St. John's Law Review

Volume 36
Number 2 *Volume 36, May 1962, Number 2*

Article 7

May 2013

Breach of Warranty--Privity--Requirement of Privity Abandoned in Suit on Express Warranty (Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5 (1962))

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RECENT DECISIONS

BREACH OF WARRANTY — PRIVITY — REQUIREMENT OF PRIVITY ABANDONED IN SUIT ON EXPRESS WARRANTY. — Defendant, the manufacturer of a product designed to render fabrics shrink-proof, had expressly represented in trade journals, letters to garment manufacturers, and labels which it furnished, that fabrics finished with its product would not shrink. Plaintiff, a manufacturer of children's clothing, purchased fabrics so treated from several intermediate manufacturers in reliance upon defendant's representations. Alleging that the material shrunk when subjected to ordinary washing, plaintiff brought an action for breach of the express warranties and joined all the manufacturers. Defendant's motion for summary judgment, dismissing the action as to it because of a lack of privity, was denied at Special Term and the Appellate Division affirmed. The Court of Appeals, affirming the decisions of the lower courts, *held* that the plaintiff could maintain an action based on a breach of express warranty against the defendant — despite the lack of privity between them. *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, — N.E.2d —, — N.Y.S.2d — (1962).

In New York, warranties traditionally have been considered as arising from the contract between buyer and seller, and thus where there was no privity of contract between the parties in a breach of warranty action recovery has been denied.[1] This rule was firmly established by *Chysky v. Drake Bros. Co.*,[2] and reaffirmed in *Turner v. Edison Storage Battery Co.*,[3] a case similar to the instant case. In the *Turner* case a defective battery

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[1] Legal writers have argued, however, that the breach of warranty action was in its earliest form a tort action, and still retains at least some of its tort aspects. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03 (1960); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1127 (1960); see Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958).

[2] 235 N.Y. 468, 139 N.E. 576 (1923); *accord*, Burke v. Associated Coca-Cola Bottling Plants, Inc., 7 App. Div. 2d 942, 181 N.Y.S.2d 800 (3d Dep't 1959) (memorandum decision).

[3] 248 N.Y. 73, 161 N.E. 423 (1928); *accord*, Shoopak v. United States Rubber Co., 17 Misc. 2d 201, 183 N.Y.S.2d 112 (Sup. Ct. 1959), *aff'd mem.*, 10 App. Div. 2d 978, 202 N.Y.S.2d 250 (2d Dep't 1960); McDonald v. Packard Rochester, Inc., 206 Misc. 16, 132 N.Y.S.2d 322 (Sup. Ct. 1954).

purchased from a retailer, but manufactured and warranted to be safe by the defendant manufacturer, caused injuries to the plaintiff. In an action against the manufacturer for breach of the warranties, the court stated: "There can be no warranty where there is no privity of contract. A cause of action for breach of warranty, either express or implied, is not, and cannot be, stated." [4]

Some jurisdictions made an early exception to the privity rule in the area of foods.[5] A leading case is *Coca-Cola Bottling Works v. Lyons*,[6] wherein plaintiff recovered for injuries suffered from swallowing broken glass contained in a beverage bottled by defendant, even though there was no privity of contract between them. The court allowed recovery on the grounds of an implied warranty of fitness running from the manufacturer to the consumer. New York, however, had been reluctant to accept this reasoning, going so far as to deny recovery in breach of warranty actions to the administrator of a deceased infant whose death had been caused by drinking unwholesome milk,[7] and to the guardian ad litem of another infant who had suffered injuries as a result of drinking milk which contained broken glass [8] — simply because the milk had been purchased by the mothers of the infants.

While retaining the privity rule, the New York courts sometimes avoided its harsh results in the food area by use of the principles of agency. Thus in *Ryan v. Progressive Grocery Stores, Inc.*,[9] where the plaintiff husband sustained injuries from a pin

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[4] 248 N.Y. at 74, 161 N.E. at 424.

[5] *E. g.*, Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Davis v. Van Kamp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914). New York offered the sale of food special consideration in a very limited area. Under Section 96 of the New York Personal Property Law, an implied warranty as to condition or fitness for a particular purpose arises on the sale of goods only when the buyer expressly or impliedly makes known to the seller his particular purpose and relies upon the seller's judgment and skill. However, in the purchase of goods normally used for human consumption from a retailer of foods, the mere purchase, by implication, makes known to the seller the purpose for which the articles are acquired. Rinaldi v. Mohican Co., 225 N.Y. 70, 121 N.E. 471 (1918).

