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Civil Procedure—Contract, not Tort, Statute of Limitations Applicable in Action for Breach of Implied Warranty for Particular Use.

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RECENT CASES

CIVIL PROCEDURE—CONTRACT, NOT TORT, STATUTE OF LIMITATIONS APPLICABLE IN ACTION FOR BREACH OF IMPLIED WARRANTY FOR PARTICULAR USE.

Plaintiff sustained personal injuries in October, 1965, when struck by a glass door manufactured and installed in 1958 by Pittsburgh Plate Glass Co. for Central Trust Co. of Rochester. Suit was commenced against Pittsburgh Plate Glass and Central Trust in 1965 alleging two causes of action in negligence and two causes of action for breach of implied warranty. The warranty actions were dismissed as to both defendants by Special Term.[1] The appellate division[2] affirmed as to Pittsburgh Plate Glass, holding that a cause of action alleging breach of warranty is governed by section 213 of the Civil Practice Law and Rules which requires that, "an action upon a contractual obligation or liability, express or implied,"[3] must be commenced within six years. The Court of Appeals affirmed by a vote of 4-3, refusing to apply the doctrine of strict liability in tort. *Held,* a cause of action alleging breach of implied warranty of fitness for a particular use is contractual, rather than tortious in nature, and the six year statute of limitations[4] commencing on the date of sale bars this action. *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y. 2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

The instant case is an example of how the law has often been hampered by the necessity of making the tenuous distinction between tort and contract actions.[5] The characterization is often required in order to resolve the procedural problems of applying the proper statute of limitations,[6] the correct measure of damages and the permissible defenses.[7] Traditional judicial standards which deal with this problem have created the distinction between nonfeasance[8] and misfeasance[9] as guides to determine whether a cause of action is essentially in tort or in contract in circumstances where warranty is not an issue. These standards have led the courts to look to the gravamen of the particular action.[10]

1. 57 Misc. 2d 45, 291 N.Y.S.2d 94 (Sup. Ct. 1967).
2. 29 A.D.2d 918, 290 N.Y.S.2d 186 (4th Dep't 1968).
3. N.Y. CIV. PRAC. LAW § 213(2) (McKinney 1963) [hereinafter cited as CPLR].
4. *Id.*
5. W. PROSSER, *The Borderland Between Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS 430 (1954). Professor Prosser scorns the distinction in that it has recomplicated the simplified codes of pleading by forcing the pleader to elect the proper theory for recovery, a shortcoming which modern pleading has attempted to avoid.
6. *See, e.g.*, Blessington v. McCrory Stores, Inc., 305 N.Y. 140, 111 N.E.2d 421 (1953); Annot., 37 A.L.R.2d 703 (1954).
7. The defenses of contributory negligence and assumption of risk are not available in contract actions as a rule, *but see* Maiorino v. Weco Prods., 45 N.J. 570, 214 A.2d 18 (1965) which held the defense of contributory negligence is available for an action in implied warranty.
8. W. PROSSER, *supra* note 5, at 387.
9. *Id.* at 402.
10. *Id.* at 429.

Generally nonfeasance, or failure to perform on the contract, gives rise to a cause of action in contract, whereas misfeasance gives rise to a claim in tort. But at times even this delineation may be troublesome.[11] The complexity of the issue is compounded when the additional element of warranty is introduced, for warranty, having developed out of tort, has become inseparable from contract. Originally a warranty action was for breach of an imposed duty in tort where the wrong was considered to be akin to misrepresentation and similar to deceit. Mere affirmation of a fact made negligently or without knowledge of its falsity gave rise to a cause of action in tort. Later decisions held that assumpsit would lie for a breach of express warranty as a part of the contract of sale leading to the close association between warranty and contract. The historical development of warranty is presently reflected in commercial law, and to some extent in the law of product liability.[12] Yet the development of implied warranty, a relatively new concept, has led to some confusion, and its application remains unsettled in product liability actions. The issue generally turns on the nature of the duty owed to the plaintiff. It is a contractural obligation as well as a duty imposed by law, not two distinct duties but more precisely one encompassing duty, which demands that the product be fit for its intended use.[13] Confusion arises when one attempts to separate this one duty into two distinct categories (*i.e.*, tort or contract), since the distinction between an imposed legal duty and an implied warranty is more apparent than real.[14]

