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Automobiles—Negligence—Liability of Manufacturer—Nature of Liability; Chattel Mortgages—Future Advances—Priorities; Service of Summons by Plaintiff's Attorney; Torts—Joint Venture—Existence of the Relation

C. R. M.

J. B. K.

J. D. M., Jr.

L. L.

RECENT CASES

AUTOMOBILES—NEGLIGENCE—LIABILITY OF MANUFACTURER—NATURE OF LIABILITY—Arising on demurrer, the following facts were assumed: Defendant, a second-hand automobile dealer, sold a truck to L. He represented that the truck had been overhauled completely, that it was in a safe condition, and that it carried a "new truck guarantee." It had in fact, however, a cracked spring, which could have been ascertained by the dealer by an ordinarily careful inspection. Plaintiff, a passenger and wife of the driver of the truck, was injured when, 25 days after the sale, the spring broke, causing the truck to hit a parked car. The court held that the defendant was liable for the injuries received, saying that the vendor of a chattel, which is likely to cause harm to others if not made safe, has a duty to inspect properly and to discover such defects as reasonably may be discovered; and if he does not so inspect the chattel, he will be liable to all those who are harmed thereby under a reasonable and ordinary use of such chattel, irrespective of any contract to that effect, and irrespective of whether the one injured is a user of the chattel or not, particularly in view of the representations made in this case. *Bock et ux v. Truck and Tractor, Inc.*, 118 Wash. Dec. 440, 139 P. (2d) 706, (1943).

There are two approaches used by the courts in such cases; on the one hand that of straight tort liability, and, on the other, that of breach of warranty. There has long been conflict in this field between the tort law and the contract conception of privity, the latter waging a losing battle in most jurisdictions since the turn of the century. The present day tort rule may be stated as: A manufacturer or a vendor is not liable to one with whom he has not contracted directly, except where: (1) the product or thing is noxious or inherently dangerous; (2d) there is fraud or deception in passing the thing off; or (3) the manufacturer is negligent in the construction of the thing with respect to the sale of it. If one of these exceptions fits the case at hand, the manufacturer or vendor is liable to all to whom he could reasonably foresee that harm was likely to come.

Voicing the antecedent common law, Washington's earliest case along this line, *Thornton v. Dow*, 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 968, (1910), held that liability, where there was no privity of contract, extended only to those things that were noxious or of a dangerous kind, or where there is fraud or deception in passing off the thing. Plaintiff was a spectator at an athletic event, and fell from the balcony by reason of a defective railing; defendant was the contractor who built the building. However, three years later, the court, influenced by the recent decisions of other courts, added the third exception, in *Mazetti v. Armour & Co.*, 75 Wash. 662, 135 Pac. 633, 48 L. R. A. (N. S.) 213, ANN. CAS. 1915-C, 140, (1913), giving us the complete rule as above stated. In that case the plaintiff, a restaurant, had bought a carton of Armour's canned tongue from a wholesaler. When a portion of it was served to a customer it was found to be defective in some way so that the customer became ill. The plaintiff sought damages for the loss of business and reputation thereby caused. The court overruled the defendant's previously sustained demurrer in a considered opinion, saying that when the manufacturer of a product not imminently dangerous is negligent either in the

construction of, or with respect to the sale of his product, the consumer may sue for injuries which have naturally arisen therefrom.

The approach by way of breach of warranty has also been used in this state, in *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 1118, (1932), where the plaintiff had lost his eyesight as a result of a pebble striking the windshield of his Ford car. He had bought the car new, and had relied on certain literature furnished to the dealer by the company stating the advantages of the new "Shatterproof" glass alleged to be installed in every new Ford car. The lower court had excluded these representations from evidence and, as the contract between the plaintiff and the dealer expressly stated that the dealer thereby made no representations or warranties whatsoever with respect to the automobile, the plaintiff was thus denied any relief whatsoever. No attempt was made to treat the action as one in tort; it was strictly for breach of warranty. Yet the court reversed the lower court, relying heavily on the *Mazetti* case and the general principles therein set forth.

The *Baxter* and *Mazetti* cases were cited in the principal case, but it was recognized by the court that these cases were not strictly in point. The *Bock* case presented the clear question as to whether this liability of a manufacturer should be extended to cover a dealer in second-hand motor vehicles, and, if so, should he be liable to a third person in the position of the plaintiff, and upon what theory—tort or contract? The court has little trouble extending liability to the defendant here, maintaining that the RESTATEMENT OF THE LAW OF TORTS (1934), § 388, states the true rule, as follows:

"One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

"(a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;

"(b) and has no reason to believe that these for whose use the chattel is supplied will realize its dangerous condition; and

"(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so."

