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Implied Warranty and the Defense of Privity in a Personal Injury Action

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to the major bar associations, there has been little success in bar integration drives.³⁷

CONCLUSION

Notwithstanding the fact that there are many valid arguments pro and con, objectively appraised the integrated bar is not an end in itself. It exists as a means of developing high professional standards in a complex society. As a means only, its justification depends on the existence of an actual need. Should it not affirmatively appear, therefore, that voluntary bar associations are inadequate to the needs of a particular jurisdiction before an integrated bar is considered as an alternative?

It appears that such a need may exist where membership in a voluntary bar association is below seventy-five per cent of the practicing attorneys of that jurisdiction. It must be conceded that a fixed percentage can never be more than an arbitrary point of departure. Nevertheless, past experience shows that where active membership in voluntary organizations is above the seventy-five per cent figure, the need for bar integration has found little support and no actual success. Certainly if there be no need and nothing substantial to be gained, why then impinge upon, even if in the constitutional sense it be no violation of, the individual attorney's freedom of association?

IMPLIED WARRANTY AND THE DEFENSE OF PRIVACY IN A PERSONAL INJURY ACTION

INTRODUCTION

Section 15 of the Uniform Sales Act,¹ by operation of law, imposes upon the seller certain implied warranties which are intended to mitigate the common-law doctrine of caveat emptor.² In order to limit the liability imposed by implied warranties, the doctrine of privity as enunciated in *Winterbottom v. Wright*³ was applied to warranty as well as negligence cases. *MacPherson v.*

37. See Edmonds, *Integration of the Bar: A Boon or A Bust?*, 32 N.Y.S.B. Bull. 297, 301 (1960).

1. "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (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." Uniform Sales Act § 15. The above provisions are also the law in New York. See N.Y. Pers. Prop. Law §§ 96(1)-(2).

2. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1133 (1931).

3. 10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

*Buick Motor Co.*⁴ destroyed the doctrine of privity in negligence law,⁵ but it has remained a problem in the law of implied warranties.⁶ With the decision of the court of appeals in *Greenberg v. Lorenz*,⁷ the question is posed whether the doctrine of privity as applied in the law of implied warranties has not also been prepared for destruction.

OLD NEW YORK LAW

Prior to *Greenberg v. Lorenz*, New York followed the traditional view that privity of contract was necessary in an action based on breach of an implied warranty. In *Chysky v. Drake Bros., Co.*,⁸ the court of appeals concisely stated the New York rule:

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.⁹

In the *Chysky* case plaintiff was injured by a nail in a piece of cake purchased from defendant by plaintiff's employer. The court of appeals denied plaintiff a recovery because she was not the immediate purchaser, and the privity rule, therefore, denied her the protection of any implied warranty.

The rule was assailed as a harsh one, and it was obvious that it could not long endure without efforts to mitigate its rigorous application. In *Ryan v. Progressive Grocery Stores, Inc.*,¹⁰ the court of appeals introduced an agency fiction to sanction the first exception to the privity rule. In that case plaintiff-husband was injured by a pin concealed in a loaf of bread purchased by his wife. Plaintiff recovered because the wife was considered by the court to be his agent. In *Gimenez v. Great Atlantic & Pacific Tea Co.*,¹¹ again an implied warranty action, plaintiff-wife was the immediate purchaser of bad crabmeat and was subsequently injured by eating it. Plaintiff-wife was allowed a

4. 217 N.Y. 382, 111 N.E. 1050 (1916). For a discussion of the continuing effect of the doctrine of this case see Davis, A Re-Examination of the Doctrine of *MacPherson v. Buick and Its Application and Extension in the State of New York*, 24 *Fordham L. Rev.* 204 (1955).

5. In New York privity is not necessary in a case based on fraud or misrepresentation, *Kuelling v. Roderick Lean Mfg. Co.*, 183 N.Y. 78, 75 N.E. 1098 (1905); *Kennedy v. F. W. Woolworth Co.*, 205 App. Div. 648, 200 N.Y. Supp. 121 (1st Dep't 1923); *Wechsler v. Hoffman-La Roche, Inc.*, 198 Misc. 540, 99 N.Y.S.2d 588 (Sup. Ct. 1950); or where the duty is based on statute, *Pine Grove Poultry Farm, Inc. v. Newtown By-Products Mfg. Co.*, 248 N.Y. 293, 162 N.E. 84 (1928); *Alphin v. La Salle Diners, Inc.*, 197 Misc. 415, 98 N.Y.S.2d 511 (N.Y.C. City Ct. 1950).

