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Sales-Implied Warranty-Merchantable Quality of Tobacco Products

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SALES—IMPLIED WARRANTY—MERCHANTABLE QUALITY OF TOBACCO PRODUCTS—Decedent's widow[1] and the administrator of his estate[2] brought a consolidated suit against the American Tobacco Company on six theories

1 Suit was filed under the Florida wrongful death statute. FLA. STAT. §§ 768.01, .02 (1959).

2 Decedent sued American Tobacco Company in December 1957, claiming that he had incurred lung cancer as a result of smoking defendant's cigarettes. Several months

of liability[3] for the death of decedent, allegedly caused by lung cancer purportedly contracted from the smoking of defendant's cigarettes. At the close of plaintiff's evidence, the district court directed a verdict for defendant on all counts except those of implied warranty and negligence. The jury determined that, although defendant's cigarettes were the cause of decedent's lung cancer and resultant death, defendant had no means of knowing that the cigarettes would cause cancer. On appeal of the implied warranty charge to the Court of Appeals for the Fifth Circuit, *held*, affirmed, one judge dissenting. Defendant cannot be held liable for consequences which were not foreseeable through the use of ordinary human skill and foresight.[4] *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).

As early as the middle of the fifteenth century judges and legal writers discussed a doctrine of strict liability, in the nature of warranty, relating to sellers of food.[5] This doctrine was essentially a return to the old common-law principle of liability without fault[6] and provided plaintiffs with an alternative cause of action to that based upon negligence. English judges originally associated the doctrine with the tort action of deceit, but, as contract law developed, it was swept into the action of assumpsit.[7] Today, although uncertainty still exists as to whether this warranty-based liability falls within tort or contract law,[8] under either theory the effect is the same[9]—that of strict liability, without fault, being imposed upon sellers of food.[10] Writers reflect several judicially proffered justifications for this imposition of strict liability.[11] First, the public interest in human life, health and safety demands that the consumer be given the maximum possible protection. Second, the seller in such situations has induced the

later decedent died and the claim passed under the Florida survival act to his son, as administrator of his estate. FLA. STAT. § 45.11 (1959).

3 The theories of liability were breach of implied warranty, breach of express warranty, negligence, misrepresentation, battery, violation of the Federal Food, Drug and Cosmetic Act [52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-92 (1958)], Federal Trade Commission Act [38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-77 (1958)], and the Florida Food, Drug and Cosmetic Act [FLA. STAT. § 500.01 (1959)].

4 A petition was granted for rehearing to the Supreme Court of Florida to certify the question of the law of Florida. FLA. STAT. § 25.031 (1959).

5 See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1104 & nn. 31 & 32 (1960).

6 See Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 939 (1957).

7 PROSSER, TORTS § 83, at 493 (2d ed. 1955); Prosser, *supra* note 5, at 1126.

8 See RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 6, 1961); 1 WILLISTON, SALES § 197 (rev. ed. 1948).

9 Reference is made only to the type of liability and not to the procedural distinctions such as survival of actions, the statute of limitations, the measure of damages or recovery for wrongful death that may exist between tort and contract law.

10 *E.g.*, Ireland v. Louis K. Liggett Co., 243 Mass. 243, 137 N.E. 371 (1922); Simon v. Graham Bakery, 31 N.J. Super. 117, 105 A.2d 877 (1954).

11 Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928 (1957); Prosser, *supra* note 5, at 1124. See also Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

consumer to purchase the goods by placing them on the market and by representing, at least impliedly, that they are suitable and safe for use. Third, the free enterprise system, and consumers as a group, are more able to bear the loss than the victim. The rationale implicit in these attitudes is that defective food is so ultrahazardous that, when neither party is at fault, the one releasing the injurious force should bear the loss.[12] By analogy, the implied warranty doctrine has been extended beyond defective food in many jurisdictions to encompass other products considered to be sufficiently hazardous.[13]

The implied warranty theory does not, however, render the seller of a defective commodity strictly liable for all injuries resulting from any use to which his product is put. Rather, it extends only to the ordinary uses for which the product was intended and sold,[14] and the product need not be of the highest, or even the average, quality of the industry[15] to be considered merchantable.[16] It has been asserted that the ordinary use of cigarettes merely involves the lighting and burning of tobacco and, as such, an injury caused by inhaled smoke lies outside the scope of implied warranty liability.[17] However, common sense indicates that the ordinary use of cigarettes includes the inhaling and exhaling of smoke into and through the mouth, throat and lungs. In medical circles today it is generally conceded,[18] and the jury in the principal case found,[19] that smoking can cause cancer. A product cannot be "fit" for a contemplated use, in legal parlance, when such use results in serious injury. Thus, if the smoking of tobacco products is found to be cancer-forming, every cigarette would be unmerchantable, and injuries resulting therefrom should be recoverable. Before imposing liability, however, the court in the principal case would

12 Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944). *Cf.* Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948). See generally EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951). See also Plant, *supra* note 6.

