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Sales - Implied Warranty - Privity of Contract As A Prerequisite to Recovery From Manufacturer

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SALES — IMPLIED WARRANTY — PRIVITY OF CONTRACT AS A PREREQUISITE TO RECOVERY FROM MANUFACTURER — Plaintiff sustained injuries in the course of his employment when a defective abrasive wheel, while being used in its intended manner, exploded in his face. The abrasive wheel was purchased by plaintiff's employer directly from the manufacturer. Plaintiff sought recovery from the manufacturer on two grounds: negligence in the manufacture of the abrasive wheel and breach of implied warranty for fitness of purpose.[1] The negligence issue was submitted to the jury, which

[1] CAL. CIV. CODE § 1735 (2) and (5), which correspond to UNIFORM SALES ACT § 15 (2) (implied warranty of merchantable quality) and (5) (implied warranty of fitness of purpose annexed by the usage of trade).

returned a verdict adverse to the plaintiff. The manufacturer's demurrer to the cause of action based upon implied warranty was sustained by the trial court. On appeal from the ruling on the demurrer, *held,* reversed. A manufacturer is liable under an implied warranty for fitness of purpose not only to a purchaser but also to an employee of that purchaser who sustains injuries from the use of the defective chattel in the employer's business. *Peterson v. Lamb Rubber Co.,* 353 P.2d 575 (Cal. 1960).

Originally, where injuries resulted from a defective chattel, recovery under either negligence or warranty required privity of contract between plaintiff and manufacturer.[2] Though exceptions were recognized,[3] not until *MacPherson v. Buick Motor Company*[4] was a general test of foreseeable harm formulated for product liability cases based upon a negligence theory. Now it is well settled that a manufacturer owes a duty of due care to all persons who might reasonably be expected to come into contact with the chattel and to sustain injuries from a defect which the manufacturer might have prevented.[5] However, privity of contract remains a general prerequisite to recovery for breach of implied warranties of merchantability and fitness of purpose.[6] The conceptual problem can be traced to the traditional notion that warranty is contractual in nature. Thus the absence of contractual relationship has interfered with extension of the manufacturer's liability for breach of warranty beyond the purchaser. Nevertheless, more recent developments in warranty parallel the recognition of strict liability in tort law. The classic area of strict liability is that of the ultrahazardous activity. One who engages in an ultrahazardous occupation must assume responsibility for any injuries or damages without regard to fault on his part.[7] In the area of implied warranties, some courts while in general retaining the privity of contract requirement have recognized exceptions. Because of the high degree of risk to human beings, many American jurisdictions permit recovery on a theory of warranty where injury results from unwholesome food.[8] Even those courts which do recognize the food exceptions have manifested considerable reluctance to extend the relaxation of the privity requirement to other classes of products.[9] To draw a line between food and other types of products seems unnecessarily arbitrary. If unwholesome food is so potentially dangerous that its sale can be classified as an ultrahazardous activity justifying strict liability,[10] it would seem that a defective abrasive wheel which can explode and cause

2 Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).
3 See Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865, 870 (8th Cir. 1903).
4 217 N.Y. 382, 111 N.E. 1050 (1916).
5 See generally PROSSER, TORTS 498-506 (2d ed. 1955).
6 *Id.* at 506-11.
7 See, *e.g.,* Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928).
8 *E.g.,* Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939).
9 See, *e.g.,* Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954).
10 Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products —An Opposing View,* 24 TENN. L. REV. 938, 941 (1957).

