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Sales - Implied Warranty - Bystander Recovers without Privity

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RECENT CASES

SALES — IMPLIED WARRANTY — BYSTANDER RECOVERS WITHOUT PRIVITY — The plaintiff suffered personal injury when a shotgun, fired by his brother, exploded. The explosion was allegedly caused by a defective shotgun shell. Plaintiff brought an action against the retailer, wholesaler and manufacturer asserting both negligence and breach of implied warranty as bases for liability. The Supreme Court of Michigan *held* that, although plaintiff was to be considered a bystander, lack of privity did not bar his action. Two justices dissented on the ground that the plaintiff must have some contractual connection with the defendants in order to recover. *Piercefield v. Remington Arms Company*, 375 Mich. 85, 133 N.W.2d 129 (1965).

This decision represents another step in the trend away from the necessity of privity to recover for breach of implied warranty. In Michigan's case it is probably the final step.[1]

The courts have been hard at work in this century[2] at overcoming the often harsh rule of "no privity, no recovery."[3] The first sidestepping of the rule came in the contaminated food cases.[4] The reasoning in these cases seemed to be simply a policy decision to protect the consuming public from harm wrought by unwholesome foodstuffs. When the time came to make decisions concerning the manufacturer, wholesaler or retailer's liability for injury (personal or property) caused by other types of products, the courts arrived at a multitude of answers. One theory was that breach of implied warranty is a tortious breach of duty suable by a user regardless of contractual connections.[5] Another theory was that the manufacturer's advertisements, because aimed at the ultimate consumer-user, carried the implied warranty directly to him.[6] The manufacturer was also held responsible where the article was "inherently dangerous"[7] if not manufactured with care.[8]

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1. Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129, 134 (1965). "[I] would say definitely that . . . (citing cases) have put an end in Michigan to the defense of no privity, certainly so far as concerns an innocent bystander injured as this plaintiff pleads. . . ."

2. *Cf.* Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 445 (1931).

3. 13 KAN. L. REV. 411, 415 (1965).

4. Klein v. Duchess Sandwich Co., 14 Cal. App. 2d 272, 93 P.2d 799 (1939); Sams v. Ezy-Way Foodliner Co., 157 Me. 10, 170 A.2d 160 (1961); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

5. Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963); 17 S.C.L.Q. 259, 275 (1965).

6. Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961); *cf.* Burke v. Associated Coca-Cola Bottling Plants, Inc., 7 App. Div. 2d 942, 181 N.Y.S.2d 800 (1959).

7. Pesavento v. E.I. DuPont De Nemours & Co., 240 Mich. 434, 215 N.W. 330 (1927); 11 KAN. L. REV. 168, 170 (1962); *contra,* Green v. Equitable Powder Mfg. Co., 95 F. Supp. 127 (W.D. Ark. 1951).

8. Another theory allowing recovery is based on the use of a product by a person whom the manufacturer could expect would use it, such person being able to recover. Vandercook and Son, Inc. v. Thorpe, 344 F.2d 930 (5th Cir. 1965); McBurnette v. Playground Equip. Corp., 137 So. 2d 563 (Fla. 1962).

It will be noted that in none of these theories was the relaxation of the requirement of privity carried beyond the ultimate consumer-user.[9] The Michigan Supreme Court justifies this step forward by pointing to the developing trend, and claiming that this decision is a logical extension of this trend. The court reasons that if a product is defective, and if the plaintiff can show a causal relationship between such defect and his injury, he should be allowed a cause of action. This view skirts the negligence-type action for product-caused injuries without putting the plaintiff to the often difficult task of proving the defendant's negligence.[10]

It is further interesting to note that, although the Uniform Commercial Code was not in effect at the time the cause of action arose, it was in effect at the time of this decision.[11] Section 2-318 of the Code grants a cause of action to members of the buyer's household and his guests for product-caused injuries. Although there was precedent to the contrary,[12] the court chose to extend the coverage of this section.

