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MANUFACTURERS' LIABILITY TO ULTIMATE CONSUMERS

I INTRODUCTION

The relationship between the manufacturer and the ultimate consumer of goods has been the subject of much discussion in recent years because of the modern industrial and commercial trend to increase the number of commercial transactions the average citizen is engaged in and to separate these parties further and further apart in the transaction. The manufacturer or processor no longer sells directly to the consumer of the goods; a multitude of middlemen, wholesalers, jobbers, distributors and retailers have been interposed between them. This trend has made necessary a corresponding change in the law applicable to them, the judiciary of this country still being in the process of this change. Among the areas affected by this change are the law of implied warranties and the law of negligence as applied to manufacturers. This article will attempt to indicate the distinctions between these fields and the application of each.

II IMPLIED WARRANTIES

History discloses very little concern in the law for the buyer of goods. Before the founding of the action of special assumpsit, the rule was indeed *caveat emptor*, for the buyer of goods had little protection outside of his own business acumen and his often misplaced faith in his vendor.¹ The slight protection which was afforded him was the extension of the action of trespass on the case to include deceit,² if the seller was improvident enough to make any fraudulent misrepresentations, and breach of implied warranty,³ if he had the temerity to sell adulterated or contaminated food or drink. Both of these actions sounded in tort, however, the latter being an outgrowth of the former, and were based on a public policy of protecting the buyer from harm rather than to insure any contractual rights.⁴ This gave some protection to the buyer, but only because the good of society as a whole intervened and not because of any independent rights of his own. There were no implied warranties as to quality, as known today, in the early common law.⁵

When the action of special assumpsit came into existence,⁶ the

¹ 1 WILLISTON ON SALES (2nd ed., 1924) 368, §195.

² 3 BL. COMM. §166 (Lewis' ed.)

³ Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888); Statute of Pillory and Trumbul and of the Assize of Bread and Ale, 51 Hen. 3, stat. 6 (1266) 1 Stat. 47.

⁴ Ames, *History of Assumpsit*, *ibid.*

⁵ 1 WILLISTON ON SALES (2nd ed., 1924) 440, §228; See also Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 121 (1943) and Feezer, *Manufacturers' Liability*, 37 MICH. L. REV. 1 (1938).

⁶ See Ames, *History of Assumpsit*, *supra*, n. 3.

buyer of goods acquired contractual rights with regard to those goods and could depend on these rights to protect himself, and hence the action on the case for breach of implied warranty fell into disuse. Because of its similarity to the express contractual promises of *assumpsit*, the tendency of the courts was to place them together in the law of contracts without regard to their historical origin.⁷ The warranty which arose only in the case of food and drink was extended to include all goods sold and the contractual remedy applied indiscriminately to all of them. Naturally, this led courts to insist on the elements of contract as a condition to recovery for breach of implied warranty. When the Uniform Sales Act⁸ was formulated and adopted it included all warranties, express and implied, as part of the law of sales, which is contractual, and it was assumed that the implied warranties therein mentioned⁹ were contractual in nature and were so applied by the courts.¹⁰ Hence it is seen that the action for breach of implied warranty, which was originally an action in tort, has taken on the character of a contract action with all of its rigid requirements of agreement, consideration and privity. It is this latter requirement which has led courts to a great diversity of opinion as to the nature of the action.

A few courts, in view of this historical background, have held that an action for breach of implied warranty is not contractual at all,¹¹ but is simply based on public policy and hence no privity should be required.¹² Another court has merely based it on public policy without finding any other consideration necessary.¹³ This policy is supposedly based on the necessity of protecting a remote vendee from the danger of harm without compensation which has become possible due to the vast complexity of modern commercial transactions. This view

⁷ Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 149 (1937).

⁸ WIS. STATS. (1951). Chap. 121.

⁹ UNIFORM SALES ACT, §15: ". . . (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

¹⁰ "To sustain a finding that there was a breach of warranty express or implied, there must have been evidence of a contract between the parties, for without a contract there could be no warranty." *Welshausen v. Charles Parker Co.*, 83 Conn. 231, 76 Atl. 271 (1910).

¹¹ *Jacob Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942). It was there stated: "The policy of the law to protect the health and life of the public would only be half served if we were to make liability depend on the ordinary contractual warranty." See also: *Ketterer v. Armour & Co.*, 200 Fed. 322, 323 (D.C. Cir., 1912).

¹² *Ibid.* See also Feezer, *Manufacturers' Liability*, *supra*, n. 5.

¹³ "The question of privity should not protect one who sells unmerchantable goods where inspection will not disclose the defect." *Kruper v. Proctor & Gamble Company*, 113 N.E. 2d 605 (Ohio, 1953).

is indicated in the language used in *Baxter v. Ford Motor Co.*¹⁴ where the court, although speaking of advertisements as express warranties, recognizes this modern trend as the basis for doing away with the requirement of privity. It was there said:

"Since the rule of *caveat emptor* was first formulated, vast changes have taken place in the economic structure of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable."

The courts which have eliminated the requirement of privity have based their decisions on the implied warranty of merchantability of Section 15, Subsection (2) of the Uniform Sales Act. They have gone to great pains to distinguish between warranties implied-in-fact and those, like the implied warranty of merchantability, which are implied-in-law, and, although they admit the former to be contractual in nature, have insisted that the latter are not contractual at all but are merely matters of policy embodied in the statute.¹⁵ Admitting that the sources of these two different types of warranties are not the same, it would still seem that both were intended to be part of the contract of the parties to a sale, the one by the intent of the parties themselves, and the other by the intent of the legislature. As part of the contract then, they would both be subservient to the actual existence of a contract, and certainly could not be called into being without a contract. Although implied-in-law, such a warranty is still dependent on the contractual relationship to support its existence.

Another difficulty in the elimination of privity as a requirement for recovery on breach of implied warranty is the failure to distinguish between a breach of warranty which will result in danger to human life, which was the subject of the old action on the case in tort, and breach of warranty which will merely result in the loss of the purchaser's bargain. Liability for the former would seem to rest in a tort obligation where the public policy is easily understandable; liability for the latter,

¹⁴ 68 Wash. Dec. 384, 12 P.2d 409 (1932), aff'd. on rehearing, 70 Wash. Dec. 2, 15 P.2d 1118 (1932).

¹⁵ "It should also be remembered that the implied warranty of merchantability is in a sense one imposed by law although frequently spoken of as quasi-contractual." *Kruper v. Proctor & Gamble Company, supra*, n. 13.

however, possibly should be limited to an action in contract. In the one case privity would have no place; in the other privity would be absolutely essential.

Due to the historical grouping of these two types of breaches, courts have come up with a variety of results, depending on the facts of the case at hand. A tendency has grown to retain the requirement of privity, but to satisfy the requirement in the case of personal injuries by a variety of fictions.¹⁶ These fictions, rather than simplifying the basic concepts involved, have only served to confuse the issues and prevent a logical analysis of the problem. To create a fiction to satisfy a supposedly undesirable requirement is a fallacious process in that it replaces one faulty proposition with two faulty propositions. Privity has an old and honored place in contract law and should not be sacrificed to the exigencies of one particular situation.¹⁷

Wisconsin has adopted the position of the majority of the states¹⁸ and has maintained that a manufacturer's liability for breach of implied warranty only extends to those with whom he has a contractual privity. The Wisconsin court reasons thus:

"To assert a right, however, based upon a breach of warranty, express or implied, it is necessary that the required elements of a contract be present. The express language of the statute above cited (Uniform Sales Act, Sec. 15) and here invoked by plaintiff makes the rule there declared applicable as between *buyer* and *seller*, and manifestly is not intended to create a liability of the seller towards any person outside of such so defined and limited contractual relationship. The words 'buyer' and 'seller' connote a relationship and obligations created by contract, as distinguished from obligations imposed by law. Unless there be privity of contract the general rule is that there is no liability for a breach of the contract to outsiders."¹⁹

This position has been held by the Wisconsin Supreme Court right up to the present day²⁰ and represents the viewpoint with the best

¹⁶ Among the theories presented are: (1) the manufacturers' duty to the public brings the consumer within the privity, *Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155 (1924); (2) the warranty runs with the goods like a covenant which runs with land, *Coca Cola Bottling Co. of Fort Worth v. Smith*, 97 S.W. 2d 761 (Tex. Civ. App. 1936), *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1907); (3) these are third party beneficiary contracts, *Dryden v. Continental Baking Co.*, 11 Cal. 2d 33, 77 P.2d 833 (1938); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1946); and (4) the consumer is the assignee of the retailer's rights, *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382. (1920). See also *Comment*, 21 *CINN L. REV.* 460 (1952).

¹⁷ Cf. *Feezer, Manufacturers' Liability, supra*, n. 5.

¹⁸ 1 WILLISTON ON SALES (2nd ed., 1924) §244; Miller, *Liability of a Manufacturer for Harm Done by a Product*, 3 *SYR. L. REV.* 106, 118 (1951); Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 *L. Q. REV.* 343 (1929).

¹⁹ *Prinson v. Russos*, 194 Wis. 142, 215 N.W. 905 (1927).

²⁰ "To permit recovery for breach of warranty by an ultimate buyer against the manufacturer or processor of an article of food there must be privity of con-

basis in history and logic. Along with the rest of the majority, Wisconsin has inexorably tied the term "warranty" to contract law and hence finds it quite logical not to give a right of action on the contract to one who is not a party thereto. Since this word does almost universally connote the imposition of a contractual obligation, a change in the requirement of privity, no matter how desirable the result might be, would require for its justification too great an alteration in the concept of privity in general contract law.

It should be noted that the original tort liability for what was called breach of implied warranty only extended to food and drink which was intended for human consumption,²¹ while the term "implied warranty" as used in the Uniform Sales Act²² has no such limitation. In view of the above fact, as well as in view of the fact that the majority of the courts already assume the necessity of privity, it would seem to be better to restrict warranties to contractual relationships and extend the general tort liability in this field to cover the non-privity situations. This would allow logical and consistent development along both lines without the confusion which arises from permitting them to become interdependent.

III NEGLIGENCE AND TORT LIABILITY

The general rule which is the basis of liability in negligence is that every person must so conduct himself so as to avoid all unreasonable risk of harm to another. Under this rule, a manufacturer or processor is also required to comply with the standard of due care with respect to his goods. However, an early English decision²³ refused to extend the manufacturer's liability for negligence to persons who were not in contractual privity with him because it was felt that injury to such a person was too remote to come within the requirement of natural and probable causation. This conclusion was mere *obiter dicta* to the decision inasmuch as it was actually based on breach of implied warranty, but succeeding courts seized upon this language to permit what was then considered to be good policy. It was felt that to make a manufacturer of goods liable to persons with whom he had no contractual relations for defects would in effect make him an insurer for the whole world against all possible harm that might result from his product, and that this would be too great a burden to place on the manufacturer. Thus it was that, in effect, privity was made a requirement for recovery on the grounds of negligence as well as breach of implied warranty.²⁴

tractual relations between them." *Cohan v. Associated Fur Farms, Inc.*, 261 Wis. 584, 53 N.W. 2d 788 (1952).

²¹ *Supra*, n. 3.

²² *Supra*, n. 9.

²³ *Winterbottom v. Wright*, 10 M & W 109, 11 L. J. Ex. 415, 152 Eng. Rep. 402 (1842).

It was not long before the courts began to feel that it was necessary to make exceptions to this rule. The first exception was made in the case of inherently dangerous articles. It was felt that if the manufacturer of such articles was negligent in their making, he should be liable to persons harmed regardless of any contractual relationships between them. Thus, in *Thomas v. Winchester*,²⁵ where a manufacturer mislabeled dangerous drugs, he was held liable to the ultimate user without the privity relationship. Later, in the leading case of *McPherson v. Buick Motor Co.*,²⁶ Judge Cardozo extended this exception to articles not inherently dangerous, but rendered imminently so by reason of their defective manufacture. Here, however, instead of being stated as an exception to the requirement of privity, the rule was stated as a requirement necessary to the rising of a tort duty to the ultimate consumer or other third parties. This is a better statement of its nature, but courts tend to continue to consider it as another exception to the privity requirement.²⁷ To these exceptions a third was added with respect to articles intended to preserve or affect human life, limb or health,²⁸ but situations in this third class could probably be better classified in the other two.

