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Sales—Breach of Warranty and the Wrongful Death Statutes—TORT CONCEPT OF WARRANTY IS EXTENDED—*Schnabl v. Ford Motor Co.*, 54 Wis. 2d 345, 195 N.W.2d 602 (1972).

The past few decades have seen the development of a trend in the field of products liability that has increased the protection of the ultimate consumer by expanding the duties and liabilities of the manufacturer and seller.¹ This inclination has recently been extended by requiring manufacturers and sellers to warrant the safety of their products, and by abrogating the necessity of privity in most warranty actions.² The result has increased the consumer's chance of recovery for personal injury caused by a defective product on the basis of negligence or breach of warranty. However, should the consumer die from the injury, and the personal representative be unable to prove negligence, it is questionable whether an action will lie for wrongful death based on breach of warranty.³ This uncertainty exists because jurisdictions differ over whether an action for breach of warranty may be brought under their wrongful death statutes.⁴ While warranty is generally considered contractual in nature, the majority of courts have construed the wording of their statutes to be applicable only in tort.⁵

In the recent case of *Schnabl v. Ford Motor Co.*,⁶ an automobile manufacturer and a dealer were sued for breach of warranty due to a death allegedly caused by a faulty seat belt. The Wisconsin Supreme Court permitted recovery under its wrongful death statute.⁷ In so holding, the court stated that death statutes are remedial and should, therefore, be broadly construed to effect their purpose.⁸ Recognizing the tortious nature of the action

¹ See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which held that the duty of a manufacturer to a consumer did not rest on their contractual relationship but on the foreseeability of harm arising out of the manufacturer's affirmative conduct in placing the product on the market. See also *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951); *Anderson v. Linton*, 178 F.2d 304 (7th Cir. 1949); W. PROSER, HANDBOOK OF THE LAW OF TORTS § 96 (3d ed. 1964).

² Note, *Breach of Warranty as a Basis for a Wrongful Death Action*, 51 IOWA L. REV. 1010, 1012 & nn. 16, 17 & 18 (1966); see *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960) which held that privity of contract was not necessary to hold a manufacturer and dealer liable for personal injuries resulting to the vendee's wife.

³ 51 IOWA L. REV., *supra* note 2, at 1013.

⁴ See 12 AM. JUR. TRIALS *Wrongful Death Actions* § 13 (1966); 5 FLA. L. REV. 344, 345 (1952).

⁵ 51 IOWA L. REV., *supra* note 2, at 1016 & n. 50. Most American death statutes follow the wording of Lord Campbell's Act of 1846, 9 & 10 Vict. c. 93, which provides that an action can be maintained for "any wrongful act, neglect or default" that causes death.

⁶ 54 Wis. 2d 345, 195 N.W.2d 602 (1972).

⁷ *Id.* at 354, 195 N.W.2d at 610.

⁸ *Id.* at 350, 195 N.W.2d at 606.

of breach of warranty,⁹ the Wisconsin court had no trouble in discerning the car dealer's breach of implied warranty of fitness as a wrongful act, neglect, or default under its wrongful death statute.

Many of the jurisdictions whose reasoning has run contra to Wisconsin's holding tend to interpret their own death statutes strictly,¹⁰ and often state that culpability or tortious conduct is required before a suit can be brought.¹¹ Other courts have held that the language of their statutes would have to be unduly strained and extended to encompass breaches of warranty.¹² Although some of these jurisdictions have statutes worded somewhat differently from Wisconsin's,¹³ others have quite similar language.¹⁴ It appears, however, that all such jurisdictions indicate that an action for breach of warranty lies clearly in contract; few are willing to recognize its tortious nature.¹⁵

⁹ *Id.* at 353, 195 N.W.2d 609 n.3. The Wisconsin court cited with approval Prosser's statement that, "regardless of the form of action, . . . the tort aspects of warranty call for the application of a tort rather than a contract rule in various respects." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 121 (3d ed. 1964).

¹⁰ See *Gott v. Newark Motors, Inc.*, 267 A.2d 596 (Del. Super. Ct. 1970). The court held that "an action for wrongful death based upon breach of implied warranty, . . . is not such action as is embraced within the terms 'negligence' or 'unlawful violence'." *Id.* at 599. *Barley's Adm'x v. Clover Splint Coal Co.*, 286 Ky. 218, 150 S.W.2d 670 (1941) stated that the death act is confined to torts and does not cover a case of breach of ordinary contract; *Kratochvil v. City of Grayling*, 367 Mich. 682, 117 N.W.2d 164 (1962); *Post v. Manitowoc Eng'r. Corp.*, 88 N.J. Super. 199, 211 A.2d 386 (1965). See also *Horne v. Armstrong Prods. Corp.*, 416 F.2d 1329 (5th Cir. 1969); *Goelz v. J. K. & Susie L. Wadley Research Inst. & Blood Bank*, 350 S.W.2d 573 (Civ. App. Tex. 1961).

