Buffalo Law Review

Volume 8 | Number 2 Article 10

1-1-1959

Warranty, Privity, and the Judicial Process

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Warranty, Privity, and the Judicial Process

In a recent action for negligence and breach of warranty in the sale of a can of jam allegedly containing an unwholesome substance, the Municipal Court of the City of New York held that an infant was entitled to recover for breach of warranty notwithstanding the fact that the mother was the purchaser and there was no privity of contract between the infant and the retailer or disclosure by the mother that she was making the purchase for the benefit of her children.[1]

This case is especially noteworthy in that it represents one of the most vigorous and comprehensive attacks upon the privity requirement in this state in such warranty actions. In the New York Court of Appeals, it has been apparently settled that the manufacturer or seller is not liable to third parties on an implied warranty, absent a contractual relation.[2] Nor does the warranty protection extend to an injured member of the buyer's family,[3] unless the buyer can be shown to be an agent for the injured person.[4] However, there has been action within the lower New York courts which indicates a growing dissatisfaction with what is termed an outmoded doctrine.[5] The majority of these cases have not been taken up on appeal and hence a state of uncertainty and confusion exists within the state regarding the privity problem.

The common law evolvement of the warranty action grounded buyer relief initially upon an express warranty of fitness by the seller concerning the goods as well as the seller's deceit.[6] This early liability was extended by judicial decision to impose upon all retail food vendors an implied warranty concerning the fitness of their products for consumption,[7] where formerly it was thought to extend only to manufacturers and growers of food.[8]

The Uniform Sales Act (enacted in New York in 1911)[9] was thought to have modified the law of implied warranty, extending liability to any seller. However, with this extension of liability, a restriction was introduced in the form of a requirement of reliance by the buyer on the seller's skill and judgment and a declaration of the purpose for which the article was purchased. This has presented no problem regarding food sales, since the mere purchase of food makes

1. Parrish v. Great Atlantic and Pacific Tea Co., 13 Misc.2d 33, 177 N.Y.S.2d 7 (N.Y.Mun.Ct. 1958).
2. Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923).
3. Redmond v. Borden's Farm Products, 245 N.Y. 512, 157 N.E. 838 (1927).
4. Ryan v. Progressive Stores, Inc., 255 N.Y. 388, 175 N.E. 423 (1931).
5. Welch v. Schiebelhuth, 11 Misc.2d 312, 169 N.Y.S.2d 309 (Sup.Ct. 1957); Greenberg v. Lorenz, 12 Misc.2d 883, 178 N.Y.S.2d 407 (Sup.Ct. 1958).
6. Seixas v. Woods, 2 Cai. 48 (N.Y. 1804).
7. Race v. Krum, 222 N.Y. 410, 118 N.E. 853 (1918).
8. Hoe v. Sanborn, 21 N.Y. 552 (1860).
9. N.Y. PERS. PROP. LAW, §§96, 150.

known by implication the purpose of the purchase,[10] and also has been held conclusive evidence of reliance upon the vendor's skill and judgment.[11]

There have been contentions made that the Uniform Sales Act, as adopted in New York, has further extended the common law warranty liability to the non-buyer consumer. In support of this contention it is pointed out that states having a statute identical to that in New York have construed the liability to extend to the ultimate purchaser or consumer.[12]

Where, as in New York, the strict privity concept has been retained, the courts have been occupied with avoiding the harsh application of the doctrine. The New York courts have granted recovery in the absence of strict privity with the aid of presumptions, such as that the wife as a purchaser is the agent of the husband in the discharge of his legal obligation to provide food for the family.[13] The husband who is injured thus has been allowed to recover. In instances where the wife, as purchaser, is injured, the situation becomes complicated by the agency presumption, and recovery on her behalf has been disallowed in some cases.[14] However, *Gimenez v. Great Atlantic and Pacific Tea Co.*[15] classified the injured wife as presumptively the purchaser and disallowed the husband's claim for loss of service. It is interesting to note that in this case the wife's action for her injury was allowed, but the agency concept was not deemed to vest any cause of action in the husband. This suggests that the only situation in which the agency theory will prevail is when the husband is suing for his injuries, and it can be shown that the wife as purchaser was acting as his agent.[16]

Another approach attempting to skirt the privity problem has been the use of the third party beneficiary doctrine.[17] The use of this concept attempts to show that the purchase was made for the benefit of the non-buyer consumer, thereby obtaining the requisite privity. This theory has received support in other jurisdictions,[18] but in New York its applicability has not been clearly defined.