This tenuous distinction has generated an amorphous field of personal injury law with respect to defective products inasmuch as variations of both tort and contract rules have been inconsistently applied to a cause of action for a breach of implied warranty.[15] Currently there are three recognized theories of recovery for injuries sustained as a result of a defective product: common law negligence, breach of express or implied warranty, and strict liability in tort. To recover in negligence, the plaintiff has the burden of proving that the defect was caused by the manufacturer's failure to comply with the necessary standard of care required to produce a safe product. The development

11. *E.g.*, Thorne v. Deas, 4 Johns. Cas. 84 (N.Y. 1809).

12. W. PROSSER & B. SMITH, CASES AND MATERIALS ON TORTS 804 nn. 3 & 4 (4th ed. 1967).

13. *See* Note, 42 HARV. L. REV. 414 (1929). *See also*, Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 801 (1966): "Until 1962 warranty had held the field, and no court proceeded on any other basis, although a good many of them had realized that this was a new and different kind of 'warranty,' not arising out of or dependent upon any contract but imposed by law, in tort, as a matter of policy." Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828, 829 (1947): "Liability in such cases is not based on negligence, nor on a breach of the usual implied contractual warranty, but in the broad principle of the public policy to protect human health and life."

14. Blessington v. McCrory Stores, Inc., 305 N.Y. 140, 147, 148, 111 N.E.2d 421, 423 (1953): "Since the common law duty and the implied contractual obligation, in such situations, are one in the same, the suit, however labeled, is one in negligence, at least for time limitation purposes."

15. Thornton, *The Elastic Concept of Tort and Contract*, 14 BROOKLYN L. REV. 196 (1948).

of warranty liability dispensed with the necessity of showing fault, but, being so closely associated with contract, demanded that the attendant rules of contract be applied.[16] Courts began to make numerous exceptions to these rules, notably in the area of food and drug products cases where a nonpurchasing party injured by the product was allowed to recover in contract on an agency theory.[17] Ultimately, the privity requirement was dispensed with[18] and an implied warranty was held to run with the product to the purchaser and his family and guests.[19] This trend has found acceptance with products other than food and drugs and has developed into the doctrine of strict liability in tort recently adopted in many jurisdictions.[20] Warranty, express or implied, is not an element of strict liability in tort, although it certainly was an influential factor in its development.[21] Rather, recovery for personal injury under strict liability is predicated upon proof that the product was defective when manufactured, and the defect was the proximate cause of a foreseeable injury.

As the instant case illustrates, the New York courts, by tenaciously maintaining the distinction between tort and contract in product liability litigation, have complicated the application of statutes of limitation in cases dealing with implied warranties. Where the courts have deemed the cause of action to be essentially in tort,[22] thereby treating a breach of implied warranty not as a breach of the contractual obligation, but as a violation of a common law duty, the three year statute of limitations has been applied and has been held to commence on the date of injury.[23] Alternatively, if the claim is considered to be in contract, thus treating the breach of an implied warranty as a material breach of the contract itself, or some statutorily imposed standard,[24] the six year limitation has been applied[25] and has been held to run from the date of sale of the product.[26] New York courts have generally subscribed to this latter

16. These include privity, reliance on an implied or express warranty, notice of breach, and disclaimers.

17. *See* Mouren v. The Great Atl. & Pac. Tea Co., 1 N.Y.2d 884, 136 N.E.2d 715, 154 N.Y.S.2d 642 (1956); Bowman v. The Great Atl. & Pac. Tea Co., 308 N.Y. 780, 125 N.E.2d 165 (1955); Ryan v. Progressive Grocery Stores, 255 N.Y. 338, 175 N.E. 105 (1931).

18. *See* Randy Knitwear v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 266 N.Y.S.2d 363 (1962); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). PROSSER, *supra* note 5, at 791.

19. *See* Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); N.Y.U.C.C. § 2-318 (McKinney 1964) [hereinafter cited as U.C.C.].

