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Products Liability - Breach of Implied Warranty - Manufacturers' Liability to Ultimate Consumers

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enforced by the courts. It would bar the plaintiff's access to res ipsa loquitur until he can produce some affirmative evidence. This is in opposition to the present day doctrine which allows the plaintiff to use res ipsa loquitur when he cannot show the negligence of the defendant. By requiring this additional evidence, the courts can insure a better application of the doctrine of res ipsa loquitur

RONALD D. MARKOVITS

PRODUCTS LIABILITY—BREACH OF IMPLIED WARRANTY—MANUFACTURERS' LIABILITY TO ULTIMATE CONSUMERS—A seven week old child, living next door, used a vaporizer-humidifier purchased by his aunt for the ordinary purpose of relieving nasal congestion. The humidifier shot boiling water upon the child resulting in his death three days later. The administrator of the child's estate sought damages for breach of an implied warranty of merchantability against the retailer, wholesaler-distributor and manufacturer of the product. The Supreme Court of Pennsylvania, limiting liability to the retailer, *held* that the administrator could bring an action against the seller notwithstanding decedent's lack of privity of contract. *Miller v Preitz*, 221 A.2d 320 (Pa. 1966)

The majority opinion was based upon the Uniform Commercial Code, Section 2-318, which provides:

> 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 home if it is reasonable to expect that such a person may use, consume or be affected by the goods and who is injured in person by breach of the warranty .[1]

Under the court's interpretation of this section, the deceased nephew was in the buyer's "family," and, further, the section could not be construed to maintain an action in assumpsit against remote sellers. Dissenting opinions attacked both the fictional approach to the inclusion of the decedent within the buyer's family and the inequitable placement of liability The dissenters contended that the majority opinion ignored comment three of Section 2-318 which stated:

1. 12A PA. STAT. ANN. § 2-318 (1953).

> This section expressly includes as beneficiaries within its provisions the family household, and guests of the purchaser Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.[2]

The minority suggested adoption of the Restatement position[3] which eliminated both privity of contract and negligence as essential conditions to recovery

In a second case,[4] decided the same day, in the same court, the injured party sought damages against the manufacturer in a trespass action. Rather than basing recovery upon the warranty or trespass theories, the Restatement view[5] was adopted.

Prior to the two cases mentioned, Pennsylvania's general rule held that privity was required in assumpsit actions arising from a breach of warranty in the field of products liability.[6] Recognized exceptions were injuries resulting from food products for human consumption,[7] and representations of quality or fitness for particular use conveyed by the manufacturer.[8] Other recoveries were granted contrary to the general rule,[9] where advertisements extolled a product[10] and where a product did not meet standard demands.[11] At the time the instant case was to be decided, Pennsylvania had three alternatives on which to base future decisions involving privity: they could have retained their general concept of privity in assumpsit actions; they could have abolished the defense of lack of privity; finally, they could have eliminated both the privity of contract and negligence theories by encompassing

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2. 12A PA. STAT. ANN. § 2-318 Comment 3 (1953).
3. RESTATEMENT (SECOND), TORTS, § 402A (1964)
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
      (a) the seller is engaged in the business of selling such a product, and
      (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
   (2) The rule stated in subsection (1) applies although
      (a) the seller has exercised all possible care in the preparation and sale of his product, and
      (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
4. Webb v. Zern, 220 A.2d 853 (Pa. 1966). Plaintiff was allowed recovery against the brewer and manufacturer of a beer keg, purchased by the plaintiff's father and tapped by plaintiff's brother, which exploded causing severe injuries to the plaintiff.
5. *Supra* note 3.
6. Barnard v. Pennsylvania Range Boiler Co. 216 F.Supp. 560 (D.C. Pa. 1963), Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).
7. Bilk v. Abbotts Dairies, Inc., 147 Pa. Super. 39, 23 A.2d 342 (1941), Nock v. Coca Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931).
8. Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953).
9. *Supra* note 6.
10. Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959) (dictum) Knapp v. Willys Ardmore, Inc., 174 Pa. Super. 90, 93, 100 A.2d 105, 107 (1953).
11. Mannsz v. MacWhyte Co., 155 F.2d 445 (3rd Cir. 1946).

