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NOTES

THE LIABILITY OF A MANUFACTURER OR VENDOR TO PERSONS OTHER THAN THE IMMEDIATE VENDEES IN MISSOURI

The liability of a manufacturer or vendor to persons other than his immediate vendee has been the subject of much comment and criticism.¹ Most writers have been concerned with the failure of the courts to take cognizance of certain basic economic changes which have occurred since the early precedents were established. Some writers have stressed the inconsistency, dissonance and lack of harmony in this body of law.² Others have directed their attention primarily to the use of legal fictions by which some courts have been able, rather dubiously, to circumvent outmoded precedents.³ But the tenor of all of the writings has been that this branch of the law does not adequately and realistically conform to the present day methods of advertising, merchandising and marketing. To determine to what extent this is true in Missouri, if at all, is the purpose and scope of this article.

LIABILITY AND NEGLIGENCE

The general rule of law concerning the liability of a manufacturer or vendor to third persons is considered to be derived from the holding in the English case of *Winterbottom v. Wright*.⁴ In that case the defendant entered into a contract with the Postmaster-General whereby the defendant agreed to provide and to keep in good repair coaches for the carrying of the mail. The plaintiff, a mail coach driver, stated in his declaration that the defendant had negligently failed to perform his contract to keep the coaches in good repair, that one of the coaches broke down

1. Bohlen, *Liability of Manufacturers to Persons Other than Their Immediate Vendees*, 45 L. Q. REV. 343 (1929); Feezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1 (1925); Feezer, *Tort Liability of Manufacturers*, 19 MINN. L. REV. 752 (1935); Jeanblanc, *Manufacturers Liability to Persons Other than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 KY. L. J. 388 (1933). Note, 22 WASH. L. REV. 406 (1932).

2. Russell, *supra* note 1.

3. Jeanblanc, *supra* note 1.

4. 10 M. & W. 109, 152 Eng. Rep. 402.

while he was driving it, and that as a result of the defendant's failure to perform the contract the plaintiff was injured. Recovery was denied by the court, Lord Abinger saying:

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most outrageous consequences to which I can see no limit, would ensue.⁵

The above cited case has since been treated as the leading case for the proposition that a manufacturer or vendor, though negligent, is not liable for an injury to a third person when no privity of contract exists as to such persons. This principle was recognized in the early Missouri case of *Heizer v. Kingsland and Douglass Mfg. Co.*,⁶ where the plaintiff was the widow of an employee hired to operate a threshing machine. Ellis, the employer, had purchased the machine from the defendant and during the course of normal threshing operations, the cylinder on the machine broke into pieces and killed the plaintiff's husband. In reversing a judgment for the plaintiff the court said:

The plaintiff's evidence tends to show that the iron in the heads and bands of the cylinder was of a poor quality, that there was want of care in testing the pieces of iron before joined into the cylinder and perhaps want of care in testing the machine when completed; but all this does not show that the defendant knew this cylinder was defective or unfit for use. The case discloses no motive whatever on the part of the defendant for sending out a defective machine. The plaintiff's case tends to show no more than negligence, and an action based on that ground must be confined to the immediate parties to the contract by which the machine was sold.⁷

As late as 1924 this case was cited and relied upon as controlling, the court in *Tipton v. Barnard and Leas Mfg. Co.* holding that notwithstanding the negligence of the defendant, liability would not extend to a third person unless the defendant had knowledge of the defect.⁸ These two cases show very clearly that, up to 1924 at least, the basic ingredient of a tort action for negligence by a third party against a manufacturer was the

5. 152 Eng. Rep. 402, 405.

6. 110 Mo. 605, 19 S. W. 630 (1892).

7. *Id.* at 617, 19 S. W. at 633.

