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# Tort Liability For Breach Of Warranty

## TORT LIABILITY FOR BREACH OF WARRANTY

The increasing importance of the problem of products liability is depicted by the recent New Jersey case of *Henningsen v. Bloomfield Motors, Inc.*[1] In that case the plaintiff's husband had bought her a Plymouth automobile as a gift. Ten days later she was driving on a smooth, paved road at about twenty miles per hour when she heard a noise from under the hood and the steering wheel spun in her hands causing the car to veer sharply to the right and crash into a wall. The plaintiff sued both the dealer and the manufacturer for the injuries suffered in the accident. The complaint contained counts alleging both breach of warranty of merchantability and negligence, but the negligence counts were dismissed because of a lack of evidence. When the cause was submitted to the jury for a determination solely on the issue of implied warranty of merchantability, a verdict was returned in favor of Mrs. Henningsen for $30,000 against both the dealer and the manufacturer. Judgment for the plaintiff was affirmed by the New Jersey Supreme Court.

In a study of the action for breach of warranty by Professor Ames it is shown that breach of warranty was, in its origin, a pure action of tort.[2] It continued as a tort action until *Stuart v. Wilkins,*[3] in 1778, which is said to have been the first instance of an action of assumpsit upon a seller's warranty.[4] From that time until the present the tendency to treat breach of warranty as a contractual action has gained momentum until now many courts simply assume that a warranty is contractual in nature.[5]

Because the complaint in the instant case was for breach of warranty the court was immediately faced with two problems. First, in a contract action there must be privity between the plaintiff and the defendant in respect to the matter sued upon.[6] In the case at bar this

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[1]Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[2]Ames, History of Assumpsit, 2 Harv. L. Rev. 1, 8 (1888).

[3]3 Doug. 18, 99 Eng. Rep. 15 (1778). The earliest reported case upon a warranty is said to have been in 1383. See Ames, note 2 supra at 8.

[4]See note 2 supra.

[5]Compagnia Italiana Transporto Olii Minerali v. Sun Oil Co., 43 F.2d 683, 685 (2d Cir. 1930); Rasmus v. A. O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958); Dunn v. Texas Coca-Cola Bottling Co., 84 S.W.2d 545, 549 (Tex. Civ. App. 1935); Houston v. Lawhead, 116 W. Va. 652, 182 S.E. 780, 782 (1935).

[6]Young v. Aeroil Products Co., 248 F.2d 185, 190 (9th Cir. 1957); Page v. Cameron Iron Works, Inc., 155 F. Supp. 283, 287 (S.D. Tex. 1957); Dennis v. Willys-Overland Motors, Inc., 111 F. Supp. 875 (W.D. Mo. 1953); Barni v. Kutner, 45 Del. 550, 76 A.2d 801 (1950); Brown v. Howard, 285 S.W.2d 752, 753 (Tex. Civ. App. 1955). For a collection of cases see 77 C.J.S. Sales § 305 (1960).

privity was lacking. Secondly, a party is free to contract against a warranty which would otherwise be implied.[7] In the contract for the sale of the car the manufacturer expressly disclaimed the type of liability it was sued for. As will be shown later in this comment, a return to the old tort theory of breach of warranty would have eliminated both of these problems as well as the unnecessary wrestling with the contract theory.[8]

Since Mrs. Henningsen was not a party to the purchase of the car, she is precluded from a recovery in a majority of jurisdictions because of a lack of privity.[9] In dispensing with the requirement of privity the New Jersey court relied upon its former decision in *Faber v. Creswick*,[10] where there was a lease containing a covenant that the landlord would have the premises in good repair at the inception of the occupancy. The wife of the tenant was injured because of disrepair of the premises in breach of that covenant. In a suit against the landlord she obtained a recovery even though she was not a party to the lease.[11] The court in the *Faber* case cited as primary authority for its decision section 357 of the *Restatement of Torts*, which deals only with liability for negligence.[12] In citing the *Faber* decision in the instant case, the court noted that there the action was in tort while the present suit was in contract. Thus the court relied on tort criteria to determine that the plaintiff had standing to sue in contract. The court attempted to justify this unusual intermingling of the two theories by pointing out that historically actions on warranties were in tort, sounding in deceit.[13] Thus it would appear that the court held that actions on warranties are sufficiently tortious in nature to justify using tort criteria to establish the extent of liability, but not sufficiently tortious in nature to be decided solely on a tort basis.

