Tulsa Law Review

Volume 2 | Number 1

1965

Products Liability: The Privity Principle in Products Liability and Its Erosion in Oklahoma

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logically follows that a suit by a minor, whether emancipated or unemancipated, will not disrupt the peace and harmony of the family unit where the parent is covered by liability insurance. Under the *Tucker* case a minor may protect his property rights by suing the parent, but has no civil redress for any torts committed by the parent, no matter how willful or malicious they may be.

The Supreme Court of Oklahoma has forged ahead in writing progressive law in suits between husband and wife, but has declined to do so in suits between minor and parent. The Oklahoma scales of justice do not seem to balance where the peace and harmony of the family unit are concerned.

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PRODUCTS LIABILITY: THE PRIVITY PRINCIPLE IN PRODUCTS LIABILITY AND ITS EROSION IN OKLAHOMA

All liability stems from a breach of duty on the part of one person resulting in damage to another in person, property or the rights in either. In Tort, that breach issues from a wrongful act or omission and thus, is based on a concept of fault. In Contract, it arises from a failure or neglect to adhere to the rights, duties and responsibilities expressly or impliedly agreed upon by the parties. In either event, the important relationship between the parties giving rise to liability is that condition, circumstance or relationship called duty. If a contract does not impose a duty or if the relationship of the parties in tort does not impose a duty, there can be no liability regardless of the acts or omissions of the related persons.

The question then arises, "What does duty have to do with privity?" Privity has been defined as a derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest.[1] However, privity has assumed a slightly different role as related to products liability cases. Duty and privity, although not technically synonymus, have become interdependent to such an extent that it may be said, as a general rule, privity creates duty. Therefore, in the absence of privity there is no duty, thus no liability.

The progenitor of the privity principle was *Winterbottom v. Wright*.[2] In that old English decision, the court refused recovery to an injured coachman on the ground that he was not privy to the contract between the postmaster general of England and the defendant contractor who supplied a certain defective coach, concluding there was no duty between the coachman and the supplier of the coach in absence of privity. More important than the actual holding was the dicta of Lord Abinger, C.B., who said that there was "no privity of contract between

[1] Hodgson v. Midwest Oil Co., 17 F.2d 71, 75.

[2] 10 Mees & W. 109 (1842), 152 Eng. Reprint 402; For discussion and criticism see 74 A.L.R.2d 1131 § 5(b).

these parties," and that if the plaintiff could 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 and "the most absurd and outrageous consequences, to which I can see no limit," would ensue. Clearly, it was not necessary to decide the rights of such peripheral persons as passengers and persons upon the highway. So the general rule of non-liability of a manufacturer, contractor, or supplier in the absence of privity was born in dicta and broadly applied with its impact being felt in Oklahoma to some extent almost a century and a quarter after Lord Abinger's statement. The object then, of this study, is to determine the force of the application of the general rule in Oklahoma at this time.

Shortly after inception, a major exception to the rule was laid down in the United States in *Thomas v. Winchester.*[3] The court was concerned with the liability of a manufacturer who, erroneously labeling a deadly poison, belladonna, to be a harmless substance, caused injury to a plaintiff not in privity with the producer of the drug. There the court eliminated privity as a requirement where "inherently dangerous" products were involved. This exception was adopted in Oklahoma in *Ford Motor Company v. Livesay*[4] under circumstances strangely reminiscent of the *Winterbottom* case, as the case involved the failure of a wheel on an automobile assembled by the defendant manufacturer.

The broadest and most general exception to the rule was established by the well-reasoned decision of Judge Cardozo in *MacPherson v. Buick Motor Company*[5] which likewise dealt with a defective automobile wheel. Judge Cardozo, apparently conceding an automobile not to be inherently dangerous, nevertheless stated: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger." Coincidentally, the *McPherson* and *Ford Motor Company* decisions were handed down the same year but the *MacPherson* doctrine establishing the exception as to "imminently dangerous" products was not to be applied in this state until the decision in *Crane Company v. Sears.*[6] In a wrongful death action the court held the defendant manufacturer liable when a pipe flange incorporated in a steam system ruptured, fatally burning the decedent. In *Dawson v. McWilliams,*[7] the Federal Court, applying Oklahoma law and referring to the *Crane* holding relates that this state has fully embraced the *MacPherson* doctrine. In operation, the "imminently dangerous" exception vastly broadened the major exceptions to the general rule and obviated privity as a requirement for recovery over a wide, indeed, almost unlimited range of products. In fact, it is said the *MacPherson* case has "caused the exception to swallow the asserted general rule of nonliability, . . ."[8] In *Gosnell v. Zink,*[9] the *Crane* rationale was extended to cover damage to

[3] 6 N.Y. 397 (1852), 57 Am.Dec. 455.
[4] 61 Okla. 231, 160 P. 901 (1916).
[5] 217 N.Y. 382, 111 N.E. 1050 (1916), L.R.A. 1916F 696.
[6] 168 Okla. 603, 35 P.2d 916 (1934).
[7] 146 F.2d 38 (5th Cir. 1944) — Applying Oklahoma law.
[8] Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 700 (1946), 164 A.L.R. 559.
[9] 325 P2d 965 (Okla. 1958).