20. In California, *see* Greenman v. Yuba Power Tools, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 899 (1963).

21. RESTATEMENT (SECOND) OF TORTS § 402(A), comment M at 355, 356 (1965).

22. *See, e.g.*, Rosenau v. New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968); Colonna v. Rosedale Dairy, 166 Va. 314, 186 S.E. 94 (1936); Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933); Schlick v. N.Y. Dugan Bros., 175 Misc. 182, 22 N.Y.S.2d 238 (Sup. Ct. 1940).

23. CPLR § 214(5).

24. N.Y. PERS. PROP. LAW § 96(1) (McKinney 1962).

25. CPLR § 213(2). As of 1962, § 2-725 of the U.C.C. authorized a four year statute of limitations. *See, e.g.*, Bort v. Sears Roebuck & Co., 58 Misc. 2d 889, 296 N.Y.S.2d 739 (Sup. Ct. 1969).

26. *See* Liberty Mut. Ins. Co. v. Sheila Lynn, Inc., 185 Misc. 689, 57 N.Y.S.2d 707 (Sup. Ct. 1945); Citizens Utils. Co. v. American Locomotive Co., 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962).

approach[27] as illustrated in *Blessington v. McCrory Stores, Inc.*[28] where the court indicated that the breach of the implied warranty of merchantable quality, having been imposed by statute,[29] is essentially an action in contract and consequently entitled to the benefit of the six year statute. This rationale might be partially based on the fact that the court was confronted with a statute which authorized a three year limit for a personal injury action arising out of negligence[30] and a six year limitation for an action arising upon a contract. The action in that case had not been commenced within the three years required and thus would have been barred. Faced with the issue of whether the breach of warranty constituted an act of negligence within the three year statute, or a breach of a contractual obligation, the court said that even though the breach may be associated with a tortious act, "it is independent of negligence," and was thus governed by the six year statute of limitations.[31] Until *Blessington*, New York courts had decided similar cases on a substantially different basis.[32] The tort-contract distinction was not considered determinative since the action, whether for personal injury or property damage, was explicitly covered (or not covered) by the three year statute. The court in *Blessington*, however, refused to follow this reasoning since these cases dealt with actions in negligence, where the existence of the contract was merely incidental to the true nature of the event which generated the injury. Although the court in the instant case was not confronted with the issue of negligence, it nevertheless retained the rationale that implied warranty is essentially within the law of contract.

The court's determination that a cause of action for breach of implied warranty is contractual, thereby requiring application of the six year statute of limitations commencing on the date of sale, will effectively limit the number of claims that may be brought against a manufacturer of a defective product. In refusing to approve strict liability in tort the majority indicated its belief that a personal injury resulting from a defective product years after its manufacture is presumably caused by operation and maintenance rather than faulty design or assembly. Thus, the court spared the manufacturer from defending and the court from hearing many claims which may lack any substantial merit.

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27. Schwartz v. Heyden Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963); Munn v. Security Controls, Inc., 23 A.D.2d 813, 259 N.Y.S.2d 824 (4th Dep't 1965); Kakargo v. Grange Silo Co., Inc., 11 A.D.2d 796, 204 N.Y.S.2d 1010 (2d Dep't 1960); Bort v. Sears Roebuck & Co., 58 Misc. 2d 889, 296 N.Y.S.2d 739 (Sup. Ct. 1969); Wilsey v. Sam Maulkey Co., 56 Misc. 2d 480, 289 N.Y.S.2d 45 (Sup. Ct. 1968); Outwater v. Miller, 215 N.Y.S.2d 838 (Sup. Ct. 1961).

28. 305 N.Y. 140, 111 N.E.2d 421 (1953).

29. N.Y. PERS. PROP. LAW § 96(1) (McKinney 1962). U.C.C. § 2-314.

30. N.Y. Sess. Law 1936, ch. 558. *Cf.* CPLR § 214(5) which does not mention negligence.

31. Blessington v. McCrory Stores, Corp., 305 N.Y. 140, 147, 111 N.E.2d 421, 423 (1953).

32. *See, e.g.*, Webber v. Herkimer & M.R.R. Co., 109 N.Y. 311, 16 N.E. 358 (1888); Drooby v. Collins, 281 A.D. 733, 117 N.Y.S.2d 905 (3d Dep't 1952); Buyer's v. Buffalo Paint & Specialties, 199 Misc. 764, 99 N.Y.S.2d 713 (Sup. Ct. 1950).

