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Recent Cases

HOCHGERTEL v. CANADA DRY CORPORATION: THE HAZARDS OF TENDING BAR

The plaintiff, a bartender in the performance of his calling, incurred personal injuries when an innocuous-looking bottle of soda water exploded behind the bar. The defendant, who manufactured the malcontent bottle, sold and delivered it directly to the plaintiff's employer. Plaintiff brought two actions;[1] in this one[2] he sought recovery on breach of warranty theories. The lower court sustained preliminary objections in the nature of a demurrer[3] and the Pennsylvania Supreme Court affirmed. This Recent Case will evaluate *Hochgertel* in the light of decisions of this and other jurisdictions. Pennsylvania's position on the various issues raised will be compared with other views; the comparison will form the basis for conclusions about the decision.

The *Hochgertel* decision leaves the law on the privity of contract requirement for recovery on contract theories in a state of some confusion in Pennsylvania. Federal courts currently make such guarded statements as this: "it is now clear that privity of contract is not required in Pennsylvania, certainly not in suits by purchasers of new automobiles against the manufacturer."[4] One wonders if the only safe approach now is to consider each of our decisions on the privity issue restricted to its own facts.

To understand the implications of *Hochgertel* it is necessary to study a long line of cases representing a trend toward abolishment of the privity requirement in this state. In the beginning the rule was stated in this manner: "Privity of contract is the relation that exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant, in respect to the matter sued on."[5] The leading case of *Timberland Lumber Co. v. Climax Mfg. Co.* espoused this inflexible rule in dictum as late as 1932.[6] But by then decisional inroads had penetrated the doctrine, and an exception had developed in the case of food products.[7] A little over a decade after *Timberland* a

1. Plaintiff brought separate actions of assumpsit and trespass, authorized by the supreme court in Cunningham v. Joseph Horne Co., 406 Pa. 1, 176 A.2d 648 (1961).

2. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).

3. *Id.* at 612, 187 A.2d at 577.

4. Duckworth v. Ford Motor Co., 211 F. Supp. 888, 891 (D.Pa. 1962).

5. Hartley v. Phillips, 198 Pa. 9, 13 (1901).

6. 61 F.2d 391, 393 (3d Cir. 1932) (dictum). Although in 1 WILLISTON, SALES § 244 n.8a (rev. ed. 1948) the case is cited as upholding the privity requirement, it should be kept in mind both that this was dictum and that the plaintiff conceded the point. See Del Duca, *Commercial Code Litigation: Conflicts of Law; Sales,* 65 DICK. L. REV. 283, 306 n.6 (1961); Note, *Liability of Manufacturers and Wholesalers to Ultimate Consumers in Pennsylvania for Breach of Warranty,* 31 TEMP. L.Q. 62, 64 (1957).

7. Nock v. Coca Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915).

federal court voiced the precocious opinion that privity had been abolished from Pennsylvania law. "The abolition of the requirement occurred first in the food cases, next in the beverages decisions and now has been extended to those cases in which the article manufactured, not dangerous or even beneficial if properly made, injured a person because it was manufactured improperly."[8] But Pennsylvania courts insisted on deciding for themselves what Pennsylvania law was, and decisions indicating the contrary continued to be handed down. For example, in *Loch v. Confair*[9] recovery on breach of warranty theories was refused because the plaintiff was not party to a contract. The facts of the case have much in common with those of *Hochgertel*: plaintiff was injured by an exploding bottle *before she bought it* in a grocery store. The court was not greatly impressed by plaintiff's argument that a contract was not a necessary ingredient of an action in assumpsit, and declined warranty protection.[10] If the plaintiff had been a subpurchaser the warranties may have been extended to her.[11] But *Kaczmarkiewicz v. J. A. Williams Co.*[12] said they would not be extended to those not conventionally in privity except for warranties which ran with food products. The employee of one who purchased a stepladder sought to recover from a remote vendor, on his employer's contract. Even if the plaintiff acquired the rights of the employer, lack of privity barred the claim, concluded the court.[13] *Facciolo Paving and Construction Co. v. Road Machinery Inc.*[14] reached the same conclusion with respect to the remote purchaser of defective road-grading machinery. However, it was thought[15] that broad statements made by the Pennsylvania Superior Court in *Jarnot v. Ford Motor Co.*[16] might have the effect of overruling prior cases requiring privity in this state. In *Jarnot,* the subpurchaser of a faulty and dangerous truck was allowed to recover from the manufacturer. Shortly thereafter the famous *Pritchard* case[17] added its weight to those not requiring privity, permitting the subpurchaser of cigarettes to go against the manufacturer on breach-of-warranty theories. *Thompson v. Reedman,*[18] purporting to apply