8. 302 Mo. 162, 257 S. W. 791 (1924).

element of fraud.⁹ But as of today, a study of the cases seems to indicate that their value as precedent is limited to cases involving vendors.¹⁰

The case of *McLeod v. Linde Air Products Co.*¹¹ is the leading Missouri case involving the tort liability of a manufacturer or vendor to third persons. In that case the defendant manufactured and sold oxygen to the plaintiff's father for welding purposes. It was delivered in steel tanks charged to a pressure of 1800 lbs. to the square inch. On the top of each tank was a brass valve for the release of the oxygen which, in the instant case, was defective and failed to discharge the oxygen when opened. The employee who was trying to make use of the oxygen then concluded that the tank was empty, and left the valve standing open. Suddenly the oxygen shot forth in an explosive manner, causing the tank to topple over and strike a steel table which chipped off a piece of a brass coupling attached to the valve, driving it with great force into the skull of the plaintiff, a small boy who was standing about eight feet away. The plaintiff pleaded specific negligence and the defendant demurred to the plaintiff's evidence. On the appeal from a judgment for the plaintiff, the defendant argued that a manufacturer or vendor is not liable to third parties unless the article which causes the injury is a thing which is inherently dangerous. This had been a widely recognized exception to the general rule since *Thomas v. Winchester*,¹² where the court held a defendant drug manufacturer liable to a remote purchaser for mislabeling a poisonous drug as a harmless medicine. In sustaining the judgment for the plaintiff, the Supreme Court of Missouri not only refused to follow its decision three years previous in the *Tipton* case, but proceeded to bring the law of Missouri up to date by adopting three exceptions to the general rule of the *Winterbottom* case:

- (1) Where the negligent act is imminently dangerous and is committed in the preparation or sale of an article intended to preserve, destroy or affect human life.
- (2) Where the act is that of an owner combined with an

9. *Martin v. Maxwell-Brisco Motor Vehicle Co.*, 158 Mo. App. 188, 138 S. W. 65 (1911).

10. *Shroder v. Barron-Dady Motor Co.*, 111 S. W. 2d 66 (Mo. 1937).

11. *McLeod v. Linde Air Products Co.*, 318 Mo. 397, 1 S. W. 2d 122 (1927).

12. 6 N. Y. 397 (1852).

invitation to the party thereby injured to use the defective appliance on such owner's premises.

(3) Where the act consists in the sale and delivery of an article with knowledge of undisclosed danger and without notice of its qualities, whereby any person is injured in a way that might reasonably have been expected.¹³

These three exceptions were not original, but it was the first time that they had found expression in a Missouri case. The ground for the decision and the real significance of the principal case was the extension of the first exception to the general rule.

The expression as found in the opinion is:

The early cases limited exception one to things in their nature destructive such as poisons, explosives and deadly weapons. We think the exception should be extended to include "a thing which when applied to its intended use becomes dangerous," although not inherently so. There is no reason why the principle should not apply to things imminently dangerous whether inherently so or not.¹⁴

Since that date the great majority of tort actions against manufacturers have been brought on facts falling within exception number one as extended by the *McLeod* case; the cause of action arose out of an injury suffered because of a defective chattel which, though not inherently dangerous, became imminently dangerous, because of the defect, when put to its intended use. In one of these later actions the rule laid down in the *Heizen* and *Tipton* cases was held to be no longer controlling.¹⁵ In another it was decided that a person who modified a product of nature slightly thereby became a manufacturer of it.¹⁶ No further judicial legislation or extension of the manufacturer's or vendor's liability has been found.

APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR

The most consistent and perhaps the most important ground for contention in these cases has been over the application of the *res ipsa loquitur* doctrine. Obviously if the doctrine is closely restricted in its application the possibility of a recovery is like-

13. *McLeod v. Linde Air Products Co.*, 318 Mo. 397, 403, 1 S. W. 2d 122, 124 (1927). Cf. *Hussett v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865 (8th Cir. 1903).

14. *McLeod v. Linde Air Products Co.*, *supra* note 13, at 406.

15. *Jacobs v. Adams Electric Co.*, 97 S. W. 2d 849 (Mo. 1936).

16. *McCormick v. Lowe & Campbell Athletic Goods Co.*, 235 Mo. App. 612, 144 S. W. 2d 866 (1940) (bamboo vaulting pole taped and painted).

wise limited and liability of the manufacturer or vendor proportionately lessened. The converse of this would, of course, indirectly tend to extend such liability.

It seems to be settled law in Missouri that an injury suffered by the explosion of a beverage bottle is a proper case for the application of *res ipsa loquitur*.¹⁷ As regards a latent defect in other types of chattels, the courts have just as consistently denied the plaintiff the aid of the doctrine.

