COURT FILE NO.: 00-CV-189420
DATE: 20060413

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nathan Anthony Resch, Robert Higham, Ashley Higham, Ashley Crayden, Shannon Crayden, minors under the age of 18 years by their Litigation Guardian, Annette Crayden, Joan Crayden, John Crayden, Annette Crayden and Mark Crayden, Plaintiffs

A N D:

Canadian Tire Corporation Limited, Mills-Roy Enterprises Limited, Gestion R.A.D. Inc., Procycle Group Inc.

BEFORE: Justice Spies

COUNSEL: L. Craig Brown & Darcy Merkur, for the Plaintiffs

Mark Edwards & Aaron Murray, for the Defendants Canadian Tire Corporation Limited, Gestion R.A.D. and Procycle Group Inc.

A. Peter Trebuss for the Defendant Mills-Roy Enterprises Limited.

HEARD: By way of written submissions during the course of the trial

ENDORSEMENT

Overview

[1] In the present action, the plaintiffs, Nathan Resch and his immediate family, claim damages from the defendants for negligence. The claim against Mills-Roy Enterprises Ltd. is also for breach of contract under the Sale of Goods Act,[1] (the "Act") and in particular reliance on the implied warranty of fitness under s. 15 of the Act in connection with a CCM Heat mountain bicycle purchased from Mills-Roy, a Canadian Tire dealer. Resch was seriously injured after an accident on the bicycle. The bicycle was manufactured by Procycle Group Inc. and sold to Canadian Tire Corporation Limited, which in turn sold the bicycle to Mills-Roy. There are cross-claims between the defendants Canadian Tire Corporation Limited, Gestion R.A.D. and Procycle Group Inc. ("Procycle defendants") and Mills-Roy for contribution and indemnity pursuant to

[1] R.S.O. 1990 S.1

the Negligence Act.[2] Mills-Roy also cross-claims against the Procycle defendants in contract, claiming a breach of warranty under the Act.

[2] The action proceeded to trial before me, with a jury, commencing on January 23, 2006. During the course of the trial, a number of issues were argued because of the Sale of Goods Act claim. One of those issues was whether or not the Procycle defendants could argue apportionment of liability and in particular that Resch was at fault, and by his own acts and omissions contributed to his own damages, in defence of his breach of contract claim under the Act. The plaintiffs argued that there could be no apportionment of fault in connection with the Sale of Goods Act claim.

[3] On February 14, 2006, I ruled that the court could apply contributory negligence type principles in connection with the plaintiffs' Sale of Goods Act claim. In making that finding I concurred with the conclusions reached by Mr. Justice Ducharme in Treaty Group Inc. v. Drake International Inc..[3] After reviewing a number of cases that have considered this issue, Ducharme J. found that even though the Negligence Act is not applicable, damages can be apportioned at common law in a breach of contract case and suggested that the term "contributory fault" be used.

[4] Arguably, the Court of Appeal has left this issue open and has suggested, without deciding the point, that the concept of apportionment of liability in contract would be adopted if the issue had to be squarely decided by the court. For example, in Bensuro Holdings Inc. v. Avenor Inc.,[4] a case involving breach of contract, the Court of Appeal upheld a 30% reduction in damages on the basis that 30% of the plaintiffs' damages were caused by his own actions and that he was in part the author of his own misfortune.

[5] I advised counsel that in light of my ruling, questions would be put to the jury that would permit the jury to find contributory negligence in tort and/or contributory fault in contract, in connection with the alleged negligent acts and omissions of Nathan Resch and Mills-Roy, that the Procycle defendants wished to argue caused or contributed to Resch's bicycle accident. However, I accepted the plaintiffs' argument that because of privity of contract, only Mills-Roy could advance the argument of contributory fault in connection with the plaintiffs' Sale of Goods Act claim. Mills-Roy did not intend to assert that defence however, because Mills-Roy and the plaintiffs entered into a Mary Carter Agreement shortly before trial. Accordingly I ruled that the Procycle defendants had to elect whether or not to step into the shoes of Mills-Roy in order to assert that defence in defence of the main action. As a result of my ruling, the Procycle defendants made that election.