6. *Amram & Goodman, Some Problems in the Law of Implied Warranty*, 3 *Syracuse L. Rev.* 259, 263-68 (1952).

7. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

8. 235 N.Y. 468, 139 N.E. 576 (1923).

9. *Id.* at 472, 139 N.E. at 578.

10. 255 N.Y. 388, 175 N.E. 105 (1931).

11. 264 N.Y. 390, 191 N.E. 27 (1934).

recovery, but her husband was denied a recovery for consequential damages because there was no privity of contract between the husband and retailer. Since the wife brought a direct cause of action for her injuries, she could not be held to be acting as her husband's agent for the purpose of allowing him a recovery for consequential damages. Speaking of the husband's right to recover on an implied warranty theory, the court of appeals also stated that "the courts have never gone so far as to recognize warranties for the benefit of third persons."¹²

In *Bowman v. Great Atlantic & Pacific Tea Co.*,¹³ the appellate division extended the agency theory to allow plaintiff a recovery for injuries caused by a defective bottle of "Wesson" oil purchased by her sister with whom she lived. Both sisters contributed to household expenses, and for the purpose of bringing the action for breach of an implied warranty the court reasoned that the plaintiff's sister was plaintiff's agent in purchasing the bottle of oil. The agency theory was the one exception recognized in New York prior to *Greenberg v. Lorenz*.¹⁴

GREENBERG V. LORENZ

In the now famous New York case of *Greenberg v. Lorenz*, the court of appeals took a giant step to mitigate the hardship of the privity rule. Plaintiff was injured by eating some salmon from a can purchased by her father for consumption in the home. On trial in the city court plaintiff and her father were allowed a recovery on the basis of breach of implied warranty.¹⁵ The appellate term affirmed,¹⁶ but the appellate division reversed holding that *Chysky v. Drake Bros. Co.*¹⁷ was still the New York law.¹⁸ Chief Judge Desmond writing for the majority of the court of appeals held that plaintiff should be allowed a recovery even though privity was lacking, but qualified the holding saying:

So convincing a showing of injustice and impracticality calls upon us to move but we should be cautious and take one step at a time. To decide the case before us, we should hold that the infant's cause of action should not have been dismissed

12. *Id.* at 395, 191 N.E. at 29. See also *Hopkins v. Amtorg Trading Corp.*, 265 App. Div. 278, 284-85, 38 N.Y.S.2d 788, 794-95 (1st Dep't 1942).

13. 284 App. Div. 663, 133 N.Y.S.2d 904 (4th Dep't 1954), *aff'd mem.*, 308 N.Y. 780, 125 N.E.2d 165 (1955).

14. New York has held that a parent could not be considered the agent of a child in order to allow the child an action for breach of an implied warranty. See, e.g., *Redmond v. Borden's Farm Prods. Co.*, 245 N.Y. 512, 157 N.E. 838 (1927) (memorandum decision); *Salzano v. First Nat'l Stores, Inc.*, 268 App. Div. 993, 51 N.Y.S.2d 645 (2d Dep't 1944) (memorandum decision); *Smith v. Hanson*, 228 App. Div. 634, 238 N.Y. Supp. 86 (2d Dep't 1929) (*per curiam*). *Contra*, *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A.2d 316 (1943); *Sullivan v. H. P. Hood & Sons, Inc.*, — Mass. —, 168 N.E.2d 80 (1960). For a discussion of the agency exception in an implied warranty action in New York see Comment, *The Privity Rule and the Agency Fiction With Regard to Implied Warranties*, 24 *Fordham L. Rev.* 425 (1955).

15. 14 Misc. 2d 279, 178 N.Y.S.2d 404 (N.Y.C. City Ct. 1957).

16. 12 Misc. 2d 883, 178 N.Y.S.2d 407 (App. T. 1958).

17. 235 N.Y. 468, 139 N.E. 576 (1923).

