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"Manufacturer" Warranty in Louisiana

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"MANUFACTURER" WARRANTY IN LOUISIANA

Plaintiff purchased an imported automobile and immediately thereafter found it unsuitable for use. After futile efforts to obtain correction of the deficiencies, plaintiff sued the car dealer and the American distributor for return of the purchase price only. The district court set aside the sale with judgment against the dealer alone. The Louisiana supreme court found that where the distributor assumed total responsibility for marketing the vehicles and for selling, servicing, and establishing dealerships, it occupied the position of manufacturer insofar as the American consumer was concerned. Therefore, the court *held* the distributor, as a "manufacturer," liable *in solido* with the dealer for the breach of its implied warranty. *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So.2d 377 (1972).

The supreme court further seems to have expanded the liability of a manufacturer by allowing "a consumer without privity to recover, whether the suit be strictly in tort or upon implied warranty [of quality]."[1] Previous to *Media*, beginning in 1911, Louisiana courts had held the manufacturer of food products liable to the consumer for unwholesome goods through delictual liability.[2] Early cases involving contaminated soft drinks applied the rule of res ipsa loquitur.[3] Subsequent to these decisions, the supreme court in *LeBlanc v. Louisiana Coca-Cola Bottling Co.*[4] held that a manufacturer of food products warrants his product for wholesomeness to the consumer. No longer was the plaintiff required to prove the bottle of soft drink had not

1. Media Prod. Consultants, Inc. v. Mercedes-Benz of N. America, Inc., 262 La. 80, 90, 262 So.2d 377, 381 (1972).

2. McCauley v. Manda Bros. Prov. Co., 252 La. 528, 211 So.2d 637 (1968) (concurring opinion); *but see* Givens v. Baton Rouge Coca-Cola Bottling Co., 182 So.2d 532 (La. App. 1st Cir. 1966).

3. Res ipsa loquitur was applied primarily in the area of bottled soft drinks containing foreign or deleterious substances. To recover for injuries sustained, the consumer was required to prove that (1) the beverage contained the substance, (2) actual damage was suffered by consuming the drink, and (3) the bottle had not been tampered with after it left the bottler's possession. Day v. Hammond Coca-Cola Bottling Co., 53 So.2d 447 (La. App. 1st Cir. 1951); Nichols v. Louisiana Coca-Cola Bottling Co., 46 So.2d 695 (La. App. Orl. Cir. 1951); Rowton v. Ruston Coca-Cola Bottling Co., 17 So.2d 851 (La. App. 2d Cir. 1944); White v. Coca-Cola Bottling Co., 16 So.2d 579 (La. App. 2d Cir. 1944); Jenkins v. Bogalusa Coca-Cola Bottling Co., 1 So.2d 426 (La. App. 1st Cir. 1941); Gunter v. Alexandria Coca-Cola Bottling Co., 197 So. 159 (La. App. 2d Cir. 1940).

4. 221 La. 919, 60 So.2d 873 (1952).

been tampered with, as required by the rule of res ipsa loquitur; consumption of a beverage contaminated with foreign matter established a prima facie case for assessment of damages against the manufacturer. No contractual relationship was required, the only requirement being to show the soft drink was in fact bottled by the alleged manufacturer.[5] Underlying the foodstuffs cases is the presumption that a manufacturer knows of the unwholesomeness of its product and therefore is at fault, even though the manufacturer may not be proved negligent.[6] This finding of imputed negligence satisfies the fault requirement of Civil Code article 2315.[7]

The manufacturer's delictual warranty to the purchaser was extended beyond food products in *Weber v. Fidelity & Casualty Insurance Co.*,[8] where a manufacturer of cattle dip was found liable for a defective chemical mix. The court required the plaintiff only to prove the defect created a risk of hazard in normal use and the causal relationship between the defect and injury.[9] If the product is proved hazardous in normal use, then the manufacturer is liable for damages to any person, whether purchaser or other consumer. Therefore, after *Weber*, a manufacturer of a product which involves a risk of injury warrants its product for any loss to persons or other property caused by the products, *i.e., extrinsic damages.* It would seem, however, if the product did not involve a risk of injury or the product was simply unsuitable for use (*merely defective*) then the delictual warranty would not exist.