In one case,¹⁸ the Supreme Court of Missouri has held that mere proof of a latent defect does not, of and by itself, cast the liability upon the defendant manufacturer unless the defendant has had an opportunity to discover such defect; and further, that it becomes a mere matter of conjecture whether the defendant used due care in manufacturing and testing the article unless the defendant has the right to control the article after it has passed into the hands of the plaintiff.¹⁹

Contra is a case where the plaintiff was allowed to recover on a charge of specific negligence by merely proving that an abrasive grinding wheel flew to pieces, injuring him while he was exercising due care, and that the wheel was subjected to a normal operating use only.²⁰ From this set of facts the Supreme Court said the jury could reasonably draw two inferences. First, from the fact that the abrasive wheel flew to pieces under a normal operating use, the jury could infer that it contained a latent defect. Second, from the fact that the defect existed in the wheel, the jury could infer that the defendant had failed to make a reasonable test to discover it.

CONCLUSIONS ON THE LIABILITY FOR NEGLIGENCE

The rule laid down in the *Heizer* and *Tipton* cases no longer governs the liability of a manufacturer, but since the liability of a vendor is generally more limited than that of a manufacturer,

17. *Riecke v. Anheuser-Busch Brewing Ass'n*, 206 Mo. App. 246, 227 S. W. 631 (1921); *Stolle v. Anheuser-Busch Inc.*, 307 Mo. 520, 271 S. W. 497 (1925); *Counts v. Coca Cola Bottling Co. of St. Louis*, 149 S. W. 2d 418 (Mo. 1941).

18. *Tayer v. York Ice Machinery Corp.*, 342 Mo. 912, 119 S. W. 2d 240 (1938).

19. *Cf. Gibbs v. General Motors Corp., and Rendlen Motor Co.*, 350 Mo. 431, 166 S. W. 2d 575 (1943) (defective automobile brakes).

20. *Zersch v. The Abrasive Co. of Philadelphia and Production Tool and Supply Co.*, 353 Mo. 558, 183 S. W. 2d 140 (1944).

that rule may be applied to exempt the former from liability under circumstances where the latter would be held accountable.²¹

It is to be noted that the decision in the *McLeod* case extends the liability of the manufacturer not only to remote vendees, but also to innocent bystanders. This rule is both liberal and just. Tort liability in general is founded on the breach of a duty imposed by law not to expose others to a foreseeable and unreasonable risk of harm and there is no apparent reason today why a manufacturer or vendor should be put in a class immune to such liability.

With the exception of the beverage bottle cases, it would seem that the doctrine of *res ipsa loquitur* is denied a plaintiff unless the defendant has the right to control the instrumentality at the time the injury occurs. Such a restriction on the use of the doctrine makes it available only in very rare instances. The better rule would seem to require only that the defendant had the right to control the instrumentality at the time the alleged negligence of manufacturing or testing occurred.

A plaintiff can, however, allege specific negligence on the part of the defendant and by proving the existence of the latent defect and the use of due care on his own part, make a case sufficient to go to the jury and to sustain a verdict.²² Thus it would seem that the law of Missouri allows a plaintiff to recover on a charge of specific negligence with no more proof than would be required in setting up a *res ipsa* case. Conclusions which are termed "conjectural" if the plaintiff has attempted to recover on a *res ipsa* case imperceptibly become "logical inferences" if the plaintiff has pleaded specific negligence.

LIABILITY FOR BREACH OF IMPLIED WARRANTY

A warranty in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, *forming part of the contract* by the agreement of the parties express or implied.²³ . . . It further follows, and such is the general rule of law, that no warranty of the quality of a chattel is to be implied from the mere fact of sale.²⁴

21. *Shroder v. Barron-Dady Motor Co.*, 111 S. W. 2d 66 (Mo. 1937).

