Indiana Law Journal

Volume 15 | Issue 3 Article 10

2-1940

Warranty of Food-Liability of the Manufacturer to the Consumer

SALES—WARRANTY OF FOOD—LIABILITY OF THE MANUFACTURER TO THE CONSUMER.—Plaintiffs, husband and wife, seek to recover damages for the wife's illness which resulted from eating a cheese sandwich containing maggots, which had been prepared and wrapped in a sealed package by the defendant and sold through a retailer to the husband. Both allege negligence and breach of implied warranty. Plaintiffs appeal from a directed verdict for defendant. Held, reversed. The implied warranty extended to both husband and wife. *Klein v. Duchess Sandwich Co., Ltd.* (Cal. 1939), 93 P. (2d) 799.

The court takes the position that, "In adopting the Uniform Sales Act,[1] it was the clear intent of the legislature that with respect to foodstuffs, the implied warranty provision therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and that it was not intended that a strict 'privity of contract' would be essential for the bringing of an action by such ultimate consumer for an asserted breach of implied warranty."

The basis of recovery in this situation may be in tort and the principal case is in accord with the general rule which permits recovery by the consumer against the manufacturer for the negligent preparation or manufacture of food irrespective of any contractual relations between the parties.[2]

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28 Damage is, of course, the gist of the action. Pollock, The Law of Torts (12th ed. 1923), 185.

29 Harper, Law of Torts (1933), Sec. 118.

30 Restatement, Torts (1934), Sec. 435: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."

1 Uniform Sales Act, Sec. 15 (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." Cal. Civil Code, Sec. 1735.

2 MacPherson v. Buick Motor Co. (1916), 217 N. Y. 382, 111 N. E. 1050, noted 29 Harv. L. Rev. 866. This case is considered to have established that privity of contract is not required for recovery based on negligence in the manufacturer-consumer cases. Boyd v. Coca Cola Bottling Works (1914), 132 Tenn. 23, 177 S. W. 80 (cigar butt in coca cola); 105 A. L. R. 1502;

Recovery may be based on breach of implied warranty of fitness for human consumption.[3] The development of warranty shows some cause for confusion surrounding recovery on such a theory. An action on a warranty in its early stages was in tort and a recovery was had by an action on the case for deceit.[4] However, the modern action for breach of warranty is a hybrid and, though often considered contractual, still bears traces of its tort origin.[5]

It is the prevailing view that there is no implied warranty without privity of contract.[6] In the principal case the plaintiff, husband, was a sub-purchaser and normally would be denied recovery as being within the general rule requiring privity of contract for a recovery on an implied warranty theory.[7] To impose a warrantor's liability upon the manufacturer in favor of the ultimate purchaser has been criticized as somewhat severe;[8] however, several recent cases have gone that far.[9] The plaintiff, wife, was not even a sub-purchaser; therefore to allow her a recovery meant an additional step for the court. By the weight of authority she too would be denied recovery on

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Harper, Law of Torts (1933), Sec. 106. Indiana in accord, Knoefel v. Atkins (1907), 40 Ind. App. 428, 81 N. E. 600.

The facts of the principal case indicate that the res ipsa loquitur doctrine would be applicable. Brown, The Liability of Retail Dealer for Defective Food Products (1939), 23 Minn. L. Rev. 585 at 597; Harper & Heckel, Effect of the Doctrine of Res Ipsa Loquitur (1928), 22 Ill. L. Rev. 724. Applied in Knoefel v. Atkins (1907), 40 Ind. App. 428, 81 N. E. 600. Negligence per se under the pure food statutes, Meshbesher v. Channellene Oil & Mfg. Co. (1909), 107 Minn. 104, 119 N. W. 428.

[3] Williston, Sales (1924), Sec. 242, 242a. For a comprehensive discussion of the whole subject see, Perkins, Unwholesome Food as a Source of Liability (1920), 5 Iowa Law Bull. 6.

[4] Street, Foundations of Legal Liability, 377. Trespass on the case for deceit lay for false warranty as well as fraud.

[5] Williston, Sales (1924), Sec. 181, "This variety of meaning attached to the word 'warranty' is a source of confusion, and it is obviously a service to the law to limit the word to one meaning. Accordingly in the Sales Act the word is limited to what is probably its essential meaning—a material promise." Stuart v. Wilkins (1778), 1 Doug. 18 is said to have been the first instance of an action of assumpsit on a sales warranty, 8 Holdsworth, History of the English Law 70.

