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Products Liability--Cancer from Cigarette Smoking Held Actionable--Issue of Causation for Jury (Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961))

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PRODUCTS LIABILITY—CANCER FROM CIGARETTE SMOKING HELD ACTIONABLE—ISSUE OF CAUSATION FOR JURY.—The plaintiff sued Liggett & Myers Tobacco Company, contending that the smoking of its cigarettes for thirty-two years had proximately caused his contracting lung cancer. Negligence was alleged for failure to conduct adequate tests to determine if defendant's cigarettes caused cancer and for breaching the duty to warn consumers of the presence of cancer-producing ingredients. The plaintiff also alleged a cause of action in breach of express warranty arising from advertisements which stated that the defendant's brand caused no ills and was not harmful to the nose, throat or accessory organs. Furthermore, breach of the implied warranties of merchantability and fitness for a particular purpose was alleged. The trial court dismissed the warranty actions without stating whether the basis for the dismissal was insufficient proof of causation or failure to notify the defendant of the breach of warranty within a reasonable time. A verdict was directed for the defendant on the issue of negligence for a lack of substantial evidence to support it. The United States Court of Appeals for the Third Circuit reversed, *holding* that the issue of causation should go to the jury and that there was sufficient evidence to constitute causes of action in negligence and breach of express and implied warranty. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961).

In the law of products liability there are two major legal theories upon which recovery is based: negligence and breach of warranty.¹ To maintain an action in negligence against a manufacturer, a plaintiff must prove that his injury was caused by a defect in the product, that the defect existed when the product left the hands of the defendant and that the defect was present because of the defendant's negligence.² Likewise, a consumer suing on a breach of warranty theory must show his injury was caused by a defect in the product and trace that cause to the defendant, but he need not prove any negligence on the part of

¹ See PROSSER, TORTS § 83 (2d ed. 1955) wherein the author cites many cases based upon both theories. Products-liability recoveries upon other theories occur less frequently. See generally *Grigsby v. Stapleton*, 94 Mo. 423, 7 S.W. 421 (1888) (nondisclosure of defect); *Ralston Purina Co. v. Cox*, 141 Neb. 432, 3 N.W.2d 748 (1942) (deceit); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932), *second appeal*, 179 Wash. 173, 35 P.2d 1090 (1934) (misrepresentation). Most courts adopt an express warranty theory. RESTATEMENT (SECOND), TORTS § 402B, comment *d* at 45 (Tent. Draft No. 6, 1961).

² Prosser, *The Assault Upon The Citadel*, 69 YALE L.J. 1099, 1114 (1960).

the manufacturer.³ Warranty is not a concept based on fault but upon "the failure of a product to measure up to express or implied representations on the part of the manufacturer or other supplier."⁴ Generally, an express warranty is any affirmation or promise by a seller to a buyer that the goods shall conform to such affirmation or promise.⁵ There are two implied warranties, one of merchantability, *i. e.*, that goods are reasonably fit for the general purpose for which they are manufactured and sold,⁶ and one of fitness for a particular purpose, *i. e.*, where the buyer makes his purpose known to the seller and relies upon the latter's skill or judgment.⁷

Historically a plaintiff's greatest obstacle to recovery in products liability has been the necessity for privity of contract.⁸ In a negligence action, the principle of *MacPherson v. Buick Motor Co.*⁹ allows a plaintiff to recover without privity where the product is inherently dangerous and likely to cause injury if negligently made. Just as the gradual extension of the *MacPherson* rule has virtually extinguished the need for privity in actions founded on negligence,¹⁰ a similar trend has developed in warranty cases.¹¹ While most jurisdictions refuse to extend a warranty from a manufacturer to a consumer where no privity exists,¹² many make exceptions for food and drugs¹³ and products for external but intimate bodily use.¹⁴ There was no privity issue in the principal case because under Pennsylvania law it is no longer required in negligence or warranty actions.¹⁵

³ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Lundquist v. Coca Cola Bottling, Inc.*, 42 Wash. 2d 170, 254 P.2d 488 (1953). See James, *Products Liability*, 34 TEXAS L. REV. 192, 226 (1955).