The Uniform Sales Act says, "the implied condition [*i.e.*, warranty] that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description, whether they

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[7]See note 21 infra.

[8]In advocating the tort theory in preference to contract in this field, consideration has not been given to such ramifications as the amount of damages and the statute of limitations, but only to difficulties arising in regard to privity and disclaimer.

[9]See note 6 supra.

[10]31 N.J. 234, 156 A.2d 252 (1959).

[11]Id. at 255.

[12]Ibid.

[13]32 N.J. 358, 161 A.2d 69, 100 (1960). "Historically" in this context means between 1383 and 1778. See notes 2 and 3 supra. Breach of warranty was originally an action on the case for breach of an assumed duty, the wrong being in a form of misrepresentation. See note 27 infra.

are sold under a patent or trade name or otherwise."[14] It would seem that this is just another way of saying that the manufacturer is under a duty to anyone who buys his product to see that it is fit for the purpose for which it is sold. Therefore the breach of this duty by the manufacturer creates a tort. Under this view the courts would not have to wrestle with privity, as did the court in the *Henningsen* case, because privity would not be required.

The undesirable consequences to be derived from the continued application of the contract theory to breach of warranty can be seen in many cases. For example, a seller has been held to warrant meat to a husband-buyer but not to a wife and son who consumed it and for whom the meat was purchased.[15] It has been held that a child who became ill after drinking deleterious pineapple juice had no cause of action against the store where his mother purchased the juice because the implied warranty of fitness ran only to the purchaser and not to the child.[16] Another court has held that the wife of the purchaser of a used automobile could not maintain an action against the dealer for breach of warranty for defective brakes since there was no privity of contract between the parties.[17]

As previously pointed out, the court in the instant case was faced with the further problem that in the contract of sale the manufacturer expressly disclaimed all warranties, either express or implied, other than certain warranties as to material and workmanship.[18] It is recognized by the Uniform Sales Act,[19] and has long been held at common law,[20] that the parties to a contract are free to make their own agreement, and to dispense with a warranty that would otherwise exist.[21]

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[14]Bristol Tramways & Carriage Co. v. Fiat Motors, Ltd., [1910] 2 K.B. 831. American authorities support this statement. Adams v. Peter Tramontin Motor Sales, 42 N.J. Super. 313, 126 A.2d 358 (App. Div. 1956); Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931). For a collection of cases supporting this point see 126 A.2d at 363.

[15]Borucki v. MacKenzie Bros., 125 Conn. 92, 3 A.2d 224 (1938).

[16]Stave v. Giant Food Arcade, 125 N.J.L. 512, 16 A.2d 460 (1940).

[17]Barni v. Kutner, 45 Del. 550, 76 A.2d 801 (1950).

[18]32 N.J. 358, 161 A.2d 69, 74 (1960).

[19]Uniform Sales Act § 77.

[20]J. I. Case Threshing Mach. Co. v. McClamrock, 152 N.C. 405, 67 S.E. 991 (1910); Dowagiac Mfg. Co. v. Mahon, 13 N.D. 516, 101 N.W. 903 (1904).

[21]Sears, Roebuck & Co. v. Lea, 198 F.2d 1012, 1014 (6th Cir. 1952); Lindberg v. Coutches, 167 Cal. App. 2d 828, 334 P.2d 701, 704 (Super. Ct. 1959); Von Zonneveld Bros. & Philippo, Inc. v. Cary, 86 So. 2d 252, 254 (La. Ct. App. 1956); Kennedy v. Cornhusker Hybrid Co., 146 Neb. 230, 19 N.W.2d 51 (1945); McDonald Credit Serv., Inc. v. Church, 49 Wash.2d 400, 301 P.2d 1082, 1083 (1956). For a collection of cases supporting this point see 46 Am. Jur. Sales § 333 (1943).