There was no implied warranty in the early law. Chandlor v. Lopus (1606-1607), Cro. Jac. 4; Ames, History of Assumpsit (1888), 2 Harv. L. Rev. 1 at 9. Gardner v. Gray (1815), 4 Campb. 144 is the earliest case of implied warranty. Williston, Sales (1924), Sec. 228. Flessher v. Carstens Packing Co. (1916), 93 Wash. 48, 160 P. 14, "Whether the action be one of warranty or of negligence it comes to the same thing. It sounds in tort."

[6] In Chysky v. Drake Bros. Co., Inc. (1923), 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533 the court said, "If there were an implied warranty which inured to the benefit of plaintiff it must be because of some contractual relation between her and the defendant and there was no such contract." Brown, Liability of Retail Dealer for Defective Food Products (1939), 23 Minn. L. Rev. 585; Williston, Sales (1924), Sec. 244. See also 105 A. L. R. 1502.

[7] Cornelius v. B. Filippone & Co., Inc. (1938), 119 N. J. L. 540, 197 Atl. 647.

[8] Williston, Sales (1924), Sec. 244.

[9] Davis v. Van Camp Packing Co. (1920), 189 Iowa 775, 176 N. W. 382, 17 A. L. R. 649; Biedenharn Candy Co. v. Moore (Miss. 1939), 186 So. 628. Cf. Pelletier v. Dupont (1925), 124 Me. 269, 128 Atl. 186, 39 A. L. R. 972, wherein the court criticizes the Davis v. Van Camp case and says that it rest merely on a dictum in Ward v. Morehead City Sea Food Co. (1916), 171 N. C. 33, 87 S. E. 958.

an implied warranty theory.[10] It seems inconsistent and unjust to allow a husband as purchaser, to recover against the manufacturer or the retailer and yet deny the wife a similar recovery. Some courts, however, have done so.[11] Realizing the injustice of these decisions, other courts have been more liberal.[12]

Whether the case be that of the husband as sub-purchaser or that of the wife as a consumer, the courts which have allowed recovery minimize emphasis on privity of contract.[13] They have either admitted the necessity of privity and found it by certain analagous and already existing theories or have recognized that the doctrine is unsound and repudiated it. To support their decisions some courts have applied a "warranty of quality running with the food" like a covenant running with the land.[14] Since in many cases the purchase is made by a member of plaintiff's family the doctrines of agency have been extended so as to treat the purchasing member as agent for the others.[15] Some cases have been based on the third party beneficiary theory of contract, by which the consumer sues as a beneficiary of the manufacturer-retailer contract.[16] The problem has also been considered as one of joint purchase.[17] Other courts say that any liability must come from representations directed to the ultimate consumer.[18] It is to be observed that here the concept of privity is being broadened to permit recovery even though there is no direct contractual relation.[19] An exception to the rule of privity has been developed by some courts in the case of food sold in sealed packages,[20] while others deny the need for privity in all food cases.[21]

The decision in the principal case, based on a direct interpretation of the Uniform Sales Act, effectively meets the common law defense of lack of privity of contract. By this analysis questions of implied warranty in the sale of foods are greatly simplified and an eminently satisfactory result is reached. This decision, with its far reaching implications, suggests a neat way to meet the defense of privity and sets an example which might well be followed in other jurisdictions.

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[10] Borucki v. MacKenzie Bros. Co., Inc. (Conn. 1938), 3 Atl. (2d) 224; Ryan v. Progressive Grocery Stores, Inc. (1931), 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339; Williston, Sales (1924), Sec. 244; 24 R. C. L. 158.

[11] An excellent example of the injustice of a denial of recovery is Hazelton v. First Nat. Stores, Inc. (1937), 88 N. H. 409, 190 Atl. 280 (wife of the husband denied recovery).

[12] Swengel v. F. & E. Wholesale Grocery Co. (1938), 147 Kan. 555, 77 P. (2d) 930.

[13] Davis v. Van Camp Packing Co. (1920), 189 Iowa 775, 176 N. W. 382.

[14] Catani v. Swift & Co. (1915), 251 Pa. 52, 95 Atl. 931.

[15] Ryan v. Progressive Grocery Stores, Inc. (1931), 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339.