In contrast with the manufacturer's delictual warranty, the contractual warranty of quality requires privity of contract, so that an action in redhibition *must* be brought by the vendee

5. *See, e.g.*, Paul v. Hardware Mut. Ins. Co., 254 So.2d 690 (La. App. 3d Cir. 1971).

6. Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963); Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969); McCauley v. Manda Bros. Prov. Co., 202 So.2d 492 (La. App. 1st Cir. 1967); Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 TUL. L. REV. 1 (1952).

7. McCauley v. Manda Bros. Prov. Co., 252 La. 528, 211 So.2d 637 (1968) (concurring opinion); Marine Ins. Co. v. Strecker, 243 La. 522, 100 So.2d 493 (1958).

8. 259 La. 599, 250 So.2d 754 (1971).

9. A defect in the product exists if the product when used in its intended manner causes harm and the manufacturer can produce no evidence to rebut the presumption of negligence beyond the precautionary measures taken in the manufacturing process. Circumstantial evidence is admissible for the plaintiff to establish his proof. *See* Note, 33 LA. L. REV. 151 (1972).

against the vendor.[10] This warranty of quality is based on the

10. The supreme court, in dicta, relaxed the privity of contract requirement for the contractual warranty in *McEachern v. Plauche Lmbr. & Constr. Co.*, 220 La. 696, 57 So.2d 405 (1952). The court stated that a subvendee would have the right to sue the original vendor for a breach of the implied contractual warranty of quality by application of Civil Code article 2503 which states: "The parties may, by particular agreement, add to the obligation of warranty, which results of right from the sale, or diminish its effect; they may even agree that the seller shall not be subject to any warranty.

"But whether any warranty be excluded or not the *buyer shall become subrogated to the seller's rights and actions in warranty against all others.*" (Emphasis added.)

This article, although found in the section of the Code dealing with eviction, was applied to actions in redhibition by the civilian method of extending principles by analogy. The buyer or subvendee is subrogated to the rights of the seller or original vendee against the original vendor, so that the subvendee's cause of action would be that of the original vendee. If the original vendor was a manufacturer, it would be liable for damages to the subvendee through the manufacturer's imputed knowledge of the redhibitory vice. This dicta in *McEachern*, was cited with approval in *Russell v. Bartlett*, 139 So.2d 770, 777 (La. App. 4th Cir. 1961), but has never been applied by any state court. The general rule requiring privity has been rigidly adhered to. Ready v. Rhea, 222 So.2d 560 (La. App. 2d Cir. 1969). The Fifth Circuit, in a review of the state's jurisprudence, stated that the subrogation principle in *McEachern* had no foundation in Louisiana law. Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 29 (5th Cir. 1963).

In France, the right to sue for breach of contractual warranty is transmitted with the object of the sale. Some of the French decisions rely on tort liability, but it is clear that the remedies of the code articles dealing with redhibition are available to the subvendee as well as the immediate vendee. The theory is that the vendee has transmitted to the subvendee all the rights conferred upon the vendee in the original sale. Privity of contract is no obstacle in France to an action for breach of the warranty of quality. This cause of action is similar in theory to that available through the principles of subrogation embodied in Louisiana Civil Code article 2503. Pothier in his treatise states: "Beyond the case of a workman or merchant, the vendor who does not know, or have any reason to know or suspect that a redhibitory vice exists, is bound only to return the price... and is not bound for the damage that the vice has caused to the buyer in his other things. This is because if, instead of buying by casks from a manufacturer or dealer, I buy them from an individual who had more than he needed and some of them prove defective, he is bound to restore to me only the price; he is not responsible for the loss of wine that results from the defective condition of the casks.

"Dumoulin nevertheless, in his treatise, properly observes that such individual should cede to me, at least, his rights and actions, if any, against the cooper or dealer from whom he purchased the casks that he sold to me in order that I may exercise them in his place for my own account and at my risk; because the sale that he has made to me should not operate to the profit or advantage of the manufacturer who is the one at fault, and discharge him of his obligation; and the individual is considered as having ceded to me with the casks all the rights pertaining to them. But if I exercise these rights of my vendor against the cooper I may not claim of my vendor the restitution of the price." J. SMITH, LOUISIANA & COMPARATIVE MATERIAL ON SALES & LEASES 215 (1963). *See also* Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 529 (1940); Note, 14 TUL. L. REV. 470 (1940).

