Washington Law Review

Volume 37
Issue 2 *Washington Case Law—1961*

7-1-1962

Sales—Automobile Warranties

Daniel B. Ritter

SALES

Automobile Warranties. A defective switch in a new automobile started a fire that destroyed the entire machine. Under the standard warranty given by all automobile manufacturers, the dealer's only obligation was to supply a new switch. By so deciding, *Norway v. Root*[1] illustrated the worthlessness of the standard warranty. But the importance of the case lies in the Washington court's intimation that it might invalidate disclaimers of implied warranty in automobile sales were the issue squarely presented.

The plaintiff bought a new Lincoln from the defendant dealer, who gave him the uniform warranty of the Automobile Manufacturers Association:[2]

> Dealer warrants to Purchaser (except as hereinafter provided) each part of each Ford Motor Company product sold by Dealer to Purchaser to be free under normal use and service from defects in material and workmanship .... Dealer's obligation under this warranty is limited to replacement of ... such parts as shall be returned to Dealer with transportation charges prepaid and as shall be acknowledged by Dealer to be defective.... This warranty is expressly in lieu of all other warranties, express or implied, and of all other obligations or liabilities on the part of the Dealer ....[3]

Within the prescribed time and mileage limitations, the car caught fire while sitting in the plaintiff's garage overnight. The plaintiff's insurer reimbursed him for his $2,500 loss. Considering itself subrogated to his claim for breach of warranty,[4] the insurer brought an action against the

[1] 158 Wash. Dec. 85, 361 P.2d 162 (1961).

[2] See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[3] Norway v. Root, 158 Wash. Dec. 85, 86, 361 P.2d 162 (1961).

[4] The Washington Supreme Court assumed arguendo that the insurance company was subrogated to the rights of its insured, but added that they entertained substantial doubt on this point. Apparently no case has explicitly considered subrogation by an automobile insurer in an action for breach of warranty. although it was allowed without discussion in State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449 (Iowa 1961).

The equitable principle of subrogation applies wherever an indemnity policy is involved. 6 APPLEMAN, INSURANCE LAW & PRACTICE § 4051 & n.5 (1942, Supp. 1961). Thus subrogation is permitted under policies covering automobile collision and theft. Bader v. Marlin, 160 Wash. 460, 295 Pac. 160 (1931) (collision) (dictum); Barnett v. London Assur. Corp., 138 Wash. 673, 245 Pac. 3 (1926) (theft); 6 APPLEMAN. *op. cit. supra,* § 4051 & n.3 (1942, Supp. 1961). Statutory authorization (Washington insurance statutes do not mention subrogation), inclusion in the policy of a subrogation provision, or assignment of the insured's rights aids the insurer's case, but is not essential if the insurer has paid the loss. 6 APPLEMAN, *op. cit. supra.* §§ 4052, 4053 (1942, Supp. 1961). Nor is it necessary that the subrogated claim sound in tort. Consolidated Freightways, Inc. v. Moore, 38 Wn.2d 427, 229 P.2d 882 (1951), held the doctrine equally applicable to contract claims, which would seem to include claims based on express warranty. Dworak v. Tempel, 18 Ill. App. 2d 225, 152 N.E.2d 197 (1958), *aff'd,* 17 Ill. 2d 181, 161 N.E. 2d 258 (1959), allowed subrogation in an action based on a dramshop statute, which imposes a form of strict liability similar to that imposed by the law of implied warranty.

So far subrogation appears to be proper. But suretyship law suggests an analogy that

dealer, who cross-complained against the manufacturer. The trial court found that a defective starter switch had caused the fire and gave judgment to the plaintiff and, on the cross-complaint, to the dealer.

