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COMMENTS ON MENDEL

RALPH F. BISCHOFF*

When one is aware that *Mendel v. Pittsburgh Plate Glass Co.*¹ represents a four-to-three decision of the New York Court of Appeals in the area of products liability, one is prepared to have confusion added to an already existing confusion. For the student of the law in this area, it is hardly necessary to detail the history of the law whereby it has moved from a denial of any liability on the part of the manufacturer of a product to a consumer or user, either on the basis of lack of privity in contract or lack of duty in negligence, to the present general status of some degree of strict liability. Familiar milestones are *MacPherson v. Buick Motor Co.*,² which created a duty of due care for the benefit of a foreseeable plaintiff in spite of lack of privity with the manufacturer; the concurring opinion of Justice Traynor as early as 1944 in *Escola v. Coca Cola Bottling Co.*,³ in which he stated that the liability of the manufacturer of a defective bottle for a personal injury should be a strict liability in tort and not one in negligence or warranty;⁴ and *Henningsen v. Bloomfield Motors, Inc.*,⁵ in which a unanimous New Jersey Court upheld liability for personal injury on the basis of implied warranty without privity. Many more cases could be cited, but the general result of this revolution on top of a revolution has been some form of strict liability.

Many students of the law today are inclined to quarrel with decisions which they consider unjust even though justified by precedent and logic. They are in a hurry to reach what they consider an equitable result. For them, the courts must act as a dynamic agent; the traditional static quality of the law is minimized. From this standpoint of public policy, it would seem that the majority in *Mendel* is clearly wrong, and the minority, definitely right. Even when analysing the opinions as a logical result of earlier premises or as mandated by precedent, the minority have the edge. At least the majority decision was not that necessary.

Since the majority of the Court held that the statute of limitations

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

² 217 N.Y. 382, 111 N.E. 1050 (1916).

³ 24 Cal. 2d 453, 150 P.2d 436 (1944).

⁴ *Id.* at 461, 150 P.2d at 440.

⁵ 32 N.J. 358, 161 A.2d 69 (1960).

had run because the action was considered one in contract and because it admittedly had not run if conceived of as tort, the basic question is: *for this purpose*, which is it? Glass doors were installed by the Pittsburgh Plate Glass Company in the Central Trust Building of Rochester, New York, in October of 1958. Due to an alleged defect in the door, the plaintiff was injured in October of 1965. At the time of the consummation of the contract between Pittsburgh and Central, the statute of limitations was six years; an additional year had obviously passed. The action, however, was brought within the tort limitation of three years from the time of injury. Procedurally, the Court of Appeals was affirming the lower court's dismissal of that part of the action based on warranty.

From the standpoint of precedents, a focal point of the argument, it is submitted that the majority opinion is not only weak, but also misleading. The emphasis is on *Blessington v. McCrory Stores Corp.*,⁶ a 1953 decision of the Court, and the relation to it of the 1963 determination in *Goldberg v. Kollsman Instruments Corp.*⁷ In *Blessington*, a child badly burned by a "cowboy suit," which proved to be dangerously flammable, was given the "benefit" of the six-year statute of limitations in his action on implied warranty against the manufacturer. Admittedly, any tort action would have failed because of a delay in bringing suit after the injury. *Goldberg* was more complicated in facts and procedure, but for purposes of comparison it is sufficient to point out that a dismissal of a count in implied warranty was reversed in a suit for the death of a passenger on an American Airlines flight against Lockheed, the manufacturer. The alleged defective instrument had been supplied by Kollsman Corporation. To counter the argument that *Goldberg* established strict tort liability and thus overruled *Blessington*, the majority in *Mendel* rely solely on its conclusion that this is not so. In spite of some words to the contrary, the latter case stands for the proposition that the cause of action remains a contract action in implied warranty.

The majority opinion in *Mendel* is weak and misleading in the discussion of these precedents because it neglects the mood and language of *Goldberg*, because it omits the setting and arguments in *Blessington* and, above all, because it fails to stress the difference in the concept of products liability between 1953 and 1963. Judge Scileppi's majority opinion admits that in *Goldberg* there is some language on "strict tort liability,"⁸ but he fails to mention that this dominates the case, regard-

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

⁷ 12 N.Y.2d 402, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

⁸ 25 N.Y.2d at 343, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

less of whether the complaint is phrased in terms of warranty or tort. Thus, Chief Judge Desmond's opinion in *Goldberg* stresses that, "[a] breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong."⁹ Again, in referring to the California decision in *Greenman v. Yuba Power Products, Inc.*,¹⁰ Judge Desmond stated that this "unanimous opinion imposed 'strict tort liability' (surely a more accurate phrase) regardless of privity."¹¹ Even Judge Burke, among the majority of four in *Mendel*, said in his dissenting opinion in *Goldberg* that the "true grounds of decision in a case of this sort lie outside the purpose and policy of the Sales Act and must be evaluated accordingly."¹² What of *Blessington* and its definite use of the statute of limitations in contract? Although Judge Desmond's opinion in *Blessington* stressed implied warranty and the contract statute, it is only in answer to the defendant's argument that a warranty action is in reality one in *negligence* (my emphasis), subject to the three-year limitation. In 1953 the question in New York was not yet whether the liability was the consequence of the sales type of warranty or was based on strict liability in tort. It was either negligence or contract warranty. This is not only clear from the general history of products liability litigation but also from the 1953 opinion. After disposing of various counts in negligence, the Court considered the alleged breach of implied warranty of fitness for use, as follows:

[The] motion to dismiss was on the theory that such a suit is in reality one in negligence, and so should be governed by the three-year limitation. We think the motion was properly denied, and that the holding below was correct — that is, that although such a breach of duty may rest upon, or be associated with, a tortious act, it is independent of negligence, and so such a cause of action gets the benefit of the six-year limit . . . as being on an implied contract, obligation or liability.¹³

To repeat, what is omitted from the majority opinion in *Mendel* is any recognition that the issue in *Blessington*, given the circumstances of 1953, was different from the issue in 1969. *Goldberg* in 1963 did hold for "strict tort liability." With that new background, *Blessington* is no longer a valuable precedent in products liability law.

Much of common law is a logical deduction from a proven or assumed premise, but it is a truism that what one puts into a major

⁹ 12 N.Y.2d at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.

¹⁰ 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

¹¹ 12 N.Y.2d at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

¹² *Id.* at 439, 191 N.E.2d at 85, 240 N.Y.S.2d at 597 (dissenting opinion).

¹³ 305 N.Y. at 146-47, 111 N.E.2d at 422-23.

premise one can also deduce from it. It would seem that the majority opinion in *Mendel* assumes that by 1969 the major premise in products liability law is either/or; either the procedure of a particular jurisdiction follows the line of warranties with the consequent application of contract law, the law of sales and, often, the commercial codes, or else the procedure and pleading omit any reference to the warranty fiction in favor of outright recognition of strict liability in tort. However, a third variation of a major premise exists in some jurisdictions, namely that the action is one of implied warranty, but it is treated as a tort which it originally was. As pointed out in the minority opinion of Judge Breitel in *Mendel*, New Jersey recently applied tort limitations in *Rosenau v. New Brunswick*¹⁴ in spite of the fact that the basic New Jersey law on products liability emphasizes breach of warranty language.¹⁵ Clearly, if the New York Court of Appeals wished to apply tort limitations, it could have done so in like manner.

Finally, and most important, whether Cecile Mendel should be able to hold the Pittsburgh Plate Glass Co. liable more than six years after the consummation of the contract between Pittsburgh and Central Trust, but within three years after her injury, involves a matter of policy. The history of liability against manufacturers for original defects has followed a tortuous path from the period when the chief question was whether there was any liability without privity to the present-day when specific results are determined by whether the liability is in tort or contract. Under either theory much of the rationale depends on what ought to be. The long-time advocate of strict tort liability for personal injuries, Justice Roger Traynor of California, analysed the policy elements as early as his concurring opinion in *Escola v. Coca Cola Bottling Co.*¹⁶ and particularly in *Greenman v. Yuba Power Products, Inc.*¹⁷ The manufacturer can most easily distribute the cost of insurance among the general public; under modern economic conditions the manufacturer is definitely tied to the consumer, particularly through advertising; the dealer or retailer is part of a network to accomplish sales; responsibility on the part of the manufacturer usually avoids multiplicity of actions. Similar considerations are to be found in leading cases emphasizing warranty, such as *Henningsen v. Bloomfield Motors, Inc.*¹⁸ In addition, the purpose and policy of a Sales Act or Commercial Code is far removed from the grounds of decision in products liability.

¹⁴ 51 N.J. 130, 238 A.2d 169 (1968).

¹⁵ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

¹⁶ 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion).

¹⁷ 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

¹⁸ 32 N.J. 358, 161 A.2d 69 (1960).

Granted that policy considerations have engendered strict liability, whether in contract or tort, there remains the question of how policy should affect time limitations on commencing a suit. As indicated, a court may use the language of implied warranty and at the same time recognize that a plaintiff not in privity with the manufacturer can hardly be expected to sue until he has been injured. Here, again, the minority opinion in *Mendel* arrives at the more just result, both in theory and practice. Mrs. Mendel was not injured by her passage through the glass doors until seven years after completion of the contract; she sued within the tort limitation of three years after the injury. The majority are willing to sacrifice the small percentage of meritorious claims in order to prevent "unfounded suits . . . ad infinitum."¹⁹ However, how many injury-causing defects occur long after a contract? The plaintiff still has the task of proving the defect and causation. The longer the time, the less likely is it that he can get to or convince the jury. Is it not unjust to deny an injured party compensation on the arbitrary basis of the passage of time when completely unconnected with any laches on the part of the plaintiff? The question is almost rhetorical.

In summary, neither from the standpoint of necessary precedent or logical analysis or equity can the opinion of the majority that the mere passage of time has barred Mrs. Mendel's action for personal injury be considered satisfactory. Perhaps this was the sole common denominator which could produce a majority. Perhaps strict liability in any form should not be extended to this type of accident. But, that is another question.

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