[6] Following my ruling the Procycle defendants admitted that the bicycle in question was defective and in particular that there was a breach of the implied warranty of fitness provided by section 15 of the Act.

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[2] R.S.O. 1990, c. N-1
[3] [2005] O.J. No. 5232 (Ont. Sup. Ct.)
[4] [2004] O.J. No. 4875

[7] Shortly after the argument on the issue of whether or not there could be apportionment of liability in contract in connection with the Sale of Goods Act claim, counsel for the Procycle defendants took the position, for the first time, that the Act did not apply because Resch was not a "buyer" under the Act and therefore could not rely on section 15 and assert a claim under the Act for breach of warranty. The plaintiffs disputed this. All counsel agreed that this was a question of law that I should decide, not the jury.

[8] When this issue was raised, counsel agreed that questions be put to the jury on the assumption that the Sale of Goods Act applied, given that apportionment of liability in contract would need to be treated differently than contributory negligence, even though counsel had agreed that the definition of contributory negligence and contributory fault should be considered to be the same.[5] I would then decide the question of whether or not Resch was a buyer within the meaning of the Act, following the motion for judgment.

[9] Following the close of evidence and immediately before closing submissions, counsel for the plaintiffs took the position that in light of the decision of the Supreme Court of Canada in ter Neuzen v. Korn,[6] it was necessary for me to decide the issue of whether or not Nathan Resch was a buyer within the meaning of the Act before the case went to the jury. In ter Neuzen, Sopinka J. stated (at para. 83) that "only once it is determined that the Sale of Goods Act has any application in the circumstances should the jury be instructed to determine whether the statutory warranty was breached on the facts". The Procycle defendants did not take a position on this issue and so I decided to consider the written submissions that counsel had provided to me when the issue first arose and decide the matter.

[10] After considering the submissions, I ruled that Nathan was not a buyer within the meaning of the Sale of Goods Act. As a result no questions concerning the Act and apportionment of liability in contract were put to the jury. I advised counsel that I would provide reasons for my decision. These are my reasons.

The Issues

[11] The main issue raised by the submission of the Procycle defendants was whether or not Nathan Resch was entitled to claim the benefit of the implied warranty of fitness under section 15 of the Act. This issue required a determination of whether or not Resch was a "buyer" within the meaning of the Act when the bicycle was purchased.

[12] The plaintiffs made the following two submissions supporting their position that Resch was a "buyer" under the Sale of Goods Act:

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[5] Separate questions would have been put to the jury because the Procycle defendants admitted a breach of s. 15 of the Act and that the bicycle was defective but did not admit negligence in the manufacture and distribution of the bicycle. A staged approach would have been required to apportion fault between the parties to the final contract of sale, assuming Resch as a buyer and Mills-Roy as the seller, and then again as between Mills-Roy as the buyer and Canadian Tire as the seller, the parties to the first contract of sale.

[6] [1995] 3 S.C.R. 674

1. Nathan Resch was a "buyer" within the meaning of s. 15 of the Act based on the facts; and, or
2. Nathan Resch qualified as a "buyer" within the meaning of s. 15 of the Act based on an exception to the privity of contract doctrine.

[13] For the reasons that follow, I rejected both of these arguments.

Was Nathan Resch a "buyer" within the meaning of s. 15 of the Sale of Goods Act?

[14] Resch and his stepfather, Mark Crayden, went to the Mills-Roy Canadian Tire store on April 24, 1998 to purchase a bicycle for Resch, who was 15 years old at the time. Resch chose a CCM Heat bicycle and Crayden put the entire purchase price on his Canadian Tire Mastercard credit card.

[15] Resch testified that he gave some of his own money, that he had saved from his various jobs, to his stepfather for the purchase of the bicycle. He did not remember how much and did not give evidence as to when he provided the money to his stepfather. Crayden testified that he believed that Resch had contributed some money to the purchase of the bicycle but could not recall how much. He also did not give any evidence at to when this payment by Resch was made.

[16] Under the Sale of Goods Act, a "buyer" is entitled to certain benefits and protections. Section 15(1) states in part as follows:

> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose.

[17] A "buyer" is defined under section 1 of the Act as "the person who buys or agrees to buy goods". Section 2(1) of the Act states:

> A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price, and there may be a contract of sale between one part owner and another.

