6-1-1965

Torts -- Products Liability -- Sale Requirement

David A. Irvin

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.unc.edu/nclr/vol43/iss4/17
The attitude of some courts in their consideration of "thin skin" plaintiffs is reflected by the lawyers' joke which defines "emotional trauma as a 'state of mind precipitated by an accident, stimulated by an attorney, perpetuated by avarice and cured by a verdict.'"47

THOMAS E. CAPPS

Torts—Products Liability—Sale Requirement

The decline of the requirement of a sale in the field of products liability parallels the decline of the requirement of privity.1 Both are being replaced by "strict tort liability."

Delaney v. Towmotor Corp.2 reveals the final stage of this development. The court in Delaney held a manufacturer of a defective fork lift strictly liable to an injured employee of a prospective buyer who had the lift on a demonstration loan directly from the manufacturer. In overcoming the defendant's argument of "no sale, no warranty," the court went beyond the recognition that a sale is not always a requisite of warranty and stated that products liability should no longer be characterized as warranty liability but rather as "strict tort liability."

In the past, products liability has been limited and confined by the uncertain nature and character of warranty—more specifically by the contractual barriers associated with it.4 Although the requirement of privity is said to be the major deterrent to new frontiers of products liability,5 the idea that warranty requires a "sale" also has been an obstacle. It is said that goods are warranted only when supplied under a contract to sell or a sale,6 generating the conten-


1 For a distinction between the two requirements, see, e.g., Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963) (elimination of the privity requirement having no effect on the force of the sale requirement); Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962) (benefit of a privity exception having no effect upon the sale requirement).
2 339 F.2d 4 (2d Cir. 1964).
3 Id. at 6.
5 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 3 (1964).
6 UNIFORM SALES ACT § 15. Although North Carolina has not adopted the Uniform Sales Act, it could easily be indirectly applied since the act is recognized as a codification of the common law. McCarley v. Wood Drugs, Inc., 228 Ala. 226, 153 So. 446 (1934). Also, recent North Carolina cases state that warranty is an element in a contract of sale. See
tion "that in the absence of a sale to and a purchase by the plaintiff, there is no 'vehicle to carry an implied warranty' by the manufacturer." Some courts have decided warranty litigation on this narrow issue of "sale or no sale," consciously or unconsciously overlooking the possibility that a warranty can arise in the absence of a sale.8

In those cases where the crucial issue has been the existence of a "sale," the passage of title to the goods is not required;9 but either a statutory payment10 or an executory contract11 and a delivery12 are required. These requisites are satisfied in a "sale" of a container because it is essential to the sale of its contents.13 However, ma-

[Page references and footnotes]


[8] In declaring "no sale, no warranty" of a product used in a beauty treatment, the court in Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963), supports its decision with cases that also stand for the proposition that warranty may arise without sale. The court in its application of the Uniform Commercial Code also overlooks a comment that indicates that the sales language of the warranty sections of the Code is not to be a limitation of the case law growth which has recognized "that warranties need not be confined either to sales contracts or to the direct parties to such a contract." UNIFORM COMMERCIAL CODE § 2-313, comment 2 at 88 (1962 Official Text). See generally, Farnsworth, Implied Warranties of Quality In Non-Sales Cases, 57 COLUM. L. REV. 653 (1957).


[10] In Haag v. Klee, 162 Misc. 250, 293 N.Y. Supp. 266 (Sup. Ct. 1936), an employee was denied recovery for an illness resulting from a meal served as part of her wages because the statutory sale contemplated payment in personal property and services. This problem with the definition of price, arising from a literal interpretation of UNIFORM SALES ACT § 9(2), has been corrected by UNIFORM COMMERCIAL CODE § 2-304(1), making the price "payable in money or otherwise."


[13] There is a sale of the container even though it is returnable. Trust
aterial essential to a contract for construction, repair, or professional services is not considered to be sold because the “essence” of the transaction is said to be the sale of the labor or services rendered and not the sale of the finished product. This weighing of the entire transaction reflects the courts’ hesitancy to impose strict liability for services and labor by implying a warranty to the material supplied. As consumer demand for more protection increases, however, this attitude changes and transactions are reclassified. The purchase of a meal in a restaurant has undergone such a transition, from one of the services of an innkeeper to a sale of goods, and there are a few indications that other transactions may be treated similarly. Finally, where the transaction has the elements


Blood furnished to perfect a cure is not warranted because a transfusion is just an incidental part of the professional services performed. Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954). This denial of warranty by an insistence upon a sale has been consistently upheld in the “bad blood” cases. Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 132 N.W.2d 805 (Minn. 1965). For criticism of the “bad blood” rationale, see 69 HARV. L. REV. 391 (1955); 37 NOTRE DAME LAW. 565 (1961); 29 ST. JOHN’S L. REV. 305 (1955); 103 U. PA. L. REV. 833 (1955).