13 Ross v. Philip Morris Co., Civil No. 9494, W.D. Mo., Oct. 22, 1959, *modifying* 164 F. Supp. 683 (W.D. Mo. 1958) (cigarette); Free v. Sluss, 87 Cal. App. 2d 933, 197 P.2d 854 (1948) (soap); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940) (insecticide).

14 Warranties on the sale of goods are governed by the Uniform Sales Act, a codification of the common-law rules, or the Uniform Commercial Code, in all but a few states. UNIFORM SALES ACT §§ 15(1), (2); UNIFORM COMMERCIAL CODE §§ 2-314 to -315. See PROSSER, TORTS § 83, at 494 (2d ed. 1955); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 138 (1943).

15 Wilson v. Lawrence, 139 Mass. 318, 1 N.E. 278 (1885). See 1 WILLISTON, *op. cit. supra* note 8, § 243; Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 138 (1943).

16 "Merchantable" under the Uniform Sales Act and Uniform Commercial Code means that a product is fit for ordinary uses and purposes for which it is sold. PROSSER, TORTS § 83, at 495 (2d ed. 1955).

17 See 42 B.U.L. REV. 250 (1962); 50 CALIF. L. REV. 566 (1962).

18 See Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), in which plaintiff offered 795 articles allegedly dealing with harmful effects of smoking upon the human body. See generally Brumfield, *Liabilities of Tobacco Industry: Cancer and Its Relationship to Smoking—Is It Actionable?*, in 1958 TRIALS AND TORT TRENDS 1.

19 Principal case at 71.

require that sellers have a means available to gain knowledge of the product's defect. Yet, since implied warranty is a doctrine which has developed separately from concepts of negligence, liability should not be dependent upon a finding of fault or lack of due care.[20] In fact, the weight of authority has distinguished the two doctrines by requiring proof of actual or implied knowledge of relevant circumstances only in a negligence-based action.[21] Moreover, the prinicpal reasons underlying a strict liability approach—the public's interest in life, health and safety, the consumer's induced reliance upon the seller and his relative inability to bear the loss—do not require that the seller have knowledge of the defect.[22]

Although the thirty to forty thousand deaths resulting from lung cancer each year, which form a potentially extensive basis for litigation, place tobacco companies in a precarious situation,[23] representatives of a deceased smoker are nevertheless not assured of recovery, as the law has been reluctant to protect a man from his own folly. In general, courts have limited the imposition of strict liability to those situations in which the consumer has relied upon the seller,[24] a circumstance which can hardly exist when the defect is of such a nature that it is or should be known to the consumer. Moreover, the defenses of assumption of risk and contributory negligence have been made available to sellers in strict liability actions against plaintiffs who have later discovered the defect and nevertheless proceeded to make use of the product.[25] As early as the seventeenth century men were writing about the adverse effects of smoking on the human body,[26] which, although not as pronounced as those from alcohol, have still been discernible. Recently a great deal of information has been released to the American public through current publications and by various health

20 See note 10 *supra.*

21 *E.g.*, Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961); Pietrus v. J. R. Watkins Co., 229 Minn. 179, 38 N.W.2d 799 (1949). See PROSSER, *op. cit. supra* note 16, at 494; 1 WILLISTON, *op. cit. supra* note 8, § 242.

22 See note 12 *supra.* For a recent decision following the prevailing authority [*e.g.*, Ward v. Great Atl. & Pac. Tea Co., 231 Mass. 90, 120 N.E. 225 (1918); Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942)] in holding that knowledge is not a requisite to a finding of strict liability, see Sencer v. Carl's Mkts., Inc., 45 So. 2d 671 (Fla. 1950), where a retailer was held liable for a packaged good's defects which he had no practical means to discover.

23 This figure represents only the number of annual deaths in the United States from lung cancer and does not include the many other injuries that may be attributed to smoking or those injuries which are discovered and actionable in the absence of death. See Time, July 6, 1962, p. 29. See generally Readers Digest, June 1962, p. 45.