both under an independent theory of strict product liability as recommended by the Restatement of Torts. The *Miller* case indicated the court would maintain the privity requirement as found in the Uniform Commercial Code, however, *Webb v Zern*[12] adopted the Restatement view as explained in the third alternative. By introducing this standard, Pennsylvania seems to have taken the most realistic approach to the practical needs of consumers in today's complex society

Breach of warranty is a form of strict liability which originally was an action on the case, sounding in tort.[13] The term "warranty" as used in tort became erroneously attached to the law of contract and subsequently was encumbered with such contractual burdens as privity of contract[14] and the limitation of liability through the use of contractual waivers and disclaimers of liability[15] These burdens were relieved somewhat when third persons were allowed recovery against manufacturers of "inherently dangerous" products.[16] Modern trends have indicated an even greater relaxation of the restrictions placed upon the warranty theory Although a great many states still require privity under the breach of warranty theory,[17] some jurisdictions appear either to have abolished the privity requirement[18] or to have reduced the requirement of privity in accordance with the U.C.C., Section 2-318.[19]

A noticeable trend of the last two years has been abandonment of both the contract and negligence theories and the adoption of the Restatement theory[20] This view abandoned such legal obstacles as requirement of privity in the warranty theory and proof of negligence under the tort theory In their place, the plaintiff is required to prove the product was defective when it left the manu-

12. *Supra* note 4.

13. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1126 (1960).

14. Smith, *Surviving Fictions II*, 27 YALE L. J. 317, 324 (1917).

15. *Cf.* Rasmus v. A.O. Smith Corp., 158 F.Supp. 70 (D.C. Iowa 1958), Nelson v. Swedish Hosp., 241 Minn. 551, 64 N.W.2d 38 (1954), Valley Refrigeration Co. v. Lange Co., 242 Wis. 466, 8 N.W.2d 294 (1943).

16. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

17. *Cf.* Barnard v. Pennsylvania Range Boiler Co., Inc., *supra* note 6, Larson v. U.S. Rubber Co., 163 F Supp. 327 (D.C. Mont. 1958), Long v. Flanigan Warehouse Co., 79 Nev. 241, 382 P.2d 399 (1963), Whitehorn v. Nash Finch Co., 67 S.D. 465, 293 N.W 859 (1940), Cohan v. Associated Fur Farms, 261 Wis. 584, 53 N.W.2d 788 (1952).

18. *Cf.* B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th. Cir. 1959) (Kan. Law) Garthwait v. Burgio, 153 Conn. 290, 216 A.2d 189 (1965), Berstein v. Lily-Tulip Cup Corp., 181 So.2d 641 (Fla. 1966), State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961), Wilson v. Modern Mobile Homes, Inc., 376 Mich. 342, 137 N.W.2d 144 (1965).

19. Henry v. John W Eschelman & Sons, 209 A.2d 51 (R.I. 1965) (But § 2-318 is to be strictly construed), VA. CODE ANN. § 8-654.4 (Supp. 1966).

20. Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965) Dealers Transport Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966) Ford Motor Co. v. Lonan, 398 S.W.2d 240 (Tenn. 1966), Shamrock Fuel & Oil Sales Co. v. Tunks, 406 S.W.2d 488 (Tex. Civ. App. 1966).

facturer[21] and to relate the defectiveness to his injury.[22] A few states have specifically adopted the Restatement view[23] while others have strongly indicated such intentions.[24]

States bordering North Dakota have varied approaches to the privity requirement. Montana law favors use of the negligence theory but adheres to the requirement of privity in breach of warranty actions.[25] South Dakota law requires privity in breach of implied warranty actions but tends to overlook this requirement where warranties are expressed through advertisements.[26] The Minnesota Supreme Court strongly indicated its desire to abolish the requirement of privity when it stated:

> It may well be that the time has come when we should discard the whole troublesome idea that privity of contract is essential to recovery on an implied warranty and extend liability to the one who has caused the harm.[27]

North Dakota also strongly indicated that privity of contract is no obstacle in breach of warranty cases.[28] The state's first case in point[29] allowed the purchaser of a defective truck recovery against the manufacturer As the court had no North Dakota precedent, the case was based upon a recent Michigan decision.[30] North Dakota's most recent decision[31] granted recovery against a manufacturer for injuries sustained from the use of a defective drug under both the theory of warranty and negligence. Although sufficient evidence was submitted under these theories, the court felt the Restatement view was important enough to be submitted as follows:

> It is believed, however, that strict liability in tort is for the most part no different than strict liability in warranty, that similar results can be achieved under either theory. Comment m to § 402A of the Restatement of Torts seems to agree. It states:

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21. RESTATEMENT (SECOND), TORTS, § 402A, comment g at 351 (1964).
22. RESTATEMENT (SECOND), TORTS, § 402A (1964).
23. *Supra* note 20.
24. *Cf.* Greenman v. Yuba Power Prod. Co., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963) Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965), Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963), Lonzrick v. Republic Steel Corp., 6 Ohio St.2d 227, 218 N.E.2d 185 (1966), Wrights v. Staff Jennings, Inc., 405 P.2d 624 (Ore. 1965).
25. Larson v. U.S. Rubber Co., *supra* note 17.
26. Torpey v. Red Owl Stores, 129 F.Supp. 404 (D.C. Minn. 1955) (South Dakota Law) Whitehorn v. Nash Finch Co., *supra* note 17.
27. Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670, 682 (1959).
28. Stromsodt v. Parke-Davis & Co., 257 F.Supp. 991 (D.C.N.D. 1966) (appeal pending),
29. Lang v. General Motors Corp., *supra* note 28.
Lang v. General Motors, 136 N.W.2d 805 (N.D. 1965).
30. Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).
31. Stromsodt v. Parke-Davis & Co., *supra* note 28.

> 'There is nothing in this section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer '

But in the next sentence it points out that,

> 'if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods and that it is not subject to the various contract rules which have grown up to surround such sales.'[32]

Because of the two earlier decisions, North Dakota appears to be confronted with the same alternatives as was Pennsylvania prior to their most recent decision.[33] Earlier state cases, public policy, and the latest trend indicate that future litigation in North Dakota is likely to adopt the Restatement view as did Pennsylvania.

A possible criticism of the Restatement approach is that such a holding places an unfair burden upon the manufacturer. This approach does not place liability without fault since the plaintiff is still required to prove a defect in the product as well as to show a causal connection between the defect and the injury.[34] Placing a consumer, who has no adequate means of protecting himself, in a position of uncertain recovery for injuries resulting from defective products is a more dangerous proposition. A supplier should not be permitted to avoid responsibility by saying that he has made no contract with the consumer. Liability ought to be placed at the source of the defect. That end can best be accomplished through the adoption of the view recommended by the Restatement of Torts (Second)

RONALD K. CARPENTER

TORTS—NEGLIGENCE—LIABILITY TO TRESPASSING CHILDREN—The plaintiff, a twelve-year-old boy, suffered personal injuries while climbing on and jumping from a scaffold erected by the defendants in connection with the construction of a new home. The district court denied defendants' motion for a judgment notwithstanding verdict. The Supreme Court of North Dakota *held* that under the

32. Stromsodt v. Parke-Davis & Co., *supra* note 28 at 997, quoted from 2 FRUMER-FRIEDMAN, PRODUCTS LIABILITY, Chap. 3, § 16A (4).
33. Webb v. Zern, 220 A.2d 853 (Pa. 1966).
34. RESTATEMENT (SECOND), TORTS, § 402A (1964).