A disclaimer of warranty is contractual in nature. Where the contract contains an agreement that no warranty other than that specified in the contract shall be binding upon the seller, a warranty which the law would otherwise imply is thereby excluded.[22] However, some courts have recognized an exception to this rule and hold that warranties cannot be disclaimed in certain instances, mainly on the ground of public policy. In the principal case the court said "Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity."[23] This holding is supported by ample authority in cases which are not dissimilar from the instant case.[24] However, to reach such a result under the contract theory, it is necessary to rely on public policy in order to controvert established legal principles. This undesirable necessity would be eliminated by reverting to the tort concept of products liability, for there can be no disclaimer of liability under that theory.

With the present decision New Jersey has evaded problems of both privity and disclaimer, either one of which in the past has usually been sufficient to preclude a recovery in a case involving warranty. It is submitted that this court had the opportunity to advance the law more boldly in this field by relying on the tort theory of warranty. Instead the court compromised by eliminating contract requirements as to privity and disclaimer of warranty, while retaining the concept that the defendant's basic liability arises from his breach of contract.

The most desirable approach to this problem can be taken through the logical extension of *MacPherson v. Buick Motor Co.*, that warranty is a matter of strict liability in tort.[25] Under this view no contract between the parties is necessary.[26] The liability arises because the seller, through his advertising and marketing and the insistence of public policy, has assumed a duty to all members of the consuming public and is responsible to those who may be injured by his neglect of that duty.

Breach of warranty was originally a tort action on the case for breach of an assumed duty, the wrong being a form of misrepre-

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[22]Ibid.

[23]32 N.J. 358, 161 A.2d 69, 95 (1960).

[24]Steamship Ansaldo San Giorgio I v. Rheinstrom Bros., 294 U.S. 494 (1935); Olson Mfg. Co. v. Roberts, 131 Colo. 152, 280 P.2d 433 (1955); Elliott-Lewis Corp. v. York-Shipley, Inc., 372 Pa. 346, 94 A.2d 47 (1935).

[25]MacPherson v. Buick Motor Co., 217 N.Y. 282, 111 N.E. 1050 (1916).

[26]Jones v. Kelley, 208 Cal. 251, 280 P. 942 (1929); Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (Dist. Ct. App. 1954).

sentation.[27] There seems to be no logical reason to negative this duty—indeed the very language of the present case implies a duty. In referring to the New Jersy Uniform Sale of Goods Law the court said:

> "The transcendent value of the legislation, particularly with respect to implied warranties, rests in the fact that obligations on the part of the seller were imposed by operation of law, and did not depend for their existence upon the express agreement of the parties."[28]

In *Flessher v. Carstens Packing Co.*,[29] the Supreme Court of Washington paved the way for a return to tort liability for breach of warranty. This case was an action for injuries suffered when the plaintiff ate diseased dried beef, prepared and sold by the defendant. The court stated:

> "[W]here there is a positive duty created by implication of law independent of the contract, though arising out of a relation or state of facts created by the contract, an action on the case as for a tort will lie for a violation or disregard of that duty."[30]

As in the principal case, there was an implied warranty, but the court said:

> "Whether the action be called one on warranty or of negligence it comes to the same thing. It sounds in tort.... The negligence consists in offering stuff not known to be wholesome for sale, to the purchaser's injury."[31]

In another Washington case,[32] the plaintiff purchased from a retail dealer an automobile manufactured by defendant and represented to contain shatter-proof glass. A pebble from a passing truck struck the windshield causing the glass to shatter and the plaintiff to lose an eye, for which she brought this action. It was held that, "the rule in such cases does not rest upon contractual obligations, but rather on the principle that the original act of delivering an article is wrong...."[33]

It is submitted that Washington has adopted the proper approach to the problem of products liability. This approach has the advantage of producing a just result without a strained extension of established

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[27]Prosser, Warranty of Mercrantable Quality, 27 Minn. L. Rev. 117, 118 (1943).
[28]32 N.J. 358, 161 A.2d 69, 77 (1910).
[29]93 Wash. 48, 160 P. 14 (1916).
[30]Id. at 15.
[31]Id. at 17.
[32]Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).
[33]Id. at 412.