Buffalo Law Review

Volume 12 | Number 1 Article 21

10-1-1962

Contracts—Privity No Longer Required in Express Warranty Action

Gerald S. Lippes

PRIVITY NO LONGER REQUIRED IN EXPRESS WARRANTY ACTION

American Cyanamid Company manufactured a chemical resin, "Cyana," used to treat fabrics to arrest shrinkage due to washing. The product was promoted by extensive advertising aimed through trade journals at garment manufacturers, which appeal was tied in with newspaper ads prompting consumer acceptance of the product. The consumer was told to look for the "Cyana" label, which plainly stated that a garment treated with this resin would not shrink. American Cyanamid took the precaution of testing the processed fabric before allowing the "Cyana" labels to be distributed so many a yard with the fabric sold by various mills to the garment industry. Randy Knitwear purchased a substantial quantity of the treated fabric from one of American Cyanamid's customers. The goods made from the material shrunk. Randy brought suit directly against American Cyanamid alleging breach of an express warranty. The lower courts resisted the defendant's motion for summary judgment. On appeal of a certified question, *held,* affirmed, one judge concurring in a separate opinion. In fashioning a cause of action in warranty based solely upon the representations of the manufacturer in spite of the obvious lack of privity of contract, the Court offered this rationale: "The policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentations outweighs allegiance to an old and outmoded technical rule of law which, if observed, might be productive of great injustice."[1] Thus, where there is a clear affirmation, apparently even an implied affirmation, of the quality of a product given by a producer and directed toward a purchaser admittedly not in privity with the producer, on the strength of the affirmation alone the producer now stands liable for damage due to a failure of the product's stated quality. *Randy Knitwear v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

The decision is by no means the first to have allowed recovery in the absence of privity. On the theory that a pharmacist had been negligent in labeling a bottle of poison as something less than imminently dangerous, the Court of Appeals as early as 1852 allowed an injured consumer other than the immediate purchaser to recover.[2] Incidentally, it is worth remembering that warranty actions take their origin from tort law, and only after some decades did they become wedded to a contract theory and its attendant requirement of privity.[3] Under the negligence theory a distinct body of law developed which circumvented the bar created by privity in warranty actions. However, it was not until negligence was redefined to reach past the concept of imminently dangerous products to that class of products which, if negligently made, were likely to cause injury that the exception had wide impact.[4] This was the state

1. Randy Knitwear v. American Cyanamid Co., 11 N.Y.2d 5, 13, 181 N.E.2d 399, 402, 226 N.Y.S.2d 363, 368 (1962).
2. Thomas v. Winchester, 6 N.Y. 396 (1852).
3. Prosser, Torts § 83 (2d ed. 1955).
4. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

of the law when the Supreme Court of Washington dispensed with the privity requirement itself. That high court found that a windshield, arguably a product inviting injury if defective, which had been represented as shatterproof, induced reliance on the part of a subsequent purchaser, who was entitled to recover because of the extra-contractual representation.[5] Recently, our own state adopted in capsule a cause of action in warrant absent privity.[6] The case, however, concerned implied warranties as to the quality of food consumed by the members of the immediate purchaser's household. Although the case was not to be confused with other decisions based upon various theories supplying privity by such devices as deeming the immediate purchaser an agent for the ultimate user,[7] still on its face it dealt with food products. These occasions for injury have traditionally led developments in product liability and fall within a definable class. The case, too, dealt with recovery for personal injury.

In the instant case, liability was extended to include even the innocuous product. The shrunken garments here could at their lethal best only pinch the wallet of the user who believed in them. The inclusion of the innocuous product obliterates distinctions in recovery based upon product class. Allowing recovery for pecuniary injury completes the family of plaintiffs. Indeed it is only the rationale of the Court with its seeming insistence that advertising and marketing practices provided a particular atmosphere in which the privity requirement might justly be relaxed, that would seem to act as a limit on the doctrine of the case. Instead, it is perhaps more correct to regard this rationale as a vehicle promising further extension of the doctrine. It is clear that in the words of the label the Court found ample express warranty of the product. At the same time the Court speaks of the reliance created by advertising. If advertising is the rationale prompting liability, then surely it is the most direct vehicle to that conclusion.