[18] The plaintiffs also relied on section 4 of the Act, which provides that the formation of a contract of sale "may be made in writing either with or without seal, or by word of mouth or partly in writing and partly by word of mouth, **or may be implied from the conduct of the parties**".

[19] The plaintiffs argued that the conduct of Mills-Roy, in helping Resch purchase a bicycle for his size, and the conduct of Resch and Crayden at the store, implied a contract with Resch as

the buyer or alternatively that Resch and Crayden intended to execute the sales contract as co-buyers. Specifically it was argued that if Resch was not the buyer, pursuant to section 2(1) of the Act, where part owners combine finances to purchase a good, both part owners should be considered "buyers" within the meaning of the Act. They submitted that the contract was between Mills-Roy as one party and Resch and Crayden as the other party, as part owners.

[20] Before turning to the specific arguments made by the plaintiffs in support of their position, the meaning of the last phrase of sub-section 2(1) must be considered. In my view the phrase in section 2(1) that there may be a "contract of sale **between** one part owner and another" is not a reference to co-buyers, but rather is intended to ensure that if a part owner sells his or her interest in a good to the other part owner, the Act may apply. The phrase does not specifically address a contract of sale between a seller and co-buyers. That however, is not necessary, given the definition of a "buyer", as there is no reason to interpret that definition as excluding multiple parties to a contract and in particular a situation where more than one person buys a good. I accept that, if the evidence supported such a finding, that both Resch and his stepfather could be co-buyers within the meaning of the Act. The issue however, is whether or not Resch on his own or with his stepfather was the buyer of the bicycle.

[21] The plaintiffs argued that on the evidence at trial, I should find that Resch was the buyer or alternatively a co-buyer to the contract of sale because Resch made a financial contribution to the purchase price of the bicycle and Mills-Roy knew the bicycle was for Resch's use and therefore knew that the purchase was truly one between Resch and Mills-Roy.

[22] In my view, considering the definition in the Act of a buyer, and the wording of section 2(1) of the Act which refers to a contract of sale of goods with a "buyer for a money consideration, called the price," the buyer is clearly the person or persons who provide the consideration and is a party or one of the parties to the contract of sale.

[23] On the evidence before me, there is absolutely no basis upon which to find that Resch was the buyer or a co-buyer of the bicycle. There are two problems with the plaintiffs' argument. First of all, there is no evidence that at the time of the purchase Resch paid part of the purchase price and certainly no evidence that Mills-Roy knew of any financial contribution made by him to the purchase price. It was Crayden alone who purchased the bicycle from Mills-Roy. There was no evidence of Crayden and Resch buying the bicycle together at the store or any evidence from which I could imply that Resch was a party to the sale contract that clearly existed between his stepfather and Mills-Roy. In order to be a co-buyer, both Resch and his stepfather would have needed to pay cash or divide the purchase price between them on two separate credit cards in each of their names, at the time of purchase. There is no evidence in this case that could imply a contract of sale to which Resch was a co-buyer at the time of the purchase. The facts are more suggestive of a father buying a gift for his son, rather than as a co-buyer.

[24] Secondly, although there is no doubt that Mills-Roy knew that the bicycle was for Resch and would be used by him, the person who will use the goods is not necessarily the buyer. The definition of buyer in the Act refers to the person who actually buys the goods, which is the

person who enters into the contract of sale with the seller. The intended user of the goods is not how the buyer is defined under the Act.

[25] The plaintiffs submitted, in support of this argument, that a gift certificate given to Resch on May 15, 1998 by Mills-Roy, when he brought the bicycle in for repair pursuant to the Recall Notice, was evidence that Mills-Roy considered Resch to be the buyer. The gift certificate was for $20 and given to Resch and not Crayden. Patti Mills-Roy, the owner of Mills-Roy, testified that the gift certificate was meant to compensate Resch for the inconvenience of having to return the bicycle for repair. There is no evidence to suggest that giving Resch the certificate was intended as compensation to the original purchaser and certainly no evidence to imply that by giving the gift certificate to Resch, when he was the one who brought the bicycle in for repair, was anything other than a recognition that as the user and the person responding to the recall, he was the one who had been inconvenienced.

