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PROCEDURE CATCHES UP — AND MAKES TROUBLE

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Mendel v. Pittsburgh Plate Glass Co.[1] is a hard one no matter which side one takes. Under the majority opinion, the distasteful scene is of a plaintiff whose claim is barred by time before he could possibly have sued on it. Until plaintiff was injured, he had absolutely no claim whatever, whether its underlying theory was negligence, warranty, or strict liability. Yet, when he at last sustained an injury, the law told him that his claim was not only barred but had in fact, at that moment, been barred for some time. The law can make what explanations it will, but to the intelligent layman, and most particularly to the injured plaintiff, the explanations will not enhance his picture of the law. If the law gave him, and the majority says it did give him, a substantive claim in warranty against the glass company, the plaintiff will have to deem himself the most cheated of donees when, at the first moment the law allows him to apply, it tells him that his application is too late.

With such an introduction the reader would have to assume that the minority view is necessarily correct. But we are in a realm of law in which satisfactory justice to all sides attends neither view. Whichever way a judge casts his vote there will be some element of injustice to someone. The cause of this is not an uncommon situation in the law. It is an almost inevitable result when the substantive law, in our common-law system, has been stretched by the judges to meet new situations: the previously unconsidered procedural ramifications finally catch up, and they pose some interesting challenges.

With the *Mendel* case, procedure finally intercedes, demanding to know where, within the recent and rapid evolution of the doctrines of warranty and strict liability, it stands. One could have guessed that the procedural problem that would voice its demand most strongly would be the statute of limitations. Nothing in the law of procedure has more sudden or substantive impact.

The minority in *Mendel* would call the plaintiff's claim "strict liability" and niche it in the "tort" category, thereby invoking the tort rule that the claim arises (and its attendant period begins to run) from the time of injury. But while the majority adheres to the view that the

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1 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

claim is in warranty and therefore is "contract" for procedural purposes as well, the minority deems it time to acknowledge that this "contractual" warranty is nothing but a tort suit devised to ease the path of an injured plaintiff and that the Court should not, by ignoring that reality, adhere to procedural notions related to "contract" and thereby undo what the personal-injury-predicated-on-warranty idea was really designed to accomplish in the first place.

Most often cited as the discomforting feature of the minority view is the prospect of the perpetual liability of a manufacturer. *M* manufactures an item and sells it to and installs it for *B*. The glass in the *Mendel* case is an ideal example. Years later the glass injures *P*. If *P* can prove negligence against *M*, in the manufacture or installation, he will make that the basis of his suit and he will get the benefit of the "tort" rule that the claim accrues at injury. Then, notwithstanding that a decade may have passed since *M*'s sale or installation, *P* would have three years from the injury in which to sue. But where *P* cannot prove negligence — and the farther in time from the sale the more remote his prospect of sustaining such proof — he must rely upon the other available theories. *Mendel* seems to establish that whether he labels his alternative "warranty" or "strict liability in tort," it is still warranty; it is still governed by the Uniform Commercial Code (UCC); and section 2-725[2] starts his claim from the sale. (Technically, it is from the "tender of delivery" under the UCC, which will likely be the source of governing law in future cases. *Mendel* itself involved the transitional stage of the UCC.) The majority cites section 2-318,[3] which confers warranty rights on designated persons, to show that the legislature has spoken here and the courts are not free to vary the theory of liability (such as by adopting a "strict liability in tort" theory instead). The minority answers that at worst the UCC provision merely sets forth one theory of recovery (warranty) and that it need not be deemed exclusive; that the strict liability criterion can be superimposed upon it to offer alternative ground of recovery; and that when this "tort" alternative is used it may be accompanied by such advantages as the law of procedure, including that of the statute of limitations, may confer upon it.

The majority contends that to allow this alternative with its procedural advantages would encourage "many unfounded suits . . . against manufacturers ad infinitum."[4] The basis of this conclusion is that since the plaintiff would not have to prove negligence he would have an easy

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2 UNIFORM COMMERCIAL CODE § 2-725.

3 *Id.* § 2-318.

