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Products Liability - Breach of Warranty - Danger Invites Rescue. Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969)

William M. Musser III

> youth is stigmatized as a "criminal" because he has been found to be a delinquent, or (3) burden the juvenile courts with a procedural requirement which will make juvenile adjudications significantly more time consuming or rigid.[17]

The cautious manner in which the Court is proceeding into the area of juvenile rights at hearings indicates that it recognizes the beneficial aspects of the present juvenile court system as well as its need for improvement. The Court seems determined to preserve those aspects of the juvenile hearing which it considers necessary for rehabilitation while at the same time providing the safeguards of criminal procedure which it considers essential to due process.

DENNIS L. BECK

Products Liability—BREACH OF WARRANTY—DANGER INVITES RESCUE. *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969).

Plaintiffs in this case were employees, and the survivors of employees of the New York City Bureau of Sewage Disposal who had been injured or killed in an unsuccessful attempt to rescue John J. Rooney[1] from a sewer tunnel filled with lethal hydrogen sulfide gas. Rooney was suffocating and in need of aid because of a defect in the gas mask he was wearing in the tunnel.[2] The mask had been manufactured by the defendant.

The rescuers or their survivors sought damages for wrongful death and personal injuries. The trial court found the manufacturer liable; the Appellate Division[3] and Court of Appeals of New York affirmed.[4] The Court of Appeals held the manufacturer liable to the rescuers under

17. 90 S. Ct. at 1078.

1. Rooney's estate recovered in a previous action for wrongful death. Rooney v. S. A. Healy Co., 20 N.Y.2d 42, 228 N.E.2d 383, 281 N.Y.S.2d 321 (1967).

2. Rooney was wearing a used mask. *Id.* at 46, 228 N.E.2d at 386, 281 N.Y.S.2d at 325. *See* Kaufman v. Katz, 356 Mich. 354, 97 N.W.2d 56 (1959); UNIFORM COMMERCIAL CODE § 2-314, Comment 3. *Contra*, Holley v. Central Auto Parts, 347 S.W.2d 341 (Tex. Civ. App. 1961) (the court held that the doctrine of implied warranty does not extend to used goods).

3. Guarino v. Mine Safety Appliances Co., 31 App. Div. 2d 255, 297 N.Y.S.2d 639 (1969).

4. Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969) (the actions of all the rescuers were consolidated).

the "danger invites rescue" doctrine[5] because the danger which resulted in the injuries and deaths was created by the defendant's breach of warranty.[6]

Historically, liability for breach of warranty required privity of contract.[7] This requirement, however, is being abolished by an increasing number of courts. In the leading case of *Henningsen v. Bloomfield Motors, Inc.*,[8] the New Jersey Supreme Court found the manufacturer of a new car liable for personal injuries to the wife of the purchaser sustained as a result of a defective steering mechanism. The court held that regardless of privity, an implied warranty of merchantability from the manufacturer and dealer extended to the purchaser, members of his family, other persons occupying the car, and users.[9] After *Henningsen*, the privity requirements for breach of warranty actions were eliminated in a number of states.[10] The manufacturer's liability was extended to purchasers and users on the basis of breach of implied warranty, liability in tort,[11] or a combination of the two.[12]

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5. The "danger invites rescue" doctrine permits an injured rescuer to recover damages when, as a result of defendant's negligence, an emergency situation was created which imperiled his life or the lives of others. The doctrine allows a rescuer to recover regardless of contributory negligence, as long as he did not act in a reckless manner. "Danger invites rescue. The cry of distress is the summons to relief. . . . The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer." Wagner v. International Ry., 232 N.Y. 176, 180, 133 N.E. 437 (1921). *See* Eckert v. Long Island R.R., 43 N.Y. 502 (1871).

6. 25 N.Y.2d at 465, 255 N.E.2d at 176, 306 N.Y.S.2d at 945-46.

7. *See, e.g.*, Bourcheix v. Willow Brook Dairy, 268 N.Y. 1, 196 N.E. 617 (1935).

8. 32 N.J. 358, 161 A.2d 69 (1960).

9. 161 A.2d at 100 The *Henningsen* court gave the following reasons for extending liability:

> Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser.

161 A.2d at 84. *See also* 75 HARV. L. REV. 630 (1961).

10. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Hill v. Harbor Steel & Supply Corp., 374 Mich. 194, 132 N.W.2d 54 (1965). *See also* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.04[2][b] (1966) for a state by state analysis.

11. *See, e.g.*, Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) citing RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 10, 1964), which states:

> 1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer is subject to liability for physical harm

In New York, the effect of *Henningsen* was apparent in *Goldberg v. Kollsman Instrument Corp.*[13] There the court held the manufacturer of an airplane containing a defective altimeter liable to the passenger's parents in an action for wrongful death on the combined theories of breach of implied warranty and strict liability.[14] Neither *Henningsen* nor *Goldberg*, however, extended protection to bystanders or other persons affected by the defect.

Protection to third parties was first extended in *Piercefield v. Remington Arms Co.*,[15] in which the Supreme Court of Michigan allowed a bystander to recover damages for personal injuries from the manufacturer for breach of an implied warranty of merchantability.[16] The court reasoned that the manufacturer is in the best position to correct defects which endanger the public.[17] Subsequent decisions extending the liability of the manufacturer to bystanders have been based on implied breach of warranty,[18] strict liability in tort,[19] or a combination of both.[20]

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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.

