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Implied Warranty Extending To Persons Not In Privity Of Contract With Seller - Pabon v. Hackensack Auto Sales, Inc.

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Implied Warranty Extending To Persons Not In Privity Of Contract With Seller

Pabon v. Hackensack Auto Sales, Inc.[1]

An infant driver of an automobile brought an action for breach of the implied warranty of merchantibility,[2] by next friend, for breach of the implied warranty of fitness for a particular purpose,[3] and for negligence. The action was against the Ford Motor Company, the manufacturer of the automobile, and Hackensack Auto Sales, Inc., the dealer selling the automobile, for personal in-

[1] 63 N.J. Super. 476, 164 A. 2d 773 (1960).
[2] N.J.S.A. 46: 30-20; similar provision found in 7 MD. CODE (1957) Art. 83, § 33(2).
[3] N.J.S.A. 46: 30-21(1); similar provision found in 7 MD. CODE (1957) Art. 83, § 33(1).

juries to the infant driver and property damage sustained when the steering wheel of the automobile locked and the auto went out of control, crashing into a pole. The automobile was purchased from the defendant dealer by the infant plaintiff's adult sister for the infant plaintiff's use. With respect to the alleged breach of warranties, the lower court said that the plaintiff was barred from recovery from either defendant since there was an absence of privity of contract. In reversing the decision of the lower court, the Superior Court of New Jersey held that the plaintiff was not precluded from recovery in an action for breach of an implied warranty merely because of the lack of privity of contract between defendants and himself. The court found the rule enunciated in the recent case of *Henningsen v. Bloomfield Motors, Inc.*,[4] controlling. There, the Supreme Court of New Jersey decided that an implied warranty of merchantibility, chargeable to either an automobile manufacturer or a dealer, extends to the persons "who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile."[5]

A majority of jurisdictions still require privity of contract between the parties to a sale of goods in order to enforce an implied warranty.[6] In the leading case of

[4] 32 N.J. 358, 161 A. 2d 69, 75 A.L.R. 2d 1 (1960).

[5] *Id.*, 100.

[6] Sterchi Bros. Stores v. Castleberry, 28 Ala. App. 281, 182 So. 471 (1937), rev'd on other grounds 236 Ala. 349, 182 So. 474 (1938); Crystal Coca-Cola Bottling Co. v. Cathy, 83 Ariz. 163, 317 P. 2d 1094 (1957); Collum v. Pope & Talbot, Inc., 135 Cal. App. 2d 653, 288 P. 2d 75 (1955); Borucki v. Mackenzie Bros. Co., 125 Conn. 92, 3 A. 2d 224 (1938); Berni v. Kutner, 76 A. 2d 801 (Del. 1950); Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E. 2d 198 (1950); Abercrombie v. Union Portland Cement Co., 35 Idaho 231, 205 P. 1118 (1922); Paul Harris Furniture Co. v. Morse, 10 Ill. 2d 28, 139 N.E. 2d 275 (1956) (express warranty); Booth v. Scheer, 105 Kan. 643, 185 P. 898, 8 A.L.R. 663 (1919); Caplinger v. Werner, 311 S.W. 2d 201 (Ky. 1958); Strother v. Villere Coal Co., 15 So. 2d 383 (La. 1943); Pelletier v. Dupont, 124 Me. 269, 128 A. 186 (1925); Kennedy v. Brockelman Brothers, Inc., 334 Mass. 225, 134 N.E. 2d 747 (1956); Pease & Dwyer Co. v. Somera Planting Co., 130 Miss. 147, 93 So. 673 (1922) (express warranty); Finks v. Viking Refrigerators, 235 Mo. App. 679, 147 S.W. 2d 124 (1940); Pearlman v. Garrod Shoe Co., Inc., 276 N.Y. 172, 11 N.E. 2d 718 (1937); Marler v. Pearlman's R.R. Salvage Co., 230 N.C. 121, 52 S.E. 2d 3 (1949); Wood v. Advance Rumely Thresher Co., 60 N.D. 284, 234 N.W. 517 (1931); Wood v. General Electric Co., 159 Ohio St. 273, 112 N.E. 2d 8 (1953); Miller v. Hand Ford Sales, Inc., 340 P. 2d 181 (Or. 1959); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913, 143 A.L.R. 1417 (1942); Lombardi v. California Packing Sales Company, 83 R.I. 51, 112 A. 2d 701 (1955); Odom v. Ford Motor Company, 230 S.C. 320, 95 S.E. 2d 601 (1956); Brown v. Howard, 285 S.W. 2d 752 (Tex. 1955); H. M. Gleason and Co. v. International Harvester Co., 197 Va. 255, 88 S.E. 2d 904 (1955); Williams v. S. H. Kress & Company, 48 Wash. 2d 88, 291 P. 2d 662 (1955); Cohan v. Associated Fur Farms, 261 Wis. 584, 53 N.W.