“...a different line has been followed in England. While most sales rules must be applied to a transaction in toto or not at all, warranties may be implied as to only a part—that concerned with goods furnished as opposed to services rendered or labor done.” Farnsworth, supra note 8, at 664.


For an example of this transition in the typical service or labor contract, see Burge Ice Machine Co. v. Weiss, 219 F.2d 573 (6th Cir. 1955) (contract for installation of refrigeration system); Hanson v. Murray, 190 Cal. App. 2d 617, 12 Cal. Rptr. 304 (1961) (contract for application of weed killer). Cf. Gottsdanker v. Cutter Laboratories, 182
of a sale, an implied warranty is not destroyed merely because it is an illegal sale.\textsuperscript{20}

More enlightened courts realize and accept that a sale as such is not the only transaction in which warranties are implied.\textsuperscript{21} Although still the exception, such courts imply "true"\textsuperscript{22} warranty liability to articles bailed for hire or for mutual benefit where a technical sale is obviously missing;\textsuperscript{23} to food served in a restaurant irrespective of whether there is a sale of the food,\textsuperscript{24} and to the material in a construction contract even though a lack of sale of goods is conceded.\textsuperscript{25} Thus the trend appears to be that although the implied warranties of the Uniform Sales Act apply only to sales of goods, "similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified."\textsuperscript{26}

Instead of stating in the principal case that a sale is no longer necessary to imply a warranty, the court eliminated warranty liability altogether and with it the requirement of sale. This finality was accomplished by the court's application of Restatement of Torts Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960), where it was declared that a sale in the marketing process would be sufficient to impose warranty upon the manufacturer of a new drug even though the plaintiff's inoculation, like a transfusion, was not a sale. For criticism, see 13 STAN. L. REV. 645 (1961) (public policy misconceived). This inconsistency between a blood transfusion and a new drug inoculation may be realistically settled in the manufacturer's favor based on public policy and not on "sale." RESTATEMENT (SECOND), TORTS § 402A, comment k (Tent. Draft No. 10, 1964).

\textsuperscript{20} Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 528 (1942), Contra, Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925).

\textsuperscript{21} 1 Frufer \& Friedman, Products Liability § 19.02 (1964); Farnsworth, supra note 8.

\textsuperscript{22} In the majority of the bailment cases, the term "implied warranty" actually imposes a negligence requirement, especially when personal injuries are involved. The bailor "impliedly warrants only that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purposes for which it was hired." McNeal v. Greenberg, 40 Cal. 2d 740, 742, 255 P.2d 810, 812 (1953). See generally Annot., 12 A.L.R. 774 (1921).


\textsuperscript{24} E.g., Cushing v. Rodman, 82 F.2d 864 (D.C. Cir. 1936); Stanfield v. F. W. Woolworth Co., 143 Kan. 117, 53 P.2d 878 (1936); Sartin v. Blackwell, 200 Miss. 579, 28 So. 2d 222 (1946).


\textsuperscript{26} Id. at 582, 12 Cal. Rptr. at 262, 360 P.2d at 902.
section 402A, a section described as a special rule of strict liability based purely in tort and applicable to sellers of defective products. Aimed at the elimination of the contract rules associated with "warranty," it adequately handles the requirement of privity and even states that it "is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code; and it is not affected by limitations on the scope and content of warranties, or by any limitation to 'buyer' and 'seller' in those statutes." However, the drafters unfortunately chose to characterize the defendant of this section as a "seller," thereby limiting the section's significance. Delaney, however, lends new life to the section by regarding this restrictive feature as a description of the situation that has most commonly arisen rather than as a deliberate limitation of the principle to cases where the product has been sold, intentionally excluding instances where a manufacturer has placed a defective article in the stream of commerce by other means.

The true import of Delaney is now evident. A new concept of products liability has been adopted, and it is clearly stated that such future law will not be limited by the requirement of sale.

DAVID A. IRVIN

[28] Id. comment m.
[29] Ibid.
[30] Id. comment l.
[31] Id. comment m at 10.
[32] Id. comments f & l (illustrations).
[33] 339 F.2d at 6.
[34] If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask. Such strict liability is familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, and respondeat superior. There is nothing so shocking about it today that cannot be accepted and stand on its own feet in this new and additional field, provided always that public sentiment, public demand, and "public policy" have reached the point where the change is called for.

Prosser, supra note 4, at 1134.