property. The Oklahoma decisions clearly established that privity is not essential to recovery in negligence actions growing out of product-caused injuries where the products in question were imminently dangerous, and those decisions are numerous.[10]

Modulating from negligence into warranty, the major exception is consistently applied in Oklahoma where products of the character of food and drink are concerned. In *Southwest Ice and Dairy Products Co. v. Faulkenberry,*[11] although privity existed between the plaintiff and defendant, our court stated:

> A manufacturer or processor of food products under modern conditions impliedly warrants his goods when dispensed in original packages or bottles and such warranty is available to *all* who may be damaged by their use in legitimate channels of trade, including those who purchase them for resale. (emphasis added)

The same result was reached in *Griffin v. Asbury*[12] when the court said that where a bottled beverage, intended for human consumption is sealed by the manufacturer the manufacturer impliedly warrants such beverage to be fit for human consumption. Likewise, *Cook v. Safeway Stores Inc.*[13] applies the same exception in the broadest possible terms by holding that an implied warranty of wholesomeness of food sold for human consumption runs in favor of a consumer not only from the retail seller, but also from the manufacturer, packer, processor, and any intermediate dealer.

Fraud, in this state, is suggested to be a circumstance sufficient to create an exception to the privity rule.[14]

The violation of a statute has also, at least inferentially, been recognized as a basis for an exception. In *Spencer v. Holt,*[15] the Oklahoma court approved the following language: "It is an implied duty on the part of one who sells explosives to give notice of their dangerous character, which duty is some time expressly enjoined by statute. Where one sells oil in violation of the statute, his liability is not confined to the immediate vendee, but extends to subsequent purchases."

While denying recovery to the plaintiff on other grounds, *Auten v. Livingston,*[16] extends an exception to the general rule when dealing with situations involving employees of one who is in privity with the manufacturer.

The recently adopted Uniform Commercial Code applies the exception to the benefit of members of a purchaser's family and guests in the following language:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or

[10] Marker v. Universal Oil Products Co., 250 F.2d 603 (10th Cir. 1959); McWilliams v. Dawson, 48 F.Supp. 538 (1943); Cases cited, *supra* notes 6 and 9.
[11] 203 Okla. 279, 220 P.2d 257, 260 (1950), 17 A.L.R.2d 1373.
[12] 196 Okla. 484, 165 P.2d 822 (1945).
[13] 330 P.2d 375 (Okla. 1958).
[14] See Crane v. Sears, infra, fn. 6.
[15] 82 Okla. 280, 200 P. 187, 189 (1921).
[16] 201 Okla. 467, 207 P.2d 256 (1949).

who is a guest in his home if it is reasonable to expect that such person may 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.[17]

Generally in Oklahoma, privity has been an essential element to recovery against negligent contractors as evidenced by the fact that liability ordinarily terminates upon acceptance of a contract by the contractee. However, in *Leigh v. Wadsworth*,[18] the tenant of a subvendee of the defendant contractor was allowed recovery for injuries sustained when a porch, negligently constructed by defendant, fell two years after construction. The same result was reached in *Schlender v. Andy Jansen Company*.[19] In each of these decisions the court held the acceptance of a contract did not terminate liability to third persons and thus allowed recovery to the injured plaintiff who was completely remote to the contract out of which the injuries arose. The court said, as a matter of public policy, a builder's liability to third persons for negligent construction generally is terminated upon acceptance by the contractee, but where the contractor has wilfully created a condition which he knows, or ought to know by the exercise of ordinary care, to be immediately and certainly dangerous to persons other than the contractee, considerations of public policy do not require the application of the general rule. This rational has also been extended to include property damage, as well as bodily injury.[20]

To recapitulate, the Oklahoma court has ignored privity as essential to recovery in a variety of situations involving inherently dangerous products, imminently dangerous products, food and beverages, fraud, statutory violations, sales regulated by the Uniform Commercial Code and in cases involving negligent contractors where injuries to sub-grantees occurred after completion of the contract. Therefore, the conclusion is inescapable that the rule of *Winterbottom v. Wright*[21] has been substantially eroded and modified in this state. Indeed, to paraphrase the statement in *Carter v. Yardley & Company*,[22] the many, varied, and forceful exceptions have all but swallowed up the rule.

In warranty cases the rule has been completely eliminated in California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Michigan, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania and Tennessee.[23]

[17] 12A O.S. § 2-318 (1961).
[18] 361 P.2d 849 (Okla. 1961).
[19] 380 P.2d 523 (Okla. 1962).
[20] Lowe v. Francis Construction Co., 373 P.2d 51 (Okla. 1962).
[21] Infra, fn. 2.
[22] Infra, fn. 8.
[23] Greenman v. Yuba Power Products, Inc. 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1962) — Applies to warranty and negligence; Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Mun. App. 1962); Continental Copper & Steel Industries, Inc. v. E. C. "Red" Cornelius, Inc., 104 So.2d 40 (Fla. App. 1958); Chapman v. Brown, 198 F.Supp. 78 (Hawaii 1961), aff'd 304 F.2d 149 (9th Cir. 1962); State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc. 252 Iowa 1289, 110 N.W.2d 449 (1961); B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959); Spence v. Three Rivers Builders & Masonry Supply Co., 353 Mich. 120, 90 N.W.2d 873 (1958); Worley v. Proctor