Buffalo Law Review

Volume 11 | Number 1 Article 103

10-1-1961

Torts—Attack on Manufacturer's Product May Impugn His Integrity and Be Actionable Without Proof of Special Damages

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precisely with canned salmon only) to include "food and household goods." The product class may predictably grow to include even items of clothing.[46] Professor Prosser has said in this regard, "It is not difficult to predict a process of development similar to that of the maker's liability in negligence, which will extend first to products involving a high degree of risk, and perhaps eventually to anything which may be expected to do harm if defective."[47] The fruition of this now famous prediction appears to be more than a possibility in our courts after this decision.

Not only does the Court's holding seem to embrace an extensive number of new claimants and fresh products, but it also announces a clean break with the privity rule. The opinion is quite frank about the "nonprivity" of the infant claimant. No attempt is made to guise the holding in the agency doctrine or the third-party beneficiary doctrine. The Court speaks in terms of "change" in the privity rule, itself, and inquires into the origin of the rule in justifying such change. Simply stated, the Court holds that privity is no longer a prerequisite in certain warranty actions. Thus, the privity rule seems to have given way at least in a limited area to a more realistic approach to warranty claims.

The only noticeable pause the Court takes in coming to its decision is the short time given to resolving the propriety of judicial change in the rule as opposed to legislative change. The Court argues that the privity rule is in its origin merely a rule of judicial making, and, moreover, that no insistence on the rule can be found in the statutes. Justice Froessel in a separate concurring opinion, while acknowledging the correctness of the present change, expressed doubt as to the propriety of future judicial change. He points to the inequity of holding a retailer liable where there is no fault on his part for the injurious character of the packaged food he sells. The plight of the retailer, he believes, approximates the unjust situation that the nonpurchaser claimant has been placed in by the privity rule. He urges that the dilemma of choosing between the innocent retailer and the misfortunate nonpurchaser claimant be left to legislative investigation and determination.[48]

The importance of the present case is that it discernibly stands for the first clean, if limited, break with the privity rule in warranty actions and foretells of the further dispensation of the rule in an increasing number of cases.

D. P. S.

ATTACK ON MANUFACTURER'S PRODUCT MAY IMPUGN HIS INTEGRITY AND BE ACTIONABLE WITHOUT PROOF OF SPECIAL DAMAGES

In *Harwood Pharmacal Co. v. National Broadcasting Co.*,[49] plaintiff

46. Blessington v. McCrory Stores Corp., supra note 42.
47. Prosser, Torts 510 (2d ed. 1955).
48. For a discussion of the propriety of judicial change in the privity rule in New York see Note, 8 Buffalo L. Rev. 290 (1959).
49. 9 N.Y.2d 460, 214 N.Y.S.2d 725 (1961).

charged defendants with libel, alleging that on a 1957 television program, the Jack Paar Show, one of the defendants displayed to the audience a box reputed to be plaintiff's product, "Snooze," and stated: " 'Snooze,' the new aid for sleep. 'Snooze' is full of all kinds of habit-forming drugs. Nothing short of a hospital cure will make you stop taking 'Snooze.' You'll feel like a run-down dog and lose weight." The complaint branded these words false and uttered with the malicious intent of injuring and ridiculing plaintiff and its product, but no special damages were pleaded.

The trial court denied defendant's motion to dismiss the complaint for insufficiency. The Appellate Division affirmed,[50] but granted leave to appeal to the Court of Appeals in view of the *Drug Research Corp. v. Curtis Publishing Co.* case,[51] a recent decision on which both parties apparently relied. In affirming the lower courts, the Court of Appeals held that the language, when reasonably read, could be held by a jury to impugn the plaintiff as well as its product and thusly be treated as libelous per se, so injurious to the manufacturer's reputation, credit, and integrity that no special damages need be shown.

Libel per se, defamation actionable without proof of special damages, whether defamatory of a particular person on its face or so by extrinsic facts,[52] generally is classified into four subject categories: imputations of crime, loathsome disease, unchastity, and injury to business, trade, or profession.[53] The last of these poses a problem, for it is not easy to distinguish between defamation of a manufactured product itself and its manufacturer or seller. New York case law, as early as 1830,[54] has held that words spoken not of the manufacturer but of the quality of the articles it deals in must reflect on the character of the manufacturer and must impeach his integrity or business methods in order to be actionable *per se* without proof of special damages.[55] The intendment of such words is that the manufacturer is guilty of fraud and unethical practices and that the public is being duped into buying worthless merchandise.[56] Such is the test, but the court, in considering the complaint, has to allow for individual freedom of evaluation, personal judgment and comparison.[57] Where such an