22. See note 20 *supra*.

23. BENJAMIN, A TREATISE ON THE LAW OF THE SALE OF PERSONAL PROPERTY 564 (2d ed. 1877).

24. BENJAMIN, *op. cit. supra* note 23, at 565.

Even where an express warranty and reliance on it can be found, such a warranty cannot generally be the basis of an action by a third person because the warranty is a part of the contract and the liability thereon is limited to the parties to the contract.²⁵ A number of courts, however, have shown their ingenuity in circumventing these established precedents by applying legal fictions which have made it possible for a third party to recover on the breach of an implied warranty.²⁶ A noteworthy example in the state of Missouri is the case of *Madouros v. Kansas City Coca Cola Bottling Co.*²⁷ In that case the plaintiff purchased a bottle of Coca Cola from one Gus Paulos to whom it had been delivered by the defendant. The plaintiff took two or three swallows from the bottle and immediately became violently ill. One of the plaintiff's witnesses then examined the bottle and found that it contained a dead, decomposing and putrefied mouse with bits of fuzz floating about in the liquid. The plaintiff based his cause of action on the breach of an implied warranty that the beverage was fit for human consumption. The defendant argued that no cause of action would lie for the breach of a warranty when there existed no privity of contract between the parties. The Kansas City Court of Appeals sustained the verdict and judgment for the plaintiff saying:

Under modern conditions, when products of food or drink have been prepared under the exclusive supervision of the manufacturer and the consumer must take them as they are supplied, the representations constitute an implied contract, or implied warranty to the unknown and helpless consumer that the article is good and wholesome and fit for use. If privity of contract is required, then, under the situation and circumstances of modern merchandise in such matters, privity of contract exists in the consciousness and understanding of all right thinking persons.²⁸

The majority opinion relied heavily on *Tomlinson v. Armour*

25. 1 WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT 490 (2d ed. 1924).

26. See Jeanblanc, *Manufacturers' Liability to Persons Other than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937) (where the author discusses the use of the unilateral contract theory, the third party beneficiary theory, the theory of the assignment of the cause of action, and the concept of a warranty running with the chattel as means of evading the privity of contract requirement).

27. *Madouros v. Kansas City Coca Cola Bottling Co.*, 230 Mo. App. 275, 90 S. W. 2d 445 (1936).

28. *Id.* at 283, 90 S. W. 2d at 450.

and *Co.*²⁹ and *Mazetti v. Armour and Co.*³⁰ which support the proposition that a manufacturer who sells goods in a sealed package or container represents to each succeeding purchaser that the contents thereof are suited to the purpose for which they are sold. Justice Bland, however, did not take this view, and dissented as follows:

The decided weight of authority in this country is that a suit of this character against a remote vendor cannot be based upon a breach of an implied warranty but must be upon negligence. . . . I quite agree with what was said in the case of *Davis v. Van Camp Packing Company* [189 Iowa 775, 176 N. W. 382 (1920)] cited in the majority opinion, that the highest degree of care is imposed upon the manufacturer of an article for immediate human consumption and, in *Nehi Bottling Co. v. Thomas* [236 Ky. 684, 33 S.W.2d 701 (1930)] cited in the majority opinion, that the doctrine of *res ipsa loquitur* applies, but hold, with the weight of authorities in this country, that the suit cannot be brought upon the theory of a breach of an implied warranty, there being no privity of contract between the parties.³¹

Later in the same year, the same court came to the unanimous conclusion that a remote vendor was not liable to a plaintiff who had suffered injuries from eating deleterious canned salmon.³² The grounds for distinguishing the two cases were not that one involved a bottled beverage and the other a can of salmon, but rather, that in the latter case the remote vendor had no opportunity for discovering what went into the cans as they were packed for him by his vendor. Nevertheless, the court refuted the argument of the defendant-retailer, who claimed that he should not be held liable for defective food in a sealed package because he had no opportunity to examine it, by adopting Williston's statement³³ that to so hold would revise the whole field of warranty and put it on a basis of negligence. Query: What then is the real basis for holding the remote vendor liable? A subsequent decision by the St. Louis Court of Appeals³⁴ follows the

29. 75 N. J. L. 748, 70 Atl. 314 (1908).

30. 75 Wash. 622, 135 Pac. 633 (1913).

31. *Madouros v. Kansas City Coca Cola Bottling Company*, 230 Mo. App. 275, 284, 90 S. W. 2d 445, 450 (1936); *accord*, *Darke v. Scudder-Gale Grocer Company*, 146 Mo. App. 246, 130 S. W. 430 (1910) (relied on by the majority opinion but holds that "the action in this class of cases is in tort, and not in contract.")

32. *DeGouvera v. H. D. Lee Mercantile Co. et al.*, 100 S. W. 2d 336 (Mo. 1936).

