "food and household goods." The product class may predictably grow to include even items of clothing.[46] Professor Prosser has said in this regard, "It is not difficult to predict a process of development similar to that of the maker's liability in negligence, which will extend first to products involving a high degree of risk, and perhaps eventually to anything which may be expected to do harm if defective."[47] The fruition of this now famous prediction appears to be more than a possibility in our courts after this decision.

Not only does the Court's holding seem to embrace an extensive number of new claimants and fresh products, but it also announces a clean break with the privity rule. The opinion is quite frank about the "nonprivity" of the infant claimant. No attempt is made to guise the holding in the agency doctrine or the third-party beneficiary doctrine. The Court speaks in terms of "change" in the privity rule, itself, and inquires into the origin of the rule in justifying such change. Simply stated, the Court holds that privity is no longer a prerequisite in certain warranty actions. Thus, the privity rule seems to have given way at least in a limited area to a more realistic approach to warranty claims.

The only noticeable pause the Court takes in coming to its decision is the short time given to resolving the propriety of judicial change in the rule as opposed to legislative change. The Court argues that the privity rule is in its origin merely a rule of judicial making, and, moreover, that no insistence on the rule can be found in the statutes. Justice Froessel in a separate concurring opinion, while acknowledging the correctness of the present change, expressed doubt as to the propriety of future judicial change. He points to the inequity of holding a retailer liable where there is no fault on his part for the injurious character of the packaged food he sells. The plight of the retailer, he believes, approximates the unjust situation that the nonpurchaser claimant has been placed in by the privity rule. He urges that the dilemma of choosing between the innocent retailer and the misfortunate nonpurchaser claimant be left to legislative investigation and determination.[48]

The importance of the present case is that it discernibly stands for the first clean, if limited, break with the privity rule in warranty actions and foretells of the further dispensation of the rule in an increasing number of cases.

D. P. S.

ATTACK ON MANUFACTURER'S PRODUCT MAY IMPUGN HIS INTEGRITY AND BE ACTIONABLE WITHOUT PROOF OF SPECIAL DAMAGES

In *Harwood Pharmacal Co. v. National Broadcasting Co.*,[49] plaintiff

46. Blessington v. McCrory Stores Corp., supra note 42.
47. Prosser, Torts 510 (2d ed. 1955).
48. For a discussion of the propriety of judicial change in the privity rule in New York see Note, 8 Buffalo L. Rev. 290 (1959).
49. 9 N.Y.2d 460, 214 N.Y.S.2d 725 (1961).