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Torts - Liability for the Endorser of a Product - Hanberry v. Hearst Corp., __Cal. App. 3rd __, 81 Cal. Rptr. 519 (1969)

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CURRENT DECISIONS

Torts—Liability for the Endorser of a Product—*Hanberry v. Hearst Corp.*, — Cal. App. 3rd —, 81 Cal. Rptr. 519 (1969).

Plaintiff purchased a pair of shoes relying on an advertisement in the defendant's magazine and upon its "Guaranty Seal" which was affixed to the shoes and their container.[1] She alleged that the shoes were defective in design and manufacture,[2] and that as a result of this defect she slipped and fell sustaining serious personal injuries. The plaintiff brought suit against the defendant Hearst alleging *inter alia* breach of warranty and negligence.[3]

Hearst Corporation entered a general demurrer which the trial court sustained in dismissing the action. The appellate court addressed itself to the basic question,

> whether one who endorses a product for his own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement.[4]

This court justified the imposition of liability on the basis of public

1. With respect to this seal the magazine stated: "This is Good Housekeeping's Consumers' Guarantee" and "We satisfy ourselves that products advertised in Good Housekeeping are good ones and that the advertising claims made for them in our magazine are truthful." The seal itself contained the promise, "If the product or performance is defective, Good Housekeeping guarantees replacement or refund to consumer."
Hanberry v. Hearst Corp., — Cal. App. 3rd —, —, 81 Cal. Rptr. 519, 521 (1969).

2. The plaintiff averred that the shoes had a low coefficient of friction on vinyl and other types of floor coverings commonly used in the area. *Id.* at —, 81 Cal. Rptr. at 523.

3. Plaintiff's case was stated in eight causes of action but only the second, third, seventh, and eighth involved the defendant Hearst. The second and eighth were based on the theory of negligent misrepresentation. The third alleged that the defendants conspired to sell shoes through false representations and the seventh was grounded on either express or implied warranty. *Id.* at —, 81 Cal. Rptr. at 520-21.

4. *Id.* at —, 81 Cal. Rptr. at 521.

policy[5] and negligent misrepresentation,[6] but refused to impose liability on the basis of breach of warranty.[7]

The development and rapid growth of mass production in industry[8] and of products with complex design has brought about changes in the relationship of the consumer to the producer-seller. What was once an area dominated by *caveat emptor* has evolved, through such decisions as *MacPherson*,[9] *Henningsen*,[10] *Greenman*,[11] *Vandermark*,[12] *Connor*,[13] and *Kriegler*,[14] into one in which the consumer is afforded pro-

5. In voluntarily assuming this business relationship, we think respondent Hearst has placed itself in the position where public policy imposes upon it the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm.

Id. at —, 81 Cal. Rptr. at 522. In deciding that public policy is sufficient to impose a duty of reasonable care, the court in *Hanberry* refers to two prior California cases: Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968) (savings and loan ass'n held liable to purchasers for the negligent construction of homes by a builder it was financing) and Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964) (automobile dealer and manufacturer liable for injuries sustained as a result of a defective automobile).

6. If either of the alternative allegations is true [the seal was issued without test, inspection or examination, or upon such test inspection or examination conducted in a negligent manner] respondent violated its duty of care to the appellant and the issuance of its seal and certification with respect to the shoes under that circumstance would amount to a negligent misrepresentation.

Hanberry v. Hearst Corp., — Cal. App. 3rd —, —, 81 Cal. Rptr. 519, 523 (1969). This conclusion was reached in consideration of RESTATEMENT (SECOND) OF TORTS § 311 (1966). This section provides a remedy for a party who is injured while acting in reliance upon information negligently given by another. The negligence may consist of failure to exercise reasonable care in ascertaining the accuracy of the information or in the manner in which it is transmitted.

7. *See* text accompanying note 22 *infra*.

8. *See generally* Tobriner & Groden, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967).

9. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturer liable to the purchaser of an automobile even though the latter had purchased the automobile from a dealer and thus there was no privity of contract between purchaser and manufacturer).

10. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (allowed recovery against an automobile manufacturer on the grounds of implied warranty and in the absence of privity).

11. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) (manufacturer of a defective power tool held liable for injuries resulting from use of the tool on the basis of strict liability).

12. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964) (manufacturer held liable irrespective of the fact that the dealer was to make the final inspection).

13. Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 73 Cal. Rptr. 369,

tection against losses sustained as a result of a defective product. Expansion in the field of products liability has been toward increasing both the class of persons upon which liability will attach, and the class of persons eligible to seek relief for injuries sustained as a result of a defective product.[15]

The possibility of extending liability to an independent testing agency[16] was judicially considered for the first time in *Hempstead v. General Fire Extinguisher Corp.*[17] The court, in denying the defendant testing company's motion for a summary judgment, held that liability would exist if the plaintiff could prove, both that Underwriters was negligent in approving the design of an inherently dangerous instrument, and that the plaintiff's injury was a result of such negligence.[18] The court was unable to present any decisional law in support of this conclusion, but it felt that such a result would be justified by the Restatement (Second) of Torts § 324A (1965), which provides for liability to third parties for the negligent performance of an undertaking.[19]

It is of course significant that the liability of an independent tester-endorser can now be established, but it is also worthy of note that these cases were decided upon various independent grounds. It would appear from this difference that these courts, at least, have decided that the imposition of liability upon an endorser is a desirable result, but that, as in the case of the field of products liability generally, the legal

447 P.2d 609 (1968) (financier held liable for damages resulting from the negligence of a construction company that it was financing); 10 WM. & MARY L. REV. 1000 (1969)

14. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (strict liability applied to the sale of realty); 11 WM. & MARY L. REV. 272 (1969).

15. *See* notes 9-15 *supra.*

16. *See generally* Note, *Liability of Certifiers of Quality to Ultimate Consumers,* 36 NOTRE DAME LAWYER 176 (1961); Note, *Tort Liability of Independent Testing Agencies,* 22 RUTGERS L. REV. 299 (1968); Comment, *Potential Liability of Non-Manufacturer Certifiers of Quality,* 10 VILL. L. REV. 708 (1965).

17. 269 F. Supp. 109 (D. Del. 1967). "No decision in Virginia or seemingly elsewhere has dealt with the issue of the liability of a testing company such as Underwriters." *Id.* at 116.

18. *Id.* at 118.

19. RESTATEMENT (SECOND) OF TORTS § 324A (1965):

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm . . . .

theory upon which this liability rests remains to be developed on a case by case basis.

While *Hempstead* and *Hanberry* differed as to the specific grounds for their holdings, they were similar in that they were both based on the negligence of the tester-endorser. In view of the difficulty entailed for an individual to show negligence on the part of the endorser, it would seem possible, if not probable, that another court would find a cause of action existing against an endorser on some grounds other than negligence.

Although the plaintiff in *Hempstead* raised only issues which were based on negligence,[20] the plaintiff in *Hanberry* asserted both breach of warranty[21] and negligence. The court, however, rejected the plaintiff's contentions based on warranty on the grounds that the plaintiff failed to cite any authority which extended recovery based on warranty "to one not directly involved in manufacturing products for, or supplying products to, the consuming public." [22] It also held that to invoke liability on such grounds would subject Hearst to liability not justified by the circumstances, and, if the plaintiff were allowed to proceed under warranty, there would be a question as to whether Hearst had limited its liability to replacement of the product or refund of the purchase price.[23] In light of the court's declaration that it would be guided more by public policy than by one of the traditional theories of liability,[24] it would seem that the court's objection to the warranty theory could perhaps be easily overcome. Although Hearst did not manufacture or directly sell the product involved, the use of its seal and advertising guarantee was, to a large extent, responsible for the product being purchased, and this inextricably involved Hearst in the marketing process. In such a situation the endorser should stand on equal footing with the manufacturer and seller with regards to liability for the guarantees he makes concerning the product he is attempting to market. As to the court's reasoning that such liability is not warranted since the endorser only examined or tested samples and not the specific pair of shoes involved, the endorser should limit his warranty to those defects arising out of design. His liability should be dependent upon the nature of the warranty given

20. 269 F. Supp. at 111.

21. — Cal. App. 3rd at —, 81 Cal. Rptr. at 521.

22. *Id.* at —, 81 Cal. Rptr. at 524.