⁴ 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY §16.01 (1960).

⁵ *Id.* §19.04.

⁶ *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954); *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931).

⁷ N.Y. PERS. PROP. LAW §96(1). Frequently both of these implied warranties are present at one time. *Huscher v. Pfost*, 221 P.2d 931 (Colo. 1950).

⁸ The leading common-law case is *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. 1842). See generally Prosser, *supra* note 2, for an historical background of privity in this area.

⁹ 217 N.Y. 382, 111 N.E. 1050 (1916).

¹⁰ 1 FRUMER & FRIEDMAN, *op. cit. supra* note 4, §5.03(1).

¹¹ Comment, *Effect of Advertising on Manufacturer's Liability to Ultimate Purchaser*, 42 MARQ. L. REV. 521, 527-31 (1950).

¹² Prosser, *The Assault Upon The Citadel*, 69 YALE L.J. 1099, 1110 (1960).

¹³ *Id.* at 1111. In RESTATEMENT (SECOND), TORTS §402A, at 24 (Tent. Draft No. 6, 1961), the advisors list the jurisdictions allowing the food and drug exception to date.

¹⁴ Prosser, *supra* note 12, at 1111-12.

¹⁵ *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959)

In the few cigarette-cancer cases actually litigated, the problem of allowing a plaintiff to introduce evidence on the issue of causation does not appear to have been encountered.¹⁶ In *Cooper v. R. J. Reynolds Tobacco Co.*,¹⁷ the Court of Appeals for the First Circuit, reversing the District Court, found that a valid cause of action in deceit had been alleged and remanded the case for further proceedings. Subsequently the District Court denied recovery for a failure to substantiate the allegations of false advertisements by defendant.¹⁸

In 1961 the first cigarette-cancer cases ever to reach a jury were tried in federal courts.¹⁹ In *Green v. American Tobacco Co.*,²⁰ an action based on negligence and breach of an implied warranty of merchantability, the following charge was directed to the jury:

The manufacturer of products . . . impliedly warrants that its products are reasonably wholesome or fit for the purposes for which they are sold, but such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge.²¹

In answering interrogatories, the jury found that the cigarettes did cause the cancer but replied negatively when asked if the defendant, at the time (1956), "by the reasonable application of human skill and foresight" could have foreseen the cancer danger.²²

The court in *Lartigue v. Liggett & Myers Tobacco Co.*²³ followed the *Green* decision in tacitly applying the negligence test of foreseeability in an action based on warranty. Charging the jury on the issue of implied warranty, the court stated:

If you find . . . that the state of medical knowledge was then such that the defendants could not have anticipated in the exercise of reasonable care that their products would cause cancer, then your verdict on the issue of implied warranty would be in favor of the defendants.²⁴

abolished the privity requirement in implied warranty. Previously it had been abolished in negligence and express warranty. *Mannsz v. Macwhyte Co.*, 155 F.2d 445 (3d Cir. 1946).

¹⁶ A list of cigarette-cancer cases may be found in 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 1388 (1960).

¹⁷ 234 F.2d 170 (1st Cir. 1956).

¹⁸ *Cooper v. R. J. Reynolds Tobacco Co.*, 158 F. Supp. 22 (D. Mass. 1957), *aff'd*, 256 F.2d 464 (1st Cir. 1958).

¹⁹ *Green v. American Tobacco Co.*, 3 PERSONAL INJURY NEWSLETTER 110 (1960); *Lartigue v. Liggett & Myers Tobacco Co.*, 3 PERSONAL INJURY NEWSLETTER 160, 165 (1960).

²⁰ 3 PERSONAL INJURY NEWSLETTER 110 (1960).

²¹ *Ibid.* (emphasis added).

²² *Id.* at 110.