18. 7 App. Div. 2d 968, 183 N.Y.S.2d 46 (1st Dep't 1959) (*per curiam*).

solely on the ground that the food was purchased not by the child but by the child's father.¹⁹

The concurring opinion of Judge Froessel demonstrated the conflicting theories which beset the court of appeals. Is the problem one for the courts or for the legislature to resolve? Speaking about that Judge Froessel said:

However much one may think liability should be broadened, that must be left to the Legislature. . . . Indeed, the Legislature has not been unaware of the problem for, in three separate years—1943,²⁰ 1945,²¹ 1959²² . . . the New York State Law Revision Commission recommended that the benefits of implied warranties be extended to the buyer's employees and to the members of his household, but the Legislature has declined to act, despite the introduction of legislation.²³

The court of appeals has served notice that the *Greenberg* decision is not to be taken as the signal that New York is prepared to abolish the privity rule. But it departed at least from the limited agency fiction and stated that where the relationship between the immediate purchaser and injured consumer is a familial one, the injured party may bring a direct cause of action for breach of implied warranty. Whether other persons besides members of the family would be allowed a direct cause of action in warranty is still left open in New York.²⁴

PRIVITY NO LONGER NECESSARY

A number of years ago Judge Cardozo in another connection stated that "the assault upon the citadel of privity is proceeding in these days apace."²⁵ This assault is now being waged against the necessity of privity in both express and implied warranty actions.

In the field of implied warranties, *Henningsen v. Bloomfield Motors, Inc.*²⁶ has become the landmark case. It completely dispensed with the privity requirement. The plaintiff there was injured by a defective car purchased by her husband. The New Jersey court held:

We are convinced that the cause of justice in this area of the law can be served only by recognizing that she is such a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile. Accordingly, her lack of privity does not stand in the way of prosecution of the injury suit against the defendant. . . .²⁷

19. 9 N.Y.2d at 200, 173 N.E.2d at 775-76, 213 N.Y.S.2d at 42.

20. N.Y. Leg. Doc. No. 65(J) (1943).

21. N.Y. Leg. Doc. No. 65(A) (1945).

22. N.Y. Leg. Doc. No. 65(B) (1959).

23. 9 N.Y.2d at 201, 173 N.E.2d at 776, 213 N.Y.S.2d at 43.

24. The lower courts appear to be following the court of appeals' caveat that *Greenberg v. Lorenz* is not to be interpreted as abolishing the privity rule in New York. See, e.g., *Rypins v. Rowan*, 219 N.Y.S.2d 288, 289 (Sup. Ct. 1961); *Simpson v. Eichenbrunner*, 217 N.Y.S.2d 678, 679 (App. T. 1961) (per curiam); *Anderson v. Radio Corp. of America*, 216 N.Y.S.2d 182, 184 (Sup. Ct. 1961); *Levitt v. Ford Motor Co.*, 215 N.Y.S.2d 679, 681 (Sup. Ct. 1961).

25. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

26. 32 N.J. 358, 161 A.2d 69 (1960), 29 *Fordham L. Rev.* 183.

27. *Id.* at 413, 161 A.2d at 99-100.

The court found that under modern marketing conditions the requirement of privity worked many injustices and held that the ultimate consumer could bring a warranty action against the manufacturer even though there was no privity of contract.

At the same time a Tennessee court decided that a wife injured by a car with defective brakes could bring an action in warranty without privity of contract.²⁸ In a recent Iowa case²⁹ involving a similar factual situation the court said, "It is our opinion that these recent pronouncements in New Jersey and Tennessee represent the most advanced thinking and the soundest conclusions in the field of new car warranties, express and implied."³⁰ It remains to be seen whether *Henningsen v. Bloomfield Motors, Inc.*³¹ will be to implied warranties what *MacPherson v. Buick Motor Co.*³² was to negligence.³³

The assault on the citadel of privity is indeed being pressed apace. There is a substantial advantage to bringing a personal injury action in warranty rather than in negligence.³⁴ To establish his case in negligence the plaintiff must show as a fact that the defendant failed to exercise reasonable care and that the product was defective when it left the manufacturer or seller. The problem of proof can be very difficult, indeed critical, in this day of mass production. The plaintiff may find it impossible to prove that reasonable care was not exercised in the manufacturing process. Where an action is brought in implied warranty the plaintiff need only show that the product was defective when it left the manufacturer. He is not burdened with proof of the lack of reasonable care.³⁵

IMPLIED WARRANTY—TORT ACTION

Legal authorities have repeatedly pointed out that the original action of implied warranty was in tort for deceit rather than contract. Williston wrote: The action was thus conceived of at the outset as an action of tort. . . . It is probable that to-day most persons instinctively think of a warranty as a contract or promise; but it is believed that the original character of the action cannot safely

28. *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. 1960).

29. *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449 (Iowa 1961).

30. *Id.* at 456. See also *Thompson v. Reedman Motors*, 199 F. Supp. 120 (E.D. Pa. 1961).

31. 32 N.J. 358, 161 A.2d 69 (1960).