The plaintiff's theory was that the dealer had warranted to replace all parts that were defective, not only when the car was *delivered,* but also when it was *returned.* He relied on a single case, from Massachusetts.[5] To the extent that it supported the plaintiff's position, the case had been recently overruled.[6]

Two Washington cases have interpreted this kind of warranty agreement to mean that the seller's replacement of parts defective on delivery completely fulfills his warranty obligation, irrespective of whether the defective part has produced consequential damage. *Crandall Engineering Co. v. Winslow Marine Ry. & Shipbuilding Co.*[7] held that in an action for the purchase price the buyer of drydock hauling machinery could not recover on a counterclaim the cost of dismantling a defective gear and installing a new one. The 1960 case of *Dimoff v. Ernie Majer, Inc.*[8] held that the seller of a Ford truck was not liable under the standard warranty for loss incurred by the buyer when a crimped fuel line greatly increased gasoline consumption. Citing the *Crandall* case, the court said that the warranty terms "precluded recovery for consequential damages suffered because of a defective part."[9] Courts of other jurisdictions similarly interpret this kind of warranty.[10]

---

may produce difficulty for the automobile insurer when the owner's claim is based on warranty. A surety is subrogated to the obligee's claim against a third party only when the surety's rights have greater equity that the third party's. SIMPSON, SURETYSHIP 220 (1950). So where the third party has acted neither negligently nor in bad faith, the surety is denied subrogation. Meyers v. Bank of America, 11 Cal. 2d 92, 77 P.2d 1084 (1938). The non-negligent automobile manufacturer in the principal case may be able similarly to defeat the insurer's claim to subrogation. At least he has a better chance than would someone who had deliberately or negligently caused the fire in the automobile.

[5] American Locomotive Co. v. National Wholesale Grocery Co., 226 Mass. 314, 115 N.E. 404 (1917). There the seller warranted to replace parts that broke "because of" defective material or workmanship. While ambiguous, this warranty is distinguishable from the current automobile warranty in which the seller promises in effect to replace parts that contain defects in material or workmanship.

[6] Hall v. Everett Motors, Inc., 340 Mass. 430, 165 N.E.2d 107 (1960). In that case, as in *Norway,* the plaintiff's car was destroyed by a fire of which defective wiring was the cause. The court held that the express warranty did not cover the loss and that implied warranties had been disclaimed.

[7] 188 Wash. 1, 61 P.2d 136 (1936).

[8] 55 Wn.2d 385, 347 P.2d 1056 (1960).

[9] *Id.* at 388, 347 P.2d at 1058.

[10] Sharpless Separator Co. v. Domestic Electric Refrigerator Corp., 61 F.2d 499 (3d Cir. 1932); Morris & Co. v. Power Mfg. Co., 17 F.2d 689 (6th Cir. 1927); Maryland Cas Co. v. Independent Metal Prods. Co., 99 F. Supp. 862 (D. Neb. 1951); Whitaker v. Cannon Mills Co. 132 Conn. 434. 45 A.2d 120 (1945); Pan Am. World Airways, Inc. v. United Aircraft Corp., 163 A.2d 582 (Del. 1960); Hall v. Everett Motors, Inc., 340 Mass. 430, 165 N.E.2d 107 (1960); Fealk v. Economy Baler Co., 223 Mich. 45, 193 N.W. 787 (1923); Chiquita Mining Co. v. Fairbanks, Morse & Co., 60 Nev. 142. 104

Reading the warranty as applicable to parts defective on return, the plaintiff in *Norway* implicitly distinguished damages caused by defective parts according to whether the initial defect produced injury to other parts or to something else. Accordingly, only the second kind of injury would be consequential within the *Crandall* and *Dimoff* cases. But the dealer only warranted each part to free from defects in material and workmanship. If a part is defective solely because of a fire, from whatever cause, the defect has no connection with the material or workmanship of that part. Since the part remains as free from the defects warranted against as it was on the day of manufacture, the warranty is inapplicable by any reasonable construction. As a result, the plaintiff had no basis for distinguishing consequential damage to other parts of the car so as to take it out of the rule of the *Crandall* and *Dimoff* cases. Because the plaintiff did not attack those cases, but claimed instead that they did not apply, the Washington Supreme Court could only reverse the judgment which the trial court had rendered in favor of the plaintiff.