Chysky v. Drake Bros. Co.,[7] the New York Court of Appeals stated:

> "The general rule is that a manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty, who have no contractual relations with him. The reason for this rule is that privity of contract does not exist between the seller and such third persons, and unless there be privity of contract, there can be no implied warranty."[8]

The basis upon which this doctrine rests is that since the implied warranty has its origin in the sales contract, there can therefore be neither rights nor duties involving a warranty except insofar as there are contractual relationships supporting them.[9] It is said that, aside from the legal argument, if the requirement of privity were abolished, there would emerge a new flock of evils, perhaps more injurious, than those arising from a strict adherence to the rule: fraudulent claims are easily pretended and difficult to combat.[10]

On the other hand, it is reasoned, since warranty obligations are not necessarily promissory and are implied by law, the absence of contractual relations is a far from convincing argument against recovery in such a case.[11]

Many courts, however, while adhering to the majority rule, except certain classes of cases involving injuries to parties not in privity with the seller or manufacturer. This exception is particularly prevalent in cases involving unwholesome food.[12] Various theories are advanced as a

2d 788 (1952). Cf. Jarnot v. Ford Motor Company, 191 Pa. Super. 422. 156 A. 2d 568 (1959). In general, see 46 Am. Jur. 487, Sales, § 306; 77 C.J.S. 1121, Sales, § 305; 142 A.L.R. 1490 (1943); 140 A.L.R. 191 (1942); 111 A.L.R. 1239 (1937); 105 A.L.R. 1502 (1936); 88 A.L.R. 527 (1934); 63 A.L.R. 340 (1929); 39 A.L.R. 992 (1925); 17 A.L.R. 672 (1922).

[7] 235 N.Y. 468, 139 N.E. 576, 37 A.L.R. 1533 (1923).

[8] *Id.*, 578.

[9] Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785, 786 (1916).

[10] VOLD, SALES, (2nd ed. 1959) § 93, 452.

[11] *Id.*, 451.

[12] Crystal Coca-Cola Bottling Co. v. Cathy, 83 Ariz. 163, 317 P. 2d 1094 (1957); Burr v. Sherwin Williams Co., 43 Cal. 2d 682, 268 P. 2d 1041 (1954); Patargias v. Coca-Cola Bottling Co. of Chicago, 332 Ill. App. 117, 74 N.E. 2d 162 (1947); Nichols v. Nold, 174 Kan. 613, 258 P. 2d 317, 28 A.L.R. 2d 887 (1953); Miller v. Louisiana Coca-Cola Bottling Co., 70 So. 2d 409 (La. 1954); Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97, 44 A.L.R. 124 (1925); Williams v. Coca-Cola Bottling Co., 285 S.W. 2d 53 (Mo. 1955); Menaker v. Supplee-Wills-Jones Milk Co., 125 Pa. Super. 76, 189 A. 714 (1937); Bowman Biscuit Co. v. Hines, 240 S.W. 2d 467 (Tex. 1951); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P. 2d 76, 130 A.L.R. 606 (1940).

basis upon which to rest this exception. One leading case, *Jacob E. Decker & Sons, Inc. v. Capps*,[13] held the manufacturer of tainted food liable to a party with whom he was not in privity and who was made ill from its consumption, stating, "[l]iability in such a case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of public policy to protect human health and life."[14] Among the other theories advanced in this area by various courts are: (1) The manufacturer or dealer is liable on the basis that the warranty runs with the sale of the article.[15] (2) The requirements of privity are satisfied by the commercial advertising and merchandising methods of the defendant.[16] (3) Since the manufacturer of food impliedly warrants its quality to the dealer and since the manufacturer is fully aware that the dealer will pass the food to a member of the public, the implied warranty in favor of the dealer is also in favor of the ultimate consumer, under a third party beneficiary rationale.[17] Although these theories might be equally applicable to other situations, the courts have, in general, refused to expand their application outside food cases.