¹¹ *Necktas v. General Motors Corp.*, 259 N.E.2d 234 (Sup. Ct. Mass. 1970). The right of action is "statutory and is based either upon negligence or upon a wilful, wanton or reckless act causing death;" therefore, no recovery can be allowed from an automobile dealer on the basis of breach of warranty. *Burkhardt v. Armour & Co.*, 161 A. 385 (Conn. 1932). Recovery is limited to injuries resulting in death from negligent, willful, malicious, or felonious act; *Whiteley v. Webb's City Inc.*, 55 So. 2d 730 (Fla. 1951). Florida has since amended its wrongful death statute to encompass specifically both *ex delicto* and *ex contractu* actions.

¹² *DiBelardino v. Lemmon Pharmaceutical Co.*, 416 Pa. 580, 208 A.2d 283 (1965) contained a strong dissent by Roberts and Musmans, J. J., which stated that the majority took an unduly restricted view of the wrongful death statute. See *Sacks v. Creasy*, 211 F. Supp. 859 (E.D. Pa. 1962); *Frankel v. Styer*, 201 F. Supp. 726 (E.D. Pa. 1962).

¹³ See e.g., DEL. CODE ANN. tit. 37, § 3704 (b) (1953); IDAHO CODE ANN. § 5-311 (1948); KY. REV. STAT. tit. 36, § 411.130 (1948); MICH. STAT. ANN. § 27.711 (1935); PA. STAT. ANN. tit. 12, § 1601 (1953).

¹⁴ See e.g., FLA. STAT. § 768.01 (1951); MO. REV. STAT. § 537.080 (1950); TEX. REV. CIV. STAT. art. 4672 (1948).

¹⁵ *Sugai v. General Motors Corp.*, 130 F. Supp. 101 (S.D. Idaho 1955). In this case of first impression, the District Court in Idaho stated that "it is widely recognized that death statutes of this sort generally are *ex delicto* and not *ex contractu* in nature. Therefore, it will not suffice in this action for plaintiffs merely to allege a breach of implied warranty of fitness or of merchantability." *Id.* at 103. See generally, *Sterling Alum.*

Nevertheless, a few jurisdictions have recognized the tortious nature of warranty and have consequently allowed actions for breach of warranty to be brought under their death statutes. New York was one of the first jurisdictions to allow such an action,¹⁶ and several other jurisdictions have ascribed to her reasoning.¹⁷ These jurisdictions hold that breach of warranty is in many respects an action in tort, and whether in tort or contract, there is a default or breach that constitutes the violation of a duty to another.¹⁸ This violation is a wrongful act, and clearly comes within the wrongful death statutes. This same reasoning, followed in California¹⁹ and Minnesota²⁰ in holding airplane manufacturers liable in death actions for breach of warranty, has been extended more recently into the area of implied warranties in cases involving automobile manufacturers.²¹

By allowing an action for breach of warranty to arise under its wrongful death statute, Wisconsin has reflected the growing trend of deciding products liability cases on the basis of the new principle of strict liability in tort, rather than the traditional theory of implied warranty.²² This trend has

Prods. Inc. v. Shell Oil Co., 140 F.2d 801 (8th Cir. 1944); *Bloss v. Dr. C. R. Woodson Sanitarium Co.*, 319 Mo. 1061, 5 S.W.2d 367, 368 (1928).

¹⁶ *Greco v. S.S. Kresge Co.*, 277 N.Y. 26, 12 N.E.2d 557 (1938). The New York Court of Appeals said that "the distinction between torts and breaches of contract is, oftentimes, so dim and shadowy that no clear line of delimitation may be observed. . . . Recovery is not conditioned on definition nor measured by determination of whether it is grounded in a violation of a duty owing to another or in a breach of a contractual obligation." *Id.* at 561. In this case there was a duty to see that the food was fit for human consumption, and although the action could have been brought for breach of warranty, "the breach is a wrongful act, a default, and, in its essential nature, a tort." *Accord*, *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969); *Calamari v. Mary Immaculate Hosp.*, 3 Misc. 2d 780, 155 N.Y.S.2d 552, 553 (Sup. Ct. 1956).