10. Rinaldi v. Mohican Co., 225 N.Y. 70, 121 N.E. 471 (1918).
11. Greco v. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938).
12. Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 962 (1941), regarding §1735 WEST'S ANNO. CIVIL CODE.
13. Singer v. Zabelin, —Misc.—, 24 N.Y.S.2d 962 (City Ct. of N.Y. 1941); Ryan v. Progressive Stores, Inc., *supra* note 4.
14. Vaccaro v. Prudential Condensed Milk Co., 133 Misc. 556, 232 N.Y.Supp. 299 (City Ct. of N.Y. 1927).
15. 264 N.Y. 390, 191 N.E. 27 (1934).
16. See also *Bowman v. Great Atlantic and Pacific Tea Co.*, 284 A.D.2d 663, 133 N.Y.S.2d 904 (4th Dep't 1954), *aff'd without opinion*, 308 N.Y. 780, 125 N.E.2d 165 (1955), in which the court employed a "household fund" theory to raise an agency allowing recovery to plaintiff although goods were purchased by her sister.
17. Singer v. Zabelin, *supra* note 13.
18. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Klein v. Duchess Sandwich Co., *supra* note 12.

The Court, in the instant case, indicated that the only impediment to the application of the doctrine has been the use, for authority, of some questionable language in the *Gimenez* case.[19] The Court stated that in that case it was admitted that a third party beneficiary doctrine may be invoked, but that the courts had not gone so far as to allow it. This, the Court submits, should not continue to act as an authority to deter the application of a new doctrine that is dictated by strong public policy considerations.

As a further buttress to this contention, mention is made of *Blessington v. McCrory Store Corp.*,[20] which allowed the plaintiff father, suing as the administrator of his infant son who had died from burns, to maintain a suit against the defendant retailer under the breach of warranty statute of limitations. The Court felt that since the warranty action was allowed to stand it was reasonable to conclude that the infant obtained a warranty right when the article was purchased for his benefit. However, the emphasis placed upon this case does not appear to be merited since the decision was upon a statute of limitations question and the warranty claim was not heard on the merits.

It is sufficient to note, however, absent any clear pronouncement by the Court of Appeals regarding the third party beneficiary doctrine, that the existence of decisions attempting to apply such a theory, coupled with the existence of the agency concept, are indicative that the traditional privity requirement stands now on questionable authoritative basis. The warranty doctrine historically is a duty imposed by law regarding transactions arising contractually. It has its roots in strong public health factors dictating that food thus sold should be of a wholesome quality fit for human consumption. Thus the imposition of the duty itself is grounded upon considerations of human safety. The retailer necessarily must realize that food when purchased is to be consumed by someone. Should then the duty thus imposed be any less when the same food which would allow a cause of action in the buyer, should it be tainted, injures a person who is a non-buyer? It is this element of duty which is felt to furnish strong grounds for extending implied warranties to third person consumers in the absence of privity.[21] To so extend the liability would make the duty placed upon the retainer analogous to that imposed upon the manufacturer in *MacPherson v. Buick*[22] which extended negligence liability to third persons regardless of immediate contact with the ultimate consumer.

The general state of confusion in the field of warranty liability presents

19. *Supra* note 15 at 395, 191 N.E. at 29: "The courts have never gone so far as to recognize warranties for the benefit of third persons."
20. 305 N.Y. 140, 111 N.E.2d 421 (1953).
21. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1942).
22. 217 N.Y. 382, 111 N.E. 1050 (1916).

another interesting aspect of this decision—legislative change versus judicial interpretation. In this context it is interesting to note that a 1943 Law Revision Commission recommendation proposing legislative amendment of section 96(1) of the Personal Property Law[23] to extend warranty protection to ultimate consumers, was not acted upon by the legislature. There are various possible inferences which can be reasonably drawn from such refusal: that inaction was due to oversight through political expedience; that the legislature did not wish to extend recovery beyond that provided by section 96; or that the legislature was willing to leave the matter to the courts.