There are, however, still a number of jurisdictions which refuse to allow recovery in the absence of privity, even in unwholesome food cases.[18] A recent Rhode Island case,[19] for example, while recognizing the problem faced by the ultimate consumer, held that if there were to be any change in the usual policy, it must come from the legislature and not the courts.

The trend, nevertheless, seems to be away from the requirement of privity, not only in food cases, but also in other areas.[20] It should be noted that in most of these cases

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[13] 139 Tex. 609, 164 S.W. 2d 828, 142 A.L.R. 1479 (1942).

[14] *Id.*, 829.

[15] Patargias v. Coca-Cola Bottling Co. of Chicago; Grapico Bottling Co. v. Ennis, both *supra*, n. 12.

[16] Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. 2d 445 (1936).

[17] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

[18] Birmingham Cherco-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64, 17 A.L.R. 667 (1921); Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A. 2d 224 (1938); Bourcheix v. Willow Brook Dairy, 268 N.Y. 1, 196 N.E. 617, 98 A.L.R. 1492 (1935); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936).

[19] Lombardi v. California Packing Sales Company, 83 R.I. 51, 112 A. 2d 701 (1955).

[20] Free v. Sluss, 87 Cal. App. 2d 933, 197 P. 2d 854 (1948) (soap in labeled wrapper unfit for use); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612, 75 A.L.R. 2d 103 (1958) (damage to retail customer's hair by application of nationally advertised home permanent

the party bringing the action was a sub-purchaser of a nationally advertised product or of an article within a labeled package on which were express representations as to quality. The California court, in *Burr v. Sherwin Williams Co.*,[21] seems to feel that this is the second possible exception to the general rule. The courts, in allowing recovery against the manufacturer, ground the recovery on breach of an express warranty, rather than the breach of an implied warranty.[22] The principal case,[23] however, in applying the rule of the *Henningsen*[24] decision, grounded liability on breach of an implied warranty.

The approach of the Uniform Commercial Code conforms to the modern trend of extending the application of implied warranties to those not in privity with the warrantor. The Code expressly protects the members of the family or household group of the buyer.[25] There is, of course, no such provision in the Uniform Sales Act.[26]

Maryland has long recognized the general rule that an "action cannot be maintained on the theory of an implied warranty where there is no privity of contract,"[27] and this doctrine has been followed in subsequent cases.[28] A recent case[29] decided by the Municipal Court of Appeals for the District of Columbia, the court applying the Maryland law on the subject, found "there are no warranties between

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set); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (1932), aff'd 171 Wash. 123, 35 P. 2d 1090, 88 A.L.R. 521 (1934) (auto advertised as equipped with shatter-proof windshield); WAITE, SALES (2nd ed. 1938) 204; WILLISTON, SALES (Rev. ed. 1948) § 244 (a).

[21] 42 Cal. 2d 682, 268 P. 2d 1041 (1954).

[22] Free v. Sluss; Rogers v. Toni Home Permanent Co.; Baxter v. Ford Motor Co., all *supra*, n. 20.

[23] Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A. 2d 773 (1960).

[24] 32 N.J. 358, 161 A. 2d 69 (1960).

[25] Uniform Commercial Code § 2-318, states:
"A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his house if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

[26] 7 MD. CODE (1957) Art. 83, §§ 19-95.

[27] Flaccomio v. Eysink, 129 Md. 367, 100 A. 510 (1916).

[28] Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943), noted 8 Md. L. Rev. 61 (1943); Poplar v. Hochschild, Kohn & Co., 180 Md. 389, 24 A. 2d 783 (1942), noted 7 Md. L. Rev. 82 (1942); State v. Consolidated, Gas, Electric Light & Power Co., 146 Md. 390, 126 A. 105 (1924).