32. 217 N.Y. 382, 111 N.E. 1050 (1916).

33. For other cases prior to *Henningsen v. Bloomfield Motors, Inc.*, which dispensed with the requirement of privity of contract in a warranty action see *Hector Supply Co. v. Carter*, 122 So. 2d 22 (Fla. 1960); *Diamond Alkali Co. v. Godwin*, 100 Ga. App. 799, 112 S.E.2d 365 (1959); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958).

34. Meehan, "The Assault Upon the Citadel of Privity": A Recent Communique, 24 Brooklyn L. Rev. 308 (1958).

35. Prosser, *Torts* § 84, at 505-06 (2d ed. 1955).

be lost sight of, and that the seller's liability upon a warranty may sound in tort as well as in contract.³⁶

Prosser noted that:

The seller's warranty is a curious hybrid of tort and contract, unique in the law. In its inception the liability was based on tort, . . . the warranty gradually came to be regarded as a term of the contract of sale, express or implied, for which the normal remedy is a contract action.³⁷

In attempting to abolish the privity rule the courts have seized on the point that privity developed by judicial construction and not by legislative enactment. Chief Judge Desmond in *Greenberg v. Lorenz* said of the privity rule: "But the present rule which we are being asked to modify is itself of judicial making since our statutes say nothing at all about privity and in early times such liabilities were thought to be in tort. . . ."³⁸ In stressing the origin of the warranty action we are in reality getting back to the real nature of the action. Since the early warranty cases were concerned with contract actions, the courts came to apply contract theory to warranty actions. The New York Court of Appeals has applied the six year contract statute of limitations to warranty actions.³⁹ On the other hand there is earlier language of the court of appeals noting that the action of warranty may sound in tort rather than in contract.⁴⁰

A difficulty also arises from the language of the Uniform Sales Act. The Sales Act states that a buyer "means a person who buys or agrees to buy goods or any legal successor in interest of such person."⁴¹ The language would appear to limit the action of implied warranty to the immediate purchaser or someone who claims legal title through him. Some courts hurdled the language of the statute by construing the term buyer to include any person who in the reasonable contemplation of the seller might use the goods.⁴²

The Uniform Commercial Code now in effect in six states⁴³ expressly provides for an action in warranty by a person other than the immediate purchaser. Section 2-318 states that:

36. 1 Williston, Sales § 195, at 501-02 (rev. ed. 1948).

37. Prosser, Torts § 83, at 493 (2d ed. 1955).

38. 9 N.Y.2d at 199-200, 173 N.E.2d at 775, 213 N.Y.S.2d at 42. See also *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

39. *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953).

40. *Greco v. S. S. Kresge Co.*, 277 N.Y. 26, 12 N.E.2d 557 (1938). In this case the court of appeals said, "Even today, an action for breach of warranty is, in some respects, an action in tort. . . . Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default and, in its essential nature, a tort." *Id.* at 33-34, 12 N.E.2d at 561.

41. Uniform Sales Act § 76(1).

42. See *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939).

43. Connecticut, Kentucky, Massachusetts, New Hampshire, Pennsylvania, and Rhode Island.

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 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.⁴⁴

In the purpose clause attached to this section the drafters of the code state that "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, extends to other persons in the distributive chain."⁴⁵

The law regarding the need for privity in a warranty is thus still in a state of flux in New York. The court of appeals has recognized that the doctrine of privity is a judicial creature, but apparently intends to leave the problem of its possible rejection to the legislature. The legislature on the other hand has on three different occasions⁴⁶ refused to act on bills introduced to modify the privity rule. The matter is now approaching a point of decision for either the court or the legislature. If the doctrine be outmoded and if it be of judicial making, should not its modification be a judicial function?

CONCLUSION

The doctrine of privity is properly a question for the courts, and it is within the province of the courts to abrogate the rule universally recognized as unduly harsh. But the court must distinguish between express and implied warranties. Since express warranties arise out of the mutual assent of the parties, they may properly be considered as arising under contract theory. Implied warranties, however, are imposed by operation of law and should be approached as tort violations.⁴⁷ By analogy the same restrictions that have been placed on negligence actions would be applicable to implied warranties.⁴⁸

44. Uniform Commercial Code § 2-318.

45. *Ibid.*

46. See notes 20-22 *supra*.

47. See Koerner, *The Beleaguered Citadel of Privity in the Distributive Process of the Sale of Goods*, 7 N.Y.L.F. 176 (1961).

48. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).