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Sales - Implied Warranty - Cigarette-Cancer Problem

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point with the present case, but it is the writer's submission they will follow the present law in Pennsylvania and Michigan.

The end result of the *Austin* case would seem to bring the Michigan application of felony-murder back in line with the majority rule that the killing must be done by the defendant or someone acting in concert with him, and to limit its application to those situations which caused such a doctrine to be developed in the first place.

DAVID J. LANDBERG

SALES — IMPLIED WARRANTY—CIGARETTE-CANCER PROBLEM — The decedent's widow and the administrator of his estate brought an action for death allegedly caused by using defendant's cigarettes. In U. S. District Court there was a judgment for defendant. Their decision was conditionally affirmed by the U. S. Court of Appeals;[1] subject to a statutory certification procedure to determine the applicable state law.[2] The Supreme Court of Florida *held*, two justices dissenting, that there was imposed on the defendant absolute liability for breach of an implied warranty of fitness; even though the plaintiff contracted cancer when it was not foreseeable that cigarettes might be the cause. *Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963).

Early in the 19th century an implied warranty of quality was established on the theory that a purchaser has a right to expect a saleable article when there is no opportunity for inspection.[3] By 1911 strict liability respecting unwholesome food products was established and has since been recognized in most jurisdictions.[4] This strict liability has been given

1. Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1963).

2. Fla. Stat. Ann § 25.031 (1945). Where there are no controlling precedents, the U. S. Supreme Court and federal appellate courts may certify to the state Supreme Court for an interpretation of the law.

3. See Gardiner v. Gray, 4 Camp. 144, 171 Eng. Rep. 46 (1815); Halcombe v. Hewson, 2 Camp. 391, 170 Eng. Rep. 1194 (1810); See generally Prosser, **The Implied Warranty of Merchantable Quality**, 27 Minn. L. Rev. 117, 120 (1943).

4. Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906 (1911); See Prosser, **The Assault Upon the Citadel (Strict Liability to the Consumer)**, 69 Yale L. J. 1099, 1107-1108 (1960). Seventeen states extend strict liability without regard to negligence and privity. Five states have reached the same result by statute. There is no definite North Dakota law on the subject.

to products other than food,[5] but courts have been hesitant to include tobacco.[6] Except for the special areas wherein this absolute warranty is granted, privity is generally required in all contract situations. Its lack has barred recovery in several tobacco injury cases.[7]

Food and similar products have enjoyed the strict liability remedy because they are used for internal consumption and public policy demands protection.[8] The manufacturer, armed with superior knowledge of his product and means of assuring its safety, can better bear the burden and allow the innocent consumer proper protection.[9] Although the reasoning applied to food could apply to tobacco, such an analogy has generally not received judicial sanction.[10]

Occasional or accidental presence of a substance has been the basis of liability in prior litigation and, with such substance being relatable to the product, unforeseeability has not been an issue.[11] There are decisions in the tobacco field where the producer or seller has been held liable for foreign materials.[12] In the instant case, however, the injury producing defect was an inherent element of the product. The producer was unaware that it was harmful and no scientific data could have given him that information.[13]

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5. Crotty v. Shartenburg's—New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960) (hair remover); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697 (1939) (face powder); Pietrus v. Watkins Co., 299 Minn. 179, 38 N.W.2d 799 (1949) (hair shampoo).

6. Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958); Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915); **Contra** Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S.W.2d 612 (1932).

7. Cooper v. R. J. Reynolds Tobacco Co., 158 F. Supp. 22 (D. Mass. 1957), **aff'd** 256 F.2d 464 (1st Cir. 1958), **cert. denied** 358 U.S. 875 (1958); Ross v. Philip Morris Co., **supra** note 6; **But see** Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918). The purported landmark case demanding privity as a prerequisite to liability is Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

8. **Eg.,** Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164, S.W.2d 828 (1942); See generally Green, **Should the Manufacturer of General Products be Liable Without Negligence,** 24 Tenn. L. Rev. 928 (1957).

9. Manzone v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918 (1961).

10. Ross v. Philip Morris Co., **supra** note 6; Liggett & Myers Tobacco Co. v. Cannon, **supra** note 6.

11. See Prosser, **supra** note 4 at 1143. Therein foreseeability is referred to as the "typicality" of the injury.

12. Corum v. R. J. Reynolds Tobacco Co., 205 N.C. 213, 171 S.E. 78 (1933) (fishhook in chewing tobacco); **But see** Block v. Liggett & Myers Tobacco Co., 162 Misc. 325, 296 N.Y.S. 923 (Sup. Ct. 1937) reversing 163 Misc. 858, 296 N.Y.S. 920 (Sup. Ct. 1936) (piece of razor blade in cigarette).

13. Deceased started smoking in 1924 before there was any connection between cancer & tobacco. Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963); See generally Brunfield, **Liabilities of Tobacco Industry: Cancer and Its Relationship to Smoking—Is it Actionable,** TRIALS & TORT TRENDS pp 1-49 (1958). This article presents a perspective of medical research and the development of the problem.

Liability, therefore, hinges on whether there is a foreseeable requirement or whether the producers are responsible for all possible injuries caused by the use of their product.

The instant case dispensed with any requirement of foreseeability in holding that the wholesomeness of a product should be determined by no other standard than safety.[14] Prior cases have indicated that strict liability may be extended this far.[15] The principal case, in holding that tobacco merits the strict liability theory and that liability is exclusive of "human skill and foresight", has significantly extended liability. The supplier in effect becomes an insurer as to defects unknown and undetectable.[16]

It is submitted that the real value of the decision lies in its warning. Faced with a dilemma, the producers and distributors of tobacco products have failed to handle the problem in a way to which the public is entitled. The impact of this decision should force them to seek a solution to the problem. Failure to respond will bring upon the tobacco industry an immediate threat of an increased financial loss via lawsuits similar to this and a future crowded with regulatory legislation.

NEIL A. MCEWEN

LIMITATION OF ACTIONS — IGNORANCE OF CAUSE OF ACTION — DOES IGNORANCE OF A CAUSE OF ACTION TOLL THE STATUTE OF LIMITATION?—While plaintiff was hospitalized in 1944, a product manufactured by defendant was injected into his nasal sinuses for the purpose of making them perceptible in X-rays. In 1957 plaintiff learned that this substance had caused a cancerous condition in his nose and he brought an action based on negligence and breach of warranty. The New York Court of Appeals *held*, two justices

14. Green v. American Tobacco Co., **supra** note 13 at 173.

15. Pietrus v. Watkins Co., **supra** note 5, at 802 quoting 46 Am. Jur. **Sales** § 806 (1943). ". . . the manufacturer as a rule will be charged with notice of the quality of the article that he himself has made, and cannot excuse himself upon the ground that he did not know its dangerous qualities."

16. See Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 795 (1954) (bad blood); See generally 1 Frumer & Friedmann, PRODUCTS LIABILITY, § 16.03(4) (1961).