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PRODUCTS LIABILITY

A Traditional Decision in Nevada

Rulings in products liability cases where the injured plaintiff's ability to recover in contract for a breach of warranty depends upon the forum's attitude toward the defense of lack of privity have developed a very wide spectrum of views from the most conservative to the most liberal extremes. And though the Uniform Sales Act governs such actions in thirty-five states, many courts' inclination to circumvent its provisions through their own interpretive language has weakened its objective of harmonizing the common laws of sales throughout the United States.

There may be a trend toward relaxing the requirement of privity of contract[1]; nevertheless, remarkably conservative decisions continue to appear. Such was the recent Nevada case of *Long* v. *Flannigan Warehouse Company and Inland Ladder Company*.[2] A workman injured because of latent defects in a ladder bought by his employer for him to use on the job joined the seller and the manufacturer for suit in tort and contract, in the one cause of action for negligence and in the other for breach of implied warranty. On the ground of lack of privity the court dismissed the contract actions and also the tort action against the seller, he being under no duty to inspect for latent defects.[3] Thus the court tried the tort action as between the plaintiff and the manufacturer alone and found the plaintiff had failed to prove his case.[4]

That the plaintiff lost in tort against both defendants is little to be wondered. On the one hand, recovery against

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1 William L. Prosser, "The Assault upon the Citadel (Strict Liability to the Consumer)," 69 *Yale L. Jour.* 1099. Dean Prosser prefers to be noncommittal on this point.

2 382 P. 2d 399 (1963).

3 382 P. 2d 399, 404.

4 The elements of proof were 1) that there was a defect in the ladder, 2) that the defect existed when the ladder left the possession of the manufacturer, 3) that the manufacturer had violated a duty of ordinary care, and 4) that injury followed as a proximate result. Case, supra., at page 404.

the manufacturer required bearing a difficult burden of proof; and on the other, recovery against the seller depended on breach of a duty that the court had decided did not exist.

But recovery in contract would have been much easier, because the plaintiff need have proved only the existence of the implied warranty, its breach, and injury as a proximate result. In Nevada, however, recovery on such a theory would have to depend on the local meaning of sections 15 (1) and 15(2) of the Uniform Sales Act:[5]

> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality.

On appeal, the Supreme Court of Nevada proceeded upon the supposition that a contractual relationship of some kind must precede a recovery founded upon a contract theory. The precise question that the court decided to resolve was not the kind of relationship between plaintiff and defendants[6] but lack of privity as an effective defense to an action for breach of implied warranty. Upholding lack of privity as a defense, the court reasoned:

> Clarity in our law will not be served by applying the Uniform Sales Act to parties for whom its provisions

[5] The sections of the Nevada code corresponding to sections 15(1) and 15(2) of the USA are NRS 96.240(1) and 96.240(2).

[6] The court referred in passing, to two clauses of section 76 of the Uniform Sales Act (NRS 96.020), which state: "*Buyer* means a person who buys or agrees to buy goods or any legal successor in interest of such person. . . .*Seller* means a person who sells or agrees to sell goods, or any legal successor in interest of such person."

> were not designed. If liability is to be placed upon either the retailer or the manufacturer it must rest upon (a) his negligence or (b) upon a declared public policy that one who sells a product in a condition dangerous for use shall be strictly liable to its ultimate user for injuries resulting from such use, although the seller has exercised all reasonable care and the user has entered into no contractual relationship with him (liability without fault.[7]

Two previous decisions referred to in the opinion failed to show that the law of Nevada on the point was clear to begin with. These were *Underhill* v. *Anciaux*[8] and *Cosgriff Sign Co.* v. *Matthews*,[9] both of which turned on negligence alone. This situation left the court a choice between applying the Uniform Sales Act or interpreting its language. By its literal application of the Act in an effort to serve clarity in the law, the Supreme Court of Nevada seems to be asserting a powerful conviction that a statute should mean what it says, even though such a meaning may express only the legislature's original intention.[10] Meanwhile in the majority of Uniform Sales Act jurisdictions today, the courts have effectively enough made the Act say what they have decided it should mean.[11] So that the state of the law

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7 382 P.2d 399, 403.

8 68 Nev. 69, 226 P.2d 794, in which green slime appeared in a bottle of Coca-Cola. The court admitted, at page 796, "Some authorities rely upon breach of implied warranty, although many reject this theory of recovery in absence of privity of contract .... There can be no question as to the general trend toward granting of such recovery."

9 78 Nev. 281, 371 P.2d 819.

10 Prosser, at page 1128 (note 1, supra.): "Warranties on the sale of goods are governed in thirty-five states by the Uniform Sales Act, a codification of the common law rules, which was promulgated in 1906 at a time when there was no such thing as a warranty to any third person. The definition of 'buyer' and 'seller' in the act were drawn with the immediate parties to the sale in mind, and it specifically provides that there are no implied warranties of quality except as set forth."