[6] 145 Miss. 876, 111 So. 305 (1927).

[7] Massey v. Borden Co., 265 App. Div. 839, 37 N.Y.S.2d 571 (2d Dep't 1942) (memorandum decision).

[8] Redmond v. Borden's Farm Prods. Co., 245 N.Y. 512, 157 N.E. 838 (1927) (memorandum decision).

[9] 255 N.Y. 388, 175 N.E. 105 (1931); *accord,* Visusil v. W. T. Grant Co., 253 App. Div. 736, 300 N.Y. Supp. 652 (2d Dep't 1937) (memorandum decision), *appeal denied,* 277 N.Y. 740 (1938); see Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 285, 38 N.Y.S.2d 788, 794-95 (1st Dep't 1942); Mouren v. Great Atl. & Pac. Tea Co., 139 N.Y.S.2d 375 (Sup. Ct. 1955), *modified,* 1 App. Div. 2d 767, 148 N.Y.S.2d 1 (1st Dep't) (memorandum decision), *aff'd mem.,* 1 N.Y.2d 884, 136 N.E.2d 715, 154 N.Y.S.2d

embedded in a loaf of bread purchased by his wife, the court found that the wife was acting as her husband's agent when she purchased the bread, and therefore there was privity of contract between the husband and the defendant store. This reasoning was also used in other analogous situations.[10] A major shortcoming of this approach, however, was that while it served, under certain circumstances, to avoid these inequitable results as between adult members of a family, an infant was still precluded from recovering — simply because he could not be considered a principal.[11]

Several proposals have been made in the legislature[12] to extend a seller's warranty to employees, members of the household, and guests of the purchaser, but none have been successful. Some of the lower courts,[13] and notably Judge Starke in the New York City Municipal Court,[14] advocated a modification of the privity requirement, at least in food cases. In 1961 the New York Court of Appeals, in *Greenberg v. Lorenz*,[15] made a major exception to the privity requirement in breach of warranty actions. There a child was injured by a sharp piece of metal in a can of salmon purchased by her father; the court allowed recovery, thus following the trend of other jurisdictions in the food area.[16]

In the *American Cyanamid* case, as in the *Greenberg* case, the Court was faced with the barrier of privity, but decided that

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642 (1956). *But cf.* Vaccaro v. Prudential Condensed Milk Co., 133 Misc. 556, 232 N.Y. Supp. 299 (N.Y. City Ct. 1927) wherein a wife was presumed to be the agent of her husband and therefore could not recover for injuries sustained from drinking unwholesome milk, even though she had purchased and paid for the milk.

[10] Bowman v. Great Atl. & Pac. Tea Co., 308 N.Y. 780, 125 N.E.2d 165 (1955) (where two sisters live together, one is considered the agent of the other); *cf.* Conklin v. Hotel Waldorf Astoria Corp., 5 Misc. 2d 496, 161 N.Y.S.2d 205 (N.Y. City Ct. 1957).

[11] Salzano v. First Nat'l Stores, Inc., 268 App. Div. 993, 51 N.Y.S.2d 645 (2d Dep't 1944) (memorandum decision).

[12] S. Int. 3159, Pr. 3413, and A. Int. 315, Pr. 315 (1962); see 1959 N.Y. LEG. DOC. No. 65(B); 1956 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (A) 27; 1945 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (A) 5-7; 1943 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (J) 5-6.

[13] See Welch v. Schiebelhuth, 11 Misc. 2d 312, 169 N.Y.S.2d 309 (Sup. Ct. 1957).

[14] See Conklin v. Hotel Waldorf Astoria Corp., *supra* note 10; Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958); Starke, *Implied Warranties of Quality and Wholesomeness in the Sale of Food*, 137 N.Y.L.J., April 8, 1957, p. 4, cols. 1-3, April 9, 1957, p. 4, cols. 1-3, April 10, 1957, p. 4, cols. 1-3.

[15] 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

[16] 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 23.01[1][a] (1960); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1106-08 (1960).

the interests of justice demand exceptions. In the *Greenberg* decision the court said: "The injustice of denying damages to a child because of nonprivity seems too plain for argument." [17] The language used in the instant case was: "The policy of protecting the public from injury . . . resulting from misrepresentations outweighs allegiance to an old and out-moded technical rule of law which, if observed, might be productive of great injustice."[18]

Recognizing the tort characteristics of a breach of warranty action, the Court in the *American Cyanamid* decision felt that modern commercial practices justify abandoning the privity requirement when the manufacturer has given express warranties. It emphasized the practice of the modern *manufacturer* to induce purchases by the public through the media of mass advertising and labels. The product is thereby warranted to the public, not just to the immediate purchaser, who often is merely a conduit through which the product passes to the consumer. If the manufacturer's representations prove false, the Court reasoned, then he should be directly liable to anyone who is injured thereby.