Significantly, however, the court added sua sponte:

> We are aware that an express warranty of this character, which purports to be a disclaimer of all implied warranties, is under severe attack.... The very recent case of *Henningsen v. Bloomfield Motors, Inc.*, 1960, 32 N.J. 358, 161 A.2d 69, contains the best-documented criticism we have found. It brands the attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom as so inimical to the public good as to compel an adjudication of its invalidity.
>
> We are, therefore, at some pains to make it clear that in this particular case the... [plaintiff] makes no claim based on an implied warranty, but relies on the express warranty relative to defective parts.... (Italics added.)[11]

The *Henningsen* case arose out of the sale of a new Plymouth with the standard warranty. Ten days after the sale, the steering mechanism broke while the buyer's wife was driving, and the car veered into a brick wall. She sued the dealer and the manufacturer to recover

P.2d 191 (1940); Lyons v. Benson, 12 N.J. Misc. 468, 172 Atl. 792 (Sup. Ct. 1934); Bell Bros. v. Robinson, 5 Ohio App. 454 (1916); Eimco Corp. v. Joseph Lombardi & Sons, 193 Pa. Super. 1, 162 A.2d 263 (1960); Bechtold v. Murray Ohio Mfg. Co., 321 Pa. 423, 184 Atl. 49 (1936); Hill & MacMillan v. Taylor, 304 Pa. 18, 155 Atl. 103 (1931); Lee v. Pauly Motor Truck Co., 179 Wis. 139. 190 N.W. 819 (1922). Compare Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

[11] Norway v. Root, 158 Wash. Dec. 85, 87, 361 P.2d 162, 163-64 (1961). The reluctance of the Washington court to enforce disclaimers is illustrated in Hatten Machinery Co. v. Brunch, 159 Wash. Dec. 773. 370 P.2d 601 (1962). There a disclaimer agreement was denied effect for lack of proof that the agent who signed the agreement had authority to negotiate changes in his principal's oral contract.

damages for personal injuries. Her husband joined to recover his consequential losses. The New Jersey Supreme Court unanimously affirmed a judgment for the plaintiffs. This was a bold and important decision, grounded on three new principles of case law: (1) Despite lack of privity, manufacturers of automobiles are liable to ultimate buyers for breach of implied warranty. (2) Despite lack of privity, automobile manufacturers and dealers are liable for breach of implied warranty to members of the family and household of the buyer and to others who use the automobile with his consent. (3) Automobile manufacturers and dealers cannot disclaim liability for breach of the implied warranty of merchantability.[12]

There is a considerable literature on privity and disclaimer of warranty in the automobile industry. Professor Gillam has thoroughly analyzed the relevant cases and secondary authorities which appeared before 1959.[13] The *Henningsen* case itself is well-documented, and it has been noted thirteen times.[14] This note, therefore, treats these issues summarily.

It is noteworthy that the *Henningsen* case is the first appellate case in which the automobile industry has used the warranty disclaimer as a defense to a claim for personal injuries.[15] The New Jersey court held

[12] A few months before the *Henningsen* decision, General Motors Corp. v. Dodson, 338 S.W.2d 655 (Tenn. App. 1960), affirmed a judgment against a manufacturer in a breach of warranty action, despite the lack of privity between manufacturer and buyer. The court, however, did not base its decision only on the theory that advertisements constituted express warranties to ultimate buyers. The decision also turned on the fraud exception to the privity requirement, since the severe personal injuries of the driver were caused by the locking of defective brakes. These were of a type that frequently malfunctioned, as the manufacturer knew. Significantly, the manufacturer in that case did not raise any defense based on the disclaimer clause.

While the *Henningsen* result is novel, it is no longer unique. Relying on the reasoning of the *Henningsen* and *Dodson* cases, the Iowa court has held that there need be no privity between manufacturer and buyer and that the disclaimer clause in the automobile warranty is void. State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449 (Iowa 1961). This case is singular in that the plaintiff sued to recover damages for property loss rather than personal injuries, and nevertheless the court embraced the new doctrine in order to sustain him.

The *Henningsen* case was also relied on in Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), which is quite as famous as the New Jersey case. The plaintiff in *Chapman* borrowed a hula skirt from her aunt (by marriage) and wore it to a dance. Cigarette butts on the floor ignited the skirt, which burned rapidly and intensely. In an action for breach of implied warranty against the retail seller of the skirt, the court repudiated the requirement of privity between the seller and persons using the product with the buyer's consent. The decision rested on an analysis of the UNIFORM SALES ACT, the common law trend away from privity, and the public policy arguments against the requirement.

[13] GILLAM, PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY (1960).