Henceforth, unlike a cause of action in negligence, a manufacturer will be subject to liability for a breach of warranty for a period of only six years from the date of sale. Once this period has elapsed the injured plaintiff will be forced to sue in negligence even though a valid claim in implied warranty may exist.

The court considered the rationale of *Goldberg v. Kollsman Instrument Corp.*,[33] as well as the reasoning of *Blessington*.[34] In *Goldberg*, the Court of Appeals held the manufacturer of a commercial aircraft liable where a faulty altimeter was believed to be the cause of a fatal crash. The court based its decision on the theory that the benefit of an implied warranty, albeit without privity, runs to those persons whose use of the product is within the reasonable contemplation of the manufacturer. The majority in the instant case postulated that since *Goldberg* stood for the proposition that in the absence of privity the cause of action which exists in favor of a stranger to the contract is one for a breach of implied warranty, a contract action rather than a tort action exists. The dissent strongly opposed this characterization of *Goldberg* and insisted that strict liability in tort was clearly approved in that case. Furthermore, the dissenters asserted that the nature of the breach of warranty which existed was more properly within the scope of strict liability rather than contract and that this interpretation of *Goldberg* should be followed giving the plaintiff a cause of action in tort with the consonant three year statute of limitations beginning on the date of injury.[35]

The argument raised by the appellant that the three year statute could apply to third party strangers only, thereby giving the plaintiff a cause of action in warranty and thus allowing the decision in *Blessington* to remain undisturbed was rejected by the court. It was stated that such a rule would raise the anomaly of giving greater rights to the stranger than to the immediate purchaser. Where the purchaser's cause of action would lapse six years after sale, the third party could sue in warranty up to three years subsequent to the injury. The court noted that it would be impossible to remedy such a defect for to establish a three year statute of limitations for all personal injury actions, thereby overruling *Blessington*, would be contrary to the Legislature's intentions embodied in the Uniform Commmercial Code.[36] The dissent was not persuaded by this reasoning; it was noted that the U.C.C. was all but irrelevant for it reflects dated policies, even with its annual updating and review, in that tort cases have been decided on more modern theories as distinguished from those in sales law.[37] Moreover, the failure to establish a three year statute would

33. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).
34. 305 N.Y. 140, 111 N.E.2d 421 (1953).
35. *See* W. PROSSER, THE LAW OF TORTS § 97 (3d ed. 1964).
36. *See* U.C.C. § 2-725.
37. *E.g.*, doctrine of strict liability in tort, *see* Santor v. A. & M. Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965); Goldberg v. Kollsman Inst. Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); Greenman v. Yuba Power Prod., 59 Cal. 2d. 57, 27 Cal. Rptr.

result in barring such warranty actions before they had accrued; the injury may occur after the six year period had lapsed.

The majority further indicated that to establish a three year statute for all personal injury actions would enable a plaintiff whose action was covered by the U.C.C.[38] to choose either a three year period or a four year period in which to sue. The court opined that while strict liability in tort and implied warranty are different ways of describing the same cause of action, requiring the same elements of proof, it may be permissible to plead both as different theories of recovery but it would be absurd to have two different statutes of limitation applicable.

In holding that a breach of implied warranty is essentially a contract action, the court seems to have selected a rationale that may well serve as a stumbling block for future decisions in product liability litigation. Henceforth, personal injury actions resulting from defective products can be based either in negligence or breach of warranty, and while the instant case leaves the existing rule of negligence undisturbed, it serves to curtail warranty actions which may arise more than six years after the sale of the product. These actions will be barred by the statute of limitations for warranty before they accrue, relegating the plaintiff to proving negligence where none may have originally existed. The court justified this decision by stating the policy which presumes that injuries caused by a defective product many years after its manufacture and sale generally result from operation and maintenance. The court indicated its willingness to subscribe to this policy and presumption when it stated that it would rather sacrifice a small number of meritorious claims than open the floodgates to numerous unfounded suits.