This is not the first time the Court of Appeals has recognized the tort aspects of the traditionally contractual warranty action. In *Greco v. S. S. Kresge Co.*[19] the decedent's administrator was allowed to bring an action for breach of warranty under Section 130 of the Decedent Estate Law,[20] because "the breach is a wrongful act, a default and, in its essential nature, a tort." [21] Significantly, in the case under discussion, the Court questions the validity of the assumption that a breach of warranty action is really contractual in nature. Applying this reasoning to present commercial practice, it states:

> The world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels . . . prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the

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[17] 9 N.Y.2d at 199, 173 N.E.2d at 775, 213 N.Y.S.2d at 42.

[18] 11 N.Y.2d at 13, — N.E.2d at —, — N.Y.S.2d at —.

[19] 277 N.Y. 26, 12 N.E.2d 557 (1938).

[20] An administrator or executor may maintain an action under this section to recover damages only for a "wrongful act, neglect or default, by which the decedent's death was caused. . . ." N.Y. DECED. EST. LAW § 130.

[21] 277 N.Y. at 34, 12 N.E.2d at 561. However, the courts have, for the most part, considered the action basically contractual in nature. *E. g.*, Gimenez v. Great Atl. & Pac. Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934); Haller v. Rudmann, 249 App. Div. 831, 292 N.Y. Supp. 586 (2d Dep't 1937) (memorandum decision); McSpedon v. Kunz, 245 App. Div. 824, 281 N.Y. Supp. 147 (2d Dep't 1935) (memorandum decision).

manufacturer's denial of liability on the sole ground of the absence of technical privity.[22]

Thus New York has made two major exceptions to the law of privity. In *Greenberg* v. *Lorenz,* where a father purchased food from a retailer, the court determined that "at least as to food and household goods, the presumption should be that the purchase was made for all the members of the household," [23] and thus an *implied* warranty of fitness runs from the retailer to the ultimate consumer. The *American Cyanamid* case determines that when a manufacturer *expressly* warrants his product by use of advertisements and labels, he will be liable to remote purchasers for breach of such warranty.[24]

In the *Greenberg* case the recovery was for personal injuries; in the *American Cyanamid* case, for pecuniary harm. This is a significant factor of the decision, especially when compared with other jurisdictions which led the way in abandoning the privity requirement. In *Baxter v. Ford Motor Co.,*[25] the defendant had stated that the glass in its windshield was shatterproof; plaintiff purchased a Ford automobile, and when a pebble struck the windshield, the glass shattered and seriously injured the plaintiff. The court, in a landmark decision, allowed recovery for breach of the express warranty despite the lack of privity between the parties. Many other jurisdictions followed suit; in fact, few have failed to allow recovery in the case of an express warranty, even though privity was lacking.[26] Limitations on the *Baxter* rule, however, were pointed out by the same court in *Dimoff v. Ernie Majer, Inc.,*[27] wherein the court, denying recovery for purely pecuniary damages caused by a defective fuel line in a truck, stated that "the rule announced in *Baxter v. Ford Motor Co.* is not apposite for the reason that, in the *Baxter* case the defective windshield was an *inherently dangerous condition.*" [28]

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[22] 11 N.Y.2d at 12, — N.E.2d at —, — N.Y.S.2d at —.

[23] 9 N.Y.2d at 200, 173 N.E.2d at 776, 213 N.Y.S.2d at 42.

[24] In Thomas v. Leary, 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (4th Dep't 1962), decided the same day as the *American Cyanamid* case, the court allowed an employee of the purchaser of a defective chair to maintain a cause of action for breach of warranty, stating: *"The problem presented, however, does not depend on whether the plaintiff relies upon express or implied warranty,* because the very difficult question of privity or lack thereof is present in either case as plaintiff himself was not a purchaser." *Id.* at 439, 225 N.Y.S.2d at 139 (emphasis added).

[25] 168 Wash. 456, 12 P.2d 409 (1932).

[26] Prosser, *supra* note 16, at 1135-36.

[27] 55 Wash. 2d 385, 347 P.2d 1056 (1960).