Another exception to the privity requirement was offered in *Weathermaster Parts & Services, Inc. v. McCay*, 242 So.2d 306, 309 (La. App. 4th

principle that the vendee is entitled to goods which are free from hidden vices or defects that render the thing sold either absolutely useless, or its use so inconvenient or imperfect that it must be supposed the vendee would not have purchased the goods had he known of the vice.[11] The vendee need only prove that the product was not suited for the purpose intended,[12] the defect was present at the time of the sale,[13] and the defect was not apparent.[14] The vendor's liability is limited to return of the purchase price and the expenses of the sale if he acted in good faith.[15] On the other hand, if the vendor knows of the defect before the sale, he is considered in bad faith and is responsible for damages.[16] The courts have imputed bad faith to a manufacturer on the theory that it has constructive knowledge of the defect and is therefore liable for damages.[17] The presumption of bad faith to the manufacturer in cases involving the warranty of quality is similar to the presumption of fault in the delictual warranty cases.

Prior to the instant case, the manufacturer's delictual warranty could be asserted only in cases where the purchaser suffered bodily injury as a result of unwholesome food products,[18] or when damage resulted from a product which involved a risk of hazard in normal use.[19] However, it would seem if the defective manufacture resulted only in a valueless article or in its reduced value, privity would still be necessary because the delictual warranty would not exist. Similarly, the privity require-

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Cir. 1970): "It appears to us that a manufacturer's warranty [of quality] is intended for the benefit of the ultimate consumer and makes him a third-party beneficiary of the contract or original sale to a distributor . . . , entitled to enforce the warranty obligation, C.C. Art. 1890, which is surely part of the ultimate purchaser's motive for purchasing the manufacturer's product." Neither the subrogation principle in *McEachern*, nor this exception to the privity requirement has been applied in subsequent cases.

11. LA. CIV. CODE art. 2520.

12. Passman v. Alexander, 4 So.2d 787 (La. App. 2d Cir. 1941); Hemenway, Inc. v. Roach, 175 So. 892 (La. App. 2d Cir. 1937).

13. This can be shown by circumstantial evidence. McCauley v. Manda Bros. Prov. Co., 252 La. 528, 211 So.2d 637 (1968).

14. LA. CIV. CODE art. 2521.

15. *Id.* art. 2531.

16. *Id.* art. 2545.

17. Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So.2d 830 (1955); Tuminello v. Mawby, 220 La. 733, 57 So.2d 666 (1952); George v. Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432 (1905); Johnson v. H.W. Parson Motors, Inc., 231 So.2d 73 (La. App. 1st Cir. 1970); Brown v. Dauzat, 157 So.2d 570 (La. App. 3d Cir. 1963).

18. *See* text accompanying note 3 *supra.*

19. *See* text accompanying notes 7 & 8 *supra.*

ment would have to be satisfied where the defective product did not present a risk of hazard. Thus, the basis of liability would depend not only on the character of the product but also the nature of the loss suffered. However, there is no reason why the manufacturer's assurance of reasonable fitness should attach only where the product caused extrinsic damage and not where the product was merely defective. Also, it should make no difference that the defect in the product would likely harm the purchaser. The existence of the defect and resultant loss results in "violation of the representation implicit in the presence of the article in the stream of trade that it is suitable for the general purposes for which it is sold and for which such goods are generally appropriate."[20]

In the instant case, the court has now allowed a purchaser to maintain an action against a manufacturer for defective products without regard to the character of the product or type of resulting loss.[21] No longer is it necessary to distinguish between extrinsic damage and a mere defect or to determine if the defective product presents a risk of hazard. All the plaintiff must prove is the existence of the defect, from which negligence is imputed to the manufacturer, and the causal relationship between that defect and the resultant loss of whatever sort.[22]

It should be noted that the court not only expanded the delictual warranty of the manufacturer but also the contractual warranty of quality. Prior to *Media*, privity was a requirement in all actions in redhibition where the warranty of quality had been breached.[23] Now the supreme court has abrogated the privity requirement in any action founded on the manufacturer's breach of the warranty. The privity requirement would, however, remain when the action in redhibition is directed against

20. Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 67, 207 A.2d 305, 313 (1965).

