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SALES - IMPLIED WARRANTIES RUNNING TO ULTIMATE CONSUMER - IS PRIVITY OF CONTRACT NECESSARY?

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SALES — IMPLIED WARRANTIES RUNNING TO ULTIMATE CONSUMER — IS PRIVITY OF CONTRACT NECESSARY? — Plaintiff's husband purchased from defendant, a large retailer, minced ham and liverwurst manufactured by another concern. Plaintiff with other members of the family became ill after eating the liverwurst. An appeal was taken from a directed verdict for defendant. *Held*, when food is sold, there is no implied warranty of wholesomeness running from the retailer to the ultimate consumer; for the remedy is based on contract and limited to parties and privies thereto. *Borucki v. MacKenzie Bros. Co., Inc.*, (Conn. 1938) 3 A. (2d) 224.

By the great weight of authority, the implied warranty of a retailer does not extend beyond his immediate contract purchaser.[1] The reason generally given for this rule is that the remedy is based on contract and therefore is limited to the parties and privies thereto.[2] However, a right of recovery in tort may be available to one injured through the retailer's negligence even though he is not in privity of contract with the retailer.[3] But in the main, the factor of negligence is difficult to prove,[4] if not totally lacking. Is the injured party, who is not in privity of contract with the retailer, therefore to be left remediless?

[1] Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916); Gimenez v. Great Atlantic & Pacific Tea Co., 264 N. Y. 390, 191 N. E. 27 (1934); Binion v. Sasaki, 5 Cal. App. (2d) 15, 41 P. (2d) 585 (1935), noted 23 CAL. L. REV. 621 (1935); 1 WILLISTON, SALES, 2d ed., § 244 (1924); 24 R. C. L. 158 (1919).

[2] "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. Parker Co., 83 Conn. 231 at 233, 76 A. 271 (1910).

[3] Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 A. 314 (1908); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 P. 202 (1914); Bourcheix v. Willow Brook Dairy Inc., 268 N. Y. 1, 196 N. E. 617 (1935); Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N. W. 812 (1893); Heinemann v. Barfield, 136 Ark. 456, 207 S. W. 58 (1918).

[4] Ketterer v. Armour & Co., (C. C. A. 2d, 1917) 247 F. 921; Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253 (1896).

In the face of existing authority the answer is emphatically in the affirmative.[5] Yet the injustice of such a position is undeniable.[6] Aware of this fact, one court, in allowing a subvendee recovery against a manufacturer, has said,[7] "If there is no authority for the remedy, 'it is high time for such an authority.' " At the outset it should be noted that the requirement of privity is historically unsound.[8] Older by a century than contract, warranty, originally sounding in tort,[9] was regarded in the nature of an action on the case for deceit.[10] In that *scienter* need not be alleged nor proved, warranty today still bears traces of its tort origin.[11] Thus, because of its hybrid nature, a fearless court, emphasizing its early background, would have sufficient basis to dispense with the requirement of privity. Recent authority for this position is to be found in the manufacturer-consumer cases.[12] As a basis for recovery, resort to agency principles has been suggested.[13] Due to the fact that in the majority of cases the purchase is made by a member of the plaintiff's family, the court might extend the doctrines of agency so as to treat the purchasing member of the family as an agent for the others. Although the courts would be indulging in a fiction, the end justifies the means. To some extent, the state pure food laws[14] could be invoked, in

[5] Supra, note 1.

[6] See generally, 23 CAL. L. REV. 621 (1935); 32 ILL. L. REV. 375 (1937); 12 ST. JOHNS L. REV. 362 (1938); 2 OHIO ST. L. J. 180 (1936); Perkins, "Unwholesome Food as a Source of Liability," 5 IOWA L. REV. 86 (1920).

[7] Mazetti v. Armour & Co., 75 Wash. 622 at 630, 135 P. 633 (1913).

[8] See generally, 1 WILLISTON, SALES, 2d ed., § 195 (1924); Ames, "The History of Assumpsit," 2 HARV. L. REV. 1 at 8 (1888); 9 CORN. L. Q. 487 (1924); 18 CORN. L. Q. 445 (1933); 42 HARV. L. REV. 414 (1929).