²³ 3 PERSONAL INJURY NEWSLETTER 160 (1960).

²⁴ *Id.* at 165.

As stated above, the basic elements of a cause of action in breach of warranty have *not* included any proof of negligence or any concept of foreseeability.²⁵ A plaintiff traditionally need only prove breach of the warranty,²⁶ and courts have stated that it is immaterial whether a harmful substance could be eliminated.²⁷

In the present case the Court found that this manufacturer-consumer relationship could support implied warranties of both merchantability and fitness for use, *i. e.*, that the "cigarettes were reasonably fit and generally intended for smoking without causing physical injury."²⁸ Moreover, the opinion declared that a jury might find an express warranty had arisen from a national advertising campaign in which the defendant had expressly claimed that medical tests had proven its product would not adversely affect "nose, throat and *accessory organs*."²⁹ The Court further stated that a jury might also conclude, from evidence showing a failure to warn consumers of the presence of cancer-producing substances in its cigarettes, that the defendants were liable for negligence.³⁰ Thus the majority opinion shows a willingness to allow the question of causation to go to the jury on the issues of negligence and breach of express and implied warranties.

In his concurring opinion, Judge Goodrich agrees that there were possible causes of action in breach of express warranty or negligent misrepresentation, but he would stop at that point.³¹ He reasoned that, absent an express warranty, the defendant could not be held liable on an implied warranty unless the tobacco itself were adulterated.³² He asserted that the situation before the Court was akin to those situations in which a consumer's excessive drinking causes liver trouble or where one eats salted peanuts when he should be on a salt-free diet. The judge intimated that neither the whiskey distiller nor the peanut manufacturer could be held for breach of implied warranty.³³

²⁵ James, *Products Liability*, 34 TEXAS L. REV. 192, 226 (1955). In this article Professor James gives a full discussion of the various remedies a plaintiff may pursue in this area, including the requirements, limitations and advantages of every cause of action.

²⁶ 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03(4) (1960).

²⁷ *Holt v. Mann*, 294 Mass. 21, 200 N.E. 403 (1936). See also Wilson, *Products Liability*, 43 CALIF. L. REV. 614, 639 (1955). *But cf.* Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954) wherein the plaintiff failed to recover upon breach of implied warranty for transfusing her with impure blood.

²⁸ *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296 (3d Cir. 1961).

²⁹ *Id.* at 296-97.

³⁰ *Id.* at 300.

³¹ *Id.* at 301-02.

³² *Id.* at 302.

³³ *Ibid.*

Because the medical profession is so sharply divided upon the possible causes of cancer,³⁴ the issue of proximate cause is much more difficult under these circumstances than in the usual products liability case.³⁵ The Court in the instant case allowed this issue to go to the jury on all three counts—express warranty, implied warranty and negligence. Patently such a view forces the jury to depend entirely upon expert evidence and grope blindly through an area in which the experts themselves violently disagree. Perhaps this difficulty was recognized by the judges in the *Green* and *Lartigue* cases and motivated them to inject an artificial quasi-negligence test into an action grounded on breach of implied warranty. It would seem that the line drawn by Judge Goodrich is more realistic, in that it permits a plaintiff to prove causation *only* if the manufacturer had expressly warranted the product *or* had produced one which was adulterated. While not explicitly so stating, Judge Goodrich's reasoning follows the theory that if the present level of scientific knowledge does not permit the manufacture of a socially desirable product free of possibly harmful substances, a manufacturer should not be held liable for a breach of an implied warranty therefor.³⁶ Whichever cause of action is pursued, the causation problem remains—as the jury's final determination can only be based on the most persuasive expert testimony.³⁷ However, an important factor in Judge Goodrich's approach, which is also implicit in the *Green* and *Lartigue* cases, is that once a cause of action on implied warranty is precluded, certain safeguards are maintained. Thus, a consumer suing on a negligence theory must establish that the manufacturer could have foreseen the harmful effects of its product, and furthermore may be obliged to overcome the defenses of contributory

³⁴ *Cancer of the Lung—Breach of Warranty in Cigarette Sales?*, 1 Current Med. 35 (Sept. 1954), 1 Current Med. 16 (Nov. 1954). The September issue lists those authorities who contend smoking causes cancer of the lung, whereas the November issue cites authorities in opposition.