¹⁷ *See, e.g.*, *Zostautas v. St. Anthony De Padua Hosp.*, 23 Ill. 2d 326, 178 N.E.2d 303 (1961); *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 179 N.W.2d 64 (1970); *cf.* *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958).

¹⁸ *See* notes 16 & 17 *supra*.

¹⁹ *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D. N.Y. 1959); *accord*, *Goldberg v. Kollsman Inst. Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

²⁰ *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216 (D. Minn. 1962).

²¹ *Kelley v. Volkswagenwerk Aktiengesellschaft*, 268 A.2d 837 (N.H. 1970). In this case in which a car overturned killing the driver, the New Hampshire Supreme Court said "that the administrator of an estate can maintain an action for breach of warranty allegedly resulting in death of his decedent and that count based on strict liability alleges a good cause of action." *Id.* at 837. *Accord*, *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245 (7th Cir. 1965), which noted that a defect in a tire caused by an act or omission of the manufacturer or designer of the tire was a wrongful act or omission within the Indiana death statute; *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959).

²² *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965); *Wetherspoon, Torts or Warranties*, 73 COM. L. J. 134 (1968).

been encouraged by the tendency to eliminate the requirement of privity of contract in warranty cases, since this elimination serves to strip warranty of its contractual nature.²³ Those jurisdictions that agree with the Wisconsin court have recognized that warranty without privity of contract is in fact a matter of tort. By applying the theory of strict liability in tort, these jurisdictions have found no reason why an action for breach of warranty will not lie under their wrongful death statutes.²⁴

The important considerations are that a tort duty arises out of the relationship of the parties when an implied warranty is involved,²⁵ and that the death statutes are intended to compensate those damaged by a breach of this duty. *Schnabl* has recognized the tort duty that arises in the case of a car dealer who impliedly warrants that the parts of a car are free from defects possibly harmful to its user. The Wisconsin court noted the illogic of those jurisdictions that allow contract theories of warranty to prevent the bringing of breach of warranty actions under their wrongful death statutes. In this case of first impression, the Wisconsin Supreme Court clearly indicated its agreement with the growing concept of strict liability in tort, and showed that the recognition of the tortious nature of warranty should logically extend to any case where the warranty results in a duty owed by one to another. The court refused to allow archaic concepts of warranty to prohibit a deserving plaintiff from recovery under its death statute.

This line of reasoning is consistent with the recent trend to protect the ultimate consumer and to provide compensation for those injured by defective products. Those jurisdictions that refuse to allow warranty actions under their death statutes do so because of their continuing deference to the aging concept of warranty as a contract that runs with the goods or requires privity.²⁶ Little justification for this view exists today; nevertheless, the concept continues to hinder the recognition of strict tort liability, preventing some courts from carrying out the intent of modern products liability legislation.²⁷

The *Schnabl* decision should be significant to Virginia, because Virginia has not yet had the opportunity to decide whether an action for breach of

²³ See Generally Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982 (1962).

²⁴ See W. PROSSER, *LAW OF TORTS* § 102 (4th ed. 1971).

²⁵ The *Greco* case first recognized this tort duty in the case of breach of warranty as to the fitness of food for consumption; following cases began to perceive the same duty with regard to mechanical devices. 277 N.Y. 26, 12 N.E.2d 557 (1938).

²⁶ See W. PROSSER, *supra* note 24, 631-40. In 1778, the first decision was reported in which a plaintiff proceeded in contract theory. Thereafter, warranty gradually came to be considered as a term of the contract of sale for which the normal remedy would be a contract action.

²⁷ See note 22 *supra*.

warranty will lie under its death statute. Whether Virginia would allow such an action will depend on the interpretation of its statute, and more important, on how it views the nature of a breach of warranty action. The wording of Virginia's Death by Wrongful Act Statute²⁸ is similar to Wisconsin's and should pose no problem, although it is unclear from past decisions whether Virginia recognizes the tortious nature of warranty. While Virginia has followed the trend of eliminating the requirement of privity of contract in warranty actions,²⁹ it has framed its Products Liability Act within section 2-318 of the Uniform Commercial Code. It has been submitted that by so doing the Virginia Legislature has directed the courts to use the Sales Article of the Uniform Commercial Code to govern the scope, conditions, and remedies available in breach of warranty actions.³⁰ Therefore, Virginia has apparently suggested that the Uniform Commercial Code approach to warranties is preferable to the strict liability in tort theory.³¹ Also, in a number of cases involving the joining of causes of action, the decisions of the Virginia Supreme Court would apparently indicate that the court considers breach of implied warranty as an *ex contractu* action.³²

²⁸ VA. CODE ANN. § 8-633 (Cum. Supp. 1972). The statute creates an action for death caused by "wrongful act, neglect or default."