8. Mannz v. Macwhyte Co., 155 F.2d 445, 450 (3d Cir. 1946) (dictum). Since no breach of warranty was found the statements as to privity would appear to be dictum. See Childs v. Austin Supply Co., 408 Pa. 403, 184 A.2d 250 (1962).

9. 361 Pa. 158, 63 A.2d 24 (1949).

10. *Id.* at 163, 63 A.2d at 26.

11. *Ibid.*

12. 13 Pa. D. & C.2d 14 (1957).

13. *Id.* at 16-17.

14. 8 Chest. Co. Rep. 375 (Pa. 1958).

15. Del Duca, *op. cit. supra* note 6, at 307 n.98.

16. 191 Pa. Super. 422, 156 A.2d 568 (1959). The case was followed in Willman v. American Motor Sales Co., 44 Erie Co.L.J. 51 (1961).

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

18. 199 F. Supp. 120 (E.D. Pa. 1961).

Pennsylvania law, extended the zone of protection considerably beyond that of any of the prior cases. A guest passenger in an automobile recovered from the remote manufacturer thereof on breach of warranty theories. The one ground on which this case might be distinguished from *Hochgertel* is that here, clearly, a dangerous instrumentality was involved—a bottle of soda water, on the other hand, has an innocent appearance. *Reedman* was followed in *Allen v. Savage Arms Corp.*[19] The plaintiff was injured when a shotgun purchased by his father blew up. In *Allen* the Uniform Commercial Code[20] overcame any problem as to privity of the boy with his father on his father's contract of sale.

At this stage of the developing trend away, down came the *Hochgertel* decision, breathing new life into the dying requirement of privity. Vindicated are the earlier lower court decisions holding that one may not recover on a contract to which he is not a party. Cases apparently contrary to *Hochgertel* are either erroneous or are exceptions to a general requirement of privity. The supreme court expressly condones cases "involving food, beverages, and like goods for human consumption,"[21] which permit a subpurchaser to sue directly. It is not possible to ascertain from the language of the opinion whether the court considers a mishap owing to a bad bottle as falling under the food-products exception to the general privity requirement. If one reads the language of the opinion carefully, some doubt is cast on whether any implied warranty would cover the bottle itself. Since the court finds that the warranty did not extend to this plaintiff it becomes unnecessary to answer the question "Did the warranty cover the container as well as the contents of the bottle?"[22] The question reserved by the court has earned Dean Prosser's amused indignation:

> There remains . . . an astonishing little argument over whether the "warranty" of food includes the safety of the container in which it is sold . . . . This metaphysical distinction between the container and the contents can only be regarded as amazing. The two are sold by each seller, and received by each ultimate purchaser, as an integrated whole; and where the action is against the immediate seller (by one in privity), it is well-settled that the warranty covers both. One can only surmise that the courts which make the distinction have been disturbed by an uneasy uncertainty as to whether, despite the evidence, the plaintiff may not have tried to open the bottle by banging it on the radiator. Suppose that a bottle of Coca Cola explodes, and cuts the plaintiff's wrist—is recovery really to turn on whether the

19. 52 Luz.Leg.Reg. 150 (1962).
20. PA. STAT. ANN. tit. 12A, § 2-318A (1954).
21. *Supra* note 2, at 614, 187 A.2d at 578.
22. *Id.* at 612, 187 A.2d at 577.

> explosion is due to a flaw in the glass or to an over-charged beverage?[23]

Escola v. Coca Cola Bottling Co.[24] and other cases held that recovery does depend on such a distinction. The Pennsylvania Supreme Court stands a good chance of replying to Prosser's question. When the plaintiff in one of these broken bottle cases is a subpurchaser, he will argue that his case falls under the food-products exception to the privity requirement. His opponent will contend that in effect the case does not because the warranty does not spread its protection over the container.