It is clearly pointed out in the RESTATEMENT that "suppliers" as used in the above quotation includes vendors.

The position of the plaintiff in this action was not so clearly defined, however, and apparently it was tacitly assumed that she came within the class of those whom the supplier might expect to be within the vicinity of the probable use of the chattel. This would be, however, more a question of policy than of cause—heretofore a vendor's liability has been more limited as a public policy measure of protection. Moreover, the decision is somewhat confusing in that it fails to entirely distinguish the basis upon which the case is decided—is it tort or warranty? The court constantly qualifies its statements in regard to tort liability with the clause "particularly in view the representations made." The courts are slow in recognizing liability on warranties; and proof of reliance is a strong

factor in any event; consequently, we arrive at the query whether or not the wife of a driver-employee of the vendee of a chattel has relief upon the strong warranties concededly given; it is difficult to find how she could have relied on them here. It would seem that here the court had a chance to distinguish the two grounds which it had once before confused in the *Baxter* case, but failed to do so.

C. R. M.

CHATTEL MORTGAGES—FUTURE ADVANCES—PRIORITIES. *A* leased orchard to *B*, who, representing himself to *C* as owner, borrowed money from *M* on a combination mortgage and contract to sell crop. *C's* search failed to disclose lease from *A* to *B*. *C* advanced money to *B* on the crop from time to time before *A* took chattel mortgage on crop to secure her share of crop as rental. *C* was notified of this latter mortgage but nevertheless made subsequent advances and finally bought the crop as per contract, charging against *B* the handling costs. In action in trial court, *A* recovered one-fourth of proceeds after *C* deducted all the cash advanced to *B* plus the cost of handling the crop. On appeal, *A* contends the court erred in deducting these latter costs, that *C* had knowledge of *A's* mortgage on the crop, and that moneys advanced *after* such knowledge did not have priority over *A's* mortgage. *Held*, The contract between *B* and *C* was in effect a contract for future advances which, though not obligatory upon *C*, were necessary to protect *C's* interest and were therefore to be treated as obligatory. Judgment for *A* reversed and decree that *A* reimburse C an advance made to her. *Cedar v. W. E. Roche Fruit Co.*, 16 Wn. (2d) 652 (1943).

After pointing out the fact of incorrect computation of the account the court stated that its primary concern was with the question of priorities of mortgages. If it had been the usual chattel mortgage, there would have been no problem of priority as to the money *advanced. Cashmere Valley Bank v. Pacific Fruit & Produce Co.*, 198 Wash. 363 (1939), *Wenatchee Production Credit Ass'n. v. Pacific Fruit & Produce Co.*, 199 Wash. 651 (1939). But unlike the present case, the two just cited did not have to deal with the question of the right of the first mortgagee to make advances and furnish services and supplies *after actual notice of the junior mortgage.*

There is no quotation of the future advances provision of the mortgage under scrutiny, but there is the court's statement that it ". . . was given to secure the sum of $525, as well as advances made from time to time to the grower, all indebtedness which may accrue for supplies or merchandise sold, all charges incurred in selling and handling the crop . . ." This provision is silent, apparently, on the point of whether these future advancements were optional or obligatory.

When the writer considered future advances on mortgages in Washington in 18 WASH LAW REV. 24, he was principally concerned with optional future advances, being satisfied that the rule as to obligatory future advances was settled. The discussion in this case gives no reason to abandon that view. The court in the instant case cites with approval the quotation from 5 A. L. R. 398 found in *Elmendorf-Anthony Co. v. Dunn*, 10 Wn. (2d) 29 (1941), which makes a lien for future advances effective, if at all, from the time of its execution. Then what has to be determined is whether or not the advances are optional or obligatory. As regards optional

advances the *Elmendorf* case points to a trend in this jurisdiction which allows the optional advances a priority over junior encumbrances until such time as the first mortgagee has knowledge of the junior encumbrance.

The rule as to obligatory advances is different, ". . . if such mortgagee is under obligation to make advances, he is entitled to the security, whatever may be the encumbrances subsequently made upon the property, and whether he has notice of them or not . . ." 9 Thompson, *Real Prop.* (Perm. ed. 1940) 326. This statement is modified by 1 Jones on *Chattel Mortgages and Cond. Sales* (Bowers ed.) 173, § 97, by this language: "Advances made by a mortgagee after he has actual notice that others have acquired rights in the property will be postponed to the rights acquired to such other persons, unless the mortgagee be under a binding contract to make the advances, *or it be essential to his own security to complete the advances contemplated by the mortgage.*" This is a rather definite statement of the rule applicable to a situation wherein a mortgagee is in danger of losing his security. The court in the instant case seemed to think that this was a fact situation in which the rule would fit, and it is fairly clear that it was. The description of the mortgage and contract between the Fruit Company and Stone, the lessee, was a contract for future advances, but whether it was for optional or obligatory advances the instrument seemed to be silent. Thus the court had to fall back on the facts to determine what kind of future advances it was considering. It evidently appeared to the satisfaction of the court that such future advances were necessary to protect the previous loans and advances made. Opinions may differ on a purely factual basis, but it is suggested that the case represents an enunciation of the majority rule regarding obligatory future advances, whether obligatory by specific provision in the mortgage provision or because of the exigencies of the situation.