The common statement of the rule declares that a manufacturer will not be liable *for negligence* to persons who are not in privity with him except in the above situations. From this statement of the rule it is seen that the necessary elements of duty, arising from foreseeable harm, and breach of that duty, which elements constitute negligence, are assumed, and liability hence must be denied on the grounds of causation. The exceptions to the rule then, must be the situations in which the manufacturer's negligence is the natural cause of the consumer's harm, and all cases not within one of the exceptions are without relief because of lack of causation. And even the necessity courts find of bringing a case within one of the exceptions to the rule gives at least implied recognition to the rule itself. On the other hand, Cardozo's statement of the rule in the *McPherson* case, including articles imminently dangerous by reason of their defective manufacture, was based on foreseeability. In other words, a manufacturer would only be able to reasonably foresee harm in the case of inherently dangerous or defective articles, and hence only in those cases would arise a duty to use due care. In both cases, privity is being used as a cloak, either for causation or for foreseeability, and would allow recovery or denial of recovery in identical circumstances to turn solely on the requirement

²⁴ 65 C. J. S. Negligence §100, 619 and cases cited, note 60.

²⁵ 6 N.Y. 397, 57 Am. Dec. 455 (1852); see also *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865. (8th Cir., 1903)

²⁶ 217 N.Y. 382, 111 N.E. 1050. (1916).

²⁷ 65 C.J.S. Negligence §100, 629 and annotations, note 89.

²⁸ *Johnson v. Stoddard*, 310 Mass. 232, 37 N.E. 2d 505. (1941).

of privity without regard to its actual effect on foreseeability or causation. At one time it might have been argued that a manufacturer, as a reasonably prudent person, could not foresee harm to anyone other than his immediate vendee, or that a subsequent sale by such vendee was not natural or probable, but today such an argument is groundless. It is the rule now rather than the exception that a manufacturer sells to one other than the actual consumer. The modern economic trend has been to place more and more middlemen between the manufacturer and the consumer. The foreseeability of harm to an ultimate consumer is just as apparent today as was harm to the immediate vendee a hundred years ago; and harm to an ultimate consumer is just as much the natural and probable result of the negligence of the manufacturer today as was harm to the immediate vendee a hundred years ago. The rule requiring privity is no longer a rule, and the exceptions to that rule are no longer exceptions, but are statements of the actual circumstances necessary to find tort liability in negligence.²⁹

Wisconsin has followed the majority of the states and has laid down privity as a requirement to recovery on the grounds of negligence. This rule was stated in the case of *Benzor v. Howell*³⁰ as follows:

“Subject to certain well defined exceptions it is the general rule that manufacturers are not liable for damages to persons with whom they have no contractual relations for personal injuries sustained by such persons because of the negligent manufacture of their product.”

and again in *Flies v. Fox Bros. Buick Corp.*³¹

“It is a general rule that manufacturers are not liable for damages to persons with whom they have no contractual relations for personal injuries sustained by such persons because of the negligent manufacture of their product. This is for the reason, it is said, that an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated as the probable result of the negligence in its construction.”

That case went on to hold the seller of a used car with defective brakes liable to a third party on the basis of the exception in the *McPherson* case. Wisconsin has also adopted the three exceptions to the privity rule.³² Hence no privity need be shown (and a duty to use care will lie) in the case of (1) inherently dangerous articles,³³ (2) articles not inherently dangerous but made imminently so by reason of their de-

²⁹ This is the view taken by the American Law Institute in the *Restatement*.

³⁰ 203 Wis. 1, 233 N.W. 758 (1930).

³¹ 196 Wis. 196, 218 N.W. 855 (1928).

³² Wickham, *Products Liability in Wisconsin*, 29 MARQ. L. REV. 20 (1938).

³³ *Coakley v. Prentiss-Wabers Stove Co.*, 182 Wis. 94, 195 N.W. 388 (1923).

fective manufacture,³⁴ and (3) articles intended to preserve or affect human life, limb or health.³⁵ An intimation of the true nature of these exceptions was indicated in the case of *Hasbrouck v. Armour & Co.*,³⁶ where recovery was denied without privity because the harm was too unusual and remote. In that case the Wisconsin Supreme Court said:

“ . . . there is in the common law no authority for imposing special duties upon him (the manufacturer) by reason of any privity between him and the vendee of his vendee, except in the instances mentioned (the exceptions to the rule), which may be regarded as occasions of a general duty toward the public to whom the wares are offered, or as exceptions to the rule of non-liability.”