Since the Court in the instant case is in essence formulating a new rule of law by judicial interpretation, it may be worthwhile briefly to examine the place of the judiciary in shaping new law. The interrelation between statute and decision is often close, and in the judicial process, the formulation of new law is essentially an extra-legislational process.[24]

There are areas in which judicial lawmaking is not only allowed, but frequently expressly desired by the legislature. In the area of closely drawn statutes the legislature curbs judicial creativity by leaving little area to the courts through an interpretive process. However, where the statute is general rather than specific, it is within the province of the court to construe and apply the statutory scheme to a given factual situation, and it is frequently the desire of the legislature that they do just this. In so doing, the judiciary is actively exercising a lawmaking function. In the field of closely drawn statutes covering a given factual situation, the courts may, reasoning by analogy, allow recovery in slightly different circumstances. It is conceivable that within this ambit would come the New York courts' creation of the agency and third party beneficiary concepts regarding privity. A third judicial process regarding statutory interpretation manifests itself when a statute is ambiguous although very possibly quite specific. In resolving this ambiguity the courts exercise a legitimate, if not invaluable, function.

It is conceivable under a dual system of statutory and common law that a rule may be judicially evolved when a case at bar cannot be answered by reference to statutory remedies or to common law. It is here, Lenhoff suggests, that the courts have the power to fill the gaps without waiting for the legislature to act. This power, however, is subject to the limitations of precedent cases which may induce or deter a court from creating a new policy. In the instant case the grounds for the decision are not readily apparent. The Court appears

23. Section 96(1) is taken from section 15(1) of the Uniform Sales Act.

24. The role of judicial creativity and innovation in the molding of new legal concepts has been infrequently discussed by legal theorists. Perhaps most prominent in this field is the jurisprudential analysis of Dr. Arthur Lenhoff in 28 Nebraska Law Review 542 (1949).

willing to reason by analogy in its advocacy of the third party beneficiary doctrine, but the whole tenor of the opinion suggests the Court is proceeding under the last mentioned analysis. It is faced with a situation which is not covered directly by the statute and would not be maintainable at common law and hence both statute and common law are evaluated. The fact that the Court does attempt to create a third party beneficiary, however, seems to indicate that the statute as it stands is still limited in scope. Thus, the Court exercises a process of judicial evaluation of prior decisions in the common law tradition.

Theoretically, in a given factual situation, the courts are precluded from judicial manipulations by predetermined judicial decisions. However, factual situations are rarely identical and subjectivity, tempered by considerations of judicial and public policy, may lead a court to adhere to precedent on one hand or distinguish on the other. There are times when the exigencies of the situation will lead the court to re-examine the validity of prior distinctions and question them in the light of further experience. This, it appears, is the evaluating process the Court has used in this case in finding the precedent cases, in the light of resulting experience, resulting in manifest injustice by their insistence on a rule which at best has tenuous foundations in logic.

It is submitted that the inaction of the legislature regarding the proposed statutory amendment is of little significance. The statutory remedy as it stood was insufficient in this instance, not because of legislative inaction, but because of court-made precedents. It is a legitimate function of the courts to re-evaluate these precedents and extend the statutory remedy by analogy when the purchase is made for the benefit of another.

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Newspaper Reporter's Confidential Sources of Information—Are They Constitutionally Protected?

Judy Garland commenced a libel suit against the Columbia Broadcasting System, Inc. based upon statements made in Maria Torre's newspaper column allegedly based upon information from a C.B.S. executive. The plaintiff's counsel took Miss Torre's deposition[1] in which she admitted that the statements in her column were based upon information given her by a C.B.S. "network executive," but refused to disclose the identity of her informant. The case of *Garland v. Torre*[2] affirmed Torre's contempt conviction for her refusal to disclose her "confidential" news source.

1. See FED. R. CIV. P. 26(b).
2. 259 F.2d 545 (2d Cir. 1958).