11 The Federal District Court of Hawaii in *Chapman* v. *Brown*, 198 F. Supp. 78, 102 (1961), in determining that the law of Hawaii would not demand privity of contract as a prerequisite to recovery for breach of an implied warranty under the Uniform Sales Act said, "By the clear weight of authority today, even in jurisdictions having the Uniform Sales Act, with respect to food and/or some other categories of goods, such a warranty runs to others

regarding the need for privity of contract generally to recover in actions of this type is as unsettled in Uniform Sales Act states as it is elsewhere.[12] Annotations of USA sections 15(1) and 15(2) reflect the increasing frequency of cases permitting recovery through disregard or complete circumvention of privity.[13]

The most recent cases to bear upon the employer-employee relationship of the Nevada case described have not clearly moved this aspect of products liability law in either direction.[14] In the New Jersey case of *Jakubowski* v. *Minnesota Mining and Manufacturing Co.*[15] the court in

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than the immediate buyer as narrowly defined in the Act. "Even the doctrine of privity, which is the main stumbling block to extending a remedy to consumers generally (as distinguished from the immediate buyer) against a seller or manufacturer of a defective or dangerous product, has itself been used to extend the remedy to others than the buyer as defined by the Uniform Sales Act, through various expedients adopted by the courts. . .such as adopting (a) the theory of a third party beneficiary contract, (b) the agency theory, or (c) some other fiction to establish a relationship between the injured consumer and the seller or manufacturer."

12 Walter H. E. Jaeger, "Privity of Warranty: Has the Tocsin Sounded?", 1 *Duquesne L. Rev.* 1 (1963), at p. 141: "But even where the courts have been inclined to relax the doctrine of privity, they have at times considered themselves blocked by a narrow interpretation or construction of the language of a sales statute. Thus the contention has been advanced that certain sections of the Uniform Sales Act preclude offering any relief for [142] breach of warranty to one not in strict privity of contract. Other courts have enlarged this interpretation to include those 'in the distributive chain.' And some have held that the legislative intent should be held to include those who suffer injury from use of the product. Analysis of the cases. . .makes one conclusion inelectible: the desired uniformity has not been achieved under this statute."

13 1 ULA 220 and 221, 1962 Supp. 104.

14 Murray v. Brown Aircraft Corp., 259 N.C.——, 131 S.E.2d 367 (1963), following Wyatt v. N.C. Equipment Company, 253 N.C. 355, 117 S.E.2d. 21 (1960): "Absent privity of contract, there can be no recovery for breach of warranty except in those cases where the warranty is addressed to an ultimate consumer or user. Ordinarily, the rule that a seller is not liable for a breach of warranty to a stranger to the contract of warranty is applicable to an employee of a buyer." The next footnote discusses the other case.

15 80 N.J. Super. 184, 193 A.2d 275 (1963). This case neatly parallels the Nevada case of Long v. Flanigan Warehouse etc., 382 P.2d 399. Here, an employee injured by a defective grinding wheel supplied by his employer sued in negligence and also in implied warranty under the New Jersey enactment of the Uniform Sales Act (RS 46:30-21 NJSA et seq.).

reinterpreting the meaning of implied warranties under the Uniform Sales Act returned to the historical origin of breach of warranty actions, which was in tort rather than in contract. And since warranties which the law imposes on sales contracts are vehicles of social policy, they deserve the flexibility of operation that implementation of a social policy demands.

By calling the implied warranty a "matter of strict tort liability" the New Jersey court made the law say what they thought it should mean. Supporters of the Nevada position might say that the *Jakubowski* case portended confusion, and that good jurisprudence required according to laws the plain meaning of their words. But the New Jersey case

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Lack of privity was the defense to both counts. While the venerable MacPherson v. Buick Motor Company, 217 N.Y. 382, 111 N.E. 1050 (1916) authorized a recovery in tort without privity of contract with the manufacturer, the plaintiff could not sustain the burden of proof of negligence. On the same ground, the trial court also dismissed the breach of warranty action. On appeal, the defendant sought to restrict the scope of Heningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960), at pp. 99-100, to the purchaser and members of his family only.

Extending the interpretation of RS 46:30-21 NJSA beyond the scope of the Heningsen case, the court reasoned: "Increasingly, during recent years courts following the lead of authorities in tort law, have broken away from the privity requirement and found some way of holding a manufacturer strictly liable to the user of his product. There has been a deepening feeling that social policy requires that the burden of accidental injury due to defective chattels be placed upon the producer, he being best able to distribute the risk to the general public through price and insurance.

"Absent a contract between the manufacturers or sellers and the person who uses or consumes the goods, most courts have consistently refused to find any warranty. This overlooks the fact that the action for breach of warranty was originally a tort action, for breach of a duty assumed.

"Since the warranties we discuss do not represent an expressed or implied intent, but are warranties imposed by law as vehicles of social policy, present day authorities hold that the courts should extend them as far as relevant social policy requires.
"What appears to be the sounder approach is that the implied warranty is a matter of strict tort liability, not dependent upon a contract between the parties. It arises because the manufacturers or sellers, in marketing the goods, assume such a responsibility toward any consumer or user who, in reasonable contemplation, might be injured."

suggests that if in New Jersey the price of clarity in the law is social injustice it is too high a price to pay.[16]

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[16] Ironically, the very absence of either the USA or the UCC in Virginia has let the Commonwealth take the advanced step of enacting a statute to cancel the defense of no privity in such actions, thus only superseding, not confusing, the common law of sales. The enactment of 1962 reads: "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods. . . ," #8-654.3, Code 1950. An addition to § 2-318 of the UCC, which will become effective in Virginia in 1966, specifically averts any conflict with this secttion of the Code.