It is apparent that the courts are refusing to find a tort duty where privity is present rather than actually making privity a requirement to recovery in negligence. However, the generally accepted statement of the rule permits the courts to deny recovery without looking into the actual facts of foreseeability or causation. The result has been to make the law in this field lag far behind the fast developing commercial trends. An opposing reaction to the technical limitation of this rule has taken the form of extending the exception in the *McPherson* case to any and all types of fact situations.³⁷ As long as this is done, not as an exception to a rule requiring privity, but as a requirement for the rising of a tort duty, the courts can develop consistent rules to cover the field. One solution would be to do away with all mention of privity and impose liability on the same broad general grounds, and with the same limitations, as in any other field of negligence.³⁸ Such a stand would dispel a great deal of the confusion and the wide variance of opinion which has risen in this field.³⁹

The field of tort also offers another solution to one of the many problems of manufacturers' liability. In the case of inherently dangerous articles, strict liability could be imposed on the grounds that public policy requires it. This is in effect what was done in the case of *Jacob Decker & Sons, Inc. v. Capps*,⁴⁰ but there the court called it breach

³⁴ *Flies v. Fox Bros. Buick Corp.*, *supra*, n. 31.

³⁵ *Haley v. Swift & Co.*, 152 Wis. 570, 140 N.W. 292 (1913).

³⁶ 139 Wis. 357, 121 N.W. 157. (1909).

³⁷ See 140 A.L.R. 243 (1942).

³⁸ Massachusetts has done this expressly in *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E. 2d 693. (1946).

³⁹ The ultimate consumer's burden is further increased by the inherent difficulty in proving negligence. Most courts have allowed the use of the doctrine of *res ipsa loquitur* as an aid in this proof. PROSSER, TORTS §43; Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519 (1934); Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur*, 22 ILL. L. REV. 724 (1928). Another aid has been negligence *per se* by showing the violation of a criminal statute. 65 C.J.S. Negligence §100. 620; *MvAleavey v. Lowe*, 259 Wis. 463, 49 N.W. 2d 487 (1951). Both of these aspects of the subject are beyond the scope of this article.

⁴⁰ *Supra*, n. 11.

of implied warranty rather than strict liability and thereby confused the rest of the law of warranties. The policy argument in the case of food, drugs, explosives and the like is very strong for strict liability, but if such liability is to be imposed it should be done in the name of tort where it belongs, and thereby eliminate all the difficulties inherent in the word warranty. Strict liability is tort in nature and should be imposed as such.

IV CONCLUSION

As seen from the above discussion, the vast majority of the courts have come to the conclusion that a greater liability should be imposed on the manufacturer of goods in favor of the ultimate consumer. However, with two fields, contract and tort, competing for the basis of liability, these courts have arrived at a great variety of results, depending on the viewpoint taken. The greatest single difficulty in this field seems to be the confusion of nomenclature. Imposition of tort liability under the name of warranty, and insisting on privity as a requirement to recovery in negligence, have served to confuse legal thought as to the limitations of either field. The simplest way to reduce this chaos would be to restrict the contract and tort liabilities to their respective spheres and not to intermix both the law and the terminology. Both fields have their own drawbacks in proving liability: warranty requiring all the contractual elements, and negligence requiring a degree of proof impractical for a consumer.⁴¹ For a logical solution to the problems in both fields, however, it seems desirable to make the distinctions between them very sharp, and then to solve each field's problems in that field. Since the term warranty almost universally connotes a contractual duty, this word should be restricted to obligations arising out of contractual relationships and not be used to denote a tort obligation. Likewise, the law of negligence should be freed from the hundred year old restrictions which have entangled it and should be stated for what it actually is, the obligation of an individual to society to so conduct himself as to avoid unreasonable risk of harm to others. By bearing these elementary distinctions in mind, the courts can develop both fields logically and without the inevitable confusion which results from their interdependence.

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⁴¹ *Supra*, n. 39.