[14] 12 BAYLOR L. REV. 345 (1960); 46 CORNELL L.Q. 607 (1961); 74 HARV. L. REV. 630 (1961); 59 MICH. L. REV. 467 (1961); 39 N.C.L. REV. 299 (1961); 36 NOTRE DAME LAW. 233 (1961); 14 RUTGERS L. REV. 829 (1960); 12 SYRACUSE L. REV. 123 (1960); 13 S.C.L.Q. 131 (1960); 39 TEXAS L. REV. 694 (1961); 8 U.C.L.A.L. REV. 658 (1961); 38 U. DET. L.J. 218 (1960); 14 VAND. L. REV. 681 (1961).

[15] See GILLAM, *op. cit. supra* note 13, at 192.

the disclaimer to be void as against public policy, reasoning that since imposition of an agreement so favorable to the seller results from the overwhelmingly superior bargaining power of the united manufacturers, the law ought to regard the agreement as unfairly procured, just as if it were obtained by overreaching or concealment. In fact, the court also found that the (customary) contract form does conceal the disclaimer by de-emphasizing its presence and extent.

Although disclaimer clauses are imposed unfairly, it seems unlikely that Washington cases allowing such clauses[16] would be overruled for that reason alone. If disclaimers were declared invalid for a given industry, the result would be to distribute the social cost of defective products among all buyers,[17] whether or not they wanted to assume that cost. Disclaimers usually accompany sales of automobiles, machinery and appliances. Any buyer wanting to protect himself against loss from defects in such products can obtain insurance to cover these risks, and no one pays for that protection except those who so choose. On the other hand, absolute liability of manufacturers would ensure better quality control.[18] On balance, it is far from certain that disclaimer clauses really offend public policy.

The *Henningsen* opinion is more convincing on the privity question, which, of course, was not involved in the *Norway* case. In the view of the New Jersey court, manufacturers cannot develop a mass market through advertising and merchandising techniques directed toward the ultimate consumer or user and, at the same time, justly escape liability for defective products by claiming that they have no contractual relationship with the people injured. As Professor Vold makes clear,[19] certain implied warranties, notably that of merchantability, have been created by law on grounds of public policy and quite independently of the sales contract. Analytically and historically they are forms of absolute tort liability and ought, therefore, to protect everyone who is expectably injured by the defects warranted against. To require privity here is to oppose fundamentally the notion of implied warranty.[20]

[16] The Washington disclaimer of warranty cases are cited and several are discussed in Cosway, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code* (pts. 1,2,4) 35 WASH. L. REV. 412, 426-428, 617, 628-632 (1960), 36 WASH. L. REV. 440, 472-474 (1961). The American cases validating automobile warranty disclaimers are collected in GILLAM, *op. cit. supra* note 13, at 176 n.344.

[17] GILLAM, *op. cit. supra* note 13, at 196-210.

[18] Llewellyn, *On Warranty of Quality, & Society: II,* 37 COLUM. L. REV. 341 (1937).

[19] VOLD, SALES § 93 (2d ed. 1959).

[20] Note, however, that the requirement of privity now has little effect in Washington as between manufacturer and ultimate buyer. Under WASH. R.P.P.P. 14(a), a defendant may implead a third party "who is or may be liable to him for all or part of the plaintiff's claim against him." Since the manufacturer's and the dealer's warranties

In the past, the Washington court has led in the relaxation of the privity requirement. In *Mazetti v. Armour & Co.*,[21] it early recognized an exception for defective foods, and the leading case of *Baxter v. Ford Motor Co.*[22] (relied on in *Henningsen*) was the first to hold an automobile manufacturer liable for breach of express warranty. In that case the plaintiff lost his eye when it was struck by shattering glass from a windshield advertised as shatter-proof. Note that both cases involved personal injuries. Washington has now abandoned privity in cases involving fraud, negligence or dangerous instrumentalities.[23] The breadth of these exceptions recalls the status of the privity rule in negligence cases in 1916. During that year Mr. Justice (then Chief Judge) Cardozo wrote the celebrated opinion in *MacPherson v. Buick Motor Co.*,[24] where he created a new rule out of previous exceptions to the privity requirement. The courts of New Jersey,[25] Tennessee[26] and Iowa[27] have already applied Cardozo's method to warranty cases. Especially in a personal injuries case, the Washington court might very well do likewise.