The principal case raises the question of how North Dakota courts will react to a similar situation, as section 2-318 of the U.C.C.[13] will soon (July 1, 1966) be effective here. A recent case, *Lang v. General Motors Corp.*,[14] extended the trend against privity in North Dakota by allowing an ultimate consumer to maintain an action against the manufacturer of a motor vehicle where the only injury was financial, and there was not privity between the parties. The court's reasoning seemed to be based in part on the fact that the manufacturer's advertisements, because directed at the ultimate consumer, carried the implied warranty to him. The court also based its decision on a Michigan case, *Spence v. Three Rivers Builders & Masonry Supply, Inc.*,[15] which was cited in the principal case. Both these cases tend to amalgamate negligence and breach of implied warranty into one hybrid action. The result, however, insofar as it does away with the necessity for privity, is desirable.

When North Dakota faces the question of bystander recovery under the U.C.C., it would seem more in keeping with economic reality to allow the bystander to recover. Only in rare situations will the plaintiff be able to endure the loss without serious economic

9. 64 COLUM. L. REV. 916, 917 (1964). "No appellate case has been found in which a bystander, . . . , has been allowed to recover without proof of negligence."

10. See 17 S.C.L.Q. 259, 262 (1965).

11. The cause of action arose in 1957, *supra* note 1, at 130. The U.C.C. was passed in 1962, MICH. STAT. ANN. § 19.1101, and became effective on Jan. 1, 1964, MICH. STAT. ANN. § 19.9991.

12. Wilson v. Am. Chain & Cable Co., 216 F. Supp. (E.D. Pa. 1963); Driver v. F.A. Mitchell Co., 35 F.R.D. 226 (E.D. Pa. 1964); Hochgertel v. Canada Dry Corp. 409 Pa. 610, 187 A.2d 575 (1963).

13. N.D. CENT. CODE § 41-02-35 (Supp. 1965).

14. 136 N.W.2d 805 (N.D. 1965).

15. 353 Mich. 120, 90 N.W.2d 873 (1958).

deprivation. Therefore the loss should be placed on the manufacturer, who is best able to minimize it.[16]

If this smacks of strict liability, the answer may be that this is what is needed. Let the only basis for non-recovery be remoteness of causation.[17] In placing the manufacturer in this position, it is probably only fair to allow him reasonable defenses, *i.e.* contributory negligence, unforeseeability, etc. The ultimate answer may be to abrogate the cause of action for breach of implied warranty and substitute a new cause of action which sounds in tort, but which does not put the plaintiff to proof of the manufacturer's negligence.

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ATTORNEY AND CLIENT — CONSTITUTIONAL LAW — ATTORNEY'S FIFTH AMENDMENT RIGHT TO JUST COMPENSATION FOR DEFENDING INDIGENT CLIENT—The Petitioner was appointed by the federal court to defend an indigent client which involved 108 hours of labor, use of his firm's facilities and out of pocket expenses. He requested compensation under the fifth amendment guarantee of just compensation for property taken by the government. The United States District Court for the District of Oregon *held* that the petitioner was entitled to just compensation because his property was taken without due process of law. The court also found that by taking his services, the government had entered into an implied contract that it would pay for this property. The United States Court of Appeals reversed the district court decision, *holding* that upon becoming a member of the bar the petitioner was entitled to no compensation because as an officer of the court he has assented to donating his services. *Dillon v. United States*, 230 F. Supp. 487 (D. Ore. 1964); *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965).

Receiving some compensation for defending an indigent client is not the problem since the Criminal Justice Act of 1964 now reimburses an attorney for defending such client in a federal court.[1] The Federal District of North Dakota has adopted a plan under this act in which a competent attorney is appointed, with option

16. Escola v. Coca-Cola Bottling Co., 24 Cal. App. 2d 453, 150 P.2d 436 (1944). "Those who suffer injury from defective products are unprepared to meet its consequences. . . . [T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."

17. In Hahn v. Ford Motor Co., 126 N.W.2d 350 (Iowa 1964), the court states that the plaintiff's failure to establish causation is part of the reason for refusing to allow recovery in implied warranty.

1. CRIMINAL JUSTICE ACT OF 1964, 78 Stat. 552 (1964), 18 U.S.C. § 3006A (1964). An attorney appointed pursuant to this section, or a bar association or legal aid agency which made an attorney available for appointment, shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $15 per hour for time expended in court or before a United States commissioner, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred.