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Sales - Implied Warranty - Final Parts Assembler but Not Parts Manufacturer Liable for Death of Passenger in Airplane Crash

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be applied in an "after-the-fact" fashion merely to rationalize or describe a court's denial of federal habeas corpus. Waiver should be confined to the role of a judicial shortcut when exercised by a defendant before he is required to assert the federal right which he intends to "waive."

In conclusion, it might be asked just what are the present limitations on the writ when used by state prisoners. Also what facts, if changed, would have persuaded the Court to reach a different result? Viewing the case realistically, it is evident that simple solutions to these and related questions will not be found easily. Habeas corpus is very likely to remain an "untidy area of our law" for years to come. One observation which can be made, however, is that the Fay decision reflects a trend by which the Supreme Court, with increasing frequency, has searched for and discovered defects in state court proceedings which are in violation of a defendant's constitutional rights. And perhaps as our concept of due process continues to acquire broader meaning, the flexibility of habeas corpus will correspondingly expand.\(^3\) The writ is largely a barometer of our contemporary notions of justice and fairness. In the future, federal habeas corpus will permit federal courts to correct injustices and achieve those same results which direct appellate review cannot remedy. Perhaps this trend by the Supreme Court to bring state criminal proceedings more and more within the protection of the Federal Bill of Rights is what makes the protection of civil liberties, through habeas corpus, important.

\textit{Thomas M. Twardowski}

SALES — IMPLIED WARRANTY — FINAL PARTS ASSEMBLER BUT NOT PARTS MANUFACTURER LIABLE FOR DEATH OF PASSENGER IN AIRPLANE CRASH.


Plaintiff, administratrix of the estate of the deceased, brought this action against American Airlines, Lockheed Aircraft Corporation and Kollsman Instrument Corporation, for the wrongful death of the deceased in an airplane crash. The complaint against American Airlines was based on negligence, while that against the latter two companies was for breach of implied warranty. Lockheed had assembled the aircraft; Kollsman manufactured the altimeter which apparently caused the accident. However, both lacked a privity relationship with the deceased, a passenger.

\(^{37}\) Brennan, \textit{supra} note 15, at 440.
Using this absence of privity as a basis for its ruling, the Supreme Court dismissed the complaint against both Lockheed and Kollsman, and the Appellate Division affirmed. The Court of Appeals, by a four to three margin, reversed these decisions as to Lockheed while affirming as to Kollsman, holding that liability for the death of a passenger in an airplane crash falls on the assembler of the plane's component parts rather than the manufacturer of the defective part. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

New York's struggle against the privity requirement has been a long and checkered one, beginning, at least, as far back as *Thomas v. Wincheste* and continuing through *MacPherson v. Buick Motor Co.* Unfortunately, these cases attempted to create exceptions to the privity rule by using negligence as their line of attack. The result was that the injured party often found himself with massive evidentiary problems which sometimes caused significant injustices.

Seeking a way out of such difficulties, New York recently turned to the doctrine of implied warranty to impose what was virtually strict liability on specific manufacturers in particular situations. In *Greenberg v. Lorenz*, the limitations on who could bring an action under implied warranty were considerably weakened. A boy sickened by bad fish, which had been purchased by his father, was permitted to recover against the food producer despite the lack of privity between victim and manufacturer. Although the actual holding of the court cautiously limited the food purchaser to being a member of the same household as the stricken party, a majority of the court left little doubt that they would extend the area of recovery for those not in privity much further, if the occasion demanded it.

Less than a year later, the same court considered the converse situation: the extent of implied warranty liability. *Randy Knitwear v. American Cyanamid Co.* decided that warranties could be expanded into the manufacturing area. As a result, the purchaser of a chemically treated

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3. Desmond, C.J., wrote the majority opinion with Dye, Fuld, and Foster, JJ. concurring, while Burke J. dissented with the concurrence of Van Voorhis, and Scileppi J.
4. 6 N.Y. 397 (1850).
5. 217 N.Y. 382, 111 N.E. 1050 (1916).
7. See Tiffin v. Great A.&P. Tea Co., 20 Ill. App. 2d 421, 156 N.E.2d 257 (1959); Sharpe v. Danville Coca-Cola Bottling Co., 9 Ill. App. 175, 132 N.E.2d 442 (1956). In both cases recovery by the plaintiff was precluded because he was unable to prove that tampering with the product was unlikely after it left defendant's control.
9. Several members of the court preferred to preserve at least a facade of privity by the use of an implied agency rationale similar to that of Bowman v. Great A.&P. Tea Co., 308 N.Y. 780, 125 N.E.2d 165 (1955).
11. It is ironic and perhaps significant that the court chose this rather detached area of the clothing industry, instead of one in which the public was more directly concerned, to impose implied warranty.
garment was permitted to recover against the manufacturer of the chemical which had failed to work satisfactorily on the clothing. Four of the judges stressed that the public advertising involved created a warranty. However, the remainder of the court, while concurring in the result, refused to accede to any further extension of the line of liability in such cases. Instead they clung to what was a rather tenuous privity connection between the buyer and the manufacturer. Concurrently, the California Supreme Court decided Greenman v. Yuba Power Products, a case which markedly influenced the instant case. There the court held that one injured by a faulty power tool could recover against its manufacturer on the basis of strict liability for breach of implied warranty. The decision greatly emphasized placing the cost of this type of injury on those who market such products, rather than on those who are injured by them.

In the present decision, the court found itself confronted with an implied warranty which the plaintiff attempted to carry a crucial step further by the action against the altimeter manufacturer, Kollsman. Since advertising of the type used in the Randy Knitwear case was not employed here, the thrust of the majority opinion is on protection of the helpless individual who had been injured. Following California's lead, the court has attempted to make those who can best afford it pay the cost of offering a defective product for public use. The difficulty with such a theory is that it fails to explain why Lockheed, which merely put the defective altimeter into the plane, is strictly liable to the public for its failure, while Kollsman is released, even though it manufactured the product.

The answer to this problem may lie in a literal interpretation of the Greenman case, where the burden of strict liability was cast on those who put imperfect merchandise before the public. It was Lockheed, through American Airlines, which made it possible for the deceased to use the ill-fated plane. Thus, it may be argued, that as the final assembler of the plane, an absolute duty devolved upon Lockheed to see that the components were not latent defective. In view of the heavy burden which implied warranty imposes, there are strong reasons for limiting liability to as few companies as possible along the chain of production. Unfortunately the choice of the assembler of the parts to carry this burden may be somewhat arbitrary.

12. These same justices thought that liability should be dependent upon the representation, not upon the character of the product.
13. The concurring justices held that the defendant's labeling of its product established privity with the plaintiff.
15. The federal courts had extended implied warranty to the assembler of an airplane in a similar case, but had not been confronted with an attempt to hold the manufacturer of the part as well. See Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D.N.Y. 1959).
16. See 44 Cornell L.Q. 608 (1959), which expounds much the same theory in the food sales area.
17. With the relative frequency of air crashes it might be wise to distribute implied warranty among more producers in order to lessen its cost.
Judge Burke strikes against this seeming arbitrariness in his dissenting opinion. What disturbs him most is that Lockheed did not have the final word in determining whether its airplane would be used by the public. This decision instead was made by the Federal Aviation Agency which certified the plane fit for flight. The dissent argues that since the chance for the last inspection was taken from Kollsman's hands, giving Lockheed and Kollsman equal opportunities to inspect, there is no reason why the former be held to more strict liability than the latter. 18 A study of the reasons for government inspections makes clear the flaw in such reasoning. The federal regulations concerning aviation were promulgated to protect passengers from injuries, not to protect the manufacturers from lawsuits. It would hardly be just to turn the government agencies involved against the very people they were meant to protect.