Although the court chose to face the issue of implied warranty it should have avoided it by applying the three year statute of limitations which expressly covers actions for "personal injury."[39] Contrary to the assertion that such a rule would run counter to the U.C.C., some lower New York courts,[40] as well as courts in other jurisdictions governed by the U.C.C.[41] have held that the theory of pleading is indeterminative where the applicable statute of limitations covers the essential nature of the action. In failing to apply the clear meaning of the statute the court chose to rely on *Blessington* which, although bearing a marked similarity on its facts, was at least partially based

697, 377 P.2d 897 (1962); Wilsey v. Sam Maulkey Co., 56 Misc. 2d 480, 289 N.Y.S.2d 307 (Sup. Ct. 1968).

38. *E.g.*, U.C.C. § 2-318.

39. CPLR § 214(5).

40. *See, e.g.*, Webber v. Herkimer & M. St. & R. Co., 109 N.Y. 311, 16 N.E. 358 (1888); Drooby v. Collins, 281 A.D. 733, 117 N.Y.S.2d 905 (3d Dep't 1952); Buyer's v. Buffalo Paint & Specialties, 199 Misc. 764, 99 N.Y.S.2d 713 (Sup. Ct. 1950); *and especially* Wilsey v. Sam Maulkey Co., 56 Misc. 2d 480, 289 N.Y.S.2d 45 (1968) which not only allowed a cause of action in strict liability in tort, but also applied the three year statute of limitations from the date of injury.

41. *See* Annot., 1 A.L.R. 1313 (1919), 157 A.L.R. 763 (1945), 37 A.L.R.2d 703 (1954), 4 A.L.R.3d 821 §§ 3-5 & 7b (1965).

on a statute of limitations which expressly required the existence of negligence.[42] In the instant case, the statute speaks to "an action to recover damages for personal injury"[43] and specifies no theory of pleading. Thus, whether the action is in negligence or in warranty, it may be argued that such a characterization is indeterminative of the applicable limitation period.

Having embarked on a discussion of implied warranty without privity, the court certainly could have adopted the doctrine of strict liability in tort, for it did indicate that there was no real difference between the two concepts. The majority stated that the elements of proof were the same for both theories. Although this characterization may be interpreted as an equivocation of terms it is clear that the court was not willing to accept the doctrine of strict liability in tort now being adopted in many jurisdictions. The policy reasons given for the instant decision are quite different from those which underlie the strict liability doctrine. There the burden of loss due to personal injury is on the manufacturer who puts the product into the mainstream of consumer trade and is in better position than the injured individual to sustain financial loss.[44] This rationale may be far more attractive than that adopted here, which may limit more than just a small percentage of warranty claims. Although modern manufacturing methods are generally reliable, mass production's assembly line technique has produced products which do not always meet qualitative standards. It is not an uncommon practice for manufacturers to design products with "built-in obsolescence."[45] Yet, even though these practices increase the probability of injury to consumers, it appears that the policy espoused in the instant case at least implicitly approves of these practices. Even more important, the court establishes not a rebuttable presumption, but a conclusive presumption that such injury six years after sale is a result of operation and maintenance rather than defective manufacture or design. Thus, it may be argued that the court has clearly chosen a policy quite favorable to manufacturers in a time when consumer legislation of all sorts has been increasing.[46] It would thus appear that the court has chosen to protect those parties least in need of such aid at the expense of those who deserve protection the most.

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42. N.Y. Sess. Laws 1942, ch. 851; *see also* text accompanying note 14 *supra.*

43. W. PROSSER, *supra* note 5.

44. *See* policy reasons for decision in Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); Santor v. A. & M. Karagheusain, 44 N.J. 52, 207 A.2d 305 (1965); Rooney v. S. A. Healy, 20 N.Y.2d 42, 228 N.E.2d 338, 281 N.Y.S.2d 321 (1967).

45. R. NADER, UNSAFE AT ANY SPEED (1965).

46. As to warranties for fitness, *see* U.C.C. § 2-313, warranties for merchantability § 2-314, § 2-318, N.Y. PERS. PROP. LAW § 96 (McKinney 1962). As to sales contracts *see* Retail Installment Sales Act, N.Y. PERS. PROP. LAW, Art. 10 § 401 *et seq.*; Motor Vehicle Retail Installment Sales Act, N.Y. PERS. PROP. LAW § 301 *et seq.*