4 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

burden of proof against the manufacturer or seller. The minority answer to this is that it assumes that the "strict liability" burden of proof is an easy one. It disagrees and calls it "heavy rather than light" because plaintiff would still have to prove (1) the defect in the merchandise and (2) that it was the "proximate cause of the injuries."[5]

The posture of each view therefore purports to be indulgent of the seller who is sued many years after the sale. But while the majority would protect the seller through a statute of limitations held to run from the time of sale rather than the later time of injury, the minority would keep the case open under the statute of limitations and rely instead upon what it deems plaintiff's "heavy" burden of proof to protect the defendant-seller. Here we can perhaps fault the minority position with a simple practical truth. Unless the plaintiff so poorly "discharges" this burden of proof as to have his theory dismissed by the court, should we not realistically concede that if the plaintiff gets to the jury his chances of recovery are, to coin a phrase, excellent? In the jargon of the practicing bar, all plaintiff has to do is "get past the court" and he is home. That is what the minority opinion invites.

The whole philosophical thrust of the Court's recent decisions seems to support the minority view. There has been an unmistakable trend towards giving an injured plaintiff a recovery if at all possible. Surely that accounts in great measure for the development of the "strict liability" doctrine. Surely it accounts in great measure for the initial substantive stretches of "warranty" to protect those hitherto excluded by the "privity" concept.[6]

And perhaps nowhere more dramatically is this philosophy apparent than in the burgeoning choice-of-law realm in tort. There the major developments, beginning with *Babcock v. Jackson*[7] and culminating with *Tooker v. Lopez*[8] in 1969 and involving (in *Tooker*) the overruling of *Dym v. Gordon*,[9] were almost entirely plaintiff-oriented and can be much more readily explained under a "plaintiff's viewpoint" approach (which the Court has not formally adopted) rather than the "grouping of contracts" or "interest analysis" approaches (which the judges continue to employ as the formal labels).

If the thread tying together the substantive developments is de-

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[5] *Id.* at 351, 253 N.E.2d at 214, 305 N.Y.S.2d at 499 (dissenting opinion).

[6] *See, e.g.*, Goldberg v. Kollsman Instr. Co., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

[7] 12 N.Y.2d 437, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[8] 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

[9] 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

signed to ease the injured plaintiff's path to recovery, one can readily argue that the motivations behind these substantive developments should not be undone by inconsistent postures taken on attendant procedural problems.

In some recent instances the Court has bent over backwards to supply an injured New Yorker with a New York forum, "construing" procedural provisions mercilessly to reach that result.[10] Underlying such a move is unquestionably a motive to ease the plaintiff's path. Is it consistent to squeeze one set of procedural provisions[11] to get jurisdiction for the plaintiff, and then use another[12] to preclude his recovery? These two areas are not as unrelated as may seem at first blush. This writer has watched developments in the Court of Appeals closely during the past decade. A prevalent motive in personal injury cases has been to help the plaintiff. Whatever this may be born of — it is apparently the assumption that it is an insurer and thereby the national pool of insurance premiums which will supply the recovery fund — it is unmistakable in a host of opinions. It seems to me that a case like *Mendel* is a departure from the Court's own chartered path and a destruction rather than implementation of its broad underlying aim. Another example of such a departure (and destruction) appears in *Schwartz v. Public Administrator*,[13] involving a collateral estoppel problem. The Court in *Schwartz* held that driver #1 was precluded by collateral estoppel from recovering for his injuries against driver #2 because in a prior action a passenger had recovered against both drivers. The realities of the Court's substantive aims are set forth well in Judge Bergan's dissenting opinion in that case, where the judge reasonably asks why the Court, whose policies in personal injury litigation are clear enough in numerous cases, should suddenly turn, in the context of a procedural problem, to a course of action wholly at war with that policy.[14] It was apparently Judge Bergan's view in *Schwartz* that the Court was so engaged in surgery on a single tree that it lost sight of the forest it was so carefully planting.

That seems to be what was lost sight of in *Mendel.*

Indeed, there is a rather plain irony in all of this, in which *Blessington v. McCrory Stores Corp.*[15] figures strongly.

Blessington at first seems consistent with the *Mendel* majority view,

10 *See* Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

11 CPLR 320(c), 5201(a). *See also* Commentaries to CPLR 5201, New York Consolidated Laws (McKinney 1969).

12 UNIFORM COMMERCIAL CODE § 2-725; CPLR 213.

13 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

14 *Id.* at 76, 246 N.E.2d at 732, 298 N.Y.S.2d at 964.

15 305 N.Y. 140, 111 N.E.2d 421 (1953).

which cites and relies on it. In *Blessington* the Court held that the warranty period applied and ran from the sale. But in *Blessington* that had the effect of *preserving* plaintiff's claim, which would have been barred under a three-year-from-injury standard.