Obviously the dissenting judges are deeply concerned about the loss of certainty as to when one should be liable, as well as the loss of uniformity concerning who should be held liable both of which have resulted from the abandonment of privity. However, against these fears the majority has weighed its overriding concern for the injured party. The victim's right to recover is now the primary factor in determining the permissibility of recovery, regardless of any technicalities in the law. There is little doubt that the majority intends that the line of liability which it has drawn between the assembler and the manufacturer can be indelible only as long as the rights of the plaintiff are adequately protected. 19 If a later litigant using implied warranty can show that he must go farther along the chain of production in order to recover, then the area of liability will probably be widened. Such a rule of law may result in a clash with the first discussed California decision which places the burden on those who put defective products on the market, rather than on the manufacturer. It is possible to imagine situations in which New York would have to allow recovery by a plaintiff against a manufacturer in order to protect the former, while the California rule of law would not allow such a recovery because the defendant was not engaged in marketing the product. 20

Practical protection of the individual such as the majority envisions may produce illogical and even unfair results. As the dissent points out, the ruling in the present case apparently leaves the public carrier (American Airlines) liable to a standard of due care, the assembler (Lockheed) strictly liable, and the manufacturer (Kollsman) not liable at all, unless protection of the injured party demands it. 21

18. There is a divergence of opinion as to whether the probability of inspection would relieve liability even with a negligence standard. Compare Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946), holding the probability of inspection could relieve liability, with Restatement, Torts § 396 (1934).

19. "However, for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer . . . of a component part." (Emphasis added.) 12 N.Y.2d 432, 435, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963).

20. Consider the possibility of a situation in which the assembler and the marketer of the product are bankrupt and the manufacturer is solvent.

21. In view of the majority's stated aim of protecting the individual, this seemingly illogical result may follow perfectly reasonably from the decision.
It is wise to remember, however, that due to certain peculiarities concerning aircraft, the lines drawn here may not extend beyond the bounds of the airplane industry. Therefore, further consideration is necessary before boundaries of liability are erected in other areas such as the food industry. In the first place, it is difficult to establish definitely the party (beyond the assembler) responsible for the crash in question. It is certain that the plane which Lockheed assembled failed to fly its destined course. The same amount of certainty does not support the assertion that Kollsman’s altimeter caused this failure. Although government probes usually are made of this type of accident, the courts may well feel a reluctance to fix strict liability according to the results of these investigations. However, such problems usually are not present in the food industry, since ample evidence of the causes of injuries is almost always readily available. It is not difficult, therefore, to fix definite responsibility (and consequently impose strict liability) on companies beyond those which merely market inadequate goods. In other words, failure to base implied warranty on the mental deductions of government investigators is one thing, while failure to base implied warranty on the physical evidence of bad food may well be another.

Another distinctive feature of the airplane industry is the degree of government control over its carrier’s prices. An industry such as this has a great deal of difficulty in distributing the cost of implied warranties, since its carriers must obtain approval from the government for any change in its fares. Thus, while prices will eventually adjust themselves in a free market industry regardless of how far down the line of production implied warranty is imposed, this is not necessarily true in a price regulated industry. In the latter, government commissioners may lose sight of price increases which are necessary, due to implied warranty, relatively far down the production line and refuse to permit those persons putting the products on the market to raise their prices to meet the situation. In the present case, for instance, a rise in the prices of Lockheed, made necessary by this decision, could hardly be missed by even the most obtuse government commissions. As a result, American Airlines could probably raise its fares. This would not necessarily be true, however, if Kollsman increased its prices for the same reason and consequently caused Lockheed to do the same. It would seem likely, therefore, that industries in the free market will find themselves responsible for implied warranties regardless of their remoteness from actual sales, while this may not be the case in industries under government control. Despite its announced purpose of protecting the individual, it is hard to believe that the court did not at least consider these distinctions between various industries.

22. One defense which is unlikely to be available in airplane cases, but may be of use to other businesses, is contributory negligence. 36 So. CALIF. L. Rev. 490 (1963).

23. Both regulated and unregulated industries may be able to avoid liability by expressly contracting against it with the ultimate purchaser, provided such provisions are not against public policy. Knecht v. Universal Motor Co., 113 N.W.2d 688 (N.D.