The cases not involving food products which are inconsistent with *Hochgertel* on the privity issue may involve other exceptions to the general requirement. Some of them may be explained away because they are concerned with liability for the manufacture of dangerous instrumentalities such as automobiles and shotguns. The law of privity in warranty actions may undergo the same development seen in tort actions, the development that culminated in *Macpherson v. Buick Motor Co.*[25]

Another factor which might explain apparently contrary cases is the presence of an express warranty made to the ultimate consumer by the manufacturer.[26] A very strong policy dictates that the manufacturer should be made liable to all groups within the distributive chain which are the target of commercial solicitation.[27] Among the rules of law which the *Jarnot* court draws upon in support of its decision is this: "a manufacturer who by means of advertising extols his product, in the effort to persuade the public to buy, may thereby incur liability to a purchaser notwithstanding privity between the purchaser and the manufacturer is wholly lacking."[28]

When this entire body of case law is considered, the conclusion is inescapable that the privity requirement is a tool of policy, that and nothing more. In accordance with "social justice"[29] the obligation of the manufacturer is extended "as far as the relevant social policy requires."[30] A sure sign of policy afoot is the number of fictions that play hide-and-go-seek with logic

23. Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099, 1138 (1960). (Footnotes omitted.)

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

25. 211 N.Y. 382, 111 N.E. 1050 (1916). See RESTATEMENT, TORTS § 395 (1938).

26. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, *aff'd per curiam on rehearing*, 15 P.2d 1118 (1932), *aff'd on second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934) is the leading case on this point.

27. Note, *Implied Warranty of Merchantability Renders Manufacturer Liable to Buyer's Wife Despite Disclaimer Clause and Absence of Privity of Contract*, 74 HARV. L. REV. 630, 631 (1961).

28. *Supra* note 16, at 429-30, 156 A.2d at 572.

29. *Supra* note 2, at 615, 187 A.2d at 589; see Fricke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 123, 155 (1960-61).

30. James, *Products Liability*, 34 TEXAS L. REV. 192, 193 (1955).

in the products liability cases.[31] "[C]ourts . . . invent a remarkable variety of highly ingenious, and equally unconvincing, theories of fictitious agency, third-party-beneficiary contract, and the like, to get around the lack of privity between the plaintiff and the defendant."[32] Another favorite fiction employed by the courts is one which visualizes a covenant running with the goods,[33] just as a covenant may run with the land. "If, as has been often said, the warranty runs with the goods, then it can protect no one who does not acquire the title; and the employee[34] . . . cannot recover. It may well be that we are not yet ready, and may never be ready, to extend the strict liability to such people; but if the time is to come when the courts are ready for it, they have laid up trouble in heaven."[35] Notwithstanding his observation Dean Prosser apparently thought that such employees would be extended warranty protection.[36]

The *Hochgertel* case concludes otherwise. The court stresses the fact that this particular plaintiff was not a purchaser.

> In no case in Pennsylvania has recovery against the manufacturer for breach of warranty been extended beyond *a purchaser* in the distributive chain. In fact the inescapable conclusion . . . is that no warranty will be implied in favor of one who is not in the category of a purchaser . . . .
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> [T]he basis for recovery upon an implied warranty, absent a specific statutory exception . . . must be that the implied warranty forms a part of the consideration for the contract, and flows from manufacturer to subpurchaser through the conduit of a contractual chain.[37]

The statutory exception the court refers to is that contained in section 2-318 of the Uniform Commercial Code.[38] Evidently it was argued that an employee would fall under the extension of warranty protection afforded by that section. The provision reads as follows:

> 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

31. For an entertaining survey of the fictions that have developed, see Gilliam, *Judicial Legislation, Legal Fictions, and Products Liability: the Agency Theory*, 37 ORE. L. REV. 217 (1958). "This article is, in essence, an essay on the usefulness of subterfuge." *Id.* at 219.

32. Prosser, *op. cit. supra* note 23, at 1124.

33. Coca Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

34. Here Dean Prosser cites the case of Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. Ct. App. 1943).

35. Prosser, *op. cit. supra* note 23, at 1133. (Footnotes omitted.)

36. *Id.* at 1142.