³⁵ See *Foley v. Liggett & Meyers Tobacco Co.*, 136 Misc. 468, 241 N.Y. Supp. 233 (Sup. Ct. 1930), *aff'd*, 232 App. Div. 822, 249 N.Y. Supp. 924 (2d Dep't 1931) (tobacco contained segments of a dead mouse); *Corum v. R. J. Reynolds Tobacco Co.*, 205 N.C. 213, 171 S.E. 78 (1933) (fish-hook imbedded in plug of tobacco). *But see* *Rexall Drug Co. v. Nihill*, 276 F.2d 637, 645 (9th Cir. 1960) where plaintiff alleged loss of her hair from using a home permanent. In finding for the defendant it was held that the only reasonable inference from the evidence was that the cause of plaintiff's condition was unknown.

³⁶ 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03(4) (1960). The authors state that such a theory could be supported by courts on a policy basis.

³⁷ Of course this problem is not limited to medical causation. See, *e.g.*, *Brown v. Sterling Abrasives Div. of Cleveland Quarries Co.*, 5 Ill. App. 2d 1, 124 N.E.2d 607 (1955) (defective machinery); *Baker v. B. F. Goodrich Co.*, 115 Cal. App. 2d 221, 252 P.2d 24 (1953) (explosion of tire).

negligence and assumption of risk—certainly relevant considerations in cigarette-cancer cases. And, should the consumer sue on an express warranty, he must show that an alleged assurance was actually an express warranty pertaining to the harm suffered; that it could reasonably be relied upon; and that he did in fact rely upon it. In addition to these safeguards, the approach of Judge Goodrich seemingly protects the manufacturer from an excessive exposure to absolute liability based on a causal relationship laden with doubt.³⁸



REAL PROPERTY—LIS PENDENS—ACTION TO ABATE NUISANCE NO BASIS FOR LIS PENDENS.—The owners and developers of a tract of land constructed conduits which collected surface water and diverted it onto the plaintiffs' adjacent property. Plaintiffs brought suit, seeking damages and a mandatory injunction ordering defendants to eliminate the conduits, and filed a notice of *lis pendens* against the defendants' property. Special Term granted defendants' motion to cancel the *lis pendens*, conditioned upon the filing of an undertaking of \$10,000. On appeal the Appellate Division reinstated the *lis pendens*. In a four-to-three decision, the Court of Appeals reversed and held that the plaintiffs were not entitled to file a *lis pendens*, since the action was one to abate a nuisance, and not one affecting the "use" of land within the meaning of Section 120 of the New York Civil Practice Act. *Braunston v. Anchorage Woods, Inc.*, 10 N.Y.2d 302, 178 N.E.2d 717, 222 N.Y.S.2d 316 (1961).

At the beginning of the 19th century New York followed the common-law doctrine of *lis pendens*,¹ which provided that a grantee of real property who received title from a litigant during the pendency of an action concerning the land took title subject to the outcome of the litigation.² This rule caused hardship to innocent purchasers who often had no way of discovering whether real property was the subject of litigation at the time of purchase.³

³⁸ It is interesting to note that, in light of the concurring opinion, the majority advised the lower court, on remand, to submit interrogatories to the jury in order to ascertain upon which theory the jury reached their verdict. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 301 n.18 (3d Cir. 1961).

¹ 1957 N.Y. LEG. DOC. NO. 88, N.Y. JUDICIAL CONFERENCE SECOND ANNUAL REPORT 107 [hereinafter cited as 1957 N.Y. LEG. DOC. NO. 88].

² 1957 N.Y. LEG. DOC. NO. 88, at 107.

³ *Ibid.*