21. Media Prod. Consultants, Inc. v. Mercedes-Benz of N. America, Inc., 262 La. 80, 90-91, 262 So.2d 377, 381 (1972): "We see no reason why the [consumer-protection] rule should not apply to the pecuniary loss resulting from the purchase of a new automobile that proves unfit for use because of latent defects."

22. One of the cases cited by the court in *Media* has an interesting parallel to the instant case. In *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), the court held that the ultimate purchaser of defective carpeting could maintain an action directly against the manufacturer for breach of warranty even though the loss was limited to the value of the carpeting. The decision in *Santor* contains a detailed discussion of the policy considerations involved in such a case.

23. *See* text accompanying notes 9-16 *supra*.

any seller other than the manufacturer.[24] Louisiana has now, as the court in *Media* states, "aligned itself with the consumer-protection rule . . . ."[25]

An extremely important aspect of the instant case is the court's finding that the distributor occupied the position of a manufacturer insofar as its liability is concerned.[26] Generally, knowledge of a defect in a product is only imputed to its manufacturer, thereby giving rise to liability.[27] In the early cases involving the manufacturer's liability in relation to food products, the courts consistently held that a distributor, who was not the manufacturer or preparer, was not liable under the warranty of wholesomeness.[28] However, since *Penn v. Inferno Manufacturing Corp.*,[29] an exception to this general rule has been recognized. When a seller has labeled the goods as his own, or in some way held the goods out to be manufactured by him, then knowledge of the article's defect will be imputed

24. In a concurring opinion in *Media*, Justice Dixon offers an alternative suggestion in relation to the contractual warranty of quality. Justice Dixon states that by application of the subrogation principle embodied in Civil Code article 2503 the plaintiff, subvendee, would be subrogated to the rights and actions of the dealer, the immediate vendee, against the distributor, the immediate vendor. *See* note 9 *supra*. Since the demand was only for the return of the purchase price, there would be no necessity of finding the distributor a manufacturer in order to insure recovery. Under the Code articles dealing with redhibition, a vendee may always maintain an action against the vendor for return of the purchase price and expenses of the sale (article 2531). Therefore, by application of article 2503 this action could be maintained. The only time a vendor must be considered a manufacturer would be to allow the plaintiff to receive damages in addition to the purchase price and expenses of the sale. Perhaps in subsequent decisions the court will offer the subrogation principle as another weapon to the purchaser in addition to those available in *Media*. This principle would be of special importance in a situation where the court could not classify the distributor as a "manufacturer," and the demand was only for the purchase price.

25. 262 La. at 90, 262 So.2d at 381.

26. *Id.* at 89-90, 262 So.2d at 380: "Insofar as the American consumer is concerned, MBNA occupies the position of manufacturer. We hold, therefore, that the liability of MBNA to the American consumer is that of the manufacturer of a defective vehicle."

27. *See* text accompanying notes 5, 8 & 16 *supra*.

28. Cartwright v. Firemen's Ins. Co., 254 La. 330, 223 So.2d 822 (1969); McCauley v. Manda Bros. Prov. Co., 252 La. 528, 211 So.2d 637 (1968); Lesher v. Great Atl. & Pac. Tea Co., 129 So.2d 96 (La. App. 2d Cir. 1961). It should be noted that other jurisdictions have found liability as a matter of public policy. Since the retailer is in a superior position in experience when dealing with the manufacturer and also in a better position to seek indemnity, liability has been justified. Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

29. 199 So.2d 210 (La. App. 1st Cir. 1967).

to him.[30] Under the rationale in *Penn*, in order to hold the distributor liable for damages the plaintiff was required to show that the distributor labeled the product as its own, advertised it as its own, and that the plaintiff relied upon these advertisements as an inducement to purchase the article.[31] However, in the instant case the court found that the distributor occupied the position of a manufacturer in spite of the fact that there was no evidence to indicate that the distributor labeled the product as its own, or advertised it as its own.[32] The distributor did assume responsibility for marketing the cars in this country, and for selling, servicing, and establishing dealerships, and the court thought this sufficient to find the distributor a "manufacturer."