37. *Supra* note 2, at 615-16, 187 A.2d at 578-79.

38. PA. STAT. ANN. tit. 12A, § 2-318 (1954).

> use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.[39]

Based on a reading of this section, the court concludes that "Clearly the Code gives no basis for the extension of the existing warranty to an *employee* of the purchaser. . . . An employee is in none of these categories."[40] The court adopts a policy of strict construction, flatly refusing to "add to legislation,"[41] despite the fact that it quotes comment 3 to section 2-318 which says in part:

> This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.[42]

One cannot help but feel that although the comment expressly provides that section 2-318 is not intended to restrict the developing case law, the court demonstrates reluctance to go beyond the enumerated classes to permit an employee to recover on the employer's warranty.

Not all jurisdictions are in line with *Hochgertel* on this point. Leading cases in other jurisdictions have adopted the view that an employee who is not party to any contract of sale may recover on his employer's sales contract for breach of warranty.[43] In the Ohio case of *Mahoney v. Shaker Square Beverages*,[44] a servant was injured when a bottle of Black Horse ale exploded. The court held that the bottle was a dangerous instrumentality, that the war-

39. "Since the Code does not deal with manufacturer's liability, its drafters apparently concluded upon an analysis of the interests that manufacturer's liability is socially less necessary than the extension of dealer's liability to the buyer's family." *Implied Warranties, op. cit. supra* note 27, at 631. The former has been referred to as the vertical and the latter as the horizontal line of extension of liability. Del Duca, *Extension of Warranty Protection Under Section* 2-318, UNIFORM COMMERCIAL CODE CO-ORDINATOR ANNOTATED 419-21 (1963).

40. *Supra* note 2, at 612-13, 187 A.2d at 577. For the meanings of the terms "family" and "household" the court in *Hochgertel* looks to the cases of Way Estate, 379 Pa. 421, 109 A.2d 164 (1954) and Shank Estate, 399 Pa. 656, 161 A.2d 47 (1960); the former dealt with the construction of an alleged family agreement and the latter with whether certain property was household property and therefore entitled to an exemption.

This court had refused to pass on the question of whether an employee was included within the class of persons to whom warranty protection was extended by § 2-318 in Childs v. Austin Supply Co., 408 Pa. 403, 184 A.2d 250 (1962).

41. *Id.* at 614, 187 A.2d at 577. The court cites Altieri v. Allentown Retirement Bd., 368 Pa. 176, 81 A.2d 884 (1951), in which a statutory construction act was cited for the rule of strict construction of the statute there involved.

42. PA. STAT. ANN. tit. 12A, § 2-318, comment 2 (1954).

43. See Annot., 75 A.L.R.2d 39 (1961).

44. 64 Ohio L. Abs. 200, 102 N.E.2d 281 (1951).

ranty of merchantable quality was breached, and that an action could be brought against the retailer. In the case of *Petersen v. Lamb Rubber Co.*,[45] an employee was injured when a grinding wheel bought by his employer disintegrated. He was allowed to recover on breach of warranty theories against the manufacturer because the court found that his successive right to use the wheel fulfilled the privity requirement. Perhaps both these cases require a finding of dangerous instrumentality before the requirement is relaxed.[46] It must be conceded that, notwithstanding the opinion of the court in the *Mahoney* case, some valid doubt as to whether a bottle is a dangerous instrumentality may well exist.

The Connecticut Supreme Court construed an almost identical statute the same way the Pennsylvania Supreme Court construed section 2-318.[47] A college cook suffered personal injuries through the use of some soap purchased by her employer. The court refused to find that the cook was a member of the household of the purchaser, and relied heavily on the fact that the legislature could have chosen much more suitable wording to extend warranty protection to such persons had it wished to do so. One wonders if, because of commonly accepted strict-construction principles, recovery will be more limited in jurisdictions which have a limited statutory extension of protection. That conventional kind of thinking may have been a factor moving the *Hochgertel* court to deny warranty protection to an employee.

