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Torts--Absence o Privacy on Implied Warranty of Fitness

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Today's proliferation of paper work, together with the growing size and complexity of government at all levels—local, state and national—will tend to place increasing pressure on courts and legislatures to adequately define which records are to be public, and who may have access to them. In determining the answers to these questions, it will be necessary to balance the interest of the public at large in having complete freedom of access to all of the records of government against the factors which weigh against permitting inspection. Among the factors weighing against inspection are the right of privacy of the individual in the conduct of his personal affairs, the necessity of withholding state secrets from potential enemies and the possible disruption and loss of governmental efficiency through making the records available to the public. It is hoped that those whose job it is to weigh and decide these questions will constantly recognize how vital the openness of public affairs is to the proper functioning of a democratic society. Only when the most compelling reasons dictate should the public be denied the right of free access to government records.

Raymond Albert Hinerman

Torts—Absence of Privity on Implied Warranty of Fitness

The administrator of a deceased truck driver brought action against the designer and manufacturer of a truck tire which allegedly had blown out resulting in the death of the truck driver. Damages were sought on two counts. One count was for wrongful death allegedly caused by the negligent manufacture and design of the tire, and the other was for breach of implied warranty of fitness. There was no privity of contract between the deceased and the defendants. The trial court dismissed the count based on breach of implied warranty, and a judgment was entered for defendants on the negligence count. Held, negligence count affirmed and implied warranty count reversed. The court said that neither negligence nor privity of contract is required in Indiana in an action for breach of implied warranty. This new concept of warranty bases liability on strict liability in tort. *Dagley v. Armstrong Rubber Co.* 344 F.2d 245, (7th Cir. 1965).

The principal case is indicative of a type of warranty which is different from those usually found in the sale of goods. The

principle followed in this case is not to be confused with that of the leading case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). The suit in the *MacPherson* case was based on a theory of negligence, while the action in the principal case was on implied warranty without privity of contract.

Most states still follow the view that a suit for damages resulting from defective goods must be based on negligence or privity of contract, and the general proposition is that the warranty extends only to parties to the contract. *Racklin v. Libby-Owens Ford Glass Co.*, 96 F.2d 597 (2d Cir. 1938), *Hieronymous Motor Co. v. Smith*, 241 Ky. 209, 43 S.W.2d 668 (1931); *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 139 N.E. 576 (1923).

Only about a third of the states have extended strict liability to the consumer, and thus far this extension has been limited to cases concerning defective food. A few recent cases have extended the manufacturer's strict liability without privity beyond food: *Spencer v. Three Builders & Masonry Supply, Inc.*, 353 Mich. 120, N.W.2d 873 (1958), (defective building blocks resulted in damages when used); *Morrow v. Caloric Appliance Corp.* 372 S.W.2d 41 (1963), (explosion of a gas stove); *Chapman v. Brown* 198 F. Supp. 78 (D. Hawaii, 1961), (igniting of hula skirt); *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476, 164 A.2d 773 (1960), (defective steering of car resulted in wreck); *Thompson v. Redman* 199 F. Supp. 120 (E.D. Penn. 1961), (accelerator pedal of automobile stuck causing collision); *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Indiana 1965), (defective forklift truck resulting in injuries to operator).

For those states that have adopted the UNIFORM COMMERCIAL CODE, section 2-318 has extended the range of warranty protection by including members of the family and household of the immediate purchaser and his guests. However, its provisions are far from reaching the results of the *Dagley* case.

In reaching its decision, the court in the principal case relied heavily upon a 1964 revision of the Restatement of Torts which departs from the Restatement's original position and now recognizes the concept of strict liability.

> § 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer (1) One who sells any product

> in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

This section is not limited to food or other goods for intimate bodily use. Its coverage extends to any product which is in a condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him. It applied to any person engaged in the business of selling products for use or consumption. Thus, it applies to any manufacturer, to any wholesale or retail dealer or distributer and to the restaurant operator. One need not be solely engaged in the business of selling such products for the section to apply.

As the liability of this strict liability concept is not based upon negligence of the seller, then contributory negligence of the plaintiff such as failing to discover the defect does not constitute a defense. However, the user or consumer is barred from recovery if he has discovered the defect and then has proceeded to make use of the product. In allowing recovery under the rules of the Restatement section the courts have only extended it to the user or consumer and have not included the bystanders and passers-by.