[29] Atwell v. Pepsi-Cola Bottling Co. of Washington, D.C., 152 A. 2d 196 (D.C. 1959).

manufacturer and ultimate purchaser because of lack of privity."[30]

However, in *Vaccarino v. Cozzubo*,[31] the Maryland Court of Appeals, while denying recovery on the ground that the plaintiff failed to allege that the meat was properly cooked, in *dictum* found the requisite privity to maintain an action where the plaintiff's daughter, upon instructions of the plaintiff's wife, purchased sausage for the family's use from the defendant grocer. This was based upon the theory that the wife and child were acting as agents for the husband in purchasing supplies ordinarily required for family use.[32]

Except where the court has found an agency relationship, Maryland has not tended to follow the movement in doing away with the requirement of privity in unwholesome food cases.[33] Notwithstanding this attitude, because *Child's Dining Hall Co. v. Swingler*[34] held that a restaurant serving food to a customer renders services and does not make a sale under the Uniform Sales Act, the Act was amended in order to cover such transactions.[35] The amendment, however, does not do away with the necessity of privity. Also, the amendment does not include within its wording any mention of beverages.[36] Whether the legislature intentionally excluded this term or whether the court will adopt a broad interpretation of the term "food" and thereby include beverages therein is a matter of conjecture.

Since Maryland holds lack of privity to be a complete bar to an action on an implied warranty, negligence on the part of the manufacturer or dealer must be alleged and proved in order that a stranger may recover.[37] The follow-

[30] *Id.*, 197.

[31] 181 Md. 614, 31 A. 2d 316 (1943).

[32] See 4 MD. CODE (1957) Art. 45. § 21.

[33] Vaccarino v. Cozzubo, *supra*, n. 28; Flaccomio v. Eysink, *supra*, n. 27.

[34] 173 Md. 490, 197 A. 105 (1938).

[35] 7 MD. CODE (Cum. Supp. 1960) Art. 83, § 94 (1), noted 18 Md. L. Rev. 343 (1959), now reads:

"'Sale' includes a bargain and sale as well as a sale and delivery *and also the serving or providing of food for human consumption by any caterer, or by any restaurant, hotel, boardinghouse, dining room or any other eating establishment.*" (Italics indicate new matter added to existing law.)

[36] But see Uniform Commercial Code § 2-314 (1) (". . . the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.").

[37] In the principal case it was found that the question concerning Hackensack's negligence should have gone to the jury since the infant plaintiff had returned the car a number of times, complaining of uneven movements in the steering mechanism accompanied by a clicking sensation, and the employee of the defendant had merely said that this was natural for a new car of this type. The negligence count against Ford Motor Co. was held correctly dismissed by the lower court.

ing statement from the Restatement of Torts has been quoted with approval by our Court of Appeals:

> "One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so."[38]

In regard to cases involving unwholesome food or drink, the Maryland Court of Appeals has held, "[a] manufacturer of an article for human consumption is not an insurer,"[39] but is liable to a consumer where the manufacturer has not exercised proper care in the preparation of food or drink and where injury is caused by this failure.[40] The proper care to be exercised will vary in different cases with "the vigilance, caution, and skill required to insure the wholesomeness of different products. . . ."[41] However, it has been held "that where a foreign substance or a deleterious ingredient is found in food taken directly from a sealed container, there arises a strong inference . . . that the packer was negligent."[42]

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[38] Restatement, Torts (1934) § 388, p. 1039. See Twombley v. Fuller Brush Co., 221 Md. 476, 492, 158 A. 2d 110 (1960); Kaplan v. Stein, 198 Md. 414, 420, 84 A. 2d 81 (1951).

[39] Cloverland Farms Dairy v. Ellin, 195 Md. 663, 670, 75 A. 2d 116 (1950).

[40] Bryer v. Rath Packing Company, 221 Md. 105, 156 A. 2d 442 (1959).

[41] Armour & Co. v. Leasure, 177 Md. 393, 411, 9 A. 2d 572 (1939).

[42] Bryer v. Rath Packing Company, *supra*, n. 40, 108.