But while the *rule* of *Blessington* is consistent, its result, which sustained the plaintiff's suit, is not. And one cannot help but conjecture that if a vice-versa holding had been necessary to sustain the plaintiff's action in *Blessington, i.e.,* where the claim would have been alive under a three-year-from-injury measure though dead under a six-year-from-sale measure, *Blessington* would have sustained that, too, and *Mendel* would itself — if *Blessington* really dictates its result — have gone the other way. This is not cynicism. It is merely an acknowledgement of what can and necessarily does occur in a common-law system. The judges are confronted with a novel situation and the rule they devise to govern it — it being up to them to formulate the rule — implements some broad policy the judges discern as being required by the times. In that light, which only illuminates the legitimate function of judges in a common-law society, we may say that *Blessington* was right. By that same light, we would have to say that *Mendel* is probably wrong. If *Blessington* is to be held to account, and *Mendel* relieved of fault under stare decisis, we could say that *Blessington* was too limited in its approach . . . too anxious to pronounce a rule that would protect that particular plaintiff's claim and stop there. Perhaps *Blessington* should have included some statement to the effect that measuring the period from the sale is but an *alternative* open to the plaintiff to be linked up only with the warranty claim, but that the holding does not preclude the use of tort's accrual-from-injury rule for such theory as "strict liability" even though the proof sustaining the latter theory is largely the same as that which sustains warranty — the major factor being that both cast out the need to prove negligence.

These conclusions, however, are the product of hindsight. They are the rearward vision made possible only by the intervening further development of the strict liability theory. There is no need to fault *Blessington.* It did what had to be done to carry forth the pro-plaintiff policy of the courts in personal injury cases. It at least implemented the policy whose motivating presence (if we are correct in deducing that such a policy exists) should be omnipresent behind the scenes. It is *Mendel's* restrictive reading of *Blessington,* as Judge Breitel indicates in his dissent, which undermines the policy.

The dissent had available to it an additional point. It did not make it; it is only slightly tangential:

CPLR 5001 and its history allows interest on every cause of action from the time of its accrual with but two exceptions. One is the personal injury claim (the other, which does not concern us here, is punitive damages). But this exception developed during the era when personal injury was predicated almost exclusively on negligence. As warranty began to make inroads, and personal injury recoveries were based in ever increasing numbers on warranty instead of negligence, the question naturally arose whether such recovery when based on a warranty theory would draw interest. *P* is injured by a defective product in 1964. He sues in 1968 and wins on a warranty claim. His verdict is $50,000. If the predicate were negligence, he would get no interest from accrual to verdict. But he prevailed on warranty. Does he get the interest? It amounts to some $12,000 at a 6 percent rate.[16] The Court of Appeals itself realized the absurdity of allowing so much extra money merely because the underlying claim was based on a warranty breach rather than negligence and held in *Gillespie v. Great Atlantic & Pacific Tea Co.*[17] that the interest was unavailable *regardless* of the underlying theory of liability.

Gillespie in effect recognizes that for so substantial a purpose as interest, the personal injury is still a tort though predicated on warranty. For so substantial a purpose as the statute of limitations, then, should it not be similarly treated, at least as an alternative? The theoretical justification for such a treatment, which would enable the warranty theory to survive as well (with its period of limitations and starting time), is as the dissent in *Mendel* suggests: Treat the warranty not as an exclusive remedy, but rather as an alternative one, with strict liability also kept on the scene to offer plaintiff a time-of-injury accrual if that would help him.[18]

If the seller of the item thereby ends up with a prolonged liability, which is what the *Mendel* majority principally feared, the justification, emanating from the holdings of the Court of Appeals for a long time now, is that as between the item's seller and the injured plaintiff the latter should be favored if the law makes it reasonably possible. As the *Mendel* dissent indicates, the law does make it reasonably possible. With the advent of the warranty and strict liability theories the Court has

16 Apparently, the rate is even higher today. *See* Commentaries to CPLR 5004, New York Consolidated Laws (McKinney 1969).

17 21 N.Y.2d 823, 235 N.E.2d 911, 288 N.Y.S.2d 907 (1968).