[9] 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 67 et seq. (1926); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 389 (1906).

[10] Ames, "The History of Assumpsit," 2 HARV. L. REV. 1 at 8 (1888).

[11] 1 WILLISTON, SALES, 2d ed., § 197 (1924); Caldbeck v. Simanton, 82 Vt. 69, 71 A. 881 (1909); Flessher v. Carstens Packing Co., 93 Wash. 48 at 56, 160 P. 14 (1916): "Whether the action be called one on warranty or of negligence it comes to the same thing. It sounds in tort."

[12] Waite, "Retail Responsibility and Judicial Law Making," 34 MICH. L. REV. 494 (1936); Rachlin v. Libby-Owens-Ford Glass Co., (C. C. A. 2d, 1938) 96 F. (2d) 597; Anderson v. Tyler, 223 Iowa 1033, 274 N. W. 48 (1937); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1922); Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S. W. 80 (1915); Swengel v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P. (2d) 930 (1938), noted 52 HARV. L. REV. 328 (1938); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N. E. 557 (1928); Catani v. Swift & Co., 251 Pa. 52, 95 A. 931 (1915).

[13] Ryan v. Progressive Grocery Stores, 255 N. Y. 388, 175 N. E. 105 (1931), noted 16 CORN. L. Q. 610 (1931). See also, Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916); Groce v. First National Stores, 268 Mass. 210, 167 N. E. 308 (1929). One writer suggests that agency should depend on whether the retailer knows this. 8 ST. JOHNS L. REV. 362 (1934).

[14] See Conn. Gen. Stat. (1930), §§ 2435, 2442. In the instant case civil liability was expressly denied by the state pure food law. But see People v. Schwartz, (Cal. App. 1937) 70 P. (2d) 1017. In Kelley v. John R. Daily Co., 56 Mont. 63 at 74, 181

effect creating a statutory duty.[15] Thus, the mere allegation that unwholesome foods were sold in violation of state pure food laws has been held to state facts sufficient to show negligence as a matter of law.[16] The cases also suggest the possibility of a third party beneficiary theory for recovery.[17] Where the consumer sues as a beneficiary of the manufacturer-retailer contract, some courts have recognized the validity of such an argument, and there seems to be no apparent reason why the same principles could not be extended, so as to enable the third party consumer to take advantage of the retailer-purchaser contract. However justifiable the above suggestions may be, perhaps a sounder solution to the problem would be attained by meeting the issue squarely. In this regard, one court has said,[18] "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest . . . upon 'the demands of social justice.' " Generally, if the consumer is denied recovery, as in the instant case, he will have no other remedy. But on the other hand, the retailer is not without his equities; for to impose liability upon him in many cases might mean his ruin. However, in the end the retailer would protect himself by insurance, the cost of which would be passed on to the consumer. To so spread the risk is, after all, socially desirable.[19]

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P. 326 (1919), the court said, "Under Section 5115, Revised Codes, the warranty of food offered for sale extended only to the immediate purchaser, evidently upon the theory that it arose out of the contractual relations of the parties. Under Chapter 130 the warranty extends to the public generally, and the liability of the vender rests upon the principle that his original act in selling impure food was unlawful, and that he is responsible for the natural consequences of his wrongful act. But, in any event, the liability arises from a violation of the statute, and it is immaterial whether the foundation is laid in negligence or warranty."

[15] Square v. Model Farm Dairies, 54 T. L. R. 831, 12 AUSTR. L. J. 155 (1938); Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428 (1909); Kelley v. John R. Daily Co., 56 Mont. 63, 181 P. 326 (1919); 98 A. L. R. 1496 (1935).

[16] Donaldson v. Great Atlantic & Pacific Tea Co., 186 Ga. 870, 199 S. E. 213 (1938).

[17] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N. E. 557 (1928).

[18] Ketterer v. Armour & Co., (D. C. N. Y. 1912) 200 F. 322 at 323.

[19] In Race v. Krum, 222 N. Y. 410 at 415, 118 N. E. 853 (1918), the court, in holding the retailer liable on an implied warranty to a consumer, said, "This rule is based upon the high regard which the law has for human life."