serious injury comes within the same rationale.[11] Therefore, if risk of personal injury is the test of liability, recovery follows as clearly in the principal case as in the food cases.[12] Moreover, since the abrasive wheel exploded when first used, plaintiff appears to have been in no better position to protect himself than the inexperienced consumer who sustains injuries from unwholesome food.[13] Also, to preclude recovery by the worker in the principal case would in effect insulate the manufacturer from liability under implied warranty, for the corporate purchaser can "suffer" a serious injury only if forced to compensate the worker in a tort action. Since such direct recovery from the employer is unlikely under the facts of the principal case,[14] the implied warranty is significant only if it extends to the ultimate user. The manufacturer should not be able to avoid liability in this case on the ground that an alleged defect in the chattel has caused injury to a remote person, for the employees of the purchaser are the persons most likely to use the chattel and sustain injury if it should be defective. The court in the principal case accepted this last argument as the basis[15] for its decision although policy considerations also suggest that a general relaxation of the privity requirement in product liability cases is desirable.[16] The manufacturer can protect the intended user either through improvements in the product or by spreading the cost through insurance[17] or higher

11 On facts similar to the principal case, recovery was permitted under implied warranty in DiVello v. Gardner Mach. Co., 102 N.E.2d 289 (Ohio C.P. 1951). Wood v. General Electric Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953) seemed to overrule DiVello, *but see* Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

12 See 2 HARPER & JAMES, TORTS § 28.16 n.14 (1956).

13 See Collum v. Pope & Talbot, Inc., 135 Cal. App. 2d 653, 288 P.2d 75 (1955), where the court was influenced by the fact that defendant lumber mill was in no better position than plaintiff, an experienced carpenter, to inspect the lumber for defects. See Green, *Should the Manufacturer of General Products Be Liable Without Negligence?* 24 TENN. L. REV. 928 (1957), in which the writer tries to distinguish food and chemical products from mechanical products. He places emphasis on the fact that mechanical products are typically produced for use over a longer period of time by rather experienced workers. The distinction is not persuasive given the facts of the principal case where the accident, which occurred upon the first use, appeared to result from a latent defect.

14 The apparent cause of the accident was a latent defect in the grinding wheel which normally would not be subject to employer's control.

15 Principal case at 581. An alternative basis for the decision was the court's conclusion that plaintiff meets the privity requirement which they defined as "mutual or successive relationship to the same thing or right of property," principal case at 581. Proponents of the privity requirement will surely recognize this vague test, when applied in warranty cases, to be the embryonic stage of another court-created "fiction" which could ultimately engulf the privity requirement. In warranty cases, the substance of privity has been the requirement of a contractual relationship between plaintiff and defendant. Conceptually, the California court's definition might have eliminated the hard-fought battle for privity exceptions in circumstances such as the one presented when husband sustains injury from unwholesome food purchased by his wife. The demise of privity in warranty cases will probably be hastened if the court's alternative holding is taken seriously.

16 See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960).

17 *But see id.* at 1121.

prices.[18] Thus, in most cases society, not the individual manufacturer, will bear the burden. This seems desirable, for the burden on the individual who is injured may be catastrophic though the total amount involved in product liability cases is rather low when viewed from the standpoint of society. Moreover, in some situations strict liability may be indirectly achieved, for plaintiff may be able to recover from the warrantee who in turn can pursue his rights under the warranty. It would seem preferable to avoid this circuitous route. Also, because specific evidence of negligence is rarely available in product liability cases, plaintiff typically relies upon *res ipsa loquitur* to get the case to the jury.[19] If strict liability results, in fact, from the use of a negligence theory, it would seem more desirable to face the problem squarely and thus protect the integrity of an important negligence concept. The trend in the current cases appears to be toward a general relaxation of the privity requirement;[20] eventually there may appear in the area of product warranty liability another *MacPherson* case in which the exceptions swallow up the rule.

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[18] See generally 2 HARPER & JAMES, TORTS § 28.16 (1956); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (concurring opinion). Strict liability in the product liability cases would probably impose a significant burden on a small business which is operating on a marginal profit and has a limited capacity to implement price changes.

[19] See Escola v. Coca Cola Bottling Co., *supra* note 18.

[20] See, *e.g.*, Gottsdanker v. Cutter Labs., 6 Cal. Rptr. 320 (Cal. Ct. App. 1960); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Continental Copper & Steel Indus. v. Cornelius, 104 So. 2d 40 (Fla. Ct. App. 1958); see generally Prosser, *supra* note 16.