[26] The plaintiffs also argued that the Procycle defendants had admitted, in response to a Request to Admit, that Resch was at all material times the "owner and operator" of the bicycle and that accordingly, at the time of purchase, Resch was the owner of the bicycle. Since the ownership passed directly from the Mill-Roy store to Resch, the plaintiffs submitted that this meant that Resch was the true buyer.

[27] I did not accept the plaintiffs' submission in this regard. The admission that Resch was the "owner and operator" of the bicycle, was not an admission that Resch was a "buyer", nor could it be interpreted as an admission that Resch was a buyer under the Act. The definition of buyer under the Act is, in my view, very clear and a "buyer" is not synonymous with an "owner". While Resch was the owner of the bike, it was clear that Crayden purchased the bike and was therefore the buyer within the meaning of the Act. The nexus created under the Act is between the seller and the buyer for a money consideration and while the buyer would normally also become the owner, that is not how the Act defines a buyer.

[28] Furthermore, if the plaintiffs had intended to obtain an admission from the Procycle defendants that Resch was a buyer within the meaning of the Act, they should have more clearly sought that specific admission, or at least tracked the language of the definition of buyer in the Act.

[29] The plaintiffs argued that if the test of who is the buyer is solely related to who actually transfers the funds to the seller, then Mastercard would technically be the buyer not Crayden. I did not accept this argument. It would be absurd to find that Mastercard was the "buyer" under the Act because Crayden used his credit card to pay for the purchase. Clearly, Crayden was ultimately responsible for the payment not Mastercard.

[30] The plaintiffs argued that Resch was in much the same position; he was ultimately responsible for the payment of the bicycle. His stepfather was helping him to purchase a significantly costly item and it was simply more commercially efficient to put it on his stepfather's credit card. The evidence of Resch and Crayden did not go this far but even if it

had, that would amount to a separate agreement between Resch and his stepfather but would not change the fact that the contract of sale with Mills-Roy was between Mills-Roy and Crayden.

[31] For these reasons I rejected the argument that Resch was a "buyer" or co-buyer under the Sale of Goods Act.

2. Is There a Privity of Contract Exception?

[32] A contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it.[7] Consideration must flow directly from the buyer to the seller in order for the buyer to be privy to the contract. Therefore, one cannot sue if one is not a party to the contract.

[33] The law respecting third party beneficiaries has been the subject of a good deal of criticism. The Supreme Court of Canada addressed the issue of the doctrine of privity in London Drugs Ltd. v. Kuehne & Nagel International Ltd..[8] While the Supreme Court relaxed the doctrine to include employee-employer relationships, the court also reiterated that the privity rule is still binding law.

[34] While this doctrine has received much criticism, it is not up to the court to change the law; this is the role of the legislature. In my view, given the clear definition of a buyer in the Act, this court is not at liberty to rely on any relaxation of the doctrine of privity of contract, if it is not consistent with the definition of buyer in the Act. As stated by the court in London Drugs, "privity of contract is an established principle in the law of contract and should not be discarded lightly. Simply to abolish the doctrine of privity or to ignore it, without more, would represent a major change to the common law involving complex and uncertain ramifications."[9] The implied conditions and warranties in the Act attach to the contract of sale in that they are terms implied by operation of the Act and do not attach to the product itself.[10]

[35] The plaintiffs submitted that the doctrine of privity should be relaxed in this case to include family members that enter into a contract together. They relied on Coulls v. Bagot's Executor and Trustee Co Ltd.[11], a High Court of Australia case that adopted this reasoning; however, there is no Canadian case that has yet adopted this reasoning.

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[7] Chitty on Contracts, 29th ed., vol. 1 p. 1075
[8] [1992] 3 S.C.R. 299
[9] London Drugs, supra at para. 237

[10] S. Conte and D. Grossman, "Demystifying Product Liability", Annual Review of Civil Litigation 2004 (Toronto: Thomson Canada, 2005
[11] [1967] ALR 385

[36] For the most part, the courts that have considered this type of issue have refused to extend the privity doctrine beyond the purchaser, to family members, even though it could readily be said they might be anticipated users of a product or it was at least reasonably foreseeable that a defective product sold to one family member could injure other family members.