It is to be remembered, however, that the necessity found by the court in this case is based upon the perishable nature of the property mortgaged and seems to have been clear to the court that this finding was called for. This does not indicate that, in every case where the facts are not clear, there will be a finding of necessity sufficient to warrant the court's declaring a priority in favor of the first mortgagee who makes advances after knowledge of a junior encumbrance. Rather, it suggests that the situation must be such that upon search, the investigator can find in the mortgage contracts language which will satisfy him that nothing else could have been contemplated by the parties than to give the mortgage a priority of lien for those future advances.

Admittedly, this rule of necessity is a hard one to apply, but no rule necessitating the evaluation of a fact situation is easily invoked.

J. B. K.

SERVICE OF SUMMONS BY PLAINTIFF'S ATTORNEY. The plaintiff obtained a money judgment against the defendants by default, and the defendants filed a petition to have the judgment set aside on the ground that the service was void for the reason that it was made by the plaintiff's attorney —that the attorney was a person interested in the outcome of the action and was therefor incompetent to serve summons and complaint. The plaintiff demurred. *Held:* The service was good; the plaintiff is the only otherwise qualified person who is without authority to serve summons and complaint. The statute is clear, and to read more into it would create

confusion where none before existed. *Roth v. Nash*, 119 Wash. Dec. 766, 144 P. (2d) 271 (1943).

The limitations as to who may make valid service are set out in REM. REV. STAT. § 225, "In all cases, except when service is made by publication, as hereinafter provided, the summons shall be served by the sheriff of the county wherein service is made or by his deputy, or by any person over twenty-one years of age, who is competent to be a witness in an action, other than the plaintiff." Although this has been the form of the statute since its enactment in 1893, there have been no decisions upon the point involved in the principal case. There has been a tendency to believe that the attorney for the plaintiff had no authority to make valid service of summons; it is true that the words of the statute do not exclude him, but it was thought, that as agent of the plaintiff, he would have no greater authority than his principal. The rule that the plaintiff is without authority to make valid service is based upon sound public policy—that it is only reasonable to allow disinterested persons to attend to the details of the action to prevent further friction between the contestants. However, the reason for the rule seems less applicable to attorneys.

There is little authority upon this point, and no uniform rule has been established; however, the greater number of decisions are in accord with the principal case. *First National Bank of Whitewater v. Estenson*, 68 Minn. 28, 70 N. W. 775 (1897); *Meihl v. Souh Central Sec. Co.*, 227 Mo. App. 788, 58 S. W. (2d) 1011 (1923); *Sheehan v. All Persons*, 80 Cal. App. 393, 252 Pac. 337 (1927). In these cases, service was made under statutes forbidding service by "A party to the action." But these cases are not strictly in point, for it is to be noted that this type of statute is less restrictive than that of Washington, since an attorney as such is not a party to the record. The cases taking a contrary view are not strong authority, in that strong dissents follow the majority opinions. *Nelson v. Chittenden*, 53 Colo. 30, 123 Pac. 656 (1912); *Nevada Cornell Silver Mines v. Hankins*, 51 Nev. 420, 279 Pac. 27 (1929). It is interesting to note that under the Nevada statute, N. C. L. § 8578, summons may be served by any citizen of the United States over twenty-one years of age. This requirement seems to be even less limiting than the Washington statute, and it is thus shown that the *Hankins* case is entirely inconsistent. The Nevada court gave little weight to the statute, but chose to base its decision upon common law principles. Several state statutes exclude an "interested party" from authority to make valid service—this would probably disqualify an attorney, but no cases in point have arisen.

With the decision in the principal case, the position of the Washington court has been defined. It has been seen that the opinion is in accord with the weight of authority, but even if it were unsupported, it would be the only logical, consistent view to be taken. There can now be no question as to the effect of the Washington statute.