33. 1 WILLISTON, *op. cit. supra* note 25, § 242.

34. *McNicholas v. Continental Baking Co.*, 112 S. W. 2d 849 (Mo. 1938).

rule espoused in the *Madouros* case and allows a recovery for injuries suffered as a result of foreign substances in a loaf of bread. The court then also laid stress on the exclusive supervision of the defendant in the manufacture of the bread. This case was held controlling in a subsequent decision where it was held that the plaintiff need not allege a warranty if he stated sufficient facts from which a warranty could be implied.³⁵

In a recent Federal case³⁶ the court was confronted with the problem of construing the Missouri law on the subject of implied warranties. It was there held that the only warranty which would be implied was one of fitness for a particular purpose and not one of merchantability in general. Moreover, the court was of the opinion that Missouri law would not extend the liability of a manufacturer or vendor to a donee of a remote vendee. The court also found just grounds for denying the cause of action based on an implied warranty of merchantability in view of a recent decision by the Missouri Supreme Court.³⁷

CONCLUSIONS ON LIABILITY FOR BREACH OF AN IMPLIED WARRANTY

The rule developed from the *Madouros* case makes it necessary that the manufacturer or vendor have the exclusive control and supervision over the production of the deleterious food product before liability will attach for the breach of an implied warranty. The Missouri appellate courts have also distinguished between the liability of a remote vendor and the manufacturer or immediate vendor.³⁸ The immediate vendor in privity of contract with the plaintiff is held liable without regard to fault on the grounds that to hold otherwise would revise the whole field of warranty and place it on a basis of negligence. The remote vendor, not in privity of contract with the plaintiff, is exempt from liability unless he has had exclusive control over the processing or manufacture of the product. Why this distinction is made, unless for the inference of possible negligence, is not clear. It would seem that the law of warranty has, as a purely practical matter, become in some manner related to the liability for neg-

35. *Carter v. St. Louis Dairy Co.*, 139 S. W. 2d 1025 (Mo. 1940).

36. *McIntyre v. Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W. D. Mo. 1949).

37. *State ex rel. Jones Store Co. v. Shain*, 179 S. W. 2d 19 (Mo. 1944).

38. *DeGouvera v. H. D. Lee Mercantile Co. et al.*, 100 S. W. 2d 336 (Mo. 1936).

ligence, and that before an action for the breach of an implied warranty will lie against a remote vendor or manufacturers, such defendants must have been in such a position as to allow an inference of some negligent act. That such a fence straddling proposition is unique goes without saying and it may be doubted if the Supreme Court of Missouri would affirm such a holding.³⁹ As yet the problem has not come before the highest court of the state.

FINAL CONCLUSIONS

The first precedents affecting this field of law were established over a century ago. At that time the shield of the law was thrown over industry as a matter of practical expediency, enabling it to grow and prosper. The end has been accomplished. It is time that the courts took judicial notice of this fact.

An eminent jurist once remarked that law which does not make good sense is not good law. From that standpoint the law of Missouri on this particular subject leaves a little to be desired. Four suggestions for modification and improvement seem apparent:

(1) The tort liability of a manufacturer should be predicated on the basis of the foreseeable risk of harm instead of on the characteristics of the chattel involved.

(2) *Res ipsa loquitur* should be applicable whenever the defendant has had control of the instrumentality at the time the alleged negligence of manufacture or testing occurred without regard to the time when actual injury occurs.

(3) A remote vendor should be equally as liable as an immediate vendor to avoid circuitry of actions.

(4) The liability of a manufacturer or vendor for the breach of an implied warranty should extend to the donee of a remote vendee.

The first three suggested modifications need no further explanation, but a final word may help to clarify the author's position on the last one mentioned. As the case law of Missouri stands today, a manufacturer is liable in tort to an innocent bystander for injuries caused by a defective chattel (if it is considered to be imminently dangerous) which has been negligently

39. See Overstreet, *Some Aspects of Implied Warranties in the Supreme Court of Missouri*, 10 Mo. L. REV. 147 (1945) (where the author discusses the theory of the supreme court denying plaintiff recovery for injuries suffered from a poisonous dye in a blouse which she had purchased from the defendant because she had not purchased the blouse for any special purpose, but only for the general purpose of wearing it.)