23. *Id.*

24. *Id.* at —, 81 Cal. Rptr. at 521.

and not the degree of inspection to which he subjects the product. The limitation of damages to replacement of the product or refund of the purchase price presents no problem since the Uniform Commercial Code, adopted in California, considers any limitation of damages for injury to the person in the case of consumer goods as *prima facie* unconscionable.[25]

Although strict liability was not raised by the plaintiff in *Hanberry*, the court rejected such a theory as a basis for imposing liability upon the endorser on grounds similar to those used in rejecting the breach of warranty theory.[26] The application of this principle as a basis for liability is also hindered by the fact that the endorser is *technically* not a seller. The Restatement (Second) Torts § 402B[27] would afford protection to a consumer in a situation such as *Hanberry*, provided the party making the representation was a seller. It would certainly be arguable that Hearst with its seal of guarantee became so enmeshed in the marketing of the product, that it should be liable in the same manner as the manufacturer or retailer would be, had they misrepresented the product.[28]

An increase in the number of products of complex design has placed

25. CAL. COMM. CODE § 2719 (3) (West 1964):

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

26. In rejecting the strict liability theory the court did not use the ground of limitation of damages as was used in the rejection of the warranty theory.

27. RESTATEMENT (SECOND) OF TORTS § 402B (1965):

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
>
> (a) it is not made fraudulently or negligently, and
>
> (b) the consumer has not brought the chattel from or entered into any contractual relation with the seller.

28. *Id.* at comment (*e*) at 360:

> The rule stated applies, however, only to those who are engaged in the business of selling such chattels. . . . It does not apply, for example, to a newspaper advertisement published by a private owner of a single automobile who offers it for sale.

It would be arguable that the above distinction between one engaged in the business of selling and one not so engaged could be construed so that one who engages in endorsing a product for his own profit could be considered a seller for the purpose of imposing liability for the veracity of his endorsement.

an increased burden on the ability of the consumer to judge, for himself, the quality of the products he will purchase, and thus makes the role of the independent tester-endorser increasingly more significant. As this role enlarges, the duty of care which the independent tester-endorser owes to the public must increase accordingly.

BRUCE E. TITUS

Constitutional Law—TRUSTS—STATE ACTION UNDER THE FOURTEENTH AMENDMENT. *Evans v. Abney*, 90 S. Ct. 628 (1970).

The will of Senator A. O. Bacon of Georgia conveyed property in trust to his hometown of Macon, Georgia, to be used as a public park exclusively for white people. In 1966, the Supreme Court held that the park could not be operated on a racially discriminatory basis.[1] Following that decision, the Supreme Court of Georgia ruled that since the testator's intent to provide a park for the exclusive use of white people had been legally frustrated, the trust must fail, and therefore, the property by state law[2] must revert to the Senator's heirs.[3]

The Supreme Court affirmed[4] the Georgia decision on the ground that the interpretation of wills has always been governed by state law,[5] and that the termination of the trust was a proper application of Georgia's racially neutral trust law.[6] Justice Black, speaking for the

1. Evans v. Newton, 382 U.S. 296 (1966). *See* 52 A.B.A.J. 276 (1966); 8 WM. & MARY L. REV. 152 (1966).

2. GA. CODE ANN. §§ 108-06(4) (1959). "Where a trust is expressly created, but . . . [its] uses . . . fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." *See* Adams v. Bass, 18 Ga. 130 (1855) (testator's intent to settle his slaves in Indiana and Ohio was frustrated by statutes of the latter states, the government held that *cy pres* was not applicable and that the testator died intestate as to his slaves and that a trust resulted for his heirs).

3. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968). The Court also found that the doctrine of *cy pres* was not applicable as segregation was an essential and inseparable part of the testator's plan.

4. Evans v. Abney, 90 S. Ct. 628 (1970). Mr. Justice Brennan dissented on the ground that the closing of the park was the result of discriminatory state action. *Id.* at 636. Mr. Justice Douglas dissented on the ground that reversion of the park to the heirs is less in accord with the Senator's intent than retention of the park by the city for municipal use. *Id.* at 635.

5. *Id.* at 633. *See* Lyeth v. Hoey, 305 U.S. 188, 193 (1938).

6. *See* 90 S. Ct. at 631. Other jurisdictions have reached similar results: First Universalist Society v. Swett, 148 Me. 142, 90 A.2d 812 (1952) (bequest for support of a specific church that had ceased to exist reverted to testator's estate by virtue of a resulting trust); Bullard v. Shirley, 153 Mass. 559, 27 N.E. 766 (1891) (bequest to town for support of a Unitarian clergyman was illegal, therefore the gift failed and