J. D. M., JR.

TORTS—JOINT VENTURE—EXISTENCE OF THE RELATION. Appeal from a judgment against *A* for injuries to *B* arising out of an automobile accident. *B*, upon learning that *A* was to drive from Spokane to Wallace to spend the week-end with her husband, asked if she might make the trip with *A* as she desired to visit a friend. Before leaving Spokane, and again while on the way to Wallace, *B* said she would pay her share of the ex-

penses and *A* replied each time, "That's fine." After arriving in Wallace, they went their separate ways and did not meet again until they started the return trip to Spokane, during which the accident occurred. *Held:* That in order to establish joint venture, unless the undertaking be of a business nature for material gain or profit, there must be a definite contract specifically providing for the right of control, and that *Manos v. James* (1941) 7 Wn. (2d) 695, 110 P. (2d) 887, which had held that the fact of sharing expenses of a trip supports an inference of joint control, be expressly overruled. *Poutre v. Saunders* (1943) 119 Wash. Dec. 613, 143 P. (2d) 554.

Because "considerable confusion still surrounds the doctrine joint venture, which no one has succeeded in reducing to any very exact definition," Prosser, *The Law of Torts* (1941) p. 493, analysis of the requirements for joint venture will be confined to Washington cases. Nor does this jurisdiction lack for judicial consideration of the subject. It has been discussed in over thirty cases within the past twenty years, *Masterson v. Leonard* (1921) 116 Wash. 551, 200 Pac. 320 through *Pence v. Berry* (1942) 13 Wn. (2d) 564, 125 P. (2d) 645, with a detailed discussion of twenty-seven cases contained in *Carboneau v. Peterson* (1939) 1 Wn. (2d) 347, 95 P. (2d) 1043. It was held in the *Carboneau* case, after analysis of the earlier opinions, that the requirements for joint venture are four: a contract, express or implied; a common purpose; a community of interest; an equal right to a voice, accompanied by an equal right to control. Of these, the court called the contract the "*sina qua non* of the relationship." *Carboneau v. Peterson, supra* at p. 374.

Whether the relation exists is normally a question for the jury. Weintraub, *The Joint Enterprise Doctrine in Automobile Law* (1931) 16 CORN. L. Q. 320, 325; Prosser, *supra* at p. 491; see cases cited in *Lempe v. Tyrell* (1939) 200 Wash. 589, 595, 94 P. (2d) 193.

Specific though the formula appears at first reading, it is not always easy to determine whether or not the relationship exists as the determination obviously depends on the facts of each case and no general tests can be established to apply to the different factual situations. *Edwards v. Washkuhn* (1941) 11 Wn. (2d) 425, 443, 119 P. (2d) 905. The *Manos* case had rendered practically meaningless the requirements of common purpose and community of interest, finding these elements satisfied by reason of the transportation itself. It is submitted that the test of joint venture cannot be met unless there is something more substantial in the common purpose and community of interest than the mere sharing of a ride. Hamley, *Joint Adventure in Washington Automobile Law* (1933) 7 WASH. L. REV. 377, 383. Taking a trip together is an incident common to each host-guest relation, transportation for hire, and joint venture so that its presence is not conclusive of any one relation. Even the additional factor that expenses are shared equally does not necessarily eliminate any one of the three relations, though perhaps the most realistic inference from this latter situation is that the parties contemplate a case of transportation for hire. Thus, by overruling the *Manos* case which allowed a finding of joint venture based upon untenable inferences, a source of possible confusion has been removed from Washington case law.

The opinion in the *Poutre* case opens with the question "can a contract for transportation for hire constitute a case of joint adventure?" and proceeds with a discussion of imputed liability. This adds confusion to the

case as an imputed liability would have no effect upon the plaintiff's right to recover. The court assumed that imputed liability is based upon the right of control. However, the most commonly accepted basis of imputed liability today is that the master is liable for acts done within the course and scope of the business simply because he is conducting the business and he is better able to bear the losses and to distribute them, through prices, rates or liability insurance, to the public, Prosser, *supra* at p. 472. As a matter of fact, control follows from imputed liability. That there can be control without liability is illustrated by the case of an intermediate servant who controls acts of sub-servants and yet is not liable for their acts unless he is at fault.

The court assumes that because there was no special contract for control in this case there was no evidence from which to establish joint venture. It would seem that any evidence tending to establish joint control would be sufficient and that a specific contract should not be a *sine qua non*. There was, however, no such evidence in the *Poutre* case; the only evidence present was the offer to share expenses which might tend to indicate that the parties intended something other than a host-guest relation.

Though the court discussed at some length the concepts of control *as a matter of law* and *as a matter of fact*, the only rule to be deduced from the facts of the case is that recovery will be denied an occupant if there is a showing merely of taking the ride accompanied by an offer to share expenses.

L. L.