18 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495. For purposes of "long-arm" jurisdiction, we may also note that the "tortious act" of CPLR 302(a)(2) and (3) has been construed to embrace a breach of warranty as well. *See, e.g.*, Naples v. City of New York, 34 App. Div. 2d 577, 309 N.Y.S.2d 663 (2d Dep't 1970).

made plain that it wants to relieve the plaintiff of proof of negligence, if feasible. With *Mendel*, the majority, through the collateral factor of the statute of limitations, reimposes that burden on the plaintiff, though it was quite feasible not to.

Impleader Problems

The *Mendel* decision is setting up some rules which are bound to have impact, and likely an unfortunate one, in impleader situations.

In the *Mendel* case, the only sale involved was by the glass company to the bank. The period of limitations on plaintiff's claim against the company was measured from the time the company sold the glass to the bank. *Mendel* thus seems to stand for the proposition that in a suit by an injured person against the seller of an item, the period of limitations (four years under the UCC[19]) runs from the time of that particular defendant's sale of the item. How will that figure when two sales are involved, one by manufacturer to retailer and the other by retailer to consumer?

In October 1964, let us assume *M* (manufacturer) sells a truckload of pressure cookers to *R* (retailer). *R* puts them on his shelves and sells many. Now, in 1969, a few of that old shipment are still in *R*'s stock and *P* wants one. He buys it from *R* in October of 1969. It explodes and injures *P* in 1970. *P* sues *M* for breach of warranty. The period (under *Mendel*) is the four years of UCC 2-725, running from the time of tender of delivery — loosely speaking, from the "sale." Which sale? The sale from *M* to *R* in 1964 or from *R* to *P* in 1969? If the former, *P* is too late under the statute of limitations. If the latter, he is in time. Though *Mendel* involved only one sale, it seems to stand for the proposition that when a defendant is sued in warranty the period of limitations against him is measured from the time *he* sold the item, which would be 1964 in our example. *P* is too late.

Now turn to the impleader point.

Suppose that *P* sues only *R*, the retailer. As against *R*, *P*'s warranty claim accrued in 1969 (when *R* sold the item to *P*) and is timely. Now *R* seeks to implead *M* to make *M* hold *R* harmless for what *P* may recover from *R*. *M* moves to dismiss on the ground that *M* was impleaded in 1970, more than four years after *M*'s sale to *R*. Is the impleader barred? Lower court cases indicate that it is,[20] and on assumptions which *Mendel* now apparently supports. Here, then, is the greatest

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19 UNIFORM COMMERCIAL CODE § 2-725.

20 *See, e.g.*, C.K.S., Inc. v. Helen Borgenicht Sportswear, Inc., 22 App. Div. 2d 650, 253 N.Y.S.2d 56 (1st Dep't 1964).

injustice *Mendel* has in store. *R*, an innocent retailer selling a packaged item in whose manufacture he had no part but for which he bears a "warranty" liability under the law, is precluded under the statute of limitations from recovering over against the one (*M*) who (if anyone is) is really at fault.[21]

Is that what *Mendel* seeks in that context? There is an out, of course, when that situation arises. All the Court has to do to enable *R* to recover over against *M* is denominate the claim-over as one in "indemnity." That would accomplish two things. It would append a six-year period to the claim-over[22] and would start it running from the time *R* actually *pays P*'s judgment. The law has in fact done that in negligence cases when the original defendant was only "passively" negligent. He is permitted to implead the one "actively" negligent without fear that the period of limitations has run. In fact, his claim-over has not even "accrued" yet, and will not accrue until judgment in the main action is secured by the plaintiff and paid by the defendant. A similar result can be reached in warranty cases. It would entail only this: that the court permit the claim-over to qualify in all regards as an "indemnity" claim (with the concomitant advantages of the statute of limitations).

Will *Mendel* permit that? One can only wait and see. It sounds fair as set forth above, but it also has its potential injustices. If *R* keeps *M*'s items on the shelf indefinitely, *M* can be held to account for breaches of warranty many, many years after *M*'s original sale to *R*.

What the Court of Appeals does have in any event to do is decide for itself just what its broad purposes are in this personal injury area and then go about the business of seeing to it that arguable procedural or other collateral matters not be permitted to obscure the aim. If the policy of the Court has been to ease the path of the personal injury plaintiff and the present roster of the Court are behind that policy, one would have to conclude that the *Mendel* case is not a very faithful servant.

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21 *See* Note, *An Appraisal of Judicial Reluctance to Imply an Indemnity Contract in Time-Barred Breach of Warranty Suits*, 39 ST. JOHN'S L. REV. 361 (1965).

22 CPLR 213(2).