Why is it important that the plaintiff is denied warranty relief since there is always the possibility of a suit in negligence? One authority has enumerated the following reasons: (1) plaintiffs often are a considerable distance from production lines and therefore encounter difficulties of proof (the effects of this disadvantage can be alleviated by application of the *res ipsa loquitur* doctrine); (2) often the conduits in the merchandising chain are wholly free of negligence so there is no cause of action against them; (3) a shorter statute of limitations may be provided for the tort action.[48] Dean Prosser, on the other hand, is of the view that limiting the plaintiff to his remedy in tort occasions him little or no hardship.

> [A]n honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not. . . .
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> . . . . [I]n every jurisdiction . . . the doctrine of res ipsa loquitur, or . . . its practical equivalent . . . gives rise to a permissible infer-

45. 5 Cal. Rptr. 863, 353 P.2d 575 (1960). *But see* Collum v. Pope & Talbot, Inc., 135 Cal. App. 2d 653, 288 P.2d 75 (1955).

46. Note, *Implied Warranties: Modification of the Requirement of Privity of Contract in California*, 34 So. CAL. L. REV. 98, 99 (1960).

47. Duart v. Axton-Cross, 19 Conn. Supp. 188, 110 A.2d 647 (1954).

48. Del Duca, *op. cit. supra* note 39, at 416.

> ence of the defendant's negligence, which gets the plaintiff to the jury. And in cases against manufacturers, once the cause of the harm is laid at their doorstep, a jury verdict for the defendant on the negligence issue is virtually unknown.[49]

Despite the strong view above advanced one cannot help but be a little uneasy about the adequacy of the negligence remedy. Although that one is always available, plaintiffs continue to battle for the remedy resting on breach of warranty.

The *Hochgertel* case, though, is of the view that the plaintiff's remedy in trespass is perfectly adequate, and points out[50] that the regulations as to proof set out in *Loch v. Confair*[51] will govern the subsequent disposition of the case. Concerning the subject that court said,

> Plaintiffs having testified to the manner in which the accident occurred, the burden should then rest upon the defendant A. & P. Company to show that after the bottle came into its possession it was not subjected to any mishandling or to any unusual atmospheric or temperature changes. The duty would then devolve upon the Beverage Company to establish that it conducted its operations with due care and according to the usual and proper methods generally employed in the bottling industry.[52]

This manner of applying the *res ipsa loquitur* doctrine has been criticized. Primarily the criticism rests on the ground that there are too many causes other than the defendant's negligence which could explain the mishap.[53] It has been said by experts that it is virtually impossible for a bottle to explode without impact.[54] If this were accepted as true it would reduce the likelihood of the manufacturer being responsible for the defect.

Some authorities are of the view that the courts even through the application of negligence principles are imposing something close to strict liability in the exploding bottle situation.[55] The courts have justified their doing so.

> It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products

49. Prosser, *op. cit. supra* note 23, at 1114-15.

50. *Supra* note 2, at 616, 187 A.2d at 578.

51. 372 Pa. 212, 93 A.2d 451 (1953).

52. *Id.* at 217, 93 A.2d at 454. For a general consideration of the manner of applying *res ipsa loquitur* in these cases, see Fricke, *op. cit. supra* note 29, at 34.

53. Possible causes of exploding bottles include such occurrences as sudden changes in temperature causing unequal expansion of different parts of the glass, overcharging of gas, defectively manufactured bottles, inadequate system of inspection for defects, excessive shaking on a hot day, and mishandling in transportation weakening the fabric of the bottle. *Id.* at 29.

54. *Id.* at 30.

55. *Id.* at 28.

> nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.[56]

Reduce the hazard and spread the risk[57] are the arguments in support of strict liability. Arguments can be advanced in support of the court's decision in *Hochgertel.* Why should this individual have contract protection if he did not pay for it? Why, in any event, does he need it, in view of the generous application the Pennsylvania court gives *res ipsa loquitur*? But the law of the future will undoubtedly impose strict liability on manufacturers of consumers' goods. Perhaps the swiftest route to this destination is via the application of warranty principles.

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56. *Supra* note 24, at 462, 150 P.2d at 440-41 (concurring opinion).

57. Dean Prosser feels that the risk-spreading argument is entitled to the most respect. Prosser, *op. cit. supra* note 22, at 1120.