Extension of the doctrine is implicit in the theory of recovery which in effect the Court accepted. It is a theory resembling strict liability. There is no need to prove any negligence on the part of the manufacturer, merely his perhaps-careless representation and its broken promise. Aside from the proffered rationale of the case, which must be taken, in so far as it is applicable, to mean that a finding of liability accords with the practices of today's market place,[8] there are a number of reasons recommending the decision. It sheds the weaknesses of the earlier negligence theory by removing the middleman who usually is not at fault in the preparation of the product but who acts as fortuitous insulation for the fault of the manufacturer. It overcomes the

5. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).
6. Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1959).
7. Ryan v. Progressive Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).
8. See discussion by Hohmann, Effect of Advertising on Manufacturers' Liability to Ultimate Purchaser, 42 Marq. L. Rev. 521 (1959).

difficulty of proving negligence,[9] which in the course of the manufacturing and distributing process becomes a readily obscured happening, too much so for the res ipsa loquitur doctrine. Placing the burden on the manufacturer centers distribution of the cost of such protection. Thus, it may be readily insured against and spread in small doses by price increases. At the very heart of the decision is the simple justice of recompensing the altogether blameless but injured plaintiff. What remains now is for the courts to fill out this new theory of recovery. Apparently, liability absent privity will be found in implied warranty situations. The definition to be sought is the definition of what constitutes a warranty. In express warranty actions it is the issue as now formulated of "whether or not the manufacturer induced the sale of his goods by *direct* representations of quality which were not true, and the purchaser relied on such representations to his damage."[10]

G. S. L.

PURCHASE OPTION CLAUSE NONCONTINUANCE IN LEASE EXTENSION AGREEMENTS

This is an action by lessee seeking to exercise a purchase option clause in his original lease dating back to 1939. Considering the question of whether or not a purchase option clause in a lease which could be exercised "at any time during the term of the lease" became part of twenty-two successive extension agreements entered into after the expiration of the original term, the court of original jurisdiction granted summary judgment dismissing the complaint. The intermediate court affirmed. The Court of Appeals considered the additional fact that other provisions of the lease were specifically to be extended, while the purchase option clause was not, and each separate extension was entered into by a writing subsequent to the termination of the previous tenancy. Each extension agreement extended the lease "under the terms set forth herein." On appeal, *held,* affirmed:

> When . . . the option to purchase was exercised during a term extended by a series of new extension agreements separate from the original amended lease and options to renew contained therein, "the option is extended if the agreement refers to and continues the original lease, but the option is not extended if the agreement merely continues the tenancy, even though upon the terms fixed by the original lease." [Citation omitted.]

---

9. A number of objects have not been regarded as dangerous even though negligently made: Boyd v. American Can Co., 249 App. Div. 644, 291 N.Y. Supp. 205 (2d Dep't 1936), aff'd, 274 N.Y. 526, 10 N.E.2d 532 (1937) (can with opener key); Liedeker v. Sears & Roebuck Co., 249 App. Div. 835, 292 N.Y. Supp. 541 (2d Dep't 1937); Jaroniec v. C. O. Hasselbarth Inc., 223 App. Div. 182, 228 N.Y. Supp. 302 (3d Dep't 1928) (bed); Timpson v. Marshall, Meadows & Stewart, Inc., 198 Misc. 1034, 101 N.Y.S.2d 583 (Sup. Ct. 1950) (shoes); Block v. Liggett & Meyers Tobacco Co., 162 Misc. 325, 296 N.Y.S. 922 (Sup. Ct. 1937) (cigarettes); Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960).

10. Skeel, Product Warranty Liability, 6 Cleve.-Mar. L. Rev. 94 (1957).