[28] *Id.* at 389, 347 P.2d at 1059 (emphasis added). Compare MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1912), the landmark case allowing recovery for the negligent manufacture of a product even though there was no privity of contract between the parties, in which Judge

The Uniform Commercial Code also adopts the view that recovery in breach of warranty cases should be limited to situations where personal injuries have resulted from the defective condition of a product.[29] Thus New York, which four years before the *Baxter* decision, refused in *Turner v. Edison Storage Battery Co.*[30] to allow recovery on similar facts, has not only accepted the *Baxter* rule, but extended it beyond the limitations imposed by the *Dimoff* case. New York is not the first jurisdiction to allow recovery for pecuniary damages in breach of warranty cases,[31] but it has taken a large step forward in abandoning both the privity and personal injury requirements at the same time.

The *Greenberg* and *American Cyanamid* cases still leave many questions unanswered. Although the *Greenberg* case involved injuries suffered from adulterated food, the court extended the rule to household products also, without defining them.[32] Moreover, this case merely allows a member of the purchaser's household to bring suit against the *retailer;* nothing is said about allowing the purchaser or members of his household to proceed against the wholesaler or manufacturer. Another unanswered question is whether employees and guests can be considered members of the household.[33]

In *American Cyanamid* the Court stresses the fact that the defendant supplied labels for distribution to remote purchasers,

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Cardozo stated: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a *thing of danger." Id.* at 389, 111 N.E. at 1053 (emphasis added).

[29] Section 2-318 states: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. . . ." Thus the Code, if adopted by New York, would limit the *American Cyanamid* rule. The Law Revision Commission, however, does not recommend this limited version. 1955 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (C) 81. See also RESTATEMENT (SECOND), TORTS, Explanatory Notes § 402B, comment *a* at 44 (Tent. Draft No. 6, 1961).

[30] 248 N.Y. 73, 161 N.E. 423 (1928).

[31] Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., — Iowa —, 110 N.W.2d 449 (1961); United States Pipe & Foundry Co. v. City of Waco, 130 Tex. 126, 108 S.W.2d 432, *cert. denied,* 302 U.S. 749 (1937); see Laclede Steel Co. v. Silas Mason Co., 67 F. Supp. 751 (W.D. La. 1946); Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953); *cf.* Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931).

[32] See Thomas v. Leary, *supra* note 24, which may well indicate a vast extension of the *Greenberg* doctrine.

[33] "On logic . . . there should be no distinction between the *Greenberg* case and the present case, merely because food and family were involved in that case and a chair and an employer-employee relationship in this." Thomas v. Leary, *supra* note 24, at 440, 225 N.Y.S.2d at 140.

implying that the express representations in trade magazines and letters to garment manufacturers did not suffice to create an express warranty. Under what precise circumstances, however, the media of radio, television, newspaper and direct mail advertising, either alone or in combination, will constitute express warranties, in the absence of labels, is another question left unanswered by the Court.

Thus while the Court uses very broad language in discussing the tort aspects of a warranty action,[34] it carefully limits the decision to its facts. The language shows an inclination to abandon the privity requirement altogether, at least when the interests of justice demand it; the limitations, a desire to proceed slowly. The policy of the Court of Appeals is to "be cautious and take one step at a time." [35] The Court seems to be unnecessarily cautious in the instant case, for there is no apparent reason for limiting an express warranty to situations where the remote manufacturer supplies labels. The language of the decision indicates that the rule will be extended, but apparently only on an *ad hoc* basis.

CONSTITUTIONAL LAW — TELEGRAPH COMPANY DENIED DUE PROCESS OF LAW BY STATE JUDGMENT ESCHEATING UNDISBURSED MONEY ORDER FUND. — As part of its business Western Union offers the service of telegraphing money orders. The receiver is given a note which can be cashed at one of the company's offices. Some of these notes are never redeemed. At other times the receiver cannot be located and in attempting to return the money the sender, also, cannot be located. This money is held on deposit by the company until its true owner should appear. The state of Pennsylvania, however, escheated these funds and its right to do so was upheld by the Pennsylvania Supreme Court.[1] The United States Supreme Court reversed, *holding* that the proceeding lacked due process since Western Union was compelled to relinquish the monies without any assurance that it would not again be subject to an escheat action by any other state in which it also did business or that it would not be held liable to a party not

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[34] See text accompanying note 22 *supra*.

[35] Greenberg v. Lorenz, 9 N.Y.2d 195, 200, 173 N.E.2d 773, 776, 213 N.Y.S.2d 39, 42 (1961).

[1] Commonwealth v. Western Union Tel. Co., 400 Pa. 337, 162 A.2d 617 (1960).