²⁹ VA. CODE ANN. § 8.2-318 (1950). The Virginia Products Liability Act eliminates the defense of lack of privity when an action is brought to recover damages for breach of warranty or negligence even though the plaintiff did not purchase the goods from the defendant, if the "plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods." See also VA. CODE ANN. § 8-654.4 (Cum. Supp. 1972), which provides that "[i]n [all other] cases . . . where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense."

³⁰ See Spiedel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965).

³¹ *Id.* at 852.

³² See *eg.*, *Daniels v. Truck & Equip. Corp.*, 205 Va. 579, 139 S.E.2d 31 (1964). The plaintiff brought suit for damages for breach of warranty to repair and replace defective parts, and for wrongful repossession. The court held that the motion for judgement was demurrable for misjoinder of contract and tort actions. *Blythe v. Camp Mfg. Co.*, 183 Va. 432, 32 S.E.2d 659 (1945); *Kroger Grocery & Bakery Co. v. Dunn*, 181 Va. 390, 25 S.E.2d 254 (1943) held that a motion charging breach of warranty for fitness of food and negligence in handling the food was demurrable as joining actions in contract and in tort. Although these decisions turned on the fact that the causes of action did not arise from the same transaction, the holdings suggest that Virginia still perceives the action for breach of warranty as lying in contract only. *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S.E. 94 (1936). *But cf.* *E.I. Dupont De Nemours & Co. v. Universal Moulded Prods. Corp.*, 191 Va. 525, 62 S.E.2d 233 (1950). See also *Brockett v. Harrell Bros. Inc.*, 206 Va. 457, 143 S.E.2d 897 (1965), wherein the court ruled that because an action by a consumer against a food processor and retailer for breach of an implied warranty of fitness was *ex contractu*, contributory negligence was not a defense.

Nevertheless, it cannot be concluded from the above that Virginia would fail to realize the tortious nature of breach of warranty under all circumstances. For example, in deciding which statute of limitations is applicable in an action to recover for personal injuries resulting from breach of implied warranty, the Virginia Supreme Court held that regardless of whether an action is in tort or contract, it is the object of the action that determined which statute of limitations would apply.³³ Furthermore, the Federal District Court in applying Virginia law has held that breach of warranty for seaworthiness is not contractual in nature but lies in the field of tort liability.³⁴ Consequently, it does seem possible that Virginia could apply the same reasoning in an implied warranty action under the death statute.

With the growing acceptance of strict tort liability in warranty cases, it would seem that Virginia would benefit by separating its Products Liability Act from the Uniform Commercial Code.³⁵ The Code laws only tend to restrict Virginia courts from carrying out the true purpose of the act with regard to warranties. The logic of allowing breach of warranty actions under the wrongful death statute should weigh heavily in a state that has extended warranties from the manufacturer and seller to any reasonable user of the product in the absence of privity of contract between the two. A refusal to allow such an action would be a step backward for Virginia, and would be contrary to the intent of recent legislation that has increased the protection of the ultimate consumer. It can be reasoned with some justification that by its elimination of the requirement of privity in warranty actions, the Virginia legislature has begun to perceive warranty as a duty imposed by law as a matter of public policy.³⁶ With this realization, the court should have no difficulty in viewing a breach of warranty action as *ex delicto* and, therefore, maintainable under Virginia's death statute. Virginia has been progressive in following the modern trends in consumer protection, and hopefully will follow the reasoning of the Wisconsin Supreme Court and refuse to allow outmoded contract ideas of warranty to prevent just compensation in wrongful death actions.

F. J. H.

³³ Birmingham v. Chesapeake & Ohio R.R., 98 Va. 548, 37 S.E. 17 (1900) noted that where one complains of injury to the person, the limitation in assumpsit is the same as if the action was *ex delicto*. The court said that "the object of the suit at bar being to recover damages for personal injuries alleged to have been sustained by the plaintiff, the limitation in tort actions is applicable."

³⁴ Dawson v. Fernly & Eger, 196 F. Supp. 816 (E.D. Va. 1961).

³⁵ See Emroch, *Caveat Emptor to Strict Liability: One Hundred Years of Products Liability Law*, 4 UNIV. OF RICH. L. REV. 155 (1970).

³⁶ See note 23 *supra*.