[16] Dryden v. Continental Baking Co. (Cal. 1938), 77 P. (2d) 833; Ward Baking Co. v. Trizzino (1928), 27 Ohio App. 475, 161 N. E. 557.

[17] Coca Cola Bottling Works v. Lyons (1927), 145 Miss. 876, 111 So. 305.

[18] 42 Harv. L. Rev. 414 and cases cited.

[19] 6 Univ. of Chi. L. Rev. 514.

[20] Madouros v. Kansas City Coca Cola Bottling Co. (1936), 230 Mo. App. 275, 90 S. W. (2d) 445; Brown, The Liability of Retail Dealer for Defective Food Products (1939), 23 Minn. L. Rev. 585.

[21] Hertzler v. Maushnm (1924), 228 Mich. 416, 200 N. W. 155 (arsenate of lead in flour); Catani v. Swift & Co. (1915), 251 Pa. 52, 95 Atl. 931.

Indiana's position on this problem is not clear.[22] Analogous decisions,[23] however, indicate that the modern trend would be followed, at least in the sealed package cases. Nevertheless, the influence of leading cases, may limit recovery.[24] Should the issue arise in Indiana it is to be hoped that the court will consider the analysis of this decision.

Fortunately, the court in the principal case did not attempt to justify its decision by a further application of fictions. The holding is in line with the modern tendency to impose the liability of a warrantor upon the manufacturer of food irrespective of contractual relations. It is submitted that the result of the case, based on a direct interpretation of the Sales Act, is sound in principle and clearly desirable in policy. H. R. H.

TORTS—PERSONAL INJURY ACTION BY UNEMANCIPATED BROTHER AGAINST UNEMANCIPATED SISTER.—Plaintiff, a boy of twelve, was injured in an automobile collision while a passenger in the car negligently driven by defendant, his sister, sixteen years of age. Both parties were unemancipated and lived with their parents and were being supported by their father. From a judgment allowing recovery, defendant appealed, principally on the grounds that public policy forbids the maintenance of such actions, and that to allow such actions is an incentive to fraud where insurance is available for the payment of any recovery allowed. Held, that judgment be affirmed. Rozell v. Rozell (New York, 1939), 22 N. E. (2d) 254.[1]

An infant is generally responsible for his own torts.[2] Persons who are not in domestic relations with a minor who negligently injures them may recover damages from him.[3] The overwhelming weight of authority is that an action for personal injury will not lie when either the parents or unemanci-

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22 No Indiana decisions directly on the point have been found.

23 See: Heise v. Gillette (1925), 83 Ind. App. 551, 149 N. E. 182, noted 1 Ind. L. J. 54 (purchase of food in restaurant is a sale accompanied by an implied warranty); Morris v. Trinkle (1930), 91 Ind. App. 657, 170 N. E. 101 (where the defendant sold auto subject to warranty of the manufacturer on the reverse side of the order, he thereby adopted such warranty as his own); Wallace v. Shoemaker (1924), 194 Ind. 419, 143 N. E. 285; Musselman v. Wise (1882), 84 Ind. 248; The York Mfg. Co. v. Bonnell (1900), 24 Ind. App. 667, 57 N. E. 590.

24 Chysky v. Drake Bros. Co., Inc. (1923), 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533; Prinsen v. Russos (1927), 194 Wis. 142, 215 N. W. 905 (friends of the buyer denied recovery); Borucki v. MacKenzie Bros. Co., Inc. (Conn. 1938), 3 Atl. (2d) 224.

1 "No logical reason nor reported authority exists to indicate that the rule of liability (that persons who are not members of the family, when injured through the tortious negligence of minors, may recover damages against them by way of compensation for injuries sustained) should be changed when brothers and sisters are involved. . . . Neither the Constitution, statutes nor judicial decisions of the State directly or by fair implication declare any State policy against which the maintenance of such an action offends." Rozell v. Rozell (N. Y., 1939), 22 N. E. (2d) 254.

2 Vasse v. Smith (1810), 6 Cranch 226; Cooley on Torts (1932), 4th ed., vol. 1, sec. 66; see, Daugherty v. Reveal (1913), 54 Ind. App. 71, 102 N. E. 381.

3 Hopkins v. Droppers (1926), 191 Wisc. 334, 210 N. W. 684; Moore v. Wilson (1929), 180 Ark. 41, 20 S. W. (2d) 310; Peterson v. Haffner (1877), 59 Ind. 130.