The *Henningsen* case conforms with the Uniform Commercial Code in two respects and goes beyond it in two other.[28] Section 2-318 provides an illimitable extension of warranties to members of the buyer's household or family and to guests that may expectably use the goods. The Code, however, remains neutral with respect to the developing case law on the warranty requirement of privity between manufacturer and ultimate buyer.[29] Section 2-719(1) allows limitation of the buyer's remedies, as to replacement of defective parts. But subsection three prohibits unconscionable limitation of warranty liability for consequential damages. It specifies that limitation of damages for personal injuries (but not commercial losses) is prima facie unconscion-

contain identical terms, a dealer who is sued by a buyer can bring the manufacturer into the action, and the dealer has every reason to do so (unless it is an insolvent corporation). Except that the superceded process of cross-complaint was used, that is just what happened in the *Norway* case. If the manufacturer is a foreign corporation, it may not be subject to the jurisdiction of Washington. In this case, however, the buyer proceeding directly would have no greater success than the dealer seeking impleader.

[21] 75 Wash. 622, 135 Pac. 633 (1913).

[22] 168 Wash. 456, 12 P.2d 409 (1932), *aff'd after retrial*, 179 Wash. 123, 35 P.2d 1090 (1934). Compare Murphy v. Plymouth Motor Corp., 3 Wn.2d 180, 100 P.2d 30 (1940).

[23] Dimoff v. Ernie Majer, Inc., 55 Wn.2d 385, 347 P.2d 1056 (1960).

[24] 217 N.Y. 382, 111 N.E. 1050 (1916).

[25] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[26] General Motors Corp. v. Dodson, 338 S.W.2d 655 (Tenn. App. 1960). See note 12 *supra*.

[27] State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449 (Iowa 1961). See note 12 *supra*.

[28] See generally Cosway, *supra* note 16.

[29] UNIFORM COMMERCIAL CODE § 2-313, Comment 2; UNIFORM COMMERCIAL CODE § 2-318, Comment 3.

able.[30] Both the *Norway* and the *Henningsen* cases are thus consistent with Section 2-719, although the reasoning of the New Jersey case does not depend on the fact of injury to the person.

The law of warranty is obviously in flux, resolving conflicts between the elements it derives from tort and contract. The observable trend in favor of buyers raises the further problem of the "third-party victim" —one who sustains damage because of defects in the product of a total stranger. The implied warranty of merchantability should in theory extend to him equally with the buyer and his household, since the law imposes this warranty to protect the public, rather than to implement a sales contract. Where injury to the public is a foreseeable consequence of a breach, other implied warranties and warranties based on sellers' representations seem likewise open to extension.

Finally, the changing state of warranty law calls attention to the relationship between disclaimers and privity. If, in the same situation, one seller is allowed to defend with the disclaimer clause and another with the privity requirement, then the first seller escapes liability because there is a contract and the second because there is not a contract. This unfairness can be avoided by confining the disclaimer defense to situations where there is privity of contract.[31]

DANIEL B. RITTER

SECURITY TRANSACTIONS

Mortgage on Shifting Stock of Merchandise—Mortgagor's Duty to Account. Washington businessmen using mortgages on shifting stocks of merchandise as a security arrangement received encouragement from *United States Rubber Co. v. Young*,[1] that more liberal agreements and procedures may be allowed. However, by failing to expressly overrule certain prior judicial restrictions on the use of this type of security, the Washington Supreme Court has left some unnecessary confusion to be resolved in the future.[2]

The case arose when U.S. Rubber Co., a creditor, sought the appointment of a receiver for Glen Young's sporting-goods store. The purchase

[30] See also UNIFORM COMMERCIAL CODE § 2-302 (authorizing refusal to enforce unconscionable or clauses generally).

[31] Jolly v. C. E. Blackwell & Co., 122 Wash. 620, 211 Pac. 748 (1922). Pelletier v. Brown Bros. Chevrolet & Oldsmobile, Inc., 164 N.Y.S.2d 249 (N.Y. Sup. Ct. 1956); Ford Motor Co. v. Switzer, 140 Va. 383, 125 S.E. 209 (1924). *But cf.* Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956).

[1] 57 Wn.2d 686, 359 P.2d 315 (1961).

[2] For a brief history and development of the Washington position see Kerr, *Chattel Mortgages on Shifting Stocks of Goods in Washington*, 11 WASH. L. REV. 199 (1936).