12. *See, e.g.*, Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

13. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

14. "A breach of warranty . . . is not only a violation of the sales contract out of which the warranty arises, but is a tortious wrong. . . . ." *Id.* at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594. The court refused to hold defendant Kollsman liable because the assembler's liability provided "adequate protection" to the passengers even though Kollsman manufactured the defective altimeter and Lockheed merely installed it in its plane. *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

15. 375 Mich. 85, 133 N.W.2d 129 (1965) (plaintiff's injuries were caused by a defective shotgun shell).

16. 133 N.W.2d at 136.

17. 133 N.W.2d at 134.

18. *See* Speed Fasteners, Inc. v. Newsom, 382 F.2d 395 (10th Cir. 1967).

19. *See* Elmore v. American Motors Corp., 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969). *See also* Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916 (1964).

20. *See* Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Sills v. Massey-Ferguson, Inc., 296 F.Supp. 776 (N.D. Ind. 1969).

The facts of the instant case caused the court no difficulty in accepting breach of warranty as the basis for its decision. The result might be otherwise, however, in a different fact situation because of certain incongruities between breach of warranty and tort liability. The Uniform Commercial Code requires an injured party to give notice of a breach of warranty within a reasonable time after learning of the breach before damages may be recovered.[21] Under tort theory, however, notice of a breach is not required.[22] The Code allows disclaimer of any warranty, express or implied, by use of appropriate language,[23] but because disclaimer is a contract device, it is not a valid defense in a tort action.[24] The U. C. C. usually requires a "sale" of the defective goods,[25] but no sale is required under tort law for liability to attach.[26] Furthermore, under the Code the statute of limitations for breach of warranty actions is four years,[27] and the period is computed from the time the breach occurs which is most often "when tender of delivery is made." [28] Statutory periods for tort actions are generally shorter than the four year Code limitation, and a tort cause of action accrues when the injury occurs,[29] not when the goods are tendered.

The *Guarino* decision represents a developing trend of extending liability to include bystanders who are affected by defective goods.[30]

21. UNIFORM COMMERCIAL CODE § 2-607(3)(a).

22. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

23. UNIFORM COMMERCIAL CODE § 2-316.

24. *See, e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (automobile disclaimer held no defense to strict liability). *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 831 (1966). *See also* 2 L. FRUMER & M. FREIDMAN, *supra* note 9, § 16A[5][e] (1966).

25. *See, e.g.*, Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954).

26. *See, e.g.*, Schenfield v. Norton Co., 391 F.2d 420 (10th Cir. 1968). RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) (Tent. Draft No. 10, 1964).

27. UNIFORM COMMERCIAL CODE § 2-725(1). *See* Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1965).

28. UNIFORM COMMERCIAL CODE § 2-725(2). Under the majority view, the statute begins to run from the time of tender. *See, e.g.*, Rufo v. Bastian-Blessing Co., 417 Pa. 107, 207 A.2d 823 (1965).

29. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 147 (3rd ed. 1964).

30. Some states have extended liability to persons affected by the goods by adopting anti-privity statutes.

> Lack of privity . . . shall be no defense . . . for breach of warranty . . . if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods . . . .

VA. CODE ANN. § 8.2-318 (Added Vol. 1965). *See generally* Speidel, *The Virginia*

In so holding, the Court of Appeals believed that the theory of the action, whether breach of warranty or negligence, was unimportant in a "danger invites rescue" situation.[31] Previous litigation and the significantly different bases of liability, however, indicate that some distinction between warranty and tort theory is desirable.[32] Indeed, some members of this court cautioned that the holding should be limited to similar factual settings as were present in *Guarino* lest injustice result from abuse of the remedy of breach of warranty.[33]

WILLIAM M. MUSSER, III

Taxation—STOCK REDEMPTIONS—THE AVAILABILITY OF CAPITAL GAINS TREATMENT. *United States v. Davis*, 90 S. Ct. 1041 (1970).

Maclin Davis, a fifty percent stockholder in a closely held corporation,[1] made an additional capital contribution in exchange for preferred stock to enable the corporation to qualify for a loan.[2] The stock was redeemed

"Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code, 51 VA. L. REV. 804 (1965).

31. 25 N.Y.2d at 464, 255 N.E.2d at 175, 306 N.Y.S.2d at 944.

32. The trend toward abolishing privity in warranty actions is gaining support. *See supra* note 10. As a result, the word "warranty" is no longer identified with contract law but has taken on many aspects of tort law. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* at 9 (Tent. Draft No. 10, 1964). However, the new meaning of "warranty" causes a conflict between section 402A of the *Restatement* and the warranty provisions of the Uniform Commercial Code. The question arises when to apply section 402A and when to apply the Code. Does section 402A apply to all warranty actions or only certain types such as personal injury cases? It is this conflict which prompted Chief Justice Traynor to criticize the New Jersey Supreme Court for allowing a plaintiff to recover damages for loss of bargain on the basis of strict tort liability under section 402A of the Restatement in Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). The California court stated:

> The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather to govern the distinct problem of physical injuries.

403 P.2d at 149, 45 Cal. Rptr. at 21. However, Justice Peters in a strong dissent reasoned that if a defect exists, recovery should not be based on what kind of damage the defect caused. 403 P.2d at 153, 45 Cal. Rptr. at 25. *See generally* R. D. DUESENBERG & L. KING, SALES AND BULK TRANSACTIONS UNDER U.C.C., § 7.06[1] (1966).

33. 255 N.E.2d at 176, 306 N.Y.S.2d at 946 (Scileppi, J., concurring).

1. Davis and his wife each owned twenty-five percent of the issued common stock.

2. The company believed that it needed to present a better position on the balance sheet for the purposes of loan qualification. Once the anticipated loan was repaid, Davis was to be reimbursed via the redemption of the preferred stock.