The concept of strict liability makes the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The justification for strict liability is that the public has the right to expect sellers to stand behind their goods. Public policy demands that the damages of accidental injuries caused by products intended for consumption fall upon the producer, and that these costs be treated as a cost of production. The policy of strict liability might provide a healthy and highly desirable incentive for producers to make their products safe. 24 Tenn. L. Rev. 938 (1957).

The strict liability rule was first extended to products involving a high degree of risk. *Klein v. Duchess Sandwich Co.*, 14 Cal.2d 272, 93 P.2d 799 (1939); *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So.2d 313 (1944); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 472, 161 N.E. 557 (1928); *Griffin v. Ashbury*, 196 Okla. 484, 165 P.2d 822 (1945); *Bilk v. Abbotts Dairies, Inc.*, 147 Pa. Super. 39, 23 A.2d 342 (1941). Now it seems that the courts may be arriving at a strict liability rule for all products which might be expected to do harm if defective.

West Virginia has in the past recognized implied warranties. 63 W. VA. L. REV. 326 (1961). In *Schaffer v. National Supply Co.*, 80 W. Va. 111, 92 S.E. 580 (1917), the court recognized an implied warranty to articles other than foodstuffs where the purchaser had disclosed the purpose for which the goods were desired and had relied upon the seller's skill and judgment. In *Pennington v. Cranberry*, 117 W. Va. 680, 185 S.E. 610 (1936), the court held that in absence of statute, the retailer does not impliedly warrant to the consumer the contents of a sealed package of food, but only warrants that he has purchased from a reliable manufacturer and that there is no apparent defect. Three years later in 1939, the West Virginia Supreme Court held that where food is purchased from a retail dealer for immediate consumption, there is generally an implied warranty that the article sold is fit for human consumption. *Burgess v. Sanitary Meat Mkt.*, 121 W. Va. 605, 5 S.E.2d 785 (1939). However, the court said by dicta that a food seller's warranty inured only to the benefit of the purchaser. Since this case was decided, West Virginia has adopted the Uniform Commercial Code which has extended the seller's warranty to any natural person who is in the family or household of the buyer or who is a guest in the buyer's home, and it seems reasonable that he may use or consume the goods. The effect of the dicta in the *Burgess* case was to say that to recover on an implied warranty it was necessary to have privity. However, a federal case applying West Virginia law implied that absence of privity is no bar to an action on warranty. *Kyle v. Swift & Co.* 229 F.2d 887 (4th Cir. 1956). The court in the *Kyle* case said whether the liability of the manufacturer be held to rest upon implied contract or negligence in manufacture, ". . . [t]he evidence before us was sufficient to take the case to the jury as against the manufacturer as well as against the retail dealer."

Thus, the issue as to whether privity is necessary in West Virginia for a suit on implied warranty is torn between dicta of the 1939 *Burgess* case and the 1956 federal case. It appears that the West Virginia position in regard to the privity question at issue in the principal case remains to be sufficiently answered in future litigation.

John I. Rogers, II

Torts—The Fall of the Charitable Immunity Doctrine

P, a patient in D hospital, fell against a hot radiator while being given a bath by a hospital orderly. *P's* action to recover damages for personal injuries was based on the alleged negligence of the orderly in failing to remove *P* from his peril. *P* also alleged negligence of *D* in the hiring and retention of the orderly. The trial court, relying on the doctrine of charitable immunity, entered summary judgment for *D*. *Held*, reversed. The court departed from stare decisis on the ground that charitable hospitals are no longer essentially charitable within the classical definition of the word. Today they are managed like business corporations and should be responsible for the torts of their servants while in the scope of their employment. *Adkins v. Saint Francis Hosp.*, 143 S.E.2d 154 (W. Va. 1965).

English courts introduced the doctrine of charitable immunity in *Duncan v. Findlater*, 7 Cl .& F. 894, 7 Eng. Rep. 934 (H.L. 1839), and *Feofees of Heriots Hosp. v. Ross*, 12 Cl. & F. 507, 8 Eng. Rep. 1508 (H.L. 1846). It was later repudiated in *Mersey Docks Trustees v. Gibbs*, L.R. 1 H.L. 93 (1866). Maryland and Massachusetts adopted the rule after it had been repudiated by English courts. *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495 (1885); *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432, 21 Am. Rep. 529 (1876).

Most state courts applied the doctrine in early decisions. Through the years many exceptions to the doctrine have been developed, but to delineate each would be impractical. In 1940, Oklahoma became one of the first states to abolish the charitable immunity doctrine. *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244 (1940). In the principal case Judge Caplan cited a leading case in this area, *President & Directors of Georgetown College v.*