50. 10 A.D.2d 607, 197 N.Y.S.2d 413 (1st Dep't 1960).
51. 7 N.Y.2d 435, 199 N.Y.S.2d 33 (1960). See also 10 Buffalo L. Rev. 83 (1960).
52. A publication may be defamatory on its face or by reason of extrinsic circumstances. Even if extrinsic facts are pleaded, a statement may be libelous without pleading special damages. Sydney v. MacFadden Newspaper Pub. Co., 242 N.Y. 208, 151 N.E. 209 (1926). Cf. O'Connell v. Press Pub. Co., 214 N.Y. 352, 108 N.E. 556 (1915), criticized as a "judicial error" in Seelman, Libel and Slander in New York 64-65 (1941).
53. Prosser, Torts 588-593 (2d ed. 1955).
54. Tobias v. Harland, 4 Wend. 537 (1830).
55. First Nat. Bank of Waverly v. Winters, 225 N.Y. 47, 121 N.E. 459 (1918); Larsen v. Brooklyn Daily Eagle, 165 App. Div. 4, 150 N.Y. Supp. 464 (2d Dep't 1914), aff'd, 214 N.Y. 713, 108 N.E. 1098 (1915); Golden Buddha v. N.Y. Times Co., 182 Misc. 579, 45 N.Y.S.2d 433 (Sup. Ct. 1944), aff'd, 267 App. Div. 903, 48 N.Y.S.2d 327 (1st Dep't 1944).
56. Tex Smith, the Harmonica Man Inc. v. Godfrey, 198 Misc. 1006, 102 N.Y.S.2d 251 (Sup. Ct. 1951) (Slander).
57. See Tobias v. Harland, supra note 54 at 541.

imputation of fraud is lacking, a mere disparagement of goods or trade libel results, necessitating a pleading of special damages for a good cause of action.[58]

The law is clear on the matter, but specific fact situations in different cases have resulted in opposite results, as in the case at bar, where the facts stated a cause of action, and the *Drug Research*[59] case, where the complaint was insufficient. However, in the latter decision, the majority and dissent, in examining the complaint, differed as to the reasonable susceptibility of the meaning of the purported libelous magazine article. On its face, the article referred to a product and to the misleading advertising practices of its distributor, not to the manufacturer. In dismissing the action, the majority felt that a fair reading of the entire article indicated, as a matter of law, no defamation of the business methods of the plaintiff manufacturer.

As in the *Drug Research* case, the plaintiff in the *Harwood* case was not specifically mentioned in the defamatory language. Although, traditionally the plaintiff had the burden of pleading in the colloquium extrinsic facts to show that the language referred to him, the complaint is satisfied by a mere averment that it was said of and concerning him.[60] The absence of a reference to the plaintiff merely gave rise to an ambiguity, which the Court held, as a matter of law, could convey a defamation of the plaintiff.[61] Whether it in fact did was properly for the jury to decide.

Thus, an assault on a product is not necessarily a libel on those who manufacture it, although it may be depending on the fair and reasonable import of the defamatory language used.

E. J. S.

BLASTER'S LIABILITY FOR CONCUSSION DAMAGES

The majority of the states today impose absolute liability for damage occasioned by the use of explosives,[62] the doctrine having its foundation in the now classic English case of *Rylands v. Fletcher*,[63] which imposed absolute liability upon one who engages in a "non-natural activity" on his land. However, a minority, which includes New York,[64] still distinguishes between damage resulting from physical trespass on the land, for which liability without fault is imposed, and concussion damage, wherein the negligence of the blaster must be pleaded and proven.[65]

Historically, the distinction arises from common law forms of pleading

58. See Marlin Fire Arms v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902).
59. Supra note 51.
60. N.Y. Rules Civ. Prac., Rule 96.
61. See First Nat. Bank of Waverly v. Winters, supra note 55 at 50, 121 N.E. at 460.
62. For a complete analysis of the jurisdictions following the majority and minority rules see Annot., 20 A.L.R.2d 1372 (1951).
63. L.R. 3 H.L. 330 (1868).
64. Holland House Co. v. Baird, 169 N.Y. 136, 62 N.E. 149 (1901).
65. It should be noted that the New York rule is somewhat mitigated by the doctrine of nuisance in a case where the concussion damage is recurrent and prolonged. Here negligence need not be shown and due care and lawfulness of the operations generally are not defenses. See 1 N.Y. Jur. "Adjoining Landowners" § 12 (1958).