24 *E.g.*, Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940); Berger v. E. Berger & Co., 76 Fla. 503, 80 So. 296 (1918); Rosenbush v. Learned, 242 Mass. 297, 136 N.E. 341 (1922); Wavra v. Karr, 142 Minn. 248, 172 N.W. 118 (1919). See generally PROSSER, *op. cit. supra* note 16, at 494; 1 WILLISTON, *op. cit. supra* note 8, § 242; Prosser, *supra* note 15.

25 *E.g.*, Arthur v. Merchants' Ice & Cold Storage Co., 173 Cal. 646, 161 Pac. 121 (1916); Hosmer v. Carney, 228 N.Y. 73, 126 N.E. 650 (1920); Brown v. Barber, 26 Tenn. App. 534, 174 S.W.2d 298 (1943).

26 Brumfield, *supra* note 18, at 2.

groups on the cancer-causing effects of smoking.[27] That these warnings have not gone unheeded is evidenced by the fact that a substantial percentage of sixty million smokers has switched to filter-tip cigarettes.[28] Thus, persuasive evidence exists to show that smokers are well aware of the possible harm caused by smoking tobacco and, as such, should be precluded from recovery.[29] It is also common knowledge that overconsumption of a variety of products will cause physical harm.[30] The standard of merchantable quality does not require a product to be fit for an uncontemplated use.[31] The decedent in the principal case smoked from one to three packages of cigarettes a day—an extraordinarily large smoking appetite. Medical statistics indicate that he thereby tripled or quadrupled his susceptibility to lung cancer,[32] and that he may not have been injured at all had he smoked fewer cigarettes—many smokers never contract lung cancer.[33] If, as a question of fact, a decedent's smoking habit is determined to constitute overconsumption, and thus an uncontemplated use of cigarettes, as the principal factor causing his injury, the implied warranty theory should seemingly be unavailable as a basis of recovery.

In spite of the smoker's assailable position, cigarette manufacturers are presently in a dilemma. The defenses available to them are impractical, for disclaimers, warnings or any admission that smoking causes cancer will undoubtedly have an adverse effect on the volume of cigarette sales. However, retailers might find these arguments a useful defense, inasmuch as cigarettes would usually comprise but a small part of their total sales. Moreover, the statute of limitations in many states may act as a bar to plaintiff's claim against either party where the cancer can be proved to have lain dormant for the statutory period.[34] Retailers will continue to be principally liable in about half of the states, and their recourse to indemnity by the manufacturer for recoveries resulting from his defective product is not wholly adequate.[35] The principal case gives rise to a somewhat paradoxical situation, for a seller of cigarettes may distribute an unmerchant-

27 See *id.* at 4; Ladies Home J., Dec. 1956, p. 160; Life, June 11, 1956, p. 126; Newsweek, June 18, 1962, p. 74; Newsweek, March 19, 1962, p. 78; Readers Digest, June 1962, p. 45; Time, March 23, 1962, p. 44; Time, Jan. 25, 1960, p. 64; Time, July 5, 1954, p. 37; U.S. News & World Report, July 26, 1957, p. 68. Interestingly, Italy has banned all advertising of cigarettes. See Bus. Week, June 16, 1962, p. 29.

28 See Brumfield, *supra* note 18, at 35; Readers Digest, July 1961, p. 71.

29 Analogically, recoveries against manufacturers for harm resulting from the consumption of whiskey are virtually non-existent, since all are presumed to know of its possible deleterious effects. See Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 302 (3d Cir. 1961).

30 See RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 6, 1961).

31 See note 16 *supra.*

32 See NATIONAL HEALTH EDUCATION COMMITTEE, INC., SUMMARIES OF REPORTS ON RESEARCH PROGRESS AGAINST CANCER (1958); Newsweek, June 18, 1962, p. 74.

33 There are sixty million smokers in the United States and only thirty thousand deaths from lung cancer annually. See generally Brumfield, *supra* note 18.

34 *Contra,* Urie v. Thompson, 337 U.S. 163 (1948). See 62 W. VA. L. REV. 94 (1960).

35 Prosser, *supra* note 5, at 1123.

able product which may cause serious injury while being exempt from implied warranty liability, since, under the present state of the law, the burden of loss from such an injury has been consistently left with the consumer possessed with knowledge, at least constructive, of the defect. If there is to be a change in the allocation of the loss in this area, it will apparently come through legislation.

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