[37] In Buckley v. Lever Bros.[12], the buyer of a defective clothespin that caused the buyer to lose her eye successfully maintained an action against Lever Bros. for the loss of her eye. According to Professor Waddams[13] if the buyer's husband, child or another bystander had been similarly injured by the clothespin, they would have no remedy against Lever Bros.

[38] In Lyons v. Consumer Glass Co,[14] an infant plaintiff brought an action against the manufacturer and the retail store that sold a baby bottle to the mother of the plaintiff. The glass bottle fell from a table to the floor and broke into a number of pieces, one of which struck the plaintiff in the eye. The court found that the infant plaintiff was not entitled to rely on the Sale of Goods Act because the there was no privity of contract.

[39] In Varga v. John Labatt Ltd.,[15] the plaintiff became ill after drinking a bottle of beer. The plaintiff's friend had purchased the beer and the court found that the plaintiff could not sue under the Sale of Goods Act because there was no privity of contract between the plaintiff and the beer manufacturer.

[40] In Mann-Tattersall (Litigation Guardian of) v. Hamilton (City),[16] an infant plaintiff was restrained in a restraint jacket to prevent him from falling out of bed in a hospital. The plaintiff fell out of bed despite this precaution and went into cardiac arrest. Cavarzan J. applied Lyons and held that the plaintiffs could not sue under the Sale of Goods Act because there was no privity of contract between the family and the manufacturers of the restraint jacket.

[41] The case most similar to the facts in this case is Sigurdson v. Hillcrest Service Ltd.[17]. The plaintiffs were family members who suffered injuries pursuant to a brake failure in the car being driven by the plaintiff owner. The court found the plaintiff owner's injuries compensable through the implied conditions of the Sale of Goods Act. However, the other family members were left without recourse, as there was no privity of contract between them and the seller, and no negligence was found on the latter's part.

[42] There is one case that I was referred to where the court relaxed privity of contract. In Jackson v. Horizon Holidays Ltd.,[18] a man booked a holiday for himself and his family that turned out to be inferior to what the defendant had promised. The court held the defendant liable in damages in respect of the disappointment and distress suffered not only by the plaintiff but

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[12] [1953] O.R. 704 (Ont. Sup. Ct.)
[13] S.M. Waddams, "Products Liability", 4th Edition (Toronto: Carswell, 2002)
[14] [1981] B.C.L.R. 319 (BCSC)
[15] [1956] O.R. 1007 (Ont. Sup. Ct.)
[16] [2000] 38 C.L.R. (3d) 255 (Ont. Sup. Ct.)
[17] (1976), 73 D.L.R. (3d) 132 (Sask. Q.B.)
[18] [1975] 1 W.L.R. 1468 (Eng. C.A.),

also by his wife and children. As pointed out by the court in the Lyons case, this approach has not been followed in Canada and the state of law in Canada requires privity of contract to found a claim on the warranty in the Sale of Goods Act.[19]

[43] My decision not to extend or relax the privity of contract doctrine in these circumstances was also consistent with my finding, on the evidence, that Mills-Roy did not consider Resch the buyer of the bicycle. On the evidence it could not have been the reasonable expectation of Mills-Roy at the time, that they had extended the implied warranties in the Act to Resch.

[44] For these reasons I found that Resch did not qualify as a "buyer" within the meaning of the Act based on an exception to the privity of contract doctrine.

[45] The Procycle defendants argued in the alternative, that even if I found that Resch was a buyer within the meaning of the Act, as he was a minor at the time of the purchase, he lacked the legal capacity to contract. Section 3(1) of the Act provides that capacity to buy is regulated by the general law concerning capacity to contract. It is not necessary for me to consider this argument in light of my conclusion that Resch was not a buyer and privy to the contract of sale entered into between his stepfather and Crayden.

Conclusion

[46] In summary, I found that Nathan Resch did not fall within the definition of "buyer" in the Sale of Goods Act. There was no privity of contract between Resch and Mills-Roy. Accordingly, the Sale of Goods Act is not applicable to this case and the jury was not asked to answer questions concerning contributory fault and whether or not there should be apportionment of liability in contract with respect to Resch's claim for breach of warranty pursuant to the Sale of Goods Act.

Spies J.

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Released: April 13, 2006

[19] Lyons, supra at para. 10