Thus, the distributor's "manufacturer's" liability was based upon its activities in relation to its marketing of the cars. There is no reason why liability should only be contingent on overt actions by the distributor. Distributors and retailers, like manufacturers, are engaged in the business of distribution of goods to the public. Since all are an integral part of the producing and marketing enterprises, they should bear the burden of damages resulting from defective goods. In many cases, such as the situation in *Media*, the distributor may be the only member of the marketing enterprise which may be amenable to suit by the ultimate purchaser. In reality, such liability results in maximum protection to the innocent purchaser and works no injustice to the defendant. The distributor or retailer may always pass the loss to the manufacturer in the course of their continuing business relationship.[33] The basis of finding such liability is that of the special responsibility owed the public taken by one who supplies the public with products and the forced reliance upon those suppliers on the part of those who purchase such goods.[34] In future cases, the court should continue to expand the

30. *See* RESTATEMENT (SECOND) OF TORTS § 400, comment *c* (1965); *accord*, Travelers Indem. Co. v. Sears, Roebuck & Co., 256 So.2d 321 (La. App. 1st Cir. 1971); *see generally* 65 C.J.S. *Negligence* § 100(3) (1966).

31. Media Prod. Consultants, Inc. v. Mercedes-Benz of N. America, Inc., 247 So.2d 266, 269 (La. App. 4th Cir. 1971).

32. *Id.*

33. For an excellent discussion of the policy involved in such a situation, see Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

34. This liability is suggested to apply to the manufacturer, wholesale or retail dealer, distributor, and seller of food. It does not, however, apply to the occasional seller, not engaged in that activity as a part of his regular business. RESTATEMENT (SECOND) OF TORTS § 402-A, comment *f* (1965).

"manufacturer's" liability to distributors and retailers without the requirement of any actions other than those taken in the course of their regular distribution of products.

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ARGERSINGER V. HAMLIN: THE GIDEON OF MISDEMEANORS?

Petitioner, an indigent unrepresented by counsel, was sentenced to 90 days in jail for carrying a concealed weapon. In a habeas corpus action, the Florida supreme court held that petitioner had no right to court-appointed counsel, reasoning that such right extends only to "trials for non-petty offenses punishable by more than six months' imprisonment."[1] The United States Supreme Court reversed,[2] holding no person may be imprisoned for any offense, in a criminal case, unless he was represented by counsel at his trial or waived his right to counsel. *Argersinger v. Hamlin*, 92 S. Ct. 2006 (1972).

The landmark case of *Gideon v. Wainwright*[3] held the right to counsel for indigents, guaranteed by the sixth amendment, is a fundamental right and therefore applicable to the states through the due process clause of the fourteenth amendment. Although *Gideon* involved a felony trial, the opinion repeatedly referred to the rights of persons "charged with crime."[4] In a *per curiam* decision[5] rendered shortly after *Gideon*, the Court applied the Gideon rule to a "misdemeanor" offense punishable by two years in prison although certiorari was subsequently denied in two cases involving a state court's refusal to appoint counsel in misdemeanor prosecutions.[6]

1. 236 So.2d 442, 443 (Fla. 1970).

2. An 8-0 decision, Justice Douglas writing the opinion, Chief Justice Burger, and Justices Powell and Rehnquist concurring in result.

3. 372 U.S. 335 (1963).

4. *Id.* at 344: "The right of one charged with crime to counsel may not be fundamental and essential to fair trials in some countries, but it is in ours."

5. Patterson v. Warden, 372 U.S. 776 (1963). The offenses involved carried maximum terms of two years imprisonment, although labelled "misdemeanors" under Maryland law. *Patterson* was remanded for further consideration in light of *Gideon* and, on remand, the Maryland supreme court reversed and remanded for trial with appointed counsel. Patterson v. State, 231 Md. 509, 191 A.2d 237 (1963).

6. Winters v. Beck, 385 U.S. 907 (1966); and DeJoseph v. Connecticut, 385 U.S. 982 (1966). Justice Stewart, dissenting from the denial of certiorari in *Winters*, wrote: "I think this Court has a duty to resolve the conflict and clarify the scope of *Gideon v. Wainwright*." 385 U.S. at 908. One year later,